BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERRY VAN DORIN, Claimant, vs. VERMEER MANUFACTURING, Employer, and EMC RISK SERVICES Insurance Carrier, Defendants.	File No. 5043653 APPEAL DECISION RE: REVIEW-REOPENING Head Note No.: 2905

FILED
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WORKERS' COMPENSATION

STATEMENT OF THE CASE

On December 18, 2017, Jerry Van Dorin, claimant, timely filed his notice of appeal from a review-reopening decision filed on December 11, 2017. Defendants respond, but do not cross-appeal.

On September 9, 2014, this agency approved an agreement for settlement. On February 22, 2016, claimant filed a petition for review-reopening of the agreement for settlement. The hearing on the petition for review-reopening was held on March 28, 2017. The parties submitted post-hearing briefs and the matter was fully submitted on June 2, 2017.

In the review-reopening decision, the hearing deputy denied the request to reassess claimant's permanent partial disability finding that claimant failed to prove his current condition was causally related to his original work injury.

On March 29, 2019, the Iowa Workers' Compensation Commissioner entered an order delegating authority to the undersigned to issue the intra-agency appeal decision in this matter as final agency action pursuant to Iowa Code section 86.3.

ISSUES

Claimant presents the following issues on appeal:

1) Whether claimant's current condition is causally related to his March 5, 2013, work injury.

2) Whether a change in circumstances has occurred warranting a review-reopening of the prior agreement for settlement and the extent of claimant's permanent partial disability.

3) Whether claimant is entitled to penalty benefits.

4) Whether claimant is entitled to medical reimbursement.

5) Whether claimant is entitled to independent medical evaluation (IME) reimbursement.

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, I adopt the findings of the deputy commissioner as set out in the December 11, 2017 review-reopening decision with the following additional findings, conclusions and analysis:

FINDINGS OF FACT

On September 9, 2014, this agency approved an agreement for settlement between the claimant and defendants, wherein the parties agreed that claimant sustained injury to his left shoulder, which arose out of and in the course of his employment on March 5, 2013. (Exhibit 7)

Claimant's primary argument in this matter is that his current neck condition is related to his March 5, 2013 work injury and has worsened since the agreement for settlement was approved. It is not pled as a sequela of the left shoulder.

Defendants agree in their appeal brief that the March 2013 injury initially involved not only the left shoulder, but also claimant's neck and back. (Defendants' Appeal Brief, p. 2) Defendants do not argue that the neck is an improper basis for this review-reopening, even though the neck is not specifically included in the settlement agreement or pled as a sequela of the left shoulder.

A brief history of the underlying case is appropriate. Claimant filed his original petition alleging injury to his back, neck and the left shoulder, with an injury date of March 5, 2013. (Ex. A, p. 1) Claimant reported to his employer that on or about March 5, 2013, while pushing snow with a front loader, he hit a piece of raised concrete causing the machine he was driving to come to an abrupt stop, resulting in pain in his neck, back and shoulder. (Ex. 6, p. 42; Ex. 3, p. 24; Transcript page 40) Although defendants agree that claimant's March 5, 2013 injury initially involved the neck in addition to the left shoulder, they argue that claimant's neck condition resolved on or before March 17, 2014, when claimant was seen by his selected independent medical evaluation (IME) physician, Sunil Bansal, M.D. (Ex. 3, p. 23) Although Dr. Bansal

found claimant sustained permanent impairment in the left shoulder, he opined that claimant had "no ratable impairment" of his neck or back. (Ex. 3, p. 35) Concerning the neck, Dr. Bansal found claimant had full range of motion with no tenderness to palpation, and that although "[h]e did initially have neck and back symptomology . . . he reports his neck and back pain has resolved." (Ex. 3, p. 35)

After Dr. Bansal's IME on March 17, 2014 and before the agreement for settlement was approved by this agency on September 9, 2014, claimant filed a separate petition alleging a new acute injury to his neck arising out of an incident on March 19, 2014. (Ex. A, p. 2) On September 25, 2014, claimant dismissed with prejudice that separate neck petition. (Ex. A, p. 3)

