BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LARRY BEEMAN,

Claimant,

vs.

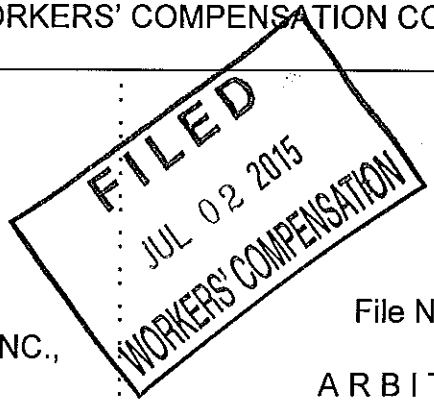
LARRY JOHNSON TRUCKING, INC.,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Insurance Carrier,
Defendants.



File No. 5042913

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

The claimant, Larry Beeman, filed a petition for arbitration and seeks workers' compensation benefits from Larry Johnson Trucking, Inc., employer, and Travelers Indemnity Company, insurance carrier. The claimant was represented by Ryan T. Beattie. The defendants were represented by Dennis R. Riekenberg.

The matter came on for hearing on February 9, 2015, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 7 and defense exhibits A through H. The claimant testified under oath at hearing. Brittney Frericks was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on February 23, 2015 after helpful briefing by the parties.

ISSUE

The parties submitted the following issue for determination:

The issue is the nature and the extent of the claimant's disability. Specifically, the parties seek a determination as to situs of the impairment, as well as the extent of the disability.

A number of issues were stipulated in the hearing report. Those stipulations have been accepted by the agency and are binding. There is a stipulation that the

claimant was employed by the employer on March 27, 2012, when the claimant suffered an injury which arose out of and in the course of employment. The parties have stipulated that the work injury was a cause of both temporary and permanent disability; however, the claimant is not claiming further entitlement to healing period benefits at this time. The parties have agreed to the elements which comprise the rate of compensation. Claimant was single and entitled to one exemption with gross earnings of $668.00 per week at the time of his stipulated work injury. Affirmative defenses are waived and medical benefits are not in dispute at this time. The defendants have paid 22 weeks of permanency benefits at the rate of $421.74 per week.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.
2. Claimant sustained an injury which arose out of and in the course of employment on March 14, 2011.
3. Temporary disability/healing period and medical benefits are no longer in dispute.
4. The commencement date for any permanent disability benefits is July 24, 2012.
5. The weekly rate of compensation is $354.56.
6. Defendants have paid and are entitled to a credit of 41.145 weeks of compensation (permanent partial disability).
7. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant, Larry Beeman was 58 years old as of the date of hearing. He lives in northeast Nebraska in a little town called Chadron. (Transcript, page 12) Larry was a truck driver for Larry Johnson Trucking, Inc. On March 27, 2012, Larry suffered a serious work accident. On that date, Larry was assisting and observing the unloading of railroad ties from his flatbed trailer. A column of railroad ties tipped over during the unloading process. Larry jumped from the trailer to avoid being hit by the ties. He was, nevertheless, struck by the ties. Larry was struck by a file as he jumped. He landed on all fours. Three ties landed on his right leg on his foot, above the knee and one on his hip. (Tr., pp. 31-32) He was immediately taken to Boone County Hospital. (Tr., pp. 32-33)

The following history was noted in the hospital:

> The patient complains of right lateral ankle pain from a(n) workplace injury Patient stated he works for Lary [sic] Johnson Trucking Inc. and was unloading railroad ties when two of the [sic] fell onto his right foot when he fell from standing position. Patient stated in the process he skinned his knees. . The symptoms are constant. . The pain is described as throbbing and sharp.

(Claimant's Ex. 3, p. 1) He spent the day in the hospital and was discharged to home at about 7:00 p.m. Radiology reports demonstrated a fracture in his right ankle. (Cl. Ex. 3, pp. 9-10)

Larry returned to Nebraska and was seen at Chadron Community Hospital. The fracture was verified, and Larry was referred to a foot and ankle specialist, Gregory Harbach, M.D. (Cl. Ex. 4) Larry underwent a course of treatment with Dr. Harbach. (Cl. Ex. 2) Initially, Larry elected to attempt non-surgical options, but he was not allowed to bear any weight on the foot. (Cl. Ex. 2, p. 2) In June, the pain in the right foot was improving, and he recommended a cam boot and some minimal weight bearing. As Larry followed this course of treatment, he began to experience low back pain. (Tr., p. 37) Larry testified that he discussed the low back with Dr. Harbach, and he was advised that the sciatic nerve would heal. (Tr., p. 38) There is nothing in Dr. Harbach's medical notes about the back pain. Dr. Harbach placed Larry at maximum medical improvement on September 17, 2012. He was provided permanent restriction of no lifting greater than 50 pounds. Larry returned to work with the restriction and performed his regular job; however, he only did loads that did not require tarps, although he could use the 40-pound chains. (Tr., p. 38)

