BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RONALD D. CARR,

Claimant,

vs.

KIRKWOOD COMMUNITY COLLEGE,

Employer,

and

THE PHOENIX INS. COMPANY,

Insurance Carrier,

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5054595

ARBITRATION

DECISION

Head Note Nos.: 1402.40; 1402.60; 1803; 1803.1; 2907; 3202

STATEMENT OF THE CASE

Ronald Carr, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Kirkwood Community College, as the employer and Phoenix Insurance Company as the insurance carrier. Claimant also filed a claim against the Second Injury Fund of Iowa.

An arbitration hearing was held on March 1, 2017 in Des Moines, Iowa. 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.

Claimant testified on his own behalf. Claimant also called his wife, Ann Carr, to testify. Defendants did not call any witnesses to testify live.

The evidentiary record also includes joint exhibits 1 through 7, claimant's exhibits 1 through 20 and defendants' exhibits A through F, and Second Injury Fund exhibits AA through BB. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties' briefing deadline was established as March 22, 2017. Upon the filing of post-hearing briefs, this case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's injury is limited to a left leg scheduled member injury or includes mental injuries such that the claim should be compensated with industrial disability as an unscheduled injury.

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

3. Claimant's entitlement to past medical expenses.

4. Claimant's entitlement to reimbursement for an independent medical evaluation.

5. Whether defendants were entitled to a credit for overpayment of temporary total disability benefits.

6. Whether defendants should be ordered to pay penalty benefits for an alleged unreasonable delay or denial of benefits due to an alleged underpayment of weekly rate.

7. Whether claimant has established a qualifying first injury for purposes of qualifying for Second Injury Fund benefits.

8. Whether claimant has established a qualifying second injury for purposes of qualifying for Second Injury Fund benefits.

9. Claimant's entitlement to Second injury Fund benefits, if any.

10. Whether costs should be assessed any party.

In his post-hearing brief, claimant notes, "Defendant Kirkwood and Claimant have reached an agreement that credit and penalty are no longer issues for the deputy to decide." The employer and insurance carrier's post hearing brief is silent as to both issues. It is assumed that the issue of credit for any alleged overpayment of temporary disability or any claim for penalty benefits are resolved and withdrawn by the parties as disputed issues. If this assumption is incorrect, the parties should file an application for rehearing. Otherwise, no findings of fact or conclusions of law will be made with respect to the issue of credit or penalty benefits.

FINDINGS OF FACT

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

Ronald Carr is a 46 year old gentleman, who lives in Cedar Rapids, Iowa. Mr. Carr sustained a horrific left foot and leg injury as a result of a work accident on November 3, 2013. At that time, Mr. Carr was working as an instructor for Kirkwood Community College in Cedar Rapids. Specifically, he was in the field training new semi drivers. He was attempting to explain backing procedures to dock a semi when the student driver backed the semi onto claimant's left foot and ankle.

Mr. Carr sustained very significant injuries to his left foot and ankle as a result of this accident, including crush injuries, dislocation of bones in his foot, and a de-gloving type injury. Photos of his injuries are contained at exhibit 20 and demonstrate the significance of the left foot and leg injuries. Mr. Carr required five surgical procedures to repair his left foot and ankle, including external fixators, skin grafting, hardware removal, and surgical cleaning of infection. Mr. Carr's recovery has been extended and difficult.

Despite the significant medical care, Mr. Carr describes ongoing symptoms in his left foot and ankle, including a feeling of constant pressure, "zingers" or stabbing pains periodically, and sometimes a dull ache like the feeling of a toothache in his left foot and ankle. Mr. Carr credibly testified that he never experiences a "pain-free" day since the November 3, 2013 work injury.

Mr. Carr has difficulties with sleep as a result of his injury and symptoms. He estimates that he averages approximately six hours of "broken" sleep per night. He may require bone fusion in his left foot and ankle into the future if his symptoms deteriorate or worsen.

However, his treating pain specialist, Douglas T. Sedlacek, M.D., declared him to have achieved maximum medical improvement on November 30, 2015. (Joint Ex. 7, p. 119) In a report dated February 3, 2016, Dr. Sedlacek noted that claimant's only symptomatic complaints revolved around the left ankle. (Jt. Ex. 7, p. 120)

In October 2016, Dr. Sedlacek authored a progress note, indicating claimant was reporting increased back pain and hip pain, as well as right knee pain. Dr. Sedlacek indicated, "I suspect [these are] secondary to his gait." (Jt. Ex. 7, p. 124) However, neither Dr. Sedlacek nor any other physician opined that the increased back pain, hip pain, and right knee pain were causally related to or caused by the left foot and ankle injury within a reasonable degree of medical certainty.

