BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EDWARD B. COUCH, Claimant, vs. HY-VEE, INC., Employer, and EMCASCO INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED FEB 04 2019 WORKERS COMPENSATION	File No. 5063697 ARBITRATION DECISION Head Note No.: 1803, 1803.1

STATEMENT OF THE CASE

Edward Couch, claimant, filed a petition in arbitration seeking workers' compensation benefits from Hy-Vee, Inc. (Hy-Vee) and its insurer, EMCASCO as a result of an injury he sustained on March 1, 2013 that arose out of and in the course of his employment. This case was heard in Davenport, Iowa, and fully submitted on July 5, 2018. The evidence in this case consists of the testimony of claimant, Kristi Couch, Joint Exhibits 1 – 10 and Defendants' Exhibits A and B. Both parties submitted briefs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether the disability is a scheduled member disability or an unscheduled disability.

2. The extent of claimant's disability.

3. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Edward Couch[1], claimant, was 46 years old at the time of the hearing. Claimant graduated from high school and has no post-secondary education.

Claimant's work history reveals that after high school he worked for a restaurant/hotel in various positions including busboy, room service, line cook and prep cook. (Joint Exhibit 10, p. 7) Claimant worked as a security guard for a couple of months. Claimant then worked for Tri-City Heat Treat, a foundry. (Transcript page 11) This job only lasted a couple of months. (JEx. 10, p.8) Claimant then worked production for Wonder Bread. Claimant also worked for three years on an assembly line making vehicle brake parts. Claimant did not believe he could perform these jobs now due to stairs, the amount of standing, and the pace of the work. (Tr. pp. 32 – 34)

Claimant started working part-time as a custodian for the Davenport Community School District in 2003. (Tr. p. 12) He began working full time in 2006 and was employed in that position at the time of the hearing. (JEx. 10, p. 11)

Claimant started working part-time for Hy-Vee in the fall of 2008. Claimant worked about 20 – 25 hours a week. (Tr. pp. 12, 13) Claimant held a number of positions with Hy-Vee. At the time of injury on March 1, 2013, claimant would stock meat for the meat department. Claimant continued with this job after his injury. (JEx. 10, p. 20) Claimant resigned his position with Hy-Vee on June 10, 2017. (Exhibit A, page 2: Tr. p. 42) In his deposition, claimant said he could not perform his job as he did before he was hurt. (JEx. 10, pp. 21, 22)

On March 1, 2013, claimant was in the parking lot at Hy-Vee when he slipped on ice and hurt his left ankle. Claimant was unable to walk and called the store for assistance. Claimant was then taken by ambulance to a Trinity Hospital in Bettendorf and was kept overnight. (Tr. p. 15) Claimant had surgery on his ankle that night by Dr. Martin. (JEx.10, p. 30) He had a second surgery on May 24, 2013 to remove some screws in his ankle. (JEx, 10, p. 31) Claimant returned to work with just seated duties in June 2013 and returned to his regular duties for both Hy-Vee and the school district on July 15, 2013

Claimant had a third surgery on September 27, 2013 by Beau Shay, DPM, to try to increase mobility. (Tr. p. 17) Claimant testified that his third surgery did not help. (Tr. p. 18) In his deposition, claimant said the surgery helped. (JEx. 10, p. 33)

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[1] Some of the early records refer to the claimant as Edward York. At some time his name was changed to Edward Couch.

Claimant returned to work for both jobs a couple of weeks after the third surgery. (JEx. 10, p. 33) Claimant was found to be at maximum medical improvement by Dr. Shay as of April 7, 2014. (Tr. p. 28) Claimant was working 40-hours per week at the Davenport schools and 16 – 20 hours at Hy-Vee when he returned to the work. (Tr. p. 28) Claimant continued working both jobs, regular duties, until he resigned from Hy-Vee in June 2017. (Tr. p. 58) Claimant said at that time his ankle was swollen at the end of his shift that it was hard for him to walk and his back was very painful. (Tr. p. 30) Claimant was working without restrictions. (Tr. p. 46)

