BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
APR 25 2018
WORKERS' COMPENSATION

DALE BALL, Claimant, vs. ADECCO d/b/a ENTEGEE, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Insurance Carrier, Defendants.	File No. 5054638 ARBITRATION DECISION Head Notes: 1108.50, 1402.30, 1402.40, 1802, 1803, 2907

STATEMENT OF THE CASE

Dale Ball, claimant, filed a petition in arbitration seeking workers' compensation benefits from Adecco d/b/a Entegee, employer, and Insurance Company of the State of Pennsylvania, insurance carrier, as defendants. Hearing was held on November 22, 2017 in Des Moines, Iowa.

Claimant, Dale Ball, and Angel Streete both testified live at trial. The evidentiary record also includes joint exhibits JE1-JE8, claimant's exhibits 1-22, and defendants' exhibits A-E.

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.

The parties submitted post-hearing briefs on January 22, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on January 26, 2015 which arose out of and in the course of his employment?

2. Whether the alleged injury is the cause of permanent disability? If so, the nature and extent of permanent disability claimant sustained as a result of the January 26, 2015 work injury.

3. Whether the alleged injury is the cause of temporary disability?

4. The appropriate commencement date for the permanent partial disability benefits.

5. Whether claimant is entitled to past medical benefits?

6. Whether claimant is entitled to reimbursement for an IME pursuant to Iowa Code section 85.39?

7. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Dale Ball (hereinafter "Dale" or "claimant"), alleges that the walking he did at work materially aggravated the underlying neuropathy in his left foot which accelerated his Charcot foot and ultimately resulted in the amputation of his leg.

At the time of hearing Dale was 53 years of age. H is 5' 11" tall and weighs approximately 310 pounds. Prior to the alleged date of injury of January 26, 2015 he was diagnosed with diabetes and hypertension and took numerous medications for these conditions. (Testimony, Claimant's Exhibit 13)

Dale graduated from high school in 1983. He studied Computer-Aided Design ("CAD") in college and earned an associate's degree. At the time of the alleged injury, Dale was an employee of ADECCO who was working at the John Deere Products Engineering Center (PEC) facility in Waterloo, Iowa. He began working at the John Deere facility on January 3, 2012. His job involved making models for the wiring system in a 9000 tractor model. His work consisted of routing and design work on the computer. Dale testified that the job description in evidence was for the job of the person directly superior to him, but the duties were similar to his job duties. (Cl. Ex. 8) At the time of the alleged injury, Dale was working on routing all the harnesses for the John Deere 9000 machine. Most of the work he did for this job involved sitting at a computer. (Testimony)

Although Dale sat while performing the computer work, his job did require some walking. Dale's desk was located in the electrical department. He testified that from the

parking lot to the building he needed to walk the distance of approximately one football field. Once he was inside the building, he walked about the distance of two football fields to his desk. Before the injury he would take the stairs; after the injury he used the elevator. Throughout the course of his work day he also did some additional walking. The amount of walking he did varied depending on where he was in the process of a build. For example, his job required him to work with the chassis team, which was located approximately two-thirds of a football field away from his desk. Dale testified that some days he would need to go to the chassis team 25-30 times. There were also times he needed to walk to the drive team, which was probably the distance of three football fields away. Additionally, there were times he needed to go out back of the building to look at tractors to see how something was previously attached. (Testimony)

It should be noted that in early February 2013, Dale developed ulcers on his feet as a result of wearing steel-toed boots at work. He had a mild infection. Because of his underlying diabetes Dale was prescribed a course of cephalexin. (JE1, pp. 7-8) By March of 2013 the ulcers had healed. (JE2a, pp. 64-66) Dale testified that he did not have any other problems with his feet until the date of injury, January 26, 2015.

