BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS YEAGER,

Claimant,

vs.

BAKER MECHANICAL, INC.,

Employer,

and

EMC PROPERTY AND CASUALTY COMPANY,

Insurance Carriers,
Defendants.

FILED
MAR 14 2016
WORKERS COMPENSATION

File No. 5050549

ARBITRATION DECISION

Head Note Nos.: 1702; 1802; 1803; 2800

STATEMENT OF THE CASE

Dennis Yeager, claimant, filed a petition in arbitration seeking workers' compensation benefits from Baker Mechanical, Inc. (hereinafter Baker) and its insurer EMC Insurance Company, defendants, as a result of an alleged injury he sustained on December 20, 2013 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on September 24, 2015. The evidence in this case consists of the testimony of claimant and Tracy Haus and claimant's exhibits 1 through 3 and joint exhibits A through O. Both parties submitted briefs, which were considered with the evidence.

ISSUES

Whether claimant sustained an injury on December 20, 2013 which arose out of and in the course of employment;

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability;

Whether the claimant provide timely notice of his injury;

Whether claimant is entitled to payment of medical expenses;

Whether claimant is entitled to alternate medical care;

Whether defendants are entitled to a credit under Iowa Code 85.34(7)(a); and

Assessment of costs.

The stipulations contained in the Hearing Report are accepted and incorporated into this decision as if fully set forth.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Dennis Yeager, claimant, was 56 years old at the time of the arbitration hearing. Mr. Yeager dropped out of high school in the 11th grade. He eventually obtained a GED in 1982. (Transcript, page 75) Claimant has had a number of jobs since high school. The most significant is his 20 years he worked in the factory at Maytag. Maytag closed and he lost his job. Claimant obtained a 2-year degree in HVAC from a community college due to training provided through North American Free Trade Agreement (NAFTA) treaty, after the Maytag shut down. (Tr. p. 75) Claimant was employed by Service Solutions for about 3 years performing HVAC work. After injuring his back and having surgery, claimant left Service Solutions.

Claimant began his work for Baker on December 10, 2013. (Ex. O, p. 16) On December 20, 2013, the claimant and Steve Carroll were assigned a job to replace a heat exchanger on a roof of Billion Auto Center. The claimant was an apprentice HVAC worker and Mr. Carroll was a journeyman HVAC worker. Claimant was told to follow the instructions of Mr. Carroll. Claimant believed that Mr. Carroll was his direct supervisor when they went out for work. (Tr. p. 43) The claimant and Mr. Carroll successfully removed the heat exchange from the roof. They returned to Baker and threw the old heat exchange into a roll-off dumpster. The dumpster's walls were six to seven feet high. It was while claimant was lifting the heat exchange, that he felt pain in his shoulder. Claimant told Mr. Carroll that something happened to his shoulder on that day. Claimant continued his employment with Baker. Claimant testified that he generally did not have sharp pain unless he used his arm in certain ways. He did not inform anyone else at Baker about his injury until his April 7, 2014 email. (Ex. M, p. 140) Claimant testified that as a new employee he did not want to complain and risk his job status with Baker.

Claimant stopped working for Baker on February 26, 2014 due to his back injury and took a personal leave of absence. (Tr. p 110) Claimant went to his personal physician, Bonte Gbemudu, M.D. (a/k/a Dr. Bonte) on February 26, March 3, and March 17, 2014 and did not tell her at any of these visits about any back problems. (Tr.

pp. 112, 113, 116) Claimant testified that he mentioned his shoulder problem during his physical therapy session in March 2014, but was told that they could not do anything about that problem and he should talk to his doctor about the problem. (Tr. 114) Claimant first spoke to Dr. Bonte about his shoulder on March 31, 2014. (Tr. p. 116; Ex. A, p. 8) Dr. Bonte ordered an MRI of the shoulder which took place on April 3, 2014. (Tr. p. 121) After reviewing the MRI, Dr. Bonte referred claimant to Timothy Vinyard, M.D. and an appointment was scheduled for April 9, 2014.

