BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUN 27 2017
WORKERS' COMPENSATION

RODNEY K. JOHNSTON, Claimant, vs. GERDAU AMERISTEEL U.S. CORP., Employer, and AMERICAN ZURICH INS. CO., Insurance Carrier, Defendants.	File No. 5055573 ARBITRATION DECISION Head Note Nos.: 1402.40, 1803, 2502, 2907

STATEMENT OF THE CASE

Rodney ("Rocky") Johnston, claimant, filed a petition for arbitration against Gerdau Ameristeel, U.S. Corp. (hereinafter referred to as "Gerdau"), as the employer and American Zurich Insurance, as the insurance carrier. The case came on for hearing before the undersigned on February 14, 2017.

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 evidentiary record includes Claimant's Exhibits 1 through 7 and Defendants' Exhibits A through F and J. All exhibits were received without objection. Claimant testified on his own behalf and called his wife, Penelope Johnston, to testify. No other witnesses testified live at the evidentiary hearing.

The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties served their briefs simultaneously on March 3, 2017. The case was considered fully submitted to the undersigned upon filing of the parties' briefs.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's current knee symptoms and need for a total knee replacement at some time in the future is causally related to the stipulated March 16, 2015 work injury.

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

3. Whether claimant is entitled to reimbursement for an independent medical evaluation.

4. Whether claimant is entitled to an order for alternate medical care to include a transfer of care for consideration of a total knee replacement.

5. Whether costs should be assessed against either party.

At the commencement of hearing, the parties noted they were submitting the issue of reimbursement for the independent medical evaluation as a disputed issue. However, counsel noted the parties may be able to work out their disputes on that issue prior to issuance of an arbitration decision. In their post-hearing briefs, all parties acknowledge that the issue of reimbursement for claimant's independent medical evaluation has been resolved and is no longer a disputed issue. Therefore, no findings or conclusions will be entered relative to the issue of reimbursement for claimant's independent medical evaluation.

FINDINGS OF FACT

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

Rodney Johnston began working for Gerdau's predecessor in Wilton, Iowa, in 1979 and started working full-time for the company in 1981. Mr. Johnston has been a loyal employee of Gerdau since 1981. (Claimant's testimony) He sustained a stipulated work injury to his left knee on March 16, 2015. (Hearing Report)

Mr. Johnston works as a loader at Gerdau, which is the top available position in the shipping department. As a loader, Mr. Johnston loads finished products into rail cars and semi-trucks. He does this with the use of fork trucks and large overhead cranes to move large pieces of steel. (Claimant's testimony)

Throughout his career, Mr. Johnston's job has become easier. He used to have to climb 20 foot piles of steel to hook up large chains to move the steel from place to place. The company now uses large magnets to lift and move the steel. However,

Mr. Johnston still uses ladders extensively and climbs into rail cars to pile wood (dunnage) upon which steel can be stacked for transport and later unloading. He is also required to place vertical blocks on each load or bundle of steel and must climb onto the semi-trailer or rail car to perform these tasks. (Claimant's testimony)

On March 16, 2015, at approximately noon, claimant was standing on the loading dock. He was working on loading one semi that had backed into the loading dock. Another semi was backing into position to be loaded at the dock when it struck the platform and jolted claimant. Mr. Johnston immediately got on his radio, notified others of the accident, and said, "Owe, that hurt." However, he did not think too much about the incident and was able to shake it off and complete his shift. (Claimant's testimony)

Unfortunately, later that evening when claimant was at home, he experienced throbbing in his left knee and realized the pain was from the incident at work. His knee began popping with each step he took. Three days after the incident, Mr. Johnston sought evaluation with his personal physician. (Claimant's testimony)

On March 19, 2015, Ashley M. Losch, P.A., evaluated claimant at Unity Point Health's clinic. Ms. Losch noted a history that included the March 16, 2015 work accident. Ms. Losch noted normal range of motion in the left knee, no swelling or effusion. She noted no objective or obvious deformity of the left knee. She recommended a left knee x-ray but claimant declined that recommendation. She discussed the possibility that claimant sprained a tendon or ligament in his left knee. (Exhibit 1, pages 1-2)

