

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT MULLINS,

Claimant,

vs.

DOHRN TRANSFER CO.,

Employer,

and

AMERICAN ZURICH INS. CO.,

Insurance Carrier,
Defendants.

FILED
MAY 26 2015
WORKERS' COMPENSATION

File No. 5043008

ARBITRATION

DECISION

Head Note Nos.: 1803, 1803.1

STATEMENT OF THE CASE

Robert Mullins, claimant, filed a petition in arbitration seeking workers' compensation benefits from Dohrn Transfer Company, Inc. and its insurer, Zurich American Insurance Company, as a result of an injury he allegedly sustained on December 21, 2010 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on November 8, 2014. The evidence in this case consists of the testimony of claimant and joint exhibits A – P.

ISSUES

1. Whether the alleged injury is a cause of permanent disability and, if so;
2. Whether the alleged disability is a scheduled member disability or an unscheduled disability.
3. The extent of claimant's disability.
4. Assessment of costs.

The stipulations of the parties are accepted. The parties stipulated Mr. Mullins had an injury that arose out of and in the course of his employment on December 21, 2010. Temporary benefits are not in dispute. The parties agree that if permanent

partial disability benefits are awarded the commencement date is March 16, 2011 at the weekly rate of \$507.22 per week. The parties agreed that defendants paid 2.2 weeks of permanent partial disability at \$507.22 per week.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Robert Mullins, claimant, was 51 years old at the time of the hearing. His employment history is detailed in Exhibit O, pages 2- 3. Mr. Mullins worked for Dohrn Transfer (Dohrn) from March 2010 until June 13, 2011, when he exhausted his FMLA leave and was terminated. (Exhibit O, pages 8, 9) From September 2006 through February 2010 Mr. Mullins worked for United Van Lines as a driver, packer, mover, warehouseman and trainer. (Transcript p. 13) This work was extremely heavy work and required climbing stairs, crouching and walking long distance. Mr. Mullins was a driver and warehouse man for United Fuel from August 1985 through September 2006. He worked as a correction officer in New Mexico from April 2002 through August 2005. Mr. Mullins said that he could not perform any of his prior work due to lifting, climbing, crouching and walking. (Tr. p. 15) Mr. Mullins' complete work history is set forth in Exhibit N pages 12 and 13. Mr. Mullins briefly attended college for music but did not complete college. (Ex. P, p. 2) Mr. Mullins did possess a CDL. At the time of the hearing his CDL was not valid, as he had not passed the physical and he did not believe he could pass a DOT physical. (Tr. p. 18) Mr. Mullins obtained training after his injury at Dohrn through a program offered by the Iowa Workforce Development and a community college for sterile processing programmer. Mullins said he was not able to find work in this field, primarily due to the amount of standing required. (Tr. p. 19) Mr. Mullins testified he has applied for over 100 positions and was unemployed at the time of the hearing. (Tr. p. 20) Mr. Mullins was receiving Social Security Disability at the time of the hearing.

Mr. Mullins had work-related injuries with employers other than Dohrn. Mr. Mullins had injuries while working for United Fuel, Lee County Corrections and Champion Technologies. His right big toe was injured while working for United Fuel. He had no restrictions when he returned to work. While working as a correction officer Mr. Mullins hurt his back and was put on light duty for a week. He had physical therapy for six months. (Ex. P, p. 7) He returned to work without restrictions. Mr. Mullins said that he did not have any back symptoms after that incident. While working for United Fuel, Mr. Mullins injured both knees. He was not provided any restrictions for this injury.

