

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SENAD MILJKOVIC,

Claimant,

vs.

KPR/TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 1662952.01

ARBITRATION DECISION

Head Note Nos.: 1802, 1803, 2502, 2907

STATEMENT OF THE CASE

Senad Miljkovic, claimant, filed a petition in arbitration seeking workers' compensation benefits from KPR/Tyson Foods, Inc., self-insured employer as defendant. Hearing was held on August 18, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Senad Miljkovic was the only witness to testify live at trial. He testified via the use of a translator. The evidentiary record also includes joint exhibits JE1-JE7, claimant's exhibits 1-3, and defendant's exhibits A-G. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on September 17, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant is entitled to healing period benefits from August 15, 2019 through May 4, 2021.

2. The amount of permanent partial disability benefits that claimant is entitled to receive due to the injury to his left lower extremity.
3. The appropriate commencement date for his permanent partial disability benefits.
4. Whether claimant is entitled to reimbursement for an Independent Medical Examination.
5. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

On May 6, 2018, claimant, Senad Miljkovic, sustained an injury to his left knee which arose out of and in the course of his employment with KPR/Tyson Foods, Inc. ("Tyson"). Mr. Miljkovic received medical treatment from Robert L. Gordon, M.S., the on-site physician and from Thomas Gorsche, M.D., the authorized treating physician. (Testimony)

On April 15, 2019, Dr. Gorsche performed surgery for a torn meniscus. Mr. Miljkovic returned to see Dr. Gorsche on July 15, 2019. He reported that his left knee symptoms had resolved. Dr. Gorsche released Mr. Miljkovic to return to regular duty work and placed him at maximum medical improvement (MMI). On July 21, 2019, Dr. Gorsche opined that Mr. Miljkovic had sustained 2 percent impairment of the left lower extremity as the result of the work injury. He noted that the rating was based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 17-33. (JE3, pp. 7-8, 49; Def. Ex. A, pp. 16-17; Def. Ex. B, pp. 2-3; JE6; Testimony)

Tyson terminated Mr. Miljkovic's employment on August 15, 2019 due to a safety violation. Mr. Miljkovic reached into a piece of operating equipment to retrieve a part without first "locking out" or "tagging out" that particular piece of equipment. He applied for unemployment benefits twice, but was denied. At the time Mr. Miljkovic was terminated he was working full duty with no restrictions. (Def. Ex. A, pp. 20-23; testimony)

Mr. Miljkovic returned to Dr. Gorsche on December 15, 2019. He reported that he had not been working, but his left knee symptoms returned about a month ago. Later Mr. Miljkovic reported that his symptoms had never resolved and the pain increased one month ago. (JE3, pp. 17-20)

On May 28, 2020, Dr. Gorsche performed a second surgery. On June 25, 2020, Dr. Gorsche released him to regular duty work within tolerance. I find that Mr. Miljkovic did not have any formal work restrictions placed on his activities and therefore he was medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of the injury as of June 25, 2020. The last time Mr. Miljkovic received treatment from Dr. Gorsche was July 30, 2020. Dr. Gorsche did not

give him any restrictions. He was placed at MMI. Mr. Miljkovic has not sought any treatment for his knee since that time. (Def. Ex. A, pp. 16-17; Def. Ex. B, p. 2; JE3; JE6; Testimony)

At the request of his attorney, Mr. Miljkovic saw Farid Manshadi, M.D., on May 4, 2021 for an independent medical evaluation. Dr. Manshadi addressed the issue of permanent impairment. Like Dr. Gorsche, Dr. Manshadi utilized Table 17-33 of the Guides to assign 2 percent impairment of the left lower extremity. Dr. Manshadi then stated, "I also add another five (5) percent impairment of the left lower extremity for patellofemoral pain." (Cl. Ex. 1, p. 3) Dr. Manshadi does not state where he derived the additional five percent from; he makes no mention of the AMA Guides with regard to the additional five percent impairment. I find that the additional 5 percent impairment for patellofemoral pain was not determined solely by utilizing the Guides to the Evaluation of Permanent Impairment. Dr. Manshadi also addressed the issue of MMI. He placed Mr. Miljkovic at MMI as of May 4, 2021, the date of his IME. (Cl. Ex. 1)

I find that the 2 percent impairment of the left lower extremity ratings assigned by Dr. Gorsche and by Dr. Manshadi are determined solely by utilizing the Guides to the Evaluation of Permanent Impairment. Thus, I find claimant has demonstrated that he sustained 2 percent impairment of the left lower extremity due to the work injury.

