

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SANTIAGO RIVERA-AVILAR,

Claimant,

vs.

FARMLAND FOODS, INC.,

Employer,

and

SAFETY NATIONAL,

Insurance Carrier,
Defendant.

File No. 5057081

FILED

APR 25 2019

A P P E A L

WORKERS' COMPENSATION

D E C I S I O N

Head Notes: 1402.30; 1802; 1803; 2401;
2700; 2801; 2907; 5-9999

Defendants Farmland Foods, Inc., employer, and its insurer, Safety National, appeal from an arbitration decision filed on December 27, 2017. Claimant Santiago Rivera-Avilar responds to the appeal. The case was heard on August 16, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 18, 2017.

The deputy commissioner found claimant carried his burden of proof that he sustained a cumulative injury to his left knee which manifested on September 24, 2014, which arose out of and in the course of his employment with defendant-employer. The deputy commissioner found claimant carried his burden of proof that he also sustained a sequela injury to his right knee as a result of the work injury. The deputy commissioner found defendants failed to prove their Iowa Code section 85.23 90-day notice defense. The deputy commissioner found claimant is entitled to receive healing period benefits from November 9, 2015, through March 6, 2016, from July 14, 2016, through July 15, 2016, for August 7, 2016, and from November 1, 2016, through February 8, 2017. The deputy commissioner found that pursuant to Iowa Code section 85.34(2)(s), claimant sustained scheduled member functional disability of 28 percent of the body as whole as a result of the work injury, which entitles claimant to receive 140 weeks of permanent partial disability (PPD) benefits commencing on March 7, 2016. The deputy commissioner found claimant is entitled to receive future medical care at defendants' expense for the work injury to be provided by Bradley Lister, M.D., orthopedic surgeon. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$250.00.

Defendants assert on appeal that the deputy commissioner erred in finding claimant carried his burden of proof that he sustained a work-related injury on September 24, 2014, and in finding claimant sustained a sequela injury. Defendants assert the deputy commissioner erred in finding defendants failed to prove their 90-day notice defense. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive healing period benefits. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive permanent disability benefits. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive future medical care for the alleged work injury. Defendants assert the deputy commissioner erred in ordering defendants to pay claimant's costs of the arbitration proceeding.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on December 27, 2017, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

I affirm the deputy commissioner's finding that claimant carried his burden of proof that he sustained a work-related cumulative injury to his left knee which manifested on September 24, 2014, and I affirm the deputy commissioner's finding that claimant sustained a sequela injury to his right knee as a result of the work injury. I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits from November 9, 2015, through March 6, 2016, from July 14, 2016, through July 15, 2016, for August 7, 2016, and from November 1, 2016, through February 8, 2017. I affirm the deputy commissioner's finding that claimant sustained scheduled member functional disability of 28 percent of the body as whole as a result of the work injury, which entitles claimant to receive 140 weeks of permanent partial disability (PPD) benefits commencing on March 7, 2016. I affirm the deputy commissioner's finding that claimant is entitled to receive future medical care from Dr. Lister at defendants' expense for the work injury. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding in the amount of \$250.00.

The dispositive issue in this appeal is whether defendants proved their Iowa Code section 85.23 90-day notice defense. I find defendants did not prove that defense, but for reasons different than those provided by the deputy commissioner. I provide the following analysis for that issue:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the arbitration decision, the deputy commissioner provided the following analysis regarding the notice issue:

I find that Mr. Rivera-Avilar likely, or objectively should have known, by June 2013 that he had a left knee injury and that it was likely work related. (Tr., pp. 46-47) Certainly, by September 24, 2014, claimant knew or should have known about the work-related nature of his left knee condition. However, claimant was not removed from work, other than for a couple of days' rest, in 2013 or 2014. Not until June 30, 2015, was claimant notified that he may require a total knee replacement of his left knee. At that juncture, claimant was aware, or should have known, of the serious nature of his left knee injury. (Joint Exhibit 2, p. 42)

Defendants contend that Mr. Rivera-Avilar failed to give timely notice of his injuries to the employer. Defendants relied upon the testimony of claimant to establish their defense. Mr. Rivera-Avilar provided contradictory testimony on the issue of notice. On direct examination, he testified that he advised the company nurse about the suspected cause of his left knee injury, namely standing and walking stairs in 2013. (Transcript, pages 35, 48)

However, Mr. Rivera-Avilar also made concessions during cross-examination that he did not provide timely notice. In fact, he conceded on cross-examination that he did not tell the employer about the work-related nature of his knee injury until shortly before his left knee replacement in December 2015. (Tr., p. 39) He contradicted this testimony again on re-direct, noting that he told the nurse several times about the work-related nature but she would not listen, did not pay attention, and would not obtain the assistance of an interpreter to understand this issue. (Tr., pp. 48-49)

When considered separately, claimant's testimony made sense on direct and re-direct examination. It was believable. However, claimant's testimony during cross-examination also made sense and could be believed. Obviously, claimant could not have given notice of his injury in 2013 and also not given notice of his injury at that time. Ultimately, without additional evidence to demonstrate one way or the other, claimant's testimony was contradictory, confusing, and ultimately not credible on the notice issue.