Mr. Johnston reported the injury to his employer. Gerdau scheduled claimant to be evaluated by a medical provider of its choosing. On March 24, 2015, claimant submitted to examination by Cheryl Benson, PA-C at Genesis Occupational Health. Ms. Benson noted a similar history of injury and noted that claimant "denies any previous knee injuries." Ms. Benson diagnosed claimant with a left knee sprain/strain. She initiated medication management and physical therapy. (Ex. 2, pp. 3-4)

On April 10, 2015, Mr. Johnston returned to Genesis Occupational Health for follow-up. On that date, Ms. Benson noted no significant change or improvement despite the medications and physical therapy. She recommended a left knee MRI and noted that claimant's clinical examination findings were "consistent with meniscal involvement or tear." (Ex. 2, p. 4)

An MRI of claimant's left knee was accomplished on May 11, 2015. The MRI demonstrated a medial meniscus tear. (Ex. 4) Claimant returned to Genesis Occupational Health and was evaluated by Rick Garrels, M.D. on May 14, 2015. Dr. Garrels noted a moderate limp favoring the left leg. He noted the medial meniscus tear per the MRI and referred claimant for orthopaedic evaluation. (Ex. 2, p. 8)

Tuvi Mendel, M.D. performed an orthopaedic evaluation on claimant on May 22, 2015. Dr. Mendel noted that claimant had no prior left knee problems before the work injury on March 16, 2015. Dr. Mendel noted significant medial joint line tenderness but noted stable knee ligaments. Dr. Mendel diagnosed claimant with a left knee medial meniscus tear. He recommended surgical intervention. (Ex. 5, pp. 1-2)

Dr. Mendel took claimant to surgery on June 16, 2015 and performed a left knee arthroscopy with a partial medial meniscectomy and a patellofemoral compartment chondroplasty. (Ex. 6) Surgery did not resolve all of claimant's left knee symptoms. Dr. Mendel attempted other conservative measures, including injections into claimant's left knee. Unfortunately, by August 28, 2015, claimant was reporting that his knee would give away and Dr. Mendel noted that claimant continued to limp. (Ex. 5, p. 12)

Dr. Mendel suggested that claimant "has significant wear and most likely will require a total knee replacement." (Ex. 5, p. 13) However, Dr. Mendel opined that "the need for a knee replacement is not related to the work injury." (Ex. 5, p. 13) Dr. Mendel declared claimant to have achieved maximum medical improvement from the work injury on August 28, 2015. He opined that claimant sustained a two percent permanent impairment of the left leg as a result of the medial meniscus tear that occurred as a result of the March 16, 2015 work injury. (Ex. J)

Claimant sought an independent medical evaluation, performed by Richard Neiman, M.D. on December 9, 2016. (Ex. 7) Dr. Neiman noted that claimant had no left knee pain or symptoms prior to the March 16, 2015 work injury. He concluded that claimant's degenerative knee changes were "asymptomatic until the time of the injury." (Ex. 7, p. 2) When addressing the issue of causation, Dr. Neiman opined, "I disagree strongly with Dr. Mendel in this regard. Up until the time of injury, he was asymptomatic; and at that time, his knee became symptomatic." (Ex. 7, p. 3) Dr. Neiman opined that claimant "had previous history of arthritis but was asymptomatic, and it was entirely aggravated and worsened by the work injury." (Ex. 7, p. 3)

Mr. Johnston testified that he had no prior knee issues and no symptoms in his left knee prior to March 16, 2015. Based upon my observations of Mr. Johnston while he testified and the lack of any prior medical evidence of left knee symptoms or treatment before March 16, 2015, I find Mr. Johnston credible and find that he had no prior left knee symptoms and required no medical treatment of his left knee prior to the March 16, 2015 work accident.

When I review the opinions of Dr. Mendel and Dr. Neiman, I recognize that Dr. Mendel is the treating surgeon. He had the advantage of seeing claimant multiple times and inspecting claimant's knee intra-operatively. Dr. Mendel is an orthopaedic surgeon.

