BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VINCE JOHNSON, Claimant, vs. JBS USA, LLC, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 20700361.01 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

The claimant, Vince Johnson, filed a petition for arbitration and seeks workers' compensation benefits from JBS USA, employer, and American Zurich Insurance Company, insurance carrier. The claimant was represented by James Hoffman. The defendants were represented by Andrew Workman.

The matter came on for hearing on May 6, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of joint exhibits 1 through 3; claimant's exhibit 1; and defense exhibits A and C. The claimant testified under oath at hearing. Roxann Zuniga served as the court reporter. The matter was fully submitted on May 24, 2021, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained any permanent disability as a result of his stipulated injury, and if so, the extent of his impairment under the AMA Guides.

2. Whether claimant is entitled to an independent medical evaluation (IME) under Iowa Code section 85.39.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on February 24, 2020. The stipulation that claimant sustained an injury which arose out of and in the course of employment is accepted. Based upon the evidence submitted, it appears this injury actually occurred on February 18, 2020.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The elements comprising the rate of compensation have all been stipulated and the weekly rate of compensation is $661.39.

5. Medical expenses are not in dispute.

6. Credit is not an issue.

7. Relevant affirmative defenses have been waived.

FINDINGS OF FACT

Vince Johnson was 60 years old as of the date of hearing. He testified live and under oath at hearing. His testimony is credible. His testimony generally was consistent with the medical records in evidence. His demeanor was appropriate and matter-of-fact. There was nothing about his demeanor which caused me any concern for his truthfulness. In fact, the opposite is true. He testified with candor about his prior conditions.

On its face, this is a relatively simple case which is complicated significantly by Mr. Johnson's medical history. Mr. Johnson has worked for JBS since 2014, performing boiler and refrigeration maintenance. He has a long, well-documented history of somewhat significant symptoms, pain and impairment in his bilateral feet. There are over one hundred pages of medical records, mostly from the Iowa City VA Medical Center, outlining symptoms and disability in Mr. Johnson's bilateral feet beginning as early as 2010. (Joint Exhibits 1 and 2) He has been diagnosed primarily with plantar fasciitis, diabetic neuropathy, chronic bilateral foot pain, fibromatosis, in addition to pain in other parts of his body (shoulder, low back, in particular). All of the medical records have been reviewed and it appears Mr. Johnson was never treated for left ankle or leg difficulties prior to the work injury. At hearing, Mr. Johnson testified that he believed his work over the years has, at least in part, contributed to the condition in his bilateral feet. In any event, he has made no claim for any condition in his bilateral feet at this time. The issue in this case is whether the condition in claimant's left ankle is causally-

connected to his stipulated work injury, and if so, the extent of his impairment.

Mr. Johnson was having particular difficulty with his bilateral feet just prior to this work injury. Approximately one month prior to the injury in this case, he was evaluated by Michael Greiner, M.D., who diagnosed bilateral plantar fasciitis. (Jt. Ex. 3, p. 132) There is no mention of ankle or leg pain in these records, other than an indication that his bilateral feet hurt so bad that he would occasionally have leg spasms. (Jt. Ex. 3, p. 129) Dr. Greiner indicated a referral to a foot specialist was in order. X-rays were taken at Jefferson County Health which showed degenerative changes in both feet but no acute abnormalities. (Jt. Ex. 3, p. 133) No x-rays were taken of his ankle at that time.

