

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOANNE DUNBAR,

Claimant,

vs.

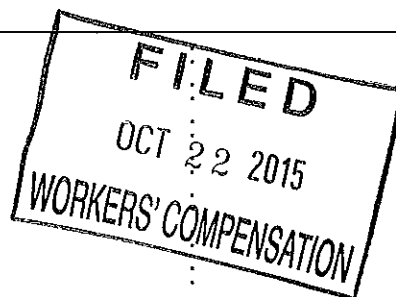
O'REILLY AUTOMOTIVE STORES, INC.,

Employer,

and

SAFETY NATIONAL CASUALTY
CORPORATION,

Insurance Carrier,
Defendants.



File No. 5047642

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 2502

STATEMENT OF THE CASE

Claimant, Joanne Dunbar, filed a petition in arbitration seeking workers' compensation benefits from O'Reilly Automotive Stores, Inc. (O'Reilly), employer, and Safety National Casualty Corporation, insurer, both as defendants. This case was heard in Davenport, Iowa, on August 6, 2015.

The record in this case consists of claimant's exhibits 1 through 9, defendants' exhibits A through N, and the testimony of claimant.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment on November 27, 2012.
2. The extent of claimant's entitlement to temporary benefits.
3. Whether the injury resulted in a permanent disability; and if so,
4. The extent of claimant's entitlement to permanent partial disability benefits.
5. The commencement date for permanent partial disability benefits.

6. Whether there is a causal connection between the injury and the claimed medical expenses.
7. Whether claimant is entitled to reimbursement to an independent medical evaluation (IME).

FINDINGS OF FACT

Claimant was 50 years old at the time of hearing. Claimant did not graduate from high school and does not have a GED. Claimant had received certification to work as a Certified Nurse's Assistant (CNA), but at the time of hearing, claimant's certification was not up to date. Claimant has worked as a CNA, truck driver, sales clerk, and a housekeeper.

Claimant began working for O'Reilly in November 2010. Claimant worked as a driver/sales associate. Claimant worked at the O'Reilly store in Davenport. Claimant's job duties included picking up and delivery of parts to customers and to the store, and stocking shelves. Claimant testified, on direct exam that she worked full time, 40 hours per week. Claimant testified that half of her time, in the Davenport store, was spent in delivery and the other half was spent stocking shelves.

Claimant's prior medical history is relevant. Claimant testified that in May 2011 she had an accident on a motorcycle that resulted in a left knee injury. On August 9, 2011, claimant underwent arthroscopic partial meniscectomy on the left. Surgery was performed by Suleman Hussain, M.D. (Exhibit C)

Records indicate claimant continued to have left knee problems. When conservative treatment failed to remedy claimant's symptoms, claimant underwent a total knee replacement (TKR) on the left. TKR was performed on March 26, 2012 by Dr. Hussain.

Claimant returned in follow up to Dr. Hussain's office on September 20, 2012. Records indicate that x-rays at that time showed a slight lucency between the tibia and the hardware. (Ex. 3, p. 15) The record indicates that a lucency indicates lack of bone density or a "clear zone" in an x-ray. (Ex. J, p. 5)

Claimant testified she returned to work approximately 6-12 weeks after surgery. Claimant said that when she returned to work her knees felt good.

Claimant testified that on November 27, 2012 she was stocking shelves. She said she was on a three-step ladder. She said that when coming off the ladder, she missed the last step. She said she landed hard on her left foot on a floor. Claimant said she did not fall. She testified she told her supervisor she injured her leg. Claimant estimated the height between the second step on the floor was approximately 16-20 inches. (Ex. I, p. 3, Ex. N, Deposition pages 69-72)

Claimant was evaluated by Michelle Sprengelmeyer, M.D., with complaints of bilateral knee pain with no injury. Claimant was assessed as having knee pain and treated with medication. (Ex. L)

Claimant testified she deliberately failed to tell Dr. Sprengelmeyer she hurt herself at work.