Larry testified that, after returning to work, his foot and back pain worsened. He described shooting pains "like little electrical sparks type of feeling and pain on it, and I noticed that the longer I sat up there the more it would hurt." (Tr., p. 39) The first documentation of the back pain in the medical records occurred on February 7, 2013. Dr. Harbach had left the practice and Larry's care was taken over by Eric Gardner, M.D. Dr. Gardner diagnosed "history of right calcaneus fracture and subtalar arthrosis" as well as "lumbar arthritis and greater trochanteric bursitis." (Cl. Ex. 2, p. 11) He took some films. He noted that Larry's "biggest complaint appears to be his back and I'll go ahead and treat him for that." (Cl. Ex. 2, p. 11) He recommended therapy and back exercises, as well as a referral to a physiatrist.

He followed up in June after an injection. (Cl. Ex. 2, p. 12) At this point, Dr. Gardner mainly focused on the foot, and the back was not mentioned at all. Larry was sent to Bryan Den Hartog, M.D., who eventually diagnosed "right posttraumatic arthritis, subtalar joint, post calcaneal fracture" and "peroneal tendon impingement secondary to lateral wall blowout from the calcaneus." (Cl. Ex. 6, p. 4) He performed surgery including a subtalar joint fusion on July 29, 2013. (Cl. Ex. 6, p. 4) Larry

continued to follow up with Dr. Den Hartog who released him on February 25, 2014, in pretty good shape although he still had difficulty walking significant distances. (Cl. Ex. 6, p. 14) A functional capacity evaluation in March placed Larry in the light-medium classification with no lifting more than 20 pounds. (Cl. Ex. 7)

On April 2, 2014, Dr. Den Hartog indicated Larry had some permanent functional impairment but declined to provide a rating. He stated, "I think permanently the patient will be restricted to a minimal amount of walking on uneven ground." (Def. Ex. H)

The defendants referred claimant to Greg Reichhardt, M.D. He recommended work restrictions consistent with the functional capacity evaluation, which he described as follows:

> Work restrictions are outlined, largely relying on the results of the functional capacity evaluation. It was reviewed with Mr. Beeman that it is difficult to medically determine the risk of injury and he should not do anything that he is not confident to safely do.
>
> Limit lifting floor to waist to 20 pounds occasionally, 15 pounds frequently. Limit lifting waist to shoulder to 30 pounds occasionally, 25 pounds frequently. Limit overhead lifting to 20 pounds occasionally, 15 pounds frequently. Limit carrying to 15 pounds occasionally and frequently. Limit walking pushing and pulling to 30 pounds occasionally, 25 pounds frequently. Limit standing pushing and pulling to 60 pounds pushing occasionally, 45 pounds frequently, 55 pounds pulling occasionally, 45 pounds frequently. Limit squatting, kneeling, stair climbing and crawling to an occasional basis. No climbing ladders, poles or scaffolds (this is added as the patient notes he does not feel safe climbing at unprotected heights).

(Def. Ex. C, pp. 3-4) He opined that Larry has a 10 percent functional loss of use of his right leg as a result of the work injury. The defendants paid this rating.

Following Dr. Reichhardt's rating, Larry was evaluated by Sunil Bansal, M.D., on July 3, 2014. Dr. Bansal performed a thorough examination and record review. He diagnosed the following. With regard to the right lower extremity, he diagnosed closed right calcaneus fracture, comminuted fracture of the os calcis and right subtalar joint arthritis (status post joint fusion). For the back and hip he diagnosed sacroiliitis and trochanteric bursitis of the right hip. (Cl. Ex. 1, pp. 10-11) He opined that both of these conditions were related to the stipulated March 27, 2012, work injury.

> . . . Mr. Beeman clearly has an altered gait from his right ankle/foot pathology. He was also made to wear a CAM boot for a period of time. This will place unbalanced stress to the sacroiliac joint and hip, resulting in sacroiliitis and right trochanteric bursitis. His symptomatology has followed a medically logical chronological order from the time of his right

> ankle/foot pathology, development of an altered gait, and then development of sacroiliitis and trochanteric bursitis. Chronologically, it is medically logical that his back and hip manifestations appeared months after his lower extremity injury, as this is a cumulative process.

