BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARVIN VEENENDAAL,

Claimant,

vs.

ABF FREIGHT SYSTEM, INC.,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5027224

APPEAL DECISION

HEAD NOTES: 2501, 2701, 2905

Upon written delegation of authority by the workers' compensation commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on the behalf of the Iowa Workers' Compensation Commissioner.

Defendants ABF Freight System, Inc. (ABF), employer, and Ace American Insurance Company, insurer, filed notice of appeal on August 15, 2014.

This case was heard on December 10, 2013, before a deputy workers' compensation commissioner, and considered fully submitted on January 13, 2014.

A review-reopening decision was filed on July 29, 2014. That decision found claimant had sustained an additional ten percent loss of earning capacity. The decision also found claimant carried his burden of proof to entitlement to alternate medical care consisting of surgery with a qualified surgeon.

Defendants contend on appeal the deputy erred in finding claimant sustained an additional ten percent loss of earning capacity. Defendants also contend on appeal the deputy erred that claimant was entitled to alternate medical care.

The detailed arguments of the parties have been considered, and the record of evidence has been reviewed de novo.

FINDINGS OF FACT

Claimant had a work-related injury to his lower back on October 23, 2006. An arbitration hearing was held on December 15, 2009.

In the Finding of Facts section, the arbitration decision noted an MRI, taken November 6, 2006, showed a moderate disc bulge at the L4-5 levels. Chad Abernathey, M.D., reviewed the MRI. He noted a severe right L3 radiculopathy secondary to a large right L3-4 disc extrusion. Claimant was offered surgical intervention by Dr. Abernathey. The record indicates claimant wanted back surgery but was convinced by the third party administrator, (TPA), Gallagher Bassett, to have more conservative care. As a result claimant underwent an epidural injection. (Arbitration Decision, pages 2-3)

In 2008 claimant underwent another MRI at the request of Nate Brady, M.D. The findings from that MRI were a minimal retrolisthesis at the L5-S1 levels with a disc protrusion on the left, and a disc protrusion at the L4-5. Dr. Brady wrote to Dr. Abernathey indicating claimant would be an excellent candidate for surgery. (Arb. Dec., p. 3)

The Finding of Facts indicates claimant was scheduled for surgery on September 11, 2008. However, Gallagher Bassett notified claimant surgery was not authorized based on an opinion by Dr. Abernathey that the L4-5 herniation was not related to the work injury. (Arb. Dec., p. 3; Ex. B, p. 3)

At the time of the arbitration hearing, claimant did not request defendants be ordered to provide the surgical care as recommended by Dr. Brady. (Arb. Dec., p. 1)

In a February 26, 2010, arbitration decision, the deputy found claimant had a 20 percent loss of earning capacity. Defendants filed an appeal. The commissioner affirmed the arbitration decision on April 8, 2011.

Defendants appealed to the Iowa District Court, which affirmed the agency's decision. In the Ruling on Petition for Judicial Review, the district court found Dr. Abernathey's statements that the L4-5 injury was not present in 2006 was false. (Ruling on Petition for Judicial Review, p. 9)

Defendants appealed to the Iowa Supreme Court. In a May 23, 2012, decision, the Iowa Court of Appeals affirmed the district court's decision and found there was substantial evidence in the record to show claimant's back problems were related to the October 23, 2006, injury, rather than a preexisting back problem.

At the time of the review-reopening hearing, claimant was 62 years old. (Transcript p. 10) At the time of hearing claimant was still employed with ABF. Shortly after the December of 2009 hearing, claimant bid off the midnight shift to the "5:00 p.m.

shift." Claimant testified the midnight shift required a lot of lifting, which was the reason he bid to the 5:00 p.m. shift. (Tr. pp. 10-11)

Claimant testified at the review-reopening hearing that approximately in November of 2013 he bid off the 5:00 p.m. shift into the "UE run." Claimant said the UE run required driving from Cedar Rapids, Iowa, to Tomah, Wisconsin, from 7:00 p.m. until 7:00 a.m. Claimant testified he took the "UE run" to further reduce the physical demands of his jobs. (Tr. pp. 12-14)

Claimant testified he did not like working the night shift, but took the night shift, as he believed it was lighter work. (Tr. p. 14)

Claimant testified at the review-reopening hearing, that after his arbitration decision, he requested Gallagher Bassett provide him with medical care for his back, but his requests were routinely ignored. (Tr. pp. 15-17)

