BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH BAUMAN,

Claimant,

vs.

BRIDGESTONE/FIRESTONE,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5054286

ARBITRATION

DECISION

Head Note Nos.: 1803; 2501; 2907

STATEMENT OF THE CASE

Claimant, Joseph Bauman, filed a petition in arbitration seeking workers' compensation benefits from defendants, Bridgestone/Firestone, the employer, and their workers' compensation insurance carrier, Old Republic Insurance Company. The arbitration hearing was held on August 22, 2016, in Des Moines, Iowa.

The claimant provided testimony at hearing. The evidentiary record also includes Claimant's Exhibits 1 and 3, and Defendants' Exhibits A through F, all of which were admitted without objection.

The parties submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations. The parties are now bound by those stipulations.

Counsel for the parties submitted briefs on October 7, 2016, and the case was considered fully submitted at that time.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of permanent impairment, if any.

2. Whether claimant is entitled to payment of medical expenses incurred at Capital Orthopaedics in the amount of $1,287.00

3. Whether claimant is entitled to receive ongoing medical care with Dr. Jacobson at Capital Orthopaedics.

FINDINGS OF FACT

At the time of the hearing, claimant was 59 years of age. (Tr. p. 10) He graduated from high school in Indianola, Iowa, in 1975, and attended Simpson College for a few years, until about 1977. He did not obtain a degree. (Tr. p. 10-11)

Claimant began working for the defendant employer on February 4, 1988. (Tr. p. 12)

On June 13, 2013, claimant, was injured while working for the defendant employer. (Hearing Report) On that date, he was working as a rubber trucker, a job that he had been doing for several years. (Tr. p. 12) This job required claimant to operate a forklift and move skids of rubber around the plant. (Id.) On the above date, claimant stepped off a forklift, got his foot caught on the machine, and twisted his left knee. (Tr. p. 13) He felt a burning twinge that he had never felt before. (Id.)

Claimant received initial medical care that included an MRI on June 19, 2013, which showed, among other things, findings that were "suspicious for an oblique linear tear of the posterior horn of the medial meniscus extending to the inferior articular surface." (Ex. B, p. 1)

On July 17, 2013, claimant was seen by William Jacobson, M.D., of Capital Orthopaedics. (Ex. A, p. 1-2) Dr. Jacobson noted that claimant had left knee pain with underlying medial meniscus tear and mild degenerative changes. (Ex. A, p. 1) Dr. Jacobson stated that claimant "had an injury in the service that sounds like he probably tore his meniscus at that point." (Ex. A, p. 2) However, claimant flatly denies that he ever served in the military at any time. (Tr. p. 11, 15) In addition, claimant testified that he never hurt his left knee or received any medical treatment for his left knee before June 13, 2013. (Tr. p. 15)

On September 12, 2013, Dr. Jacobson performed a surgery that included a partial knee medial meniscectomy and chondroplasty. (Ex. C, p. 1)

Following surgery, claimant continued to have pain in the left knee and was prescribed physical therapy. (Ex. A, p. 6-8)

On January 28, 2014, Dr. Jacobson noted that claimant was "doing reasonably well," and was "back to his normal job." (Ex. A, p. 12) However, he also indicated that claimant "still had some mild pain issues." (Id.) Dr. Jacobson then confirmed that claimant was released to return to work, full-duty. (Ex. A, p. 14)

On April 7, 2014, Dr. Jacobson authored a letter to Sedgwick Claims Management Services, in which he opined that claimant was at maximum medical improvement (MMI) on January 28, 2014 concerning his left knee, and he assigned a 2 percent permanent impairment to the left lower extremity based on Table 17-33, page 546 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. A, p. 15)

On July 14, 2014, claimant returned to Dr. Jacobson with increasing pain in his left knee. (Ex, A, p. 16; Tr. pp. 16-17) He was given a cortisone injection and discussed potential future surgery including knee replacement. (Ex. A, p. 16-17) Claimant stated that the pain he was having at that time was different from the pain he had prior to surgery. (Tr. p. 16) However, he also testified that he never had that type of pain before the work injury on June 13, 2013. (Tr. p. 17)

On August 12, 2014, claimant followed-up with Dr. Jacobson who reported that a cortisone injection gave him some mild relief, but that the pain continued. (Ex. A, p. 18) Dr. Jacobson noted that claimant had: "left knee medial compartment arthritis," and "prior left knee arthroscopy, work-related." (Id.) Prior to June 13, 2013, claimant had never been told by any physician that he had arthritis in his left knee. (Tr. p. 17) Dr. Jacobson spoke with claimant about getting approved for a Visco supplementation injection and trying an unloader brace in an effort to get some relief from the medial compartment pain. It was also discussed again that a knee replacement may be in his future, but due to his weight, he was not a candidate at that time. (Id.)

