

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JESUS GONZALEZ,

Claimant,

vs.

KRAFT HEINZ CO.,

Employer,

and

INDEMNITY INSURANCE CO.,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

FILED
JUN 25 2019
WORKERS' COMPENSATION

File No. 5063096

ARBITRATION

DECISION

Head Note Nos.: 1402.40, 2502, 2907

STATEMENT OF THE CASE

Claimant, Jesus Gonzalez, filed a petition in arbitration seeking workers' compensation benefits from Kraft Heinz Co. (Kraft), employer, Indemnity Insurance Company (Indemnity), insurer, and the Second Injury Fund of Iowa (Fund), all as defendants. This matter was heard in Des Moines, Iowa on April 30, 2019 with a final submission date of May 28, 2019.

The record in this case consists of Joint Exhibits 1-11, Claimant's Exhibits 1-5, Defendants Kraft and Indemnity's Exhibits A through E, Defendant Fund's Exhibits AA through CC, and the testimony of claimant, Kurt Lund, and Brian Kendall.

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.

ISSUES

1. The extent of claimant's entitlement to temporary benefits.
2. Whether claimant has reached maximum medical improvement (MMI).
3. Whether claimant's injury is the cause of a permanent disability; and if so
4. The extent of claimant's entitlement to permanent partial disability benefits.
5. Whether there is a causal connection between the injury and the claimed medical expenses.
6. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.
7. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME), under Iowa Code section 85.39.
8. Whether claimant is entitled to Second Injury Fund benefits.

FINDINGS OF FACT

Claimant was 55 years old at the time of hearing. Claimant graduated from high school. Claimant has worked at fast food restaurants. He worked as a cook at a casino. From 1990 through 1997 he worked at IPSCO operating machinery that split coils. Claimant began employment with Kraft in February of 1997. (Transcript pages 12-13)

Claimant testified at hearing he had an injury to his right knee from playing football in high school. Claimant said he had arthroscopic surgery on the right knee while in high school. (Tr. p. 24)

From January 1997 through June 1999 claimant received treatment for a right knee condition. (Joint Exhibit 9, pp. 81-87)

Records from June of 1999 indicate claimant had considered surgery as a treatment option for the right knee. (Jt. Ex. 9, p. 87) Claimant testified he only has a vague recollection of any treatment for his right knee at that time. (Tr. pp. 24-25) Claimant testified he believes the right knee was sprained around that time. Claimant said his right knee did not give him any problems up to July of 2016. (Tr. pp. 24-25)

Claimant did not note a right knee condition on any job applications. (Tr. p. 48; Ex. AA, p. 6) Claimant passed a pre-employment physical with Kraft when he was hired in 1997. (Jt. Ex. 11) Claimant did not have any recollection of having any knee symptoms before his June of 2016 work injury. (Tr. p. 48; Ex. AA, pp. 2-3, 6)

At the time of his injury, claimant's job at Kraft involved cleaning large containers where bologna was made. The job is called the Equilibrator Wash job. The container where bologna is made is called the equilibrator. It is also referred to as a "coffin."

Claimant testified that on July 5, 2016 he slipped on a wet floor and bent his left knee.

Claimant was evaluated by Rick Garrels, M.D. on August 16, 2016. Claimant was assessed as having left knee pain. Claimant was put on restrictions. An MRI was recommended. (Jt. Ex. 1, p. 13)

On August 22, 2016 claimant underwent an MRI on the left knee. It showed advanced osteoarthritis. Claimant was prescribed medication for pain. (Jt. Ex. 1, p. 14)

Claimant returned to Dr. Garrels in follow up on September 20, 2016. Claimant had no improvement with symptoms. Claimant walked with an antalgic gait on both legs. Claimant was referred to an orthopedic specialist. (Jt. Ex. 1, p. 18)

Claimant was evaluated by Suleman Hussain, M.D., an orthopedic surgeon, on October 5, 2016. Claimant complained of left knee pain after moving containers at work. Claimant was assessed as having degenerative osteoarthritis in both knees. Claimant's symptoms were aggravated by his weight. Claimant's work injury caused an aggravation of his underlying arthritis. Claimant was found to be at maximum medical improvement (MMI) of his work injury. Claimant was told he needed to lower his weight before Dr. Hussain would perform surgery. Claimant was returned to work with no restrictions. (Jt. Ex. 3, pp. 25-27)