Dale began using a Fitbit to track his steps in early January of 2015. He tracked his steps from January 5, 2015 through January 25, 2015. He only used the device while he was at work, and he testified that he did not use it at home. The number of steps he took each day at work is reflected in the number at the top left-hand corner of the pages in claimant's exhibit 9. Dale testified that he walked more at work than he did at home. (Testimony)

Defendants offered the written statement of Chris Kellum, an employee of John Deere. Mr. Kellum was Dale's supervisor from August 2014 through February 2016. He stated that Dale did "not have very far to walk from the employee entrance to the stairwell or elevators leading to the third floor." (Def. Ex. C, p. 1) He also stated that Dale did not have to walk far to reach his work station once he was on the third floor. (id.) Unfortunately, Mr. Kellum does not specify what he means by not "very far;" his description is vague. However, he did note that he did not expect that Dale's work assignment would require him to walk anywhere near 10,000 steps per day on a regular basis. Mr. Kellum noted that he wore a step counter, and he typically collected less than 5,000 steps while at work. (Def. Ex. C)

On January 26, 2015, the alleged date of injury, as Dale stood up from his chair at work his ankle twisted under him and collapsed. He testified that he lost a step, but kept walking on it. Over the next two weeks, he rolled his ankle at work two or three more times. He continued to walk on his foot until he could not walk anymore and then he reported it to the defendant employer who directed Dale to their workers' compensation carrier. A medical appointment was scheduled for Dale. (Testimony)

Dale saw Kenneth McMains, M.D. on February 23, 2015. Dale reported the January 26, 2015 left ankle incident. The doctor took x-rays and concluded that Dale had serious dislocation of the metatarsals, likely due to neuropathy from his diabetes.

Dr. McMains stated that this "likely came about over time as he continued to walk without pain, due to the neuropathy." (JE3, p. 190) The doctor went on to explain to Dale that walking was a normal part of life, as is rising from a chair, and the fact that Dale noticed symptoms at work did not make his Charcot foot job related. (Id.) Dr. McMains discharged Dale and explained that he needed to avoid any weight bearing to the foot, wear an ortho boot, and immediately seek a referral. Dr. McMains noted that Dale was visibly upset that he did not consider this to be a work-related condition. There was also a note that Dale and "Mrs. Ball" made numerous phone calls to his office requesting that this be deemed work-related because they did not have insurance[1]. (JE3, p. 191)

Dale then sought treatment with Christopher J. Considine, D.P.M. The first time he saw Dr. Considine was on March 4, 2015. Dale gave Dr. Considine the history of the January 26, 2015 work incident. He reported that he had been in a cam boot for approximately a week and a half and felt some relief. The doctor noted that Dale requested treatment and a statement about if his condition could be considered work related because he was seeking workers' compensation benefits. The note also indicated that he did not have health insurance. Dr. Considine stated:

> As far as this being potential workmans [sic] comp, this is a condition that he would have suffered regardless of his activity or his work requirements. It is true that walking with this condition would exacerbate the foot collapse and he does have to walk at work. While it is true that he must walk for normal activities of daily living anyway, it is possible that extra walking at work may have sped up the process of midtarsal collapse.

(JE4, p. 199)

Dale was instructed to stay strictly non-weight bearing (NWB). Dale indicated that he had access to a motorized scooter. (JE4) Dale testified that he used either a motorized scooter or his knee scooter the entire time from March 4, 2015 until his leg was amputated in November of 2016. (Testimony)

On March 11, 2015, Dale returned to Dr. Considine. He reported that he was using a roll-about scooter that hurt his knee. The doctor noted that Dale's ulcer was healed. He instructed Dale to use lotion and inspect his foot daily. (JE4, pp. 203-04)

Dr. Considine saw Dale again on April 1, 2015. Dale had a new sore on the outside bottom of his foot in a different spot than his prior ulcer. Dale reported that he had been staying mostly NWB in a boot and roll-about scooter. The doctor noted that he had a lengthy discussion regarding Charcot foot and its implications. Dale was to remain NWB with his boot. The assessment was Charcot foot left, active changes occurring. (JE4, pp. 205-07)

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[1] Dale is not married. He testified that the reference to "Mrs. Ball" was actually about his significant other, Angel Streete. They have been together for 26 years.