On September 13, 2012, claimant's counsel requested defendants provide claimant with medical treatment. (Exhibit 1 to Exhibit J) That letter was apparently ignored. Letters were sent by claimant's counsel on October 11, 2012, and November 8, 2012. These letters also suggest claimant's requests for medical care were ignored by defendants. (Ex. 2, 3 to Ex. J)

On February 13, 2013, claimant was evaluated by Dr. Abernathey. Claimant had a one to two-year history of bilateral left lower extremity paresthesia and lower back pain. Claimant believed his symptoms were related to his original 2006 injury. An MRI was recommended. (Ex. 1, p. 3)

The MRI, taken on February 19, 2013, showed a disc bulge at the L4-5 levels and grade I spondylolisthesis, and a disc herniation at the L5-S1 levels. The MRI also showed a disc bulge at the L3-4 with stenosis. (Ex. 2, p. 2)

Claimant returned in followup with Dr. Abernathey on February 20, 2013. Dr. Abernathey opined the majority of claimant's paresthesia was due to stenosis. A lumbar decompression was discussed. Teresa Lane, R.N., a nurse case manager for the TPA, was present at that exam and discussion. Notes indicated Ms. Lane would discuss the case with defendant insurer to see if workers' compensation would cover and authorize surgery. (Ex. 1, p. 3)

Claimant testified that after his February 20, 2013, evaluation with Dr. Abernathey, he attempted to follow up on numerous occasions with Nurse Lane to find if defendants would authorize surgery. Claimant testified he received no response and was eventually told that Nurse Lane left Gallagher Bassett. (Tr. pp. 19-20, 23, 27-28)

In a letter to defendants' counsel, dated August 28, 2013, Dr. Abernathey opined he did not believe claimant's spondylolisthesis, stenosis or surgical treatment was related to the original work injury. (Ex. B, p. 3)

At hearing, claimant testified his symptoms had worsened since the time of the arbitration hearing. Claimant testified his legs go numb and he had to consciously make himself walk. Claimant said he wanted the surgery that was recommended by Dr. Abernathey and Dr. Brady. (Tr. pp. 19-21) Claimant testified that because of his condition, he was unable to maintain his home and yard in the way he would like. (Tr. p. 22)

Dan Parnell testified at hearing that he was the branch manager for ABF terminal in Cedar Rapids where claimant worked. Mr. Parnell said claimant had spoken to him regarding Gallagher Bassett. He testified claimant did not work as much overtime as other drivers. (Tr. pp. 31-35)

Terry Johnson testified he was the former manager of the terminal where claimant worked. Mr. Johnson said he retired in 2012. He said he recalled claimant limping and dragging his leg at work. He said there were times at work where claimant limited his activity at work due to back pain. (Tr. pp. 42-48)

CONCLUSIONS OF LAW

The first issue on appeal is if claimant carried his burden of proof he sustained a change in earning capacity, proximately caused by the original injury, not contemplated at the time of the original arbitration hearing.

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).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. 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 permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

In a review-reopening procedure the claimant has the burden of proof to prove whether he has suffered an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994).

Claimant testified his symptoms in his leg and back had worsened since the time of his arbitration hearing. He testified he has tried to work shifts with ABF that are less physically demanding because of symptoms he has in his legs and back. Claimant still works for ABF as a driver.

There is no evidence in the record claimant's permanent impairment has increased since his arbitration hearing. There is no evidence claimant has any permanent restrictions imposed since his arbitration hearing. There is no evidence claimant has sustained a loss in wages since his arbitration hearing. There is little evidence in the record claimant has sustained a loss of earning capacity since his arbitration hearing. Given this record, claimant has failed to carry his burden of proof he suffered an increase in loss of earning capacity proximately caused by the original injury.

The next issue to be determined is if claimant is entitled to alternate medical care consisting of lumbar surgery by a qualified back surgeon.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such

> alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care
>
> By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

The employee requesting the care has the burden to prove the care being offered by the employer is unreasonable. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 196–96 (Iowa 2003); Lynch Livestock v. Bursell, No. 14-1133, Filed May 20, 2015 (Iowa Ct. App.).

