

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HEATHER HILDRETH,

Claimant,

vs.

THE ALL STAR GROUP COMPANIES,

Employer,

and

AMERICAN HOME ASSURANCE,

Insurance Carrier,
Defendants.

FILED

MAY 3 2018

WORKERS' COMPENSATION

File No. 5027979

A P P E A L

D E C I S I O N

Head Note Nos: 1803; 2907

Defendants The All Star Group Companies, employer, and its insurer, American Home Assurance, appeal from an arbitration decision filed on November 18, 2016. Claimant Heather Hildreth responds to the appeal. The case was heard on October 10, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 17, 2016.

The deputy commissioner found claimant's permanent disability resulting from the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on April 15, 2008, is confined to claimant's right lower extremity and does not extend into claimant's body as a whole. The deputy commissioner found claimant sustained permanent functional scheduled member disability of 60 percent of the right lower extremity, which entitles claimant to receive 132 weeks of permanent partial disability (PPD) benefits, commencing on September 29, 2015. The deputy commissioner found defendants are entitled to a credit against the award for 22.429 weeks of PPD benefits paid to claimant prior to the arbitration hearing for the work injury. The deputy commissioner found claimant is not entitled to reimbursement from defendants for a motel expense incurred on March 28, 2012, when claimant traveled to Iowa City for an evaluation, because claimant failed to prove that particular expense was a reasonable and necessary medical transportation expense. The deputy commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding, including \$960.00 for the cost of a functional capacity evaluation (FCE) performed on November 13, 2015, at Kinetic Edge Physical Therapy.

Defendants assert on appeal that the deputy commissioner erred in finding claimant sustained permanent functional scheduled member disability of 60 percent of the right lower extremity. Defendants assert the award for permanent disability should be reduced substantially. Defendants also assert the deputy commissioner erred in

ordering defendants to pay \$960.00 for the Kinetic Edge FCE charge as a cost pursuant to rule 876 IAC 4.33.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on November 18, 2016, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant's permanent disability resulting from the work injury is confined to claimant's right lower extremity and does not extend into claimant's body as a whole. I affirm the deputy commissioner's finding that defendants are entitled to a credit against the award for 22.429 weeks of PPD benefits paid to claimant prior to the arbitration hearing for the work injury. I affirm the deputy commissioner's finding that claimant is not entitled to reimbursement from defendants for the March 28, 2012, hotel expense because claimant failed to prove that particular expense was a reasonable and necessary medical transportation expense. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I modify the arbitration decision by finding claimant sustained permanent functional scheduled member disability of 18 percent of the right lower extremity, which entitles claimant to receive 39.6 weeks of PPD benefits. I further modify the arbitration decision by reversing the deputy commissioner's order that defendants pay the Kinetic Edge FCE charge. I provide the following analysis for my decision:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for defendant-employer in late 2007 or early 2008. (Hearing Transcript, pages 20-21) Defendant-employer is an employment agency which contracts with Verizon, a cell phone service provider, to furnish workers for Verizon's retail outlet stores. (Tr. p. 21) Claimant worked as a cell phone technician at two Verizon stores in the Des Moines metro area. (Tr. pp. 22-24) Claimant's job involved working with customers and it involved the operation of a cash/sales register when customers purchased equipment or cell phone services. (Tr. p. 24)

The stipulated work injury occurred on April 15, 2008, when a cash/sales register malfunctioned and the cash drawer came out of the register and landed on claimant's right foot and ankle. (Tr. pp. 24-25) She initially received medical treatment at Broadlawns Medical Center in Des Moines. (Exhibit C, pp. 1-2) After about a year of treatment with little improvement, claimant was referred in August 2009 to John Femino, M.D., an orthopedic surgeon with the University of Iowa Hospitals and Clinics. In his

initial report, Dr. Femino provided a synopsis of claimant's prior treatment history. She was initially placed into a cast for six weeks. Thereafter she developed swelling and ecchymosis on the lateral region of her foot. She also began to have medial-sided pain. She was placed in a Cam boot and was able to return to work for some period of time, but had recurrent right foot and ankle pain. She then received a cortisone injection which only provided a few hours of pain relief. She would develop pain after prolonged standing or walking. Her ankle occasionally locked up. . (Ex. D, p. 1)