On December 19, 2012, claimant saw Dr. Hussain with left sided knee pain after missing a step on a ladder. Claimant's knee was aspirated. X-rays showed a lucency under the tibial component. (Ex. E, p. 1, Ex. 3, p. 16)

Claimant returned to Dr. Hussain on December 31, 2012 with continued complaints of left knee pain. Dr. Hussain was concerned with loosening hardware in claimant's knee. She was referred to Joseph Martin, M.D. (Ex. E, p. 2)

Claimant saw Dr. Martin on January 8, 2013 with complaints of left knee pain. Based on the x-rays, Dr. Martin believed that a loosening of hardware in the left knee had occurred and required further surgery. (Ex. E, pp. 3-4)

On March 11, 2013, claimant underwent a revision of the components in her left knee. The surgery was performed by Dr. Martin. (Ex. E, pp. 5-6)

On June 3, 2013, claimant was returned to work with no restrictions. (Ex. E, p. 7)

Claimant testified that she requested to be transferred from the O'Reilly store in Davenport to the O'Reilly store in Rock Island in early July 2013. She said she made the transfer as she had moved from Davenport to Rock Island. (Ex. N, Dep. pp. 38-39) Claimant testified that when she moved to the Rock Island store, she began to do more shelving of products and standing behind the counter than in Davenport. She said that her work duties changed at the Rock Island store so that she was doing delivery work only approximately one hour per day.

On September 10, 2013, claimant returned to Dr. Martin with complaints of left knee pain. Claimant's left knee was aspirated. (Ex. F, pp. 2-3)

On September 18, 2013, claimant voluntarily quit her employment with O'Reilly. Claimant said she quit because she could not take the standing anymore. Claimant testified no doctor told her to terminate her employment. She said she did not ask for any accommodations from O'Reilly. She said she did not have any work restrictions from her doctor indicating she could not physically manage her job at O'Reilly. She said she did not ask for a transfer to another store. Claimant said she did not ask O'Reilly for less hours.

Claimant testified she worked as a bus driver for a school district. She said she worked at the job from approximately November 1, 2013 through November 18, 2013. Claimant said she quit the job as she had difficulty getting in and out of the bus. (Ex. N, Dep. pp. 45-49)

On November 19 and November 27, 2013, claimant saw Dr. Martin with continued complaints of left knee pain. Dr. Martin believed claimant's left knee hardware was causing her difficulty. A revision surgery was discussed on both visits. (Ex. 3, pp. 29-33)

In a January 2, 2014 report, Abdul Foad, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Foad is an orthopaedic surgeon. Dr. Foad was not convinced claimant's hardware was unstable based on one set of x-rays. He also opined that a second revision surgery was not related to claimant's work accident but may be caused by claimant's obesity. Dr. Foad also questioned that a one-time, low energy trauma of missing a single step ladder step would have caused the need for revision of the total knee replacement initially. He based this opinion on x-rays that showed evidence of lucency, pre-injury. (Ex. A)

Dr. Foad found claimant at maximum medical improvement (MMI), but did not assign any permanent impairment as he did not think claimant's need for revision knee surgery was work related. (Ex. A)

In a May 1, 2014 letter, Dr. Martin opined claimant's work accident in November 2013 contributed or aggravated the loosening of the hardware in her knee. (Ex. 3, p. 36)

On May 13, 2014, claimant underwent a bone scan of the knee at the University of Iowa Hospital and Clinics (UIHC). Staff at UIHC did not recommend a revision of the TKR. (Ex. B, p. 7)

Based on Dr. Martin's recommendations, claimant eventually underwent a revision of the second knee prosthesis in a revision surgery. Surgery was performed by Dr. Martin on July 15, 2014. (Ex. 3, p. 38; Ex. 4, Ex. G)

Claimant returned to Dr. Martin for follow up in July through September 2014. Records indicate claimant had a mild surgical infection that was later treated. (Ex. 3, pp. 39-42)

