

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK L. SWANSON,

Claimant,

vs.

PELLA CORPORATION,

Employer,
Self-Insured,
Defendant.

File No. 5055114

REHEARING

DECISION

FILED

MAR 15 2019

WORKERS' COMPENSATION

Defendants filed a 23-page application for rehearing (application). Claimant resists the application. The application is considered.

Defendant raises five issues why rehearing is required in this matter. First, defendant contends claimant failed to carry his burden of proof he sustained an injury arising out of and in the course of employment.

Claimant was found by the deputy, who heard this case, to be a credible witness. I give considerable deference to findings of facts that are impacted by credibility findings of the deputy. The deputy who presided at hearing has the best opportunity to evaluate the demeanor of the person testifying at hearing. My ability to make findings of facts that are affected by demeanor and credibility cannot be better than that of the deputy presiding at the hearing.

Claimant testified he injured his right shoulder while lifting a door part, (called a "stile") out of a sliding door cart, to place the stile on a work table. (Hearing Transcript pp. 11-12)

Claimant's testimony at hearing regarding his accident was consistent with numerous medical records. (Exhibits 1-2, 8) His testimony of how the accident happened was corroborated by at least one other witness. (Ex. 12, p. 10) Investigation documents, generated by defendant also support claimant's testimony as to how his shoulder injury occurred. (Ex. 9, pp. 3-6; Ex. 12, pp. 10-12, Ex. K) Given this record, it is again found claimant carried his burden of proof he sustained an injury arising out of and in the course of employment. Defendant's application is denied as to this ground.

Second, defendant contends the agency abused its discretion in accepting expert opinions.

It is unclear why this is a basis for rehearing. However, as detailed in the arbitration and appeal decisions, Jason Sullivan, M.D. treated claimant for an extended period and performed surgery on claimant. Of all the experts, he has the most experience with claimant's condition and greater familiarity with claimant's medical presentation, than any other expert in this case. Dr. Sullivan opined claimant's right shoulder problems were the result of a work injury in September of 2015. (Ex. 2, pp. 34-42)

Brian Crites, M.D., reviewed claimant's medical records and the MRI of claimant's shoulder. His opinion corroborates the causation opinions of Dr. Sullivan. (Ex. 8, p. 16)

Claimant was assessed as having a SLAP tear in the right shoulder. Christopher Vincent, M.D., opined, in part, he was unable to give an opinion regarding the SLAP tear in claimant's right shoulder. (Ex. 1, p. 22)

Both Dr. Sullivan and Dr. Crites found claimant had an aggravation of a pre-existing condition in the right shoulder as a result of the September 2015 injury. Claimant has been assessed as having a SLAP tear. Dr. Vincent has no opinion regarding the SLAP tear in claimant's right shoulder. Given this record, defendant's application is denied as to this ground.

Third, defendant contends the award of industrial disability is based on inaccurate evidence. Claimant was 53 years old at the time of hearing. He graduated from high school. He has worked at defendant since 1989. Dr. Sullivan found claimant had an eight percent permanent impairment to the right upper extremity. (Ex. 2, p. 39) There is no contrary opinion. Claimant credibly testified he could not return to work at his prior job with stiles due to right shoulder limitations. He credibly testified he was offered, and turned down, a higher paying job, due to lifting requirements. Claimant credibly testified he has continued pain and difficulty with lifting in his right shoulder. At the time of the hearing, claimant was still working at defendant.

Defendant again argues that evidence not in the record supports its claim claimant has little or no industrial disability. Defendant's counsel is, again, reminded it is improper for defendant to continue to base its argument on evidence not made a part of this record. Defendants' counsel is respectfully requested to discontinue this practice.

Given this record, defendant's application is denied as to this ground.

Fourth, defendant contends the agency decision should conform to the parties' stipulation regarding credits against an award.

Defendant has still not paid claimant any benefits as awarded in the arbitration decision and as affirmed in the appeal decision. The hearing report indicates "Parties will agree on amount of credit if applicable benefits are awarded."

Benefits have been awarded in this case. Claimant's resistance to the application indicates defendant has yet to pay any benefits to claimant and defendants have yet to make any proposal for a potential credit.

Given this record, defendant's application is granted, in part. As benefits have been awarded, defendants shall make a proposal to claimant within twenty (20) days of the date of this ruling regarding any credits defendant may be due.

Fifth, defendant contends it was prejudiced as a determination was made claimant sustained a cumulative injury instead a traumatic injury. A review of the record and the opinions of Dr. Sullivan and Dr. Crites do indicate claimant sustained a traumatic injury to his shoulder that materially aggravated a pre-existing condition. (Ex. 2, pp. 34-42; Ex. 8, p. 16)

As noted in the September 26, 2017, rehearing ruling, and in the appeal decision in this matter, it is found defendant was put on notice of the potential for an injury based on cumulative trauma. However, as noted, the record does reflect claimant sustained a traumatic injury to his shoulder that materially aggravated a pre-existing condition. Defendant's application is granted, in part, so as to reflect claimant had a traumatic injury to the right shoulder that arose out of and in the course of employment.

ORDER

IT IS THEREFORE ORDERED that defendant's application for rehearing is granted, in part, and denied in part.

The arbitration decision is modified to reflect claimant sustained a traumatic injury to his right shoulder that arose out of and in the course of his employment.

The arbitration decision is also modified and defendant is required, within twenty (20) days of this date of this decision, to offer a proposal to claimant regarding any credits that might be due.

Defendant's application for rehearing is denied on all other grounds.

Signed and filed on this 15th day of March, 2019.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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