BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERRY DONATH,

Claimant,

vs.

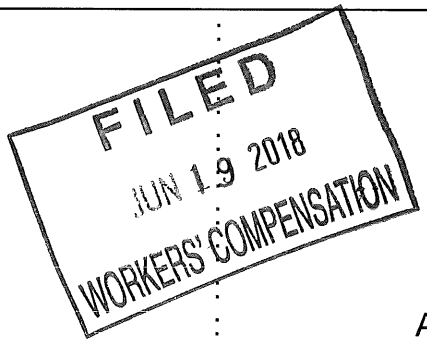
HEYL TRUCKING, INC.,

Employer,

and

FIDELITY & GUARANTY INS. CO.,

Insurance Carrier,
Defendants.



File No. 5056087

ARBITRATION

DECISION

Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

Jerry Donath, claimant, filed a petition in arbitration seeking workers' compensation benefits from Heyl Trucking, Inc. and Fidelity & Guaranty Ins. Co.

The matter proceeded to hearing on January 19, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE7; Defendants' Exhibits A through G; and, Claimant's Exhibits 1 through 3. At hearing, claimant and claimant's spouse, Mary Donath provided testimony.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on March 5, 2018 and the matter was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of industrial disability, if any.

2. Medical mileage reimbursement.

3. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 61 years old at the time of the hearing. He has been married to Mary Donath for 32 years. Claimant completed the 7th grade. He stated that he completed the G.E.D. requirements, but has not received a paper certificate. He obtained a Class-A commercial driver's license (CDL) in Sun Prairie, Wisconsin.

1) WORK HISTORY

Claimant has worked as a truck driver since 2000. (Exhibit 3) His work has included driving a dump truck, a straight truck, and a semi-truck with regular trailers, flatbed trailers and refrigerated trailers. (Id.) He has also hauled hazardous materials in tanker trailers. He testified that when driving a dump truck, he was responsible for cleaning out the dump bed. When claimant drove a flatbed he was required to tarp loads using 125 to 150-pound tarps. Some truck driving jobs also required unloading the truck. Claimant testified that he did not believe he could return to his prior truck driving jobs because of the requirements of: climbing on flatbed trailers; tarping and strapping loads; climbing in and on dump trucks to clean them out; and, unloading trucks.

The stipulated injury which is the basis of the petition occurred while claimant was working for Heyl Trucking, Inc. on October 28, 2013. At Heyl Trucking, claimant drove a truck delivering meat. This job required that he move pallets around as needed. Claimant testified that he might be able to return to this job, if he could move fewer pallets than he had done in the past.

In March 2015, claimant began working for T & H Trucking, which is a contracted hauler for Fed Ex Ground. In this job, claimant testified that he does not have to load or unload. He also testified that if he loses this job he would likely retire, because he did not think he could perform other truck driving jobs that required more physical demands, and that most jobs that he is aware of require more than just picking up and dropping off trailers.

However, in his deposition, taken December 20, 2016, claimant was asked if he had ever had a job that required loading or unloading trucks and claimant responded "No. I don't load trucks," contrary to his hearing testimony. (Ex. C, p. 7, dep. p. 25)

I find that claimant is motivated to continue working, as evidenced by his continued employment.

2) THE INJURY

The parties stipulated that claimant sustained an injury that arose out of and in the course of his employment with defendant Heyl Trucking on October 28, 2013. (Hearing Report, p. 1) On that date, claimant was getting out of the truck, tripped and fell and landed on his right hip. (Ex. 2, p. 3) He testified that he was assisted to his feet after being on the ground for a few minutes and that he had shooting pain in his leg, hip and arm. He finished his route at about 10:30 or 11:00 p.m. and advised his dispatcher about the injury that evening. He drove to Finley Hospital in Dubuque and was seen on October 29, 2013 and complained of "pain in the right groin." (Ex. JE2, p. 3)

3) PRIOR MEDICAL CONDITION

Claimant was diagnosed with diabetes about 10 years prior to the hearing. He testified that he has had a series of amputations on the left side starting with a left toe, and ending with a below-the-knee amputation of his left lower leg on or about August 23, 2016. (Ex. F, p. 7; Ex. G, pp. 9, 10) He has also had a toe amputated on his right foot in February, 2016. (Ex. G, pp. 1, 3) He testified that his diabetes is managed at this time. He stated that he has a prosthetic, and his condition limits his ability to stand to short periods of time.

