BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LUIS PEREZ,

Claimant,

vs.

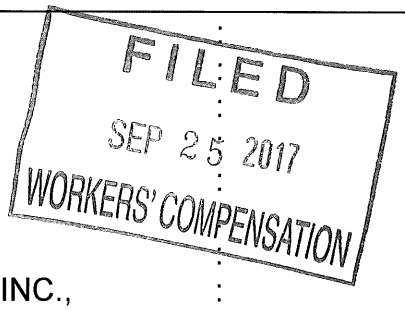
S.M. HENTGES & SONS, INC.,

Employer,

and

COMMERCE & INDUSTRY/AIG,

Insurance Carrier/TPA,
Defendants.



File No. 5053115

ARBITRATION DECISION

Head Note Nos.: 1108, 1803

STATEMENT OF THE CASE

Luis Perez filed a petition for arbitration seeking workers' compensation benefits from, the employer, S.M. Hentges & Sons, Inc., and Commerce & Industry/AIG, the insurance carrier.

The matter came on for hearing on April 19, 2016, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Claimant's Exhibits 1 through 13; Defense Exhibits A through C; as well the sworn testimony of claimant, Luis Perez. Stephani Sanyour was found to be a qualified Spanish-language interpreter and she served as the interpreter for the hearing. SuAnne Jones was appointed court reporter. The parties argued this case and the matter was fully submitted on May 16, 2016.

ISSUES AND STIPULATIONS

Claimant has alleged an injury to his left foot, leg, ankle and back which arose out of and in the course of employment on August 20, 2013. The defendants admit that an injury occurred on that date. The defendants, however, dispute that the injury, resulted in any permanency. The defendants also dispute that the injury extended into the claimant's low back. The claimant alleges entitlement to permanent partial disability benefits. The defendants contend the claimant is entitled to no such benefits. Moreover, the defendants contend that if claimant is entitled to benefits, his disability is

scheduled, not industrial. The commencement date for any benefits is disputed. The elements which comprise the rate of compensation are stipulated and affirmative defenses are waived. The claimant alleges entitlement to medical expenses as outlined in Exhibit 12 and independent medical evaluation (IME) as set forth in Exhibit 13. These expenses are disputed on the basis of causal connection. The parties have requested a specific taxation of costs.

FINDINGS OF FACT

Luis Perez is a 55-year-old employee of S.M. Hentges & Sons, Inc. He was born in Mexico in 1960 and attended school through approximately the eighth grade. He came to the United States in 1977. In California, Mr. Perez worked mostly in the field of construction as a laborer. Mr. Perez speaks very basic or rudimentary English. He does not write in English. There is no evidence in this record that claimant ever had any left foot or leg problems prior to the work injury in this case.

In 2010, he moved to Iowa and began working construction as a laborer for the employer in this case, S.M. Hentges & Sons, Inc., (hereafter Hentges). Hentges is an excavating company. Claimant's job was providing general labor, welding and otherwise repairing pipes. He was required to lift 60 to 70 pounds. Mr. Perez suffered an unfortunate and fairly significant incident of injury on August 20, 2013, when a co-worker lost control of a 8 foot long, 10 inch diameter pipe. The 50 plus pound pipe rolled down a hill and struck Mr. Perez, who was working in a ditch, in the back of his left leg and foot.

The injury claim was accepted and treatment was provided to the claimant. He was seen by Terrance Kurtz, M.D., on the date of the injury. After correctly recording how the injury occurred, he diagnosed lower leg contusion as well as hematoma of lower leg. (Claimant's Exhibit 1, page 2) Dr. Kurtz restricted claimant's activities for two days and provided some medications. (Cl. Ex. 1, p. 2) Mr. Perez treated regularly (approximately 12 visits) with Dr. Kurtz between the date of his injury through November 1, 2013. His symptoms waxed and waned to some degree during this time. (Cl. Ex. 1, pp. 3-34) The records show claimant sometimes used his girlfriend as an interpreter. Sometimes there is no record of anyone interpreting. The operational diagnoses were leg contusion, crush injury, lower leg, and open wound lower leg, and ankle. He was treated with temporary restrictions, ice and medications during this period.

On November 1, 2013, Dr. Kurtz documented that claimant had healed from his injuries. (Cl. Ex. 1, p. 33) The following is documented.

