BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN FITZPATRICK,

Claimant,

vs.

HILAND DAIRY FOODS COMPANY, L.L.C.,

Employer,

and

INDEMNITY INSURANCE CO. OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File Nos. 5051617, 5051618

ARBITRATION

DECISION

Head Note Nos.: 1803, 4000.2

STATEMENT OF THE CASE

Steven Fitzpatrick, claimant, filed petitions in arbitration seeking workers' compensation benefits from Hiland Dairy Foods Company, LLC (Hiland), and its insurer, Indemnity Insurance Company of North America, as a result of an injury he sustained on October 21, 2014 and October 23, 2014 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on October 7, 2016. The evidence in this case consists of the testimony of claimant, Terry Landers, and Joint Exhibits 1 – 16. Both parties submitted briefs.

ISSUES

For File No. 5051617 (Date of Injury October 21, 2014- left foot):

1. Whether the injury is a cause of permanent disability and, if so;
2. The extent of claimant's disability.
3. Assessment of costs

For File No. 5051618 (Date of Injury October 23, 2014 - back):

1. Whether the injury is a cause of permanent disability and, if so;
2. The extent of claimant's disability.

3. Whether penalty benefits should be awarded.

4. Assessment of costs

STIPULATIONS

The parties filed hearing reports at the commencement of the arbitration hearing. On the hearing reports, 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.

The parties agreed post-hearing the rate identified in both hearing reports was incorrect. The parties agreed the correct weekly rate for claimant is $622.42. I find this is claimant's weekly rate.

FINDINGS OF FACT

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

Steven Fitzpatrick, claimant, was 37 years old at the time of the hearing. Claimant graduated high school in Australia. He received the equivalent of an associate degree by attending a technical college in Australia for 12 months. (Transcript, page 13)

Claimant's first job was for Troy Little Racing in Australia. He performed this work for about two years. At different times, he worked on engines, fabrication, financial duties and managing the race team. (Tr. p. 14) Claimant started working for Vortex Racing Products around 1998 and ended around 2002/2003. Claimant stated coming to the United States while working for Vortex Racing Products. After 2001 claimant's primary residence has been in the United States. Claimant was, from 2005 through 2015, self-employed and operated SJF Consulting, which was similar work he did for Vortex— research and development for race teams. (Tr. p. 17) Claimant stated at first it was full time and transitioned to part time in 2007. (Tr. p. 17)

Claimant began working for Hiland in January 2008. Claimant originally worked driving a truck then loading truck and eventually worked in sales. (Tr. 20) He worked until October of 2014 when he was terminated on October 30, 2014 for violation of a company policy. (Tr. p. 20; Ex. 12, p. 3) Claimant received unemployment. (Tr. p. 64)

Claimant next worked for W. Reeves & Associates from January 2015 through June 2015. Claimant next worked for Big O Tires (d/b/a J & J Tire) as an assistant manager for about 14 weeks. (Ex.11, p. 7) In December 2015, claimant started working for United Rentals on January 6, 2016, which was claimant's employer at the time of the hearing. (Tr. p.27)

On October 21, 2014, claimant was assisting on a route when a milk dolly fell off the back of a truck and landed on his left foot. This happened at about 12:30 a.m. Claimant informed his supervisor. Claimant finished his shift and was able to see his physician later that afternoon.

Claimant said that he had one day in the office after the foot injury and was back helping on a route two days after the injury. On October 23, 2014, claimant moved a case of milk and felt pain in his back. (Tr. p. 31) Claimant reported his injury and finished his shift. Claimant was advised by a supervisor to go to his chiropractor. On October 27, 2014, claimant was sent to Concentra Medical and was provided physical therapy for his back. (Tr. p. 33)

Claimant received treatment from Daniel Miller, D.O., and Irving Wolfe, D.O. Claimant said that Dr. Wolfe's neurological testing did not reveal neurological issues for his foot. (Tr. p. 36) Claimant said that Christian Ledet, M.D., provided him two injections in his back that provided little improvement. (Tr. p. 37) Claimant testified he was told that surgery likely would not help him. (Tr. p.38)

Claimant said that he was sent to Sunil Bansal, M.D., and John Kuhnlein, D.O., for examinations. Claimant said Dr. Bansal provided a 45 pound lifting restriction and Dr. Kuhnlein provided restriction of about 40 pounds waist to shoulder and 20 pounds overhead. (Tr. pp. 41, 42) After claimant received an impairment rating for his back from Dr. Miller of 5 percent he has not received any workers' compensation. After claimant received an 8 percent impairment rating from Dr. Kuhnlein for his back, he has not received any workers' compensation. (Tr. pp. 44, 45)