As mentioned, Mr. Johnson has worked for the employer since 2014 in spite of the condition in his bilateral feet. He was, however, off work for the bilateral foot condition for approximately 17 months in 2018 and 2019. The parties have stipulated that Mr. Johnson sustained an injury which arose out of and in the course of his employment on or about February 24, 2020. Based upon the evidence submitted, it appears the correct date of injury is February 18, 2020. (See Jt. Ex. 1, p. 91) Mr. Johnson testified in detail about this event at hearing. His testimony about the injury, as mentioned above, is credible. He was carrying a heavy, five gallon jug while walking down a busy walkway. He stepped into a depression and rolled his left ankle causing a spraining sensation. As he took a few more steps, he felt his ankle snap and could no longer bear weight on it. This occurred at the end of his work shift. He was able to limp and hop in order to clock out, however, it took him a great deal of time to even get out to his car to leave the plant. He came to the plant the following day using a cane. He testified that the plant nurses did not want to even look at his ankle and instructed him to see his own physician, thereby effectively denying the claim. It is noted that Mr. Johnson described the injury at hearing as a left ankle injury, indicating the top and side portion of his left foot and ankle.

On February 19, 2020, Mr. Johnson reported to the Iowa City VA Medical Center and the following history was documented.

> 59 y/o WM carrying 5 gallon bucket of water, felt “POP” sensation in left foot, mid/laterally, had sudden sensation of pain, electrical like to a degree. Hurts to walk on it since yesterday

(Jt. Ex. 1, p. 91) X-rays were taken of his left foot and ankle which showed nothing acute, but only degenerative changes. (Jt. Ex. 1, pp. 88-90) He was diagnosed with a left foot sprain and told to elevate, ice and rest his foot. (Jt. Ex. 1, p. 94) He was provided with a post-op shoe and taken off work as well. (Jt. Ex. 1, pp. 91, 94)

Mr. Johnson returned to the VA the following week and saw one of his regular podiatrists, David Deeney, DPM. Dr. Deeney documented the following:

> Patient presents today with an approximate one week history of walking and having an intense sharp pain and feeling a “pop” on the outside of his

> foot. He states he didnt [sic] trip, and the pain was intense, he also noted some swelling. The next day he went into the ER, they took xrays and put him into a post op shoe. He states most of the swelling has gone down, there is still some on the outside of the foot. He has been trying to keep off of it as much as possible, he was taken off work till next week. He presents today for evaluation and treatment recommendations.

(Jt. Ex. 1, p. 101) Dr. Deeney opined "he does have some of the findings of a possible stress fracture." (Jt. Ex. 1, p. 102) He placed Mr. Johnson in an immobilizer boot and instructed him to return for follow up. Mr. Johnson remained off work.

Mr. Johnson followed up with Dr. Deeney in March. He underwent an MRI which is not actually in the record, other than as recorded by claimant's expert. (Cl. Ex. 1, p. 6) The MRI apparently showed a number of problems with the left foot, including peroneus brevis and peroneus longus tears. Dr. Deeney diagnosed probable intermetatarsal ligament strain and instructed him to continue to use the immobilizer boot and rest. (Jt. Ex. 1, p. 107) The working diagnosis for this condition was described as metatarsalgia which seems to be distinguished from his bilateral feet neuralgia. (Jt. Ex. 1, pp. 111, 115) By May 2020, he was provided some physical therapy exercises. (Jt. Ex. 1, p. 112) He continued to remain off work while they ordered new shoe inserts. There was some difficulty getting the correct inserts. By July 2020, he had inserts that worked properly and was returned to work without any new restrictions. (Jt. Ex. 1, p. 120) Mr. Johnson testified that he has not returned to the doctor for this condition since being released by Dr. Deeney.

Sunil Bansal, M.D., evaluated Mr. Johnson in February 2021, and prepared a report dated March 3, 2021. (Cl. Ex. 1) He reviewed all of the relevant medical records and evaluated Mr. Johnson's left foot and ankle. (Cl. Ex. 1, pp. 2-10) He also took a history of the injury from Mr. Johnson which was generally accurate. The one portion of the history which was incorrect is that Dr. Bansal was under the impression that Mr. Johnson fell to the ground. I find that this discrepancy was likely a minor communication error which has little or no impact on Dr. Bansal's ultimate medical opinions.