In his deposition of January 16, 2018, claimant testified that he was able to perform the duties of a custodian and occasionally, two to three times per month, his supervisor will help him catch up. (JEx. 10, p. 13) At the hearing claimant said that he needed help two to three times a week. (Tr. p. 62) According to the claimant, this happens when the rooms are dirtier than normal and because it is not as easy for him to get around. (JEx. 10, p. 13) At hearing claimant testified he had difficulty moving things and taking out the trash as a custodian. (Tr. p. 35) A couple of weeks before the hearing claimant switched the type of custodian work he was performing. He switched to a starter position. This custodian work involves wiping down table tops and door handles to sanitize. (Tr. p. 47) Claimant, in his deposition, said he had occasional pain in the back and hips. (JEx. 10, pp. 41, 42) Claimant said that he walks with a limp all the time and the past couple of years it has been very noticeable. (JEx. 10, p. 44)

Claimant has worn a number of braces on his left leg due to his injury. At the time of the hearing, he was wearing an AFO brace (ankle-foot orthosis) and started wearing the AFO in October 2017. (Tr. pp. 20, 21) The AFO brace helps keep claimant's foot straight when he walks. Claimant stated that he has had an abnormal gait since September 5, 2013. (Tr. p. 22)

Claimant testified that he has been told that eventually he will need an ankle fusion or ankle replacement, but he is too young for such a procedure at this time. (Tr. p. 24) Claimant depends on his older son to help out around the house to move heavy things and reach light fixtures. (Tr. p. 36) Claimant will crawl up his stairs at home in the morning as sometimes it is hard for him to get on his feet. (Tr. p. 37; JEx. 3, p. 25) Claimant believes his back pain is caused by having to favor his right side. (Tr. pp. 38, 40)

Kristi Crouch, claimant's wife testified at the hearing. Ms. Couch said that claimant will tell her that his ankle and back are hurting him. Ms. Crouch said that activities like carrying their daughter, moving furniture and cleaning caused claimant pain. (Tr. p. 67) Ms. Crouch has noticed claimant has an abnormal gait and that it is getting worse. (Tr. p. 67) Ms. Crouch observes claimant crawling in the house "Pretty much daily", and "especially after he has worked all day." (Tr. p. 68)

On March 1, 2013, Joseph Martin, M.D., assessed claimant with an "Unstable Weber C lateral malleolar fracture, status post dislocation and relocation by the emergency room staff." (JEx. 1, p. 5) Dr. Martin performed an open reduction internal

fixation, left ankle fracture, lateral malleolus procedure on March 1, 2013. (JEx. 2, pp. 6, 7; JEx. 5, p. 49) On May 24, 2013, Dr. Martin performed a. "Syndesmodic screw removal left ankle." (JEx. 5, p. 50) On July 12, 2013, claimant requested that Dr. Martin provide him a return to work without restrictions. (JEx. 2, p. 13)

On September 18, 2013, Dr. Shay saw claimant concerning decreased range of motion in his left ankle. (JEx. 2, p. 15) Dr. Shay's impression was, "Osteophyte, anterior aspect of the distal tibia with left ankle arthritis." (JEx. 2, p. 16) Dr. Shay recommended additional ankle surgery. (JEx. 2, p. 26) On September 27, 2013, Dr. Shay performed a "Left ankle arthrotomy with resection of the osteophyte left ankle." (JEx. 5, p. 51)

On February 24, 2014, Dr. Shay examined claimant. Dr. Shay allowed claimant to return to work, 8-hours, with no restrictions. Dr. Shay said that in 10 – 15 years claimant would need an ankle fusion and that it was related to his initial injury. (JEx. 4, pp. 30. 31) On May 2, 2014, Dr. Shay said that claimant was at maximum medical improvement as of April 7, 2014 and stated as restrictions that claimant should wear an ASO/AFO brace for stability and claimant needs to be able to sit down when his leg becomes very swollen and elevate his leg. (JEx. 4, p. 34) Dr. Shay's diagnosis was,

> 1. Continued limited range of motion of the left ankle with antalgic gait and left ankle arthritis.
>
> 2. History of open reduction internal fixation of left ankle fracture and dislocation status post history of left ankle arthrotomy.

