BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUL 30 2018
WORKERS' COMPENSATION

MICHAEL TESCH, Claimant, vs. ART'S-WAY MANUFACTURING CO., INC., Employer, ACUITY, Insurance Carrier, Defendants.	:	File No. 5065195 ARBITRATION DECISION Head Note Nos.: 1402.40, 1704, 1802, 1803, 1803.1

STATEMENT OF THE CASE

Michael Tesch, claimant, filed a petition for arbitration against Art's-Way Manufacturing, Co., Inc. (hereinafter referred to as "Art's-Way") as the employer and Acuity as the insurance carrier. An in-person hearing occurred in Des Moines on March 9, 2018.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations.

As part of the stipulations, defendants agreed to pay $875.00 for an independent medical evaluation performed by David Archer, M.D. Defendants will be ordered to pay this amount pursuant to the parties' stipulations.

The evidentiary record includes Joint Exhibits 1 through 8, Claimant's Exhibits 11 through 25, and Defendant's Exhibits A through J. All exhibits were received into the evidentiary record without objection.

Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record closed at the end of the March 9, 2018 arbitration hearing.

However, counsel requested the opportunity to submit post-hearing briefs. Their request was granted. The case was deemed fully submitted upon the filing of simultaneous post-hearing briefs on March 30, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's injury resulted in a scheduled member injury limited to the right leg, or involves an unscheduled injury to the hip or low back that should be compensated with industrial disability.

2. Whether claimant is entitled to additional healing period benefits.

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

4. The proper commencement date for permanent disability benefits.

5. Whether defendants are entitled to a credit and, if so, the extent of such credit against any award of permanent disability benefits.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Michael Tesch sustained a significant right knee injury while working at Art's-Way in Armstrong, Iowa, on September 5, 2013. He fell off a ramp from a height of approximately three feet, landed on his right leg and right side, and experienced immediate pain in his right knee. He was taken to a local hospital and later transferred to Spencer Hospital in Spencer, Iowa. (Joint Exhibit 1, pages 1-4)

Alexander Pruitt, M.D., took Mr. Tesch to surgery on September 6, 2013. Dr. Pruitt diagnosed claimant with a ride-sided bicondylar tibial plateau fracture and performed an open reduction and internal fixation with plating on both the medial and lateral sides of claimant's right knee. (Joint Ex. 3, p. 72) Mr. Tesch developed complications after the surgery, including atrial fibrillation and fracture blisters, which appear to be quite extensive and painful. (Joint Ex. 1, p. 7; Claimant's Ex. 11 & 12) Although technically successful, the initial surgery did not alleviate all of claimant's limitations or symptoms.

Unfortunately, claimant's injury required several additional surgeries. In January 2014, claimant submitted to a partial medial meniscectomy and partial lateral meniscectomy. In early September 2014, Mr. Tesch was experiencing some pain as a screw backed out of his knee. Therefore, he had hardware removed from his knee. (Joint Ex. 3, p. 81) However, following the hardware removal, claimant's knee collapsed. (Joint Ex. 2, p. 43)

After the knee collapsed, defendants scheduled claimant for an independent medical evaluation with Matthew J. Weresh, M.D. in Des Moines. (Defendants' Ex. A) Dr. Weresh opined that Dr. Pruitt rendered appropriate and timely care for claimant. Dr. Weresh concurred with Dr. Pruitt's ongoing recommendations. Therefore, Mr. Tesch required and submitted to another surgery in January 2015 to perform another open reduction and internal fixation of the right knee. (Joint Ex. 3, p. 83)

Despite the multiple surgeries, claimant continued to experience symptoms in his right knee. Once again, he was taken back to surgery on December 10, 2015 and Dr. Pruitt performed a chondroplasty of the medial tibial plateau as well as partial medial and lateral meniscectomies. (Joint Ex. 1, p. 21)

Ultimately, claimant was diagnosed with a complete loss of joint space in his right knee. (Joint Ex. 2, p. 57) Mr. Tesch required a total right knee replacement on July 7, 2016. (Joint Ex. 1, p. 24) Dr. Pruitt performed all of claimant's right knee surgeries.

