BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
AUG - 3 2017
WORKERS' COMPENSATION

IZUDIN DUBINOVIC, Claimant, vs. DES MOINES PUBLIC SCHOOLS, Self-Insured Employer, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 5042677, 5047783 REHEARING DECISION Head Note Nos: 1108.20, 1802, 1803, 3202

Claimant filed two applications for rehearing (Application). Defendants filed a resistance. The application is considered.

File Nos. 5042677 and 5047783 were consolidated by order dated September 22, 2014. Both cases were heard together. One arbitration decision was issued for both files. In his application, claimant's counsel filed two separate applications for rehearing. It is unclear why this was done. To avoid confusion, claimant's counsel is respectfully requested to refrain from this practice in the future.

Claimant raises two grounds for rehearing. Regarding File No. 5042677 (date of injury November 11, 2011), claimant contends the deputy workers' compensation commissioner erred in finding claimant failed to carry his burden of proof he sustained a mental/mental injury that arose out of and in the course of employment. Regarding File No 5047783 (date of injury December 20, 2012), claimant contends the deputy erred in finding defendants not liable for a penalty under Iowa Code Section 86.13.

Regarding File No. 5042677, it appears claimant's counsel contends the deputy erred in finding claimant failed to carry his burden of proof he sustained a mental/mental injury under an analysis used in Brown v. Quik Trip Corporation, 641 N.W. 2d 725, 729 (Iowa 2002).

The arbitration decision, in this case, gave a detailed analysis of why claimant failed to carry his burden of proof he sustained a mental/mental injury using the analysis in Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). As noted in

the appeal decision, I affirm the deputy commissioners finding claimant failed to carry his burden of proof he sustained a mental/mental injury under Dunlavey.

The record indicates claimant worked as custodian for Des Moines Public Schools. At the time of the incident at issue, claimant worked at Hubbell Elementary School. (Exhibit V, pages 66-76)

At Hubbell, Doug Witt was the Chief Custodian, and claimant worked as First Assistant Custodian. Timothy Schott was the Principal at Hubbell. (Transcript pages 135-138)

In October of 2011, claimant decided to leave 25 pencils on the floor in a classroom after cleaning the room. The record indicates claimant did this to teach students a lesson in cleaning up after themselves. (Exhibit V, pp. 4 and 13)

There were complaints regarding this failure to adequately clean the classroom, and eventually a meeting was held with claimant, Principal Schott and Mr. Witt. Both Principal Schott and Mr. Witt believed claimant was upset and defensive following the meeting. (Ex. V, p. 4) Claimant testified he did not recall much in detail about the meeting, but felt he was being interrogated. (Tr. pp119-120) Mental health records note claimant was easily hurt by and obsessed about negative comments and perceived he was treated disrespectfully at work. (Ex. II, pp. 220- 244)

At claimant's request a second meeting was held with Principal Schott on October 26, 2011. The record indicates this meeting went poorly. Client did not like Principal Schott telling him what to do, and claimant felt Principal Schott was putting his nose into areas that were none of his business. (Ex. V, p 4; Tr. p. 187)

Claimant did not receive a formal reprimand for either meeting. (Tr. p 188)

On November 11, 2011, claimant met with Mr. Witt. Mr. Witt wanted to know why claimant failed to vacuum four rooms. Mr. Witt and claimant then discussed setting up chairs for a music program. (Tr. pp 131-133) At that point, claimant said he "flipped out" and had, what he believed, was a nervous breakdown. (Ex. II, p 33; Tr. p 134) Claimant went to the nurse's office crying and was taken by his family to a hospital emergency department. (Ex. II, p 33)

Claimant eventually returned to work at Hubbell and worked the rest of the school year, the summer and into the fall of 2012. (Tr. p 151)

Claimant had three meetings with supervisors. After the third meeting, he had, what he believes to be, a nervous breakdown. This is the basis of claimant's contention he sustained a mental/mental injury that arose out of and in the course of employment.

As noted, 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).

Non-traumatically caused mental injuries are compensable under Iowa Code section 85.3(1). Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995).

Under Dunlavey, mental injuries caused by work-related stress are compensable if, after demonstrating medical causation, the employee shows the mental injury was caused by work place stress of greater magnitude than the day to day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer. Id. at 857.

Both medical and legal causation must be resolved in claimant's favor before an injury arising out of and in the course of the employment can be established. To establish medical causation, the employee must show that the stresses and tensions arising from the work environment are a proximate cause of the employee's mental difficulties. If the medical causation issue is resolved in favor of the employee, legal causation is examined. Legal causation involves a determination of whether the work stresses and tensions the employee experienced, when viewed objectively and not as the employee perceived them, were of greater magnitude than the day to day mental stresses workers employed in the same or similar jobs experience routinely regardless of their employer.

The employee has the burden to establish the requisite legal causation. Evidence of stresses experienced by workers with similar jobs employed by a different employer is relevant; evidence of the stresses of other workers employed by the same employer in the same or similar jobs will usually be most persuasive and determinative on the issue. Id. at 858.

