BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH MULVEHILL,

Claimant,

vs.

KRAFT HEINZ COMPANY,

Employer,

and

INDEMNITY INSURANCE CO. N.A.,

Insurance Carrier,
Defendants.

File No. 5056658

APPEAL

DECISION

Head Note Nos: 1402.40; 1700; 1801; 1803; 2907

Claimant Joseph Mulvehill appeals from an arbitration decision filed on December 28, 2017. Defendants Kraft Heinz Co., employer, and Indemnity Ins. Co. of N.A., insurer, respond to the appeal. The case was heard on August 22, 2017, and it was considered fully submitted on October 30, 2017.

In the arbitration decision, the deputy commissioner determined claimant did not meet his burden to prove his July 11, 2014, work injury aggravated, accelerated, worsened, or "lighted up" his preexisting left hip osteoarthritis causing his need for a total left hip replacement. In doing so, the deputy commissioner found the causation opinion of defendants' expert, William Jacobson, M.D., to be most persuasive.

On appeal, claimant argues the deputy commissioner erred in finding claimant's injury of July 11, 2014, did not cause an aggravation, acceleration, or lighting up of his preexisting arthritic condition. Claimant asserts he is entitled to temporary benefits from August 10, 2016, through October 10, 2016, and claimant asserts he sustained industrial disability in the range of 20 to 40 percent.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the proposed arbitration decision filed on December 28, 2017 is reversed.

FINDINGS OF FACT

I adopt the deputy commissioner's findings of fact from pages 2 through 8 of the arbitration decision. I make the following additional findings:

As noted by the deputy commissioner, several physicians offered competing causation opinions in this case. Rick Garrels, M.D., who evaluated claimant at defendant-employer's plant in September of 2014, and Dr. Jacobson, who evaluated claimant at defendants' request for purposes of an independent medical examination (IME), offered opinions against causation. Dr. Garrels opined, "The advanced nature of the osteoarthritis [in claimant's left hip] would have resulted in the need for a total hip replacement within a period of months irrelevant of left buttock contusion at work." (Exhibit A, page 4)

Dr. Jacobson presented a similar opinion:

> It is my opinion that the fall on July 11, 2014, did not directly cause, materially aggravate, or substantially accelerate [claimant's] underlying left hip degenerative arthritis condition. This is based on the fact that the x-rays obtained approximately two months after the injury show severe degenerative arthritic changes in the left hip joint and moderate arthritic degenerative hip changes of the right hip. . . . [Claimant] states that he was not having any left hip problems prior to the fall. While this may be possible, I do not think the injury itself would have changed the natural history and symptoms that are seen on the x-rays from September 2014. This is clearly a hip that would have developed pain, decreased motion, and resulted in the typical back stiffness that he describes, also.

(Ex. B, p. 4)

Peter Rink, D.O., who evaluated claimant's left hip at the request of claimant's primary care provider, similarly acknowledged claimant's arthritis was preexisting and eventual treatment was inevitable, but he also noted claimant's onset of symptoms was caused by his work injury:

> Over time arthritis has developed in the left hip and has become very significant and painful. I do feel the arthritis that he has is not secondary to the injury. I do think the arthritis that he has was going to happen

> anyway and was going to require treatment with or without the fall. On the other hand, I do think the fall did cause symptoms and it was reasonable to be under Workers' Compensation at that time.

(Joint Ex. 1, p. 2) (emphasis added)

Dr. Richard Kreiter, M.D., claimant's IME physician, presented the most favorable causation opinions for claimant. He opined "the event permanently aggravated and accelerated changes in [claimant's] left hip which now will require total hip replacement for pain relief." (Ex. 5, p. 7) Dr. Kreiter then confirmed and elaborated on his opinion in a subsequent letter:

> [Claimant] was asymptomatic in regard to his hips prior to the significant fall at work, down a stairwell in 07/2014. He was active, without hip pain, and even participate[d] in the Bix runs, but after the fall, this changed. He did have pre-existing changes in hip joints, but on the left, the condition was aggravated, accelerated, and ended up with a total hip replacement. I would agree with Dr. Garrels that the soft tissue buttock contusion resolved within two months, but the trauma to the bony and cartilaginous hip joint did not. He could have broken the hip with such trauma. The MRI of 06/18/15 noted degenerative changes in both hips, but it was the left side that sustained the ecchymotic contusion and major injury. Even today, his right hip with some degenerative changes on MRI, remains asymptomatic.

