

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PATRICK BOSTWICK,

Claimant,

vs.

AMERICAN SECURITY, LLC,

Employer,

and

XL SPECIALTY INS. CO.,

Insurance Carrier,  
Defendants.

File No. 5040419

A P P E A L

D E C I S I O N

**FILED**

DEC 18 2015

WORKERS' COMPENSATION

Head Note Nos.: 1108.20, 1803,  
1803.1, 4100

Defendants, American Security, LLC, employer, and XL Specialty Ins. Co., appeal from an arbitration decision filed on November 24, 2014. The case was heard on April 12, 2014, and it was considered fully submitted before the deputy commissioner at the hearing.

In the underlying arbitration decision, it was found that claimant's left ankle injury, which occurred on or about March 7, 2007, developed into an industrial disability and, as a result, claimant is permanently and totally disabled. The deputy commissioner did not award the independent examination costs as requested by the claimant but this issue was not appealed.

On December 10, 2014, defendants filed their notice of appeal asserting that the finding of permanent total disability is not supported by the evidence.

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 the finding of the deputy commissioner as it relates to industrial disability without further comment, but I REVERSE the deputy commissioner with regard to the finding of permanent total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of the hearing, claimant was 65 years old. He had a college degree in criminal justice and participated in the legal assistant program at Des Moines Area

Community College. Claimant's past work history included extensive employment as a paralegal and claims adjuster from 1979 through 2000. He worked retail between 2001 and 2003.

In 2003 claimant began working for defendant providing security services at Grandview University as lead officer. The lead officer position was new. Claimant's primary duties included ensuring that the existence of security was prominent on campus. To accomplish that, claimant drove around the campus in his security vehicle, walked through the buildings to talk to students and staff, made appearances at athletic events, and sometimes would provide assistance to students in need. He also had duties that would require him to be at his desk early in the morning and late in the afternoon. Claimant wore a pedometer which recorded anywhere from 3 3/4 to 6 miles a day of activity.

Claimant referred to this position as "my retirement job". (Transcript, page 19)

On March 7, 2007, claimant slipped and fell on ice while working. One of his managers drove claimant to the hospital where he was x-rayed and diagnosed with a fracture. A week later, claimant had surgical repair of the fracture and shortly after that a blood clot developed and passed into claimant's lungs. The subsequent diagnosis was deep vein thrombosis. Claimant had a lengthy convalescence which required him to keep his leg elevated due to the clotting risk.

The recovery for claimant was long and it wasn't until June 27, 2008, that claimant was placed at maximum medical improvement.

Prior to reaching MMI, claimant was sent a letter from defendant-employer on May 2, 2007, informing him of his family medical leave act rights and informing him that if he was not able to return to work within 12 weeks he would be terminated. (Exhibit 8, page 122) Claimant was not able to return to work and his termination became official on May 30, 2007.

Claimant applied for Social Security disability in April or May 2008 and was awarded benefits in July 2008. (Ex. 10, pp. 126-130)

On June 26, 2008, Timothy Kenney, M.D., who had performed the open reduction internal fixation of the left ankle, opined that claimant has residual symptoms in his ankle that would keep him from working more than an hour or two on his feet and he would likely be limited to sedentary employment. Dr. Kenney assigned permanent restrictions of avoidance of repetitive climbing, walking on uneven ground, prolonged standing, and walking. (Ex. 3, p. 72) Dr. Kenney determined claimant has permanent impairment of 24 percent of the left lower extremity. (Ex. 3, p. 85)

Claimant had no treatment for his left ankle from 2008 to 2013.

Since his injury he has performed some temporary part-time work including answering the phone, numbering bills, and other office related tasks at Grandview University in 2008 and 2009 that comprise the sole work that he has performed since his injury.

At the time of the hearing, claimant asserted that he had left ankle pain, left hip pain, right knee pain, occasional back stiffness and soreness as well as depression arising out of the March 7, 2007, injury. Claimant is taking pain medication and has also started drinking. He is described as short-tempered, quick to anger since the injury. He is not participating in household chores at his pre-injury level or taking care of the lawn maintenance.

