BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ALAN GUSTAFSON,

Claimant,

vs.

HEARTLAND AREA EDUCATION AGENCY 11,

Employer,

and

EMPLOYERS MUTUAL CASUALTY, COMPANY,

Insurance Carrier,

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5051728

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 2502; 3202

## STATEMENT OF THE CASE

Alan Gustafson, claimant, filed a petition for arbitration against Heartland Area Education Agency 11 (hereinafter referred to as "Heartland"), as the employer and Employers Mutual Casualty Company as the insurance carrier. Mr. Gustafson also filed a claim against the Second Injury Fund of Iowa. An in-person hearing occurred on March 8, 2016.

The evidentiary record includes claimant's exhibits 1 through 18. The employer and insurance carrier offered exhibits A through D and the Second Injury Fund of Iowa offered exhibits AA through FF. All exhibits were received into the evidentiary record without objection. Claimant was the only witness to testify at the hearing.

The evidentiary record closed at the end of the March 8, 2016 hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until March 28, 2016 to file their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

The parties filed a hearing report, which contains numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment with Heartland Area Education Agency 11 on May 1, 2013.

2. Whether the alleged May 1, 2013 injury is limited to the right lower extremity or should be compensated on an industrial disability basis.

3. Whether claimant gave timely notice of the alleged May 1, 2013 injury.

4. Whether claimant is entitled to an award of permanent disability against the employer and, if so, the extent of such entitlement.

5. Whether claimant is entitled to an award of past medical expenses.

6. Whether claimant is entitled to reimbursement of his independent medical evaluation fee pursuant to Iowa Code section 85.39.

7. Whether claimant proved a qualifying permanent first injury occurred on October 25, 2014.

8. Whether claimant proved industrial disability that exceeds the Second Injury Fund's credit and, if so, the extent of claimant's award of benefits against the Second Injury Fund.

9. Whether claimant's costs should be assessed against the employer.

## FINDINGS OF FACTS

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

Alan Gustafson began his employment at Heartland in 2011 and continued working for the employer through the date of the arbitration hearing. Claimant works for Heartland as a van driver and delivers books, paper, and physical therapy equipment to school buildings throughout the central Iowa area. He is required to load and unload the items he is transporting and uses large metal carts to move some of the items during the loading and unloading process. (Exhibit 14, page 5; Ex. EE, p. 17-18; Claimant's testimony)

Claimant testified that his ankle was struck by a metal cart multiple times over a period of months. He explained that a metal cart he utilized to transport materials to his van to be loaded struck his right ankle multiple times and asserts that this ultimately caused a cumulative injury to his right ankle.

Claimant initially reported right ankle and heel pain to his podiatrist, Michael Lee, DPM on November 9, 2012. He reported he bumped his ankle several times over a period of six months. (Ex. 4, pp. 1-3) Dr. Lee pursued a conservative course of care and initially diagnosed claimant with tendinitis. (Ex. 4, p. 4) Dr. Lee performed injections into claimant's heel, which were not beneficial over the long term. (Ex. 4, pp. 6-9)

Ultimately, Dr. Lee recommended an MRI of claimant's right ankle. The MRI occurred on December 20, 2013 and demonstrated a "High-grade partial thickness longitudinal split tear of the peroneus brevis tendon." (Ex. 5, p. 1) Following the MRI, Dr. Lee recommended surgical intervention to repair the damaged tendon. (Ex. 4, pp. 10-11) Dr. Lee took claimant to surgery and performed extensive debridement as well as a repair of the peroneal brevis tendon. (Ex. 6)

Unfortunately, the surgery did not completely relieve claimant's right foot and ankle symptoms. Claimant continues to report pain and symptoms. Claimant also reports difficulties with daily activities such as walking. (Claimant's testimony; Ex. 11, p. 18)

Two medical professionals have been asked to offer opinions about whether claimant's right ankle injury is causally related to his work activities at Heartland. Specifically, Dr. Lee, the treating surgeon, has been asked to comment. Claimant also obtained and introduced an independent medical evaluation performed by Jacqueline M. Stoken, D.O., on January 28, 2016. (Ex. 11)

When comparing the competing medical opinions of Dr. Lee and Dr. Stoken, I find that the opinions offered by Dr. Lee carry greater weight in this case. Dr. Lee was the treating podiatrist and performed surgery on claimant's right ankle. He had the opportunity to inspect claimant's ankle intra-operatively and to visually determine the extent and nature of claimant's injury. Moreover, claimant selected Dr. Lee as his treating surgeon.

Although defendants did not select Dr. Lee or retain a physician of their own choosing to evaluate claimant's condition, claimant sought an independent medical evaluation with Dr. Stoken to challenge the opinions of the surgeon she selected. (Ex. 11) I find Dr. Stoken's opinion to carry lesser weight in this case because I identified an error in her report that causes me hesitation about the accuracy of her understanding of the injury and resulting opinion.

