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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LAUHOFF GRAIN COMPANY and AETNA INSURANCE,

Petitioners-Appellants,

vs

TED M. McINTOSH,

Respondent-Appellee.

Filed March 31, 1986

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5-604
85-434

Appeal from the Iowa District Court for Pottawattamie County (55399) Leo Connolly, Judge.

Petitioners appeal from the judgment of the district court affirming the industrial commissioner's decision to grant respondent benefits for permanent partial disability to the body as a whole. **AFFIRMED.**

Phillip Willson of Smith, Peterson, Beckman & Willson, Council Bluffs, Iowa, for petitioners-appellants.

Thomas L. Root of Pogge & Root Law Office, Council Bluffs, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., Snell, and Hayden, JJ., but considered en banc.

Petitioners appeal from the judgment of the district court affirming the industrial commissioner's decision to grant respondent benefits for permanent partial disability to the body as a whole. We affirm.

In 1978, Ted McIntosh fractured the femoral neck of his left leg while working for his employer, Lauhoff Grain Company. Surgery was performed to reduce the fracture and four Knowles pins were placed across the fracture site. The orthopedic surgeon, Dr. Cousins, indicated that further complications could result from the fracture eventually requiring replacement of the head of the femur with a metal prosthesis.

Dr. David W. Minard, another orthopedic surgeon, examined McIntosh in April 1979. He stated that the claimant could likely develop "disabling severe pain in his hip secondary to aseptic necrosis of the head of the femur."

In October 1980, Dr. Ronald K. Miller tested claimant and recommended a total hip replacement. The surgery, which was performed in November, involved constructing a new socket in the acetabulum, an area of the body which extends beyond the hip joint.[1] In July 1982, Dr. Miller reported that McIntosh had a 100 percent disability to the leg. He also indicated that in view of long-term problems and complications, the claimant should have a permanent impairment rating to the total body of 50 to 70 percent.

At the request of petitioners, respondent was examined by the chairman of the orthopedic department of the University of Nebraska Medical Center.

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[1] Briefly, the bone in the upper leg is known as the femur. The femur has a neck and a head where it joins the hip. The head of the femur is ball shaped and rests in the corresponding socket or acetabulum, which is located in the pelvis. The hip joint consists of the ball and socket.

This physician estimated respondent's overall functional impairment of his entire body at 20 percent.

In his appeal decision, the industrial commissioner reasoned that because the hip surgery resulting from the work injury involved an area which extends beyond the left extremity, respondent had an impairment to the body as a whole and a determination of industrial disability was appropriate. The industrial commissioner held that respondent had a 75 percent permanent partial disability to the body as a whole. This decision was affirmed by the district court on judicial review and petitioners have appealed.

The determinative question before this court is whether the industrial commissioner and district court erred in awarding disability on the basis of the body as a whole rather than on a percentage of disability of the left leg only. It is the petitioner's position that the commissioner erred as a matter of law. They also contend substantial evidence does not support the decision.

A review of the industrial commissioner's decision is governed by Iowa Code section 17A.19. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 282 (Iowa 1983). Our duty is to correct errors of law made by the district court. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa Ct. App. 1984). In doing so, we apply the standards set forth in section 17A.19(8) to the agency action and determine whether our conclusions are the same as the district court's. Gipson v. Iowa Dept. of Job Service, 315 N.W.2d 834, 836 (Iowa Ct. App. 1981). Findings of fact by the industrial commissioner are considered binding; however, questions of law are not conclusive and are subject to review. Thomas, 349 N.W.2d at 125.

The Iowa Worker's Compensation Act (Iowa Code chapter 85) confers the right to collect disability compensation for work-related injuries. It also limits the amount payable for certain disabilities. Caylor v. Employers Mutual

Casualty Co., 337 N.W.2d 890, 892 (Iowa Ct. App. 1983). Section 85.34(1) provides a statutory compensation schedule for the loss of specified parts of the body. If the claimant has suffered a scheduled injury, recovery is limited to the statutorily prescribed amount. Id. No inquiry is made regarding loss of earning capacity or industrial disability. Soukup v. Shores Co., 222 Iowa 272, 278-79, 268 N.W. 598, 601 (1936). "The very purpose of the schedule is to make certain the amount of compensation in the case of specified injuries and to avoid controversies." Dailey v. Pooley Lumber Co., 233 Iowa 758, 760, 10 N.W.2d 569, 571 (1943).

If, however, the resulting impairment extends beyond the parts of the body listed in the schedule, the claimant is said to have an injury to the body as a whole. Iowa Code § 85.34(2)(u). Compensation for nonscheduled injuries is based upon the percentage of industrial disability, i.e., loss of earning capacity, as the percentage bears to 500 weeks. Id. The criteria for gauging the extent of disability includes the age of the claimant, education, qualifications, experience, and inability due to injury, to engage in the employment for which the claimant is fitted. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). If it is determined that the claimant is permanently and totally disabled from employment, he receives benefits for life. Iowa Code § 85.34(3) (1985).

In the present case the original diagnosis was a "fracture of the neck of the left femur," a bone in the upper leg. However, the industrial commissioner determined that the resulting ailment extended beyond the scheduled injury thereby entitling claimant to compensation for injury to the body as a whole. In reaching this conclusion, the commissioner reasoned that the surgery to replace claimant's hip involved an area of the body extending beyond the hip joint. As such, it was concluded that the ailment did not fit within the "statutory definition of a leg."

