BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID ROY SCHERVISH,	:	File No. 5060927
Claimant,	:	
vs.	:	ARBITRATION DECISION
CITY OF DES MOINES,	:	
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1803, 1803.01

STATEMENT OF THE CASE

David Schervish, claimant, filed a petition for arbitration against City of Des Moines, as the self-insured employer. This case came before the undersigned for an arbitration hearing on April 3, 2020, in Des Moines.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 8, including 58 pages, and Defendants' Exhibits A through C. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses testified live. The evidentiary record closed and the case was considered fully submitted on April 3, 2020.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's injury is limited to a left leg or extends beyond the scheduled member to include unscheduled injuries.

2. The extent of claimant's entitlement to permanent partial disability benefits.

FINDINGS OF FACT

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

Claimant, David Schervish, works for the City of Des Moines. On July 20, 2017, Mr. Schervish sustained an admitted left ankle injury while working as a Senior Refuse Collector. On that date, claimant was raking out debris that collected in his truck. As he did so, he stepped backwards onto what he believes was a water bottle and rolled his left ankle. He fell to the ground but was able to get up and complete his shift.

Mr. Schervish's left ankle was uncomfortable after the slip and fall, but he did not think much about his ankle injury during his shift. However, after he returned home, claimant took off his boot and noted significant swelling and bruising of his left ankle. He reported the injury at the commencement of his shift the next day and the City of Des Moines sent claimant for medical care.

Initial medical treatment diagnosed an ankle sprain and initial treatment was conservative in nature. Unfortunately, Mr. Schervish's left ankle did not improve with conservative care and time. Ultimately, defendants scheduled claimant for a one-time evaluation with a foot surgeon, Michael S. Lee, DPM. Dr. Lee performed an independent medical evaluation on April 23, 2018. As a result of that evaluation, Dr. Lee diagnosed claimant with an osteochondral lesion or bone marrow lesion of the medial talar shoulder with a history of a work-related ankle sprain. (Joint Ex. 6, p. 44) Dr. Lee recommended arthroscopic surgery on claimant's left ankle. (Joint Ex. 6, p. 45)

Defendants authorized further treatment through Eric Barp, DPM. Ultimately, Dr. Barp concurred that claimant's left ankle MRI demonstrated an osteochondral lesion of the talar dome. He attempted a steroid injection, but the injection did not provide lasting relief of symptoms. Dr. Barp concurred that surgical intervention was necessary and performed an arthroscopic surgical procedure on claimant's left ankle.

On November 20, 2018, Dr. Barp noted that claimant demonstrated a gait abnormality after surgery. (Joint Ex. 3, p. 12) After an appropriate period of recovery, Dr. Barp released Mr. Schervish to return to work without restrictions in January 2019. (Joint Ex. 3, p. 16) Dr. Barp declared maximum medical improvement on February 19, 2019, confirmed claimant was able to return to work at full duty without permanent restrictions, and assigned a permanent impairment rating for claimant's left ankle injury equal to seven percent of the left foot, five percent of the left leg, and two percent of the whole person. (Joint Ex. 3, p. 17)

Mr. Schervish rolled his ankle again at work on April 8, 2019. (Joint Ex. 1, p. 7) Once again, he experienced an increase in symptoms, reported his injury, and was sent by the City of Des Moines for medical treatment. Ultimately, the second injury did not prove to be a significant or permanent injury. Instead, claimant treated conservatively for the April 2019 left ankle injury. Dr. Barp again treated that injury and on August 14,

2019, declared that claimant achieved maximum medical improvement. Once again, Dr. Barp released claimant to return to work without restrictions and opined that claimant sustained no additional permanent impairment as a result of the second left ankle injury. (Joint Ex. 3, p. 21) I find that the second injury did not cause any permanent change in claimant's condition and that his ongoing symptoms and condition are related to the July 20, 2017 left ankle injury at work.