No physician has offered an opinion that claimant sustained permanent aggravations to his back, hips, or right knee as a result of the November 3, 2013 work injury. No physician has opined that claimant sustained permanent impairment of his back, hips, or right knee as a result of the November 3, 2013 work injury. Although claimant testified that these symptoms have increased since this November 3, 2013 work injury, I find that claimant failed to prove a permanent injury or permanent aggravation to his low back, hips, or right knee as a result of the November 3, 2013 work injury.

The Second Injury Fund also urges a finding that claimant sustained a permanent injury to his back or hips and that the November 3, 2013 injury should be compensated as a body as a whole injury. Again, the Fund did not introduce any evidence to demonstrate that there has been an injury to any anatomical site other than claimant's left foot or ankle as a result of the November 3, 2013 work accident. Although I find that claimant has restricted range of motion in his left ankle that causes an altered gait, I specifically find that the only permanent injuries sustained as a result of the November 3, 2013 work accident are limited to and confined to the left foot and ankle.

Two physicians have offered opinions about claimant's permanent impairment related to the November 3, 2013 work accident. In May 7, 2015 report, the authorized treating surgeon, Scott R. Ekroth, M.D., opines that claimant sustained a 36 percent permanent impairment of the whole person as a result of the November 3, 2013 work injury, which contained an impairment rating for an altered gait. (Claimant's Ex. 4, p. 26) When asked to reconsider this impairment rating, Dr. Ekroth removed his impairment rating for the gait derangement and opined that claimant sustained a 28 percent permanent impairment of the left lower extremity, but he also reiterated that claimant has a gait abnormality following the work injury. (Claimant's Ex. 4, p. 27)

Claimant's independent medical evaluator, Mark C. Taylor, M.D., also identified an altered gait. Dr. Taylor evaluated claimant on October 21, 2015 and opines that claimant sustained a 17 percent permanent impairment of the whole person as a result of the November 3, 2013 work accident. Dr. Taylor explained some of the requirements and limitations of the AMA Guides and their applicability to claimant's situation. Having reviewed both physicians' ratings, I note that Dr. Ekroth and Dr. Taylor provide similar ratings but Dr. Taylor provides a more thorough explanation of how he reached his impairment rating. I find Dr. Taylor's impairment rating to be credible and accurate. Therefore, I find that claimant has proven he sustained a 17 percent permanent impairment of the whole person, which converts to a 42 percent permanent impairment of the left lower extremity. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 17-3, p. 527.

Mr. Carr asserts a claim against the Second Injury Fund of Iowa and asserts that he sustained a first qualifying injury while in the United States Army. Specifically, claimant asserts that he sustained a right knee injury in 1992. Claimant's medical records and service records support a finding that he sustained a permanent right knee injury during his military service. (Joint Ex. 2, p. 5; Claimant's Ex. 1, p. 20; Claimant's Ex. 5, pp. 33, 35)

The Second Injury Fund correctly points out that a veterans' administration disability is determined under quite different standards than those in an Iowa workers' compensation claim. Yet, it is undeniable that claimant was determined to have sustained a 10 percent disability as a result of his right knee injury during his military service. (Claimant's Ex. 5, p. 35) While the extent of disability does not convert directly or easily to a permanent impairment rating under the AMA Guides, the military disability

finding certainly suggests that claimant sustained a permanent right knee injury as a result of his military service.

Moreover, claimant offered the opinion of Dr. Taylor, who found a 3 percent permanent impairment of the right lower extremity as a result of the prior military injury. (Claimant's Ex. 1, p. 20) Dr. Taylor's impairment rating is not rebutted in this evidentiary record and is found to be convincing. Therefore, I find that claimant has proven he sustained a permanent right knee injury during his military service in 1992 and that he sustained a three percent permanent impairment of the right leg as a result of that injury.

As a result of left foot and ankle injury, claimant requires significant permanent restrictions. According to Dr. Taylor claimant is restricted to lifting no more than 25-30 pounds on an occasional basis. He must lift at or above the knee level, climb stairs one at a time, avoid ladders or kneeling, and is permitted to use a cane when walking away from his residence. (Claimant's Ex. 1, p. 20) Ultimately, the treating surgeon, Dr. Ekroth, adopted these same restrictions for claimant's left foot and ankle injuries. (Claimant's Ex. 4, p. 32) I find these restrictions to be reasonable and accept them as accurate.