In October 2014, claimant was evaluated by Dr. Martin. Dr. Martin did not think claimant should return to work in a labor type of position. Claimant wanted to return to work as a bus driver. (Ex. F, p. 4)

In a December 7, 2014 letter Fred Pilcher, M.D., gave his opinions regarding claimant's condition following an IME. Dr. Pilcher is an orthopaedic surgeon. Dr. Pilcher opined claimant's injury of November 2012 caused or contributed to claimant's need for a TKR. He based this opinion on the fact that prior to the November 2012 work injury, claimant was non-symptomatic after her March 2012 surgery. (Ex. 8)

Dr. Pilcher opined claimant's walking on concrete, squatting, and kneeling at work aggravated her knee condition. Based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he opined that claimant had a 50 percent

permanent impairment to the lower extremity. He did not believe that claimant was at MMI as of December 2014, but would probably reach MMI within seven months. (Ex. A)

In a March 13, 2015 note, Dr. Martin restricted claimant from doing any stooping, crawling, squatting or climbing and lifting over 20 pounds. (Ex. 3, p. 44)

On April 7, 2015, claimant was evaluated by Charles Clark, M.D., at the UIHC for an IME. Dr. Clark is an orthopaedic surgeon. He is a professor of orthopaedic surgery and of biomedical engineering. Dr. Clark reviewed multiple radiographs, specifically those of September 20, 2012 and December 19, 2012. Dr. Clark opined that lucencies, or "clear zones" were consistent in both the pre and post injury x-rays. (Ex. I)

Dr. Clark opined claimant's weight was a contributing factor to her knee condition. He noted there was no change in any of the x-rays before and after the November 2012 accident. Dr. Clark agreed with Dr. Foad's opinions. Dr. Clark noted that missing one step on a three-step ladder, without falling, was a one-time low energy trauma that was not the cause of claimant's knee failure and a need for a revision. (Ex. I)

Dr. Clark also opined he believed claimant had a fair result following her non-work-related surgery of March 2012, which resulted in a 50 percent permanent impairment to the lower extremity under the Guides. (Ex. I)

In an April 30, 2015 letter, Dr. Clark gave further details of his opinions following the IME. Dr. Clark again opined that claimant's weight was a factor in her left knee history and problems. (Ex. J)

Dr. Clark noted claimant complained to Dr. Hussain in June 2012, of shin splints, approximately 11 ½ weeks after her first TKR in March 2012. Dr. Hussain noted that lucencies or "clear zones" on the June 2012 x-rays, between the implant and the bone, indicated a loosening of the hardware at that time. X-rays taken by Dr. Hussain on December 19, 2012, one month after the work injury, also noted lucency between the implant and the bone. Dr. Clark noted that both the September 2012 and December 2012 x-rays showed lucencies that were approximately 2 millimeters thick. Dr. Clark opined this indicates the November 27, 2012 work incident did not cause or aggravate the loosening of the hardware in claimant's knee. (Ex. J, p. 5)

Based on x-rays and claimant's complaints of shin splints both before and after the November 2012 incident, Dr. Clark opined it was clear the step ladder incident of November 27, 2012 did not cause or necessitate the surgery of March 2013 or July 2014. He believed claimant's activity at O'Reilly's after November 2012 did not have any bearing on claimant's need for surgery in July 2014. (Ex. J, p. 5)

Dr. Clark also believed claimant had fair results surgically following her March 2012 surgery. This would result in 50 percent permanent impairment to the lower extremity. This is the same permanent impairment claimant had following her July 2014 surgery. (Ex. J, p. 6)

In a May 15, 2015 letter, Dr. Pilcher noted he reviewed Dr. Clark's IME report. Dr. Pilcher agreed, in large part, with Dr. Clark's findings that radiographs, before and after the November 2012 work incident, showing a loosening of hardware in claimant's knee. Dr. Pilcher believed claimant's November 2012 step ladder incident aggravated claimant's condition based on claimant's statements the incident caused pain and changes in her symptoms. (Ex. 8, pp. 4-5)

In a June 5, 2015 letter, Dr. Clark noted that Dr. Pilcher agreed that the pre and post injury x-rays showed loosening of claimant's hardware. Dr. Pilcher also agreed that claimant had a 50 percent permanent impairment to the lower extremity after the March 2012 surgery.