> Patient returns for follow-up . . . to his left lower leg with a hematoma and then statis ulcer. Now healed 100% epithelization. No pain or complaints. Patient has been working their regular duty. He does not have any pain.

(Cl. Ex. 1, p. 33) There was apparently no interpreter at this evaluation. Mr. Perez testified at hearing that he was, in fact, not pain free. He testified he was continuing to take pain medications (ibuprofen) for his foot pain at that time. I believe the claimant that he was not 100 percent pain free at that time. The evidence, however, does not support a finding that the claimant had a significant limp at that time, or severe pain on the bottom of his foot.

Mr. Perez testified that he worked unrestricted and without any treatment from November 1, 2013, through July 2014. For his job, he regularly walked on uneven surfaces. He testified that his foot was not healed during this period of time. He testified that he was limping regularly during this period and that the pain began to extend into the bottom of his left foot. (Transcript, pp. 30-31)

He complained to his foreman about pain in approximately July 2014. (Tr., pp. 31-32) The employer allowed him to return to Dr. Kurtz. Dr. Kurtz documented the following.

> This 53 year old male returns and claims pain of his left foot which started 2 months ago and is worse when he gets out of bed. It helps to stretch. He claims pain in foot to be a 7 out of 10. It all gets better later in day. Left foot sole is tender. Injury on 8-20-13 is not related to this issue and area that was involved is ok with no pain on palpation. Mild limp due to left foot. Likely plantar fasciitis.

(Cl. Ex. 1, p. 35) Claimant was referred to Des Moines University Clinic, Mindi Feilmeier, D.P.M.

Dr. Feilmeier documented an injury history of claimant "stepping on a rock at work." (Cl. Ex. 2, p. 43) She took detailed history from Mr. Perez and diagnosed plantar fasciitis. She developed a plan of treatment which involved physical therapy, supportive shoe wear and orthotics. (Cl. Ex. 2, pp. 40-46) Mr. Perez returned to Dr. Feilmeier several times through November 17, 2014, receiving a variety of different treatments. (Cl. Ex. 2, pp. 40-83) Plantar fasciitis was eventually diagnosed in both feet. Claimant did not like the orthotics and was noncompliant with the treatment. He did have injections as well. In January 2015, Des Moines University Clinic sent a letter to claimant discontinuing treatment due to noncompliance. (Cl. Ex. 2, p. 91)

Meanwhile, Mr. Perez sought treatment through Des Moines Latin American Medical Clinic, Jose Angel, M.D., in December 2014. (Cl. Ex. 3, p. 100) Dr. Angel assessed venous trauma with venous dilation and possible lymphatic trauma to the left leg. He ordered medications, x-rays and a compressive stocking. (Cl. Ex. 3, pp. 100-101) In January 2015, he performed bilateral steroid injections in the heels. (Cl. Ex. 3, pp. 107-108)

Claimant was evaluated by Sunil Bansal, M.D., in March 2015. Dr. Bansal

assessed left plantar fasciitis, left plantar heel, and sacroiliitis. He opined that these diagnoses were all related to the original work injury. (Cl. Ex. 4, pp. 125-26) He assigned a 5 percent impairment to the left lower extremity for the conditions in the left foot and ankle and a 3 percent whole person impairment rating for the back problems. (Cl. Ex. 4, p. 126) He also recommended permanent restrictions.

Defendants sought and obtained adverse medical causation opinions from Dr. Feilmeier and Dr. Kurtz. (Def. Ex. A, pp. 10-12; 20-25) Dr. Kurtz, in a "check box" report, opined that neither the plantar fasciitis, nor the back problems were caused or aggravated by the original work injury. (Def. Ex. A, p. 11) Dr. Feilmeier provided similar opinions in a credible traditional report responding to questions from defense counsel.

CONCLUSIONS OF LAW

The first question is whether the admitted August 20, 2013, injury is a cause of permanent disability, and if so, the extent of such disability. The claimant alleges that his injury on that date caused disability in his foot, ankle and eventually, his lower back. The defendants allege that, while claimant suffered a work injury to his left foot, he fully healed from that injury several months later. His ongoing conditions are not causally connected to the work injury. By a preponderance of evidence, I find that the August 2013, work injury is a proximate cause of disability in the claimant's left ankle and foot. I find, however, the claimant has failed to prove that the left leg disability has resulted in any permanent condition in claimant's low back.