Mr. Mullins went to the emergency room in May 2009 for both of his knees. This was not a work-related injury. Mr. Mullins was not working for Dohrn at this time. (Tr. p. 45)

Mr. Mullins would have DOT physicals in order to maintain his CDL. After Mr. Mullins was diagnosed with diabetes he was required to have checkups every three months. (Tr. p. 26) Mr. Mullins was diagnosed with cancer and had surgery for cancer after his injury at Dohrn. Mr. Mullins was not given any restrictions due to his cancer and resulting surgery. (Tr. pp. 30-31)

Mr. Mullins worked as a driver for Dohrn. As part of his duties he would hook and unhook trailers and to lift items between 5 and 150 pounds. He also was required to walk, crouch and climb.

On December 21, 2010 Mr. Mullins was operating a pallet jack in his trailer. The pallet jack became stuck and claimant testified he popped both of his knees while pulling on the pallet jack. (Tr. p. 33) Claimant fell. He was helped up, and some other workers removed the pallet. Mr. Mullins did not report an injury on that day. He returned to work the next day and told his employer he had an injury, but no formal report was completed. Mr. Mullins had difficulty performing his job and went to the emergency room the next day. He returned to work on crutches and then filled out an accident report. Mr. Mullins was sent by Dohrn to Concentra for medical care. Claimant said he told the initial physicians he injured both knees. (Tr. p. 36) Claimant said that physical therapy was not helping him at that time. Mr. Mullins returned to work for one day after his injury and was given a make-work job of shredding papers using scissors.

Mr. Mullins was off work from Dohrn when his mesentery tumor was discovered. He had surgery, and his FMLA expired. Mr. Mullins said that Dr. Ash had not removed his knee restrictions at the time he was terminated.

Mr. Mullins testified his knees were injured on December 21, 2010, and his back and hips have come on after the injury to his knees due to his walking. (Ex. P, p. 9) Mr. Mullins currently maintains a sedentary life style. He has given up sports, and other than church activities is not engaged in much daily activity.

Mr. Mullins' past medical record is relevant to his current claim. Claimant had right knee surgery in 2004. (Ex. K, p. 4) He had right knee pain and an MRI in 2006. (Ex. B, 2) In May 2009 Mr. Mullins had his bilateral knees examined due to pain. (Ex. C, p. 2) Claimant was involved in a fight and his knees were hit and he fell on his knees. (Ex. C, p. 3) Claimant fell at work in 2005 and injured his back and was briefly taken off work as a correction officer. (Ex. A, p. 2)

Mr. Mullins went to Iowa Methodist Medical Center with right knee pain on December 23, 2012. (Ex. D, p. 1) He was diagnosed with right knee strain. (Ex. D, p. 3) Mr. Mullins was seen by Concentra Medical Center on December 27, 2010 by Ernest Perea, M.D. His diagnosis was pain in the joint of the lower leg. (Ex. E, p. 1) Mr. Mullins was referred to Mark Kirkland, D.O., an orthopedic specialist. (Ex. E, p.3)

An MRI of the right knee showed,

Impression:

1. Complex tear of the lateral meniscus including a full thickness radial-type tear at the junction of the posterior body and posterior horn.
2. Large segment full thickness cartilage loss of the lateral compartment that is severely affecting the lateral femoral condyle.
3. Moderate tricompartmental degenerative change with large marginal osteophytes.
4. Small joint effusion.

(Ex. F, pp. 1, 2)

On January 7, 2011 Stephen Ash, M.D. evaluated claimant's right knee. His impression was "Right knee degenerative joint disease with recent exacerbation." (Ex. G, p. 2) Dr. Ash wrote, "... I feel his injury is a work-related exacerbation of a pre-existing severe degenerative arthritis in the right knee." (Ex. G, p. 2) On March 11, 2011 Dr. Ash provided Mr. Mullins with a 30-pound lifting limit and walking less than 20 minutes per hour. (Ex. G, p. 8) On August 29, 2011 Dr. Ash wrote,

According to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, [sic] Mr. Mullins has a 1% impairment for his work-related exacerbation of his pre-existing left [sic] knee arthritis. His knee function and imaging studies would have a higher impairment rating, but the contribution of the actual recent work exacerbation is minimal and this justifies the 1% rating.