With respect to the prior right knee injury, claimant was able to pursue gainful employment for many years between 1992 and his injury in November 2013. Nevertheless, Dr. Taylor opines that claimant should avoid crawling, squat only occasionally, kneel on a rare basis, and restrict his walking of stairs to only an occasional basis and should avoid uneven surfaces or inclines. (Claimant's Ex. 1, pp. 20-21) Given the nature of claimant's right knee injury, I find the recommended restrictions to be reasonable, though claimant likely exceeded these restrictions prior to November 2013.

Having reached these findings of fact, I must consider the 1992 right knee injury and the 2013 left foot and ankle injuries to determine the combined effect of these injuries on claimant's future earning capacity. In this case, claimant is of an age where he can retrain and pursue other employment options. Claimant is demonstrating good motivation to pursue further education and it appears he will ultimately succeed and obtain a degree permitting him to identify employment within the computer industry. He specifically contemplates working at an IT help desk after completing his schooling.

Mr. Carr has sustained a significant left foot and ankle injury. The effects of that injury, coupled with his prior right knee injury produce a moderate impact on his ability to return to work and earn into the future. It is not realistic to believe claimant will be able to return to his former employment as a truck driver or instructor. Claimant has proven he sustained a loss of earning capacity as a result of the combined effects of these injuries. Considering claimant's age, educational background, employment history, permanent impairment, permanent restrictions, lack of motivation, physical ability to return to some of his prior employment, ability to retrain, as well as all other factors of industrial disability as outlined by the Iowa Supreme Court, I find that claimant

has proven a 50 percent loss of future earning capacity as a result of the combined effects of the 1992 right knee injury and the November 3, 2013 left foot and ankle injuries sustained at Kirkwood Community College.

Mr. Carr also seeks payment, or reimbursement, of some past medical expenses. Claimant's past medical expenses are itemized at claimant's exhibit 18. Defendants, in their post-hearing brief, concede that the medical charges from Linn County Anesthesiologists and Walgreens are causally related and authorized medical expenses. Defendants specifically agree to pay those charges.

However, defendants dispute charges itemized as occurring at St. Luke's Hospital on February 1, 2017 totaling $230.00 and two charges at the VA Hospital for dates of service on June 2, 2016 and June 6, 2016. (Claimant's Ex. 18, p. 82) The charges incurred at St. Luke's Hospital on February 1, 2017 are not detailed on any billing statement and it cannot be corroborated that these charges are causally related to the November 3, 2013 work injury.

The VA charges sought by claimant for medical treatment on June 2, 2016 and June 6, 2016 relate to treatment of the right knee. As noted above, claimant has not established that he sustained a permanent aggravation of his right knee as a result of the November 3, 2013 work accident. No physician has opined that the treatment received on June 2, 2016 or June 6, 2016 at the VA Hospital are causally related to the November 3, 2013 work accident. Therefore, I find that claimant has not proven that the St. Luke's Hospital or the VA Hospital charges are causally related to the November 3, 2013 work injury at Kirkwood Community College.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

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)-(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). 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).

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) - (t) 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).

In this case, I found that claimant did not prove a permanent aggravation or disability of the back, hip or right knee as a result of the November 3, 2013 injury. Instead, I found that claimant's injuries were limited to the left foot and ankle. As such, I conclude that claimant's November 3, 2013 injuries should be compensated as a scheduled member injury.

Claimant's injuries involved the left ankle. An injury to the left ankle is considered an injury to the left leg for purposes of awarding benefits on the schedule. Hildreth v. The All Star Group Companies, File No. 5027979 (Arb. November 2016). Therefore, I conclude that Mr. Carr proved permanent disability related to his left leg as a result of the November 3, 2013 work injury.

Having found the impairment rating of Dr. Taylor most convincing and having converted that impairment rating to the equivalent of 42 percent of the left leg, I conclude that claimant is entitled to an award of permanent partial disability benefits against the employer and insurance carrier equivalent to 42 percent of the left leg. The Iowa legislature has established a 220 week schedule for leg injuries. Iowa Code section 85.34(2)(o). Claimant 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); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969). Forty-two (42) percent of 220 weeks equals 92.4 weeks. Claimant is, therefore, entitled to an award of 92.4 weeks of permanent partial disability benefits against the employer and insurance carrier. Iowa Code section 85.34(2)(o), (v).

