BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

REX EVANS,

Claimant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

STATE OF IOWA,

Self-Insured,
Employer,
Defendant.

FILED

MAR 25 2015

WORKERS COMPENSATION

File No. 5046657

ARBITRATION DECISION

STATEMENT OF THE CASE

Rex Evans, the claimant, seeks workers' compensation benefits from defendant, the Iowa Department of Transportation, an agency of the State of Iowa, a self-insured employer, as a result of an alleged injury on February 13, 2012. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 6, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on March 12, 2015. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendant's exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Exhibit 1-2:4." References to a page of a transcript shall be to the actual page number of the original transcript, not to the page number of a copy containing multiple pages of the original transcript.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On February 13, 2012, claimant received an injury to his right knee arising out of and in the course of employment with defendant employer.

2. Claimant is seeking temporary total or healing period benefits only from September 24, 2012 through October 5, 2012 and defendant agrees that he was off work during this period of time.

3. If the injury is found to have caused permanent disability, the type of disability is a scheduled member disability to the right leg.

4. If I award permanent partial disability benefits, they shall begin on October 6, 2012.

5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $1,326.54. Also, at that time, he was married and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $836.06 according to the workers' compensation commissioner's published rate booklet for this date of injury.

6. Prior to hearing, defendant paid claimant sick leave benefits in the amount of $2,447.20.

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to weekly temporary total or healing period benefits and permanent disability benefits; and,

II. The extent of defendant's entitlement to credit for prior payments of permanent disability benefits for the right leg.

III. The extent of defendant's entitlement to a credit for payments of accumulated sick leave used by claimant during his recovery from the injury.

IV. The extent of claimant's entitlement to reimbursement for a disability evaluation by Sunil Bansal, M.D.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Rex, and to the defendant employer as the DOT.

Rex, age 59, has worked for the DOT since 1976, and continues to do so at the present time. At the time of his injury, he was a garage operation assistant and he continues in this same job at the present time. The job consists of office/administrative duties for 50 percent of his work time and the balance is spent performing physical labor, such as operating equipment or inspecting roads and bridges.

Rex stated that he had no problems with his right knee prior to 2003 and the record does not show otherwise.

On January 7, 2003, Rex injured his right knee while working for the DOT. He received two surgeries by Kary Schulte, M.D., an orthopedic surgeon, and was

subsequently released to full duty. However, Dr. Schulte opined that Rex suffered a 4 percent permanent partial impairment to the right leg from the injury due to undergoing his 2 surgeries. This was based on Table 17-33, page 546 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Exhibit 1-46:47) Another orthopedist, Keith Riggins, M.D., opined at that time that the permanent impairment under the Guides should be 20 percent according to Tables 17-10, page 537; 17-31, page 544; and 17-33, page 546, due to lost range of motion which exceeded the ratings for the arthritis and the surgical meniscectomy. (Ex. 1-48:50) The DOT ended up paying Rex weekly benefits for a 10 percent permanent partial disability benefit to the right leg. (Ex. A-4) There was neither litigation nor an approved settlement by this agency as a result of this injury.

Dr. Schulte released Rex back to full duty work after ending his treatment of the 2003 injury. Rex acknowledged that despite this release to full duty by Dr. Schulte, his knee was not 100 percent and he continued to have pain, but he was able to deal with it until the work injury involved in this proceeding. He stated that between his release by Dr. Schulte and the 2012 work injury in this case, he did not seek any treatment for his right knee.

The stipulated work injury on February 13, 2012 occurred when Rex was climbing off a large end loader using an attached ladder. He testified that he miscounted the number of steps on the ladder and when he stepped down expecting to land on the bottom step, his right leg went to the ground "hard" and he experienced the onset of severe pain in his right knee.

Defendant initially authorized treatment by providers at Doctors Now, who diagnosed a meniscus injury. (Ex. 1-1:3) He was then referred to Dr. Schulte, the same doctor who treated the 2003 injury. Dr. Schulte's diagnosis was right knee sprain and non-work related right knee patellofemoral degenerative arthritis. Dr. Schulte saw Rex on two occasions. At the last office visit, he gave Rex a cortisone injection in the right knee and released him back to full duty work. Dr. Schulte specifically opines that Rex achieved maximum medical improvement from his sprain injury at the last appointment on April 25, 2012 and the injury does not require additional treatment. (Ex.1-9) Dr. Schulte attributed Rex's ongoing pain to his preexisting degenerative arthritis, not the sprain work injury. (Ex. 1-10) Rex testified that he obtained no relief from the injection by Dr. Schulte. He requested a return to Dr. Schulte, but was denied further care by the DOT.