Other than the Grandview position, claimant has not applied for any other position. He does not believe that he is capable.

In the fall of 2003, claimant was diagnosed with rheumatoid arthritis. He received different courses and combinations of drug therapy with "satisfactory results." (Trans. p. 20)

By February 1, 2007, the disease was deemed not active per Kristin L. Harts, M.D. (Ex.1, p. 1) During a September 23, 2008, visit with Dr. Harts, claimant exhibited pain in the left ankle and pain in the right knee. He was ambulating with a cane. (Ex. 1, p. 5) Of note, they tried to withdraw the methotrexate the prior summer but were unsuccessful. (Ex. 1, p. 5) Claimant had negative reactions to the methotrexate. (Ex. 1, p. 8)

Further, it was noted claimant had morning stiffness up to two hours in the morning. (Ex. 1, p. 5) Dr. Harts wrote, "He has a significant component of osteoarthritis but I think this is accountable for the pain in his left ankle, which is posttraumatic, related to his previous fracture, and his right knee, hence the hydrocodone." (Ex. 1, p. 6) Later medical records from Dr. Harts would differentiate between the osteoarthritis and the traumatic ankle injury. "He does have osteopenia by bone density measures," she wrote in the January 15, 2009, medical record. (Ex. 1, p. 7) And on February 26, 2009, Dr. Harts wrote, "As you know, he was recently put on disability I believe for a combination of osteoarthritis with chronic left ankle pain related to previous fracture and rheumatoid arthritis." (Ex. 1, p. 9)

Timothy Kenney, M.D., cared for claimant's ankle fracture. By December 2007, Dr. Kenney wrote, "I still think the swelling and pain that is associated with swelling is part of his difficulty in being able to advance his activities further. I believe this will significantly effect [sic] the DVT that he had. His fracture has been healing well. His range of motion is good. He still could improve over time as he gets additional healing and hopefully some improvement from his deep venous thrombosis with improvement in the venous return from his leg." (Ex. 1, pp. 66-67)

Because of claimant's pain and swelling, Dr. Kenney wrote, "I would still encourage him to do a sedentary job if he could find one available and try to avoid prolonged walking, standing or repetitive climbing, and lifting type activities. His ankle will be much more likely to tolerate a sedentary work position than one on his feet all day." (Ex. 1, p. 67)

On June 26, 2008, Dr. Kenney released claimant and while Dr. Kenney assigned permanent work restrictions he wrote, "He can certainly do sedentary work if this was available to him." (Ex. 3, p. 72)

While the disease may have plateaued in 2007, medical records reveal an escalation by January 15, 2009, when Dr. Harts noted the following, in pertinent part:

"Pat comes in today to discuss further therapy for rheumatoid arthritis. He has had aggressive disease and I believe it just was approved for disability.

He has significant underlying osteoarthritis as well as a traumatic left ankle fracture, which has given him chronic pain.

In terms of his rheumatoid, it tends to seem to be somewhat migratory from the hands, elbows and shoulders."

(Ex. C, p. 9)

On April 9, 2009, Dr. Harts wrote that claimant's "significant osteoarthritis...is the primary reason for his disability." (Ex. 1, p. 11) His greatest pain, however, was the chronic ankle pain. During the April examination, claimant was tender to palpation in all joints of his hands, his distal styloids, his right shoulder, his ankles bilaterally particularly on the left. (Ex. 1, p. 12)

His follow-up appointment on June 18, 2009, reveals that claimant continued "to feel poorly. He is not able to give me a very good vocal description of his pain, although more so today than in the past. Definitely have pain and stiffness in the small joints of the hands particularly in the morning. On his worst day this will last an hour.... He has pain in his feet across the metatarsal heads. He notices the swelling in both these places as well. He has quite a bit of pain in his left ankle and foot from his previous fracture." (Ex. C, p. 11)

