

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT

AARON GASSER,
Claimant,

HF No. 45, 2009/10

v.

DECISION

TWIN CITY FAN COMPNAY,
Employer,

and

**ZURICH AMERICAN
INSURANCE COMPANY,**
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation pursuant to SDCL §62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Aberdeen, South Dakota. Claimant, Aaron Gasser appeared personally and through his attorney of record, Drew C. Johnson. Mark J. Freeman represented Employer, Twin Fan Companies and Insurer Zurich American Insurance Company.

Issues

Extent of claimant's disability – Entitlement to Permanent Partial Disability Benefits

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

On September 4, 2007, Aaron Gasser worked for Twin City Fan Company in the shipping department when he sustained a crush fracture to both ankles when a 2000 pound industrial fan fell on his legs. Employer/Insurer has stipulated that the work related injury on September 24, 2007, was compensable.

Gasser was initially treated at Avera St. Luke's Hospital by Dr. Mark Harlow, an orthopedic surgeon. Dr. Harlow performed a series of surgeries to repair both ankles. Gasser also went to physical therapy for approximately a year. On September 3, 2008, Dr. Harlow was asked to give Gasser an impairment rating. Dr. Harlow gave a 0% impairment.

In April of 2008, Gasser returned to work at Twin City Fan in the shipping department doing light duty work. After a month, Gasser moved to traffic assistant position which was a more sedentary desk job. After leaving Twin City Fan, Gasser held several sedentary desk jobs in Aberdeen and at the time of the hearing, Gasser worked full time at Wells Fargo Auto Finance.

Gasser continues to use a cane to help him walk. He testified that it helps with stability, support and also helps with the pain. Gasser uses the cane interchangeably on the right and left side depending on which needs extra support. He anticipates needing the cane indefinitely. Gasser also uses orthotic inserts, prescribed by Dr. Harlow, in both shoes to keep his feet from rolling. Gasser walks with a gait derangement, or limp since his injury.

On November 18, 2008, Dr. Jeff Luther preformed an independent medical evaluation (IME) at the request of Claimant. Dr. Luther disagreed with Dr. Harlow's impairment rating. Using the AMA Guide to Permanent Impairment, 4th Edition (AMA Guides), Dr. Luther indicated there are multiple methods to rate the lower extremity including anatomic, diagnostic, and functional methods. He noted that in this case, surgery had restored alignment and overall function, but Gasser had a significant gait derangement. Dr. Luther assigned a 28% impairment for each ankle. Dr. Luther arrived at this impairment rating by utilizing Table 36 on page of 76 of the AMA Guides which provided for a 7% whole person impairment for antalgic limp, which he then multiplied by 40%- the percentage of lower extremity related to the whole person, which he calculated to be a 28% impairment of each foot/ ankle.

On April 27, 2009, Dr. Jerry Blow preformed IME at the request of Employer/Insurer. Dr. Blow also concluded that Dr. Harlow gave an incorrect impairment rating. Dr. Blow considered Range of Motion (ROM) measurements of Gasser's ankles in assigning an impairment rating. Dr. Blow did not assess gait. Based on the AMA Guides¹, Dr. Blow gave a 17% impairment to the left ankle and a 13% impairment to the right ankle. Dr. Blow stated in his report that although assessment of gait to determine impairment was allowed under the guide, it was a really rough assessment of impairment and that a more detailed assessment such as range of motion or strength is preferred. Employer/Insurer has paid Claimant \$12671.00 based on the impairment rate given by Dr. Blow.

On July 1, 2010, Dr. Luther provided a supplemental report to clarify the impairment rating offered on November 18, 2008. Dr. Luther disagreed with Dr. Blow's assessment because he failed to consider gait derangement, use of a cane, and orthotic inserts. Dr. Luther noted that "Mr. Gasser's case is quite complex, I believe his impairment is a

¹ Dr. Blow stated that for his impairment, Tables 42, 43, or 44 could be used to assess ankle motion and hind foot motion and then looked at whichever was greater.

result of being hobbled by a gait derangement. Furthermore I failed to mention that he required the use of a cane intermittently... and again referencing Table 36 on page 76 [of the AMA Guides] it is my considered opinion that Mr. Gasser's impairment is actually 15% whole person for each lower extremity." During his deposition testimony, Dr. Luther testified that using table 39 in the AMA Guides, he converted that whole person impairment rating to 53% for each foot/ankle.

Analysis

SDCL §62-4-6(24) allows compensation for permanent partial disability. In order to compute the statutory compensation allowed, a claimant must be evaluated and given an impairment rating. Such rating shall be "expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, fourth edition, June 1993." SDCL §62-1-1.2.

Dr. Blow and Dr. Luther, two qualified medical experts with extensive experience, each offered an impairment rating expressed as a percentage to the foot/ankle using the AMA Guides as required by statute. The AMA Guides offer some latitude in determining the Claimant's impairment. The AMA Guides are not intended to establish a rigid formula, though where use of the AMA Guides is required by statute, a deviation must be justified by competent medical evidence and be consistent with the specific dictates and general purpose of the Guides. *Cantalope v. Veterans of Foreign Wars Club ("VFW") of Eureka*, 2004 SD 4 ¶ 14, 674 N.W.2d 329, 336.

When there is more than one expert medical opinion, it is within the Department's discretion to disregard one expert's impairment rating and accept another. *Tischler v. United Parcel Serv.*, 1996 SD 98, 552 N.W.2d 597, 605. The trier of fact is free to accept all, part, or none of an expert's opinion. *Bonnett v. Custer Lumber Corp.*, 528 N.W.2d 393, 395 (S.D.1995) (citing *Hanson v. Penrod*, 425 N.W.2d at 398).

In the case at hand, the Department finds the impairment rating given by Dr. Luther more persuasive when the evidence is viewed as a whole. Dr. Luther took into account Gasser's use of a cane, orthotics and gait in assigning an impairment rating. Claimant is entitled to 53% impairment in each ankle.²

Employer/Insurer has already paid permanent partial disability (PPD) in the amount of \$12,671.00. Claimant has requested that the remaining PPD be paid in a lump sum. Employer/Insurer has indicated that it has no objection to a lump sum payment of benefits. In this case, lump sum is in the Claimant's best interest to pay expenses that have been incurred due his work related injury and legal fees. It is appropriate to allow for lump sum payment of benefits in the amount of \$32,102.00

² Loss of an ankle is defined by SDCL 62-4-6(15) as 125 weeks. 53% of 125 weeks would equal 66.25 weeks for each ankle. Gasser's workers compensation rate if \$337.91 x 132.5 weeks= \$44,773.00.

Conclusion

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within fifteen (15) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 10th day of August, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ Taya M. Runyan

Taya M. Runyan
Administrative Law Judge