BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTOPHER ARDAPPLE, Claimant, vs. JOHN DEERE DAVENPORT WORKS, Employer, Self-Insured, Defendant.	:	File No. 5049457 REVIEW-REOPENING DECISION Head Notes: 2501, 2502, 2905

STATEMENT OF THE CASE

Claimant, Christopher Ardapple, filed a petition in review-reopening seeking workers' compensation benefits from John Deere Davenport Works (Deere), self-insured employer as defendant.

Prior to hearing, the parties agreed to submit this case on the record. This matter was fully submitted on July 12, 2019. This case was initially assigned to Deputy Workers' Compensation Commissioner Michelle McGovern. By order of delegation of authority, Deputy Workers' Compensation Commissioner Jim Christenson was appointed to prepare the findings of fact and proposed decision in this case.

The record in this case consists of Joint Exhibits 1-5, Claimant's Exhibits 1-10, and Defendant's Exhibits A through Q.

On May 30, 2019, prior to the submission of this case, defendant moved to suspend claimant's right to compensation for claimant's alleged failure to appear at an independent medical evaluation (IME). By stipulation attached to the June 21, 2019 hearing report, the defendant agreed to withdraw the motion.

ISSUES

1. Whether claimant is entitled to permanent partial disability benefits under review-reopening procedures; and if so

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

3. Whether claimant is due reimbursement for an IME under Iowa Code section 85.39.

4. Whether claimant is due reimbursement for lost time and medical mileage taken for medical appointments.

5. Costs.

The parties indicated in the hearing report claimant's entitlement to alternate medical care was an issue in dispute. In his post-hearing brief, claimant indicated he was no longer seeking alternate medical care.

FINDINGS OF FACT

Claimant was 41 years old at the time this case was submitted. Claimant graduated from high school. Claimant served for approximately four years in the military. Claimant attended a graphic arts program at a community college but did not graduate. (Arbitration Decision, page 2)

This matter was initially heard on a petition for arbitration on October 26, 2015. An arbitration decision was issued on January 29, 2016. That arbitration decision held, in part:

> It is found that claimant's bilateral carpal tunnel syndrome arose out of and in the course of his employment. Claimant's work was of the type that caused carpal tunnel syndrome. He had no previous symptoms of numbness and tingling before working in the roof assembly line despite prior use of alcohol and a prior martial arts injury. After working an assembly job that is assigned to 1.4 people, per defendant employer's own assessment, claimant developed CTS symptoms.

(Arb. Dec., p. 15)

The decision determined claimant was not at maximum medical improvement (MMI). (Arb. Dec., p. 16) The arbitration decision also found claimant was entitled to direct his own medical care for his bilateral carpal tunnel syndrome. (Arb. Dec., pp. 17-18)

The decision was affirmed in its entirety on appeal on September 21, 2017.

On or about July 17, 2016 claimant attended a 30-day residential alcohol rehabilitation program at Gateway Foundation. (Joint Exhibit 1)

Claimant voluntarily quit his employment with Deere on August 29, 2016. (Exhibit O, p. 71)

Following his employment with Deere claimant worked for four different employers, as of February 2019. Claimant testified his next job after Deere was as a welder with Highland Machine, in Highland, Illinois. Claimant welded parts for hair

dryers and utility trailers. Claimant worked for Highland for approximately two years. (Ex. I, p. 32; Deposition pp. 17-21)

Claimant next worked for Complete Lawn Care and Landscaping (Complete) mowing lawns and doing landscaping. Claimant worked for Complete for four to five months. (Ex. I, pp. 33-34; Depo. pp. 24-28)

After Complete, claimant worked for FLSmidth (FL). At FL claimant repaired and aligned kilns for the mining industry. Claimant testified a major part of his work for FL involved welding. Claimant worked for FL for about a year and a half. He left employment with FL in approximately December of 2018. (Ex. I, pp. 35-37; Depo. pp. 29-40)

Claimant then worked for North American Kiln Company (North American). At North American claimant did welding for grinding machines, loading and unloading. Claimant testified he worked approximately 70-84 hours per week for North American. Claimant was still working for North American at the time of his February of 2019 deposition. Claimant testified the work at North American was physical and repetitive. (Ex. I, pp. 37-38; Depo. pp. 37-43)

In October and November of 2017, counsel for both parties exchanged emails regarding authorization for further care for claimant. (Ex. F) A consent order, dated October 30, 2017 was approved by this agency. The parties agreed defendant would authorize care and treatment for claimant with Michael Hughes, M.D. at Belleville, Illinois. (Ex. G)