Dr. Neiman is a neurologist. He evaluated claimant only once. He did not have the advantage of inspecting claimant's knee surgically. Certainly, when credentials and

observations are considered, Dr. Mendel had better access and information for this type of case.

Yet, Dr. Mendel's opinion is based on what appears to be an assumption that the work injury must have caused the underlying degeneration in claimant's left knee for it to be compensable. Dr. Mendel addresses whether the arthritis was caused by the work injury of March 16, 2015. It clearly was not caused by that injury and clearly pre-existed.

On the other hand, Dr. Neiman acknowledges that the arthritis was present in claimant's left knee before the date of injury. Dr. Neiman, however, opines that the injury aggravated and accelerated the arthritic condition such that it became symptomatic and moved claimant toward a knee replacement. Dr. Neiman's opinion is consistent with the other medical history contained in the evidentiary record. Dr. Neiman's opinion is consistent with claimant's credible testimony that he had no symptoms in his left knee prior to the March 16, 2015 work injury. Dr. Mendel was neither asked nor provided a definitive opinion about whether the work injury materially aggravated or accelerated claimant's left knee arthritis. In essence, I find that both medical opinions are accurate.

Specifically, I find that claimant had pre-existing arthritis in his left knee. I find that it was asymptomatic before March 16, 2015. Claimant's left knee became symptomatic as a result of the March 16, 2015 work accident. Despite operative intervention, claimant's left knee symptoms persisted after the work injury. Therefore, I find that the March 16, 2015 work injury caused a material and permanent aggravation and acceleration of claimant's left knee arthritis such that claimant continues to have symptoms in his left knee and is now in need of a left knee replacement.

The parties also submitted the issue of permanent disability for determination. Dr. Mendel opined that claimant qualifies for a two percent permanent impairment of the left lower extremity as a result of the partial medial meniscectomy he performed. Dr. Neiman concurs that claimant is entitled to a two percent permanent impairment as a result of the partial medial meniscectomy. However, Dr. Neiman opines that claimant also has an additional seven percent permanent impairment of the left lower extremity as a result of his arthritis and loss of cartilage space.

Dr. Neiman references Table 17-31 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. This table rates impairment of the lower extremity caused by loss of cartilage space, or arthritis. Having found that the injury materially aggravated and accelerated claimant's arthritis, I find that an impairment rating for the arthritis is reasonable and appropriate.

Dr. Neiman and Dr. Mendel reference Table 17-33 of the AMA Guides, Fifth Edition, which provides impairment ratings for various objectively diagnosable conditions. Among those conditions, Table 17-33 contains an impairment rating for a

partial medial meniscectomy. Certainly, the March 16, 2015 injury caused claimant's need for the partial meniscectomy. Therefore, I find that an impairment rating for the partial meniscectomy is reasonable and appropriate.

Pursuant to Table 17-2, it is permissible to combine the impairment ratings for arthritis with those given for diagnosis-based estimates. Therefore, I find that it is appropriate and reasonable to combine claimant's impairment ratings in this instance. Claimant has proven he currently has a nine percent permanent impairment of the left leg.

With respect to claimant's request for alternate medical care, I find that claimant is in need of additional medical treatment for his left knee, including some type of knee replacement. I find that the ongoing and future medical treatment of the left knee is causally related to the work injury because that injury aggravated and accelerated claimant's left knee arthritis. I find that claimant has demonstrated that future treatment is reasonable and necessary for his left knee as a result of the March 16, 2015 work injury.

Defendants contend that claimant did not give notice of his dissatisfaction with the care offered. Defendants also contend in their post-hearing brief that claimant failed to request additional care, including the recommended knee replacement. I concur that claimant did not specifically give notice of his dissatisfaction with the defendants' refusal of additional care. However, I also find that defendants denied liability for the degenerative arthritis and the need for additional treatment, including the proposed knee replacement.

CONCLUSIONS OF LAW

The initial disputed issue in this case is whether claimant's arthritis and ongoing need for treatment of his left knee arises out of and in the course of claimant's employment as a result of the March 16, 2015 work injury. The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

In this instance, I found that Mr. Johnston proved his left knee arthritis was materially aggravated and accelerated by the March 16, 2015 work injury. Therefore, I conclude that claimant has proven his ongoing left knee symptoms and need for medical treatment arose out of and in the course of his employment as a result of the March 16, 2015 work injury.