Dr. Bansal noted during the March 17, 2014 IME that claimant's initial assessment at Vermeer Occupational Health Services on March 5, 2013, was "Neck strain, left shoulder pain." (Ex. 3, p. 25) However, he also recorded that about one week later on March 11, 2013, Timothy Dykstra, M.D., at Pella Occupational Health Clinic, stated claimant's neck was "getting a little bit better;" and, on March 18, 2013, Dr. Dykstra stated that claimant's "neck pain has essentially resolved . . . ." (Ex. 3, p. 25) Dr. Bansal recorded in his IME report that on April 8, 2013, claimant saw Christopher Vincent, M.D., after an unremarkable cervical MRI. (Ex. 3, pp. 27, 28, 30; Ex. 3, p. 27 and Ex. 3, p. 28 are duplicates) Thereafter, the focus of claimant's medical treatment moved to the left shoulder. Claimant's neck condition is not mentioned again in the medical records submitted into evidence until after the March 19, 2014 incident that gave rise to the separate petition. In other words, there is over an 11 month gap in the records concerning any neck issues, from April 8, 2013 until after the March 19, 2014 incident.

It is quite significant to the undersigned that Dr. Bansal, the physician selected by claimant to specifically assess claimant's injuries from the March 5, 2013 work injury, found that claimant's neck condition had resolved with no ratable impairment.

The incident that occurred on March 19, 2014, two days after the IME with Dr. Bansal, occurred when claimant was "hanging wall angle" at work. (Jt. Ex. 1, p. 14) The injury was also described by claimant in his petition as "looking up, replacing ceramic tiles." (Ex. A, p. 2) Claimant testified at hearing that he was "looking up in the air" and was "moving some ceiling tile." (Tr. p. 98) On March 21, 2014, claimant reported to Iowa Ortho medical providers that he had been doing repetitive work hanging drywall and his shoulder pain was becoming increasingly severe. Claimant's symptoms were described as a "new aggravation" with "new symptoms of tingling and pain down the arm . . . ." (Jt. Ex. 6, p. 87) On April 2, 2014, claimant reported to Pella Regional Health Center that "at work he was having to work over his head more and seemed to aggravate his problem." (Jt. Ex. 9, p. 245) The assessment at that time was right upper extremity pain and neck pain with radicular symptoms. (Id.)

I find that on or about March 19, 2014 an incident occurred at work causing pain in claimant's neck, which was significant enough to cause him to file a new and separate petition with this agency concerning his neck. (Ex. A, p. 2)

Claimant argues that following the March 19, 2014 incident, he only had a single medical treatment related to the incident. (Jt. Ex. 2, p. 22) However, defendants argue that since the March 19, 2014 incident, claimant has had an "unbroken line of treatment and worsening of the neck symptoms . . . ." (Defendant's Appeal Brief, p. 9) The review-reopening decision sets out the medical history which I find to be consistent with defendants' argument. In addition, claimant told Dr. Bansal on March 17, 2014 that his neck pain had resolved and also testified at hearing that the neck pain he had from the incident on March 19, 2014 never resolved. (Tr. pp. 122-123)

Todd Troll, M.D. CIME, provided medical care to claimant from November 25, 2014 through October 5, 2015. (Jt. Ex. 5, pp. 58-77) On April 15, 2016, Dr. Troll authored a letter to defense counsel and stated that he was previously unaware of claimant's second injury to his neck on March 19, 2014. (Jt. Ex. 5, p. 75) Dr. Troll stated that if there was a second injury, he would be unable to causally relate claimant's current neck condition to the original work injury. (Jt. Ex. 5, p. 75) On March 16, 2017, Dr. Troll in a letter to claimant's counsel corrected the original work injury date in his records, from March 15, 2013 to March 5, 2013, but did not change his opinion concerning claimant's current neck condition. (Ex. 5, p. 41)

I find that Dr. Troll is unable to relate claimant's current neck condition to the original work injury of March 5, 2013.