Dr. Bansal provided the following diagnosis. "Peroneus brevis and peroneus longus tendon tears" of the left foot and ankle. (Cl. Ex. 1, p. 10) This was based off of the MRI. Dr. Bansal causally connected this diagnosis to the work injury in February 2020. "The mechanism of rolling his left foot while carrying the heavy five-gallon bucket of water is consistent with his left foot peroneus brevis and longus tendon tears." (Cl. Ex. 1, p. 10) While Dr. Bansal did not specifically distinguish this condition from Mr. Johnson's other medical conditions in his bilateral feet (plantar fasciitis, neuropathy), it is apparent from his report that he was only rating the left foot and ankle condition. He assigned a 7 percent left lower extremity rating for the tears using Table 17-11 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. Ex. 1, pp. 10-11)

Defendants obtained their own expert medical report from Eric Barp, DPM. (Def. Ex. A) It is unclear whether Dr. Barp reviewed medical records associated with this claim. He took a history from Mr. Johnson which was significantly inaccurate. He understood Mr. Johnson was not in much pain. It is unclear how this misunderstanding occurred, but it is hard for me to imagine Mr. Johnson stating that "he had minimal pain" and "he did not feel a snap" based upon the record before the agency. (Def. Ex. A, p. 1) As it relates to his February 2020 work injury, Dr. Barp diagnosed a "sprain" which "seems to be resolved." (Def. Ex. A, p. 2) Dr. Barp noted the peroneal tendon tears from the MRI but opined that they were not symptomatic and likely preexisted the February 2020 work injury. (Def. Ex. A, p. 2) He assigned no impairment rating for either condition. (Def. Ex. A, p. 3) "I believe he has a simple sprain or strain of the left lateral foot. This should resolve and he should return to work with maximum medical improvement." (Def. Ex. A, p. 3)

Mr. Johnson testified at hearing and distinguished between the chronic symptoms in his bilateral feet and his left foot and ankle injury. He testified that he still has difficulty with his left foot and ankle from the work injury.

CONCLUSIONS OF LAW

The primary question submitted is whether the claimant sustained any permanent disability from his stipulated February 2020, work injury. This is a question of medical causation.

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 medical evidence is conflicted. Dr. Bansal opined that claimant sustained damage to tendons in his left foot and ankle. Dr. Barp opined that while he definitely has tears in those tendons, that condition was not significantly symptomatic on the date he saw the claimant, and, moreover, those were chronic, not acute or specifically caused by the work injury. I find that the greater weight of evidence supports a finding that the claimant did sustain permanent impairment in his right ankle and foot from his February 2020, work injury.

The parties have stipulated that Mr. Johnson sustained a work injury in February 2020. Mr. Johnson's credible testimony reflects that this work injury caused symptoms which were clearly distinguishable from the underlying conditions in his bilateral feet. It is evident that this condition healed well with treatment based upon the fact that he was released by his treating physician in July 2020 without restrictions and he has not returned to any physician (other than the medical experts in this case) for that condition. The fact that he healed well from this injury, however, does not mean that Mr. Johnson sustained no impairment. I find Dr. Bansal's opinion to be more believable than that of Dr. Barp. Mr. Johnson was off work for four months from his condition, indicating that it was likely not a mere strain or sprain. The pain and symptoms were in the top and side of his left foot, up into his ankle (where the relevant tendons are located). The work injury only affected the left foot and ankle. While both physicians had some errors regarding the precise history of the injury, Dr. Barp understood that Mr. Johnson had minimal pain, did not hear a pop, and was able to walk it off working the remainder of his shift. These errors are significantly contrary to the actual facts. Of course, there is no MRI of the right ankle and foot to indicate whether he also had a tear on that side, because only his left foot and ankle were symptomatic from the injury.

