

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THOMAS FUCALORO IV,

Claimant,

vs.

CITY WIDE HEATING & AIR
CONDITIONING, INC.,

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5068012

ARBITRATION DECISION

Head Note No.: 1402.40

STATEMENT OF THE CASE

Thomas Fucaloro, claimant, filed a petition in arbitration seeking workers' compensation benefits from City Wide Heating and Air Conditioning, Inc., employer and EMCASCO Insurance Company, insurance carrier, as defendants. Hearing was held on May 5, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with claimant appearing remotely from his residence, claimant's attorney appearing remotely from his office, and defense counsel appearing remotely from his office, and the court reporter also appearing remotely.

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.

Thomas Fucaloro was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE5, Claimant's Exhibits 1-3, and Defendants' Exhibits A-C. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The undersigned ordered a copy of the transcript which was filed on June 11, 2020, at which time the case was fully submitted to the undersigned.

ISSUE

The parties submitted the following issue for resolution:

1. Whether the stipulated January 20, 2016 work injury was the cause of permanent disability to claimant's left lower extremity.

FINDINGS OF FACT

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

On January 20, 2016, claimant, Thomas Fucaloro, sustained an injury which arose out of and in the course of his employment to his left leg. Mr. Fucaloro was employed with City Wide Heating and Air Conditioning, Inc. ("City Wide"). At the time of his injury, Mr. Fucaloro had been performing some duct work on an extension ladder. He climbed down the ladder, stepped on a 2 x 4 and rolled his left ankle. His heavy tool belt was over his shoulder at the time. He heard a crazy pop sound and his left ankle swelled instantly. (Transcript pages 15-16)

Mr. Fucaloro was seen that same day at Mercy West Family Practice and Urgent Care. They took x-rays of his left ankle. The diagnosis was ankle sprain and ankle pain. He was provided a Bledsoe boot and was restricted from work for the week. He was also prescribed naproxen. (JE1, pp. 1-4) Mr. Fucaloro was eventually diagnosed with a sprain of calcaneofibular ligament of his left ankle. An orthopedic evaluation was recommended. (JE1, pp. 5-8)

On February 17, 2016, Michael Lee, DPM, saw Mr. Fucaloro. Dr. Lee diagnosed a left ankle sprain. He recommended functional rehabilitation, rest, ice, and elevation. He also provided Mr. Fucaloro with a Stromgren brace. He was to progress his activities as tolerated over the next two weeks. If his problems persisted, an MRI was to be considered. (JE2, pp. 13-17)

Mr. Fucaloro did not believe that he had merely sprained his left ankle. He attended physical therapy. Mr. Fucaloro continued to treat with Dr. Lee. On April 20, 2016, Dr. Lee noted that he had expected the ankle to be better than it was, so he recommended an MRI. (JE2, pp. 21-23) The MRI showed an anterior central distal tibial cyst or lesion. Dr. Lee stated that this was likely the result of his work injury. Dr. Lee noted that he had failed physical therapy, failed anti-inflammatories, and bracing. Mr. Fucaloro continued to struggle with his left ankle. Dr. Lee recommended proceeding with surgery. (JE2, pp. 24-30)

Dr. Lee performed a left ankle arthroscopy with microfracture and subchondroplasty on May 31, 2016. Following surgery, Mr. Fucaloro was placed in a CAM boot and restricted to sit-down work only. By July of 2016, he was allowed to return to regular work. He was restricted to no climbing ladders and no lifting over 50 pounds. (JE2, pp. 29-35)

Mr. Fucaloro continued to follow-up with Dr. Lee's office. Following surgery his ankle improved, but never returned to 100 percent. By August Mr. Fucaloro reported that he was doing well. He denied any complaints, concerns, or problems. He reported that his physical therapy helped, but he still experienced some swelling and pain. He was having a difficult time through a full day of work without having problems the next day. Dr. Lee indicated that he would likely be at maximum medical improvement (MMI) in 6 weeks. (JE2, pp. 38-42; Tr. pp. 17-20)

In October Mr. Fucaloro returned to see Dr. Lee. He reported daily pain and the need to miss work due to his pain. Dr. Lee felt that Mr. Fucaloro likely had some hypertrophic response from the scope microfracture. He recommended a steroid injection and additional physical therapy. (JE2, pp. 43-46)

On November 21, 2016, Mr. Fucaloro reported that he was 95 percent improved. He reported that this ankle was achy at times and occasionally had some popping or catching. Dr. Lee noted that Mr. Fucaloro was somewhat limited in plantar flexion, but otherwise his range of motion was within normal limits. Dr. Lee placed Mr. Fucaloro at MMI. He said Mr. Fucaloro could return to work regular duty, no restrictions. Mr. Fucaloro was to follow-up if he had any problems. Due to a mild decrease in his ankle plantar flexion between 11 and 20 degrees, Dr. Lee assigned 7 percent impairment of the left lower extremity. (JE2, pp. 47-48; Defendants' Exhibit A, p. 1)

Mr. Fucaloro returned to see Dr. Lee on May 17, 2017. At that point he was one year out from a scope microfracture. After the surgery he had an injection which he reports helped a great deal, but now he is having problems again, especially with activities. He reported pain with walking and driving. He rated his pain at a five. Dr. Lee recommended a second injection to get him through the summer. (JE2, pp. 49-51)