(Ex. G, p. 9)

On June 25, 2014 Dr. Ash wrote defendants' attorney. He said that Mr. Mullins' injury was a temporary aggravation of his severe arthritis. He did not treat, detect, or note any complaints relating to a gait disturbance. Dr. Ash stated that after reviewing Robin Epp, M.D.'s (n/k/a Robin Sassman, M.D.) report he did not change his opinions of his impairment rating report of August 29, 2011. (Ex. G, p. 10)

Mr. Mullins was sent to physical therapy on January 10, 2010. In the report Dave Vanderhoff, PT, DPT, ATC, CSCS stated that Mr. Mullins was reporting pain in his right knee. Mr. Vanderhoff scheduled eight sessions and provided a home exercise program. (Ex. H, p. 2) On January 26, 2010 Mr. Vanderhoff noted that Mr. Mullins' rehabilitation potential was fair. (Ex. H, p. 4)

On June 8, 2011 Mr. Mullins was examined at the University of Iowa Hospitals and Clinics (UIHC) for a neuroendocrine tumor. (Ex. I, p. 1) Mr. Mullins had small bowel surgery on June 26, 2011. (Ex. I, p. 5) On July 24, 2013 Mr. Mullins was seen concerning his back and knee pain. (Ex. I, pp. 5, 6) On August 19, 2013 Melissa Willenborg, M. D. of the UIHC provided the following assessment of the claimant,

ASSESSMENT/PLAN:

The patient is a 50-year-old male with a chief complaint of primarily right knee pain as well as left knee pain and bilateral hip pain with grade IV left knee osteoarthritis. With regards to his right knee, there is active litigation with regards to his knee problems. He thinks his knee issues are related to a twisting injury 2 years ago in 2010. He does report that he had a knee scope 5 years ago with evidence on imaging that he had a meniscectomy of the lateral meniscus. This may be contributing to his pain symptoms as well.

-We do not feel Mr. Mullins is a good surgical candidate due to his multiple medical problems. He has uncontrolled Diabetes with a recent A1C of 10.

-Once his medical issues are controlled we could consider surgical treatment.

-In the meantime he can continue activities as tolerated. Weight loss may help his pain as well. NSAIDs per PCP can be prescribed.

-FU PRN

(Ex. I, p. 12) Mr. Mullins' diagnoses were,

1. Right knee pain
2. Left knee pain
3. Knee pain
4. Primary osteoarthritis of right knee

(Ex. I, p. 13, ICD-9 codes omitted)

On September 11, 2012 Mr. Mullins had a functional capacity evaluation (FCE). The FCE was deemed valid. The testing showed Mr. Mullins had the capacity for sedentary work, lifting up to 20 pounds on rare basis and up to 10 pounds on an occasional basis. (Ex. J, p. 2)

On November 20, 2012 Robin Sassman, M.D. performed an independent medical examination of Mr. Mullins. (Ex. K, pp. 1 – 9) Mr. Mullins reported to her that he had bilateral knee pain, right greater than left. He also reported low back pain with occasional numbness and tingling in his feet. Mr. Mullins reported to Dr. Sassman,

Regarding prior injuries to the right knee, he states that he did have surgery on the right knee in 2004. He states that once he completed his recovery from that issue, he was essentially symptom-free and actually moved furniture for quite some time.

(Ex. K, p. 4) Dr. Sassman noted a significant limp due to right knee pain. (Ex. K, p. 5) Dr. Sassman's opinions concerning causation were,

It is my opinion that the meniscus tear in the right knee is directly and causally related to the fall that occurred on or about December 21, 2010. It is also my opinion that this fall substantially aggravated the underlying degenerative changes in his bilateral knees. This opinion is supported by the fact that he denies any knee pain immediately prior to the injury. He does have a history of right knee surgery in the past, approximately in 2004; however, he made a full recovery from this issue and denies having any pain prior to the fall. In addition, the mechanism of injury is consistent with his current complaints.

