

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASON OSMUN,

Claimant,

vs.

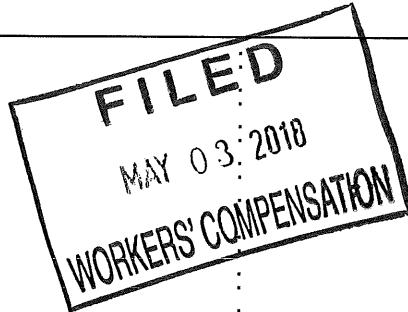
REM IOWA,

Employer,

and

NEW HAMPSHIRE INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5057510

ARBITRATION

DECISION

Head Note No.: 1402.40, 1803

STATEMENT OF THE CASE

Jason Osmun, claimant, filed a petition in arbitration seeking workers' compensation benefits from REM Iowa, employer and New Hampshire Insurance Company, insurance carrier, as defendants. Hearing was held on April 30, 2018 in Des Moines, Iowa.

Claimant, Jason Osmun, was the only witness to testify live at trial. The evidentiary record also includes medical treatment exhibits 1-5 and defendants' exhibits A-B. Claimant did not introduce any additional exhibits. Claimant understood that he had the right to hire an attorney, but he opted to proceed without an attorney.

Prior to the hearing claimant was paid 4.4 weeks of permanent partial disability (PPD) benefits at the rate of one hundred sixty and no/100 dollars (\$160.00) per week. Defendants stated that those benefits should have been paid at the state minimum rate of \$200.95. Defendants will voluntarily issue payment for the underpayment, plus interest.

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.

ISSUE

The parties submitted the following issue for resolution:

The extent of permanent disability claimant sustained as a result of the stipulated October 19, 2014 work injury to his right knee.

FINDINGS OF FACT

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

On October 19, 2014, Jason Osmun sustained an injury to his right knee which arose out of and in the course of his employment with the defendant employer. The only issue in dispute is whether Mr. Osmun is entitled to any permanent partial disability benefits beyond those which he has previously received. (Hearing Report)

On the date of the injury, Mr. Osmun was working when he was kicked in the right knee by a client. The initial diagnosis was knee sprain and strain. He received conservative treatment and was eventually referred to an orthopedic surgeon. (Exhibit 2, pages 1-12)

It should be noted that Mr. Osmun did have a prior right knee injury. According to the records it appears he sustained a contusion to his right knee in 1991. He continued to experience some symptoms in his right knee. In November of 2001 he was involved in a motor vehicle accident. An MRI of his right knee revealed a tear of the posterior horn of the medial meniscus and joint effusion. (Ex. 1, pp. 1-4)

On March 31, 2015, Mr. Osmun saw David S. Tearse, M.D. Mr. Osmun reported persistent symptoms since the date of injury. He had pain in the anteromedial aspect of his right knee. He experienced sharp pains going up and down stairs. He also had soreness and stiffness after walking. The doctor reported that although Mr. Osmun had been given some restrictions by the previous provider, these restrictions had not prevented him from performing his regular work duty. Dr. Tearse's impression was right knee exacerbation of medial compartment degenerative joint disease (DJD), with possible medial meniscus tear. The doctor recommended an MRI. (Ex. 3, pp. 1-5)

The MRI showed evidence of the previous medial meniscectomy. Dr. Tearse felt that Mr. Osmun had an exacerbation of underlying DJD. He recommended ice, ibuprofen, and physical therapy. (Ex. 3, pp. 6-7) Mr. Osmun continued to receive conservative treatment as recommended by Dr. Tearse. (Ex. 3, pp. 8-10; Ex. 5)

Mr. Osmun reported some problems with his foot and ankle. However, Dr. Tearse stated that those problems were not work related. (Ex. 3, p. 10)

Mr. Osmun saw Dr. Tearse on March 10, 2016. He reported that his biggest problem was that his knee felt unstable. He reported that it popped. His knee also felt

stiff and weak after sitting for periods of time. The doctor's impression was right knee exacerbation of osteoarthritis with instability related to pain, weakness and underlying anterior cruciate ligament (ACL) deficiency. Dr. Tearse stated that Mr. Osmun's symptoms of pain continued to be related to his exacerbation of his underlying osteoarthritis. However, he did not feel the anterior cruciate ligament injury was work related. He also stated that his recommendations for a brace, heel wedge, and glucosamine were related to the work injury. (Ex. 3, p. 13)

