FILED
MAR 13 2019
WORKERS' COMPENSATION

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DWIGHT FRAZIER, Claimant, vs. FAREWAY STORES, INC., Employer, And NATIONWIDE MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5060201, 5060202, 5060203, 5060204, 5060205, 5060206, 5060207, 5060208, 5060209, 5062876 REHEARING DECISION

Defendants filed a motion for reconsideration and more specific findings. This motion will be considered an application for rehearing (application). Claimant resists the application. The application is considered.

Defendants contend it was error to find claimant was not a credible witness, and yet find claimant's injury arose out of and in the course of his employment. In the alternative, defendants contend the appeal decision in this case requires more specific findings.

Most of the issues raised by defendant in the application were already raised and addressed in the arbitration and appeal decision. Most of defendants' argument concerns claimant's credibility. I performed a de novo review of the record. However, I give considerable deference to findings of facts that are impacted by credibility findings of the deputy commissioner. The deputy commissioner who presided at hearing has the best opportunity to evaluate the demeanor of the person testifying at hearing. My ability to make findings of facts that are affected by demeanor and credibility cannot be better than that of the deputy commissioner presiding at the hearing.

The arbitration decision indicates the deputy commissioner who heard this matter found claimant was not a credible witness during most of his testimony at hearing. The

bulk of this difficulty concerns claimant's lack of honesty regarding his pre-existing back problems and his current activity. (Arbitration Decision pages 3-5, 9)

Despite claimant's lack of credibility, the deputy commissioner found claimant had an injury that arose out of and in course of employment and was due temporary benefits.

The record and the arbitration decision reflect claimant had pre-existing back problems dating back to 2003 (Arb. Dec. pp 3-5, 9; Joint Exhibit 4, Exhibit C) Despite this history of back problems, claimant continued to work full time from 2003 through 2015. Prior to May 2016, claimant had no prior permanent restrictions for his back or mental health issues. Claimant did have pre-existing low back and mental health issues requiring periodic care. However, there is no evidence in the record claimant had lost time from work or had any loss of earning capacity for those conditions, prior to May of 2016.

Second, every expert who opined about claimant all found he had some type of aggravation as a result of his work injuries.

The arbitration decision found the various opinions of Todd Harbach, M.D. regarding claimant's permanent impairment not convincing. This was because Dr. Harbach issued opinions finding both that claimant did, and did not, have a material aggravation of his pre-existing back condition. (Joint Ex. 5, pp 29, 39, 47, 57-61; Ex. A, pp. 1-2) Because of his contradictory statements, the opinions of Dr. Harbach are found generally not convincing.

Claimant underwent an independent medical evaluation (IME) by David Boarini, M.D. Dr. Boarini opined claimant's injury resulted in only a temporary aggravation of his pre-existing condition when he slipped and fell. However, Dr. Boarini referred only to the May 2016 incident in his report, and made no reference to the July 2016 incident when claimant slipped on a piece of bacon. Dr. Boarini opined there was nothing structurally wrong with claimant's lumbar spine. (Jt. Ex. 12, p.2) However, the MRI of claimant's lumbar spine revealed a L4-5 disc bulge and several annular tears. (Jt. Ex. 5, pp. 12-16) Dr. Boarini's report and opinions cover only two and a half pages. The history detailed in these brief reports is not complete. (Joint Ex. 12) Given these inadequacies, Dr. Boarini's opinions regarding causation and permanency are found not convincing.

Robin Sassman, M.D., also evaluated claimant for an IME. Dr. Sassman's report covers 16 pages. Her history of claimant, including his pre-existing conditions, is detailed. Her analysis of causation is far more detailed than that of Dr. Boarini. Dr.

Sassman's report discusses all three injury dates of May, June and July of 2016. Following her review of the records and detailed exam, she found claimant had a permanent aggravation of a pre-existing low back condition. This opinion was based, in part, on a finding claimant had prior back problems which were intermittent in nature. Dr. Sassman's opinions regarding causation and permanency are more convincing than those of Drs. Harbach and Boarini.

Daniel McGuire, M.D., also performed an IME of claimant. Dr. McGuire is an orthopedic surgeon. Dr. McGuire was aware of claimant's three accidents. He reviewed claimant's MRI and noted it showed an annular tear. Dr. McGuire's' opinions are not as detailed as Dr. Sassman's. However, they are far more detailed than those of Dr. Boarini. Dr. McGuire opined claimant's work incidents resulted in a permanent aggravation of a pre-existing condition. (Jt. Ex. 13) Given the record above, it is found Dr. McGuire's opinions regarding causation and permanency are more convincing that the opinions of Drs. Harbach and Boarini.

Claimant was found to not be a credible witness. This was based in large part on claimant's lack of honesty regarding his pre-existing back and mental health problems. A claimant's lack of credibility as a witness does not automatically preclude that claimant from carrying the burden of proof of a compensable work injury. The deputy who wrote the decision was aware of claimant's pre-existing condition. The experts who offered opinions were aware of claimant's pre-existing condition. Claimant had no permanent impairment, permanent restrictions or loss of earning capacity prior to May of 2016. The opinions of Drs. Harbach and Boarini are found not convincing. The opinions of Drs. Sassman and McGuire are found convincing.

Given this record it is once again found claimant carried his burden of proof he had an injury arising out of and in the course of employment and that he is due temporary benefits as detailed in the arbitration decision. Defendants' application is denied as to this ground.

Second, defendants seem to suggest the appeal decision in this case is deficient as it did not provide detailed specific findings concerning every finding of fact in the arbitration decision and the issues raised by defendants on appeal.

That is an incorrect understanding of the requirements of the appeal process of this Division.

In Bridgestone/Firestone v. Accordino, 561 N.W.2d 60, 62 (Iowa 1997), the Iowa Supreme Court noted: "the commissioner need not discuss *every* evidentiary fact and the basis for its acceptance or rejection so long as the commissioner's analytical

process can be followed on appeal." In Accordino, the commissioner affirmed and adopted the deputy's decision. (Id. at 61) The Iowa Supreme Court concluded the "short form" decision by the commissioner met the requirements of section 17A.16(1). Id. at 62.

In Accordino, the Court indicated:

> We believe the standards have been met by the agency here. No purpose would be served by requiring the commissioner to duplicate the deputy's effort. We do not believe the statute to require it. When the commissioner's affirmance rests on review yielding identical factual findings, and the commissioner's legal analysis mirrors that described by the deputy, no further recitals are necessary to satisfy section 17A.16(1)...

(Id.)

See Dodd v Fleetguard, 759 N.W. 2d 133 (Ia. Ct. App. 2008); Heartland Specialty Foods v Johnson, 731 N.W.2d 397 (IA Ct. App. 2007)

The arbitration decision in this matter was 23 pages long. The appeal decision was seven pages long. The arbitration and appeal decision are clear regarding the findings of facts and the analysis used in determining claimant's entitlement to benefits, and should be easy to follow should this case be appealed.

For the reasons detailed above, defendants' application is denied as to this ground.

ORDER

Therefore it is ordered that defendants' application for rehearing is denied in its entirety.

Signed and filed on this 13th day of March, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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