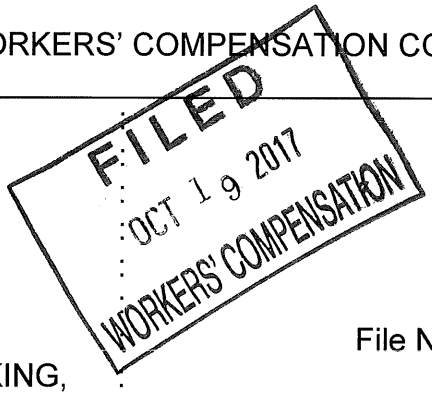
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



CHAD L. PERKINS,

Claimant,

vs.

WILKEN & SONS AUTO WRECKING,

Employer,

and

MIDWEST FAMILY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5055189

ARBITRATION

DECISION

Head Note No.: 1803.1

STATEMENT OF THE CASE

Claimant, Chad L. Perkins, filed a petition for arbitration seeking workers' compensation benefits from Wilken & Sons Auto Wrecking, the employer and Midwest Family Mutual Insurance Company, its insurance carrier.

The matter came on for hearing on November 9, 2016, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Waterloo, Iowa. The record in the case consists of Claimant's Exhibits 1 through 4; Defense Exhibits A through N; as well the sworn testimony of claimant, Chad Perkins. There was some duplication of exhibits which should be avoided in the future. Chris Quinlan was appointed as the court reporter for the proceedings. The parties briefed this case and the matter was fully submitted on November 28, 2016.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted.

The parties have stipulated that the claimant suffered an injury which arose out of and in the course of his employment on August 11, 2014. The defendants deny and dispute that this injury is a cause of permanent disability to the body as a whole but

instead assert the disability is limited to the right lower extremity. Claimant contends that he is entitled to permanent partial disability to the body as a whole. Defendants, again, deny this. Claimant also seeks mileage for a recent independent medical examination which claimant used to get an opinion on pain treatment.

Affirmative defenses have been waived. There is no credit dispute or claim for medical benefits other than mileage.

FINDINGS OF FACT

Claimant, Chad L. Perkins sustained a severe injury to the right lower extremity at work on August 11, 2014, when his foot was crushed by a skid loader bucket. The fact of this injury is stipulated. The diagnosis was complicated. Initially he was diagnosed with a proximal phalanx fracture of the great toe and bayonet apposition. Claimant also had soft tissue swelling in the right ankle. Claimant underwent surgical intervention consisting of closed reduction and percutaneous pinning of the great toe, proximal phalanx. After surgery, claimant continued to experience persistent and disabling foot pain which was predominately mechanical in nature.

A second MRI demonstrated ongoing edema at the base of the second toe as well as the great toe surgery. After the second MRI the diagnosis evolved with greater specificity, the diagnosis became severe contusion, forced plantar flexion injury, dorsal aspect of the right foot and ankle, peroneal tendon injury to the right, tarsometatarsal stress injury, second and third, contusion of the toe, second and third, sensory neuropathy, terminal division intermediate dorsal cutaneous nerve of the right foot. Claimant was eventually prescribed shoe orthotics which provided some relief.

The work injury left claimant with persistent foot pain and inability to perform numerous activities of daily living. He does not participate in housekeeping, snow removal, lawn mowing or even taking out the trash. Claimant has ceased recreational activities with his children such as throwing ball or playing hacky sack. Lifting a five gallon bucket of chicken feed causes pain to the right lower extremity to the extent he cannot engage in such activity. Overall standing and walking are very limited due to pain. Carrying anything of substance, in particular, is difficult due to pain. These limitations are all proximately caused by the great toe fracture and tendon tear of the peroneal brevis and tarsometatarsal stress fractures of the second and third digit with swelling into the ankle. Claimant also has chronic ankle pain and some back pain caused by the altered gait.

A treating doctor, Michael Scherb, M.D., opined that it is common to have persistent and incurable pain after these types of crush injuries. Surgery was not

recommended by office visit of October 18, 2016. Dr. Scherb prescribed Lidocaine patch, Ultram, and ibuprofen for pain.

Claimant reached maximum medical improvement September 14, 2015. The employer retained Charles Mooney, M.D., well known defense expert, for an independent medical examination. Dr. Mooney opined that claimant sustained 9 percent permanent partial impairment to the right lower extremity. Dr. Mooney also opined that claimant required no permanent restrictions due to the lack of an altered gait, when observed on that single occasion. Dr. Mooney also allegedly observed inconsistencies in pain symptoms.

Several doctors noted that the pain symptoms were out of proportion to the complaints. Claimant, however, has consistently used medication for the pain complaints. Moreover, the injury is of the type that often causes chronic pain. The ongoing complaints, type of injury and chronic use of medication over a long period all indicate that claimant's complaints of pain are legitimate, even if slightly embellished. Claimant's injury is found as a chronic pain syndrome of the foot and ankle caused by a severe crush injury. The MRI studies dramatically and graphically demonstrate a significant physical trauma to the foot. It follows that no matter what the defendants' experts say, this is the type of injury that will cause a significant and ongoing pain syndrome.