After being denied care, Rex received additional medical care on his own for his right knee pain using his group medical insurance. Initially, he went to his family doctor, but was later referred to another orthopedist, Craig Mahoney, M.D. Given Rex's failure to improve from Dr. Schulte's injection, Dr. Mahoney recommended arthroscopic surgery. This was performed on September 24, 2012 and the surgical notes describe the removal of loose body and a patellar chondroplasty. (Ex. 1-28) Dr. Mahoney's pre-surgery and post-surgery diagnosis was "Internal derangement of the right knee and

degenerative joint disease." When symptoms persisted after surgery, Rex was given another cortisone injection and reported some relief. The last office note by Dr. Mahoney's PAC on February 20, 2014 reports Rex refused further injections. This PAC stated that treatment of Rex's pain in the future will include physical therapy, anti-inflammatories, cortisone and viscosupplementation injections and ultimately a total knee replacement in the distant future. (Ex. 1-27) There are no further reports or opinions from Dr. Mahoney or his PAC in the record of this case.

In May 2013, Rex's right knee was evaluated by Sunil Bansal, M.D., an occupational medicine physician. From his examination of Rex and review of his medical records, Dr. Bansal opines that Rex suffered an aggravation of his pre-existing arthritis at the time of his 2012 work injury, which increased his pain and decreased his ability to sit or walk for prolonged periods of time. He also had to undergo a right patellar chondroplasty and may require future knee replacement. He opines that the injury accelerated the degenerative changes. (Ex. 1-43) Dr. Bansal opines that Rex's permanent impairment is 28 percent of the right leg due to decreased medial and patellofemoral joint space (arthritis) according to Table 17-31, page 544, of the AMA Guides. He attributes 20 percent of this impairment to prior existing issues, leaving 8 percent attributed to the February 13, 2012 work injury. (Ex. 1-42) The doctor recommends permanent activity restrictions of no lifting over 40 pounds occasionally, 20 pounds frequently; no frequent squatting, climbing, or kneeling; and sitting, standing and walking only as tolerated, but sitting and walking should be limited to 30 minutes at a time. (Ex. 1-45)

Dr. Schulte was asked to respond to Dr. Bansal's opinions. Dr. Schulte did not quarrel with Dr. Bansal's impairment rating or need for future treatment, he simply states that Rex's residual problems are not related to his sprain injury of February 13, 2012. The doctor only attributes these problems to the pre-existing degenerative arthritic condition and the 2003 injury. (Ex. 1-9:12)

Rex testified that his continued pain is worse than before the February 13, 2012 incident and is located in different areas of the leg than before. He testified that he now has more difficulty with standing, sitting and walking. He states that this change in his condition only occurred after his February 13, 2012 work injury.

Typically, the views of specialists, like Dr. Schulte, are given more weight than occupational physicians, who have not been shown to possess specialized knowledge of the conditions being evaluated. However, I believe Rex when he asserts that something significant occurred at the time of his 2012 injury and he has not improved much since this injury. Also, I do not find convincing the concept that progression of a degenerative condition would occur suddenly and only by coincidence, at the same time as the work injury. The record clearly supports Rex's assertion that he had few problems between his release from the care of Dr. Schulte in 2003 and the February 13, 2012 injury. The record shows that medical treatment for his current problems began with the 2012 work injury. Therefore, I agree with the causation opinions of Dr. Bansal.

I find that the combined permanent impairment or functional loss of use from both the 2003 work injury and the 2012 work injury is 28 percent of the right leg as opined by Dr. Bansal. I find that Rex has only been previously compensated for 10 percent of this loss of use to the right leg when he received weekly benefits from the DOT in 2003.

I find that Rex's only healing period or loss of work during treatment caused by the February 13, 2012 injury is from September 24, 2012 through October 5, 2012. Rex testified that he used his accumulated sick leave for his time off after surgery and for medical appointments.

I find that the fee of Dr. Bansal in the amount of $2,895.00 for his evaluation of Rex's right knee condition is fair and reasonable; there being no contrary evidence.

CONCLUSIONS OF LAW

I. 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 treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set

forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

The parties agreed in this case that the work injury is a cause of some degree of permanent, scheduled loss of use to the leg. Given a prior scheduled loss of use to that leg from a prior work injury, Iowa Code section 85.34(7)(1) governs how this agency is to award permanent scheduled member disabilities for successive work related disabilities. This statutory provision provides that an employer is liable for the combined disability that is caused by the prior and current work injuries. However, the employer's liability for this combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated.

I found that the combined disability is 28 percent of the right leg. I found that only 10 percent of this combined disparity was previously compensated. Therefore, claimant is entitled to compensation for the remaining 18 percent of his disability. Dr. Bansal apportioned out 20 percent of his rating due to the prior injury. This is improper as there is no apportionment permitted under Iowa Code section 85.34(7) according to current agency precedent. Steffen v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009). Therefore, claimant is entitled to 39.6 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o), which is 18 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the leg in that subsection.

Claimant's entitlement to permanent partial disability also entitles him to weekly benefits for healing period under Iowa Code section 85.34 for his absences from work during a recovery period until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he/she was performing at the time of injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first. I found that that claimant was off work for this work injury from September 24, 2012 through October 5, 2012. Consequently, he is entitled to healing period benefits accordingly.

Defendant seeks a credit pursuant to Iowa Code section 85.38(2) against claimant's entitlement to healing period benefits for claimant's use of his accumulated sick leave during this time. Claimant asserts there can be no credit according to agency precedent in Terhark v. Hope Haven, Inc., File No. 5027246 (App. April 7, 2010). Both parties are misinterpreting the holding in Terhark. It is correct that this agency in Terhark reiterated that an employer who pays holiday, sick or vacation pay to a claimant does not automatically get a credit for those payments against temporary benefits owed.