4) POST-INJURY MEDICAL TREATMENT

After the work injury, claimant was seen at Finley Hospital and described pain in the right groin area. He was diagnosed with a strain. (Ex. 2, pp. 3, 5)

On November 1, 2013, claimant was sent by the employer to Tri-State Occupational Health and described his pain as "[b]etween [his] hip & leg." (Ex. JE3, p. 2) The assessment was a right groin or adductor strain. (Ex. JE3, p. 4) On November 5, 2013, he was returned to work without any restrictions, "noting that he does not lift or squat regularly in his occupation." (Ex. JE3, p. 7)

On November 19, 2013, claimant noted continued right hip pain that he rated at 7/10, along with a sense of catching. (Ex. JE3, p. 9) An MRI was ordered. (Ex. JE3, p. 10)

On December 13, 2013, claimant was seen by Patrick Gordon, M.D., for an internal medicine consultation. (Ex. JE5, p. 1) Claimant reported that his pain has been in the range of 4-5/10 since the October, 2013 work injury. Dr. Gordon noted the MRI result and stated that "[t]he patient was somewhat surprised when I mentioned that he may be having some surgery on this." (Id.) "He is waiting to see Orthopedics before determining whether he will have surgery or not." (Ex. JE5, p. 2) He was cleared for surgery from a cardiac standpoint. (Id.)

Also on December 13, 2013, claimant was seen by Charles Morrow, M.D., an orthopedic physician. (Ex. JE4, pp. 1-2) Dr. Morrow stated that he was consulted due

to an abnormality on the MRI. (Ex. JE4, p. 1) Dr. Morrow noted that claimant reported improving groin pain and that he was pleased with the progress. However, "[t]oday's MRI does reveal a subcapital femur fracture, which is absolutely nondisplaced." (Id.) It was noted that claimant "walks with a trivial limp and says it really does not hurt much at all." (Id.) Dr. Morrow stated that his fracture is healing uneventfully, but that it "would be wise to safeguard these gains by diminishing his activity level a bit." (Ex. JE4, p. 2) Claimant was taken off work for three weeks and referred for physical therapy. (Id.)

On January 3, 2014, claimant reported that "his pain has much improved" and he was noted to be "ambulating without any walking aids at this point." (Ex. JE5, p. 5) He was noted to be doing well with no evidence of necrosis, nonunion, or delayed union and showed progressive healing. He was released to return back to full-duty work without any restrictions. (Id.)

On January 30, 2014, claimant reported that "he is doing all his normal activities and has no complaints whatsoever." (Ex. JE5, p. 9) He had "no signs of any problems" and has "no reason for any activity limitations." (Id.) He was to return in six months for a final follow-up.

On July 31, 2014, claimant returned for follow-up and reported that "his symptoms have resolved." (Ex. JE5, p. 12) Upon examination, he was found to have "no significant difficulties with his hip" and there was no additional follow-up needed. (Id.) The x-ray of the right hip showed no significant change compared to the left, non-injured hip, and was described as "unchanged from previous films." (Ex. JE5, p. 11)

In August, 2014, the workers' compensation adjuster requested an opinion from Dr. Morrow concerning maximum medical improvement (MMI), permanent impairment, and a rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). (Ex. JE5, p. 13)

On September 2, 2014, claimant returned to see Dr. Kennedy for evaluation, who recorded that claimant "comes in today reporting no pain or concerns whatsoever," and "[h]e states that he can do everything he would like to do," such as "squat, bend, kneel, etc.," and "[h]e has no trouble with being seated prolonged periods or walking or standing." (Ex. JE3, p. 16) After an examination and finding that claimant had full range of motion in his bilateral hips, Dr. Kennedy found that he "healed completely without loss of function." (Ex. JE3, p. 17) She further found that claimant reached MMI on July 31, 2015 (presumably this is a typo and was intended to be 2014) and she assigned "0%" permanent partial impairment "according to AMA Guides 5th edition." (Id.) Although there is no specific discussion concerning the assignment of zero percent permanent impairment, it is clear from the context of the record that claimant had no complaints and no identifiable deficiencies regarding the work injury.

On April 17, 2017, claimant was seen by Robin Sassman, M.D. of Medix at the

request of claimant's counsel. Dr. Sassman reviewed claimant's medical history. Dr. Sassman diagnosed claimant with a right subcapital femoral neck fracture after a fall, and causally related that injury to the October 28, 2013 work injury. (Ex. 2, p. 8)