Dr. Pruitt last rendered treatment for claimant's right knee in January 2017. (Defendants' Ex. I, p. 47) Dr. Pruitt declared claimant to have achieved maximum medical improvement on January 5, 2017. (Joint Ex. 2, p. 65) Dr. Pruitt opined that claimant sustained a 15 percent impairment of the whole person as a result of his right knee injury. (Joint Ex. 2, p. 65)

On July 14, 2017, claimant obtained an independent medical evaluation performed by David Archer, M.D. (Claimant's Ex. 17) Dr. Archer represents himself as an occupational medicine physician, though his specific board certification is in family medicine. He does belong to the American College of Occupational and Environmental Medicine. (Claimant's Ex. 18)

Dr. Archer opined that claimant has only a fair result following his right total knee replacement. (Claimant's Ex. 17, p. 24) Dr. Archer opined that claimant sustained a 20 percent permanent impairment of the whole person as a result of his right knee injury and total knee replacement. (Claimant's Ex. 17, p. 24)

The initial disputed issue in this case is whether claimant sustained a low back or right hip injury in addition to the right knee injury. Claimant testified that his right leg is now one inch shorter than the left leg. (Claimant's testimony; Defendants' Ex. I) There is no medical documentation in the evidentiary record to support this contention or testimony. I do not find claimant's trial or deposition testimony to be convincing without some medical support.

Claimant also testified in his deposition that he has restless leg syndrome following his broken leg. (Defendants' Ex. I, p. 64) There is no medical documentation in the evidentiary record to support this contention or testimony. I do not find claimant's deposition testimony to be convincing without some medical support.

Claimant testified that he walks with a limp and that it causes him pain in the right hip area and low back. Surveillance video introduced by defendants does demonstrate times in which claimant limps while walking. (Defendants' Ex. H) I find that claimant does, at least at times, limp since his right knee injury. However, the limp is not present at all times and claimant does not require the use of a cane or other assistive device to walk.

The parties also inquired of the medical experts about claimant's right hip and/or low back symptoms. Dr. Pruitt noted on April 21, 2016 in his office note that claimant's back still bothered him "a little bit." (Joint Ex. 2, p. 58) However, Dr. Pruitt specifically opined that claimant sustained no permanent impairment related to gait derangement. (Joint Ex. 2, p. 67)

Dr. Archer opined that claimant did have a gait derangement as a result of the September 5, 2013 injury. However, Dr. Archer noted that claimant "requires a cane for ambulation and his stand and walk time is limited." (Claimant's Ex. 17, p. 24) The surveillance videos do not support Dr. Archer's statement. Claimant is seen in the surveillance videos over several days and months walking without a cane. He is depicted walking on carpeted areas, sidewalks, uneven ground, and even during snow and/or icy conditions. At no time during the surveillance is claimant seen using a cane. (Defendants' Ex. H)

Again, at times, claimant limps on the surveillance. However, at other times he is seen climbing into a pickup, lifting and moving boxes, riding a lawnmower, pushing a snow blower, using a shovel to move snow, lifting a garage door, sitting for extended periods of time. (Defendants' Ex. H) Similarly, a medical record from Brandon J. Henley, D.O., dated September 4, 2014, notes that claimant's gait is normal. (Joint Ex. 5, p. 106) Dr. Weresh also noted that claimant had "near normal gait pattern" during his evaluation in December 2014. (Defendants' Ex. A, p. 3) Both of these findings by different physicians support the opinions of Dr. Pruitt.

When I consider the respective opinions of Dr. Pruitt and Dr. Archer pertaining to the issue of gait derangement, I find the opinions of Dr. Pruitt to be most consistent with the other evidence in this record. Dr. Pruitt's understanding of claimant's abilities is based upon his extended period of treatment, inspection of claimant's knee intra-operatively several times, numerous clinic evaluations, and is consistent with the surveillance depictions. Dr. Archer, on the other hand, has inaccurate information regarding claimant's need or use of a cane.

Therefore, I find that Dr. Pruitt's opinion is most convincing on the issue of gait derangement. I find that claimant has not proven he has permanent impairment relative to gait derangement.