On January 19, 2018 claimant was evaluated by Timothy LeeBurton, M.D. Dr. LeeBurton is an orthopedic surgeon specializing in hand surgery. (Ex. Q) Claimant was seen for bilateral hand tremors and weakness. On exam, claimant had bilateral range of motion, motor strength and stability within normal limitations. A recent EMG did not show peripheral nerve compression. Claimant was assessed as having hand weakness. Dr. LeeBurton was unclear of the cause of claimant's symptoms. Claimant was treated with Medrol Dosepaks. (Jt. Ex. 4, p. 28)

Claimant returned to Dr. LeeBurton on July 13, 2018. Claimant's bilateral wrist range of motion, motor strength and stability were again within normal limitations. Claimant was to repeat EMGs. Dr. LeeBurton opined claimant's hand shakiness ". . . likely not a result of carpal tunnel." (Jt. Ex. 4, p. 30)

On July 31, 2018 claimant underwent EMG testing. Claimant's testing was normal. The summary of testing found no electrodiagnostic evidence of a median, ulnar, or radial focal distal neuropathy at the wrist or elbow bilaterally or peripheral neuropathy. (Jt. Ex. 5)

In a March 5, 2019 report, Richard Kreiter, M.D., gave his opinions of claimant's condition following an IME. Claimant reported numbness in his fingers in the morning.

Claimant also complained of intermittent weakness in his palm. Claimant believed he had lost some dexterity in his hands, left greater than right, and grip strength. (Ex. 2, pp. 10-11)

On exam, claimant's elbow had normal flexion, extension, pronation, and supination. Wrist range of motion was normal. Dr. Kreiter assessed claimant as having bilateral carpal tunnel syndrome and a probable irritated or entrapped left ulnar nerve with cubital tunnel syndrome. (Ex. 2, pp. 8, 11)

Dr. Kreiter opined the "entrapment" started while working at Deere as an assembler and a welder. He also indicated the cubital tunnel symptoms are related to repetitive work. Dr. Kreiter did not believe claimant had reached MMI and needed conservative treatment as opposed to surgery. He opined carpal tunnel syndrome and cubital tunnel syndrome can both be present with normal EMG/NCV testing. (Ex. 2, p. 8)

Dr. Kreiter also indicated any rating given at this period of time was only provisional. With that in mind, Dr. Kreiter found claimant could still receive a provisional permanent impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition based on claimant's grip strength. Based on claimant's grip strength alone, he opined claimant had a 10 percent permanent impairment to both upper extremities, converting to a 6 percent permanent impairment to the body as a whole. He noted if claimant had appropriate treatment, his permanent impairment could be significantly less and perhaps claimant had no permanent impairment. (Ex. 2, p. 8)

In deposition, Dr. Kreiter testified he had not seen claimant perform his job at Deere but had read about it. (Ex. J, p. 49) He testified that under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, it was not proper to render a permanent impairment if claimant was not at MMI. (Ex. J, p. 51) He testified that under the Guides he would not rely on grip strength to calculate permanent impairment. (Ex. J, p. 52) He testified he did not know when claimant first developed cubital tunnel syndrome. (Ex. J, p. 51) Dr. Kreiter opined if claimant had a carpal tunnel release by a competent surgeon, claimant would have no permanent impairment. (Ex. J, p. 55)

In a June 14, 2019 report, Christine Deignan, M.D. gave her opinions of claimant's condition following a medical records review. The review indicates Dr. Deignan also reviewed Dr. Kreiter's recent IME report, Dr. Kreiter's deposition and claimant's deposition. The record indicates Dr. Deignan was unable to perform a physical exam, due to claimant's unavailability. (Ex. K, p. 61; Ex. M, p. 65)

Dr. Deignan noted claimant's work, at North American, was repetitive and physical work with a 70-80-hour work week. She also noted claimant's medical records indicate claimant was drinking up to a pint of vodka per day as of 2018. She opined this could lead to tremors, shaking, muscle cramps and weakness. Dr. Deignan opined claimant's current condition and symptoms were not consistent with carpal tunnel syndrome. This was based, in part, on the fact that claimant had not worked at Deere

since August of 2016. Dr. Deignan could find no evidence claimant's current condition was related to his work at Deere. (Ex. N, pp. 60-69)

Dr. Deignan did not believe claimant had cubital tunnel syndrome on his left upper extremity. This was because nerve conduction testing in July of 2018 was normal. This was also based, in part, on claimant showing no symptoms of cubital tunnel syndrome while working at Deere. Dr. Deignan also noted there were no symptoms or reference to cubital tunnel syndrome in Dr. LeeBurton's records. Dr. Deignan noted the first reference to cubital tunnel syndrome is found at Dr. Kreiter's March of 2019 IME report. (Ex. N, p. 69) Dr. Deignan also opined claimant was at MMI for his upper extremity issues. She found claimant had no permanent impairment and no permanent restrictions. (Ex. N, p. 70)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant is entitled to additional benefits under a review-reopening proceeding.

