BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
DEC 29 2016
WORKERS' COMPENSATION

JOEL HENDERSON,

Claimant,

vs.

JOHN DEERE DES MOINES WORKS,

Employer,
Self-Insured,
Defendant.

File No. 5054570

ARBITRATION

DECISION

Head Note Nos.: 1100; 1801; 1803; 2500

STATEMENT OF THE CASE

Joel Henderson, claimant, filed a petition in arbitration seeking workers' compensation benefits against John Deere Des Moines Works, a self-inured employer, for an alleged work injury dated February 3, 2015.

This case was heard on September 8, 2016, in Des Moines, Iowa. The case was considered fully submitted on September 29, 2016 upon the simultaneous filing briefs.

The record consists of Exhibits 1-4, defendants exhibits A-M, and the claimant's testimony.

ISSUES

1. Whether claimant sustained an injury on February 3, 2015 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
3. Whether the alleged injury is a cause of permanent disability and, if so;
4. The extent of claimant's industrial disability;
5. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

6. Whether defendant is entitled to credit under Iowa Code section 85.38(2) for payment of sick pay/disability;

STIPULATED FACTS

The parties agree that claimant was an employee at the time of his alleged injury. They further agree he was off work from May 14, 2015, through November 29, 2015. While they dispute the claimant's entitlement to workers' compensation benefits, they stipulate that if any are awarded, the commencement date is November 30, 2015.

At the time of the alleged injury, the claimant's gross earnings were $1,118.28. He was single and entitled to two exemptions. Based on those figures, the weekly benefit rate is $664.50.

FINDINGS OF FACTS

Claimant was a 39 year-old person at the time of the hearing. He has a high school diploma and undertook an apprenticeship program in heavy equipment operation around 2000 and 2001. He received a journeyman's card as a result. He has held a variety of positions including fry cook, busboy, stocker, cashier, and heavy duty equipment operator. Claimant began working for defendant employer in 2004.

Currently, he has returned to work for the defendant employer.

In February 2013, claimant underwent surgery for right shoulder pain that had been present for four to five years. MRI results revealed degenerative arthritis in the AC joint. (Ex. B, p. 8)

On February 5, 2015, claimant was seen at Mercy East Family Practice and Urgent Care Center by Libby Naeve, D.O. (Ex. G) He reported stinging and aching pain in the left shoulder, but could not pinpoint any specific injury. He did feel that the pain was similar to what he had on the right side several years prior. No arthritis was seen on the imaging. (Ex. G, p. 40) Dr. Naeve injected a steroid into the joint and recommended he seek an orthopaedic consultation.

On February 18, 2015, claimant was seen by Brian Crites, M.D., for pain in the left shoulder. In the history section, Dr. Crites wrote that the claimant "states this began 5 months ago and there was no injury. He notes that his shoulder aches constantly and stings." (Ex. C, p. 10) Dr. Crites suspected a left labrum tear and claimant was referred for an MRI arthrogram. (Ex. C, p. 12) The MRI showed mild to moderate AC degenerative changes with type II acromion, but the primary impression was a tear involving the superior half of the labrum. (Ex. H, p. 47) On March 18, 2015, Dr. Crites confirmed that the MRI showed a left labrum tear and claimant was scheduled for surgical repair. (Ex. C, p. 13)

Surgery took place on May 14, 2015. (Ex. C, p. 15, Ex. D, p. 30)

On May 20, 2015, claimant returned to Dr. Crites for a post-surgical checkup. (Ex. C, p. 14) Claimant reported significant pain, primarily in the upper arm. Dr. Crites recommended continual use of the sling while in public and re-emphasized claimant's restrictions of no forward flexion past horizontal, no external rotation past 90 degrees, and no raising his arm over his head. (Ex. C, p. 14) Claimant continued to have pain and discomfort following the surgery, particularly after a fall at home. (Ex. C, p. 18) Dr. Crites repeated the MRI. The test showed a possible retear of the labrum. (Ex. C, p. 20) Dr. Crites recommended another surgery. After considering his options, claimant agreed to the second surgery which took place on September 21, 2015. (Ex. C, p. 24, Ex. D, p. 32)

Claimant had a good recovery following this second surgery. When claimant was seen on November 25, 2015, three months after the second surgery, he had excellent range of motion and normal rotator cuff strength. Dr. Crites was hopeful claimant would be able to return to work in approximately three months with no restrictions. (Ex. C, p. 28) Claimant received a full release to return to work by Brian P. Neurohr, PA-C on November 30, 2015.

> The patient states he is currently continuing to undergo physical therapy for his shoulder surgery, feels very good and is eager to get back to his normal work duties. At the time of today's office visit, the patient denies any pain, numbness, or tingling in his left shoulder or left upper extremity.