Claimant's foot injury causes him pain if he is lifting weight or climbing ladders. He takes more breaks to stay off his foot than he did in the past. (Tr. p 49) Claimant has pain in his back and he self-limits his activities to take care of his back. (Tr. p. 49)

Claimant agreed that he saw a doctor at Concentra for his foot two times. Claimant disagreed that he had stopped taking any medication for his foot when he was last at Concentra. Claimant said he was still taking Tylenol and was still in pain. (Tr. p.56) Claimant admitted that for his back he saw Dr. Nayeri four times and had three visits to the chiropractor. (Tr. p. 58)

Claimant testified that at the time Dr. Nayeri released him he wanted to continue to receive treatment, but believed that he would not be hired if he did not have a release. (Tr. p. 59) Claimant testified in this deposition and at the hearing that he did not think he could lift over 50 pounds due to his back and foot and could not walk around a block without foot pain. (Tr. p. 61)

When claimant worked for W. Reeves he did not do sales, but did sandblasting and powder coating. (Tr. p. 65) According to the claimant, he left W. Reeves due to his work injuries, but never informed W. Reeves that that is why he was leaving. (Tr. p. 70

Claimant left W. Reeves and started working for Big O Tires. He worked about 55/ 60 hours a week. (Tr. p. 71) Claimant was required to move inventory at Big O Tires. He worked there about a month and the started working for United Rentals, where he was working at the time of the hearing. His work at United Rental requires him to occasionally lift 45 pounds and to assist customers with equipment they rent. (Tr. p.74)

Terry Landers, district sales manager for Hiland testified. Claimant reported both his back and foot injury to Mr. Landers. (Tr. p. 91) Mr. Landers testified but for claimant's discharge for a policy violation he could have continued to perform his duties as s sales supervisor at Hiland even with the restrictions provided by Dr. Kuhnlein. (Tr. p. 94) Mr. Landers agreed that while moving cartons of milk like claimant did when he injured his back is not part of his job description, however it was required of him as being an employee. (Tr. p. 96)

William Reeves president of W. Reeves & Associates testified via deposition. W. Reeves & Associates is a manufacturer's representative that installs lighting on police and emergency vehicles. He also owns Reerodz, Inc. a powder coating company. (Ex. 10, p. 4) Mr. Reeves said that claimant worked for him from January 2015 through June 2015. Claimant's work consisted of some marketing, police vehicles installation and servicing of vehicles, as well as working in the powder coating facility and in the media blasting facility. (Ex. 10, p. 5) He said the work varied and could be doing some computer work to climbing into fire trucks, heavy lifting, general shop labor, fabrication and being on his feet all day. He said the office work claimant did was less than 10 percent of claimant's work. (Ex. 10, p. 5)

Jeff Schwab employed claimant for the Big O Tire store in Altoona, Iowa for 14 weeks. (Ex. 11, p. 7) Claimant's job duties included, "he is to help the manager in daily duties, hiring, firing, schedules, sales, bill input, customer relations, inventory, putting away product, going to get product. (Ex. 11, p. 7) The work that claimant performed required him to be on his feet all day that could include 12 hour days. Mr. Schwab was not aware of any restriction that the claimant may have had. (Ex. 11, pp. 7, 11)

At the time of the hearing, claimant was working as a Senior Inside Sales Representative. This position is primarily sales and customer service. It does require the ability to show customers how to use equipment, occasional lifting of 25 pounds and seldom lifting of up to 50 pounds. (Ex. 13, pp. 3, 4)

Claimant went to family medicine on October 21, 2014 after the milk cart fell on his foot. X-rays were negative for fractures of his left foot. (Ex. 1, p. 6)

Claimant saw Vincent Hassel, D.C., on October 23, 24 and 27, 2014 for his lower back pain. (Ex. 2, p. 2)