The arbitration decision indicates in 2006 Dr. Abernathey offered claimant surgical care based on a 2006 MRI. (Arb. Dec., pp. 2-3) The arbitration decision indicates claimant was dissuaded from having surgery by defendants' TPA, ("The claimant indicated that he wanted to have low back surgery but the claims administrator from Gallagher Bassett had suggested the claimant have conservative care in lieu of surgery and the claimant agreed.") (Arb. Dec., p. 3)

The arbitration decision indicates claimant continued to have symptoms in his lower back and legs. In 2008 Dr. Brady recommended another MRI. Based on the findings of the 2008 MRI, Dr. Brady recommended to Dr. Abernathey that claimant have surgery. (Arb. Dec., p. 3)

Claimant was scheduled to have that surgery in September of 2008. Claimant was advised by the TPA, Gallagher Bassett, they would not authorize surgery. This was based upon Dr. Abernathey's opinion that claimant's L4-5 herniation was not work related. (Arb. Dec., p. 3; Ex. B, p. 1) The arbitration decision notes Richard Neiman, M.D., opined claimant had a pre-existing stenosis materially aggravated by his work injury. The arbitration decision found Dr. Neiman's opinion regarding causation and permanency was more convincing than that of Dr. Abernathey's. (Arb. Dec., p. 4) On appeal the arbitration decision was affirmed by the commissioner.

This matter was appealed to the district court. The district court affirmed the commissioner's decision. District court decision noted Dr. Abernathey's opinion, that claimant's problems were not related to his 2006 work injury, was based on false statements. (Ruling on Petition for Judicial Review, p. 9)

The record indicates that following the Iowa Court of Appeals decision, claimant repeatedly made attempts to get authorization from the TPA for medical treatment.

Those requests were repeatedly ignored. (Tr. pp. 15-19; Ex. 1-3 to Ex. J) Eventually, approximately six months after the first requests were made, claimant was allowed to treat again with Dr. Abernathey.

On February 20, 2013, Dr. Abernathey indicated he would provide surgery if the TPA would ". . . support surgical intervention." (Ex. 1, p. 3)

The record indicates claimant again received no followup care from Gallagher Bassett regarding the surgery following the February 20, 2013, evaluation. The record again indicates claimant made numerous unsuccessful attempts to reach Gallagher Bassett regarding authorization for surgery. (Tr. pp. 18-20, 23, 27-28)

Finally, in August of 2013, six months after the February of 2013 evaluation, following discussion with defendants' counsel, Dr. Abernathey changed his opinion and found claimant's current problems were not related to his 2006 injury. (Ex. B, p. 3)

It is unclear why Dr. Abernathey would recommend surgery for claimant in February of 2013, and yet change his opinion, after discussion with defendants' counsel, in August of 2013. The opinions expressed in Exhibit B, page 3 are ambiguous and unclear. As noted, the arbitration decision has already found claimant's lower back condition and ongoing complaints are related to his work injury. As noted, Dr. Abernathey's opinions in the arbitration decision, regarding causation, are found unconvincing. Based on this, the opinions of Dr. Abernathey, found at Exhibit B, page 3, are found to be not convincing.

Claimant requested surgical intervention in 2006. He was dissuaded from having surgery by Gallagher Bassett. Dr. Brady opined in 2008 claimant would be a good candidate for lower back surgery. Dr. Abernathey's opinions, detailed in Exhibit B, page 1, have been found by prior decisions to be unconvincing and untrue. Dr. Abernathey's opinions (Exhibit B, page 3) are also found not to be convincing. Claimant has requested medical authorization for surgery since approximately late 2012. The record indicates defendants ignored claimant's request for care from approximately September of 2012 through February of 2013. The record suggests those requests again for care were ignored between late February of 2013 to August 2013. Given this record, claimant has carried his burden of proof that defendants' care is unreasonable. Claimant is entitled to the requested alternate medical care consisting of surgery with a qualified back surgeon.

ORDER

The review-reopening decision of July 29, 2014 is affirmed, in part, and reversed in part.

Defendants shall promptly authorize a qualified surgeon and provide surgical care for claimant's lower back.

Claimant will qualify for healing period benefits if he cannot work due to back surgery, Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (Iowa 2012).

Defendants shall pay the costs originally ordered of one hundred and 00/100 dollars ($100.00) for filing fee.

Defendants shall also pay the costs of this matter and the appeal, including the preparation of the hearing transcript.

Signed and filed this 26th day of August, 2015.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
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