Having observed claimant, pondered his various statements in context with his medical care and the other evidence in this case, I am not able to determine whether claimant gave notice of a work-related injury within 90 days of him objectively understanding that his left knee injury was likely work related and serious in nature. Therefore, I find that defendants did not prove by a preponderance of the evidence that claimant failed to give notice of his work-related, left knee injury within 90 days of him objectively learning, or objectively should have known, that he had a left knee injury, that it was likely work-related, and that it was a serious condition.

(Arbitration Decision, pp. 2-3)

Claimant testified at the arbitration hearing through an interpreter because he understands and speaks very little English. (Hearing Transcript pp. 10-11) With regard to first notifying defendant-employer in 2013 about his left knee condition, claimant testified as follows on direct examination:

Q Tell us what - - excuse me. Sorry. Tell us what kind of symptoms or problems you began to notice with your left knee.

A I was having pain walking and it would bother me and have pain while I was standing.

Q Anything else causing you pain?

A No, just the knee.

Q I mean, any other activity other than walking and standing that was causing you pain?

A Just the stairs and it bothered me to stand there.

Q Okay. And did you report that to anybody at Farmland?

A I reported it to the supervisor by the name of Jerry.

Q What did you tell him?

A I told him that it hurt me and he took me to the nurse's station.

Q He took you there or told you to go there?

A No, I went.

Q And did you go to the nurse's station on the same day that you reported this to the supervisor?

A The same day, yes.

Q And - -

A Nurse Rhonda took care of me.

Q And when you got to the nurse's station, what did you say to Rhonda?

A About the knee she said they couldn't do anything. That I should go to my family doctor, Kathy.

Q And did you tell Rhonda why your knees were bothering you or what you thought the problem was?

A Yes, I told her and she said they couldn't do anything.

Q Did she say why she couldn't do anything?

A That I don't know. She told me to go to my doctor.

Q Did she ask you to fill out any paperwork at this time?

A No, nothing.

Q And the time that we're talking about you recall the date approximately that you went and reported this to nurse Rhonda?

A I don't remember the exact date, but it was in 2013.

Q Would you have reported that to Rhonda the same week that you went and saw your doctor?

A Yes.

(Tr. pp. 20-22 - emphasis added)

Claimant was evaluated by Kathy Berens-Brownmiller, RN, PA-C, at Crawford County Memorial Hospital on June 24, 2013. In the clinical note for that evaluation, the following appears, in pertinent part:

REFERRING DIAGNOSIS: Bilateral knee pain.

SUBJECTIVE: The patient reports about 4 days ago he began having pain in his knees while at work. **He says that what brought the pain on was having changed job positions from a more active job to a job that requires him to just be standing still with a saw.** He says his knee will usually start to hurt around the fourth hour of work and will increase from there until the eighth. He is only able to find relief from this

pain by moving around or walking around. The patient works at Farmland on a rotating schedule of jobs . . . The patient's chief complaint is of pain in his bilateral knees.

(Joint Exhibit 2, p. 9 – emphasis added)

The following exchange took place when claimant was cross-examined during the arbitration hearing:

Q So if we go back to 2013, that was the first time you stated that - - you first missed for your knee; is that right? First time you missed work?

A I notified them, yes, in 2013.

Q Who did you notify again?

A I told Jerry the supervisor, the general supervisor.

Q And you also talked to Rhonda?

A Also.

Q And what did you tell them?

A That it hurt.

Q You didn't tell them that you thought it was work related though, did you?

A They didn't ask me.

Q They didn't ask you and you didn't tell them?

A I didn't tell them.

Q And I'm looking at Exhibit 12, page 20. Do you remember in April of 2014 being reprimanded for not telling the plant about your injury for carpal tunnel?

A Yes, I told - - I advised Rhonda.

Q About your carpal tunnel?

A Yes, I told her.

Q Can you read in English, Mr. Rivera?

A No, English I don't understand.

Q Okay. So if exhibit - - Exhibit 12, page 20, is a reprimand for you dated April 2nd of 2014, do you remember getting written up at that time?

A Yes, I - - I remember.

Q And what the plant told you was that from now on you always had to report injuries right away, correct?

A Correct.

Q And they told you that if you didn't, you could be terminated?

A Yes, they told me if I didn't tell them they would - - would give me a warning.