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

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 R. App. P. 6.14(6). Therefore, claimant bears the burden to establish all elements of his Second Injury Fund claim.

In this case, I found that claimant proved a first qualifying injury to his right knee while serving in the military. Mr. Carr required medical treatment of that knee and received a disability pension from the military as a result of a finding that he sustained a permanent disability. Moreover, Dr. Taylor offered an unrebutted medical opinion that claimant sustained a three percent permanent impairment of the right knee as a result of his injury in the military in 1992. Therefore, I conclude that claimant met the initial requirement to establish a first qualifying injury.

The Fund disputed whether the second injury was a qualifying injury. Specifically, the Fund argued that claimant sustained an aggravation of his back and/or hip conditions as a result of the November 3, 2013 work injury, such that it was not a scheduled member injury. As explained above, I found that the November 3, 2013 work injury was limited and confined to the left foot and ankle. Therefore, I conclude that claimant has established a qualifying second injury.

Mr. Carr has also proven he sustained permanent disability related to each of these qualifying injuries. Therefore, I conclude that Mr. Carr has proven entitlement to Second Injury Fund Benefits. Iowa Code section 85.64. Having determined that Mr. Carr is entitled to benefits from the Second Injury Fund, I must determine claimant's industrial disability present after the second qualifying injury.

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae

which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Having found that claimant proved a 50 percent loss of future earning capacity as a result of the combined effects of the 1992 right knee injury and the November 3, 2013 left foot and ankle injury, I conclude that claimant is entitled to 250 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

However, the Second Injury Fund is entitled to a credit against this industrial disability for the permanent loss of each of the first and second qualifying injuries. Iowa Code section 85.64. In this instance, the first qualifying injury resulted in a 3 percent permanent disability of the right leg. As noted above, the leg is compensated on a 220 week basis. Therefore, the Second Injury Fund is entitled to a credit equivalent to 6.6 weeks of permanent partial disability benefits for the first qualifying injury. As noted above, the employer and insurance carrier are responsible for a 42 percent permanent disability of the left leg, or 92.4 weeks of permanent partial disability benefits.

In total, the Second Injury Fund is entitled to a credit equivalent to 99 weeks of permanent disability. In total, the Second Injury Fund is obligated to pay claimant 151 weeks of benefits. However, the Fund's obligation does not commence until their credit is exhausted.

The parties stipulated that the benefits owed by the employer and insurance carrier should commence on May 8, 2015. (Hearing Report) Therefore, the Second Injury Fund's credit extends from May 8, 2015 through March 31, 2017. Fund liability commences on April 1, 2017 and continues until the Fund's weekly benefits obligations are exhausted.

Mr. Carr seeks an award of past medical expenses as itemized at claimant's exhibit 18. 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).

In this instance, the defendants concede liability for authorized medical care through Linn County Anesthesiologists and Walgreens as outlined in claimant's exhibit 18. Defendants will be ordered to pay those charges pursuant to Iowa Code section 85.27. However, claimant failed to prove that the remainder of the medical charges itemized in claimant's exhibit 18 are causally related to the November 3, 2013 work injury. Therefore, claimant has failed to prove entitlement to the claimed charges for medical services rendered at St. Luke's Hospital on February 1, 2017 or at the VA Hospital on June 2, 2016 or June 6, 2016.

Mr. Carr also seeks reimbursement for his independent medical evaluation performed by Dr. Taylor on October 21, 2015. Section 85.39 states in pertinent part:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. . . .
>
> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Section 85.39 entitles an injured worker 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. Proof of employer's liability for the alleged injury, is not a requisite for entitlement for an 85.39 IME. Dodd v. Fleetguard, 759 N.W.2d 133 (Iowa App. 2008).

Furthermore, the Court of Appeals in Dodd v. Fleetguard, 759 N.W.2d 133 (Iowa App. 2008) held that an employer could be held liable for an examination when the injury did not arise out of or in the course of employment. Dodd at 140. The court cited the following language from IBP, Inc. v. Harker, 633 N.W.2d 322, 327 (Iowa 2001).

> The quid pro quo for these employer rights is the right of the employee to have a physician of his choosing present at any IME conducted at the employer's request and to have an IME conducted by a doctor of his own choice if the physician retained by the employer has given a disability

> rating unacceptable to the employee. In an apparent attempt to equalize the generally unequal financial positions of the parties, the legislature has said that the employer must pay for the employee's IME under the latter circumstances.