Dale continued to treat with Dr. Considine. The doctor treated Dale's ulcers with antibiotic medicine, ointment, and debridements. (JE4)

On October 26, 2015, Dr. Considine saw Dale for continued treatment of his left foot ulceration. Dale reported that his left foot ulcer tore open when he was working on a ramp. (JE4, p. 243)

Dale saw Dr. Considine again on November 23, 2015. At that point he admitted that he is not always able to stay off of his left leg. The note states that he spent some time shoveling snow over the weekend. The doctor's assessment included a non-pressure chronic ulcer of the left heel and midfoot. (JE4, pp. 248-49)

Dale saw Dr. Considine again on December 14, 2015. He reported that he was not always able to stay off his foot at work. He is scheduled to have a few weeks off of work over Christmas, so he will be able to rest it more then. (JE4, p. 252)

Dr. Considine performed numerous debridements from April of 2015 through January of 2016. (JE4) The doctor also performed two surgical debridements on June 9, 2015 and April 13, 2016. (JE4)

February 3, 2016, was the last day that Dale worked at the John Deere work site. (Cl. Ex. 16, p. 180) According to Dale, his assignment at John Deere ended because he was angry, grumpy, and missed a lot of work due to his foot. (Testimony)

Unfortunately, on November 30, 2016, Dale's left leg was amputated below the knee. The amputation was performed by Amy E. Reppert, M.D. She noted that the patient had a long-standing history of diabetes and non-healing ulcers of his left lower extremity as well as abscesses. She also noted that at the patient's last clinic visit with R.G. Sarsfield, M.D. on November 17, 2016, it was discussed that there were no further vascular or wound interventions to allow him to heal his wound, and he likely would need to proceed with a below-the-knee amputation. Dale had reported to the hospital on November 26, 2016 with sepsis related to an abscess within the left foot. It was deemed that the amputation was appropriate. (JE6, pp. 462-63; Cl. Ex. 22, p. 193)

There are several experts in this case who have rendered their opinions with regard to causation.

On February 23, 2015, Dr. McMains opined that:

> Lisfranc fractures are common after a major trauma, but without any specific trauma it is more likely than not due to chronic neuropathy of the foot, with gradual shifting of the metatarsals due to the diabetes. I also explained to Mr. and Ms. Ball that this likely came about over time as he continued to walk without pain, due to the neuropathy. Overtime [sic], the foot would start to swell and eventually make it difficult to put on a shoe. The homolateral dislocations are a direct result of his chronic diabetic neuropathy and not due to any trauma. I explained to Mr. Ball that walking

> is a normal life activity, as is rising from a chair; and the fact that he noticed symptoms at work does not make his Charcot foot job related.

(JE3, p. 190)

Dr. McMains also recommended that Dale avoid any weight bearing on his left foot. (id.) I do not find the opinions of Dr. McMains to carry the greatest weight in this case. Dr. McMains seems to agree that Dale's problems came about as the result of continuing to walk, and he restricted Dale's weight bearing on his left foot. However, Dr. McMains does not address the issue of whether the amount of walking Dale did at work was a material aggravating factor.

On June 8, 2015, Kayla M. Emter, D.P.M., who was Dr. Considine's partner, indicated in a clinical note that Dale's diabetic neuropathy and Charcot foot with diabetic ulcer was secondary to his diabetes mellitus. Unfortunately, it appears that Dr. Emter was not asked to provide her opinion on whether Dale's work was an aggravating factor. (JE3f, p. 142)

On May 4, 2016, Dr. Sarsfield documented that Dale had a longstanding ulceration secondary to his diabetes mellitus with polyneuropathy. (JE6, p. 390) Dr. Sarsfield did not offer any opinion regarding work as an aggravating factor.