On August 13, 2014, the workers' compensation insurance administrator denied authorization for the synvisc injection. (Ex. A, p. 22)

Claimant continued to receive treatment with Dr. Jacobson at Capital Orthopaedics after further medical care was denied by the workers' compensation insurance administrator. He therefore incurred expenses related to additional medical treatment, which are provided in the attachment to the hearing report and contained at Exhibit 3, page 1. This exhibit is a medical bill summary from Capital Orthopaedics for the period of time from September 1, 2015 through May 4, 2016. The exhibits submitted contain medical records from this time period at Exhibit A, pages 24 through 30. It is noted that the records indicate that the treatment including injections were helpful. (Ex. A, p. 29) I therefore find that the treatment claimant received was helpful, reasonable and appropriate to treat claimant's condition. Defendant offered no evidence or argument to the contrary on the issue of medical bills beyond the argument that the treatment was not causally related to the work injury.

On October 4, 2014, Dr. Jacobson replied to a question from the insurance administrator concerning whether the underlying arthritic condition was related to the work injury of June 13, 2013. The letter was presented to Dr. Jacobson with a request that he check a box "yes" or "no". (Ex. A, p. 23) However, Dr. Jacobson checked the box "no," but then also wrote in the additional phrase, "not directly." (Ex. A, p. 23) This

handwritten portion indicates to the undersigned that Dr. Jacobson believed that there was some level of connection between the arthritic condition and the work injury.

Claimant continued to have follow-up treatment with Dr. Jacobson, who on February 28, 2016, responded to a "sign here" letter from defense counsel indicating his opinion that "the meniscus tear injury may have played a role, but most likely not a substantial role, in the need for the future total knee replacement." (Ex. A, p. 27) The letter further states that "this is confirmed by the fact that Mr. Bauman had some previous arthritic findings on diagnostic testing that dated prior to the work injury of June 13, 2013." (Ex. A, p. 26-27) However, the "previous arthritic findings" are not specifically identified. The medical records submitted at hearing include only one page of records that pre-date the June 13, 2013, work injury. That record is a note from January 31, 2011, which states that while being treated for his shoulder injury, claimant indicated that "over the last two days his knees and shoulders have been very achy due to the change in weather he believes." (Ex. E, p. 1) There is no record of any examination, evaluation or treatment of any kind for claimant's knees, or more specifically, his left knee, as a result of this complaint. Claimant testified that there were no x-rays, MRI's, or any referral for any medical treatment for his left knee at that time. (Tr. p. 20) Further, claimant stated that he did not have any ongoing difficulty with his knees at that time. (Id.) I find that this January 31, 2011 medical record should be given no weight concerning any alleged prior diagnostic testing of an arthritic condition.

The only other reference to anything prior to June 13, 2013 in the record, is a note from Dr. Jacobson dated July 17, 2013, stating that claimant "had an injury in the service that sounds like he probably tore his meniscus at that point." (Ex. A, p. 2) However, claimant testified that he was never in the service and he has no idea where Dr. Jacobson came up with that statement. (Tr. p. 11, 15) Also, claimant testified that prior to June 13, 2013, he had never hurt his left knee, or received any medical treatment for his left knee. (Tr. p. 15) I find this reference to an alleged prior meniscus tear is unsupported by any other evidence presented at hearing. Further, it is specifically contrary to claimant's credible testimony.

Based on the above, the undersigned is unable to determine what "arthritic findings on diagnostic testing" allegedly predated the work injury, and were relied upon by Dr. Jacobson to support a conclusion that the meniscus tear injury did not play a substantial role in the need for the future total knee replacement. (Ex. A, p. 26-27) As such, I disregard this particular opinion of Dr. Jacobson.

