BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUN 13 2016
WORKERS' COMPENSATION

JACKIE TRUMBO, Claimant, vs. JOHNSTON COMMUNITY SCHOOL DISTRICT, Employer, Self-Insured, Defendant.	File No. 5047946 ARBITRATION DECISION Head Note No.: 1704, 1803, 2502

STATEMENT OF THE CASE

Claimant, Jackie Trumbo, filed a petition in arbitration seeking workers' compensation benefits from Johnston Community School District (Johnston), self-insured employer. This case was heard in Des Moines, Iowa on February 29, 2016 with a final submission date of March 28, 2016.

The record in this case consists of claimant's exhibits 1-6, defendant's exhibits A through O, and the testimony of claimant.

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. Credit.

3. Whether claimant is entitled to reimbursement for an independent medical examination (IME) under Iowa Code section 85.39.

4. Costs.

FINDINGS OF FACT

Claimant began working for Johnston in August of 2004 as a substitute custodian. She began working full time as a night custodian in April of 2005.

Claimant's medical history is relevant. Claimant fell off a ladder in approximately 2005. In March of 2006 claimant complained of worsening knee pain for one year

following falling off a ladder. There is no evidence in the record this prior fall resulted in any permanent impairment or permanent restrictions. (Exhibit A, page 4)

On December 29, 2011 claimant was carrying a box down stairs when she missed a step, and fell down two stairs. Claimant landed on her knees. Claimant testified she was unable to get off the ground unassisted. She was taken by ambulance to a hospital. (Ex. 5, p. 62; Ex. B)

X-rays taken at the hospital showed claimant had a transverse fracture of the lower third of the patella, on the right. Claimant was assessed as having a right patella fracture by David Vittetoe, M.D. Claimant was put in a knee brace. She was instructed by hospital staff to follow up with Dr. Vittetoe. (Ex. 1, pp. 1-2, 12; Ex. 3, p. 20; Ex. 10, p. 59; Ex. C, p. 11)

On January 5, 2012 claimant saw Dr. Vittetoe in followup. Claimant's knee pain had improved. Claimant was using a walker or crutches to ambulate. (Ex. 2, p. 13)

Claimant returned in followup on February 1, 2012. Claimant reported mild pain. She was walking independently. Claimant was prescribed physical therapy. (Ex. 2, p.16)

On March 23, 2012 claimant was released to return to work without restrictions. She was instructed to return to Dr. Vittetoe on May 2, 2012. (Ex. 2, p. 18)

From February 8, 2012 through April 27, 2012 claimant went through physical therapy. On April 22, 2012 claimant had met all her physical therapy goals. She reported minimal pain. She was released from physical therapy on April 27, 2012. (Ex. E, pp. 36-37)

Claimant testified she remained off of work until spring break at Johnston. She returned to work at her regular job duties. She said she had difficulty returning to work due to her knee and had to move slower.

Claimant failed to show up to her May 2, 2012 appointment with Dr. Vittetoe. By letter dated July 5, 2012 claimant was requested by defendant's third-party administrator to attend an exam with Dr. Vittetoe to determine permanent impairment. (Ex. L, p. 71)

In a letter dated August 31, 2012 claimant was again requested to attend an exam with Dr. Vittetoe. Claimant was told if she did not follow up, her workers' compensation claim would be closed. (Ex. L, p. 72)

On October 3, 2012 claimant saw Dr. Vittetoe in followup. Claimant complained of pain in both knees. Claimant was assessed as having a post right patella fracture and osteoarthritis in both knees. (Ex. D, p. 33)

In a January 3, 2013 letter, Dr. Vittetoe opined claimant had a 7 percent permanent impairment to the lower extremity. This was based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 17-33. (Ex. 2, p. 19)

In a November 9, 2015 report Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant indicated she had constant right knee pain and significant swelling. Claimant also complained of numbness and tingling in the right calf and the right toes. Dr. Bansal opined claimant had a 12 percent permanent impairment to the right lower extremity based on the Guides. This was based on the finding that claimant had a 7 percent permanent impairment to the healed patella fracture using Table 17-33. He also found claimant had an additional 5 percent permanent impairment to the right lower extremity for claimant having a direct trauma to the knee and crepitus, using Table 17-31. Dr. Bansal restricted claimant to not lifting more than 25 pounds. He also limited her to not engage in frequent kneeling, squatting, climbing or twisting. (Ex. 4)