On appeal petitioners argue that while the surgery may have involved areas beyond the hip joint, evidence does not support a finding that the injury itself extended beyond the actual joint. Thus, it is claimed that McIntosh should only receive benefits for injury to the lower extremity. These arguments are premised upon a finding that an injury to the hip joint is a scheduled injury to the leg. Our review of case law, however, leads us to conclude otherwise.

At the outset, we note that, contrary to the commissioner's analysis, the reference to "leg" in the statutory schedule was not intended as a legal definition of the particular extremity. Section 85.34(2)(o) provides: "The loss of two-thirds of that part of the leg between the hip joint and the knee joint shall equal the loss of a leg . . . ." In interpreting this language, the supreme court stated:

> We do not think the language used was intended to fix or limit the definition of a leg. Rather, it was for the purpose of defining a certain portion of the leg that would be considered equal to the whole leg. Neither the hip joint nor the knee joint was referred to as defining the extent of the leg.

Dailey v. Pooley Lumber Co., 233 Iowa 758, 762-63, 10 N.W.2d 569, 572 (1943).

The Iowa Supreme Court has had occasion to consider whether certain injuries involving a leg are scheduled or nonscheduled injuries. In Dailey, the court was faced with a situation where the injury clearly extended beyond the femur. There was damage to the articular surface of the acetabulum and a permanent tilting of the pelvis. 233 Iowa at 763, 10 N.W.2d at 572. The court held that it was a nonscheduled injury. In Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964), the claimant's injury was to the femur. There was some indication of a loss in hip motion, however, there was no injury to the pelvis. Id. at 1265, 130 N.W.2d at 670-71. The court distinguished Dailey on this ground and held that the claimant had suffered a scheduled injury. Id. at 1266, 130 N.W.2d at 671.

Factually, the case before this court falls somewhere between Dailey and Kellogg. The initial injury was limited to the leg. However, the resulting ailment involved the hip and required a hip replacement. A prosthesis was placed on the ball and a new socket was formed. Unlike in Dailey, there was no evidence of tilting of the pelvis or any other form of pelvic injury. The injury is also distinguishable from Kellogg in that it went beyond the femur area and unquestionably affected the actual hip joint. In essence, the supreme court has not specifically addressed whether an injury extending to but not beyond the hip joint is a scheduled injury.

A similar issue, however, was addressed in Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161, 163 (1949). There the supreme court considered whether an injury to the shoulder extended beyond a scheduled injury to the arm. The court citing Dailey specifically indicated that the statutory reference to arm did not include the shoulder. Id. at 1177, 38 N.W.2d at 163. We find this holding controlling. By analogy, an injury to the hip would extend beyond the leg. Moreover, our research reveals that several jurisdictions with similar statutes have reached this conclusion. As used in worker's compensation cases, the leg is generally said to extend from where the ball of the femur fits into the socket; however, it does not include the hip joint. See, e.g., Jeffers v Pappas Trucking, Inc., 198 Neb. 379, 390-91, 253 N.W.2d 30, 36 (1977); Miller v Industrial Commission, 110 Ariz. 229, 230, 517 P.2d 91, 92 (1973); Texas Employers' Ins. Assoc. v. Sevier, 279 S.W.2d 471, 473 (Tex. Civ. App. 1955).

Based on Alm, we hold that if the injury is clearly to the hip and the joint itself is impaired, the injury is not a scheduled injury to the leg. In the present case, evidence supports the conclusion that resulting impairment included the hip joint. As we have indicated, hip replacement surgery was necessary

as a result of claimant's work-related injury As such, the industrial commissioner was correct in finding an injury to the body as a whole We therefore affirm.

AFFIRMED.

All judges concur except Sackett, J , who specially concurs.

SACKETT, J. (specially concurring)

I concur with the majority's affirmance of the commissioner's decision that the claimant's hip injury extended beyond the scheduled injury of a leg. However, in majority's interpretation of Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949), the majority finds the court held the "statutory reference of arm did not include the shoulder." The majority does not describe the extent of the claimant's shoulder injury in Alm,[1] and instead jumps to the conclusion: "By analogy, an injury to the hip would extend beyond the leg."

I cannot concur with the majority's lengthy discussion as to where the leg ends and the hip begins. I cannot agree with the majority's bald assertion that every impairment of the hip joint is not going to be a scheduled injury to the leg. Such determinations must be made on a factual, case-by-case basis.

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[1] The claimant's "shoulder injury" in Alm consisted of a "fracture of the distal end of the collar bone where it joins the shoulder blade, together with injuries to the soft tissue of the shoulder and two hernias." Id. at 1176, 38 N.W.2d at 162. Furthermore, the Alm court is refuting the employer's assumption that a shoulder injury is always an injury to the arm when it states: "This assumption is unwarranted. Subsection 13 does not apply to a shoulder injury, nor is such an injury scheduled in any other subsection of section 85.35." Id. at 1177, 38 N.W.2d at 163. The Alm court then quotes Dailey which refers to "extent" of injury being the cornerstone of a scheduled versus nonscheduled determination.