On June 24, 2016, claimant was seen for an independent medical examination with Sunil Bansal, M.D. (Ex. 1, p. 1) After reviewing relevant medical records, Dr. Bansal noted that claimant's current left knee condition caused him to have stiffness and pain with prolonged sitting and walking. (Ex. 1, p. 5) Dr. Bansal's examination of claimant's left knee found: positive valgus stressing; bursal swelling; crepitus; medial joint line tenderness; and, positive McMurray's test. Dr. Bansal agreed with Dr. Jacobson that claimant is a candidate for a knee replacement. (Ex. 1, p. 6, 7) Dr. Bansal also opined that the left knee meniscal tear led "to the aggravation of his

degenerative joint disease," and that it was a permanent aggravation. (Ex. 1, pp. 7-8) As such, he has assigned a 2 percent permanent partial impairment to the lower extremity. (Ex. 1, p. 10) Dr. Bansal goes on to state that "provisionally and in the absence of further treatment, I would assign a 25% lower extremity for having a 1mm cartilage interval of the medial compartment. Of course, he is in need of a knee replacement . . ." (Id.) Dr. Bansal then combines the 2 percent and the 25 percent to arrive at a total impairment of 27 percent to the lower extremity. (Id.)

On August 12, 2016, Dr. Jacobson drafted a letter to claimant's attorney regarding claimant's left knee. (Ex. A, p. 31) Dr. Jacobson stated, "It is my opinion that the injury he sustained on June 13, 2013, did aggravate the underlying arthritic condition. It is also likely that it hastened the progression of the degenerative arthritis in the knee. I do not believe it likely changed the natural history of his left knee progressing on to severe arthritis." (Id.) I find that Dr. Jacobson's final statement indicates that severe arthritis may have developed at some point in the future, but it was the work injury that aggravated the underlying condition and "hastened the progression" of the condition. (Id.) I find that this letter, which was actually written by Dr. Jacobson, and not merely a "fill in the blank" response represents the most accurate statement of his opinion concerning causation of claimant's current condition.

Based upon Dr. Bansal's IME opinion and Dr. Jacobson's August 12, 2016, letter, I find that they are in agreement that the June 13, 2013 work injury aggravated the underlying arthritic condition of claimant's left knee. Prior to June 13, 2013, claimant testified credibly that he was not having any problems with the left knee of any consequence and that he was not receiving any medical treatment for the left knee. After the work injury, claimant's knee became symptomatic and continues to be symptomatic. Based on the above, I find that the June 13, 2013, work injury caused the meniscus tear and aggravated the underlying arthritic condition that requires ongoing medical care at this time.

Considering permanent impairment, on April 7, 2014, Dr. Jacobson assigned 2 percent to the left lower extremity based on Table 17-33 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. A, p. 15) On July 12, 2016, Dr. Bansal agreed with Dr. Jacobson and also assigned a 2 percent impairment based on Table 17-33 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. A, p. 10) However, Dr. Bansal also assigned an additional "provisional" impairment of 25 percent based on a 1mm cartilage interval of the medial compartment, for a total of 27 percent impairment. (Ex. 1, p. 10) The undersigned finds that the additional 25 percent impairment is supported by Table 17-31 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

In consideration of the two different permanent impairment ratings assigned by Dr. Jacobson and Dr. Bansal, the undersigned notes the following:

(1) On July 17, 2013, shortly after the work injury, the x-rays of claimant's left knee showed the joint spaces were "well preserved" and Dr. Jacobson's impression was "mild degenerative changes." (Ex. A, p. 1);

(2) On September 12, 2013, Dr. Jacobson performed surgery, which included a medial meniscectomy involving removal of 20 percent of the meniscus. (Ex. C, p. 1; Tr. p. 15);

(3) On July 14, 2014, over a month after Dr. Jacobson provided his opinion of permanent impairment, x-rays of claimant's left knee showed significant narrowing of the medial compartment, consistent with arthritis. (Ex. A, p. 16); and,

(4) On September 1, 2015, the x-rays showed essentially bone-on-bone arthritis of the medial compartment of the left knee. Thereafter, Dr. Bansal provided his opinion on permanent impairment which included the additional 25 percent impairment based on 1 mm cartilage interval of the medial compartment, which is consistent with the above documented medical history.