I decline to adopt the opinions of Dr. Mooney. Dr. Mooney only recounted the facts and circumstances which were favorable to the employer. It is difficult to reconcile his opinions on embellishment with the objective MRI evidence. Claimant's foot was crushed. He had surgery as a result of the crush. If one is to believe Dr. Mooney one needs to ignore the MRI, chronic medication use and the surgery. This is not a logical report based on physical evidence documented by all of the treating doctors. Dr. Mooney is a well known selection by defendants for independent medical examinations.

Charles Gilarski, DPM, concurred with Dr. Mooney on the impairment rating of 9 percent of the right lower extremity.

Claimant did not solicit an IME for impairment but instead asked an opinion for ongoing pain treatment. Again, another sign that claimant did in fact sustain an injury that caused a chronic pain syndrome in his right lower extremity. The IME was in fact an opinion concerning the need for ongoing medical treatment.

CONCLUSIONS OF LAW

The first question is whether the admitted August 11, 2014, injury is a cause of permanent disability to the lower extremity or body as a whole.

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).

This agency has held that pain or other subjective complaints, even without objective findings, can establish permanent impairment or permanent disability. Suljevic v. Tyson Fresh Meats, Inc., File 5017829, (App. March 27, 2008). McGregor v. Jet Company, File No. 5011648 (App. August 30, 2006). The Iowa workers' compensation system has a long history of compensating pain complaints as industrial disabilities if they are found to be disabling. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961) [complex regional pain syndrome formerly called Sudeck's atrophy, causalgia, or reflex sympathetic dystrophy (RSD)]; Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450 (Iowa 1996) (tinnitus); Young v. EDS Distribution Services, File Nos. 5006837 & 5006838, (Arb. August 2, 2004) *summarily affirmed* (App. September 21, 2005) (permanent total disability and penalties awarded for chronic pain).

I do not find compelling evidence in this file that claimant's disability extends into his body as a whole. The greater weight of evidence suggests that, while claimant has some intermittent pain in his low back, his only permanent functional disability is limited to his right leg based upon the best available evidence at the time of hearing. The Deputy Commissioner holds that claimant did sustain significant permanent disability to the right lower extremity as a result of the work injury. Again, while claimant seems to have some back pain, he does not have any impairment ratings or work restrictions associated with this injury. Thus, the strongest evidence of impairment is to the right lower extremity.

The second issue is the extent of such disability.

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. 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). Compensation for scheduled injuries is not related to earning capacity. 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).

As such this is a scheduled member injury and ratable pursuant to Iowa Code § 85.34(2)(o).

The AMA Guides, 5th Edition, has been adopted as a guide for determining an injured worker's extent of functional disability. 876 IAC section 2.4. In making an assessment of the loss of use of a scheduled member, however, the evaluation is not limited to the use of the AMA Guides. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Notwithstanding suggestions to the contrary in the AMA Guides, this agency has a long history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled

disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App. March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corporation, File No. 979887 (Arb. February 8, 1994); Ryland v. Rose's Wood Products, File No. 937842 (Arb. January 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

By a preponderance of evidence, I find that the August 11, 2014 injury is a proximate cause of disability in the claimant's right lower extremity and grant permanent partial disability of 30 percent. The claimant described symptoms and interference with his functional abilities and activities of daily living which exceed 9 percent loss. His prolonged use of medication combined with his request for an IME for pain management further contribute to my conclusion that claimant in fact has significant functional impairment which is not adequately measured in the AMA Guides.

Ongoing treatment is very much anticipated as necessary. The claimant's type of pain and disability is not uncommon with foot injuries according to the treating doctor. The objective evidence is more than conclusive that claimant had a severe crush injury that plagues him every day in his activities of daily living. The objective evidence leads me to conclude that the permanent partial disability to the right lower extremity is much greater than the impairment ratings issued. The final issue is the claimant's mileage reimbursement request for his pain management IME.

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. Iowa Code section 85.27 (2013).

Since claimant used his IME to get an opinion on further pain treatment the mileage is entirely reimbursable. This is an examination for treatment. While it is a section 85.39 examination it nonetheless is for treatment and compensable under both code sections. While the exact mileage is not clear from the record, the mileage is owed by employer. If the parties cannot work it out, a request for rehearing can be had on the issue.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant sixty-six (66) weeks of permanent partial disability benefits at the rate of three hundred thirty-eight and 26/100 dollars ($338.26) per week from September 14, 2015.

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 shall be given credit for the nineteen point eight (19.8) weeks previously paid.

Defendants shall pay mileage for claimant's independent medical examination used to obtain an opinion concerning medical treatment.

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

Costs are taxed to defendants.

Signed and filed this 19th day of October, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.