Harker at 327 (internal citations omitted).

In City of Davenport v. Newcomb, 820 N.W.2d 882 (Iowa App. 2012), the employer appealed the denial of an examination under Iowa Code section 85.39. This agency had ruled that because the employer denied liability for the claim the employer was not entitled to a section 85.39 IME. The Newcomb court reversed on this issue stating:

> Our supreme court has held that *reimbursement* for a medical examination under Iowa Code section 85.39 cannot be ordered until liability for an injury has been established. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980). In addition, the court has held an employer's "right to control treatment . . . is lost if the employer disputes liability." Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 575 (Iowa 2006). Although an admission of liability affects the employer's right to control treatment and an employee's ability to receive compensation for an employee-requested IME, we do not find a denial of liability wholly precludes an IME under Iowa Code section 85.39. In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination. *See* Daugherty v. Scandia Coal Co., 206 Iowa 120, 124, 219 N.W. 65, 67 (1928) (recognizing the purpose of what is now Iowa Code section 85.39 is "doubtless for the purpose of enabling the employer to ascertain the extent and character of the injury").

Newcomb, pp. 18, 19 (emphases in original).

In Newcomb, the court was concerned that the employer would not be able to obtain medical evidence to determine causation. The court recognized that one of the purposes of an IME is to determine causation. "In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination." Newcomb, p. 19. In Dodd, the court was concerned about the claimant being able to obtain medical evidence. Claimant is entitled to a section 85.39 IME, provided the employer has retained a physician who has made an evaluation of permanent disability that is believed to be too low by the claimant.

In this instance, the authorized treating surgeon, Dr. Ekroth issued a permanent impairment rating on May 7, 2015. Claimant did not obtain his independent medical evaluation until October 21, 2015. Claimant has established the necessary statutory prerequisites and is entitlement to reimbursement of Dr. Taylor's independent medical evaluation fees for his initial evaluation totaling $3,950.00.

Claimant seeks assessment of costs. Claimant seeks assessment of his $100.00 filing fee. This is reasonable and permitted pursuant to 876 IAC 4.33(7).

Claimant seeks assessment of reimbursement of a deposition transcript fee. The employer and insurance carrier elected to introduce the full deposition transcript as a hearing exhibit. Therefore, I assess claimant's expense totaling $331.70 pursuant to 876 IAC 4.33(2).

Claimant seeks assessment of the expert fees he incurred for reports from Dr. Taylor. I already awarded the vast majority of these expenses pursuant to Iowa Code section 85.39. I do not find it reasonable to assess the remainder of the expense for a second evaluation, even for purposes of the Second Injury Fund claim. Moreover, Dr. Taylor's billing statement does not delineate what portion of the second charge is for an evaluation and what portion of that fee is for drafting a report. I conclude that the $500.00 charge from Dr. Taylor for services on September 28, 2016 should not be assessed.

Therefore, I conclude that a total of $431.70 against the employer and insurance carrier as costs of this action pursuant to 876 IAC 4.33.

ORDER

THEREFORE, IT IS ORDERED:

The employer and insurance carrier shall pay claimant ninety-two point four (92.4) weeks of permanent partial disability commencing on May 8, 2015 at the stipulated weekly rate of five hundred forty-eight and 86/100 dollars ($548.86).

The employer and insurance carrier shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30.

The employer and insurance carrier shall be entitled to credit for all weekly benefits paid to date pursuant to the parties' stipulation in the hearing report, as itemized in claimant's exhibit 17.

The employer and insurance carrier shall pay, reimburse, or otherwise satisfy and hold claimant harmless for past medical expenses incurred at Linn County Anesthesiologists and Walgreens, as itemized in claimant's exhibit 18.

The employer and insurance carrier shall reimburse claimant's independent medical evaluation fee totaling three thousand nine hundred fifty and no/100 dollars ($3,950.00) pursuant to Iowa Code section 85.39.

The Second Injury Fund shall pay claimant one hundred fifty-one (151) weeks of benefits at the stipulated weekly rate of five hundred forty-eight and 86/100 dollars ($548.86) commencing on April 1, 2017.

Costs totaling four hundred thirty-one and 70/100 dollars ($431.70) are assessed against the employer and insurance carrier.

The employer and insurance carrier 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 26th day of October, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/kjw

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.