J. Wesley Rayburn, M.D., provided medical care to claimant beginning on December 16, 2015 for left shoulder pain. (Jt. Ex. 6, p. 92) Claimant continued to receive care from Dr. Rayburn up to the time of the hearing. (Tr. p. 69) Dr. Rayburn stated on September 9, 2016, in a letter to defense counsel that claimant's neck symptoms are "related to the 2014 injury and is consistent to the whiplash-like injury that he sustained." (Jt. Ex. 6, p. 193) This was obviously confusing because Dr. Rayburn relates the neck condition to the 2014 second injury, but describes the mechanism of injury consistent with the original March 5, 2013 injury. On March 16, 2017, in response to a letter from claimant's counsel, Dr. Rayburn stated that claimant had an aggravation of a neck injury "as a result of a work incident in 2014," and that the March 5, 2013 original work injury "caused his shoulder injury." (Ex. 4, p. 39) He also clarified that the 2014 incident of "moving tiles" was "not a 'whiplash-like' injury," and "may or may not be the cause of his current neck condition and issues." (Ex. 4, p. 40) In attempt to clarify Dr. Rayburn's opinion, defense counsel sent a letter to Dr. Rayburn who signed and dated the same on April 25, 2017. (Ex. C, p. 10) The letter stated that it was Dr. Rayburn's opinion that claimant's current neck condition "was most likely caused by the aggravation at work in 2014 to the whiplash-like injury he sustained in 2013." (Ex. C. p. 10)

I find that Dr. Rayburn does not causally relate claimant's current neck condition to the original work injury of March 5, 2013 and that he believes it is more likely related to the second injury in March, 2014.

On March 3, 2017, claimant was seen by David Hatfield, M.D. of Des Moines Orthopaedic Surgeons, P.C. for pain in his neck and bilateral arm pain. Dr. Hatfield did not recommend surgical intervention. He stated that a different doctor may perform surgery, but he would not. He warned claimant that surgery may not be successful. (Jt. Ex. 10, p. 282) The history indicates that claimant reported symptoms since March 5, 2013, but Dr. Hatfield was apparently not advised of the March 19, 2014 work incident and he does not appear to give any specific causation opinions concerning claimant's current neck condition.

I find that Dr. Hatfield does not provide a causation opinion concerning claimant's current neck condition.

On April 18, 2014, claimant was seen by Timothy Miller, M.D. and the Ottumwa Regional Health Center and complained "of bilateral arm problems as well as leg spasms." (Jt. Ex. 2, p. 50B) He was noted to appear "very comfortable sitting here today, but rates his pain as 8 to 10." (Id.) Dr. Miller reported that claimant was "fairly convinced he has whiplash. We went through this before." (Id.) He stated that "I am quite suspicious there are secondary gain issues here. I am suspicious that he is looking for either monetary settlement or some type of long-term work release, although I think it is more of a situation where he is looking for a financial settlement." (Jt. Ex. 2, p. 50B)

I find that Dr. Miller does not offer a causation opinion concerning claimant's current neck condition and appears unconvinced that the extent of claimant's symptoms are consistent with his reports of pain.

On March 17, 2014, Claimant's chosen IME physician, Dr. Bansal opined that claimant's neck condition had resolved two days prior to the March 19, 2014 work incident. (Ex. 3, p. 35) On December 14, 2016, claimant was seen by Dr. Bansal for a second IME. (Ex. 1, p. 1) Dr. Bansal conducted an examination and found that claimant's neck condition had worsened since the March 17, 2014 evaluation and he placed claimant in the DRE Category II impairment and assigned five percent whole person impairment based on the neck. (Ex. 1, p. 11) Dr. Bansal stated that claimant "has complained of a constellation of problems since his March 15, 2013 [sic] injury that has included neck" complaints, which initially "did do better . . . ." (Ex. 1, p. 11) Dr. Bansal suggested that weaning off narcotic medication has resulted in the remanifestation and worsening of the neck symptomatology." (Id.) However, Dr. Bansal's own report indicates that on March 21, 2014, Christopher Vincent M.D. was prescribing medication for claimant. (Ex. 1, p. 2) Also, the Vermeer Corporate Health records of March 24, 2014 indicate that at that time, claimant was taking Percocet 2

times per day along with Meloxicam. (Jt. Ex. 1, p. 11) Yet, it was around this time that claimant asserted the new and separate acute neck pain and injury. (Ex. A, p. 2)