Dr. Harts goes on to say, "I'm concerned as is he that even if we progress with his rheumatoid therapy this will not eliminate all of his fatigue and pain. I think there are other underlying issues such as osteoarthritis and possibly and [sic] element of depression, definitely his obesity will contribute to his immobility and disability." (Ex. C, p. 12)

Claimant returned to Dr. Harts on December 16, 2009, to follow up regarding his rheumatoid arthritis. (Ex. C, p. 13) Dr. Harts found claimant had a constellation of complaints:

He currently has pain in his hand, although it is isolated to the IPs, DIPs, and CMC joints. He has pain in his right foot which is currently isolated to the medial aspect under the arch of his foot. He is stiff in the morning, but he is stiff throughout the day. He has low back and knee pain.

He has posttraumatic arthritis in his left ankle due to previous fracture. He has osteoarthritis of the knees and likely the lumbar spine.

When I saw him prior to Rituxan in July, he had active synovitis through the MCPs with increased diffuse foot pain through the metatarsal heads.

He has some periodontal disease and receives prophylactic antibiotics from Dr. Robeson for that. He is using hydrocodone for his pain otherwise.

(Ex. C, p. 13)

Dr. Harts attributed claimant's pain to osteoarthritis and the right foot pain was probably more indicative of the stress fracture, osteoarthritis, or possibly early rheumatoid module. (Ex. C, p. 14)

On June 23, 2010, claimant returned to Dr. Harts for treatment. His worst pain was in his right shoulder and left hand. He was consuming a significant number of pain pills. Dr. Harts noted: "He has substantial osteoarthritis." (Ex. 1, p. 17) He had an antalgic gait and his right shoulder was tender at the bicipital tendon insertion. He was "exceedingly tender even to the lightest touch making the exam somewhat difficult. . . He has crepitus in both knees and again pain with even the slightest touch, but range of motion is full and no obvious warmth or effusion." (Ex. 1, p. 18)

By September 29, 2010, Dr. Harts felt claimant's osteoarthritis overshadowed his rheumatoid pain. (Ex. 1, p. 19)

On May 19, 2011, Dr. Harts saw claimant again. At this visit, "He tells me literally everything hurts from head to toe. He is still [sic] in the morning and that has never really changed, even when he has been in remission. He has low back pain, knee pain, hand pain, shoulder pain, finger pain, wrist pain, neck pain, head pain, ankle pain, and foot pain." (Ex. C, p. 15) She noted that the predominant source of his pain was osteoarthritis. (Ex. 1, p. 24)

On August 31, 2011, claimant returned with pain in his right knee. An injection was administered. The cause of the pain was attributed to osteoarthritis. (Ex. 1, p. 28)

In a January 22, 2014, letter, Dr. Harts wrote that claimant had suffered posttraumatic osteoarthritis in his left ankle, caused initially by an injury (fracture) in that area in 2007. Dr. Harts noted that the condition was permanent and would deteriorate over time, impacting claimant's gait. This secondarily worsened the pain in his knees and back, leaving him with very limited tolerance for standing and walking. "His pain is great enough that he would be unable to be on his feet more than a minimal amount of time." (Ex. 1, p. 38)

July 2, 2012, claimant was in an auto accident. He does not attribute any current medical issues to the accident other than what he termed sciatica in the right side. The medical records show claimant sustained a lumbar disc herniation as a result of being rear-ended by a semi.

On November 19, 2013, Robert C. Jones, M.D., issued an IME report which attributed the ankle pain, DVT, and right knee pain along with some symptoms of back pain to the work incident. Dr. Jones felt that claimant could not perform "regular, competitive work" and assigned work restrictions of no lifting or carrying more than 20 pounds and avoid frequent lifting and carrying of lighter amounts of weight. Additionally, he should be limited to sitting and standing where he can and no more than two hours over the course of a typical work day. (Ex. 5, p. 99) Dr. Jones did not believe claimant would be able to stay on task without interruption because of pain. (Ex. 5, p. 99)

Kurt Smith, D.O., attributed claimant's altered gait to the motor vehicle accident. (Ex. F, p. 3)