It is also my opinion that his low back pain and bilateral hip pain were aggravated by the gait change that occurred as a result of the knee injury. Mr. Mullins reports using either crutches or a cane to ambulate ever since the injury. This type of gait change can certainly aggravate any underlying degenerative changes that may be present that were asymptomatic prior to the injury.

(Ex. K, p. 7) Dr. Sassman recommended additional evaluation of the bilateral knees and bilateral hips. She did not put Mr. Mullins at maximum medical improvement. (Ex. K, p. 7) Dr. Sassman provided a 5 percent whole person rating for the low back, a 3 percent whole person for the left hip, a 3 percent whole person for the right hip. She found Mr. Mullins had a 20 percent lower extremity rating for the right knee and a 7 percent lower extremity rating for the left knee. She provided a combined 21 percent whole person rating. (Ex. K, p. 8) She recommended restriction of lifting 5 pounds occasionally, did not recommend any over-the-shoulder work, and that he rarely walk and stand. She also recommended he not use the lower extremities for work activities. (Ex. K, p. 9)

On June 10, 2014, William Boulden, M.D. performed an IME. (Ex. L, pp. 1 – 8)
Dr. Boulden's impression was,

IMPRESSION

Based on all the records I have reviewed, this patient has significant Grade IV chondromalacia of the lateral compartment of his right knee with other degenerative changes in the knee joint. I would state that he will probably need a total knee replacement someday in the future. I do not believe that the trauma on December 21, 2010, that the patient has talked about caused any of the pathological changes that we have seen on the studies.

(Ex. L, p. 6) Dr. Boulden did not believe that Mr. Mullins had any permanent injury related to his December 21, 2010 injury. (Ex. L, p. 7)

Carmen Mitchell, M.S. provided a vocational evaluation of Mr. Mullins on January 30, 2013. She concluded that Mr. Mullins had lost 97 percent of the jobs he had access to before the injury. Using the restriction from Dr. Sassman she concluded that Mr. Mullins was precluded from full-time competitive employment. (Ex. M, pp. 4, 5)

Mr. Mullins applied for Social Security Disability, with an onset date of December 22, 2010. The decision listed the following impairments as part of his claim,

Diabetes mellitus; cardiomyopathy; degenerative joint disease of the bilateral knees; osteoarthritis of the hips; obesity; gastroesophageal reflux disease; hypothyroidism; hyperlipidemia; sleep apnea; gout; history of substance abuse; and mesentery tumor with partial small bowel resection and lymphadenectomy in June 2011

(Ex. N, p. 4) He was found eligible for Social Security Disability with an onset date of June 4, 2011. (Ex. N, p. 10)

CONCLUSIONS OF LAW

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

In this case the defendants agree claimant temporarily aggravated his right knee due to the work injury of December 21, 2010. I find claimant has proven by a preponderance of the evidence that he has suffered a permanent injury to his right knee due to the injury at work on December 21, 2011. The medical reports are clear that

after December 21, 2010 claimant's right knee has never returned to baseline and that it was significantly more symptomatic after his work injury.

Dr. Ash gave Mr. Mullins a one percent rating. Dr. Ash appears to be apportioning Mr. Mullins' injury between his pre-existing degenerative knee condition and the aggravation of December 21, 2010. This apportionment is not a proper analysis. Mr. Mullins' impairment is to be rated as to its condition after the December 21, 2010 injury in total. As such, I do not accept Dr. Ash's rating of one percent. I do accept that Dr. Ash found a permanent impairment due to the December 21, 2012 injury.

I find that Dr. Sassman's rating of 20 percent to the lower right extremity is the most accurate rating in the record. Given his restrictions and functioning of his right knee this rating is supported by the medical record and Mr. Mullins' testimony. I find Mr. Mullins has a 20 percent impairment to his right lower extremity due to his December 21, 2010 work injury. This entitled Mr. Mullins to 44 weeks of permanent partial disability benefits ($220 \times 20\% = 44$). Mr. Mullins has proven a scheduled member injury to his right leg due to his right knee injury.