Claimant is seeking healing period benefits from August 15, 2019 to May 4, 2021. First, we will examine the time period from his termination on August 15, 2019 until his second surgery on May 28, 2020. Mr. Miljkovic was terminated from his employment due to a safety violation on August 15, 2019. I find that his termination was not related to his work injury. I further find that at the time of his termination, he was working full duty with no restrictions; he had returned to work. Additionally, he had already been placed at MMI by Dr. Gorsche on July 15, 2019. Thus, his entitlement to healing period benefits ended prior to his termination. I find Mr. Miljkovic has failed to demonstrate entitlement to healing period benefits from August 15, 2019 until his second surgery on May 27, 2020. (JE3, pp. 7-8; Def. Ex. B, p. 2)

Mr. Miljkovic underwent his second surgery on May 28, 2020. After this second surgery, defendant paid claimant healing period benefits until he was released to return to work without restrictions by Dr. Gorsche on June 25, 2020. (JE3, p. 9; Def. Ex. E, pp. 7-8; Testimony) Because claimant already received healing period benefits for this period, this issue for this timeframe has been rendered moot.

Mr. Miljkovic contends he is entitled to healing period benefits from June 26, 2020 until May 4, 2021, the date of Dr. Manshadi's IME. Dr. Gorsche placed Mr. Miljkovic at MMI after his second surgery on June 25, 2020. Dr. Gorsche also released him with no restrictions on this date. I find that as of June 25, 2020, Mr. Miljkovic was medically capable of returning to substantially similar employment and therefore his entitlement to healing period benefits ceased. I find Mr. Miljkovic has failed to demonstrate entitlement to healing period benefits from June 26, 2020 until May 4, 2021.

Claimant is seeking reimbursement for the IME he had performed by Dr. Manshadi. Defendant argue that claimant is not entitled to reimbursement for the IME because claimant failed to submit the invoice for the IME. While it appears that the prerequisites for an IME under section 85.39 were met, without an invoice, I do not know what fee Dr. Manshadi charged and I cannot make a finding as to whether the fee was reasonable. I find claimant has failed to demonstrate reimbursement of the reasonable fee for a subsequent examination.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. I find that claimant was generally not successful in his case and therefore exercise my discretion to not assess costs against the defendant. Each party shall bear their own costs in this case.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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).

In this case the parties have stipulated that Mr. Miljkovic sustained permanent disability to his left leg as the result of his work injury. However, there is a dispute surrounding the amount of permanent disability he sustained as the result of that injury.

The Iowa legislature enacted statutory changes that became effective July 1, 2017. As part of those statutory changes, the legislature changed how scheduled member injuries are evaluated and the amount of permanent disability

awarded. Specifically, the legislature amended the former statutory provisions to provide:

In all cases of permanent partial disability described in paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers’ compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2017).

In this case there are competing permanency opinions from Dr. Gorsche and Dr. Manshadi. Having found Dr. Gorsche’s and Dr. Manshadi’s 2 percent permanent impairment rating to have been determined solely by the Guides to the Evaluation of Permanent Impairment, published by the American Medical Association, I conclude that claimant carried his burden of proof to show that as the result of the May 6, 2018 work injury he sustained 2 percent impairment of his left lower extremity. Having accepted Dr. Gorsche’s and Dr. Manshadi’s 2 percent of the left lower extremity as accurate, I conclude that claimant proved a 2 percent permanent functional loss of the left leg as a result of the May 6, 2018 work injury.

Leg injuries continue to be compensable on a 220-week schedule after the 2017 statutory changes. Iowa Code section 85.34(2)(p). Accordingly, I conclude that claimant proved entitlement to 4.4 weeks of permanent partial disability benefits as a result of the May 6, 2018 work injury. Iowa Code section 85.34(2)(p) (2017); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969). Prior to the hearing, defendant paid 4.4 weeks of permanent partial disability benefits to the claimant; thus, defendant does not owe any additional permanent partial disability benefits. (Hearing Report; Def. Ex. E, p. 8)

We now turn to the appropriate commencement date for the permanent partial disability benefits in this case. Under Iowa law, “[c]ompensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment . . .” Iowa Code section 85.34(2).

Mr. Miljkovic returned to see Dr. Gorsche on July 15, 2019. Dr. Gorsche released Mr. Miljkovic to return to regular duty work and placed him at MMI. (Def. Ex. B, p. 2) I find that July 15, 2019 is the date when compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement

from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the Guides to the Evaluation of Permanent Impairment. Thus, the commencement date for permanent partial disability benefits in this case is July 16, 2019.

Claimant is seeking healing period benefits from August 15, 2019 to May 4, 2021. Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the employee has returned to work; (2) it is medically indicated that significant improvement from the injury is not anticipated; or (3) the employee is medically capable of returning to substantially similar employment.

Based on the above findings of fact, I conclude claimant failed to show entitlement to any healing period benefits beyond those that he was paid prior to the hearing.

ORDER

THEREFORE, IT IS ORDERED:


All weekly benefits shall be paid at the stipulated rate of four hundred twenty and 28/100 dollars (\$420.28).

Claimant demonstrated entitlement to four point four (4.4) weeks of permanent partial disability benefits commencing on July 16, 2019. As noted above, prior to hearing defendant paid four point four (4.4) weeks of permanent partial disability benefits. Thus, claimant shall take no further weekly benefits as the result of this proceeding.

Each party shall bear their own costs.

Defendant 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 10th day of January, 2022.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Adnan Mahmutagic (via WCES)

Jason Wiltfang (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.