Q And that was about your carpal tunnel, correct?

A Yes.

Q Okay. So in April of 2014, you had already started treating for your knees, correct?

A Yes.

Q And you had been taken off work because of your knees?

A Yes.

Q And you told Rhonda about your knees, but not that it was work related, correct?

A I would always report to her, yes.

Q And then in September of 2014 you went back to see Kathy Brownmiller, correct?

A Yes

Q And, again, you didn't tell Rhonda at that time that your knee was work related, correct?

A No I just told them that they would give me time off from work.

Q By "they" meaning your doctors had given you time off work?

A Yes, she would give me days to rest.

Q Okay. Dr. Brownmiller would give you days to rest?

A Dr. Kathy.

Q And then you get sent to Dr. Lister, correct?

A Yes.

Q And he recommends surgery?

A Yes.

Q And that surgery takes place in December of 2015, correct?

A Yes.

Q And that's when you filled out that disability form that your attorney showed you?

A Yes.

Q And that was when you said that you - - you thought your knees might be work related?

A Yes, that's when I told Rebecca and Rhonda that it was - - that it was related to work.

Q So right before your December of 2015 surgery?

THE INTERPRETER: 2015?

Mr. Clausen: Yes, sir.

Q Correct?

A Yes.

Q And prior to that, you hadn't told Rhonda or Rebecca that you thought your knee conditions were work related correct?

A The problem is that Rhonda doesn't pay attention to people that don't speak English because of the lack of interpreter. They got a person that would translate, but didn't explain it well.

Q But you weren't - - you weren't telling Rhonda that you thought your knee condition was work related, were you?

A Yes, I would tell her, but she wouldn't understand me and they wouldn't bring in an interpreter.

Q. Okay. When did you tell her that? When did you first tell her it was work related?

A. The second time that I saw her and she didn't understand me. What she did was send me back to work. She said work, work, work, leave the nurse's station.

Q. Okay. When was that?

A. The second day that I went and saw Kathy, when she gave me one or two days.

Q. Well, you told me that you didn't tell Rhonda back in 2013 that it was work related, correct?

A. No, I didn't tell her the first time. I told her the second time. I talked more with Rebecca because she speaks Spanish and she would understand me.

Q. And you also testified that you didn't tell either Rebecca or Rhonda when you were taken off work in September of 2014, correct?

A. It's just that I would take the papers to Rebecca and she knew that they were giving me time off.

Q. Right. She knew they were giving you time off because your knees hurt, correct?

A. Yes. Yes.

Q. But you weren't telling her that your knees hurt because of your job, correct?

A. No. Excuse me. They don't - I told them. Now what they do, it's a big mess. Now you have to give the papers to the supervisor and the supervisor takes them and turns them in.

Q. Okay. But just so that we understand. The first time you told Rebecca and Rhonda that your knees were related to your job was in September or in December of 2015, correct? Right before your surgery?

A. Yes. Yes.

(Tr. pp. 35-39 – emphasis supplied)

Later at the hearing, during re-direct examination, the following exchange took place:

Q Yeah, I want to bring you back to June of 2013 when you went and saw Kathy and she said maybe it could be work related to you. Perhaps it's just my not listening carefully, but it seemed like there's - - there was a little bit of confusion as to what you told to whom and when. So I want to clarify some of that. Now I had thought you said in your direct examination that your knees began to bother you in 2013 and that when they bothered you, you went and told the supervisor about it, correct?

A. To Jerry, yes.

Q And what did you tell the supervisor exactly as close as you can remember?

A That my knees hurt.

Q And did you tell him why you thought they were hurting?

A There wasn't a motive because all he said was go to the nurse's station to see the nurse.

Q Well, tell me then what did you tell him. You said, "Hey, my knees are hurting"?

A Yes.

Q And he told you?

A For me to go to the nurse's station.

Q And then you went to the nurse's station and spoke with Rhonda?

A Yes.

Q And what did you tell Rhonda about why your knees were hurting you?

A I told her that my knees were hurting and it was maybe for standing or going up and down the stairs and she told me to go see my family doctor, Kathy.

Q You weren't sure at that time what exactly was going on or what was the cause. It was just your thoughts about work?

A They didn't and neither did I.

Q Correct. But was it your personal thoughts in your own head that the stairs and standing all day at work were what was causing your problems?

A Yes, for that.

Q And did you express to Rhonda that that is what you thought, even if you were right or wrong?

A Yes, I would tell her, but the lady she doesn't pay attention.

Q And during your cross-examination I thought maybe you said to Attorney Clausen that it was in 2015 - - that you reported in November of 2015 that you reported to Rhonda about your knees hurting from work; is that right?

A In December of 2015 I had surgery.

