BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONNIE GIBBS, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 5067271.01 REVIEW-REOPENING DECISION Headnotes: 2502, 2905, 2701

STATEMENT OF THE CASE

Claimant, Donnie Gibbs, filed a petition in review-reopening seeking workers compensation benefits from John Deere Dubuque Works of Deere and Company, self-insured employer (Deere).

This matter was heard on May 23, 2023, with a final submission date of June 19, 2023.

The record in this case consists of Joint Exhibits 1-8, Claimant's Exhibits 1-10, Defendant's Exhibits A-J, and the testimony of claimant.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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.

ISSUES

1. Whether claimant is entitled to additional permanent partial disability benefits under review-reopening proceedings.

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

3. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

FINDINGS OF FACT

Claimant began employment with Deere in November 2014. (Hearing Transcript, page 7) Claimant worked as an assembler in the backhoe CAD line. (Tr., p. 7)

In February of 2017, claimant went to a new start-up line. Claimant testified he started working 40 hours per week. He said production quotas increased in the new line and he began working longer hours. Claimant said his job as an assembler in the new production line was not ergonomically friendly. He said the position was physically demanding. (Tr., pp. 7-9)

Claimant said he eventually injured both upper extremities on the job due to overuse and repetition. (Tr., p. 9)

In June of 2017, claimant was assessed as having left and right carpal tunnel syndrome. (Defendant's Exhibit A, page 10) On February 5, 2018, claimant had a right carpal tunnel release. Surgery was performed by Christopher Palmer, M.D. (Ex. A, p, 11) In June of 2018, claimant returned to work on the loader assembly line. (Ex. A, p. 11)

Claimant testified he did not have a left carpal tunnel release performed as he did not get much relief from surgery on his right upper extremity. (Tr., p. 15)

In a May 17, 2019 report, Robin Sassman, M.D., gave her opinion of claimant's condition following an IME. Dr. Sassman found claimant had a 16 percent whole person permanent impairment for the right upper extremity, and a 6 percent whole person permanent impairment for the left. The combined value for both permanent impairments was a 21 percent whole person impairment. (Ex. A, p. 16)

Claimant's claim was eventually settled under an Agreement for Settlement. The parties agreed claimant was entitled to a 13.77 percent permanent impairment for the bilateral upper extremities, resulting in 68.85 weeks of permanent partial disability benefits. (Ex. A, pp. 1-9) The parties agreed that claimant's date of injury was February 20, 2017. (Ex. A, p. 1) The settlement agreement was approved by the workers' compensation commissioner on October 8, 2019. (Ex. A, p. 18)

On August 27, 2020, claimant was terminated from Deere for inappropriately touching a female coworker. (Ex. B, pp. 19-20) Claimant testified he has not worked since his termination from Deere. (Tr., pp. 18-19; Ex. F, p, 26)

Claimant testified that in approximately December of 2020, he filed a Civil Rights complaint against Deere regarding his termination. He said the complaint was still being investigated at the time of hearing. (Tr., pp. 22-23; Ex. E)

In an April 16, 2021, email from claimant's counsel, claimant requested additional treatment for his right wrist and thumb. (Ex. C, p. 21)

In a recorded statement, claimant indicated his hand pain had gotten progressively worse since October of 2019. (Ex. F, p. 25) Claimant said he has not seen any doctors since October of 2019. (Ex. F, p. 26)

On June 24, 2021, a letter was sent to Edwin Chelli, M.D., regarding if any additional medical care was required for claimant. On the same date, Dr. Chelli seems to have indicated he agreed with the denial letter for further medical care for claimant. (Ex. G, pp. 31-32)

On June 24, 2021, a letter was sent to claimant's counsel. It indicated that Dr. Chelli did not believe additional medical care was reasonable and related to claimant's work injury as the post-surgery notes from Dr. Fields noted claimant had residual symptoms and improvement was unlikely. (Ex. G, p, 33)

In a March 29, 2023 report. Richard Kreiter, M.D., gave his evaluation of claimant's condition following an IME conducted on March 7, 2023. Dr. Kreiter assessed claimant as having mild sensory disturbances following a right carpal tunnel release and left median nerve compression. He opined claimant's bilateral median nerve compression was causally related to the February 20, 2017 work injury. (Claimant's Exhibit 3, pages 17, 19)