I find that Dr. Bansal has opined that claimant's current neck condition is related to the March 2013 work injury, but has done so contrary to the greater weight of the medical evidence and based on inaccurate or incomplete information concerning claimant's narcotic medication history. In support of this, the records show that claimant was taking narcotic pain medication at or about the time that he complained of new neck pain. Also, the medical evidence shows that claimant had a period of over 11 months with no treatment of the neck prior to the March 19, 2014 work incident and Dr. Bansal himself stated that the condition had resolved on March 17, 2014. Therefore, I find that Dr. Bansal's opinion is not persuasive and the same is given little weight.

In view of the greater weight of the medical evidence and considering the expert opinions and testimony, I find that claimant has failed to establish that claimant's current neck condition is related to the March 5, 2013 work injury.

CONCLUSIONS OF LAW

Iowa Code section 86.14(2) provides: "[i]n a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon."

"To justify an increase in compensation benefits, the claimant carries the burden of establishing by a preponderance of the evidence that, subsequent to the date of the award under review, he or she has suffered an impairment or lessening of earning capacity proximately caused by the original injury." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999).

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 agreement for settlement identified only the left shoulder as the injured body part. Claimant argues that a review-reopening is compensable when the change in circumstances is shown to relate to the original injury. Claimant does not contend that the neck is a sequela of the left shoulder injury. Rather, he argues that although the agreement for settlement does not specifically state that the neck is included, claimant's medical history and the intention of the parties at the time of settlement allow for its inclusion as the basis for his requested reassessment through this review reopening. Defendants do not specifically argue against this proposition. Rather, defendants argue that claimant's current neck condition is not related to the original work injury of March 5, 2013, but is causally related to the March 19, 2014 work injury, which was dismissed with prejudice and claimant is now barred from pursuing said claim.

The claimed condition that is the basis for the review-reopening must be causally related to the March 5, 2013 work injury.

The Supreme Court also stated in the case of Kohlhaas v. Hog Slat, Inc, that "A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is 'proximately caused by the original injury.' See Simonson, 588 N.W.2d at 434 (original emphasis omitted) (quoting *Collentine,* 525 N.W.2d at 829)." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009)

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).

In the case at bar, I have found above that claimant has failed to establish that claimant's current neck condition is related to his March 5, 2013 work injury. Applying Kohlhaas, I now conclude that claimant has failed to carry his burden of proof that his current neck condition is causally related to the March 5, 2013 work injury.

I concur with and affirm the presiding deputy commissioner's findings of fact as they pertain to the issue of claimant's failure to carry his burden of proof that his current neck condition is related to the March 5, 2013 work injury.

Having failed to establish that claimant's current neck condition is related to the March 5, 2013 work injury that forms the basis of the agreement for settlement, claimant has likewise failed to establish a change in circumstances that would warrant a reassessment of the extent of claimant's permanent partial disability.

I conclude that the remaining issues are moot.

ORDER

IT IS THEREFORE ORDERED:

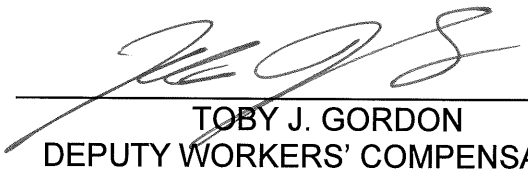
The Review Reopening Decision is affirmed in its entirety.

Claimant shall take nothing from these proceedings.

Each party shall pay their own costs.

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

Signed and filed this 19th day of April, 2019.



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