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).

The expert opinions as to the medical impairment in this case are conflicted. Dr. Feilmeier and Dr. Kurtz opined that Mr. Perez fully healed up from his foot injury in November 2013, just a few months after the injury. This is, in fact, what Dr. Kurtz documented in his medical notes. (Cl. Ex. 1, pp. 33-34) The defendants contend that claimant developed symptoms associated with plantar fasciitis at some later point and claimant has failed to prove that diagnosis is related to the original injury. Dr. Feilmeier supports this conclusion. "I do not believe that the mechanism of injury that was described by Dr. Bansal would have caused the plantar heel pain symptoms, which was Mr. Perez's chief complaint." (Def. Ex. A, p. 24)

Dr. Bansal, on the other hand, opined that Mr. Perez "developed acute plantar fasciitis from this traumatic blow, most likely occurring from direct damage to the calcaneal-fascial interface." (Cl. Ex. 4, p. 125) Claimant contends that there is some confusion in the medical evidence which is caused by the fact that the defendants failed to provide an interpreter for most of his medical visits.

I find both of these medical opinions to be somewhat compelling which makes this decision difficult. Reviewing all of the evidence, including the lay evidence, I find the greater weight of evidence supports a finding that Mr. Perez did suffer permanent disability in his left leg, ankle and foot as a result of the August 2013, work injury. The incident of injury itself was rather significant. While it is documented that Dr. Kurtz believed that claimant had fully recovered, I find claimant's testimony that, while his injury had healed well, he was not fully recovered at the time he was discharged. This could be due to the language barrier, or the claimant could have simply downplayed his ongoing symptoms at the medical visits at a point in time when his foot was healing well. In any event, I believe the claimant that he was not 100 percent better when he was released. In addition, Dr. Feilmeier did have an incorrect history of the claimant's condition beginning when he stepped on a rock at work. Furthermore, it makes logical sense to me that this type of injury would result in some permanent disability. For these reasons, I find Dr. Bansal's medical causation opinions more compelling as it relates to the permanency in claimant's left leg, ankle and foot.

I do not, however, find enough evidence in this file to support a finding that the claimant has suffered a permanent low back condition as a sequela of the left leg injury. There is simply not enough supporting contemporaneous medical documentation in this file to support this conclusion. There is no mention of any back symptoms at all until claimant saw Dr. Angel in December 2014. I do not doubt that claimant may have some intermittent back pain, but I simply do not find enough credible evidence in this file that it is a true, permanent functional disability as of the date of hearing.

For these reasons, I find the claimant has met his burden that his injury is a proximate cause of disability in his left leg, ankle and foot.

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).

Since the disability impacts the claimant's ankle, it is evaluated as a loss of function of the left leg. Iowa Code section 85.34(o)(2015).

I find that the claimant has suffered a 5 percent loss of function of his left leg as described by Dr. Bansal. A 5 percent loss of function entitles claimant to 11 weeks of benefits at the stipulated rate of compensation. Since no healing period benefits ever commenced, permanency shall commence immediately following the date of injury, August 21, 2013.

The next issue is the claimant's medical expenses.

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).

In this case, the claimant seeks medical expenses outlined in Claimant's Exhibit 12. I find that the care obtained at Des Moines University Clinic was authorized care directed by the employer. The bills for this provider are owed. (Cl. Ex. 12, pp. 187-89) I further find this treatment was causally connected to the work injury.

The final issue is the independent medical evaluation. Claimant seeks the expenses set forth in Claimant's Exhibit 13.

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).

I find that the defendants' physicians opined that the claimant had no impairment as early as November 2013. The defendants were required to obtain such an opinion of impairment in order to justify making no disability payments. This is a basic legal compliance requirement and it appears the defendants complied. Once such an opinion was rendered, the claimant was entitled to a second opinion from a physician of his choice. Claimant is entitled to the expenses set forth in Claimant's Exhibit 13.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant eleven (11) weeks of permanent partial disability benefits at the rate of six hundred forty-three and 22/100 dollars ($643.22) per week from August 21, 2013.

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 pay the medical expenses set forth in Claimant's Exhibit 12 and the independent medical evaluation expenses as set forth in Claimant's Exhibit 13.

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

All costs are taxed to defendants.

Signed and filed this 25th day of September, 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.