Claimant sought an independent medical evaluation after receiving Dr. Barp's permanent impairment rating. On November 14, 2019, Charles A. Wenzel, D.O., evaluated Mr. Schervish. (Joint Ex. 8) Dr. Wenzel diagnosed claimant with an osteochondral lesion of the talar dome, post arthroscopy and subchondroplasty on September 5, 2018. Dr. Wenzel also diagnosed claimant with mild left ankle osteoarthritis, as well as compensatory pain in the thoracolumbar spine, left knee, and left hip. (Joint Ex. 8, p. 53)

Although Dr. Wenzel suggested that additional medical treatment might improve claimant's symptoms, claimant has not undergone additional medical care. I find that Dr. Barp, as the surgeon and medical provider that evaluated claimant more frequently during the healing process, was most qualified to determine maximum medical improvement for the left ankle injury. I accept that claimant returned to work without medical restrictions in January 2019 and achieved maximum medical improvement after the July 20, 2017 work injury on or about February 19, 2019. (Joint Ex. 3, p. 17)

Dr. Wenzel identified permanent impairment involving the left ankle, left knee, left hip, and thoracolumbar spine. Specifically, Dr. Wenzel concurred with Dr. Barp and assigned a permanent impairment of the left ankle that is equivalent to seven percent of the left foot, five percent of the left lower extremity, and two percent of the whole person. However, Dr. Wenzel also identified and opined that claimant sustained an additional two percent permanent impairment of the whole person as a result of his pain and symptoms in the left knee, left hip and thoracolumbar spine. (Joint Ex. 8, p. 55)

No other physician has offered an impairment rating for claimant's condition. Accordingly, I find that the opinions of Dr. Barp and Dr. Wenzel are undisputed and that claimant sustained permanent impairment of the left ankle that is equivalent to seven percent of the left foot, five percent of the left leg, and two percent of the whole person. Noting that Dr. Barp is a podiatrist, he could not realistically (and did not) diagnose or offer opinions pertaining to claimant's left knee, left hip, or low back. The only physician offering an opinion about those body parts is Dr. Wenzel.

Accordingly, I accept Dr. Wenzel's undisputed medical opinions as they pertain to claimant's left knee, left hip and low back. Specifically, I accept Dr. Wenzel's opinion that claimant sustained an additional two percent permanent impairment as a result of the compensatory symptoms he developed after his July 2017 left ankle injury at work. Therefore, I find that Mr. Schervish proved he sustained injuries to the left ankle, left knee, left hip and low back and that those injuries produced a permanent functional impairment equivalent to four percent of the whole person. (Joint Ex. 8, p. 55)

After his injury, Mr. Schervish returned to work as a Senior Refuse Collector. He worked in the position without medical restrictions for several months. However, after he re-injured the ankle at work in April 2019, Mr. Schervish elected to bid for a different position with the City of Des Moines. He was successful in his bid and transferred within the City to a new, less physically demanding position. (Claimant's testimony)

At the time of trial, Mr. Schervish worked for the City of Des Moines as a Public Works Assistant. He works as a night dispatch person, serving as a "go-between" for the public and the Public Works crews identifying emergencies and incidents that needed to be serviced by the City. In this position, Mr. Schervish works in the field and works in a call center setting as necessary. (Claimant's testimony)

In his former positon as a Senior Refuse Collector, Mr. Schervish earned approximately $31.00 per hour on the date of injury. At the time of trial, Mr. Schervish earned approximately $28.00 per hour as a Public Works Assistant. (Claimant's testimony) I find, at the time of trial, claimant earns less than he did on the date of injury.

However, I also find that claimant returned to work after the date of injury as a Senior Refuse Collector at the same wages he earned on the date of injury. Although claimant later bid and transferred to a new position within the City of Des Moines, that bid and transfer were voluntary in nature. No physician or podiatrist has imposed permanent work restrictions. No medical provider has imposed work restrictions that precluded claimant from continuing to work as a Senior Refuse Collector as of the date of trial. The City did not request or require claimant to transfer positions. Therefore, I find that the City of Des Moines offered claimant continued employment in a position that paid the same or more than he earned on the date of injury.