On October 27, 2014, Judith Nayeri, D.O., of Concentra Medical Centers saw claimant due to his back injury of October 23, 2014 and his foot injury. For the October 21, 2015 injury, Dr. Nayeri assessed claimant with a knee and foot contusion and recommended ibuprofen that she had prescribed for his back, warm Epsom salts soaks. (Ex. 3. p. 5) For the October 23, 2014 back injury she prescribed 800 mg of ibuprofen, Skelaxin, physical therapy and lifting no more than 20 pounds. (Ex. 3, p. 6) On October 30, 2014, Dr. Nayeri noted claimant was tolerating his job and had stopped taking his medication as he was improved. (Ex. 3, p. 16) On November 6, 2014, claimant reported increased symptoms and he had resumed taking his medications. (Ex. 3, p. 20) On November 13, 2014, Dr. Nayeri noted that claimant had been working regular duties and not taking his medications as his condition had improved. She released him from medical care and returned him to work with no restrictions. (Ex. 3, pp. 24, 25) On March 19, 2015, Dr. Nayeri responded to a letter from defendants and stated claimant was at MMI and had no permanent impairment for the October 21, 2014 left foot injury. (Ex. 3, p. 28) It does not appear that any examination took place at that time.

On December 13, 2015, Dr. Miller performed an independent medical examination (IME) of claimant. Dr. Miller requested an EMG/NCS of the lower left extremity due to a positive Tinel's test. The test was interpreted as negative. (Ex. 6, p. 4) Dr. Miller noted claimant had reached maximum medical improvement for his foot and he had no permanent impairment for the foot. (Ex.6, p. 5) Concerning claimant's back pain he did not believe claimant was at MMI and recommended referral to a pain specialist. (Ex. 6. p. 5) On June 6, 2016, Dr. Miller wrote defendants' attorney. He stated that as claimant had refused additional treatment, he placed him at MMI on March 29, 2016. He provided a 5 percent impairment rating and placed no permanent restrictions. (Ex. 6, p. 6)

On February 10, 2016, Dr. Ledet examined claimant for radiating lower back pain. (Ex. 7, p. 1) Dr. Ledet's assessment was:

> ASSESSMENT
>
> Current problems (ICD10 Active)
>
> M54.16 Radiculopathy, lumbar region
>
> Condition: uncontrolled; Location: right
>
> M51.16 Intervertebral disc disorders with radiculopathy, lumbar region
>
> Condition: uncontrolled; Location: right

(Ex. 7, p. 4) Dr. Ledet performed a lumbar epidural injection on that date. On March 29, 2016, Dr. Ledet noted claimant continues to have neuropathic pain associated with the work injury. Dr. Ledet said that claimant's options were:

1. Placement at MMI and assignment if PPI.

2. Initiate medications with anti-convulsants,

3. Surgical evaluation to determine if surgical options are available.

(Ex. 7, p. 7)

On February 12, 2016, Dr. Bansal performed an IME of the claimant's left foot. He noted that claimant continues to have pain in his foot particularly when placing pressure on his foot. (Ex. 8, p. 4) Dr. Bansal when asked if claimant had an impairment of his left foot wrote, "Yes. Mr. Fitzpatrick has a marked lump over the first metatarsal that effectively limits his metatarsophalangeal joint extension to 23 degrees." (Ex. 8, p. 5) He provided a 3 percent foot impairment rating and found claimant at MMI as of November 6, 2014 and recommended no prolonged walking of more than an hour. (Ex. 8, p. 6)

I find claimant has a 3 percent scheduled loss of his left foot.

On August 1, 2016, Dr. Kuhnlein performed an IME of claimant's back condition. Dr. Kuhnlein's diagnosis was, "Low back pain with intermittent L4 radiculitis." (Ex. 9, p. 6) Dr. Kuhnlein stated, "The current back pain and radiculitis that he is currently experiencing would still be related back to the October 23, 2014 injury, absent some other reasonable explanation." (Ex. 9, p. 7) Dr. Kuhnlein found claimant at MMI on March 29, 2016 and provided an 8 percent whole person impairment rating. He provided restrictions of lifting 40 pounds occasionally from floor to waist and waist to shoulder up to 20 pounds. (Ex. 9, p. 8) I find that Dr. Kuhnlein's restrictions are claimant's restrictions.

Claimant has had a number of jobs after he left Hiland. Some of the work he performed was above Dr. Kuhnlein's recommended restrictions. He has a slight impairment to his left foot and modest impairment to his lower back.

I find that claimant has a loss of 20 percent loss of earning capacity as a result of his back injury.

Claimant has requested costs in the amount of $3,462.11. (Attached to hearing report) The costs are:

$100.00 – filing fee

$49.37 – medical records

$35.24 – medical records

$3,277.50 – IME Dr. Kuhnlein

I find that claimant the above costs are reasonable and are awarded, except for the two medical records fees.

