

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GREGORY GUSTAFSON,

FILED

Claimant,

DEC 21 2017

vs.

WORKERS COMPENSATION

File No. 5055728

BOONE FREIGHT LINES, INC.,

ARBITRATION DECISION

Employer,

and

GREAT WEST CASUALTY CO.,

Insurance Carrier,
Defendants.

Head Note Nos.: 1803, 4005

STATEMENT OF THE CASE

Gregory Gustafson, claimant, filed a petition in arbitration seeking workers' compensation benefits against Boone Freight Lines, Inc., employer, and Great West Casualty Co, insurance carrier, for a work injury date of December 28, 2015.

This case was heard on August 28, 2017, in Davenport, Iowa. The case was considered fully submitted on September 18, 2017, upon the simultaneous filing of briefs.

The record consists of Claimant's Exhibits 1-8, Joint Exhibits 1-6, Defendants' Exhibits A-E, testimony of the claimant and Kevin Pearson.

ISSUES

Extent of functional impairment to the right upper extremity;

Whether claimant is entitled to penalty benefits for late payments of both temporary total disability and permanent partial disability; and

The assessment of costs.

STIPULATIONS

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.

The parties agree claimant sustained a work-related injury on or about December 28, 2015. As a result of the injury, claimant experienced a period of temporary disability entitlement which is no longer in dispute. Further, claimant suffered a permanent disability; however, the parties dispute the extent of that disability.

They agree that the disability is a scheduled member injury to the right lower extremity.

At the time of the injury, the claimant's gross weekly earnings were \$902.78 per week. He was single and entitled to 2 exemptions. Therefore, the weekly benefit rate is \$558.94.

Prior to the hearing, the claimant was paid temporary benefits from December 29, 2015 through June 27, 2016. Permanent partial disability benefits commenced on June 28, 2016, and were paid until October 6, 2016. A new temporary total benefit period commenced on October 7, 2016, and continued to March 23, 2017. Permanent partial disability benefits were paid from March 24, 2017 through July 10, 2017.

Any additional permanent partial disability benefits would commence on July 11, 2017.

FINDINGS OF FACT

Claimant was a 47-year-old person at the time of the hearing. His educational background includes high school and 10-week course at Iowa Central to become a truck driver. At the time of his injury, he claimed 2 child dependents. The parties stipulated that claimant was entitled to only 2 exemptions and the rate is calculated accordingly.

His past work history includes primarily over-the-road trucking. (Claimant's Exhibit 3:18)

Claimant began working for defendant in March 2015. He started as an LTL Driver. (Cl. Ex 4) The company has since downsized and he now does load truck driving. As a driver, he must be able to sit for several hours at a time, climb in and out of his tractor several times a day, lift and carry up to 100 pounds, and work at a brisk pace. (Cl. Ex. 4)

There are no past medical injuries or treatment relevant to the case at hand.

On or about December 28, 2015, claimant slipped on ice while closing the door of his trailer. His ankle slid out from underneath him. He heard a loud pop and had immediate pain. He was taken to Boone County Hospital emergency department. (JE 1:1) He was diagnosed with a broken right ankle and significant ligamentous damage. (JE 1:5; 1:15) He was splinted, provided pain medication, and discharged. (JE 1:3) He was ordered to be non-weightbearing and instructed to follow up with an orthopaedic doctor of his choice within the week. (JE 1:5)

Claimant was able to get in to see Bryan Warne, M.D. X-rays showed a syndesmosis disruption. (JE 3:25; 2:17) He underwent surgery with Dr. Warne on December 30, 2015, to tie the fracture together. (JE 3:25; 2:18-19) He was discharged the following day. (JE 2:17) Claimant was initially placed in a cast and then a boot for four months. (JE 3:35-40)

He had ongoing symptoms of pain. During the April 26, 2016, visit, claimant expressed concerns about operating a gas pedal and machinery due to pain and lack of range of motion. (JE 3:40) He was kept off work and sent to physical therapy.

After two months of physical therapy, claimant returned to Dr. Warne. (JE 3:43) Claimant felt ready to return to work. He had some pain in the sole of his foot along with some underlying arthritis; however, there was no instability, no pain with stress testing, and no pain with the squeeze test. (JE 3:43)

Dr. Warne concluded that the claimant's ankle would never "be perfect with the degenerative changes." (JE 3:43) Dr. Warne sent claimant to a podiatrist for evaluation of the possible plantar fasciitis. (JE 3:43) Claimant was then released to regular duty on June 28, 2016. (Ex. 3:48)

On July 8, 2016, Erin Nelson, DPM, saw claimant for the plantar fasciitis. (JE 3:46) Claimant reported shooting pain in the right foot and arch along with some lingering ankle pain. (JE 3:46) Upon examination, claimant exhibited pain with dorsiflexion of the ankle joint, pain on the plantar medial heel, on the anterior ankle joint. (JE 3:47) He walked with a mild antalgic gait. (JE 3:47)

Claimant was instructed on stretching, icing, anti-inflammatories, and proper footwear. An injection was administered to the right heel. (JE 3:47) Dr. Nelson suggested claimant might be a good candidate for a custom orthotic. He was fitted for an orthotic but one was never made. Claimant believed that the approval was not granted. He did obtain a brace, albeit not a custom one, from Dr. Warne.