CONCLUSIONS OF LAW

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, 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)-(u) or as an unscheduled injury pursuant to the provisions of section 85.34(2)(v). 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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (u) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Having determined that claimant's injury caused sequela symptoms affecting claimant's left knee, left hip and lower back, I must consider whether the injury is limited to a scheduled member injury to the left leg or involves unscheduled injuries. Claimant introduced uncontroverted medical evidence that assigns a permanent impairment rating to the whole person as a result of the left knee, left hip and low back symptoms. Dr. Wenzel causally related these symptoms and permanent impairment of the left knee, left hip and low back to the April 2017 left ankle injury at work. The undersigned is not inclined to reject uncontroverted medical evidence of this type and found no compelling reason to do so in this case. Accordingly, having accepted the uncontroverted permanent impairment rating for the left knee, left hip, and low back, I conclude that claimant established by the preponderance of the evidence that his injury extends into the body as a whole and should be compensated pursuant to Iowa Code section 85.34(2)(v).

Iowa Code section 85.34(2)(v) (2017) provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the

> reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

In this case, claimant returned to work for the City of Des Moines performing the same job duties he performed at the time of his injury. He earned the same wages he earned on the date of injury. Claimant later bid and transferred to a different, less physical, positon with the City of Des Moines. His current position as a Public Works Assistant pays less than his prior position as a Senior Refuse Collector.

However, claimant voluntarily elected to bid to this positon. Claimant returned to his position as a Senior Refuse Collector without medial restrictions after the date of injury. The City offered and returned claimant to his prior positon with the same pay he received on the date of injury. Claimant elected to bid to a different, lower paying positon, within the City of Des Moines.

No physician has imposed permanent work restrictions on claimant or medically disqualified him from returning and continuing to perform work as a Senior Refuse Collector. Therefore, I conclude that claimant returned to work and was offered ongoing work by the City of Des Moines at a wage rate in which claimant would receive the same or greater wages as those earned on the date of injury. As such, I conclude that claimant's current recovery is limited to his permanent functional impairment rating resulting from the injury. Iowa Code section 85.34(2)(v).

Dr. Barp and Dr. Wenzel agree that claimant is entitled to a permanent impairment rating equal to two percent of the whole person as a result of his left ankle injury. Dr. Barp is a podiatrist and is not qualified to offer opinions pertaining to an injury to the left knee, left hip, or low back. On the other hand, Dr. Wenzel is an occupational and environmental medicine physician, who is qualified to diagnose and opine pertaining to the left knee, left hip and low back. Dr. Wenzel assigns an additional two percent of the whole person as a result of symptoms that developed in claimant's left knee, left hip and lower back as a result of the left ankle injury on July 20, 2017. No other physician considers or offers an opinion or permanent impairment rating for claimant's left knee, left hip, or low back. Therefore, I accepted the impairment rating offered by Dr. Wenzel and found that claimant proved a four percent permanent functional impairment of the whole person as a result of the July 20, 2017 work injury.

This finding entitles claimant to an award equivalent to four percent of the whole person. Pursuant to Iowa Code section 85.34(2)(v), unscheduled injuries are

compensated based upon a 500-week schedule. Four percent of 500 weeks is 20 weeks. Therefore, I conclude that claimant is currently entitled to an award of 20 weeks of permanent partial disability benefits as a result of the July 20, 2017 work injury.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant twenty (20) weeks of permanent partial disability benefits commencing on January 3, 2019.

Weekly benefits shall be paid at the stipulated rate of eight hundred and 78/100 dollars ($800.78).

Defendant shall be entitled to a credit for all permanent disability benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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 (Appeal April 2018).

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 __17th___ day of April, 2020.

WILLIAM H. GRELL
DEPUTY WORKERS' COMPENSATION COMMISSIONER

The parties have been served, as follows:

Richard Schmidt (via WCES)

Luke DeSmet (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.