The notes from Ali Sadia, M.D. dated April 27, 2016, indicate that Dale had Charcot deformities as a result of underlying diabetes. Dr. Sadia did not offer any opinion regarding work as an aggravating factor. (JE6, p. 384)

At the request of the defendants, Thomas S. Gorsche, M.D. conducted an IME on May 11, 2016. Dr. Gorsche noted that diabetic neuropathy is the most common cause of Charcot neuropathy. He set forth two theories of the cause of Charcot neuropathy, but also noted that the cause is not well understood. Dr. Gorsche felt that Dale had Charcot neuropathy secondary to his diabetic neuropathy. His diagnoses for Dale were Charcot arthropathy, left foot, with open ulcer and history of osteomyelitis secondary to diabetic neuropathy. Dr. Gorsche stated that "[i]f cumulative trauma played a major role in Mr. Ball's Charcot foot and not his diabetic neuropathy, then I would expect it to be bilateral." (Def. Ex. A, p. 6) He noted that Dale's Charcot was only in the left foot.

With regard to the inversion injuries that Dale had at work, Dr. Gorsche opined that the "Charcot neuropathy was already present and while the twisting of the foot could have played a role, I believe it is more indicative of the Charcot joint being present and a minor twist causing the increased symptoms of swelling and discoloration of the foot." (Id.) Dr. Gorsche felt that based on the radiographic findings, Dale had the underlying Charcot joint prior to his January 26, 2015 injury. (Def. Ex. A, p. 7) Dr. Gorsche felt that Dale did require permanent restrictions, but these restrictions were not necessitated by the alleged work injury. He would limit him to desk-type work and continue his mobility on a scooter. (id.)

On July 19, 2016, Dr. Gorsche sent a letter to defendants. The doctor commented on Dr. Considine's impairment rating. Dr. Gorsche also stated, "Mr. Ball's Charcot foot and subsequent deformity and chronic osteomyelitis is secondary to his diabetes and is not related to the minor inversion injuries at work or to any cumulative trauma." (Def. Ex. A, p. 9)

Claimant primarily relies on the opinions of the treating physician, Dr. Considine. (JE4; Cl. Ex. 22) On September 14, 2015, Dr. Considine authored a letter wherein he set forth his answers to questions posed to him by claimant's counsel. The doctor stated that Dale's Charcot neurarthopathy in his left foot was caused, aggravated or exacerbated by his walking at work. However, the doctor issued his opinion based on a history of Dale walking 10,000 steps per day at work. Dr. Considine did note that treatment for Charcot foot is complete non-weight bearing for a significant period of time. (Cl. Ex. 1, p. 1)

Dr. Considine was deposed in this matter on November 14, 2017. The podiatrist was asked to explain what Charcot foot is. The doctor responded:

> A: We pronounce it 'Shar-co,' and it's a condition usually affecting diabetics who have neuropathy. And the bones for whatever reason becomes [sic] soft and brittle and break easily or even change shape, rather than break. Because they are neuropathic, meaning they cannot feel pain, they don't make any changes as a normal person would if they would have a condition that was causing broken bones.
>
> So they keep walking on it and over time it changes the shape of the foot because the bones break and change shape and the joints will collapse and move and pretty soon the foot is a whole different shape. And the big repercussions is [sic] that that causes skin breakdown, ulcerations and infection and eventually sometimes amputation.
>
> Q. So it sound like that is a condition that walking is a material aggravator of that, correct?
>
> A. Absolutely, yes.

(Cl. Ex. 22, p. 191)

Dr. Considine then provided his causation opinion for a hypothetical that was presented to him. The hypothetical was based on an individual walking 10,000 steps per day. The individual in the hypothetical also noticed that his foot started to collapse on him when he stood up a couple of times. The doctor stated that the primary treatment in Charcot is to get the patient non-weight bearing so that the weight bearing portions of the foot are not changing the shape of the foot. Dr. Considine felt that walking on the foot would be extremely aggravating and would accelerate the situation.

