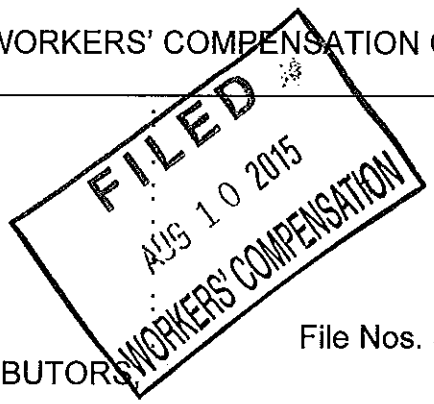
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ROXANNE FISHER,

Claimant,

vs.

OZARK AUTOMOTIVE DISTRIBUTORS, INC.,

Employer,

and

SAFETY NATIONAL CASUALTY CORP.,

Insurance Carrier,
Defendants.

File Nos. 5047012, 5047013

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Roxanne Fisher, has filed petitions in arbitration and seeks workers' compensation benefits from Ozark Automotive Distributors, Inc., employer, and Safety National Casualty Corporation, insurance carrier, and the Second Injury Fund of Iowa (SIF), defendants. SIF and the claimant settled before hearing.

Deputy Workers' Compensation Commissioner, Stan McElderry heard this matter on March 12, 2015 in Des Moines, Iowa.

ISSUES

For File No. 5047012:

1. Whether the claimant suffered an injury to her left lower extremity (LLE) arising out of and in the course of her employment on April 25, 2013;

2. The extent of disability, if any;

3. Medical benefits; and

4. Independent medical evaluation (IME).

For File No. 5047013:

1. Whether the claimant suffered an injury to her right lower extremity (RLE) arising out of and in the course of her employment on October 3, 2013;

2. The extent of disability, if any;

3. Temporary/healing period benefits;

4. Medical benefits;

5. Independent medical evaluation.

FINDINGS OF FACT

The claimant began her work with Ozark in 2000. She worked mainly as an outboard material handler, which required her to walk and stand for lengthy periods. Late in April the claimant began working more hours, which continued through July 18, 2013. Ninety-nine percent of her time was spent walking 12-15 miles per day on concrete floors during this period. As a result the claimant began to experience increased problems with her knee necessitating a visit to Ernesto Vazquez, M.D. on July 18, 2013. Dr. Vazquez limited the claimant to 40 hours of work per week and recommended the claimant pursue worker's compensation. (Exhibit 2, page 6) No treatment was offered by the defendants. The claimant ultimately underwent left knee surgery on her own with William Jacobson, M.D. (Ex. 6, p. 40)

On October 2 or 3, 2013 the claimant suffered an injury to her right knee. The claimant had been placed on light duty for a stipulated work injury to her shoulder (not part of this case). For light duty she was assigned to the mezzanine level. Claimant had previously told Ozark that the mezzanine level bothered her knees. She was required to work 16 hours on the mezzanine on September 30, 2013, 8 hours on October 1, 2013, and 6 hours on October 2, 2013. The claimant told her supervisor on October 2, 2013 that she had to leave work because she could not work due to right knee pain caused by walking the mezzanine. The claimant went to the ER that night. A follow-up with Dr. Vazquez resulted in Dr. Vazquez taking the claimant off work and writing defendant insurer that he believed this was a work injury. The defendants denied the claim with no care. The claimant then remained off work until January 30, 2014 as a result of surgery to correct the right knee. Defendants make much of doctors notes of Dr. Jacobson at Exhibit E, pages 8 and 23 which states: "Work related: No." However, Dr. Jacobson at Exhibit E, page 6 clearly says: "Left knee pain with work-related injury." It appears that the "No" may only mean that it was not being covered by workers' compensation insurance since the defendants had denied the claim. Mark Fish, D.O., who also works with Dr. Jacobson, provides a history of a work event for the right knee at Exhibit E, page 11 as well.