Claimant returned to Dr. Garrels on October 7, 2016. He was assessed as having bilateral knee osteoarthritis. His condition was not considered work related. (Jt. Ex. 1, p. 22)

Claimant was evaluated by Thomas Drabek, PA-C at ORA Orthopedics on November 16, 2016 for right knee pain. Claimant was assessed as having severe bilateral knee osteoarthritis. He was told he would need to lose weight prior to having surgery. Claimant was taken off work. (Jt. Ex. 3, p. 29)

Claimant returned to ORA on February 16, 2017 and was evaluated by Steven Boardman, M.D. Claimant wanted to have a right total knee replacement. Claimant was assessed as having severe bilateral osteoarthritis, right more symptomatic than the left. Claimant was told he needed to lose weight and get down to around 260 pounds. Claimant was given a left knee injection. He was taken off work. (Jt. Ex. 3, pp. 31-33)

Claimant returned in follow up with Physician's Assistant Drabek on March 30, 2017. Claimant had bilateral knee pain. Claimant requested cortisone and Synvisc injections. Claimant was again told he needed to lose weight before surgery would occur. Claimant was returned to work with no restrictions beginning on April 3, 2017. (Jt. Ex. 3, pp. 35-37)

Claimant returned in follow up with Dr. Boardman on May 25, 2017. Claimant had right knee pain. Claimant was given a Depo-Medrol injection on the left knee. (Jt. Ex. 3, pp. 38-39) Claimant had Depo-Medrol injections on the right knee on July 6, 2017. (Jt. Ex. 3, pp. 40-41) He had another Depo-Medrol injection on the right knee on September 28, 2017, and on the left knee on December 28, 2017. (Jt. Ex. 3, pp. 42-43)

Claimant was seen by Dr. Boardman on April 2, 2018. Claimant was assessed as having bilateral knee osteoarthritis, left moderate and right severe. Claimant was also assessed as having a right proximal medial tibia mass. An MRI of the right knee was recommended. (Jt. Ex. 3, p. 47)

Claimant had an MRI of the right knee on April 3, 2018. Claimant was shown to have right knee degenerative osteoarthritic changes. He was also shown to have a Baker's and a synovial cyst on the knee. (Jt. Ex. 3, pp. 48-50)

Claimant returned to Dr. Boardman in follow up on April 11, 2018. Claimant's MRI results were discussed. Claimant indicated he wanted to proceed with a right total knee replacement. Claimant was again counseled to continue to lose weight. (Jt. Ex. 3, p. 50)

In an April 10, 2018 report, Richard Kreiter, M.D., gave his opinions of claimant's condition following an IME. Claimant told Dr. Kreiter he had a normal functioning knee and had not seen a medical provider until the date of injury on July 5, 2016. Claimant indicated he had arthroscopic surgery on the right knee while in high school. Claimant twisted his left knee while washing "coffins" at work. This aggravated a preexisting left knee condition. While treating for his left knee, claimant's right knee, which was asymptomatic, became symptomatic. (Jt. Ex. 5, pp. 66, 68)

Dr. Kreiter found claimant had a 13 percent whole person impairment to the left and right knee. (Jt. Ex. 5, p. 66) He recommended claimant be limited in stair climbing, no ladder climbing, limited in kneeling and no crawling. Dr. Kreiter recommended claimant lose weight and conservative treatment. On exam, claimant was seen to have a pronounced limp. (Jt. Ex. 5, p. 67)

On May 21, 2018 claimant returned in follow up with Dr. Boardman. Dr. Boardman believed claimant's symptoms warranted a bilateral total knee replacement. However, claimant weighed over 300 pounds. Claimant was counseled again to get his weight down to 260 pounds. Dr. Boardman did not feel comfortable performing a total knee replacement, given claimant's weight. Claimant was recommended to have a second opinion with Ed Connolly, M.D. (Jt. Ex. 3, p. 52)

Claimant was evaluated by Dr. Connolly on June 13, 2018. Claimant indicated pain in both knees for many years, right worse than left. Claimant was assessed as having osteoarthritis in both knees, right worse than left. Claimant was told if he wanted to be treated for surgery, he would need to have his weight down to 255 pounds. Claimant was given injections in both knees. (Jt. Ex. 3, pp. 53-54)