In Brown v. Quik Trip Corporation, 641 N.W.2d 725 (Iowa 2002), a Quik Trip employee claimed a work-related mental injury after witnessing a shooting, and being involved in a robbery. The court in Brown held that if a mental injury was caused by an event of a sudden, traumatic nature, and was an unexpected cause or unusual stress, the legal test detailed in Dunlavey was not required, and the injury is considered to be compensable. The court noted that unlike Dunlavey, there was a readily identifiable stress factor, i.e., the robbery. Id. at 729. The court, in citing a Wyoming Supreme Court case regarding mental injuries, noted:

> Where a mental injury occurs rapidly and can be readily traced to a specific event,... there is a sufficient badge of reliability to assuage the

> Court's apprehension. Where, however, a mental injury develops gradually and is linked to no particular incident, the risk of groundless claims looms large indeed.

(Brown at 728.(citation omitted))

The court in Brown found a claimant may satisfy the requirement of establishing legal causation by showing the claimant was subject to an event that was sudden, traumatic and unexpected. Id. at 729

See also, Village Credit v Bryant, No. 11-1499, filed May 23, 2012 (Iowa Ct. App) Unpublished, 819 N.W. 2d 427 (Table) (Teller at credit union found to have mental/mental injury after being held up on two occasions by same suspect); Schuchmann v. Department of Transportation, File No 5035676 (App May 20, 2013) (Claimant found to have mental/mental injury after viewing charred body of driver killed in burning car wreck); Valdez v Tass Enterprises, File No. 5027740 (App. May 25, 2011) (Claimant found to have mental/mental injury after being held up at gunpoint and bound by tape); Johannsen v. Midwest Contractors, File No. 5013120 (App. January 30, 2007) (Claimant found to have mental/mental injury after witnessing horrific motor vehicle accident and narrowly escaping injury).

There are problems under Iowa law with claimant's contention he sustained a mental/mental injury because of several meetings with supervisors. The question to be asked is this: Was the situation involving claimant and the three meetings at issue similar to an employee being held up at gun point? (Village Credit v. Bryant; Valdez, File No. 5027740). Is claimant's situation as traumatic as an employee viewing a charred body following a car fire? (Schuchmann, File No. 5035676) Is Mr. claimant's situation similar to a store clerk cleaning up blood after a gunfight and later being held up? (Brown v. Quicktrip)

The obvious answer is no. Iowa cases where a claimant has been found to have a mental/mental injury caused by a sudden, traumatic or unexpected event, are dramatically different from those involving claimant.

All Iowa cases finding a mental/mental injury, under the Brown v. QuikTrip analysis, involve instances where an employee is personally physically threatened, witnessed a gruesome injury or the death of another. That clearly is not the fact pattern in this case.

The record suggests claimant's symptoms were caused, or due in part, to claimant's prior history with chronic mental health problems. (Ex. A-1; A-2; Ex I, pp. 13-34) Claimant had three meetings with supervisors. After the third meeting he broke down crying and was taken by his family to the hospital. Claimant later returned to work and continued to work as a janitor until the fall of 2012. Given these facts, claimant has failed to carry his burden of proof he sustained a mental/mental injury using the analysis

under Brown v. QuikTrip. Given this, claimant has failed to carry his burden of proof he sustained a mental/mental injury that arose out of and in the course of his employment. Claimant's application is denied as to this ground.

Claimant also asserts it was error to not award claimant penalty benefits regarding the December 20, 2012, date of injury. (File No. 5047783). Claimant seeks a penalty for alleged late payment of both healing period and permanent partial disability benefits.

The parties stipulated claimant was due healing period benefits from December 21, 2012 through March 8, 2013.

The record indicates that on December 28, 2012, claimant received a wage payment of $1,376.00. (Ex. V, p. 89) On January 11, 2013, claimant received a wage payment of $1,359.20. (Ex. V., p. 89) On January 25, 2013, claimant received a wage payment of $1,078.40. (Ex. V, p. 89-90)

On January 22, 2013, claimant received a check for over four weeks of healing period benefits for $2,039.12. (Ex. V, pp 46-47) This payment reflected a rate of $446.10 a week. The arbitration decision found claimant's rate to be $443.15 per week. Claimant continued to receive checks for healing period benefits up through March 8, 2013, at the rate of $446.10 per week. (Ex. V, pp. 48-54)

Claimant was paid wages during a substantial part of the time he was out on healing period. Healing period benefits were made current by January 22, 2013. Claimant was overpaid healing period benefits at the rate of $2.95 per week. Given this record, a penalty for the alleged delay of healing period benefits is not appropriate.

Claimant also contends he is due a penalty for an alleged delay in the payment of permanent partial disability benefits. Claimant injured his right upper extremity in December of 2012. Defendants sent claimant a voluntary two percent payment of permanent partial disability benefits on July 2, 2013. (Ex. V, pp. 103-105) On January 30, 2014, Barron Bremner, D.O., found claimant had a two percent permanent impairment to the upper extremity. (Ex. E, pp 2-3)

Claimant was paid a voluntary two percent in permanent partial disability benefits approximately six months before he was rated by Dr. Bremner. Based on this record, a penalty is not appropriate for the alleged delay of payment of permanent partial disability benefits.

Based on the record as detailed above, claimant has failed to carry his burden of proof defendants are liable for penalty for the alleged delay in the payment of benefits. Claimant's application is denied as to this ground.

ORDER

Therefore it is ordered that claimant's application for rehearing is denied.

Signed and filed this 3rd day of August, 2017.

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