

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANITA GUMM,
Claimant,

vs.

EASTER SEAL SOCIETY OF IOWA,
INC.,
Employer,

and

ACCIDENT FUND INSURANCE CO.,
Insurance Carrier,
Defendants.

FILED

OCT 12 2017

WORKERS' COMPENSATION

File No. 5047205

A P P E A L
D E C I S I O N

ANITA GUMM,
Claimant,

vs.

EASTER SEAL SOCIETY OF IOWA,
INC.,
Employer,

and

AMERICAN COMPENSATION INS. CO.
and SFM INS. CO.,
Insurance Carrier,
Defendants.

File No. 5047206

A P P E A L
D E C I S I O N

Headnote No. 2209

Claimant, Anita Gumm, and Defendants, Easter Seal Society of Iowa and Defendant Accident Fund Ins. Co., appeal from an arbitration decision filed on February 18, 2016. Defendant Easter Seal Society of Iowa with its insured, American Compensation Ins. Co. and SFM companies resist the appeal and seek an affirmation of the proposed arbitration decision.

The case was heard on March 12, 2015, and considered fully submitted on April 13, 2015, after the filing of post-hearing briefs. Claimant filed an appeal on February 26, 2016, and Defendant Accident Fund Ins. Co. filed an appeal on March 7, 2016.

The matter was then delegated to the undersigned for a final agency decision.

There were two dates of injury at issue. Under the October 28, 2008, date of injury (File No. 5047205), the deputy commissioner found that Defendants Easter Seals and Accident Fund should continue to pay claimant's prior medical expenses but awarded no other benefits. Under the March 6, 2012, May 16, 2013, and/or January 15, 2014, injury date, the deputy commissioner found that the claimant failed to prove she sustained a cumulative work injury after returning to work subsequent to the October 28, 2008 fracture. No benefits were awarded. Defendant Accident Fund and SFM were ordered to reimburse Defendant American Compensation Inc. \$500. Further, the deputy ruled that Accident Fund was not entitled to contribution from defendants American Compensation Insurance Co. or SFM.

Claimant argues that she did sustain a cumulative aggravation injury after October 28, 2008; that the injury date of the "new" aggravation manifested either on May 16, 2013, October 23, 2013, or January 24, 2014; that claimant is entitled to healing period benefits while off-work from October 23, 2013, through January 10, 2014; that claimant is entitled to permanent industrial disability benefits; that claimant is entitled to medical benefits, and costs. Claimant also supports a finding that Defendant insurance carrier Accident Fund Insurance Company is entitled to reimbursement for medical expenses from other carriers.

Defendant Accident Fund argues that claimant sustained a cumulative aggravation injury after October 28, 2008 and therefore Accident Fund should not be responsible for paying any of the disputed medical treatment and that American Compensation Insurance Co. and/or SFM Insurance Company must reimburse Accident Fund for the medical expenses Accident Fund paid. Defendant Accident Fund further denies responsibility for payment of any of claimant's costs.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision the proposed arbitration decision in its entirety with the following additional discussion of law.

FINDINGS OF FACT

I adopt and incorporate the findings of fact from the proposed Arbitration Decision.

CONCLUSIONS OF LAW

The crux of the claimant and defendant Accident Fund's Insurance Company's argument is that the deputy commissioner failed to apply the holding of Floyd v. Quaker Oats, 646 N.W.2d 105, 108-109 (Iowa 2002), to the case at bar.

The Floyd case held that when there is no finding that a previous injury was determined to be a compensable event, the claimant "should be permitted to recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the previous injury." *Id.* at 108.

The significant factor in the Ellingson case was that the extent of the 1985 injury was being litigated in the same proceeding in which the separate cumulative-injury claim was being urged. Moreover, the evidence conclusively showed that the ultimate extent of industrial disability was affected by job-related activities that aggravated the 1985 neck injury. As a result of that circumstance, this court held that the compensable consequences of the aggravation of the 1985 neck injury must be adjudicated as part of the disability flowing from that injury.