On July 29, 2016, Dr. Tearse authored a letter wherein he answered questions posed to him. Dr. Tearse stated:

I did state in March of 2016 that I felt Mr. Osmun's ACL injury was not work related. Based primarily on the fact that he'd had ongoing degenerative problems and underwent previous surgery, I felt his ACL condition was likely chronic as well. As Mr. Osmun stated, I reviewed his records and re-evaluated Mr. Osmun, as well as discussed with him in more depth, his previous knee history. He states he was having no significant episodes of instability prior to his work related injury of 10/19/14. While I cannot guarantee that he may not have had some ACL involvement prior to that date, it does appear to be [sic] me, within a reasonable degree of medical certainty, that the majority of his ACL related symptoms began with that 10/19/14 injury. Therefore it is my opinion that his current instability symptoms, which are secondary to anterior cruciate ligament deficient knee, are substantially caused by his 10/19/14 work injury.

(Ex. 3, p. 17)

The last time Mr. Osmun saw Dr. Tearse was on April 5, 2017. The purpose of the visit was for a final impairment rating. Mr. Osmun reported that overall his knee had not been too bad. He had some episodes where he felt like his knee may be swollen. He wears a brace when he is active and is fairly cautious with his knee. Mr. Osmun recommended he continue with low impact exercise, weight loss, and use of his brace as needed. Dr. Tearse placed Mr. Osmun at maximum medical improvement (MMI) as of April 28, 2016. He felt that Mr. Osmun did not require any permanent work restrictions. Dr. Tearse assigned 2 percent impairment of the right lower extremity. (Ex. 3, pp. 19-20) At the hearing, Mr. Osmun testified that he told Dr. Tearse he did not want any restrictions placed on his activities. (Testimony)

Mr. Osmun has not sought any treatment for his right knee since his last appointment with Dr. Tearse. He does still wear his knee brace on occasion. (Testimony)

Mr. Osmun testified that when he saw Dr. Tearse in June of 2015 the doctor told Mr. Osmun that an ACL repair would likely need to be performed. However, because

he had previously had a knee surgery they would try to put off the surgery as long as possible. (Testimony)

At the time of the injury, Mr. Osmun was working part time at the defendant employer's while attending school full time. At the time of the hearing, Mr. Osmun was working as the controller of a construction company. He held an office job where he performed payroll and human resources duties. (Testimony)

Mr. Osmun continues to have some symptoms with his right knee. He notices that his knee is stiffer than it used to be. He has continued pain, but he does not take medication. Prior to the injury, Mr. Osmun was able to golf and go for long walks. His knee injury has affected his ability to participate in these activities. He is no longer able to golf or take long walks. (Testimony)

Mr. Osmun testified that sometime in late 2016, early 2017 he did have an occasion where his right knee collapsed on him, causing him to fall. He went to an urgent care clinic to have it checked out to make sure no additional damage had been done. Following that event his knee returned to baseline. Since that time his knee has given out on him, but not to the extent where he has fallen. (Testimony)

Dr. Tearse has offered the only expert opinion regarding permanent impairment. I find Dr. Tearse's opinion to be persuasive. I find that Mr. Osmun has sustained 2 percent permanent impairment to his right lower extremity.

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 6.14(6).

The only disputed issue in this case is claimant's entitlement to permanent partial disability benefits. The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2), the disability is considered a scheduled member disability. "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). A scheduled disability is evaluated solely by the functional method and the compensation payable is limited to the number of weeks 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). Pursuant to Iowa Code section 85.34(2)(u), the commissioner may equitably prorate compensation payable in those cases where the functional loss is less than 100 percent. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Because the parties stipulated that claimant's injury was to his right lower extremity, his entitlement to permanent partial disability is determined pursuant to Iowa

Code section 85.34(o). 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):

[T]he 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.

Based on the above findings of fact, I conclude that Mr. Osmun has sustained 2 percent impairment to his right lower extremity. As such, he is entitled to 4.4 weeks of permanent partial disability benefits at the stipulated rate of two hundred and 95/100 dollars (\$200.95).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of two hundred and 95/100 dollars (\$200.95).

Defendants shall pay four point four (4.4) weeks of permanent partial disability benefits commencing on October 20, 2014.

Defendants shall be entitled to credit for all weekly benefits paid to date.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Pursuant to Iowa Code section 85.27, claimant remains entitled to any causally connected medical care.

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 3rd day of May, 2018.



ERIN Q. PALS
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.