(JEx. 4, p. 36) Dr. Shay provided the following impairment rating:

> The impairment rating was determined utilizing the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition. I utilized Chapter 17, Table 17-5 for lower limb impairment due to gait derangement. I also, in addition, used the impairment rating based on 17.2F, range of motion. Again, that table is 17-5 on that and also Table 17-11 on that as well. That brought me to the patient has symptoms that are consistent on Table 17-5 and gait derangement, he does have a mild severity of this with an antalgic limp, a shortened stance, and documented advanced arthritic changes within his ankle, which would give me a whole person impairment of 7%, and that is how I came to the determination 7%.
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> He also does have a lower extremity impairment rating of 15% and a foot impairment rating of 21%. How we determined that is using the ankle motion impairment estimates, Table 17-11, he has right around 10 degrees of plantar flexion and less than neutral with his knee extended and knee flexed. He is not able to get to neutral with dorsiflexion so that is how we came to that estimate of 15% lower extremity impairment and 21% foot impairment.

(JEx. 4, p. 36

Michael Pyevich, M.D., saw claimant August 14, 2015 for consultation from Dr. Shay. Dr. Pyevich recommended an MRI to rule out avascular necrosis and consider further surgical options. (JEx. 4, p. 48) On October 21, 2015, Dr. Pyevich noted claimant had fairly advance left ankle arthritis and osteochondral defect in the lateral talor dome. He stated that claimant could be a candidate for an ankle fusion, but was not a candidate for ankle replacement at that time. (JEx. 3, p. 23) Dr. Pyevich next saw claimant on July 22, 2016. At that time, claimant was still working at the Davenport schools and Hy-Vee. Dr. Pyevich reported that claimant's wife reported that claimant comes home every night complaining of pain and swelling in his left ankle and that claimant crawls the first thing in the morning due to stiffness and pain. (JEx. 3, p. 25) Dr. Pyevich recommended a solid AFO, and if that did not work, consideration of an ankle fusion. (JEx. 3, p. 26) On April 14, 2017, Dr. Pyevich's impression was: "IMPRESSION: Progressively worsening posttraumatic left ankle arthritis status post injury at work and ORIF in 2013 with moderate osteoarthritis, large anterior osteophytes in the distal tibia and talus and a lot of soft tissue swelling." (JEx. 3, p. 27) On March 5, 2018, Dr. Pyevich responded to a letter from the insurance carrier. In his response, Dr. Pyevich said that the only way claimant will be at maximum medical improvement would be for claimant to have another surgery. Dr. Pyevich would not change Dr. Shay's 15 percent impairment rating, but noted claimant was getting progressively worse. (JEx. 3, p. 29)

On August 4, 2017, Mark Taylor, M.D., provided an independent medical examination (IME) report. (JEx. 8, pp. 69 - 78) Dr. Taylor noted claimant mentioned hip pain and his pain diagram indicated low back pain, but on further questioning claimant pointed to his posterior hip and buttock, as well as over the lateral hips. (JEx. 8, p. 72) Dr. Taylor noted:

> His gait pattern revealed an antalgic gait protecting the left side and his left foot pointed outward more so than the right. He also had somewhat flat feet. He had difficulties heel and toe walking on the left side and could only squat halfway down or less due to the left ankle.

(JEx. 8, p. 74)

Dr. Taylor's diagnoses were:

Diagnoses

1. Left ankle fracture-dislocation.
2. Left ankle ORIF surgery on March 1, 2013.
3. Syndesmotic screw removal on May 24, 2013.
4. Left ankle arthrotomy with resection of osteophyte on September 27, 2013.

5. Chronic left ankle arthralgia with arthritis, and antalgic limp requiring AFO.

6. Occasional bilateral posterior and lateral hip arthralgia.

(JEx. 8, pp. 74, 75) Dr. Taylor provided a 29 percent lower extremity rating for claimant's loss of motion to his left ankle. (JEx. 8, p. 75) Dr. Taylor stated that there was no functional impairment rating to either of claimant's hips. (JEx. 8, p. 75) Dr. Taylor provided an impairment rating for claimant's gait impairment of 15 percent to the whole body using Table 15-5, page 529 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, (JEx. 8, p. 76) Based upon the diagnoses of Dr. Shay, Dr. Taylor, and based upon the testimony, I find that the March 1, 2013 injury has caused a gait derangement to the lower extremity.

