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November 19, 2008

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Re: Mittal No. 23

Gentlemen:

This is my decision about whether Grievant Eric Stevenson can return to work. I have reviewed Dr. Agarwal's report and considered it in the context of the Award. I have also considered the arguments made in the conference call.

The Company argues that Grievant cannot return to work because Dr. Agarwal said Grievant cannot work without restrictions, and the restrictions he recommended would disqualify Grievant from performing his regular job. My Award does say that that Grievant is to be returned to work if an IME determines that no medical restrictions are necessary for Grievant to perform his job. But those words have to be evaluated in the context of the opinion. My conclusion was that Grievant could not be prevented from working by medical restrictions that were intended solely to increase the longevity of the prosthesis. Grievant is aware of the risk that the artificial joint is likely to wear out faster if he continues in his job, and that a second replacement may be less effective. The Award indicates that he is entitled to assume this risk as long as there is no evidence that he risks an injury other than accelerated wear, or that his presence on the job poses a danger to himself or coworkers. Also determinative would be evidence that working would cause Grievant's prosthesis to collapse or break.

Dr. Agarwal's evaluation does not really address these issues. He does say, as the Company points out, that Grievant needs restrictions to work, but his report makes it clear that the restrictions are intended to prevent "early failure/decreased lifespan" of the knee

replacement. He also says moving to a more sedentary position “will be in the long term benefit (physical and mental health) of this patient.” The only physical health benefit Dr. Agarwal mentions in the remainder of his report is the risk of accelerated wear.

The Company references, in part, Dr. Agarwal’s comments in paragraph 9.c of his report. This portion of the report is confusing and might have been better explained. However, paragraph 9 begins by saying that Dr. Agarwal cannot comment on the opinions of Grievant’s doctors. He then notes that my Award says Grievant’s doctors’ reports were based on several factors. These included their physical examination and the current lack of symptoms. I understand the first sentence of 9.c to mean that Grievant’s doctors made their recommendation without consideration of the future impact such work would have on the prosthesis. The second sentence then lists the kinds of restrictions that are usually imposed. Clearly, Dr. Agarwal believes these restrictions are appropriate in this case. However, he wants the restrictions in-place to protect the joint against premature wear.

I understand the Company’s concern and its argument that to put Grievant back to work would “create the virtual certainty of another injury.” That was the kind of information I had hoped Dr. Agarwal would provide. But I find nothing in his report that warns of anything other than accelerated deterioration of the prosthesis. The Company points to the last paragraph on page 14, in which Dr. Agarwal says, inter alia, “there is no guarantee the claimant will not be reinjured or suffer additional injury once he or she returns.” This statement, however, is included in a paragraph largely consisting of disclaimers. The quoted language appears to me to be similar boilerplate. Note, for example, the reference to “claimant,” a term commonly used in workers compensation cases, but which is inapt in this case. In addition, the reference “once he or she returns” suggests that the language was not chosen specifically for Grievant’s condition.

Neither Dr. Agarwal nor the Company’s doctors offered a time-line about how quickly the joint may deteriorate if Grievant continues to work. There was evidence that with ordinary wear, an artificial knee lasts 10 to 15 years, or longer. Although there is convincing evidence that Grievant’s prosthesis will not last that long if he continues to work, there was no estimate about how quickly the joint will deteriorate. Reducing the device’s useful life by a year or two would not seem to create a hazard for the risk of an acute injury. Presumably, over that period of time Grievant could tell when he became incapable of physically demanding work; or, at least, doctors could glean that information from regular examinations. Evidence that the joint would last only 2 or 3 years if Grievant resumed his normal activity could raise different considerations. But I cannot assume that will be the case.

In sum, the reason I ordered the parties to obtain an assessment from an Independent Medical Examiner was because Grievant’s doctors said he could work without restrictions, and the Company doctor’s imposed restrictions that prevented Grievant from performing his regular job. However, those restrictions were based principally on the likelihood of accelerated wear of the prosthesis. I had hoped the IME would determine whether Grievant’s medical condition would allow him to perform his regular job without restrictions and with no hazard to his well-being other than accelerated wear of the prosthesis. He did not answer that question

There is nothing in the medical evidence indicating that it would be dangerous for Grievant to return to his normal job now, or that there will be any danger for the next year, when he can be re-evaluated. Thus, I order the Company to return Grievant to his regular job. For the reasons explained in the Award, Grievant is not to receive any back pay.

Very truly yours,

Terry A. Bethel

Cc: Patrick Parker  
William Nugent