

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CENDYL BUTTZ,

Claimant,

vs.

DES MOINES WATER WORKS,

Employer,

and

TRAVELERS INDEMNITY CO. OF CT,

Insurance Carrier,
Defendants.

FILED

JAN 14 2019

WORKERS COMPENSATION

File No. 5059998

ARBITRATION DECISION

Head Note Nos.: 1803

STATEMENT OF THE CASE

Claimant, Cendyl Buttz, filed a petition in arbitration seeking workers' compensation benefits from Des Moines Water Works, employer, and Travelers Indemnity Company of Connecticut, insurance carrier, both as defendants, as a result of a stipulated injury sustained on September 5, 2012. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on January 7, 2019, in Des Moines, Iowa. The record in this case consists of Joint Exhibits 1 through 2, Claimant's Exhibit 1, and the testimony of the claimant. The parties declined post-hearing briefs, opting instead for closing remarks.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's permanent disability to his left leg; and
2. Specific taxation of costs.

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.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record. His demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 65 years of age at the time of hearing. (Claimant's testimony) On September 5, 2012, claimant suffered a stipulated work-related injury to his left leg. (Hearing Report) On that date, claimant was locating pipes when he stepped into an unmarked hole which was grown-over with weeds. Defendants referred claimant for evaluation with occupational medicine physician, Michael Jackson, M.D. (Claimant's testimony)

Defendants subsequently referred claimant for care with Wesley Smidt, M.D. of Des Moines Orthopaedic Surgeons (DMOS). Dr. Smidt examined claimant and reviewed x-ray and MRI findings on September 27, 2012. He thereafter assessed patellofemoral degenerative changes; medial meniscal tear; and evidence of chondrocalcinosis. Dr. Smidt recommended proceeding with arthroscopy, but noted claimant may continue to suffer with persistent symptoms post-arthroscopy due to his pathology. Dr. Smidt also cautioned claimant might require total knee arthroplasty in the future. (JE1, page 1)

Claimant underwent arthroscopy with Dr. Smidt on or about October 3, 2012. (See CE1, p. 11) Following surgery, claimant followed up periodically with Dr. Smidt. Claimant participated in a course of conservative care. (JE1, pp. 2-5) Claimant denied relief with arthroscopy and the subsequent care. (Claimant's testimony) Persistent symptoms resulted in a left knee aspiration and orders for a repeat left knee MRI. (JE1, pp. 5-6) The repeat MRI demonstrated worsened arthritis, leading Dr. Smidt to recommend a total knee replacement. (JE1, p. 7)

Dr. Smidt performed a total knee replacement in January 2013. After surgery, claimant followed up with Dr. Smidt periodically and participated in conservative care, including splinting and extensive physical therapy. (JE1, pp. 8, 10-15) Beginning in June 2013, claimant began a gradual increase in his work activities. (JE1, pp. 13-15) On September 26, 2013, Dr. Smidt released claimant to full duty work, without restrictions. (JE1, p. 16) However, claimant was unable to successfully tolerate such activity and on November 7, 2013, Dr. Smidt imposed permanent work restrictions. (JE1, p. 17) Claimant testified he continued to suffer with swelling, achiness, and instability of his knee. (Claimant's testimony)

As a result of continued pain and persistent swelling of his left knee, Dr. Smidt ordered a second opinion with David Vittetoe, M.D. of DMOS. (JE1, p. 18) Claimant presented to Dr. Vittetoe on December 19, 2013. Following examination, Dr. Vittetoe

assessed a painful left total knee replacement secondary to mid-flexion instability. He advised claimant of treatment options, including revision surgery. (JE1, p. 19)

Following the second opinion evaluation with Dr. Vittetoe, claimant returned to Dr. Smidt on January 9, 2014. Dr. Smidt noted Dr. Vittetoe had recommended consideration of revision surgery. Dr. Smidt discussed the risks and benefits of such a procedure with claimant. Claimant was allowed time to consider the procedure, with claimant to call should he be interested in scheduling surgery. (JE1, p. 20)

Claimant underwent revision surgery with Dr. Smidt on January 31, 2014. The procedure consisted of revision of left total knee arthroplasty, femoral, tibial and polyethylene. (JE2, pp. 33-34)

Following surgery, claimant followed up periodically with Dr. Smidt and underwent further physical therapy. Dr. Smidt consistently noted continued, but improved, symptomatology. (JE1, pp. 21-24) In July 2014, Dr. Smidt began the process of gradually returning claimant to work. (JE1, pp. 25-26)

Claimant returned to Dr. Smidt on October 30, 2014. At that time, Dr. Smidt noted he was uncertain as to the reason for claimant's persistent swelling, but commented it might improve with time. He advised claimant to use above- or below-the-knee compression stockings as needed. Dr. Smidt opined claimant had achieved maximum medical improvement (MMI) and imposed permanent restrictions. (JE1, p. 29) Claimant's permanent restrictions included: no lifting over 25 pounds; and no squatting, kneeling, or climbing. Dr. Smidt subsequently opined claimant sustained permanent impairment by the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 17-35 and Table 17S-33. By this methodology, Dr. Smidt opined claimant sustained a 50 percent lower extremity impairment for fair results following total knee arthroplasty. Dr. Smidt also noted claimant might require further orthopedic care, including surgery, in the future. (JE1, p. 30)