With respect to the low back complaints expressed by claimant, I am able to identify medical records detailing low back symptoms. For instance, on April 21, 2016, Dr. Pruitt noted that claimant's back still bothered him a little bit. (Joint Ex. 2, p. 58)

There is also mention of chronic back pain for more than three months at an evaluation occurring on March 11, 2016. (Joint Ex. 4, p. 97) However, I also note an evaluation performed at Estherville Medical Clinic on June 13, 2016 that claimant denied any back pain. (Joint Ex. 5, p. 119)

No physician has rendered a permanent impairment rating for claimant's low back. No physician has opined that claimant sustained a permanent injury or permanent aggravation as a direct result of claimant's September 2013 knee injury. I find that claimant failed to prove he sustained a permanent injury or permanent and material aggravation of his low back as a result of the September 2013 right knee injury. I similarly find that claimant failed to prove a permanent injury or material aggravation of his right hip as a result of the September 2013 right knee injury.

Ultimately, I find that claimant has proven a right knee injury, that the situs of the injury is limited to claimant's right leg, and that he sustained permanent impairment equivalent to 15 percent of the whole person. Pursuant to Table 17-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, a 15 percent impairment of the whole person is equivalent to 37 percent of the whole person. This is consistent with the impairment rating offered for a total knee replacement with a good result. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 17-33, p. 547. I find that claimant has proven a 37 percent permanent impairment of the right leg and that this impairment is consistent with claimant's residual functional abilities as depicted on the surveillance video and throughout his treatment records.

Although there were earlier mentions of maximum medical improvement, I find that Mr. Tesch did not actually achieve maximum medical improvement until January 5, 2017. (Joint Ex. 2, p. 65) However, claimant was initially released without restrictions on April 24, 2014. (Joint Ex. 2, p. 39) Claimant was not capable of substantially similar employment prior to April 24, 2014.

On the hearing report, claimant seeks award of healing period benefits from July 27, 2015 through December 9, 2015. Defendants stipulated that claimant was off work during this period of time. (Hearing Report) Review of Joint Exhibit 2, page 48 demonstrates that Dr. Pruitt allowed claimant to "go back to work without restriction" as of July 23, 2015. Joint Exhibit 2, page 50 confirms that claimant was released to return to work with "No Restrictions" prior to July 27, 2015.

No apparent changes in the medical release occurs between July 23, 2015 and the subsequent surgery for loose body removal from claimant's right knee on December 10, 2015. Obviously, claimant would return to a healing period as of the date of that surgery, but I identify no work restrictions were in place between July 27, 2015 and December 9, 2015. Therefore, I find that claimant was capable of substantially similar employment during this period of time.

Mr. Tesch also seeks an award of healing period benefits from January 21, 2016 through July 6, 2016. Defendants stipulated that claimant was off work during this period of time. (Hearing Report) Dr. Pruitt evaluated claimant on January 21, 2016. In that medical note, Dr. Pruitt noted that claimant required work restrictions, including no bending, squatting, or kneeling on his knee. He was limited as to climbing and lifting over 40 pounds. (Joint Ex. 2, p. 52) With these medical restrictions, claimant was not capable of performing substantially similar employment as that which he performed on the date of injury.

No changes were made in claimant's work restrictions after January 21, 2016. In fact, on April 21, 2016, Dr. Pruitt specifically confirmed that he was not changing anything with respect to work restrictions. (Joint Ex. 2, p. 58) Claimant was subsequently scheduled for his right total knee replacement and there is no indication in Dr. Pruitt's medical records that he ever released claimant to return to substantially similar work. Therefore, I find that claimant was not capable of returning to substantially similar work between January 21, 2016 and July 6, 2016.

Finally, claimant seeks an award of healing period benefits from January 12, 2017 through July 7, 2017. Defendants stipulated that claimant was off work during this period of time. (Hearing Report) Claimant was clearly under work restrictions during this period of time. (Joint Ex. 2, p. 65) However, I also found that claimant achieved maximum medical improvement on January 5, 2017.

CONCLUSIONS OF LAW

The initial disputed issue in this case is whether claimant's injury is limited to and should be compensated pursuant to Iowa Code section 85.34(2)(o) as a scheduled member injury to his right leg, or whether the injury extends beyond the scheduled member and should be compensated pursuant to Iowa Code section 85.34(2)(u) with industrial disability. The primary dispute revolves around whether the admitted right leg injury caused a permanent injury to claimant's right hip and gait derangement, or a permanent injury to claimant's low back.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In this case, I found the opinions of Dr. Pruitt to be most credible and convincing. In reaching that finding, I also found that claimant did not prove a permanent injury to his right hip or permanent impairment related to a gait derangement. I also found that claimant did not prove a permanent injury to his low back as a result of the September 5, 2013 work injury. I also found that the situs of the work injury is limited to the right leg. Having reached those findings, I conclude that claimant proved a scheduled member injury to his right leg but failed to prove that the injury extends beyond the right

leg. Therefore, I also conclude that the injury should be compensated pursuant to Iowa Code section 85.34(2)(o) on a 220-week schedule.