Defendants have rendered a number of specific arguments regarding disability which I shall address here. First, they argue that the successive disability statute prevents any recovery by claimant citing Iowa Code section 85.34(7) (2019). This statute is inapplicable because I found that Dr. Bansal did not rate Mr. Johnson's preexisting condition of bilateral plantar fasciitis or neuropathy. Obviously this case would be much simpler if Mr. Johnson had no preexisting conditions. Mr. Johnson, however, credibly distinguished his symptoms from these conditions at hearing. Based upon the record, Dr. Bansal simply rated the condition caused by the February 2020 work injury which was only present in his left ankle and foot.

Next defendants argue that Mr. Johnson "returned to baseline." At the time of hearing, Mr. Johnson continued to have left foot and ankle symptoms at least intermittently which are not present on his right side. This is based upon Mr. Johnson's credible testimony as well as Dr. Bansal's report. The defendants have correctly observed that the injury and resulting impairment are relatively minor, pointing out there was no surgery or invasive treatment. The injury, however, did cause Mr. Johnson to be off work for approximately four months essentially unable to walk on his left leg during this time. It did heal well ultimately, although his left leg has a minor impairment associated with the injury.

Third, the defendants argue that Dr. Deeney, the treating physician, only diagnosed a strain or sprain. This is not accurate. Dr. Deeney's final diagnosis seemed to be something called "metatarsalgia," however, he utilized several different working diagnoses over the course of his treatment. Based upon the record before the undersigned, it does not appear that Dr. Deeney offered any expert opinions regarding whether Mr. Johnson sustained any permanent impairment or ongoing problems from his stipulated work injury, including whether the tendon tears were connected.

Finally, the defendants argue that Dr. Bansal's opinion is biased. For example, they point to his finding that claimant rolled his foot and ankle in the injury which, they contend, is not described elsewhere in the record (other than claimant's testimony). There is no evidence, however, in this record, that the defendants even contemporaneously investigated the injury. This argument may carry more weight had they done so. The only evidence in the record is that when Mr. Johnson approached the employer's medical department, they would not even look at his left foot and ankle and told him to get treatment on his own, effectively denying the claim. I found claimant's hearing testimony to be credible and supports Dr. Bansal's opinion.

In summary, the greater weight of evidence supports a finding that the work injury did result in some, albeit minor, permanent disability in his left ankle and foot.

The next issue is the extent of impairment. I find that since the impairment is in the ankle, it extends into the leg.

Having concluded that the disability is a scheduled member evaluated under Section 85.34(2)(p), the next issue is to assess the degree of impairment to the claimant's left leg.

> In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity

Iowa Code section 85.34(2)(x) (2019).

Thus, the law, as written, is not concerned with an injured worker's actual functional loss or disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of the AMA Guides to the Evaluation of Permanent Impairment. The only function of the agency is to determine which impairment rating should be utilized.

Having reviewed all of the evidence in the record, I find that the claimant has sustained a 7 percent impairment in his left leg as assigned by Dr. Bansal. While the impairment is quite minor, it exists. I find Dr. Bansal's impairment rating is the best reflection of claimant's actual left leg impairment. I therefore conclude that this entitles claimant to 7 percent of 220 weeks or 15.4 weeks of compensation commencing on March 3, 2021, when he was first assigned a permanent impairment rating. Iowa Code section 85.34(2) (2019).

The next issue is whether claimant is entitled to the IME expenses from Dr. Bansal.

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).

Defendants argue the IME should not be reimbursed because he failed to prove any permanent leg impairment. I have found the opposite. I find that claimant is entitled to reasonable IME expenses in the amount of $1,684.00 under Section 85.39.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant fifteen and four-tenths (15.4) weeks of permanent partial disability benefits at the stipulated rate of six hundred sixty-one and 39/100 dollars ($661.39) per week from March 3, 2021.

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 reimburse claimant for the costs associated with Dr. Bansal's IME in the amount of one thousand six hundred eighty-four and no/100 dollars ($1,684.00).

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

Signed and filed this __7th____ day of January, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Hoffman (via WCES)

Patrick Waldron (via WCES)

Andrew Workman (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.