Claimant returned to Dr. Smidt on March 30, 2015. Dr. Smidt noted claimant had visited a pain management physician, Bradley Wargo, D.O., who prescribed gabapentin. Claimant reported relief with use of gabapentin and requested to continue seeing Dr. Wargo. Dr. Smidt acquiesced in claimant's desire; he opined Dr. Wargo's treatment was work-related and should be covered under workers' compensation insurance. (JE1, pp. 31-32)

At the referral of claimant's counsel, on May 3, 2018, claimant presented for independent medical examination (IME) with board-certified occupational medicine physician, Sunil Bansal, M.D. Dr. Bansal issued a report containing his findings and opinions on August 3, 2018. As elements of his evaluation, Dr. Bansal performed a medical records review and physical examination. (JE1, pp. 2-11, 15) He also interviewed claimant regarding his injury, treatment and ongoing complaints. Noted complaints included: constant aching left knee pain; sharp pain with kneecap movement; significant swelling; decreased mobility; limp; and tingling about the left knee. Claimant expressed belief the restrictions imposed by Dr. Smidt were accurate

and reasonable. He reported an ability to sit approximately 30 minutes; stand in one place for 5 to 10 minutes; walk 1 to 1.5 miles; and relayed significant difficulty with stairs and uneven surfaces. (CE1, pp. 11-13) Dr. Bansal noted claimant had retired in May 2016 due to continued difficulties. (JE1, p. 15)

Following records review, interview, and examination, Dr. Bansal assessed medial meniscal tear and aggravation of degenerative joint disease, status-post arthroscopy, total knee arthroplasty, and revision of left total knee arthroplasty. Dr. Bansal opined claimant suffered permanent impairment by the AMA Guides, Table 17-35 equal to 50 percent lower extremity. (CE1, p. 16) Dr. Bansal expressed agreement with the permanent restrictions imposed by Dr. Smidt, with the additional recommendation to: avoid multiple steps, stairs, ladders, and uneven terrain. (CE1, p. 17)

Claimant testified his left leg symptoms remain unchanged from the date of his last evaluation with Dr. Smidt. Claimant reported experiencing pain above and below his knee joint. In the morning, his pain rates as a level 2 or 3 on a 10-point scale; by the end of the day, his pain reaches a level 7. He relayed an inability to kneel on the left knee or squat; difficulty standing and sitting; and general avoidance of ladders, climbing, slopes, and uneven ground. Claimant testified he is able to stand for approximately 10 minutes without aggravation of his pain. He must alternate to standing or walking after 30 to 45 minutes of sitting. After walking for approximately 1 mile, claimant must sit to rest. Claimant testified he experiences both bone pain and pain associated with daily swelling. As a result of his symptoms, claimant is no longer able to perform certain home repairs or engage in recreation in the same manner. Claimant continues to utilize gabapentin as prescribed by Dr. Wargo and his successor. He does not utilize a cane, walker, or wheelchair. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is the extent of claimant's permanent disability to his left leg.

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).

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).

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

Claimant's treating physician, Dr. Smidt, and claimant's IME physician, Dr. Bansal, both opined claimant sustained a 50 percent functional impairment to his left leg. Both physicians used the same rating methodology and came to the same ratable impairment percentage. I find this rating of 50 percent accurately represents claimant's ratable functional impairment by the AMA Guides, Fifth Edition.

The question in this matter is whether the ratable impairment computed by the physicians utilizing the AMA Guides adequately quantifies claimant's functional impairment. Defendants argue the 50 percent impairment outlined by the AMA Guides adequately assesses claimant's impairment, while claimant argues the guidelines set forth in the AMA Guides are insufficient to accurately reflect claimant's loss of functionality.

After review of the entirety of the evidentiary record, I find the 50 percent rating determined by the AMA Guides accurately reflects claimant's permanent functional impairment under the governing statutory scheme. Claimant undoubtedly suffers with significant limitations following his work-related left lower extremity injury and resultant surgeries. His limitations were considered by both Drs. Smidt and Bansal in determining the extent of claimant's ratable impairment. The record lacks any medical evidence to suggest the AMA Guides' rating does not adequately consider claimant's limitations. Claimant's testimony on this topic is not so convincing as to warrant a determination the rating by the AMA Guides is insufficient. By the statutory structure, claimant is to be compensated for the loss of physiological capacity to his left leg. This loss of capacity has been quantified appropriately by two opining physicians.

Upon consideration of the above, it is determined claimant sustained a 50 percent permanent partial disability to his left leg as a result of the stipulated work-related injury of September 5, 2012. Such an award entitles claimant to 110 weeks of permanent partial disability benefits (50 percent x 220 weeks = 110 weeks), commencing on the stipulated date of October 30, 2014. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were \$1,234.00, and claimant was married and entitled to 2 exemptions. The proper rate of compensation is therefore, \$783.16. The parties stipulated prior to hearing, claimant was paid 110 weeks of compensation at the rate of \$783.16 per week.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: \$100.00 filing fee. The cost of filing fee is an allowable cost and is taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant one hundred ten (110) weeks of permanent partial disability benefits commencing October 30, 2014 at the weekly rate of seven hundred eighty-three and 16/100 dollars (\$783.16).

Defendants shall receive credit for benefits paid in the stipulated amount of one hundred ten (110) weeks of compensation at the weekly rate of seven hundred eighty-three and 16/100 dollars (\$783.16).

Defendants shall pay any accrued and unpaid weekly benefits in a lump sum.

Defendants shall pay interest on any unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. 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 file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 14th day of January, 2019.


ERICA J. FITCH
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.