On July 28, 2016, claimant visited Dr. Warne for an impairment rating. (JE 3:48A) Dr. Warne believed claimant would likely need an ankle fusion or ankle replacement "in his distant future." (JE 3:48A) Claimant exhibited popping, grinding, and reduced range of motion. (JE 3:48A) He had good strength but ongoing pain. (JE 3:48A) Dr. Warne also wrote he believed claimant's plantar fasciitis stemmed from claimant's work injury.

On September 1, 2016, claimant began to treat with Phinit Phistikul M.D. (JE 4) Dr. Phistikul noted a small posterior malleolus fragment and suggested that claimant might need to undergo a diagnostic right ankle arthroscopy and debridement. (JE 4:50) Dr. Phistikul encouraged claimant to continue to work full duties with no restrictions. (JE 4:50)

On his return visit on September 8, 2016, claimant reported that he was working full time but that he continued to have pain climbing in and out of the truck. (JE 4:55) At the recommendation of Dr. Phistikul, claimant underwent surgery on October 7, 2016. (JE 4:66) The ankle joint was found to be "extremely fibrotic" with extensive scar tissue at the anterior aspect of the ankle along with damaged cartilage. (JE 4:69)

Post-operatively, he continued to have pain. The medical records note that he stopped smoking around September, but during hearing claimant admitted he had resumed. (JE 4:74) He was discharged with assistive devices and transitioned to a boot on or about November 10, 2016. (JE 4:78)

On December 22, 2016, claimant returned for a checkup with Dr. Phistikul. (JE 4:80) Claimant was still in physical therapy. Dr. Phistikul was optimistic of claimant's recovery and recommended claimant wean from ankle boot to ankle brace. (JE 4:83) Claimant was instructed to do sedentary work only with only occasional standing/walking up to one hour at a time. He was also advised "not to drive or undertake any activity requiring alertness if taking sedating medication." (JE 4:83)

His physical therapy treatment ended on January 31, 2017, after 28 visits. (JE 5:99) The therapist noted that claimant had a smooth gait pattern and was able to perform work related tasks with minimal pain. (JE 5:99) Claimant did continue to have some limitations in his right ankle range of motion with some residual pain but was "doing very well" overall. (JE 5:100) Claimant disputes the notations of the therapist. The therapist did note that the claimant's "ROM in the R ankle is quite restricted vs the L AROM." (JE 5:99)

Claimant returned for a checkup on February 2, 2017. (JE 4:85) Dr. Phistikul told claimant to continue to work through the ankle stiffness and that the pain should subside when the stiffness did. (JE 4:85) Claimant was allowed to do light duty with occasional standing and walking up to one hour at a time. (JE 4:89)

During a visit on March 23, 2017, claimant reported pain of a 4 on a 10 scale and that he had plateaued in physical therapy. (JE 4:92) Claimant continued to have anterior ankle pain worse with ambulation, walking up stairs and pivoting. (JE 4:92) Dr. Phistikul determined claimant was at maximum medical improvement and that he did not need any work restrictions. (JE 4:95)

Claimant has not sought additional treatment for the plantar fasciitis.

He last saw a doctor for a renewal of medication July 7, 2017, and was cleared for the DOT license. Claimant currently tolerates his pain, treating himself with ice and

elevation along with his prescription medications. He testified that he is slower getting in and out of his truck. He is slower loading and unloading his truck. He uses cruise control more often due to the pain in his ankle. There are no current tasks of his job which he cannot do. He has no official restrictions that he observes for his job.

Because he cannot walk on uneven terrain, he pays someone to mow his lawn. He has some weakness in his right ankle and has rolled it more than once. There are a few recreational activities he can no longer perform such as throwing horseshoes or bowling. In his answers to interrogatories, he did not identify previous recreational activities that were affected by his injury, choosing to answer that the question was inapplicable. (Defendants' Ex. E) The answers were not supplemented. Claimant was not deposed.