(Ex. E, p. 35)

On January 1, 2016, claimant received a full release from the physical therapist. All goals were marked as completed. (Ex. F, p. 37) Claimant reported no functional deficits but noted that the vacation had helped. (Ex. F, p. 36)

Initially, claimant did not believe that his pain was related to his work, but in speaking with Dr. Crites, claimant realized that he must have injured himself on February 3, 2015, when he attempted to rip a bag out of the recycling bin. The bag stuck on a pallet box as claimant was moving forward, jerking his arm backward. Claimant reported the injury to his employer on February 23, 2015. (Ex. 4)

On September 2, 2015, Dr. Crites wrote the following to claimant's attorney:

> At the current time, he is still in the recovery process and impairment, restrictions, and maximum medical improvement (MMI) are still pending; however, I can state within a reasonable degree of medical certainty as a Board-certified orthopaedic surgeon and Board-certified sports medicine specialist that the labral tear that he sustained and subsequently had repaired is a result of his injury at work. The acromioclavicular (AC) joint arthritis, however, which was also addressed at the same surgery, would be a pre-existing condition.

(Ex. 2)

On April 30, 2015, Jon Yankey, M.D., conducted a medical record review at the request of the defendants. (Ex. E) Dr. Yankey concluded that the injury to the left shoulder was not work related due to the fact that claimant's left shoulder pain was present prior to the alleged work injury.

> After reviewing the above 'incident report', the medical records from Dr. Naeve and Dr. Crites, and the MRI results, determination of work-relatedness of Mr. Henderson's left shoulder pain was considered. It is clearly apparent that the history of the left shoulder pain obtained by Dr. Naeve and Dr. Crites is not consistent with the information provided by Mr. Henderson on the incident report. The medical records from these two physicians clearly state that Mr. Henderson's left shoulder pain was present for a long while prior to the alleged work incident during the week of 02/02/2015-02/06/2015. The medical records state that Mr. Henderson's left shoulder pain and other related shoulder symptoms were present anywhere from 3-4 weeks up to 5 months prior to the alleged work incident. In addition, Mr. Henderson did not make the incident report for about 2-1/2 weeks after the alleged incident and after seeing his personal physicians.

(Ex. E, p. 34)

On June 24, 2016, claimant underwent an IME with Sunil Bansal, M.D. (Ex. 1) On examination, Dr. Bansal recorded very small range of motion decreases which Dr. Bansal used to assign a 4 percent body as a whole impairment. (Ex. 1, p. 6) As for the issue of causation, Dr. Bansal wrote:

> The shoulder is a ball and socket joint. However, the socket is very shallow, making it quite susceptible to injury. The shoulder itself has a relatively immobile scapula and clavicle and a mobile humeral head interface at the shoulder joint. Consequently, the humeral head may move suddenly in relation to the rest of the shoulder joint, especially from a forceful jerk to his left shoulder, causing an acute injury to the glenoid or labrum.

(Ex. 1, p. 6) Dr. Bansal believed claimant should not lift more than ten pounds above shoulder level on the left.

On August 9, 2016, claimant underwent another IME, this time with Joshua Kimmelman, D.O. (Ex. I, p. 48) On examination, claimant had some pain with the extremes of rotation, but full range of motion in the right and left shoulder. (Ex. I, p. 50) There was some pain in the area of the bicipital groove with resisted supination and minimal discomfort with impingement testing bilaterally. (Ex, I, p. 50) Dr. Kimmelman concluded that claimant had acromioclavicular arthritis.

> Answer: I believe Mr. Henderson had acromioclavicular arthritis. This is something that could be exacerbated or accelerated by people that lift weights or do lifting repetitively above shoulder height. I am not sure because of the difficulty of diagnosing pathologic SLAP tears on MRI that arthroscopic diagnosis is much more accurate than either clinical or radiographic diagnosis. Some authors recommend when there are multiple problems diagnosed in the shoulder that in the absence of instability, that SLAP repairs are probably inappropriate.

Dr. Kimmelman recommended claimant not lift above shoulder height and somewhat confusingly wrote first that claimant had sustained no impairment to his left shoulder but then went on to clarify with the following:

> Answer: I believe Mr. Henderson does have impairment to his shoulder based on the surgical resection of his distal clavicle and would assess a 10% impairment of the upper extremity, table 16-27 impairment in the upper extremity after arthroplasty to specific bones or joints. But again, this impairment is not causally related to the injury of February 3, 2015.

(Ex. I, p. 52)

There are some prior positions claimant feels he could not do, particularly anything that required heavy lifting or overhead work. He could drive a forklift, but not lift cabinets as he did at Home Value. He would have a difficult time digging dirt from machines as he did at McAninch Corporation or lifting heavy pieces of meat as he did when he worked as a butcher. He still suffered aches and sharp stinging pain. As a result, he has learned to be more cautious, go slower or exert extra effort. For the most part, he maintains the same level and kinds of activities post-injury as he had pre-injury.