Based on the above, and in light of Dr. Bansal's more recent assessment of permanent impairment, I find that Dr. Bansal's opinion of 27 percent impairment of the lower extremity represents a more accurate statement of claimant's current impairment and takes into consideration the continued deterioration of claimant's medial compartment of his left knee. Although it is described as "provisional" with an understanding that additional treatment may impact the rating, the undersigned is not at liberty to speculate as to the potential future results of treatment that has not yet occurred and must assess the disability as presented at the time of the hearing. I find that Dr. Bansal's 27 percent permanent impairment of the lower extremity, which is 59.4 weeks (27% x 220 weeks), to be more persuasive.

CONCLUSIONS OF LAW

The first issue is the extent of permanent impairment.

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).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section

85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

"In determining a scheduled or unscheduled award, the commissioner finds the facts as they stand at the time of the hearing and should not speculate about the future course of the claimant's condition." Kohlhaas v. Hog Slat, Inc., 777N.W.2d387, at 392 (Iowa 2009).

The parties have stipulated in the hearing report that the injury is to the left leg. For the reasons stated above, I have found that Dr. Bansal's opinion that claimant has sustained a 27 percent permanent impairment to the left lower extremity is the more accurate statement of the condition of claimant's permanent impairment resulting from the June 13, 2013 work injury.

The second issue to be addressed is whether the current condition is related to the work injury, such that claimant would be entitled to ongoing medical care.

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 Rule of Appellate Procedure 6.14(6).

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

I have found above that Dr. Jacobson's opinion, which he signed on February 28, 2016, and is reflected in the letter prepared by defense counsel dated February 24, 2016 was based on the faulty premise that there was a pre-work injury diagnostic testing that demonstrated arthritic findings, and have therefore disregarded that opinion.

As stated above I conclude that claimant's ongoing left knee condition is the result of the June 13, 2013, work injury which caused an aggravation of the pre-existing condition and as such, ongoing medical care is appropriate. I find the defendant's failure to provide medical care is unreasonable. Claimant seeks ongoing medical care with Dr. Jacobson, the previously authorized treating physician, which is found to be reasonable and is granted.

The final issue is whether claimant is entitled to payment of medical expenses incurred at Capital Orthopaedics as attached to the hearing report, and contained in claimant's exhibit 3.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January

1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

I have found above that the continued treatment with Dr. Jacobson at Capital Orthopaedics was helpful, reasonable and appropriate to treat the condition. I further conclude that the same are related to the June 13, 2013, work injury and that claimant is therefore entitled to reimbursement.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and I therefore exercise my discretion and assess costs against the defendants in this matter. The appropriate costs identified in the attachment to the hearing report include the filing fee and the cost of service of the original notice and petition. In addition, claimant has included as a cost the expense of Dr. Bansal's IME evaluation and report. The evaluation expense is listed as $394.00 and the record review and report is listed as $2,341.00. Claimant did not identify reimbursement via Iowa Code section 85.39 as an issue on the hearing report or in the discussion between counsel and the undersigned at the outset of the hearing. Therefore, this additional expense is considered as a cost under Iowa Code section 86.40. The Iowa Supreme Court has determined the proper method for assigning costs in this scenario in Des Moines Area Regional Transit Authority v. Young, 867 N.W. 2d 839 (Iowa 2015). The Court stated that "[o]nly the costs associated with the preparation of the written report . . . can be assessed as costs of the hearing." Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 847, (Iowa 2015). I therefore, tax only the costs of the preparation of the report in the amount of $2,341.00, in addition to the filing fee and service fee.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent partial disability benefits of fifty-nine point four (59.4) weeks beginning on the stipulated commencement date of January 28, 2014 until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated that defendants are entitled to a credit of four point four (4.4) weeks.

All weekly benefits shall be paid at the stipulated rate of four hundred thirty-eight and 78/100 dollars ($438.78) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall pay, reimburse, and or otherwise satisfy all medical expenses identified in claimant's exhibits 3.

Defendants shall provide reasonable medical care with Dr. William Jacobson of Capital Orthopaedics for claimant's left knee work injury, including the aggravation of the underlying arthritic condition.

Defendants shall pay costs including the preparation fee for Dr. Bansal's report of two thousand three hundred forty-one and no/100 dollars ($2,341.00) in addition to the filing fee and service fee.

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 11th day of January, 2017.

TOBY J. GORDON
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.