On April 7, 2014, claimant emailed Tracy Haus, at Baker, to inform Baker that he had injured his shoulder on December 20, 2013 and that he was informed that he had a torn rotator cuff and that he had an appointment at Iowa Orthopedic set for April 9, 2014. Claimant wrote in his email that he had told Steve Carroll on the day of his injury, that he had hurt his shoulder. (Ex. M, p. 140) On April 8, 2014, Mr. Haus responded to the email and informed claimant that since he did not inform his supervisor, Ryan English, within 90 days of the injury and his claim was rejected for workers' compensation. (Ex. M, p. 140)

Mr. Haus is the safety director at Baker. He said that employees are told that they need to report any injuries to a supervisor or to him. (Tr. p. 146) He said Ryan English was claimant's supervisor at Baker and that claimant should have reported any injury to Mr. English or himself. (Tr. p. 147) The claimant did not report an injury to Mr. English or Mr. Haus until April 7, 2014. Claimant worked from December 20, 2013 through February 25, 2014 (claimant took personal leave for his back at this time) and never reported an injury according to Mr. Haus. (Tr. p. 149)

Mr. Haus said that claimant worked with Steve Carroll. Mr. Carroll was a journeyman and claimant was his apprentice or helper. (Tr. p. 151) Mr. Haus testified that in December of 2013 Mr. Carroll was not claimant's supervisor. Mr. Carroll was designated as a supervisor on April 25, 2014. (Tr. pp. 152, 153) Mr. Haus said that Mr. Carroll was a co-worker of claimant and that Mr. English told him that he did not tell claimant that Mr. Carroll was his supervisor. (Tr. p. 154)

Mr. Haus spoke to Mr. Carroll, after he received the email from claimant. The claimant told Mr. Carroll that he felt something funny in his shoulder after they put in the heat exchanger. (Tr. p. 156)

Claimant's past medical history is relevant to his claim. Claimant had a right shoulder injury in 2002. He had surgery in 2002 and again in 2003 for his shoulder. Claimant alleged he injured his back while working for Service Solutions on August 3, 2012. A detailed summary of his medical history can be found in the March 7, 2014 independent medical examination (IME) performed by Sunil Bansal, M.D. (Ex. K, pp.124 – 128) Dr. Bansal assigned a 12 percent impairment rating for this injury. At the time of the hearing, claimant's claim for workers' compensation benefits was still pending against Service Solutions. Claimant had back surgery and was off work for

about a year. He returned to work for about three months and then left Service Solutions and started working for Baker.

On February 26, 2014, claimant was examined by Dr. Bonte for his back pain. Her assessment was,

> This is a middle-aged male with a chronic history of low back pain, appearing to have musculoskeletal back pain at this time.

(Ex. A, p. 2)

On March 3, 2014, Dr. Bonte examined claimant concerning his heart, high blood pressure and type 2 diabetes as well as persistent back pain. (Ex. A, p. 4) Dr. Bonte saw him again on March 17, 2014 for additional care. (Ex. A, pp. 6, 7) Claimant did not report any shoulder problems to Dr. Bonte in any of these three visits. On March 31, 2014, claimant informed Dr. Bonte that he was having problems with his right shoulder. Claimant reported to Dr. Bonte that he injured his shoulder when he and a co-worker were throwing something heavy into a dumpster. Claimant reported the shoulder getting progressively worse and when he has to use his upper extremity it can cause more pain. (Ex. A. p. 8) During that examination Dr. Bonte expressed concern about whether claimant could continue his work considering his back pain and surgeries. (Ex. A, p. 9) On July 10, 2015, Dr. Bonte provided checked responses to questions posed by defendants' attorney. (Ex. A, pp. 16 – 18) Dr. Bonte agreed to the statement

> It is my understanding you <u>cannot</u> give an opinion, to a reasonable degree of medical certainty, that Mr. Yeager's right shoulder problems in 2014 and need for treatment for his right shoulder were caused and/or materially aggravated by his alleged December 20, 2013 incident. Is this correct?

(Ex. A, p. 17) Dr. Bonte has not issued any restrictions related to his right shoulder.

On April 9, Dr. Vinyard examined claimant. His notes showed that an MRI showed a "[f]ull-thickness nondistracted tear of the supraspinatus at the insertional footprint." (Ex. B, p. 22) His assessment was "RIGHT shoulder rotator cuff tear. Possible proximal biceps tendinopathy/labral tear." (Ex. B, p. 22) Dr. Vinyard recommended surgery. On April 17, 2014, Dr. Vinyard agreed with a statement written by claimant's counsel paralegal that the incident of lifting the heat exchanger was the cause of his need for right shoulder surgery. (Ex. B, p. 25) Claimant had right shoulder surgery on April 23, 2014. The post-operative diagnosis was

1. Right shoulder biceps tendinopathy/SLAP tear.
2. Partial-thickness articular-sided rotator cuff tear.
3. Shoulder impingement.