(Cl. Ex. 1, p. 11)

He rated the right lower extremity at 14 percent of the leg, in addition to 3 percent of the body for the sacroiliitis and 3 percent for the trochanteric bursitis of the right hip. (Cl. Ex. 1, p. 11) He did not alter the restrictions. (Cl. Ex. 1, p. 12) Dr. Reichhardt responded to Dr. Bansal's opinion in November 2014. Dr. Reichhardt stated that he respectfully disagreed with Dr. Bansal.

> . . . Mr. Beeman did not have any initial reports of low back pain. I believe that Dr. Bansal and I agree that he did not sustain a low back injury as a direct result of the work-related incident on or about 3/27/12. Throughout his treatment course, there is some mention of low back pain. There are not, however, consistent reports of low back pain documented through his treatment course. When I saw him on his impairment rating evaluation on 5/8/14, he had reported that he had previously had some low back pain during his treatment course, but this had subsided. He did not report any low back or hip pain at that time. His pain diagram indicates only pain symptoms over the ankle and some numbness over the foot. There is no indication of any symptoms over the low back or the hip. There was no verbal report to me of any ongoing low back of hip symptoms at that time. His lumbar examination revealed no tenderness to palpation of the lumbar spine and he had no lumbar paraspinal muscle spasm. He had normal lumbar range of motion for age.

(Def. Ex. D, p. 1) The pain diagram mentioned by Dr. Reichhardt is not in the record.

At hearing, Larry was asked if he mentioned the back and hip issues to Dr. Reichhardt. "I mentioned it, but we just focused on the foot." (Tr., p. 49) "Q. Did he do any physical examination of you upon your back? A. No." (Tr., p. 49) He testified that he only spent 20 minutes with Dr. Reichhardt, whereas he spent 45 minutes to an hour with Dr. Bansal. Larry remained steadfast that Dr. Reichhardt never touched him other than his foot. (Tr., pp. 59-60) He also denied filling out a pain diagram.

Larry Johnson Trucking terminated Larry in approximately March 2013 after it received a letter from Larry's attorney. In a response to a question from the undersigned, Larry testified that the employer essentially terminated him because he was not allowed to speak to Larry due to his litigation. (Tr., pp. 75-76) Both parties seemed content to leave this issue alone, so I do not place a great amount of significance on it. He has not worked since losing his job in 2014.

Larry testified fairly extensively about his current condition. He is very believable.

He tries very hard to walk "normal" so as not to irritate his back and right hip symptoms. He testified he still gets pain in his back and hip area "a couple, three times a day depending on what I'm doing." (Tr., p. 52) He testified the aching pain is essentially constant right in the area where his spine meets his pelvis. He further stated that bouncing around in his vehicle and trying to walk on uneven ground is really bad for it. He is no longer able to hunt because of this. (Tr., pp. 52-53)

I find Larry to be credible. Larry presented in a very plain-spoken, small town manner. I found nothing in his mannerisms or presentation which caused me concern about whether he was being truthful. He did not seem particularly well-prepared or over-prepared for hearing, and most of the time he seemed to be speaking off the cuff. I believe his hip and low back hurt fairly constantly, although his greater problem is undoubtedly his right foot and ankle.

Larry graduated from high school in Largo, Florida in 1975. He secured some type of certificate associated with child counseling or crisis intervention after attending a course at St. Leo's College in Florida. His work history is both varied and interesting and includes some limited computer work, blacksmithing, working with youth as a caregiver/counselor, entertainment work (telling stories and playing music for tourists), tree trimming, operating a small engine repair shop and performing various driving tasks. His driving jobs have ranged from driving delivery vans to working as an over-the-road truck driver.

Larry had only begun working for Larry Johnson Trucking in February 2012. He was an over-the-road driver who transported goods on a flatbed trailer throughout the United States. Earnings wise, this was a good job for Larry. Larry received unemployment benefits in Nebraska after being let go from his job in March 2014. Larry testified that there are not many jobs in northwest Nebraska. I understood Mr. Beeman's testimony that he intends to relocate and find work elsewhere but that he had not truly begun that process at the time of hearing. He did testify that he has been to Denver, Colorado on a couple of occasions where there are more jobs. He would like to relocate and have employment simultaneously. Most of his work search seems to be through Craigslist. Larry likely cannot return to a substantial portion of his past employment, but there are certainly jobs in the competitive labor market he can still perform.

CONCLUSIONS OF LAW

The first question submitted is situs of Larry's disability. Larry clearly suffered an injury to his right foot and ankle. The issue is where the disability manifested. It is, in essence, an issue of causal connection. Larry alleges that, as a result of his work injury and sequela, he developed right hip and low back pain which is permanent in nature and compensable. The defendants dispute this. This is a significant dispute because if his disability is limited to his left foot and ankle (meaning a leg injury) then the extent of benefits Larry is entitled to is limited to the schedule, whereas, if there is permanency in the low back and/or right hip, the disability is unscheduled and evaluated as an

industrial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated:

> If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable.

Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

The greater weight of evidence supports the claimant's position that his disability extends into his right hip and lower back. The best evidence in the record is the expert medical opinion of Dr. Bansal, which is supported by the credible testimony of Larry Beeman and the medical reports of Dr. Eric Gardner, an authorized treating physician. I can find no solid reasons to discount Larry's testimony. In order to defeat his claim, I would have to conclude that his sworn testimony is untruthful. By a preponderance of evidence, I find that his testimony was truthful and it supports the medical opinions of Dr. Bansal.

It is significant to me that Dr. Bansal thoroughly documented all of his medical findings and evaluation. Dr. Bansal was not simply focused on the right foot; he focused on the right hip and low back. Dr. Reichhardt claimed that Larry filled out paperwork wherein he essentially denied that he had any back pain. None of that documentation, however, is in the record. It is hard to provide much weight to this type of claim when it was available but is not in evidence. Based upon Dr. Reichhardt's initial report, he was clearly not focused on the lower back or right hip. He was focused on the right foot and ankle. (Def. Ex. C)

Dr. Reichhardt has, however, provided a well-reasoned opinion which does cause some level of doubt. He opined that there was not enough high-quality documentation of ongoing low back difficulties throughout Larry's course of treatment to justify a finding that the condition extended into Larry's low back permanently. This opinion makes some sense. From an evidentiary standpoint, it would be a much easier case if the records of Dr. Harbach and Dr. Den Hartog were inundated with references to low back pain due to altered gait. Larry, however, is not required to prove his case beyond a reasonable doubt, or even by clear and convincing evidence. All he has to do is prove his case by a preponderance of evidence. I find that he has. He has convinced me that, more likely than not, he did develop back pain while recuperating from his very serious foot injury, and his back pain has been constant and disabling.

In order to conclude otherwise, I would have to conclude that Larry is being dishonest and exaggerating or manufacturing his low back symptoms. I find this highly unlikely. There are numerous reasons Larry's low back symptoms may not be recorded in the records of Dr. Den Hartog and Dr. Harbach. Larry testified that he did tell Dr. Harbach about his pain, and Dr. Harbach told him that it would resolve when his foot got better. This is believable and would explain why Dr. Harbach did not record it. When Larry saw Dr. Den Hartog, he needed an ankle fusion, and it is very clear that his back was not his worst problem at that time. In any event, Larry's testimony, combined with Dr. Bansal's examination findings, in addition to the well-documented report of Dr. Gardner, lead me to the conclusion that the condition indeed extends into Larry's hip and low back.

A hip injury is generally an injury to the body as a whole and not an injury to the lower extremity. The lower extremity extends to the acetabulum or socket side of the hip joint. For a hip injury to be industrially ratable, disability in the form of actual

impairment to the body must be present. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

Since I have found that Larry's condition extends into his body as a whole, I shall evaluate his disability industrially.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Larry is a 58-year-old-truck driver who has not worked since being let go by the employer. His work history and educational background do limit, to some extent, his employability. He is a high school graduate with some college courses and some computer skills. He is articulate and bright. Fortunately, Larry has some work skills which are transferrable to the general labor market, such as small engine repair.

Larry has significant permanent work restrictions which limit his lifting, pushing pulling and carrying. He cannot be on ladders or unsecured heights. He has a severe functional loss of his right foot and ankle and minor functional deficits in his right hip and low back. He is probably no longer suited for over-the-road driving (certainly if lifting is involved). He may be able to do lighter delivery work. He is certainly no longer suited for the heavy driving required at Larry Johnson Trucking.

Larry looks for work through the internet each day; he has limited his efforts based upon the fact that he realizes he needs to move. "I mean, finding a job is not going to be as much hassle as finding a job, finding a house, moving – getting it all done at once is a pain." (Tr., p. 70) This appears to have inhibited his work search and, consequently, it is more difficult to accurately assess his true loss of earning capacity at the present time.

The defendants argue that Larry's industrial disability is "minimal at best," while the claimant seeks an award of 65 percent.

When considering all of the factors of industrial disability, I conclude that Larry has suffered a 45 percent loss of earning capacity. This entitles Larry to 225 weeks of benefits.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant two-hundred twenty-five (225) weeks of permanent partial disability benefits at the rate of four-hundred twenty-one and 74/100 dollars ($421.74) per week commencing on the date(s) stipulated by the parties.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the twenty-two (22) weeks previously paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

Signed and filed this 2nd day of July, 2015.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.