Eva Christiansen, Ph.D., assessed claimant and concluded that, "Mr. Bostwick would have difficulty maintaining focused attention, as depression, anxiety, and pain are all associated with being sources of interference in such behaviors. Depression can lead to motor retardation, beyond what might be the result of health conditions. His indecisiveness and negativity are likely to be displayed particularly in settings that do not allow frequent withdrawal to manage pain." (Ex. 6, p. 110) There was no evidence of motor retardation, making that statement a generality, but the sum of Dr. Christiansen's opinions was that claimant's moderate to severe depression would make it difficult for him to perform well in a work setting. (Ex. 6)

Dr. Christiansen's records do not include any reference to stressors outside of his family and his work. When she summarized the records of October 11, 2013, and November 11, 2013, she avoided any mention of the following:

The patient is not currently on any medications for his depression. Pt is moody and irritable and tired and does not sleep well – lots of increase stress in life with lawsuit against rental property and MVA and lawyer not helping – pain meds for RA are not helping and having more pain and afraid of getting addicted to pain meds has COPD so cannot take a lot of RA meds, started drinking again 8 months ago after being sober for 20 years, his sponser [sic] has died and his best friend just diagnosed with

terminal lung cancer, wife is working two 12 hour shifts so pt is home aloner [sic] a lot, got a puppy to occupy his time and that is a lot of work, wife is threatening to leave him, he is ready for meds and counseling now.

(Ex. F, p. 3)

The evidence supports a finding that claimant sustained a left ankle fracture which developed into DVT, and an altered gait resulted in right knee pain as well as some low back pain. Claimant also suffers from depression. However, Dr. Christiansen's report disregards other stressors in claimant's life such as the death of a friend as well as claimant's increased reliance on alcohol.

The arbitration decision did not give much weight to claimant's nearly twenty years of work in the legal and insurance fields which would be within claimant's sedentary work restrictions. The majority of claimant's work history is sedentary or office work. (Ex. 7)

Physically, Dr. Kenney maintained claimant could return to work. Mentally, Dr. Christiansen says that it would be challenging for him because of his anxiety, depression and pain. But difficult and challenging is not the same as saying claimant is totally unfit for work.

Claimant did return to work for a short time but did not maintain his employment, testifying it was a hassle to get in and out of the golf cart and maneuver around campus. (Trans. p. 37)

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.

While claimant is limited to sedentary employment, his work history, education and training provide access to the job market beyond that of an ordinary laborer, despite having worked security in the most recent past.

Further, while Dr. Christiansen opined that claimant would have difficulty maintaining focused attention and that frequent withdrawal to manage pain would interfere with his function in a work setting, Dr. Christianson did not say claimant was unemployable. The sum of Dr. Christianson's opinions is that there are fewer jobs available to claimant given his depression, not that there are no jobs.

Based on claimant's age, his sedentary work requirements, the injury itself, claimant's college degree, his twenty years in the insurance and legal industry along with his motivation to return to work and his inability to engage in security work or other light duty work which requires regular standing or walking, taking all of the elements of industrial disability as a whole, as well as guidance provided by the Iowa Supreme Court, I find claimant's industrial disability to be 75 percent.

The parties stipulated in the hearing report that the commencement date of permanent partial disability benefits is June 27, 2008, and claimant's weekly benefit rate is \$354.08.

The other issues presented at hearing were not the subject of appeal and are affirmed.

#### ORDER

IT IS THEREFORE ORDERED: Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the rate of three hundred fifty-four and 08/100 dollars (\$354.08) per week from June 27, 2008.

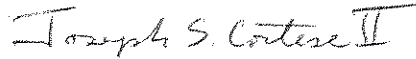
Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants are to be given credit for benefits previously paid.

Defendants shall abide by the order of the underlying arbitration decision to the extent it does not contradict the findings in this appeal decision which serves as the final agency action in this matter.

Signed and filed this 18<sup>th</sup> day of December, 2015.



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COMMISSIONER

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