(Ex. B, p. 26)

On October 7, 2014, Dr. Vinyard examined claimant. At that time he provided a 20 pound restriction on lifting. He noted claimant was not fully healed. (Ex. B, p. 31) On July 2, 2015, Dr. Vinyard responded to a series of statements by defendants' attorney. Dr. Vinyard agreed to the following statement;

> It is my understanding based on your review of Mr. Yeager's medical records and what you discovered during surgery you do not believe, to any reasonable degree of medical certainty, that the alleged December 20, 2013 incident caused and/or was a material aggravating factor causing Mr. Yeager's April 2013 shoulder complaints, his need for surgery with you on April 23, 2014 and/or any other medical treatment for his right shoulder. Is this correct?

(Ex. B, p. 38)

Dr. Vinyard agreed that claimant's injury was not related to his December 2013 incident, as the surgery did not show a significant rotator cuff tear. (Ex. B, p. 39) Dr. Vinyard agreed that the claimant's need for surgery was not related to the incident of December, 20, 2013 work incident. (Ex. B, p. 40)

CONCLUSIONS OF LAW

The Iowa Supreme Court held that the discovery rule applies to traumatic injuries as well as cumulative injuries. Baker v. Bridgestone, 872 N.W.2d 672, (Iowa 2015). The court stated,

> Whether a work-related injury arises cumulatively because of repetitive trauma or from a singular traumatic event, the agency must apply the discovery rule when it is properly raised and substantial evidence supports it. In cumulative injury cases, the agency applies the rule by deciding "whether the statutory period commenced on [the manifestation] date or whether it commenced upon a later date." Herrera, 633 N.W.2d at 288. In cases alleging injuries arising from a singular event, the agency must apply the rule in deciding whether the limitation period commenced on the date of the singular event or at some later time. If the claimant did not know—or did not have knowledge of facts sufficient to trigger a duty to investigate—"the nature, seriousness[,] and probable compensable character" of their injury, Orr, 298 N.W.2d at 261, the discovery rule tolls the limitation period until the claimant gains that knowledge. The fact an initial accident is traumatic does not necessarily provide immediate notice of seriousness or compensability. (Citation omitted.)

Baker, p. 683.

In this case claimant informed Mr. Carroll he felt something funny after working on the heat exchange on December 20, 2013. Claimant continued to work for Baker and did not miss any time off work due to his shoulder. Claimant had a number of medical appointments after December 20, 2013. It was not until March 31, 2014 that he told his family physician, Dr. Bonte, that his shoulder was hurt and he thought it was work related. Dr. Bonte ordered an MRI and informed claimant that he had a torn rotator cuff. This was in April 2014. This is the date that claimant was made aware of the nature, seriousness, and probable compensable nature of his injury. Claimant provided notice to Baker within a week of this date. I find defendants had timely notice of the injury.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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). "When an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. . . . The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion." Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

In this case, both Dr. Bonte and Dr. Vinyard could not provide an opinion within a reasonable degree of medical certainty that the incident of December 20, 2013 caused a temporary or a permanent work injury. While it is true that Dr. Vinyard initially stated that claimant's right shoulder problem and subsequent shoulder surgery were causally related to the December 20, 2013 work incident, he later changed his opinion. Claimant reasonably testified that he believes that his shoulder injury was caused by the December 20, 2013 lifting incident; however, he does not have medical evidence to support it. Given his prior history of shoulder surgery, I do not find his testimony sufficient to meet his burden of proof. Clearly the evidence showed he had a shoulder injury, but there is not a sufficient quantity or quality of evidence for claimant to meet his burden of proof.

I find that the claimant has failed to prove by a preponderance of the evidence that he had an injury that arose out of and in the course of his employment with Baker.

As claimant has failed to prevail, I find all other issues moot.

ORDER

THEREFORE IT IS ORDERED:

The claimant shall take nothing

Each party shall be responsible for their own costs.

Signed and filed this 14th day of March, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.