The defendants chose to deny both claims without any medical opinion that the injuries were not work related until Charles R. Clark, M.D., saw the claimant for a one-time examination on January 15, 2015, or about 1-1/2 years post-injury. (Ex. B) Dr. Clark opined that not only were the knees injuries not work related, but that the stipulated admitted left shoulder injury was not either. (Ex. B, p. 1) Dr. Clark clearly did not understand that an aggravation, acceleration, or worsening from work of an underlying condition is a work injury. (Ex. B) His opinions are rejected. The claimant suffered an injury arising out and in the course of her employment to her left knee on April 25, 2013 and to her right knee on October 2, 2013.

The claimant saw Sunil Bansal, M.D., for an IME on January 9, 2015. (Ex. 7) Dr. Bansal opined that both the right and left knee injuries were causally connected to her employment. He rated each lower extremity as having a two percent impairment. His views are accepted.

On April 25, 2013, the claimant was married, entitled to two exemptions, and had gross average weekly wages of $598.00. Her weekly benefit rate for that injury date is $409.93. On October 3, 2013, the claimant was married, entitled to two exemptions, and had gross average weekly wages of $600.00. Her weekly benefit rate for that injury date is $402.17. The parties stipulated to a February 24, 2014 commencement date for permanent benefits for the April 2013 injury and January 30, 2014 for the October 2013 injury.

Claimant seeks payment of medical expenses. The expenses are detailed in Exhibit 12. Dr. Bansal opined that the treatment was reasonable and necessary for the treatment of the work injuries. Claimant also seeks payment/reimbursement of the $3,395.00 IME fee of Dr. Bansal. Although there was not a prior rating by defendants' doctor this is because the defendants denied these claims without any medical opinions to the contrary, and only sought an opinion of any kind after the IME by Dr. Bansal.

REASONING AND CONCLUSIONS OF LAW

The first issue is whether there were work injuries and the extent of the claimant's entitlement to permanent partial disability.

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.

I found that the claimant suffered a 2 percent permanent loss of use of her left lower extremity due to the April 25, 2013 injury. Based on such a finding, the claimant is entitled to 4.4 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o), which is 2 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the leg in that subsection. I found that the claimant suffered a 2 percent permanent loss of use of her right lower extremity due to the October 3, 2013 injury. Based on such a finding, the claimant is entitled to 4.4 weeks of permanent

partial disability benefits under Iowa Code section 85.34(2)(o), which is 2 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the leg in that subsection.

The next issue is healing period benefits.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The claimant's injuries resulted in permanent disability. As such, any temporary benefits herein for the period from that injury would be healing period. Claimant was off work from October 3, 2013 through January 30, 2014 due to the October 3, 2013 injury. Defendants are responsible for paying hearing period benefits for that period.

MEDICAL

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The claimant has medical expenses that were reasonable and necessary for the treatment of the work injuries that are detailed in Exhibit 12. Those expenses are the responsibility of the defendants.

Independent Medical Examination.

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). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

The claimant chose to get an evaluation/examination to establish whether the injuries arose out of and in the course of employment, and whether they caused permanent impairment or disability. The claimant got that exam from Dr. Bansal, who charged a reasonable fee of $3,395.00 for the ratings. Defendants cite to Dart v. Young, No. 14-0231 (Iowa App. Oct. 1, 2014). That case is not apposite here. Herein defendants denied this claim with no medical evidence whatsoever to do so. They did not get any medical opinion of their own until claimant got one from Dr. Bansal to establish her right to benefits and medical care. Defendants shall pay/reimburse the IME fee as appropriate.

ORDER

THEREFORE IT IS ORDERED:

That the defendants shall pay claimant healing period benefits at the weekly rate of four hundred two and 17/100 dollars ($402.17) for the period of October 3, 2013 through January 30, 2014.

That the defendants shall pay claimant four point four (4.4) weeks of permanent partial disability at the weekly rate of four hundred two and 17/100 dollars ($402.17) commencing January 30, 2014.

That the defendants shall pay claimant four point four (4.4) weeks of permanent partial disability at the weekly rate of four hundred nine and 93/100 dollars ($409.93) commencing February 24, 2014.

Defendants shall pay/reimburse as appropriate the IME fee of three thousand three hundred ninety-five and 00/100 dollars ($3,395.00).

Defendants shall pay/reimburse medical expenses as detailed above.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Defendants shall receive credit for benefits previously paid.

Signed and filed this 10th day of August, 2015.

STAN MCELDERRY
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.