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 R. App. P. 6.14(6).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

In a review-reopening proceeding, the claimant has the burden of proof to prove whether he has suffered an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994).

Claimant makes several arguments as to how he has had a change in condition since the October 26, 2015 arbitration hearing that has resulted in an impairment of earning capacity.

Claimant contends he has cubital tunnel syndrome since the October of 2015 arbitration hearing, which is proximally caused by his original work injury. Two experts have opined regarding claimant's cubital tunnel syndrome. Dr. Kreiter opined claimant

has cubital tunnel syndrome and his cubital tunnel syndrome is related to repetitive work. (Ex. 2, pp. 8, 11)

There are several problems with Dr. Kreiter's opinions regarding claimant's alleged cubital tunnel syndrome. First, Dr. Kreiter does not specifically relate claimant's alleged cubital tunnel syndrome to his work at Deere. Dr. Kreiter's opinion indicates "the cubital tunnel symptoms are also related to repetitive work." (Ex. 2, p. 8) As noted in the record, claimant has held four different jobs since leaving Deere. As Dr. Kreiter also notes, claimant's job, as of February of 2019, also involved repetitive and physical work. (Ex. 2, p. 10) Claimant's testimony also indicates his job with North American is repetitive physical labor. (Ex. I, pp. 37-38; Depo. pp. 37-43) In brief, claimant's alleged cubital tunnel syndrome could be the result of one of his four jobs since leaving Deere. Dr. Kreiter offers no analysis regarding these other potential intervening causes.

Second, claimant was evaluated twice by Dr. LeeBurton in January and June of 2018 for issues with his upper extremities. Dr. LeeBurton is an orthopedic surgeon specializing in hands. There is no reference in Dr. LeeBurton's medical records claimant was diagnosed with cubital tunnel syndrome or has any symptoms of cubital tunnel syndrome. (Jt. Ex. 4, pp. 28-30)

Third, claimant had EMG/nerve conduction studies in July of 2018 that were normal. (Jt. Ex. 5)

Finally, the only mention in the record of a left cubital tunnel syndrome is found only in Dr. Kreiter's IME of March of 2019. (Ex. 2) Given these inconsistencies, Dr. Kreiter's opinions regarding causation of claimant's cubital tunnel syndrome and whether claimant even has cubital tunnel syndrome, is found not convincing.

Dr. Deignan also opined regarding claimant's alleged cubital tunnel syndrome. Dr. Deignan opined claimant did not have cubital tunnel syndrome. This is because Dr. LeeBurton did not assess claimant as having cubital tunnel syndrome. It is also because there are no symptoms regarding cubital tunnel syndrome found in any of Dr. LeeBurton's records. Claimant also had a normal EMG/nerve conduction velocity study. (Ex. N, p. 69) Dr. Deignan's opinion regarding causation, or even existence, of a cubital tunnel syndrome comports with the record in this case. Given this record, her opinions regarding lack of causation, or evidence of, a cubital tunnel syndrome is found more convincing.

Dr. Kreiter's opinions regarding causation of alleged cubital tunnel syndrome are found not convincing. Claimant had normal EMG/nerve conduction velocity testing in July of 2018. Dr. LeeBurton's records make no mention of cubital tunnel syndrome. Dr. Deignan opined claimant did not have cubital tunnel syndrome. Given this record, claimant has failed to carry his burden of proof he has cubital tunnel syndrome related to his work at Deere.

Claimant also alleges he has a permanent impairment relative to his carpal tunnel syndrome. As noted above, the arbitration decision found claimant had bilateral carpal tunnel syndrome due to his work at Deere. Dr. Kreiter opined claimant had a 10 percent permanent impairment to both upper extremities converting to a 6 percent permanent impairment to the body as a whole for claimant's bilateral carpal tunnel syndrome. (Ex. 2, p. 8)

There are also some problems with Dr. Kreiter's finding of permanent impairment regarding claimant's carpal tunnel syndrome. First, as noted, claimant has had four jobs since leaving Deere in 2016. At least one of those positions involved repetitive heavy labor. Dr. Kreiter offers no analysis how claimant can have a permanent impairment related to his work at Deere, when claimant has not worked at Deere since August of 2016. Since that time, he has had four different jobs. Dr. Kreiter offers no analysis regarding these other potential intervening causes.

Second, Dr. Kreiter opined claimant was not at MMI. He noted his rating was a "provisional rating." Dr. Kreiter testified in deposition that under the Guides, it is not proper to render permanent impairment if claimant is not at MMI. Dr. Kreiter also testified he used claimant's grip strength to find a provisional rating. He testified that under the Guides he would not rely on grip strength to arrive at a rating. (Ex. 2, pp. 8, 10; Ex. J, pp. 51-52)

Third, as noted, claimant had normal EMG/nerve conduction velocity testing in July of 2018. (Jt. Ex. 5) Dr. Kreiter opined a person can have carpal tunnel symptoms yet have normal EMG/NCV testing. Dr. Kreiter offers no corroboration for this one sentence opinion.