In a December 30, 2015 report, Joseph Chen, M.D. gave his opinions of claimant's condition following an IME. Dr. Chen assessed claimant as having a right patella fracture. He opined based upon the Guides, claimant had a 7 percent permanent impairment to the right lower extremity. Dr. Chen indicated he had reviewed Dr. Bansal's IME report. He opined it was incorrect to combine the ratings based on a direct impact to the patella, under Table 17-31 of the Guides. It was Dr. Chen's opinion that the 7 percent given under Table 17-33 already took into consideration the direct trauma to the patella. (Ex. G)

In a January 28, 2016 letter, written by defendant's counsel, Dr. Vittetoe indicated he had reviewed Dr. Bansal's November of 2015 report. He reiterated claimant's permanent impairment should be 7 percent, as he originally opined. (Ex. 2, pp. 20-22)

Claimant testified she is mostly pain free in the right knee when she wakes up in the morning. She says as the day goes on, and she is involved in more activity, her right knee will swell.

Claimant testified she had not seen any physician for treatment for her right knee since her release from care by Dr. Vittetoe. She said that, at the time of hearing, she was not taking any medication for her right knee.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Three experts have opined regarding the extent of claimant's permanent impairment claimant has to her right lower extremity as a result of the December of 2011 injury.

Dr. Vittetoe treated claimant for an extended period of time. He reviewed Dr. Bansal's IME report. Dr. Vittetoe opined, on two occasions, claimant had a 7 percent permanent impairment to the lower extremity as a result of the December 29, 2011 knee injury. (Ex. 2, pp. 19-22)

Dr. Bansal evaluated claimant once for an IME. He found claimant had a 12 percent permanent impairment to the lower extremity.

Dr. Chen evaluated claimant once for an IME. He had reviewed Dr. Bansal's IME. Dr. Chen agreed with Dr. Vittetoe and found claimant had a 7 percent permanent impairment to the right lower extremity. He also opined it was improper for Dr. Bansal to stack ratings, and the additional 5 percent found by Dr. Bansal should be used only when a trauma injury to the patella does not involve a fracture. (Ex. G)

Dr. Bansal did not rebut Dr. Chen's opinions that it was improper, under the Guides, to stack ratings using both Table 17-31 and 17-33.

Dr. Vittetoe treated claimant for an extended period of time. As a facture matter he has a far greater familiarity with claimant's medical condition than does Dr. Bansal or Dr. Chen. Dr. Chen agreed with Dr. Vittetoe's rating. Dr. Chen opined it was improper to combine the ratings, as was done with Dr. Bansal's opinion. Dr. Bansal did not rebut Dr. Chen's opinion. Based on these facts, it is found that claimant has a 7 percent permanent impairment to the right lower extremity for the December of 2011 injury. Claimant is due 15.4 weeks of permanent partial disability benefits (220 weeks x 7 percent).

The next issue to be determined is credit. Iowa Code section 85.34(4) states, in relevant part:

> 4. *Credits for excess payments.* If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

A defendant is due a credit, against permanent partial disability benefits, for all overpayments the defendant has made to the claimant in the form of healing period benefits. McBride v. Casey's Marketing Co., File No. 5037617 (Remand February 9, 2015).

According to the hearing report, the parties stipulated claimant's weekly rate is $792.04 per week. Claimant was paid healing period benefits at the rate of $667.58 per week for 7.429 weeks. Claimant was also paid 15.4 weeks of permanent partial disability benefits at the rate of $667.58 per week. (Ex. N, pp. 76-77) Defendants are due a credit for overpayment of weekly benefits for healing period and permanency under Iowa Code section 85.34(4) and 85.34(5).

The next issue to be determined is if claimant is due reimbursement for Dr. Bansal's IME.

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).

In IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001), claimant sought to compel the employer to pay for an IME under Iowa Code section 85.39. The physicians who treated claimant in Harker, Drs. Sherman and Herrera, were chosen by claimant. Drs. Sherman and Herrera later found claimant had no permanent impairment. The Iowa Supreme Court noted:

> Under the Iowa statute, the employer is given the right to choose who will provide treatment for an employee's injury...In addition, the employer is allowed to subject the employee to reasonable medical examinations by other physicians, presumably of the employer's choosing...The quid pro quo for these employer rights is the right of the employee to have a physician of his choosing present at an IME conducted at the employer's request and to have an IME conducted by a doctor of his own choice if the physician retained by the employer has given a disability rating unacceptable to the employee. In an apparent attempt to equalize the generally unequal financial positions of the parties, the legislature has said that the employer must pay for the employee's IME under the latter circumstances.

IBP, Inc. v Harker, 633 N.W.2d at 327

The Court, in Harker, found that because claimant chose Drs. Sherman and Herrera, they were not physicians retained by the employer. As a result the employer had no obligation to pay for an IME. Id.

The facts of this case are somewhat different from those found in the Harker case. Claimant went to the emergency room for her injury and was initially treated by Dr. Vittetoe, who appears to have been the orthopedic surgeon on call at that time. Claimant did not choose Dr. Vittetoe. Claimant was later instructed by the hospital staff to follow up with Dr. Vittetoe for further care after discharge from the emergency room. (Ex. C, p. 11)

The record indicates when claimant failed to return in followup appointments with Dr. Vittetoe, defendant requested, on two occasions, she return to Dr. Vittetoe for a rating of permanent impairment. On August 31, 2012 defendant essentially pressured claimant to follow up for a permanent impairment rating with Dr. Vittetoe, or her claim for benefits would be closed. (Ex. L, pp. 71-72)

Claimant was assigned to Dr. Vittetoe in the emergency room. She was instructed by hospital staff to return in followup care with Dr. Vittetoe. She was also instructed, and pressured by defendant, to return to Dr. Vittetoe for a followup for an impairment rating. Given these facts, it cannot be said claimant chose Dr. Vittetoe as her treating physician. For this reason the rule in the Harker case does not apply.

The employer-retained physician, Dr. Vittetoe, gave his opinions of permanent impairment in a report dated January 3, 2013. The employee-retained physician, Dr. Bansal, gave his opinions of permanent impairment by report dated November of 2015. Given this chronology, claimant is due reimbursement for the Dr. Bansal IME.

The final issue is costs. Rule 876 Iowa Administrative Code 4.33 provides for taxation of costs, including "transcription costs [of evidential depositions] when

appropriate." This claim actually relates to the cost of a copy of a transcript ordered by defendants. As provided in Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992):

> Allowable costs are limited to the cost of the original of depositions and do not include the expense of duplicate copies obtained for convenience of counsel.

(Coker, at 153)

See also, Higgins v. John Deere Engine Works, File No. 1253509 (App. July 12, 2002). Given agency law in Higgins, costs associated with claimant's deposition are not awarded. Claimant is awarded all other costs

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant fifteen point four (15.4) weeks of permanent partial disability benefits at the rate of four hundred ninety-two and 04/100 dollars ($492.04) per week commencing on March 25, 2012.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits as ordered above and set forth in Iowa Code section 85.30.

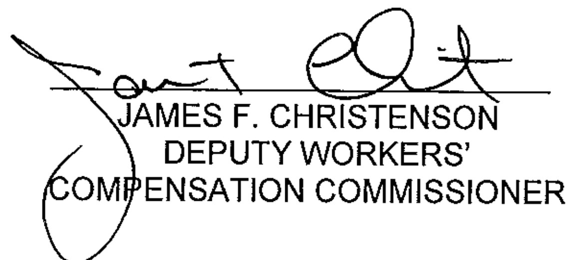
That defendant shall receive a credit for benefits previously paid, including benefits paid in overpayment, as discussed above.

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

That defendant shall reimburse claimant for costs associated with Dr. Bansal's IME.

That defendant shall pay claimant's costs as detailed above.

Signed and filed this 13th day of June, 2016.



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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.