Dr. Femino went on to perform six surgeries on claimant's right foot and ankle over a period of eight years, but claimant continued to have pain with use of her right leg, especially when standing or walking. When Dr. Femino had no further treatment to offer, he placed claimant at maximum medical improvement (MMI) on September 29, 2015. Dr. Femino did not provide an impairment rating, but agreed with the nurse case manager that a functional capacity evaluation (FCE) would be appropriate. (Ex. D, pp. 30-32)

An FCE was performed at Kinetic Edge Physical Therapy on November 13, 2015, at the request of claimant's attorney. The physical therapist performing the testing reported that claimant can function safely only at the sedentary work level. She exhibited ability to exert ten pounds of force occasionally and must sit most of the time with walking or standing for only brief periods of time. (Ex. G, p. 1)

At the request of defendants, claimant underwent another FCE from another physical therapist on December 29, 2015. From the results of this testing, claimant was found capable of work at the sedentary to light physical demand level with some components of medium level work. She could lift 30 pounds floor to waist; carry 30 pounds, but only occasionally stand and walk for a maximum of ten minutes continuous. (Ex. H, p. 1)

Upon referral by Dr. Femino for a rehabilitation consultation and impairment rating, Joseph Chen, M.D., determined on February 1, 2016, that the December 29, 2015, FCE was valid. Claimant reported to Dr. Chen that most of her trouble was with prolonged standing. Claimant experienced ankle pain after standing about 20 minutes. (Ex. F, p. 8) Dr. Chen agreed with Dr. Femino that claimant was at MMI. Dr. Chen adopted the results of the December 29, 2015, FCE as permanent restrictions on claimant's activities. It is unknown whether Dr. Chen was provided with the results of the earlier FCE. Dr. Chen provided an impairment rating under the AMA Guides of ten percent of the right lower extremity due to arthritis and cartilage space narrowing. (Ex. F, p. 11) Claimant was asked to complete a pain diagram for the location of her pain and she marked only the right foot and ankle. (Ex. F, p. 12)

Dr. Chen reevaluated claimant in March 2016. Dr. Chen noted he had prescribed amitriptyline at the last evaluation and wanted to assess claimant's response to that medication. Claimant reported that the medication did help with her right leg cramping, but that relief did not last. Dr. Chen continued the medication. He did not

change his earlier views. A pain diagram completed at that time indicated pain now in the right knee along with the right ankle. (Ex. F, pp. 13, 16-17)

Claimant criticizes the evaluations by Dr. Chen in that he did not evaluate or rate her low back pain. Claimant testified she reported back pain to her physicians throughout the treatment of her right foot and ankle. (Tr. pp. 40-42) Dr. Femino's PA-C actually referred claimant for physical therapy for those complaints in March 2012. (Ex. E, p. 2) Claimant testified that the reason she did not indicate back pain on the pain diagram provided by Dr. Chen was that she was told to only identify her pain at that time. (Tr. pp. 40-41) Apparently, she did not have back pain at the time of Dr. Chen's examination.

At the request of her attorney, claimant had an IME with Mark Kirkland, D.O., an orthopedic surgeon, in West Des Moines. (Ex. I) In addition to her chronic pain in the right foot and ankle, Dr. Kirkland noted claimant did complain of low back pain. Dr. Kirkland noted claimant had marked tenderness to palpation over the right sacroiliac joint. Active right bending to the left gave her pain in the right subacromial joint. External rotation to the left gave her mild sacroiliac pain as well. Claimant was able to lumbar flex and bring her fingers to the mid leg level. She had very good lumbar extension without any pain. In addition to his assessment of chronic right foot symptoms, Dr. Kirkland diagnosed chronic right sacroiliac sprain. Dr. Kirkland then provided an impairment rating for claimant's right lower extremity which adds to Dr. Chen's rating various impairments due to lost range of motion. Dr. Kirkland arrived at a total impairment of the right lower extremity of 18 percent under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He then stated as follows:

I stated that Heather has a chronic sacroiliac sprain on the right. I feel this chronicity is due to the previous problems and surgery that she has had with her right ankle. This being the case then, I would convert the 18% impairment to the right lower extremity and make this a 7% whole person impairment rating.