Claimant testified at hearing that she still has knee pain. She says she takes medication for swelling and pain. She said she has a knee brace and a cane, and uses both devices as needed. Claimant testified her left knee lacks flexibility, strength and range of motion. Claimant testified she can only sit for two hours at a time and stand for short periods. Claimant said she has difficulty putting on her shoes, socks, and pants due to her left knee.

Claimant testified she was approved for Social Security disability effective in May 2015. She testified her diabetes, arthritis, right knee pain, and high blood pressure are some of the basis for her receiving Social Security disability.

CONCLUSIONS OF LAW

The first issue to be determined is did claimant sustain an injury that arose out of and in the course of employment.

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 R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551

N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

As detailed in the Findings of Fact, claimant had a non-work-related knee replacement in March 2012. (Ex. D)

Claimant had a follow up with Dr. Hussain on September 20, 2012. At that time, claimant had an x-ray taken of the left knee. That x-ray showed a lucency between the implant and the bone. Dr. Clark indicates a lucency indicates a "clear zone" between the implant and the bone. (Ex. 3, p. 15; Ex. I, p. 4; Ex. J, pp. 5-8)

On November 27, 2012, claimant had an accident at work where she missed the bottom step, on a three-step ladder. Claimant's left foot went from the second step, missed the first step, and contacted with the ground. Claimant did not fall. Claimant estimated the length her foot dropped as between 16-20 inches. (Ex. I, p. 3; Ex. N, Dep. pp. 69-72)

Claimant saw Dr. Sprengelmeyer on November 27, 2012, the day of the injury, with complaints of knee pain. Records indicate claimant had no injury. Claimant testified she lied to Dr. Sprengelmeyer and that she knew her knee was hurting due to the ladder incident. (Ex. L)

X-rays taken on December 19, 2012 show lucency of about 2 millimeters. (Ex. I, p. 4; Ex. J, pp. 5-8)

Claimant eventually underwent a second TKR by Dr. Martin on March 11, 2013. (Ex. E, pp. 5-6)

Claimant testified that sometime in July 2013 she transferred to another O'Reilly store. She said that the work in the new O'Reilly store required more standing on floors and climbing on ladders than she underwent in the Davenport store.

Four experts have opined regarding the causal connection between claimant's November 27, 2012 work injury and her need for a second and third revision of the initial TKR.

Dr. Martin opined claimant's work injury of November 27, 2012 contributed to the aggravation and the loosening of the hardware in claimant's knee. (Ex. 3, p. 36) Dr. Martin treated claimant for an extended period of time. He also performed surgeries three and four on claimant's knee. Dr. Martin gave no opinions regarding the similarity in x-rays taken both before and after claimant's incident of November 2012.

Dr. Foad opined claimant's obesity was a contributing factor to her knee problems and subsequent need for surgeries. Dr. Foad did not believe that a one-time, lower injury trauma occurring in November 2012 would lead to claimant's need for revision surgeries. Dr. Foad also noted lucencies in claimant's x-rays both pre and post November 2012 incident. Dr. Foad evaluated claimant one time for an IME. (Ex. A)

Dr. Pilcher saw claimant once for an IME. He believed the work injury on November 27, 2012 aggravated a pre-existing condition and it was the cause of claimant's need for the third and fourth knee surgery. He based this opinion, on his belief that claimant was relatively nonsymptomatic after September 2012 until she reinjured the knee in November 2012. (Ex. A)