Claimant has requested costs totaling $219.59. Of the costs, $119.89 are for filing and service fees and $99.70 is the cost of a copy of claimant's deposition. (Attachment to hearing report) Claimant's deposition was submitted as Joint Exhibit 10.

Claimant's gross weekly earnings for the relevant period before his injury was $949.00. At the time of his injury, he was single and entitled to one exemption. Claimant's weekly workers' compensation rate for permanent benefits, according to the rate book in effect at the time of the injury, is $575.73.

CONCLUSIONS OF LAW

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u)[2]. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 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).

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 83- year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d

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[2] The Code Editor has modified and added to subparts (a) – (u) based upon changes to this law effective July 1, 2017. None of these changes are determinative in this case.

116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

Claimant credibly testified that he has some back pain. However, no medical expert has issued an opinion that claimant has a permanent injury/impairment to his hip or back. There is no medical evidence that has the situs of any permanent impairment in the body as a whole. Claimant has not proven that he currently has an industrial disability.

Claimant has proven an injury to the lower extremity due to the injury of March 1, 2013 and three surgeries. Claimant's injury and surgeries has caused permanent injury and disablement to his left leg and left foot. Claimant has proven an injury to his left lower extremity.

Dr. Shay's diagnosis found claimant had an antalgic gait. Dr. Taylor diagnosed a gait derangement. Claimant is using an AFO to stabilize the lower extremity. Dr. Shay found a 15 percent lower extremity rating due to a loss of range of motion to the ankle. Dr. Taylor found a 29 percent impairment rating due to loss of range of motion and a 15 percent whole body impairment rating based upon gait derangement. Defendants argue

in their brief that Dr. Taylor improperly calculated claimant's loss of range of motion rating by combining the ratings. Dr. Shay did not rate the claimant for gait derangement.

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, states "If more than one method can be used, the method that provides the higher rating should be used." AMA Guides, Chapter 17.2, p. 527

I find that Dr. Taylor's rating for a deranged gait is the correct functional evaluation. Claimant was not using the AFO at the time of Dr. Shay's rating. Claimant was wearing the AFO at the time of Dr. Taylors rating. Table 15.5 of the AMA Guides, page 529 provides for a 15 percent whole body impairment rating for a gait derangement and the required use of an AFO. This most accurately describes claimant's condition and is a higher rating than the range of motion ratings. A 15 percent whole body rating results in either a 37 or 38 percent lower extremity rating. AMA Guides, Table 17-3. p. 527

Claimant stopped working his second job due, in part, to his ankle. The medical and testimonial evidence is that claimant often has to crawl in the mornings to get around his house. Claimant switched to a position with the school district shortly before the hearing that was less physical. I find that claimant has a functional loss of 38 percent to his lower extremity.

I find claimant is entitled to 83.6 weeks of permanent partial disability benefits as a result of his March 1, 2013 injury. (220 x 38% = 83.60)

Claimant has generally prevailed in this case. The claimant has requested costs be awarded to him. The $219.59 in costs are allowable under 876 IAC 4.33. Using my discretion, I award claimant these costs.

ORDER

Defendants shall pay claimant eighty three point six (83.6) weeks of permanent partial disability benefits at the weekly rate of five hundred seventy-five and 73/100 dollars ($575.73) commencing October 13, 2014.

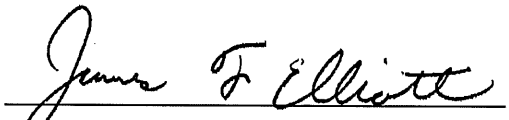
Defendants are entitled to a credit of thirty three (33) weeks of permanency benefits previously paid at the rate of five hundred seventy-five and 73/100 dollars ($575.73).

Defendants shall pay claimant two hundred nineteen and 59/100 dollars ($219.59) for costs.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See. Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

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

Signed and filed this 4th day of February, 2019.



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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.