Dr. Phistikul set claimant's impairment at ten percent of the foot and seven percent of the lower extremity due to "mild" loss of ankle extension. (JE 6:101) Dr. Phistikul wrote that "[a]ll other range of motion was within normal limits and he had no neurologic dysfunction, instability, joint space narrowing, or any other diagnosis-based impairment per Chapter 17" of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Sunil Bansal, M.D. disagreed, assigning an impairment rating of 14 percent of the lower extremity due to reduced plantar flexion and dorsiflexion. (Cl. Ex. 1:11) Dr. Bansal performed an independent medical evaluation on the claimant on June 23, 2017 and issued a report on July 24, 2017. (Cl. Ex. 1:1)

To Dr. Bansal claimant described a dull ache from the middle of the right foot that radiates into his second and third toes at times. Other times, he had pain in the front crease of his foot along with continued swelling and occasional numbness. (Cl. Ex. 1:9) He exhibited reduced range of motion upon testing. (Cl. Ex. 1:10)

Dr. Bansal assessed a 14 percent right lower extremity impairment rating and recommended work restrictions of no prolonged standing or walking greater than 60 minutes at a time, no multiple steps, stairs, or ladders and no uneven terrain. (Cl. Ex. 1:13)

Dr. Warne suspected "that [claimant] is going to have to try and live with this residual arthritis and at some point in his life, he may become a candidate for a fusion or replacement, but I would defer to Dr. Phistikul's or Dr. Femino's opinion." (JE 3:48A) Dr. Bansal wrote that claimant was "at high risk for post traumatic arthritic changes" that would result in pain, stiffness and weakness. According to Dr. Bansal, claimant may require intermittent NSAIDs, injections, and range of motion exercises. (Cl. Ex. 1:12) Claimant's future care and condition are speculative at this time. If claimant's condition worsens as both Dr. Bansal and Warne suggest may happen, claimant may file a review-reopening petition.

Claimant testified that the benefit payments were late from time to time. He would receive a check on a Monday or sometimes a Wednesday. Once he was forced to take money out of savings to pay for a missed truck payment. Defendants presented a payment register. (Def. Ex. B:1) The register records payments made once a week. (Def. Ex. B:2) There was one email on May 13, 2016, that indicated that the check was not received during that one week. (Cl. Ex. 7:27) The defendants' counsel replied the issue was fixed. (Def. Ex. C:1)

Defendants challenged claimant's credibility by bringing up past criminal charges for very minor thefts in the remote past, the most recent one occurring in 2011. (Def. Ex. D) Claimant's testimony matched that of his contemporaneous medical reports. None of his doctors or treaters indicated that claimant was exaggerating his condition or malingering. For the purposes of the hearing and claimant's testimony regarding the work injury, the course of treatment, and his post-injury condition, I find claimant to be a credible witness and that the remote crimes have little bearing on claimant's current fitness as a witness.

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 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).

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. 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). Compensation for scheduled injuries is not related to earning capacity. 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).

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 parties agree claimant sustained an injury to his right lower extremity, but dispute the extent of that injury. Claimant's expert, Dr. Bansal, assigned a 14 percent lower extremity rating based on the range of motion testing as well as claimant's increased risk of posttraumatic arthritis and manifestation of pain, stiffness and weakness. Dr. Bansal also recommended claimant avoid standing or walking for greater than one (1) hour and avoid steps or uneven terrain. Dr. Phistikul, the treating surgeon, assigned a 7 percent impairment rating to claimant's leg without any testing and recommended that claimant refrain from jumping.

Claimant testified at hearing that he still has pain and weakness during activities and that he is no longer as active.

Claimant was determined to be a credible witness. He has pain, weakness, and some limitations. It affects his work and his leisure activities. His lay testimony is more closely aligned with the findings of Dr. Bansal and therefore Dr. Bansal's report is given greater weight.

It is found claimant has sustained a 14 percent right lower extremity impairment.

Claimant also seeks late payment penalties. He testified that at times a check would not arrive on Monday or sometimes not until Wednesday. The email recording a late payment identified Wednesday as the day upon which claimant would ordinarily receive a payment. There is not sufficient evidence to show that claimant received late payments other than one instance which was immediately rectified. There was scant evidence submitted of late payment of permanent benefits.

A threshold showing of late or unpaid benefits must be made before an analysis of whether the delay was unreasonable. The payment register showed automatic payments weekly of temporary benefits. Even if there was a delay in May of 2016, the delay was of no more than a few days and the matter was rectified.

No penalty payments are awarded.

Claimant seeks reimbursement of both filing fees. The taxation of costs are within the discretion of the commissioner. See Iowa Code section 86.40. Defendants argue that they should not have to cover both filing fees. The claimant has prevailed in this case. The agency's rules encourage a dismissal and refiling which at times results in a subsequent filing fee. In this case, both filing fees are awarded as reasonable costs incurred in the prosecution of this case.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant thirty point eight (30.8) weeks of permanent partial disability benefits at the rate of five hundred fifty eight and 94/100 dollars (\$558.94) per week from July 11, 2017.

That defendants shall pay accrued weekly benefits in a lump sum.

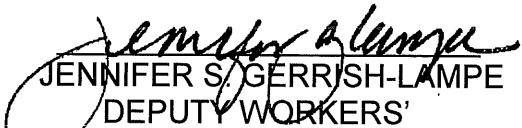
That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 21st day of December, 2017.


JENNIFER S. GERRISH-LAMPE
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.