(Ex. 7, p. 11) (emphasis added)

The deputy commissioner found the opinions of Dr. Jacobson to be most convincing, but for the reasons that follow, I respectfully disagree.

The deputy commissioner correctly noted that diagnostic imaging obtained after claimant's July 11, 2014, injury was consistent with what Dr. Jacobson described as "advanced arthritis changes." (Ex. B, p. 4; see Arbitration Decision, p. 10) The fact that claimant had degenerative arthritic changes in his left hip that preexisted his July 11, 2014 injury is not seriously in dispute, however. Instead, the relevant question is whether claimant's injury on July 11, 2014 aggravated, accelerated, worsened, or lighted up that pre-existing arthritis.

Claimant testified that before his July 11, 2014, injury he had never injured his left hip, had never been told he had arthritis in his left hip, and never had any pain or discomfort in his left hip. (Hearing Transcript, pp. 24-25) Claimant's testimony is

supported by the absence of medical records pertaining to treatment of his left hip before July 11, 2014, and the affidavits from his co-workers. (See Exs. 1 and 2) Neither Dr. Garrels nor Dr. Jacobson provide an alternative explanation as to why claimant was asymptomatic before his July 11, 2014, injury, but became, and continued to be, symptomatic after the injury.

Dr. Kreiter, on the other hand, pointed out that while both of claimant's hips are arthritic, it is the left hip that is symptomatic and did not become symptomatic until his fall. Dr. Rink made the same observation regarding the onset of claimant's symptoms. While it may be true that claimant would have eventually developed symptoms and required a hip replacement even absent his work injury, the records establish claimant's July 11, 2014, work injury is what precipitated claimant's symptoms and set forth a sequence that led to the need for a hip replacement. I therefore find Dr. Kreiter's opinion that claimant's fall aggravated and accelerated his pre-existing arthritis and the need for a hip replacement to be most persuasive. The deputy commissioner's reliance on Dr. Jacobson is reversed.

Claimant returned to work immediately after the injury and continued working until his hip replacement surgery. (See Tr., p. 31) He was then off work recovering from surgery from August 10, 2016, through October 10, 2016. (See Hearing Report; Jt. Ex. 1, p. 12) Claimant returned to work with defendant-employer on October 11, 2011. Because I adopted Dr. Kreiter's opinion that claimant's July 11, 2014, work injury accelerated the need for his hip replacement, I also find claimant's healing period from August 10, 2016, through October 10, 2016, is related to his work injury.

Having found Dr. Kreiter's causation opinion to be most persuasive, I likewise adopt Dr. Kreiter's impairment rating. Based on claimant's total hip replacement, Dr. Krieter assigned a 15 percent whole body impairment rating. (Ex. 7, p. 11) Despite this moderate impairment rating, Dr. Kreiter did not recommend any permanent restrictions other than to mention the use of a cane for long-distance walking.

At the time of the hearing, claimant was working 70-hour workweeks for defendant-employer without any work restrictions. (Tr., pp. 42, 48) His hourly wage at the time of the injury was $16.25 per hour, compared to $17.70 per hour at the time of the hearing. (Tr,. p. 48) Claimant also testified he feels "pretty good." (Tr., p. 45) That said, claimant is "not 100 percent" and his hip is "still a little stiff" after sitting. Considering these facts, particularly claimant's 15 percent whole body impairment after a total hip replacement against his return to full-duty, higher-paying work, I find claimant sustained 25 percent industrial disability.

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).

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).

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, I adopted Dr. Kreiter's opinion that claimant's left hip arthritis and need for a hip replacement was aggravated and accelerated by his July 11, 2014, work injury. As such, I conclude claimant carried his burden to establish a causal connection between the July 11, 2014, work injury and his ongoing hip symptoms, permanent disability, and the need for his hip replacement. The deputy commissioner's determination that claimant did not meet his burden to prove causation is therefore reversed.

I acknowledge claimant may have eventually developed left hip symptoms and needed a hip replacement irrespective of his July 11, 2014, work injury. Dr. Kreiter credibly opined, however, that the July 11, 2014, work injury accelerated this process, and an acceleration is all that is required by law to establish causation.