In an August 25, 2018 report, Dr. Garrels gave his opinions of claimant's condition. Dr. Garrels reviewed Dr. Kreiter's IME report. When he evaluated claimant's x-rays, he found advanced osteoarthritis in the left knee. He noted, contrary to Dr. Kreiter's report, given claimant's advanced osteoarthritis, claimant would have had limitations with the knee prior to the work injury. He noted given claimant's osteoarthritis in both knees, claimant would have been a candidate for total knee replacement before the work injury. He opined claimant's work injury did not change this at all. (Jt. Ex. 6, p. 78)

Dr. Garrels noted Dr. Kreiter also rated claimant for permanent impairment for both knees based on claimant's preexisting condition. He agreed with Dr. Kreiter's opinion regarding claimant's restrictions. (Jt. Ex. 6, pp. 78-79)

At the time of hearing claimant was still working for Kraft. Claimant testified he changed jobs in approximately September of 2018 with Kraft. Claimant testified he now works as a cooler coordinator. Claimant said the job requires him to inventory coolers and drive a forklift. He said the job requires less walking and is less physically demanding than the job he had at the time of the injury. Claimant said he has no work restrictions at the time of hearing. Claimant says he takes over-the-counter medication for knee pain.

Claimant testified he did not think he had problems with his knees before his work injury. Claimant testified he wants to have a total knee replacement for both knees.

Kurt Lund testified he is employed with Kraft and has known claimant for over 20 years. Mr. Lund said he has witnessed claimant walking with a noticeable altered gait for a long time.

Brian Kendall testified he has been employed with Kraft as a production supervisor. In that capacity he has known claimant for approximately eight years. Mr. Kendall said during the period of time he has known claimant he has noticed claimant has a "hitch" in the way he walks.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant is entitled to temporary benefits.

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. 6.14(6).

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).

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Claimant and defendant Kraft and Indemnity agree claimant sustained a work-related injury on July 5, 2016. Defendant Kraft and Indemnity dispute claimant's knee injury resulted in claimant's entitlement to temporary or permanent partial disability benefits.

Claimant contends he is owed temporary partial disability benefits from July 5, 2016 through October 5, 2016. The record indicates claimant was working light duty between July 5, 2016 and October 5, 2016. (Tr. p. 16; Jt. Ex. 1, pp. 10, 12, 15, 19, 21) Claimant was found to be at MMI by Dr. Hussain on October 5, 2016. (Jt. Ex. 3, pp. 25-26)

There is no evidence in the record claimant's earnings for the period from July 5, 2016 through October 5, 2016 were less than his earnings at the time of injury.

As claimant has failed to submit any evidence his wages, from July 5, 2016 through October 5, 2016, were less than his average weekly earnings at the time of injury, claimant has failed to carry his burden of proof he is due temporary partial disability benefits during the period of time of July 5, 2016 through October 5, 2016.

The next issue to be determined is whether claimant is entitled to temporary permanent disability benefits or healing period benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Claimant seeks temporary total disability benefits or healing period benefits from October 5, 2016 through April 2, 2017.

Three experts have opined regarding whether claimant's condition and symptoms after October 5, 2016 were caused by the July 5, 2016 work injury, or were the result of other causes.

Dr. Hussain actively treated claimant's condition. On October 5, 2016 Dr. Hussain found claimant was at MMI. He returned claimant to work with no restrictions. In his assessment of claimant, he noted,

Degenerative primary osteoarthritis in both knees. The knees are aggravated by his weight. His work injury has caused him to now have aggravation of the underlying arthritis. He is [sic] MMI for the work injury as of today.

(Jt. Ex. 3, p. 26)

It is unclear from Dr. Hussain's records whether he believes the aggravation of claimant's osteoarthritis, in both knees, was caused by claimant's weight. Claimant was 5 feet 7 inches and weighed approximately 390 pounds at the time of the October 5, 2016 exam. (Jt. Ex. 3, p. 25) It is unclear from Dr. Hussain's assessment if he believes the osteoarthritis was aggravated by the work injury. It might be inferred that because

Dr. Hussain returned claimant to work with no restrictions, he did not believe claimant's work injury of July 7, 2016 permanently aggravated claimant's knee condition.

However, Dr. Hussain's opinion regarding causation of claimant's continuing knee problems is unclear. He identifies claimant's obesity as an aggravating factor. He also identifies claimant's work injury as an aggravating factor. As a result, it is found Dr. Hussain's opinion is not convincing for either claimant or defendants' position.