Dr. Considine stated that within the few weeks of walking on the foot after the initial twist the damage was already done. (Cl. Ex. 22, pp. 191-192)

During the cross-examination of the doctor, defendants pointed out that the hypothetical presented to him was erroneous because it was based on 10,000 daily steps, and claimant's Fitbit records demonstrated he did not walk anywhere near that many steps in a day. The doctor was asked if the fact that there was absolutely no objective evidence to show that Dale was walking 10,000 steps a day changed his causation opinion. The doctor said it did not. The doctor explained that walking would materially aggravate the Charcot condition, whether it was 5 steps or 10,000 steps. Dr. Considine further explained that "the more you walk, the worse it is going to get. But as far as putting a quantity on it, I can't do that." (Cl. Ex. 22, p. 193) When asked to comment about Dale's walking at home versus walking at work, the doctor replied, "All I can say is the more walking he's doing, the more damage he's doing. So location is something I can't really comment on." (Cl. Ex. 22, p. 194)

Dr. Considine also opined that Dale's amputation was caused by the Charcot and the material aggravation. (Cl. Ex. 22, pp. 192-93)

Dr. Considine had the opportunity to review the opinions of Dr. Gorsche. Dr. Considine disagreed with part of Dr. Gorsche's rationale regarding causation. Dr. Gorsche opined that if cumulative trauma played a major role in Dale's Charcot foot, and not his diabetic neuropathy, then the doctor would expect the condition to be bilateral. However, Dr. Considine did not agree with this rationale because while Dale had neuropathy on both sides he only had Charcot on the left side. So it was only the one side, the left side, that was predisposed to the injury. (CL. Ex. 22, p. 199) I find Dr. Considine's rationale to be persuasive and therefore give Dr. Considine's causation opinions greater weight than those of Dr. Gorsche's causation opinions.

At the request of his attorney, Dale was evaluated by F. Manshadi, M.D. on April 25, 2017. Dr. Manshadi offered his opinion regarding causation. He stated,

> I also believe Mr. Ball then sustained a sore in his left foot as a result of his work activities while working for Cadstar International at John Deere at the PEC Center where he walked at least 10,000 steps per day and he was wearing steel toed boots. I believe the amount of the walking he did significantly aggravated his Charcot neuropathy and deformity of his left foot to the point that he developed a sore and was not aware of it. Eventually the sore got infected and he required having a below-the-knee amputation on the left side.

(Cl. Ex. 2, p. 6)

The opinion of Dr. Manshadi is based on the history of Dale walking at least 10,000 steps per day while wearing steel toed boots. The evidence in this case does

not support that history. Because Dr. Manshadi's causation opinion is based on an incorrect history, I do not find his causation opinion to be persuasive.

With regard to the issue of causation, I find the opinions of Dr. Considine to be the most persuasive. During his deposition, Dr. Considine explained the rationale for his opinions and why he disagreed with a portion of Dr. Gorsche's causation opinion. Based on the evidence in the record as a whole and the well-reasoned opinions of Dr. Considine, I find that claimant has carried his burden of proof to show that his left foot neuropathy and Charcot foot were aggravated by his work injury. Furthermore, I find that his amputation was necessitated by the work injury.

It should be noted that defendants argue that Dale's testimony at the hearing was not credible. In their brief, defendants set out several examples of claimant's testimony conflicting with the medical records. Because Dale's testimony was not consistent with the objective medical evidence I did not find Dale to be an entirely credible witness.

Additionally, defendants argue that the testimony of Angel Streete should not be given any weight because she knowingly lied for financial gain. Ms. Streete established a GoFundMe account in an attempt to obtain money for living expenses. Ms. Streete admitted that she lied about the cause of Dale's left foot symptoms on the website. Ms. Streete testified that sometimes when she sets up GoFundMe accounts she just says certain things for sympathy trying to get people to donate. She explained, "let's face it, nowadays people don't donate like they used to, and we were desperate." (Tr. p. 165) She admitted that on the GoFundMe webpage she represented to potential donors that Dale had injured his foot during a slip and fall on the ice. Because Ms. Streete admitted that she will lie in order to try to obtain financial gain, I do not find her testimony to be credible.