Dr. Clark evaluated claimant once for an IME. Dr. Clark also reviewed claimant's medical records, including x-rays taken in September and December 2012. He found that x-rays, taken before claimant's injury in September 2012, and after the injury, in December 2012, both show that claimant had approximately 2 millimeter lucency or "clear zone" between the implant and the bone. This indicated claimant had a loosening of the hardware with approximately the same gap between bone and implant, both before and after the injury. This suggested to Dr. Clark claimant's need for a third and fourth surgery was not caused or aggravated by the step ladder incident. He opined this diagnostic testing was a sure sign that claimant's implant was in failure mode and began the process of loosening before the November 27, 2012 step ladder incident. (Ex. I, p. 4; Ex. J, pp. 5-7; Ex. K)

Upon review, Dr. Pilcher agreed that x-rays taken both before and after claimant's November 2012 incident show the same gap between the implant and the bone. (Ex. H, pp. 4-5)

Claimant saw a physician on the day of her injury. Records indicate that there was no injury associated with knee pain. Claimant testified she lied to the doctor on this visit. Dr. Martin opined claimant's November 2012 step ladder incident caused claimant's need for a third and fourth surgery. Dr. Martin offered no opinion regarding issues raised by Dr. Clark concerning similar x-rays taken before and after claimant's accident. Dr. Pilcher opined claimant's need for a revision surgery was caused by the November 2012 incident. However, Dr. Pilcher also agreed with Dr. Clark that x-rays taken both before and after claimant's November 2012 incident showed a loosening of claimant's hardware. Dr. Foad opined that a one-time low injury trauma, like claimant had in November 2012, would not loosen hardware. Dr. Clark opined that because both the September 2012 and December 2012 x-rays showed 2 millimeter gaps between the hardware and the bone, this indicated claimant's implant was in failure mode and had already begun loosening before the November 27, 2012 incident. He opined that the loosening was unrelated to the November 27, 2012 step ladder incident.

Given, the facts as detailed above, claimant has failed to carry her burden of proof that her November 27, 2012 accident at work resulted in the need for a third and fourth knee surgery.

As claimant has failed to carry her burden of proof, her November 27, 2012 incident caused the need for a third and fourth surgery, all other issues, other than the reimbursement of the IME are moot.

The last issue to be determined is if claimant is due reimbursement for the IME by Dr. Pilcher.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice when an employer-retained physician has previously evaluated "permanent disability" and the employee believes the initial evaluation is too low. A rating of no impairment as a rating for Section 85.39 purposes. Vaughn v. Iowa Power, Inc., File No. 925283 (Arbitration August 5, 1992).

In a January 2, 2014 opinion, Dr. Foad, the employer-retained physician found that claimant had no permanent impairment related to her November 27, 2012 work injury. (Ex. A, p. 6) In a December 7, 2014 report, Dr. Pilcher, the employee-retained physician, found claimant had a 50 percent permanent impairment. Claimant is due reimbursement for costs associated with Dr. Pilcher's IME report.

ORDER

THEREFORE, IT IS ORDERED:

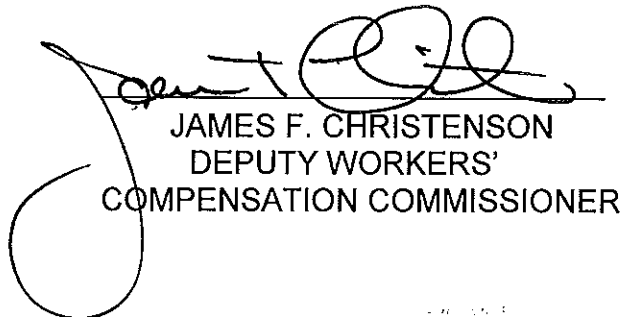
That claimant takes nothing from these proceedings in the way of additional benefits.

That both parties shall pay their own costs.

That defendants shall reimburse claimant for costs associated with Dr. Pilcher's IME.

That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2)

Signed and filed this 22nd day of October, 2015.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.