

ISSUES

The parties submitted the following issues for resolution:

1. Whether the stipulated injury was the cause of permanent disability? If so, the extent of scheduled disability claimant is entitled to receive.
2. The appropriate weekly workers' compensation rate for the claimant.
3. Whether there was an underpayment of temporary disability benefits?
4. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Manuel Suarez Maldonado (hereinafter "Manuel") sustained a compensable injury to his left ankle on May 3, 2012, when he fell while working for City View Farms. Manuel sustained a left ankle fracture which required surgical treatment the next day. Phil Deffer, M.D. of NWIA Bone, Joint & Sports Surgeons performed an open reduction internal fixation with hardware to secure the left distal fibular fracture. (Exhibit 2, pages 1-2) The surgery went well and there were no signs of complications. Following the surgery, Manuel was taken off of work for several weeks to heal. (Ex. B, p. 2; Ex. 2, pp. 1, 2, 4, 24) Defendants paid claimant weekly workers' compensation benefits while he was off work. (Ex. 1, p. 30; Ex. 3, pp. 15-17)

On August 1, 2012, Dr. Deffer released Manuel back to full duty work without restrictions. (Ex. 2, p. 25) Manuel returned to his pre-injury position. (Testimony)

In October of 2012 Manuel returned to see Dr. Deffer and reported problems with the plate rubbing inside his boot. (Ex. 2, pp. 9-11) The hardware was removed on October 15, 2012. (Ex. 2, p. 13 and 46) Manuel underwent additional physical therapy and was discharged from therapy on December 13, 2012. He met all of his physical therapy goals. (Ex. 2, p. 70)

Following the second surgery Manuel was gradually returned to work. During this time defendants paid him temporary partial disability benefits. He was released to return to full duty by November 12, 2012. Manuel returned to performing his pre-injury job. (Ex. 2, pp. 15-33)

Manuel returned to see Dr. Deffer on January 7, 2013, and reported that he had been back to full duty work without restrictions. Dr. Deffer noted some decreased plantar flexion and extension; he did not note any other issues. Dr. Deffer assigned 10 percent functional impairment to his foot. His rating was based on the AMA Guides

to the Evaluation of Permanent Impairment, Fifth Edition, page 537, Table 17-11. He explained that the 10 percent rating to the foot was the equivalent of 7 percent impairment of the lower extremity and the equivalent of 3 percent to the body as a whole. (Ex. 2, p. 18)

In 2013 Claimant requested additional medical care. Defendants authorized an appointment with Dr. Deffer. (Ex. 3, p. 2) Dr. Deffer reiterated that the claimant's impairment rating was 10 percent to the foot. (Ex. 2, pp. 16 & 21) The doctor stated, "[2] At this point, his impairment is unchanged at 10%, left foot." He also noted that Manuel was now complaining of foot numbness; the prior records did not contain mention of foot numbness. The surgeon noted that there were numerous possible causes of the numbness. He opined that "[a]t this point, I have a hard time relating [the numbness] to his ankle fracture." (Ex. 2, p. 21)

Dr. Deffer is the only medical expert to render an opinion regarding a rating of functional impairment or permanent restrictions in this case; his opinions are unrebutted. The last time Manuel sought treatment for his work injury was in November of 2013. (Testimony) I find the opinions of Dr. Deffer to carry great weight in this case.

Following the injury Manuel successfully returned to work at his pre-injury job for the defendant employer. He worked the same hours and performed the same duties as before the injury. He also received raises after the injury. After his employment with the defendant employer ended, Manuel found work earning the same or greater pay per hour than he was making at the time of the injury. Manuel continues to work some overtime with his current employer. To his credit he also works a second job. (Ex. 1, Ex. C, Testimony)

Manuel testified that he continues to have difficulty which he attributes to the work injury. He continues to have numbness in his toes and problems with pain, swelling, and limited flexibility and inflammation in his left lower extremity. Claimant and his wife also testified that he has complaints of pain and issues with his gait. He also has difficulty if he walks too much. (Testimony)

Defendants initially paid permanent partial disability benefits for the impairment rating to the foot. On January 27, 2013, defendants sent a letter to Manuel regarding the impairment rating of 10 percent of claimant's foot. Defendants stated that a person who sustained a 100 percent permanent impairment to his foot was entitled to 150 weeks of compensation. Because Manuel's impairment was rated as 10 percent of the foot he was entitled to 15 weeks of benefits. (Ex. 3, p. 13) In August of 2013, defendants paid an additional \$195.78 of permanent partial disability benefits. It should be noted that for each payment of PPD defendants sent a portion of the benefits to child support. The total paid for PPD benefits was \$7,537.08; this was the equivalent of 15.4 weeks of benefits. (Ex. 3, p. 21) I find that defendants have paid claimant 15.4 weeks of permanent partial disability benefits at the rate of \$489.42.