Despite the problematic testimony of the hearing witnesses, the most persuasive expert opinion on causation in this case is that of Dr. Considine. Dr. Considine demonstrated a thorough understanding of claimant's conditions. There is no dispute that Dale's job did require walking on a daily basis, even if it was just to get to his desk. Furthermore, based on the clinical records generated at the time of the claimant's ongoing treatment, we know that claimant was not able to be non-weight bearing and did continue to do some walking at work even after he was restricted to NWB. I note that he also continued to bear weight and walk outside of work. Despite the claimant's lack of credibility, Dr. Considine explained that walking would materially aggravate the Charcot condition, whether it was 5 steps or 10,000 steps.

Defendants also seem to argue that because Dale was not always compliant with medical instructions his claim should not be found to be compensable. Essentially, defendants contend that because Dale was not compliant, the amputation was his fault and did not arise out of and in the course of his employment. However, the undersigned does not find this argument to be persuasive because workers' compensation is a no-fault system. Furthermore, Dr. Considine testified about the

nature of Charcot foot and said by the time he saw Dale the damage to his foot had already been done.

Finally, defendants seem to rely on Dr. McMains' statement that walking was a normal part of life and therefore not job related. However, there is no requirement that the workplace activity involve more hazard or exertion than a claimant's activities outside of the work place as a condition of compensability. I do not find Dr. McMains' rationale to be persuasive.

We now turn to the issue of whether the January 26, 2015 work injury was the cause of permanent disability. As stated above, I find that the work injury was a material aggravating factor in Dale's left foot neuropathy and Charcot foot was aggravated by his work injury. I further find that his amputation was necessitated by the work injury. Thus, I find that Dale sustained permanent impairment to his left lower extremity as a result of the work injury. There are several experts who have rendered their opinions regarding permanent functional impairment.

On March 11, 2016, Dr. Considine rendered an opinion regarding impairment. However, this rating is not persuasive because it was issued prior to the November 30, 2016 amputation. (JE1, pp. 2-3)

On May 11, 2016, Dr. Gorsche rendered his opinion regarding impairment. However, this rating was also issued prior to the November 30, 2016 amputation. (Def. Ex. A, pp. 1-9)

On June 30, 2017, Dr. Manshadi rendered his opinion regarding permanent impairment. Dr. Manshadi utilized the AMA Guides to the Evaluation of Permanent Impairment, 5th edition, Chapter 18, page 545, Table 17-32, Impairment Estimates for Amputations, and assigned twenty-eight (28) percent impairment of the whole person. Dr. Manshadi stated that this is the equivalent of sixty-nine (69) percent impairment of the lower extremity. (Cl. Ex. 2, pp. 6 & 8)

With regard to permanent functional impairment, I find that the opinions of Dr. Manshadi carry the greatest weight. Dr. Manshadi is the only expert to evaluate permanent functional impairment after the amputation was performed. Therefore, I find that Dale sustained sixty-nine (69) percent impairment of the lower extremity. I find that the sixty-nine (69) percent permanent impairment rating is an appropriate estimate of claimant's permanent functional disability as a result of the injury to his left lower extremity.

Claimant is seeking additional temporary benefits. Because I have found that claimant sustained permanent disability as a result of the work injury, any temporary benefits claimant would receive would be classified as healing period benefits. Claimant is seeking two periods of healing period benefits. The first period is from February 24, 2015 through March 5, 2015. When Dr. McMains initially saw Dale on February 23, 2015, he took Dale off of work. (JE3, p. 188) Dale remained off of work

until Dr. Considine released him on March 5, 2015. (JE4, p. 202) Defendants do not dispute claimant's entitlement to healing period during this timeframe. I find that Dale is entitled to healing period benefits from February 24, 2015 through March 5, 2015.