(Ex. I, pp. 1-5)

Claimant relies on the views of Dr. Kirkland and claimant's testimony concerning her back pain in asserting that her permanent disability extends into the body as a whole and is not limited to the schedule for disability of the right leg.

I affirm the deputy commissioner's finding that claimant's stipulated April 15, 2008, injury was a cause of temporary aggravations of her low back requiring physical therapy and other modalities.

I affirm the deputy commissioner's finding that the April 15, 2008, injury is not a cause of a permanent disability of the low back which extends claimant's injury into the body as a whole. I affirm the deputy commissioner's finding that Dr. Kirkland's opinion is insufficient to show such a permanent loss. Dr. Kirkland did not provide an

impairment rating for claimant's low back. As the deputy commissioner noted, Dr. Kirkland's "body as a whole" rating was arrived at simply by converting only his impairment rating for claimant's lower extremity.

I affirm the deputy commissioner's finding that claimant's injury does extend beyond the foot and into the ankle which renders this injury an injury to the leg, with the result that compensation shall only be based on a loss of use of the right lower extremity.

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); 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).

Where an injury is limited to 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 66-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 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).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

This injury was found to involve the right foot and ankle joint and consequently consists of an injury to the right lower extremity for compensation purposes. It is now well established in Iowa that a loss of function in a joint is compensated as a part of the proximal side of the joint, not as a loss of the member on the distal side of that joint. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995); 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); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Comm'r Rep 281 (App. February 24, 1982); Godwin v. Hicklin G. M. Power, II Iowa Industrial Comm'r Rep 170 (App. August 7, 1981).

I affirm the deputy commissioner's finding in this case that claimant's injury is limited to her right lower extremity and compensation is therefore limited to the schedule contained in Iowa Code section 85.34(o) for an injury to the leg. However, I disagree with the deputy commissioner's finding that the impairment ratings rendered in this case under the AMA Guides did not address claimant's actual loss of use of the right leg.

In his impairment rating report dated February 1, 2016, Dr. Chen stated the following, in pertinent part:

Heather D. Hildreth is a 34 y.o. woman who has been referred by Dr. Femino for a physical medicine and rehabilitation consultation and impairment rating for chronic right foot pain.

She reports that she had a work injury in April 2008. She has had multiple foot surgeries since then. She reports that after Dr. Femino's surgeries, she has improved and can now walk. He saw her last in September 2015 and told her there aren't any further treatments that can be helpful for her but that she may resume her activities as much as tolerated.

She has had a Functional Capacities Evaluation that was done at the end of December 2015. This was a valid test that showed she could perform work in Medium material handling duties. She reports having the most trouble with prolonged standing. She notes that even after standing for about 20 minutes, she has increased ankle pain.

...

I reviewed her last ankle and foot x-rays. These show her joint spaces are mildly diminished in the ankle and subtalar joints. I also reviewed a 9 page Functional Capacity Evaluation performed at Rock Valley Physical Therapy. She rates her pain a 3 out of 10 today in the right ankle and leg.

IMPRESSION:

Heather D Hildreth is a 34 y.o. woman with chronic right foot pain s/p multiple ankle surgeries and soft-tissue repair procedures. Dr. Femino has no further recommendations. She likely has ongoing nociceptive and neuropathic pain in the right lower extremity. From a physical medicine and rehabilitation standpoint, I recommended that she continue to use her ankle and foot in usual low-impact activities even despite increased pain. She should continue with her lower extremity stretching and strengthening exercises as shown in physical therapy.

From a workers' compensation standpoint, I discussed that she can be placed at **maximum medical improvement** following your [sic] her injury of April 2008.

Heather D Hildreth does require **permanent work restrictions** of Medium material handling duties as described in her valid Functional Capacity Evaluation of December 29, 2015.

She has right ankle arthritis and narrowing of the cartilage space to 3mm and subtalar arthritis to about 2 mm. Both of these can be rated a 5% impairments of the lower extremity. Therefore, she can be rated as having **10% impairment of the right lower extremity** according to Table 17-31

page 544 of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

(Ex. F, pp. 8, 11)

In his IME report dated August 8, 2016, Dr. Kirkland stated the following, in pertinent part:

2. What is your opinion as to the extent of permanent impairment to each body part injured directly or indirectly (altered gait caused by foot injury, for example) by the work injury of April 15, 2008? Heather has a 7% impairment to her right lower extremity secondary to lack of right ankle extension. She also has a 2% impairment to the right lower extremity secondary to lack of inversion. This gives her a 9% impairment to the right lower extremity secondary to range of motion loss of the ankle and the hindfoot. Combining the 9% with Dr. Chen's 10% gives an 18% impairment to the right lower extremity.