RATIONAL AND 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).

Claimant minimized the physical aspect of his work with his post-Hiland employers; W. Reeves, Big O Tire and United Rental. Mr. Reeves described work that claimant performed running the gambit for sedentary to heavy work. Claimant was on his feet for extended periods of time. The fact that claimant was able to work beyond his restrictions does not mean that he should or that he does not have permanent impairment.

The medical evidence is conniving that claimant has permanent impairment to his left foot and lower back.

For File No. 5051617 (Date of Injury October 21, 2014- left foot):

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). 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).

The only physician that examined a range of motion of the left foot was Dr. Bansal. He noted the lump and assigned a 3 percent impairment to the foot. I find this to be the most convincing medical evidence concerning an impairment to the foot. Claimant has met his burden to show he has a 3 percent impairment to his left foot. This entitles claimant to 4.5 weeks of permanent partial benefits (150 x 3 percent = 4.5).

For File No. 5051618 (Date of Injury October 23, 2014 - back):

Claimant has proven by a preponderance of the evidence that he has a permanent injury to his lower back as a result of his work injury on October 24, 2014. Dr. Miller found that claimant had an impairment ratable under the AMA Guides to the Evaluation of Permanent Impairments, Fifth Edition. Dr. Kuhnlein also found a permanent back injury. I found that claimant has restrictions that Dr. Kuhnlein recommended.

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.

I find that claimant has lost the ability to perform heavy work on a daily basis. Claimant has shown a strong motivation to work and has looked for positions that allow him to be involved in sales, with an eye toward management. He has performed lifting and standing beyond the recommended restrictions by Dr. Kuhnlein. However, he has found a position that limits the times he has to exceed his limitations. Claimant's age, past work history, intelligence and motivation to work are positive vocational factors. However he is precluded from work in a significant portion of the labor market he could work in prior to his back injury. Considering all of the factors of industrial disability I find

that claimant that claimant has a 20 percent industrial disability. This entitles claimant to 125 weeks of permanent partial disability benefits (500 x 20 percent = 125).

Penalty

Iowa Code section 86.13(4) allows an award of additional benefits if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse. Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

1. The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

2. The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

3. The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

The claimant has shown that he did not receive benefits for his back injury. The defendants have not produced any convincing evidence that they contemporaneously conveyed the reason why they were not paying claimant's back injury after Dr. Miller issued his 5 percent impairment rating. The defendants have not proffered any justification as to why they did not follow Iowa Code 86.13 (4) (2) and (3).

I find the defendants should have paid the June 6, 2016 rating by Dr. Miller. This is 25 weeks of benefits. I find that the defendants should pay a penalty of approximately 50 percent. I find that this amount is appropriate based upon defendant's conduct, failure to follow Iowa Code 86.13 and to encourage future compliance with the law. I award of $7,775.00 — just slightly less than 50 percent. ($622.44 x 25 = $15,560.50. $15,560.50 x 50 percent = $7,780.25)

Costs

I find that the filing fee is allowable under 876 IAC 4.33 and in my discretion I award this cost to claimant. I also find that claimant is entitled to payment for the IME by Dr. Kuhnlein. Claimant has shown that defendants obtained a rating of impairment by a physician they had retained and then claimant obtained Dr. Kuhnlein's IME. Claimant has proven entitlement to this cost under Iowa Code section 85.39.

There is no specific provision for awarding the cost of obtaining records under 876 IAC 4.33. Claimant's request for these costs is denied.

Total costs awarded are $3,377.50.

ORDER

For File No. 5051617 (Date of Injury October 21, 2014- left foot):

Defendants shall pay four point five (4.5) weeks of permanent partial benefits commencing on November 6, 2014 at the weekly rate of six hundred twenty-two and 42/100 dollars ($622.42).

For File No. 5051618 (Date of Injury October 23, 2014- back):

Defendants shall pay one hundred twenty-five weeks of permanent partial benefits commencing on March 29, 2016, at the weekly rate of six hundred twenty-two and 42/100 dollars ($622.42).

Defendants shall pay penalty of seven thousand seven hundred seventy-five dollars ($7,775.00)

Defendant shall pay costs of three thousand three hundred seventy-seven 50/100 dollars ($3,377.50).

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

For both File Nos. 5051617 and 5051618:

Defendants shall pay any past due amounts in a lump sum with interest

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

Signed and filed this 20th day of April, 2017.

James F. Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/kjw

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.