Claimant is seeking a second period of healing period benefits from February 4, 2016 through March 30, 2017. Defendants contend that claimant is not entitled to healing period benefits after March 4, 2015, because claimant was not compliant with the medical treatment recommendations after that date. Dr. Considine opined that Dale could return to work on the condition that he was non-weight bearing. (JE4, p. 203) Dale returned to work and continued to work until he was terminated on February 3, 2016. Dale testified that he was unable to find work until he worked for a different employer from August 24, 2016 through September 26, 2016. (Testimony)

At the time of Dale's termination on February 3, 2016, Dale was still restricted to non-weight bearing activity. Dale testified he was terminated because he was angry and grumpy and missing a lot of work due to appointments at the wound clinic and other medical procedures. Although I do not find Dale to be terribly credible, his testimony is the best information contained in the record regarding why his employment ended. Therefore, I find that Dale's employment was terminated because he was angry and grumpy and missing a lot of work due to appointments at the wound clinic and other medical procedures because of his work injury. Dale's amputation occurred on November 30, 2016. Following the amputation, he was not cleared to return to work until March 30, 2017. (JE4, pp. 326-27; JE6, p. 506) I find Dale is entitled to healing period benefits from February 4, 2016 through March 30, 2017, except for the time he was able to go back to work from August 24, 2016 through September 26, 2016. Therefore, Dale is entitled to benefits from February 4, 2016 through August 23, 2016 and again from September 27, 2016 through March 30, 2017.

There is a dispute between the parties about the appropriate commencement date for the permanent disability benefits. I find that pursuant to Dr. Considine's instructions claimant was released to return to work on March 5, 2015. Claimant returned to work on March 6, 2015. I find that when Dale returned to work this established the commencement date for PPD benefits. Therefore, permanency benefits shall commence on March 6, 2015.

Claimant is seeking payment of the past medical expenses set forth in claimant's exhibit 3. A review of claimant's exhibit 3 demonstrates that the bills were for treatment claimant received as a result of the work injury. Defendants are responsible for the reasonable and necessary medical treatment. The only basis defendants assert for why they should not be responsible for the bills is a lack of causation. However, as noted above, I found that claimant's left foot and subsequent left lower extremity amputation was caused by the work injury. Therefore, I find that the defendants are responsible for the medical expenses set forth in claimant's exhibit 3.

Claimant is also seeking reimbursement for the IME of Dr. Manshadi under Iowa Code section 85.39. I find that at the time of Dr. Manshadi's IME in June of 2017, the

employer had already obtained an impairment rating that the claimant felt was too low. Thus, I find that claimant is entitled to reimbursement for the IME of Dr. Manshadi under Iowa Code section 85.39 in the amount of one thousand five hundred and no/100 dollars ($1,500.00).

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy hearing the case. I find that because claimant was generally successful in his claim an assessment of costs against the defendants is appropriate. Specifically, claimant is seeking the $100.00 filing fee as a cost. I find that this is an appropriate cost under 876 IAC 4.33(7). Claimant is also seeking $100.00 for a supplemental report from Dr. Manshadi. I find that this is an appropriate cost under 876 IAC 4.33(6). Claimant is seeking the transcript cost for Dr. Considine's deposition in the amount of $263.70. I find that this is an appropriate cost under 876 IAC 4.33(2). Additionally, claimant is seeking the doctor's deposition fee in the amount of $150.00. I find this is an appropriate cost under 876 IAC 4.33(4). Thus, defendants are assessed costs in the amount of $613.70.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The law does not require the work place activity to involve more hazard or exertion than a claimant's activities outside the work place as a condition of compensability. Floyd v. Quaker Oats, 646 N.W.2d 105, 107 (Iowa 2002).