Dr. Stoken records a history in her report that includes, "An MRI was ordered in December 2013 which showed a tear in the ligaments." (Ex. 11, p. 15) Dr. Stoken then records that "A subsequent MRI showed a tear in the tendon." (Ex. 11, p. 16)

Only one MRI record appears in this evidentiary record. It was performed on December 20, 2013. It demonstrated a tendon tear, not a ligament injury. (Ex. 5, p. 1) In fact, Dr. Stoken's own report lists all diagnostic testing performed and lists only one MRI. (Ex. 11, p. 18)

No explanation is provided for this contradiction in Dr. Stoken's report. No evidence is produced demonstrating an initial diagnosis of a ligament injury and a subsequent diagnosis of a tendon injury. Dr. Stoken's inaccuracy, lack of precision, or contradiction in this respect does not provide me confidence in her report. Therefore, when considering the competing medical opinions, I find Dr. Lee's opinions to be more consistent with the other evidence in the record and more convincing.

Dr. Lee indicated several times in his medical records that he did not believe claimant's injury was work related. (Ex. 4, pp. 12, 15, 18; Ex. AA, p. 1). When asked to specifically comment on the issue of whether claimant's ankle injury was causally related to his work activities at Heartland, Dr. Lee opined that the injury was not causally related. (Ex. BB, p. 2)

Claimant disputes Dr. Lee's opinion. Claimant testified that he specifically told Dr. Lee that he hit his ankle at work. (Claimant's testimony; Ex. FF, p. 23) Yet, Dr. Lee specifically stated that claimant did not report a history of a work-related injury when relaying his injury at Dr. Lee's evaluations. (Ex. BB, p. 2) I perceive no reason why Dr. Lee would provide inaccurate information in this regard, particularly since he was selected by claimant. If anything, his bias would be toward helping his patient not refuting his statements.

Dr. Lee's recollections are also consistent with and supported by the fact that claimant did not report this as work related on his initial paperwork completed at Dr. Lee's office. (Ex. B, p. 1) Counsel for the employer asked claimant about the initial paperwork at Dr. Lee's office and the fact that claimant did not complete the section pertaining to work-related injuries. Claimant initially hesitated and stammered a bit in response to this question.

Ultimately, claimant testified that he did not know at that point in time that he had an injury that was not going to go away. Claimant did not suggest that he thought the injury was something other than work-related and provided no definitive explanation why he did not report the injury as work-related even if he thought it was going to resolve. Claimant's response to this cross-examination was not convincing.

I accept Dr. Lee's statements and opinions as accurate. Therefore, I find that claimant has not proven by a preponderance of the evidence that his right ankle injury or any of the claimed medical expenses are causally related to his employment activities at Heartland.

## CONCLUSIONS OF LAW

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). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Having found that claimant did not prove by a preponderance of the evidence that he sustained a work-related injury, either traumatic or cumulative in nature, on May 1, 2013, I conclude that claimant has not proven entitlement to any permanent partial disability benefits.

Claimant seeks an award of past medical expenses as outlined on his itemization attached to the hearing report. 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).

Claimant's request for award of past medical expenses also fails because claimant has not proven that his injury or the past medical expenses are causally related to his work activities at Heartland.

Mr. Gustafson seeks reimbursement of his independent medical evaluation performed by Dr. Stoken. 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. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, the employer did not retain a physician to rate claimant's permanent disability. Instead, defendants defended this case under a causation defense and a notice defense. Defendants relied upon the opinions of Dr. Lee, which was the surgeon claimant selected to provide his treatment. Claimant failed to meet the necessary pre-requisites to qualify for an independent medical evaluation pursuant to Iowa Code section 85.39. Therefore, I conclude that claimant's request for reimbursement of Dr. Stoken's fee should be denied as requested pursuant to Iowa Code section 85.39.

Claimant also asserts a claim for benefits from the Second Injury Fund of Iowa. Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Given the finding that claimant failed to prove he sustained a work-related right ankle injury on May 1, 2013, I conclude that claimant failed to prove a second qualifying injury for purposes of his Second Injury Fund claim. Claimant shall take nothing from the Second Injury Fund of Iowa.

All other disputed issues are rendered moot by the above findings and conclusions.

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that defendants have prevailed on the substantive issues in this case, I conclude that each party should be ordered to bear their own costs.

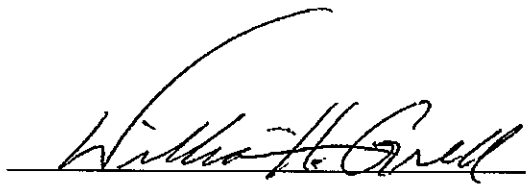
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

The parties shall bear their own costs.

Signed and filed this 1st day of June, 2016.



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WHG/kjw

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.