Claimant reported to Dr. Sassman that he had "an aching sensation in the right hip," and that his "hip will give out on him at times," and that he has pain with changes in the weather. (Ex. 2, p. 6) Claimant reported getting along okay at his current employment at Fed Ex and that he did not have to touch freight in this position. Dr. Sassman noted that claimant had no work restrictions. (Ex. 2, p. 6) She conducted a physical examination and noted equal bilateral strength in the lower extremity, but reduced sensation on the right compared to the left. She also found reduced flexion and external rotation of the right hip compared to the left. (Ex. JE2, p.7) Dr. Sassman found that claimant reached MMI on October 28, 2014, which was one year after the injury. (Ex. JE2, p. 8) She assigned a 4 percent whole person permanent impairment rating based upon loss of flexion and external rotation relying on Table 17-9, page 537 of the AMA Guides. (Id.) Dr. Sassman did not suggest any additional medical care, but did recommend that claimant "limit standing and walking to an occasional basis," and "[h]e should not walk on uneven surfaces or climb ladders," and he should not "squat or crawl." (Ex. 2, p. 9)

I note that Dr. Sassman's causation opinion relates the hip fracture to the work injury, but does not specifically address the relationship of claimant's current condition to the work injury, or discuss what if any relationship there may be between claimant's rebirth of hip symptoms and his below-the-knee amputation and prosthesis. Therefore, it is not clear from Dr. Sassman's opinion, what if any relationship there may be between claimant's current condition and the unrelated below-the-knee amputation and resulting limp.

Considering the permanency opinion of the treating physician, Dr. Kennedy, and the IME opinion of Dr. Sassman, I note that Dr. Kennedy found that claimant had full range of motion of his bilateral hips. The rating assigned by Dr. Sassman is exclusively based on loss of range of motion to the right hip.

The medical history is clear that claimant's subcapital femur fracture, was "absolutely nondisplaced." (Ex. JE4, p. 1) Also, the medical history shows a steady improvement of claimant's hip condition to the point that on January 30, 2014, claimant reported that he was "doing all his normal activities and [had] no complaints whatsoever." (Ex. JE5, p. 9) On September 2, 2014, claimant continued to report "no pain or concerns whatsoever," and that he could "do everything he would like to do," and that he had no limitation of his activities including squatting, bending and kneeling. (Ex. JE3, p. 16) Claimant had "no signs of any problems" and "no reason for any activity limitations." (Ex. JE5, p. 9) On the same date, he was noted to have "bilaterally symmetrical pain free rotational motion of the hips." (Id.)

About two and one-half years later, claimant was seen for the IME with

Dr. Sassman who concluded that claimant had some restricted motion in his right hip. Claimant also reported an aching sensation in his hip. Although Dr. Sassman noted that claimant had a limp due to the below-the-knee amputation on the left, she does not discuss, the relationship, if any, between this condition and his current hip complaints. I note that claimant's below-the-knee amputation occurred on or about August 23, 2016, which was almost two years after Dr. Kennedy's permanency evaluation, and about eight months before Dr. Sassman's IME. (Ex. G, p. 9) I also note that claimant was found to have an onset date for the purpose of awarding Social Security Disability of March 4, 2016, after Dr. Kennedy's evaluation and before Dr. Sassman's IME. (Ex. B, p. 1)

Based on the above, I accept Dr. Kennedy's opinion concerning permanency and determination that claimant requires no permanent work restrictions due to the October 28, 2013 work injury. Dr. Kennedy's opinion is most consistent with the medical history and claimant's report of no pain or limitations that existed consistently for a period of several months prior to his below-the-knee amputation.

5) ADDITIONAL FINDINGS

Claimant received authorized medical care in this case and asserts a claim for payment of medical mileage of $104.84 related to said care as set forth in the mileage statement attached to the Hearing Report. I find that the mileage requested was related to authorized medical care.

CONCLUSIONS OF LAW

The first issue in this case is the extent of industrial disability, if any.

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the

duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Clearly, claimant sustained an injury that arose out of and in the course of his employment on October 28, 2013. The question is whether that injury resulted in permanent injury and subsequent industrial disability. Above, I accepted the opinion of Dr. Kennedy, finding that claimant sustained no permanent impairment and required no permanent restrictions. I therefore conclude that claimant has failed to carry his burden of proof that he sustained permanent injury as a result of the October 28, 2013 work injury and is therefore, not entitled to an award of industrial disability.

The second issue is claimant's entitlement to medical mileage as contained in his attachment to the Hearing Report, in the amount of $104.84.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

I have found above that the medical services claimant received as set forth in the attachment to the Hearing Report were authorized, and I conclude that claimant is entitled to payment of mileage as requested therein.

The final issue is costs.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that in this case, each party should pay their own costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant medical mileage as set forth in the attachment to the Hearing Report in the amount of one hundred four and 84/100 dollars ($104.84).

Each party shall pay their own costs.

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 19th day of June, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/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.