Having determined claimant proved a causal relationship between his work injury and his total hip replacement, I also conclude claimant is entitled to receive healing period benefits for the period of August 10, 2016, through October 10, 2016, while he was recovering from his surgery. See Iowa Code 85.34(1).

The parties stipulated that should causation be established, any permanent disability sustained by claimant would be industrial in nature. (Hrg. Report) Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for industrial disability shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code § 85.34.

As discussed above, I found claimant sustained 25 percent industrial disability. 25 percent industrial disability entitles claimant to receive 125 weeks of permanent partial disability (PPD) benefits.

With respect to when these PPD benefits are to commence, claimant asserted a commencement date of October 11, 2016, upon his return to work after his hip replacement surgery, and defendants asserted a commencement date of July 12, 2014, upon claimant's return to work the day after the injury.

Iowa Code section 85.34 provides that PPD benefits are to "begin at the termination of the healing period." Iowa Code § 85.34(2). Said differently, healing

period benefits end and PPD benefits commence whenever the first factor of Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016). The three factors of Iowa Code section 85.34(1) are whether (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code § 85.34(1).

Claimant returned to work the day after the injury on July 12, 2014. As such, I understand defendants' rationale for their asserted July 12, 2014, commencement date. From defendants' perspective, claimant's return to work the day after the injury is the first factor of Iowa Code section 85.34(1) to be satisfied.

Claimant, however, had not yet entered a technical "healing period" as of his return to work on the day after the injury. Instead, the "healing period" for which he was entitled to benefits under Iowa Code section 85.34 would not occur until he was off work for his hip replacement surgery, starting in August of 2016.

The factual scenario in this case is analogous to that of Evenson. In Evenson, claimant was injured on May 18, 2010. 881 N.W.2d at 362. He returned to work the following day and continued working until September 3, 2010, or September 7, 2010, at which time defendants were unable to accommodate his restrictions. Id. at 371-72. Claimant then returned to work on September 20, 2010. See id. The Iowa Supreme Court held that claimant's return to work on September 20, 2010—not his return to work on the day after the injury—"ended the first healing period as a matter of law because it was the earliest of the section 85.34(1) alternatives and because PPD 'shall begin at the termination of the healing period . . . .'" Id. at 372 (also noting claimant's "first return to work established the end of the healing period and the commencement of PPD benefits because it was the earliest of the three triggering events prescribed in section 85.34(1)").

Applying the court's holding in Evenson to this case, I conclude claimant's first healing period terminated on October 11, 2016, the day on which he returned to work after being off work to recover from surgery. See id. Because PPD benefits commence upon the termination of healing period benefits, I conclude claimant's PPD benefits commenced as of the same date. See id.; see also Iowa Code § 85.34(2). Therefore, defendants shall begin paying claimant's 125 weeks of PPD benefits on October 11, 2016.

Because neither party appealed the deputy commissioner's costs assessment or findings regarding reimbursement for claimant's IME, I will not disturb those findings on appeal.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision, filed on December 28, 2017, is reversed.

Defendants shall pay claimant healing period benefits from August 10, 2016, through October 10, 2016, at the stipulated weekly rate of six hundred ninety-one and 30/100 dollars ($691.30).

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the stipulated weekly rate of six hundred ninety-one and 30/100 dollars ($691.30) from October 11, 2016.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Per the parties' stipulation, defendants are entitled to a credit in the amount of one thousand eight hundred eighty-three and 99/100 dollars ($1,883.99) under Iowa Code section 85.38(1) for payment of sick pay/disability income.

Pursuant to rule 876 IAC 4.33, defendants are assessed the following costs of the arbitration proceeding: one hundred and 00/100 dollars ($100.00) for the filing fee, thirteen and 00/100 dollars ($13.00) for service costs, five hundred seventy and 01/100 dollars ($570.01) for the depositions of Trevino, Dr. Kreiter, and Dr. Martin, and three hundred and 00/100 dollars ($300.00) for the professional fees for Drs. Kreiter and Martin. Defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 2nd day of July, 2019.

Joseph S. Cortese II

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WORKERS' COMPENSATION
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