The employer takes the employee as is and therefore takes the worker subject to any active or dormant health impairment. Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

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because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries resulting from cumulative trauma are compensable. McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Ford v. Goode, 240 Iowa 1219, 38 N.W.2d 158 (1949); Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

Fault is an improper consideration in a legal analysis regarding whether "the injury is a proximate cause of the claimed disability." Meyer v. IBP, Inc., 710 N.W.2d 213, 222-223 (Iowa 2006). This is a workers' compensation proceeding and there is no need to prove that there was fault or negligence in the actions of either party. Workers' compensation is a no-fault system with various trade-offs. 1 Larson Workers' Compensation Law, Section 1.03[1-4].

Based on the above findings of fact, I concluded that claimant sustained a compensable injury to his left lower extremity. The undersigned acknowledges that Dale had preexisting conditions and was not compliant with the treatment recommendations. However, the employer takes the employee as they find him. In the present case, the most persuasive expert opinion regarding causation was from Dr. Considine. The doctor opined that any amount of walking was a substantial aggravating factor which ultimately resulted in the amputation of a portion of the claimant's left lower extremity. Therefore, I concluded that the preponderance of the evidence shows that claimant sustained permanent disability to his left lower extremity as a result of the January 26, 2015 work injury.

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).

Based on the above findings of fact, I conclude that Dale sustained 69 percent impairment to his left lower extremity. The left lower extremity shall be compensated on the basis of 220 weeks. Iowa Code section 85.34(2)(o). Thus, claimant has proven entitlement to 151.8 weeks of permanent partial disability benefits.

Compensation for permanent partial disability shall begin at the termination of the healing period. I concluded that claimant's healing period ended when he was released

to return to work on March 5, 2015. Therefore, his permanent partial disability benefits shall commence on March 6, 2015. See Evenson v. Winnebago Ind., Inc., 881 N.W.2d 360 (Iowa 2016).

Claimant is also seeking additional healing period benefits. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Based on the above findings of fact, I conclude that claimant has proven entitlement to healing period benefits for the following periods: from February 24, 2015 through March 5, 2015; from February 4, 2016 through August 23, 2016; and from September 27, 2016 through March 30, 2017.

Claimant is seeking payment of past medical expenses incurred as a result of the work injury. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Based on the above findings of fact, I conclude that the medical expenses set forth in claimant's exhibit 3 were for reasonable and necessary treatment of the claimant's work injury. Pursuant to Iowa Code section 85.27, defendants are responsible for the medical expenses set forth in claimant's exhibit 3.

Claimant is also seeking reimbursement for the IME of Dr. Manshadi. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low.

I concluded that prior to Dr. Manshadi's IME, there had already been an employer-retained physician who provided an evaluation of permanent disability which Dale felt was too low. Because the requirements of Iowa Code section 85.39 were met defendants shall reimburse claimant in the amount of one thousand five hundred and no/100 ($1,500.00) for the IME.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. 876 IAC 4.33. Based on the above findings of fact, defendants are assessed costs in the amount of $613.70.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of nine hundred seventy-one and 67/100 dollars ($971.67).

Defendants shall pay one hundred fifty-one point eight zero (151.80) weeks of permanent partial disability benefits commencing on March 6, 2015.

Defendants shall pay healing period benefits for the following periods: from February 24, 2015 through March 5, 2015; from February 4, 2016 through August 23, 2016; and from September 27, 2016 through March 30, 2017.

Defendants shall be entitled to credit for all weekly benefits paid to date.

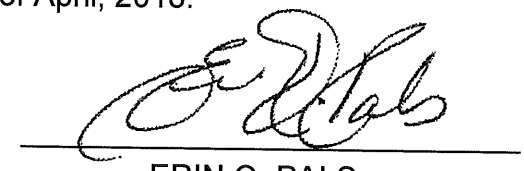
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 reimburse claimant for the IME in the amount of one thousand five hundred and no/100 dollars ($1,500.00).

Defendants shall reimburse claimant's costs in the amount of six hundred thirteen and 70/100 dollars ($613.70).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 25th day of April, 2018.



ERIN Q. PALS
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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.