Finally, as noted above, claimant was evaluated by Dr. LeeBurton in January and June of 2018. Dr. LeeBurton did not assess claimant as having carpal tunnel syndrome during these visits. Dr. LeeBurton was a physician chosen by claimant. (Ex. J, pp. 20-30) It appears Dr. Kreiter was provided with Dr. LeeBurton's records, yet he offers no rationale why Dr. LeeBurton found claimant did not likely have carpal tunnel syndrome, in 2008, yet has a permanent impairment related to carpal tunnel syndrome in 2019.

Given the above described problems and concerns with Dr. Kreiter's opinion regarding permanent impairment, it is found his opinion that claimant has a permanent impairment regarding his carpal tunnel syndrome, related to his job at Deere, is not convincing.

Dr. Deignan opined claimant's current condition and symptoms were not consistent with carpal tunnel syndrome. This is because claimant did not have clinical symptoms of carpal tunnel syndrome, and because EMG and nerve conduction testing in July of 2018 were normal. This is also because his cramping and shakiness, reported to Dr. LeeBurton, are not consistent with carpal tunnel syndrome. (Ex. I, pp. 68-70) Because Dr. Deignan's opinions regarding permanent impairment are supported

by Dr. LeeBurton's records, diagnostic testing, and other evidence in the record, her opinions regarding permanent impairment are found more convincing.

Claimant had normal EMG/nerve conduction velocity testing in July of 2008 for his upper extremities. Dr. Kreiter's opinion regarding permanent impairment is found not convincing. Dr. Deignan's opinion that claimant has no permanent impairment regarding his carpal tunnel syndrome is found more convincing and credible. Given this record, claimant has failed to carry his burden of proof he sustained a permanent impairment regarding his carpal tunnel syndrome.

As claimant has failed to carry his burden of proof he sustained any permanent impairment from his carpal tunnel syndrome, the issue regarding the extent of claimant's entitlement to permanent partial disability benefits is moot.

There is no evidence in the record claimant had an economic change in condition resulting in an impairment of earning capacity proximally caused by the original injury. Claimant failed to carry his burden of proof he sustained a physical change in condition resulting in a decrease in earning capacity proximally caused by the original injury. Given this record, claimant has failed to carry his burden of proof he is entitled to any benefits under a review-reopening proceeding.

The next issue to be determined is whether claimant is due reimbursement for an IME under Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Claimant contends he is due reimbursement for Dr. Kreiter's 2019 IME, as his right for reimbursement under Iowa Code section 85.39 was triggered by evaluations performed by Peter Matos, D.O. and Dr. Deignan from 2015. (Claimant's Post-Hearing Brief, p. 4)

The evaluation of Drs. Matos and Deignan from 2015 were in relation to claimant's arbitration hearing. These evaluations were not done in regards to the review-reopening proceeding. Those evaluations are not evidence in the review-reopening proceeding record. Dr. Kreiter issued his IME opinion in March of 2019. Dr. Deignan issued her IME opinion in a June of 2019 report. Given the chronology of these reports, claimant is not due reimbursement for an IME under Iowa Code section 85.39 for this review-reopening proceeding.

The next issue to be determined is whether claimant is due reimbursement for lost time and medical mileage for his medical appointments.

Deere authorized claimant's treatment with Dr. Hughes. This authorization was agreed to by stipulation of the claimant. (Exs. F, G) Instead of seeing Dr. Hughes, claimant chose to see Dr. LeeBurton and Boris Khariton, M.D., for his electrodiagnostic testing. Neither one of these providers was authorized.

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and is reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the cost of medical care that is not authorized by section 85.27. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003). A claimant can seek payment of unauthorized medical care if there is a preponderance of the evidence the care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206

There is no evidence in the record the care claimant received from Dr. LeeBurton or Dr. Khariton was more beneficial than the care authorized with Dr. Hughes. Given this record claimant has failed to carry his burden of proof he is due reimbursement for medical mileage or lost work time, identified in Exhibit 4, page 15.

The final issue to be determined is costs. Costs are determined at the discretion of this agency. As claimant has failed to prevail on any issue in this review-reopening proceeding, the costs are not awarded to claimant.

ORDER

Therefore, it is ordered:

That claimant shall take nothing from this proceeding.

That both parties shall pay their own costs.

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

Signed and filed this 12th day of March, 2020.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Troy Howell (via WCES)
Andrew Bribriesco (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.