(Floyd, 646 N.W.2d at 108)

(Ellingson v. Fleetguard, Inc., 599 N.W.2d 440, 444 (Iowa 1999))

Ellingson was not overturned by Floyd. Instead, the Supreme Court carved out an exception. The Floyd court went on to say that based on the Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960), "When a permanent disability has been established by an adjudicated award, a later aggravation may provide an independent compensable event but only to the extent of the increased disability that flows therefrom."

In the present case, claimant sustained a significant fracture to her right ankle on October 28, 2008. Claimant testified that she never felt as if her ankle healed and the

medical treatment records bear that out. Claimant had four surgeries and one injection in the ankle in the five years following.

Claimant initially underwent surgery and after a course of healing and physical therapy, on April 7, 2009, claimant reported that she had resumed full activity with pain or discomfort.

Defendant Accident Fund paid claimant 38.4 weeks of permanent partial disability benefits based upon Eric A. Barp, M.D.'s 17 percent lower extremity impairment rating. The last check was issued on May 21, 2010. Claimant filed her present petition on February 24, 2014. To avoid the statute of limitations problem, claimant, along with Accident Fund Insurance Co., seek a finding that the claimant sustained a compensable injury at some point after March 6, 2012.

On April 22, 2010, claimant returned to Dr. Barp with complaints of right ankle pain and stiffness. She underwent surgery on May 3, 2010, to remove the hardware and then was returned to work without restrictions on May 19, 2010. Unfortunately, claimant's ankle symptomatology did not abate. She returned with pain in the toes, ankle, and foot. Dr. Barp injected her on March 6, 2012. On April 11, 2012, she underwent a right ankle arthroscopy which revealed posttraumatic arthritis and synovitis. Claimant was treated and released again without restrictions on May 3, 2012. On July 17, 2012, Dr. Barp noted that claimant was pain free and doing well. He opined that the claimant had healed completely and warranted no additional rating of permanency.

A year later, on May 16, 2013, claimant returned with renewed complaints of pain. X-rays showed degenerative joint disease. Dr. Barp injected the claimant in the ankle again. A CT taken in August 2013, revealed posttraumatic degenerative manifestations and recommended ankle arthrodesis. However, claimant would need to stop smoking prior to surgery. The surgery took place on October 23, 2013.

In 2014, claimant began to complain of left knee, low back, and shoulder pain. It was determined that these pains were likely due to claimant's altered gait.

While there is no prior adjudication of a compensable claim, the facts of this case are more aligned with the facts in Ellingson than Floyd. In Floyd, the injured worker slipped, fell and twisted the knee resulting in a torn or partially torn medial meniscus. Floyd, 646 N.W.2d at 106. His surgeon determined that seventy-five percent of the claimant's fifteen percent impairment was attributable to the original September 1993 injury but that the balance, 3.75 percent, was attributed to cumulative trauma that resulted from work activities subsequent to the injury of September 1993.

In Ellingson, the claimant sustained a traumatic injury to her neck. She continued to suffer problems over the next several years. She then sought recovery for both the 1985 neck injury and the subsequent cumulative trauma. The court held that "compensable consequences of the aggravation of the 1985 neck injury must be adjudicated as part of the disability flowing from that injury." Floyd, 646 N.W.2d at 108.

Because there was no specific overturning or denouncement of Ellingson, the undersigned cannot ignore its holding nor its factual similarity to the case at bar. Until the Iowa Supreme Court deems that the Ellingson case is no longer good law, we are bound to abide by it. "From the very beginnings of this court, we have guarded the venerable doctrine of stare decisis and required the highest possible showing that a precedent should be overruled before taking such a step." Kiesau v. Bantz, 686 N.W.2d 164, 180 n. 1 (Iowa 2004) (Cady, J., dissenting) (citing, in part, Hildreth v. Tomlinson, 2 Greene 360, 361 (Iowa 1849)).

The deputy's analysis of the remaining issues is sufficient and need not be addressed in further detail.

ORDER

THEREFORE, IT IS ORDERED that the arbitration decision filed February 18, 2016, is affirmed in its entirety.

Signed and filed this 18th day of October, 2016.



JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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