I found that claimant sustained a 37 percent loss of function in his right leg as a result of the September 5, 2013 work injury. The Iowa legislature has established a 220-week schedule for leg injuries. Iowa Code section 85.34(2)(o). Claimant is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of her leg. Iowa Code section 85.34(2)(v). Thirty-seven (37) percent of 220 weeks equals 81.4 weeks. Claimant is, therefore, entitled to an award of 81.4 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(o), (v).

Mr. Tesch also claims several intermittent periods of healing period and challenges defendants' entitlement to a credit against permanent disability for benefits paid during these periods of time. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The Iowa Supreme Court has specifically noted that permanent partial disability benefits commence whenever the first factor of Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). I found that claimant did not achieve maximum medical improvement until January 5, 2017. However, reaching maximum medical improvement is not necessarily the first factor to be achieved to terminate the healing period. Id.

I found that Mr. Tesch was released to return to full duty work and without restrictions as of April 24, 2014. I also found that claimant was not capable of returning to substantially similar employment prior to April 24, 2014. Therefore, the first factor to be achieved pursuant to Iowa Code section 85.34(1) was the full duty release on April 24, 2014. I conclude that healing period benefits terminated as of April 24, 2014. Permanent disability benefits should commence on April 25, 2014 and be paid continuously thereafter until paid in full. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

Although permanent partial disability benefits commenced, claimant may also be entitled to payment of intermittent and simultaneous healing period benefits. Id. In this instance, claimant seeks healing period benefits from July 27, 2015 through December 9, 2015, from January 21, 2016 through July 6, 2016 and from January 12, 2017 through July 7, 2017.

Having found that claimant was released to return without restrictions and was capable of substantially similar employment during the period of time from July 27, 2015 through December 9, 2015, I conclude that claimant is not entitled to healing period benefits during this period of time. Iowa Code section 85.34(1).

Claimant was on work restrictions, did not return to work, and had not yet achieved maximum medical improvement between January 21, 2016 and July 6, 2016. Claimant proved entitlement to healing period benefits during this period of time. Iowa Code section 85.34(1).

Finally, claimant asserted a claim for healing period benefits from January 12, 2017 through July 7, 2017. Having found that claimant achieved maximum medical improvement as of January 5, 2017, I conclude that claimant has not established entitlement to healing period benefits during this period of time. Iowa Code section 85.34(1).

Defendants asserted a credit for benefits paid to date, as well as a credit for the sum paid by the Iowa Second Injury Fund of Iowa. Defendants are entitled to a credit for the weekly benefits they have paid to date, but may be required to pay healing period and permanent partial disability benefits simultaneously as outlined in this decision. Defendants provided no legal authority to substantiate that they are entitled to a credit for the settlement proceeds paid by the Second Injury Fund of Iowa. I am not aware of any such authority. I conclude that defendants are not entitled to a credit for any payments made by the Second Injury Fund of Iowa, particularly under the terms of a compromise settlement agreement.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from January 21, 2016 through July 6, 2016.

Defendants shall pay claimant eighty-one point four (81.4) weeks of permanent partial disability benefits commencing on April 25, 2014, and paid continuously thereafter until paid in full.

All weekly benefits shall be paid at the rate of five hundred twenty-eight and 46/100 dollars ($528.46).

Defendants 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 Technology File No. 5054686 (App. April 24, 2018).

Defendants are entitled to a credit for all weekly benefits paid to date against this award.

Pursuant to the parties' stipulation on the hearing report, defendants shall pay to claimant the sum of eight hundred seventy-five and no/100 dollars ($875.00), representing Dr. Archer's independent medical evaluation fee.

Signed and filed this 30th day of July, 2018.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Thomas W. Lipps
Attorney at Law
6 East State St.
Algona, IA 50511
tlipps@petelipp.com

Stephanie Marett
Attorney at Law
700 Walnut St., Ste. 1600
Des Moines, IA 50309
slm@nyemaster.com

Sarah Brandt
Assistant Attorney General
Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319-0106
Sarah.brandt@ag.iowa.gov

WHG/kjw

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.