The agency explained that although Iowa Code section 85.38(2) provides a credit for benefits paid under a "group plan covering non-occupational disabilities" sick, holiday and vacation pay programs are not typical group insurance plans as envisioned by this Code provision. This is a view shared by Professor Larson in his authoritative treatise on the subject. 2 Larson, Workers' Compensation Law, section 57.46, at 10-164.14 to 10-164.13. Holiday and vacation pay are clearly not programs to cover employees for disability.

Terhark explains that paid sick or vacation leave is usually a benefit accumulated over time earned from past work. It is to be used only at the discretion of the employee in lieu of loss of pay when ill or injured for reasons unrelated to work. Consequently, it is a form of employee compensation which can be depleted with its use and only replaced upon additional work and accumulations. On the other hand, group disability insurance envisioned by Iowa Code section 85.38(2) can be used over and over by an employee within policy limits without additional cost to the employee. If this agency were to automatically credit to an employer for use of accumulative benefits of sick or vacation leave by an injured worker or allow the employer to force injured workers to use sick or vacation leave, the worker will incur a financial cost because the worker's accumulated leave will be reduced and will not be available in the future when the worker suffers a personal illness or injury or just wants time off for holiday. On the other hand, the employer will receive a cost benefit in shifting its costs for work related temporary disability to the employee. Such a cost shifting device to relieve an employer from worker's compensation liability is prohibited by Iowa Code section 85.18.

Defendant asserts that failure to give a credit for sick leave use would result in a double recovery for claimant for his time off work. This is not correct. A credit for the payment of paid leave was given to the employer In Terhark, but the employer was ordered to reinstate the leave taken to the extent of claimant's weekly entitlement under workers' compensation law. In other words, an employer can take the credit provided in 85.38(2), but only on the condition that it reinstates the leave taken.

Consequently, if the sick pay used is less than the workers' compensation entitlement, the employer need only pay claimant the difference if the leave is restored. If, as in this case, the sick pay is more than the workers' compensation entitlement, employers are only allowed to take a credit up to their liability for weekly benefits, and only if they restore the leave. The claimant will retain the difference and the sick leave pay use for this difference will not be restored. Such a supplementation of the weekly compensation benefits with accumulated sick leave is appropriate pursuant to Iowa Code section 85.38(3), if the employer so elects. In this way, there is no double recovery.

In this case, it was stipulated that claimant received $2,447.20 in sick leave pay. The record does not show when the sick leave was used. Claimant's entitlement to healing period benefits extends from September 24, 2012 through October 5, 2012, or 1.714 weeks. At the stipulated rate of compensation of $836.06, claimant's healing

period benefits total $1,433.25. Therefore, in order to claim a credit against their healing period benefits liability, defendant must reinstate claimant's sick leave benefits to an amount equivalent to their liability or $1,433.25. Claimant can keep the excess amount as a sick leave benefit earned by him.

If any of the sick leave used by claimant was for doctor's or physical therapy appointments related to this work injury, defendant must also reinstate the sick leave used. Iowa Code section 85.27 requires an employee to be paid for absences at his regular rate of pay. Iowa Code section 85.27(7).

Finally, claimant seeks reimbursement for the cost of Dr. Bansal's evaluation and report pursuant to Iowa Code section 84.39. That Code section permits an employee to be reimbursed by the employer 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.

Claimant sought the views of Dr. Bansal in 2014. Defendant apparently asserts that Dr. Schulte did not perform a disability evaluation prior to 2014. I disagree. In May and August 2012, Dr. Schulte opined that claimant had achieved maximum medical improvement, did not require further treatment, and claimant's current symptoms were only related to claimant's pre-existing condition. This opinion clearly indicates that the doctor did not believe the February 13, 2012 injury contributed to any permanent disability and as such that opinion constitutes a prior evaluation of disability. Reimbursement for Dr. Bansal's evaluation shall be ordered.

ORDER

1. Defendant shall pay to claimant thirty-nine point six (39.6) weeks of permanent partial disability benefits at the stipulated rate of eight hundred thirty-six and 06/100 dollars ($836.06) per week from October 6, 2012.

2. Defendant shall pay to claimant healing period benefits from September 24, 2012 through October 5, 2012 at the stipulated rate of eight hundred thirty-six and 06/100 dollars ($836.06) per week. Defendant make take a credit against this award for the sick leave used, but only in an amount equivalent to the weekly benefit and only if defendant restores to claimant the sick leave used equivalent to weekly benefit. Claimant shall retain the difference and defendants need not restore that portion of the sick leave used by claimant..

3. Defendant shall reimburse claimant for the cost of Dr. Bansal's evaluation in the amount of two thousand eight hundred ninety-five and 00/100 dollars ($2,895.00).

4. Defendant shall pay accrued weekly benefits in a lump sum.

5. Defendant shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

6. Defendant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

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

Signed and filed this 25th day of March, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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LPW/srs

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.