Dr. Kreiter did not recommend further treatment for claimant's right upper extremity. Regarding the left upper extremity, he recommended EMG/nerve conduction velocity testing to see if claimant's left nerve compression had worsened. Dr. Kreiter agreed with Dr. Sassman's opinions regarding permanent impairment to the right upper extremity. Dr. Kreiter also recommended vocational rehabilitation if claimant wanted to return to work. (Ex. 3, p. 17)

Claimant testified at hearing his right arm has worsened since completing the Agreement for Settlement. (Tr., pp. 25-26) He said that he had tingling and numbness and loss of grip strength on the right. (Tr., pp. 16-17)

Claimant said his left arm condition has worsened since completing the Agreement for Settlement. He said that he has increased numbness and loss of grip strength on the left. (Tr., p. 17)

Claimant said he has difficulty doing yard work and mowing due to his condition of his upper extremities. (Tr., p. 18)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant has had a change in condition entitling him to additional benefits since the Agreement for Settlement was executed under review-reopening proceeding.

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. 6.904(3).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-

reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

Claimant testified he has increased symptoms in both upper extremities. The record indicates claimant did not complain of increased symptoms nor request medical care for his alleged increased symptoms until nearly two years after the settlement was reached regarding his 2017 injury.

Two experts have opined regarding claimant's bilateral carpal tunnel syndrome. Dr. Kreiter examined claimant for an IME and assessed claimant as having residual mild sensory disturbances on the right upper extremity and a left median nerve compression. He did not believe claimant had reached maximum medical improvement (MMI) on the left upper extremity. He did not find that claimant had any additional permanent impairment on the right since Dr. Sassman's 2019 IME. Dr. Kreiter did not believe claimant required additional care on the right, but recommended diagnostic testing on the left.

Dr. Chelli appears to have signed a faxed sheet agreeing with defendant's counsel that claimant did not require additional medical care. There is no evidence Dr. Chelli examined claimant. The signature on the fax, purporting to be Dr. Chelli's signature, is illegible and is unclear if it in fact was from Dr. Chelli. It is unknown what documents Dr. Chelli reviewed regarding his alleged opinion. There is no CV or record indicating Dr. Chelli's experience, training, or education. Based on this record, it is found that the opinion of Dr. Kreiter regarding claimant's condition is more convincing than that of the alleged opinion from Dr. Chelli.

Claimant testified he has increased symptoms in both upper extremities. Dr. Kreiter opined that claimant only needed testing for the left upper extremity. Dr. Kreiter did not find that claimant had increased permanent impairment to the right upper extremity. Given this record, it is found that claimant has carried his burden of proof he has had a change of condition as to only his left upper extremity.

Dr. Kreiter opined that claimant was not at MMI for the left upper extremity. Based on this, claimant is currently not entitled to any additional permanent partial disability benefits for his left upper extremity.

The next issue to be determined is whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience

> to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

As noted, claimant has carried his burden of proof he has had a change in condition regarding his left upper extremity. Dr. Kreiter opined that claimant required diagnostic testing regarding his left upper extremity. Dr. Chelli's opinion regarding claimant's need for additional medical care is found not convincing for the reasons as detailed above. Claimant testified he has increased symptoms in his left upper extremity. Given this record, claimant has carried his burden of proof he is entitled to alternate medical care consisting of the diagnostic testing recommended by Dr. Kreiter.

The next issue to be determined is whether claimant is entitled to reimbursement for an 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).

The Iowa Court of Appeals has ruled that a doctor's opinion on lack of causation was tantamount to a zero percent impairment rating and triggers reimbursement of an IME under section 85.39. See Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021). Claimant has demonstrated entitlement to reimbursement for the IME pursuant to Iowa Code section 85.39. Defendants shall reimburse claimant for the IME of Dr. Kreiter in the amount of two thousand and 00/100 dollars ($2,000.00).

ORDER

THEREFORE IT IS ORDERED:

That defendant shall authorize and pay for the diagnostic testing for claimant's left upper extremity as recommended by Dr. Kreiter.

That defendant shall reimburse claimant two thousand and 00/100 dollars ($2,000.00) for costs associated with Dr. Kreiter's IME.

That defendant shall pay costs.

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

Signed and filed this 14th day of September, 2023.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Leddin (via WCES)

Dirk Hamel (via WCES)

Coreen Sweeney (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.