Claimant asserts a claim for permanent disability benefits as a result of the July 14, 2014 work injury. Defendants admit that claimant sustained a work related injury to his left knee and that the injury caused permanent disability to claimant's left leg. However, defendants dispute the extent of claimant's entitlement to permanent disability benefits. (Hearing Report)

Having found that the left knee arthritis and need for ongoing treatment arose out of and in the course of employment as a result of the March 16, 2015 work injury, I reviewed the respective impairment ratings offered by Dr. Mendel and Dr. Neiman.

Comparing those impairment ratings to the AMA Guides, Fifth Edition, I found that the impairment ratings offered by Dr. Neiman were reasonable and appropriate for the injuries claimant sustained. I also noted that these ratings are permitted to be combined under the AMA Guides. Therefore, I found that claimant has proven a nine percent permanent impairment of the left leg as a result of the March 16, 2015 work injury.

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 left leg. Iowa Code section 85.34(2)(v); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969). Nine percent (9%) of 220 weeks equals 19.8 weeks. Claimant is, therefore, entitled to an award of 19.8 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(o), (v).

Claimant seeks an order for alternate medical care and specifically for orthopaedic evaluation and treatment of his left knee moving forward. Defendants contend that claimant cannot seek or recover alternate medical care at this time because he did not convey his dissatisfaction to defendants or request alternate medical care before asserting his request for an order of alternate medical care. At the same time, defendants disputed liability for the ongoing left knee symptoms and need for a left knee replacement.

Defendants are correct that, typically, a claimant must convey his dissatisfaction to the employer before pursuing an alternate medical care claim. Iowa Code section 85.27(4). However, in this instance, the defendants denied liability for the care claimant now seeks.

"[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros Heating v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). "The statute contemplates that an injured employee may select his or her own medical care when the employer abandons the injured employee through the denial of compensability of the injury." Id. Therefore, given defendants' denial of liability for the ongoing left knee and knee replacement recommendations, I conclude that the employer has no right to assert the authorization defense or challenge claimant's assertion of a claim for alternate medical care. Defendants cannot avoid their obligations under Iowa Code section 85.27 by denying liability while at the same time attempting to impose the obligations of Iowa Code section 85.27 on claimant.

Claimant's request for alternate medical care is reasonable. Having found that the ongoing left knee symptoms and treatment arose out of and in the course of claimant's employment as a result of the March 16, 2015 work injury, I conclude that claimant's request for alternate medical care is reasonable. Defendants will be ordered to provide orthopaedic evaluation and treatment, including a left knee replacement, if necessary.

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on the main fighting issues in this case, I conclude that it is appropriate to assess claimant's costs. In this instance, I find that it is appropriate to assess claimant's filing fee of $100.00 pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of the transcription fee for his deposition. However, claimant's deposition is not in evidence and was not utilized or referenced as part of the trial in this case. Therefore, although a deposition transcription fee can sometimes be assessed pursuant to 876 IAC 4.33(2), I do not find it to be appropriate in this instance.

ORDER

THEREFORE, IT IS ORDERED:

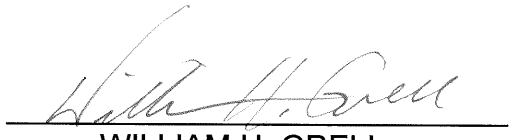
Defendants shall pay claimant nineteen point eight (19.8) weeks of permanent partial disability benefits at the weekly rate of seven hundred twenty and 74/100 dollars ($720.74) commencing on July 13, 2015.

Defendants shall provide claimant ongoing medical care of his left knee, including evaluation with an orthopaedic surgeon, other than Dr. Mendel, for purposes of determining whether claimant should proceed with a knee replacement at this time and/or other treatment options are available.

Defendants shall reimburse claimant's filing fee totaling one hundred dollars ($100.00).

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 27th day of June, 2017.



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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.