...

3. What permanent restrictions would you place on Heather's activities to avoid the risk of injury? I would recommend that the findings from the functional capacity evaluation which places Heather in a sedentary job duty should be followed. Most of the time she should be in a sitting position. She should do only limited walking no more than 15-20 minutes at a time while she is working.

(Ex. I, p. 5)

I find the impairment ratings issued by both Dr. Chen and Dr. Kirkland are comprehensive and both ratings address claimant's actual loss of use of her right lower extremity. However, I find Dr. Kirkland's impairment rating to be more convincing because it is somewhat more thorough than Dr. Chen's impairment rating. I therefore find claimant has sustained 18 percent permanent functional scheduled member disability of her right lower extremity as a result of the April 15, 2008, work injury which entitles claimant to 39.6 weeks of PPD benefits, commencing on the stipulated dated of September 29, 2015.

With regard to whether claimant is entitled to reimbursement for the \$960.00 charge from Kinetic Edge for the FCE performed on November 13, 2015, at the request of claimant's attorney, rule 876 IAC 4.33 indicates, in relevant part:

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by

Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Rule 4.33 allows for the taxation of reasonable costs associated with obtaining two reports of medical providers. The relevant inquiry with regard to taxation of the Kinetic Edge FCE cost in this case is whether that FCE was required by a medical provider as necessary for the completion of a medical report and whether defendants authorized a provider to perform the FCE.

On September 29, 2015, Dr. Femino, the authorized treating surgeon, agreed with the nurse case manager that an FCE would be appropriate because claimant had reached MMI. (Ex. D, p. 32) Because Dr. Femino did not recommend a specific provider to perform the FCE, defendants had the right pursuant to Iowa Code section 85.27 to select the provider for the FCE and defendants also had the obligation to pay the charge for the FCE performed by their chosen provider. If defendants failed or refused to authorize an FCE based on Dr. Femino's recommendation, claimant could then go ahead and obtain an FCE by a provider of her choosing and claimant would be entitled to reimbursement from defendants under rule 4.33.

In this case there is no evidence defendants failed or refused to authorize an FCE after Dr. Femino made his recommendation. In fact, defendants had claimant undergo an FCE at Rock Valley Physical Therapy on December 29, 2015, which was only two months after Dr. Femino made his recommendation. Because claimant did not have the right to select the FCE provider under section 85.27, claimant also does not have the right to be reimbursed for that evaluation.

Claimant contends defendants should be required to pay for the Kinetic Edge FCE because Dr. Kirkland adopted the results of that FCE in formulating his opinions as to claimant's permanent restrictions. However, Dr. Kirkland did not evaluate claimant until August 8, 2016, which was nine months after the Kinetic Edge FCE was performed and more than seven months after the Rock Valley FCE was performed. For claimant to be entitled to reimbursement for the Kinetic Edge FCE in this situation, claimant would have had to defer the Kinetic Edge FCE until after the Rock Valley FCE and until after Dr. Kirkland's IME. If Dr. Kirkland did not believe the Rock Valley FCE correctly addressed claimant's restrictions, and if Dr. Kirkland indicated another FCE was needed, claimant could then obtain another FCE for completion of Dr. Kirkland's IME report. Because those steps were not followed in this case, I find claimant is not entitled to reimbursement from defendants for the Kinetic Edge FCE under rule 4.33.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 18, 2016, is modified as follows:

Defendants shall pay claimant thirty-nine and six-tenths (39.6) weeks of permanent partial disability benefits at the stipulated weekly rate of two hundred sixty-eight and 43/100 dollars (\$268.43) commencing on the stipulated date of September 29, 2015.

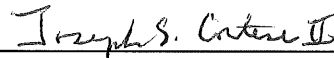
Defendants shall receive a credit against this award for the twenty-two point four two nine (22.429) weeks of permanent partial disability benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of \$420.00, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 3rd day of May, 2018.



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WORKERS' COMPENSATION
COMMISSIONER

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