CONCLUSIONS OF LAW

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 Electric 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 dispute over whether the alleged injury arose out of and in the course of his employment stems primarily from the statements claimant made regarding his injury prior to his report of the injury to his employer. On February 5, 2015, claimant reported to Dr. Naeve that the pain in his left shoulder was similar to the right sided pain he had suffered years prior and that he could not pinpoint any specific injury. On February 18, 2015, claimant reported to Dr. Crites that the pain began five months previous to the visit and there was no injury.

Defendants argue that the oral history of no specific injury and pain pre-dating the alleged work injury date are examples of a fabrication about the genesis of the injury. On the other hand, claimant argues that he did not realize it was a work injury until Dr. Crites told claimant he suffered a left labrum tear. When claimant was told of this diagnosis, he recalled an incident at work when his arm was wrenched backward. Claimant reported the injury to his employer on February 23, 2015.

Claimant appeared credible during the hearing. His testimony was consistent with past medical records and was not impeached. Claimant's explanation for his late realization that there was a work injury was plausible. His demeanor was clam and straight forward.

During surgery, it was discovered claimant had both the labrum tear but also arthritis similar to the symptoms and disease on the right side. Dr. Crites opined that claimant's tear was from his work. Dr. Bansal made a similar summary conclusion. Dr. Yankey and Dr. Kimmelman both concluded that based on the oral history of the claimant as well as the mechanism of injury that the evidence did not support a finding that the left shoulder was caused or substantially aggravated by any injury at work.

The two opposing causation findings can be reconciled by the finding that claimant had underlying arthritis but that the work injury of February 3, 2015, caused a tear needing surgical repair. While Dr. Yankey and Dr. Kimmelman's reports are well-articulated, the claimant's credible testimony more accurately aligns with the opinion of Dr. Crites and Dr. Bansal.

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).

It is found that the labrum tear in the left shoulder arose out of and in the course of his employment. Claimant underwent surgery for that injury on May 14, 2015. He returned to work on November 29, 2015.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986)

Accordingly, claimant is entitled to temporary benefits from the stipulated time period of May 14, 2015, through November 29, 2015.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The claimant was released by his surgeon, Dr. Crites, on November 30, 2015, with no restrictions. He was also given a clean bill of health from the physical therapist on January 1, 2016. All therapy goals were deemed completed.

Claimant still engages in nearly every activity that he did in the past, including bow hunting. He works without restrictions, although he is currently enduring a seasonal layoff. Dr. Bansal's conclusion that claimant should not lift anything more than 10 pounds is not consistent with the claimant's testimony nor the recovery documented in the medical records. Claimant is required to lift around 40-45 pounds at work and does so without aid or accommodation.

Claimant intends to return to work and testified he can do his work without restrictions. He testified that he still has aches and a sharp sting. He moves more

cautiously and doing some tasks requires more effort. He does not believe he can lift more than 50 pounds, and has a hard time lifting and working over his head.

Claimant tripped and fell, suffering a retear in the fall of 2015. That retear necessitated a second surgery. Regardless, claimant had achieved MMI and a return to work with no restrictions from both Dr. Crites and the physical therapist.

Dr. Kimelman found claimant had sustained a 10 percent impairment of the upper extremity as the result of the shoulder surgery, however, he did not believe that impairment was work related. Based on the foregoing evidence, it is determined claimant has sustained a modest permanent impairment arising out of his original work injury of 5 percent industrial disability.

The awards given herein are subject to Iowa Code section 85.38(2) which entitles the defendant credit for payments under a disability policy or other employee benefit. The parties agree claimant received 28.286 weeks of indemnity benefits prior to the hearing and therefore the amount of 28.286 is applied toward the award.

2. Benefits paid under group plans.

a. In the event the employee with a disability shall receive any benefits, including medical, surgical, or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A, or chapter 85B, then the amounts so paid to the employee from the group plan shall be credited to or against any compensation payments, including medical, surgical, or hospital, made or to be made under this chapter, chapter 85A, or chapter 85B. The amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B. Any employer receiving such credit shall keep the employee safe and harmless from any and all claims or liabilities that may be made against them by reason of having received the payments only to the extent of the credit.

Iowa Code section 85.38(2)

Finally, claimant seeks repayment of the IME expenses of Dr. Bansal. Pursuant to Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015), only the examination is allowed as a reimbursement expense. The defendants are ordered to reimburse claimant $450.00 for the examination of Dr. Bansal.

ORDER

THEREFORE, it is ordered:

That defendant are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of six hundred sixty-four and 50/100 dollars ($664.50) per week from November 30, 2015.

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

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

That defendant are to be given credit for benefits previously paid, including benefits paid under a sick or disability policy.

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

That defendant shall pay four hundred fifty and no/100 dollars ($450.00), pursuant to Iowa Code section 85.39.

That defendant are to furnish medical benefits consistent with the decisions rendered above.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 in the amount of one hundred and no/100 dollars ($100.00) for a filing fee.

Signed and filed this 29th day of December, 2016.

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.