Q Correct. But in November of 2015 Rhonda wasn't even at the plant anymore, correct?

A When I left I told Rebecca and I didn't know anything else about her.

Q Okay. Now you were telling Mr. Clausen that you did not use the words work related. Did you still explain to the nurse what you thought was causing the knee problems, even if you didn't use the words work related?

A Yes.

Q If the company is claiming that you failed to give notice within a timely manner and had been disciplined in 2014 for allegedly not giving notice, I'd like to ask if you were ever disciplined for allegedly giving late notice of your knee injuries?

A No, they didn't take me out of work. They just told me - - they gave me a sheet of paper and they said that next time they would give me a warning.

Q Okay. Did anybody ever give you a warning or any other discipline for allegedly providing late notice of your knee injuries?

A No, they just advised me because all they did was give me a sheet of paper. I don't know if it was a warning or not.

(Tr. pp. 47-50 – emphasis added)

Later at the hearing, during re-cross examination, the following exchange took place:

Q All right. You know that when you have an injury out at Farmland you have to fill out an incident report, right?

A Yes, not just at Farmland. I understand that all the companies require that.

Q And that's something you knew back in 2013 and 2014, correct?

A Yes.

Q And you were reminded about that in April of 2014 when you were reprimanded about your carpal tunnel?

A Yes.

Q Okay. And the first time you ever filled out an incident report on your knees was after your attorney became involved, correct?

A Yes.

Q And you have testified a lot about the conversations you had with Jerry and Rhonda, correct?

A Oh, yes.

Q And what you told them throughout those first years in 2013, 2014, and up to your surgery, was that your knees hurt, correct?

A Yes.

Q But you didn't tell them it was because of your job correct? Until you were ready for your surgery?

A Yes, because Rhonda would not permit me. She didn't pay attention to me.

MR. CLAUSEN: Okay, I don't have anything further.

(Tr. pp. 52-53 – emphasis added)

The above-quoted testimony clearly shows claimant had difficulty understanding the questions he was asked at the arbitration hearing by both his own attorney and by defendants' attorney. The medical records in this case document that claimant was evaluated for his knees by Kathy Berens-Brownmiller, RN, PA-C, on June 24, 2013, and again on September 24, 2014. (Jt. Ex. 2, pp. 9, 18)

This case presents us with a close call on the issue of the 90-day notice defense. While claimant's testimony is somewhat confusing, I find it establishes with sufficient clarity that while claimant may not have specifically stated the words "work-related", he tried to tell Nurse Rhonda in June 2013 and again in September 2014, after he was evaluated by Ms. Berens-Brownmiller, that he thought his knee pain was caused by

standing in one place while working. This is evident pursuant to claimant's testimony on redirect examination, particularly as quoted and emphasized above on page 11. I find claimant's testimony also establishes that Nurse Rhonda failed to understand the details of what claimant was telling her because she failed to bring in an interpreter to assist with the discussions in question. Defendants provided no testimony by anyone, or any other evidence, to rebut claimant's testimony in this regard.

Ms. Berens-Brownmiller's detailed note of June 24, 2013, obviously was prepared after she evaluated claimant with the assistance of an interpreter. That note supports the finding that claimant attempted to tell Nurse Rhonda that his knees were hurting him from standing in one place while working because it makes no sense for claimant to provide those details to his treating physician without at least also attempting to provide those details to the plant nurse. Again, defendants provided no testimony by anyone, or any other evidence, to rebut claimant's testimony in this regard. I therefore find defendants failed to prove their 90-day notice affirmative defense.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 27, 2017, is affirmed in its entirety.

All weekly benefits shall be paid at the rate of four hundred sixty-nine and 02/100 dollars (\$469.02) per week.

Defendants shall pay claimant healing period benefits from November 9, 2015, through March 6, 2016, from July 14, 2016 through July 15, 2016, for August 7, 2016, and from November 1, 2016, through February 8, 2017, pursuant to the parties' stipulation in the hearing report.

Defendants shall pay claimant one hundred forty (140) weeks of permanent partial disability benefits commencing on March 7, 2016 and payable as stipulated to by the parties in the hearing report.

Defendants shall be entitled to those credits stipulated to by the parties in the hearing report, including the stipulation of short-term disability credit for the right knee healing period.

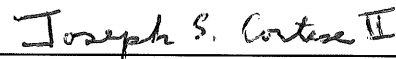
Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018). Defendant shall take credit for all benefits previously paid.

Defendants shall provide claimant reasonable future medical care for his bilateral knee injuries for all causally related conditions and treatment, including care through, or at the recommendation of, the treating orthopedic surgeon, Dr. Lister.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of \$250.00, and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 25th day of April, 2019.



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WORKERS' COMPENSATION
COMMISSIONER

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