Mr. Fucaloro did receive significant relief from the May injection but by July he experienced increasing pain. Dr. Lee recommended another MRI. The MRI revealed a bone marrow lesion in the anterior tibia distally and some mild spurring. Dr. Lee recommended an arthroscopy with subchondroplasty of the distal tibia. This procedure was carried out in October of 2017. (JE2, pp. 52-59)

Following the second surgery Mr. Fucaloro continued to follow-up with Dr. Lee. In January of 2018, he reported that he had 75-80 percent improvement. He had been attending physical therapy which he felt helped a great deal. On March 7, 2018, Mr. Fucaloro reported that he was still a little stiff and sore, but had improved significantly. He had been working regular duties and could do everything, but occasionally did have

some pain afterward. Dr. Lee placed him at MMI and noted that he had no restrictions. He was to follow-up as needed. (JE2, pp. 60-71)

In March of 2018, Dr. Lee stated that Mr. Fucaloro's impairment rating had improved from the original rating he provided in November of 2016. Dr. Lee noted that because Mr. Fucaloro no longer had problems with any paresthesias and no longer had limitations in range of motion in his ankle, his impairment rating was zero percent based on The Guides. Dr. Lee did not anticipate any further treatment other than occasional use of anti-inflammatories or a brace based on swelling. (Def. Ex. A, p. 2)

In September of 2018, at the request of his attorney, Mr. Fucaloro saw Sunil Bansal, M.D. for an IME. His diagnosis relative to the injury of January 20, 2016 was left ankle osteochondral defect, synovitis and left ankle ankylosis, stress fracture with delayed healing. Dr. Bansal noted that Mr. Fucaloro had 4/5 strength with inversion and eversion. He assigned 10 percent impairment of the left lower extremity pursuant to The Guides. (Claimant's Ex. 1)

Mr. Fucaloro testified that he continues to have problems with his left ankle. His ankle hurts every day and is swollen every day. His ankle injury affects the manner in which he walks and climbs stairs. He especially has difficulty on uneven ground. He feels he needs to be careful with curbs. He lives in a two-story home and usually seeps on his couch so that he may avoid climbing stairs. His ankle also bothers him when driving for long periods of time. He had difficulty using the clutch on his manual transmission, so he purchased a vehicle with an automatic transmission. He avoids working on ladders; his daughter helps him with things like gutter work. He does not believe that his ankle would allow him to perform HVAC work. He also does not believe he could return to work at Bridgestone due to the amount of standing and lifting that was required. Prior to his layoff at Acura, Mr. Fucaloro was able to perform all of his duties at that job. (Tr. pp. 23-27)

Although Dr. Lee is the surgeon who provided treatment to Mr. Fucaloro, when it comes to the issue of permanent impairment, I find the opinion of Dr. Bansal to carry greater weight in this case. As demonstrated by the two ratings from Dr. Lee, Mr. Fucaloro's ankle condition has changed over time. Dr. Lee issued his last impairment rating based on Mr. Fucaloro's condition when he last saw him on March 7, 2018. Dr. Bansal based his rating on Mr. Fucaloro's condition as of September 12, 2018, the date Dr. Bansal performed his examination. Because Dr. Bansal's rating is based on the most recent information, I find his rating to be more persuasive than that of Dr. Lee's. I find that Mr. Fucaloro sustained 10 percent permanent partial disability to his left lower extremity as the result of the January 20, 2016 work injury.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Workers' Compensation Commissioner or the deputy hearing the case. I find that claimant was successful in his case and therefore an assessment of costs is appropriate. Claimant is seeking the filing fee in the amount of one hundred and no/100

dollars (\$100.00) and cost of service in the amount of thirteen and 60/100 dollars (\$13.60). I find that these are both appropriate costs under 876 IAC 4.33(7), (3). Defendants are assessed costs totaling one hundred thirteen and 60/100 dollars (\$113.60).

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 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).

Under the Iowa Workers' Compensation Act applicable in 2016, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). 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). For injuries occurring prior to a 2017 statutory change, the fact finder is required to 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).

Based on the medical and lay evidence in this case, I conclude claimant proved he is entitled to 10 permanent functional loss. The Iowa legislature established a 220-week schedule for a leg injury. Iowa Code section 85.34(2)(o)(2016). Mr. Fucaloro is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of his leg. Iowa Code section 85.34(2)(v)(2016). Ten (10) percent of 220 weeks equals 22 weeks. Thus, Mr. Fucaloro is entitled to an award of 22 weeks of permanent partial disability benefits at the stipulated rate of \$413.71. Iowa Code section 85.34(2)(o), (v) (2016).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of four hundred thirteen and 71/100 dollars (\$413.71).

Defendants shall pay twenty-two (22) weeks of permanent partial disability benefits commencing on the stipulated commencement date of March 7, 2018.

Defendants shall be entitled to credit for all weekly benefits paid to date.

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 Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants are assessed costs as set forth above.

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 16th day of June, 2020.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

David Drake (via WCES)

David Brian Scieszinski (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.