Dr. Kreiter evaluated claimant one time for an IME. Dr. Kreiter found claimant's July 5, 2016 left knee injury was aggravated and accelerated claimant's preexisting knee condition. (Jt. Ex. 5, p. 66)

However, Dr. Kreiter's opinion is problematic for several reasons. Dr. Kreiter does note claimant had right knee arthroscopic surgery on his right knee in high school. He also notes claimant has not seen a medical provider for his knee until the date of injury. (Jt. Ex. 5, p. 66) This is not correct. The records indicate claimant was seen for treatment between 1997 and 1999 for a right knee condition. In June of 1999 claimant was assessed as having severe degenerative osteoarthritis in the right knee. Surgery was discussed at this time and a plan was to have claimant undergo surgery approximately in July of 1999. (Jt. Ex. 9, p. 87) For whatever reason, claimant did not have right knee surgery at this time.

Dr. Kreiter also rated both of claimant's knees. However, the rating appears to apply only to claimant's preexisting condition. The rating does not appear to address any permanent impairment resulting from the July 5, 2016 injury. (Jt. Ex. 9, p. 66) The rating also appears to apply to a dislocation of the patella. (Jt. Ex. 9, p. 66) There is nothing in the record indicating claimant dislocated his left patella. Based on these discrepancies, it is found Dr. Kreiter's opinion regarding causation of claimant's ongoing symptoms is found not convincing.

Dr. Garrels treated claimant in August, September and October of 2016. Dr. Garrels opined the x-rays at the time of injury show claimant's left knee had advanced osteoarthritis. He opined claimant's injury of July 5, 2016 did not result in claimant's need for surgery. He opined claimant's prolonged status of obesity, and claimant's osteoarthritis in both knees, would have led to claimant having a total knee replacement, with or without the July 5, 2016 work injury. (Jt. Ex. 6, p. 78)

Dr. Garrels' opinion is also problematic. That is, there is no evidence in the record that after June of 1999, claimant treated for any problems for osteoarthritis in the left or right knee.

The opinion of Dr. Hussain regarding causation of claimant's ongoing problems is ambiguous and confusing. Dr. Kreiter's opinion regarding causation of claimant's ongoing condition is found not convincing. The opinions of Dr. Garrels regarding the cause of claimant's ongoing symptoms is also problematic. In short, none of the expert

opinions in this case is convincing on determining the ongoing causation of claimant's left and right knee problems.

The record indicates claimant has had osteoarthritis in both knees, right worse than left. Claimant indicated to Dr. Connolly he had been having pain in both knees for many years. (Jt. Ex. 3, pp. 53-54) It is unclear whether claimant's need for ongoing care and his ongoing symptoms is caused by his osteoarthritis and his obesity, or was materially aggravated by the June 5, 2016 work injury. Claimant carries the burden of proof in proving his ongoing symptoms, and his need for continued care after October 5, 2016, is caused by the July 5, 2016 work injury. Given the record as detailed above, claimant has failed to carry his burden of proof his July 5, 2016 work injury is the cause of claimant's ongoing symptoms and his need for medical care after October 5, 2016.

As claimant has failed to carry his burden of proof his continued symptoms, and his need for ongoing care after October 5, 2016 is caused by the July 5, 2016 work injury, all other issues, except reimbursement of the IME, are found to be moot.

The next issue to be determined is whether claimant is entitled to reimbursement for Dr. Kreiter's 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). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Kreiter, the employee-retained physician, issued his IME opinion on April 10, 2018. (Jt. Ex. 5) Dr. Garrels, the employer-retained physician, issued his report on August 25, 2018. Given the chronology of the reports, claimant has failed to prove he is due reimbursement for costs associated with Dr. Kreiter's report under Iowa Code section 85.39.

There is no breakdown of Dr. Kreiter's bill regarding which costs are to be assessed to the writing of the report. Costs are taxed at the discretion of this agency, and claimant failed to prevail on any issue in this case. For these reasons, claimant is also not due reimbursement of the costs associated with Dr. Kreiter's report as a cost under rule 876 IAC 4.33.

ORDER


Therefore, it is ordered:

That claimant shall take nothing from these proceedings in the way of benefits.

That each party shall pay its own costs.

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

Signed and filed this 25th day of June, 2019.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
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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.