Dr. Boulden commented in his report about Mr. Mullins showing two "Waddell's signs". Dr. Boulden does not indicate in his report if two Waddell's signs are significant or not. He implies it is significant; however it is not medically clear that showing two signs out of five Waddell's signs is significant at all. Additionally, the commissioner has upheld criticism of reliance on Waddell's signs. In Guerrero vs. Carroll Auto Wrecking, File Nos. 5034380/5034381 (App. Feb. 18, 2013) the commissioner held,

Defendants further attack claimant's credibility as to his disability, and in turn criticize the presiding deputy's disability finding, using the medical opinion of William Boulden, M.D. The presiding deputy correctly rejected the views of Dr. Boulden. His views were simply inconsistent with the well-reasoned opposing medical opinions and deputy's findings that claimant had sustained a work injury and presented with permanent impairment. ...

In this particular case the medical opinions of Jacqueline Stoken, D.O., and her critique of Dr. Boulden's use of non-organic "Waddell's signs" to conclude that claimant is exaggerating his symptoms, are found convincing. Dr. Stoken's quotation of Dr. Waddell himself, which is included in her correspondence, was particularly persuasive:

Despite all that I've tried to say since 1980, the non-organic signs have been misused. The most serious abuse has been because of misconceptions that the patient has nothing physically wrong or is not genuine. They have been used by some surgeons to deny some patients further investigation or treatment.

I tried to rationalize this, because such patients are probably safe to escape from surgeons who have such lack of understanding of the illness behavior. More seriously, they have been used unscrupulously by defense "experts" and lawyers to deny some patients the compensation to which they are entitled. That shows a lack of knowledge of illness behavior that destroys their claim to expertise in this field. I condemn these abuses absolutely. All health professionals are supposed to try to understand and help patients, not make moral judgments or condemn them if they do not behave as we think they should.

Guerrero Id. p. 2

To the extent Dr. Boulden's report uses Waddle signs, his report is given less weight. That being said, much of his analysis was considered in considering Mr. Mullins' impairments.

Dr. Sassman found Mr. Mullins' back and hip symptoms were related to his December 21, 2010 injury and his resultant altered gait. I do not accept her conclusions. Dr. Sassman was not informed by claimant that he received treatment for his knees in 2009 and received treatment for his back in 2005. There is also no medical documentation from UIHC or other providers that Mr. Mullins' limp/altered gait has caused his current symptoms. Certainly there is a possibility that his right knee injury has caused his back and hip problems, but the possibility is not enough for the claimant to carry his burden of proof.

The claimant has proven by a preponderance of the medical evidence that his right knee is a permanent injury. He has not met his burden of proof for any other injuries.

ORDER

Defendants shall pay claimant forty-four (44) weeks of permanent partial disability at the rate of five hundred seven and 22/100 dollars (\$507.22) commencing on March 16, 2011.

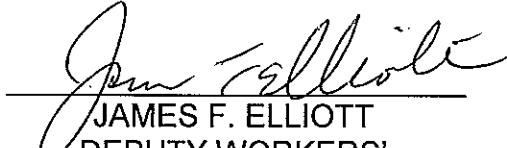
Defendants shall pay any past due amounts due in a lump sum with interest as provided by law.

Defendants shall have credit for two point two (2.2) weeks of permanent partial disability benefits they previously paid.

Defendants shall pay costs as allowed under 876 IAC 4.33.

Defendants 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 26th day of May, 2015.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jacob Van Cleaf
Attorney at Law
118 South East 4th St.
Des Moines, IA 50309
jvc@vanleafandmccormack.com

Jean Z. Dickson
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
jzd@bettylawfirm.com

JFE/sam

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.