The parties have stipulated that claimant's injury is a scheduled member injury. Claimant contends that he sustained permanent partial disability of two members as a result of a single accident and therefore should be compensated under Iowa Code section 85.34(2)(u). I do not find this argument to be supported by the evidence in this case. Rather, I find that claimant sustained a single injury to his ankle as a result of the May 3, 2012 work accident. Defendants correctly argue that there is no basis in the Iowa workers' compensation law to award multiple impairment ratings to the foot and lower extremity for the single ankle fracture. Based on the opinions of Dr. Deffer, I find that claimant sustained 7 percent impairment of the lower extremity. As such, he is entitled to 15.4 weeks of permanent partial disability benefits.

We now turn to the issue of the correct weekly workers' compensation rate. The parties have a dispute regarding the appropriate weekly workers' compensation rate. Specifically, the dispute centers on the gross weekly wages of the claimant. Defendants originally calculated the claimant's average weekly wages to be \$707.43. There is no dispute that claimant is married and entitled to 4 exemptions. Thus, if his average weekly wage was \$707.43, his weekly compensation rate would be \$489.42. (Ex. 1, p. 44) However, after initially paying benefits defendants realized they had erroneously included overtime pay and irregular bonus pay in that calculation. Defendants then recalculated the average weekly wage and concluded it to be \$682.07, which they contend results in a weekly compensation rate of \$474.65. (Ex. A)

Claimant offers no rate calculation of his own. He argues that the rate should be the original higher rate because this is what defendants said was the correct rate in their answers to interrogatories. (Ex. 1) I do not find this argument to be persuasive because that rate is simply not correct under Iowa law.

Claimant also argues that defendants' most recent rate calculation is misguided because it includes "short weeks" of 27.55 and 23.22 hours worked. (Ex. A) Claimant does not dispute that the numbers represented in Exhibit A are erroneous in any way; simply that those two "short" weeks should not be included in the calculation. However, it appears that claimant's counsel misinterpreted Exhibit A. A close reading of Exhibit A reveals that the hours of 27.55 and 23.22 are all for the week of March 3, 2012. Thus, for that week claimant worked 50.77; I find that this fairly reflects the employee's customary earnings and should be included in the rate calculation. Thus, claimant's average weekly wage is found to be \$682.07. Defendants state these results in a weekly compensation rate of \$474.65. However, when the average weekly wage is applied to the rate tables I find it results in a weekly workers' compensation rate of \$473.78. All weekly benefits shall be paid at the rate of \$473.78.

Claimant next contends that his temporary total disability (TTD) benefits were paid at an incorrect rate and resulted in an underpayment of benefits to him. I have found that the correct weekly workers' compensation rate is \$473.78. Defendants paid weekly benefits at the rate of \$489.42. (Ex. 1, p. 30) I find defendants actually overpaid the weekly rate by \$15.64 per week. Thus, I find claimant has failed to carry his burden of proof to show that defendants underpaid TTD weekly benefits.

Claimant is also seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally not successful in his case I exercise my discretion and do not assess costs against the defendants. Each party shall bear their own costs.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The first issue that must be addressed is the nature and extent of claimant's entitlement to permanent partial disability benefits. Claimant alleges that his permanency should be compensated under Iowa Code section 85.34(2)(s). Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983). However, I found that claimant failed to prove that he sustained injury to two members. Rather, claimant sustained injury to his ankle. In Iowa, the loss of function in a joint is compensated as part of the proximal side of the joint, not as a loss of the member on the distal side of the joint. Thus, an ankle is compensated as an injury to the leg, not the foot. Pursuant to Iowa Code section 85.34(2)(o) for the loss of one lower extremity, the compensation is based on 220 weeks. Dr. Deffer opined claimant sustained 7 percent loss of his lower extremity. I find Dr. Deffer's opinions to be credible. Thus, claimant is entitled to 15.4 weeks of permanent partial disability benefits.

The second issue to be addressed is rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Based on the above findings of fact, I concluded defendants' calculation of the average weekly wage contained in Exhibit A is correct. Claimant has an average weekly wage of \$682.07. The parties have stipulated that claimant is married and entitled to 4 exemptions. Therefore, claimant's weekly compensation rate is \$473.78. All weekly workers' compensation benefits shall be paid at this rate.

Claimant is also seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. 876 IAC 4.33 Because claimant was generally not successful in his case I exercise my discretion and do not assess costs against the defendants. Each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:


All weekly benefits shall be paid at the rate of four hundred seventy-three and 78/100 dollars (\$473.78).

Defendants shall pay fifteen point four (15.4) weeks of permanent partial disability benefits. Defendants shall be entitled to credit for all weekly benefits paid to date. Thus, claimant is entitled to no additional permanent partial disability benefits as a result of this proceeding.

Each party shall bear their own costs.

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 17th day of May, 2017.


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DEPUTY WORKERS'
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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.