BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL CLAY,

Claimant,

vs.

DEE ZEE, INC.,

Employer,

and

ARGENT INSURANCE,

Insurance Carrier,
Defendants.

FILED

SEP 23 2015

WORKERS' COMPENSATION

File No. 5044016

APPEAL

DECISION

Head Note No.: 1402.30

Claimant, Michael Clay, appeals from an arbitration decision filed on July 24, 2014. Responding to the appeal are defendants, Dee Zee, Inc., the employer, and Argent Insurance, its insurer.

In the arbitration decision, the presiding deputy workers' compensation commissioner denied claimant's claim for workers' compensation benefits due to a failure to show by a preponderance of credible evidence that he suffered an injury arising out of and in the course of his employment at Dee Zee, Inc.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision of July 24, 2014, filed in this matter that relate to issues properly raised on intra-agency appeal with the following additional analysis:

Claimant is a 31-year-old factory worker who asserts both a gradual and specific low back injury from lifting boxes at work on or about October 26, 2012. Claimant worked for Dee Zee for about a year before the alleged injury. While a teenager, claimant was convicted of two felony drug charges after completing 11th grade. He was subsequently sent to prison and could not complete high school. He later obtained a GED. Claimant was again sent to prison in 2011 for carrying a firearm as a felon. These convictions do not have any bearing on my appeal decision. The crimes committed do not involve claimant's past record for telling the truth. However, I agree with the presiding deputy's determination not to rely on claimant's testimony at hearing, due to the facts of this case.

Admittedly, there is no medical evidence to show any back problems before working at Dee Zee. However, treatment was not sought for the alleged work injury until after a subsequent non-work-related event.

Claimant asserts he began having back problems at work beginning in August 2012, which gradually worsened until October 25 or 26 when he heard a pop in his back while handling a box at work and yelled, "Ow or Oh, my back." (Transcript pages 22-23) Claimant testified his supervisor heard him and asked what happened and claimant asserts he then told the supervisor it was from lifting the boxes. Claimant testified the supervisor then asked if it was about his mattress at home, and claimant said no. (Id.) Claimant stated the supervisor then gave him a back brace to wear and assigned him to different work duties. (Tr. pp. 24-25)

Cathy Freestone, claimant's line supervisor, testified she did hear claimant yell out, "Oh, my back," but when she asked him about it, claimant told her his back problem was the result of his mattress at home and he needed a new one. Ms. Freestone stated claimant never said it was the result of lifting a box at work. (Tr. pp. 66-67) Ms. Freestone said the boxes only weighed five to ten pounds, but at times they weighed up to 40-100 pounds and two people are then assigned to handle the boxes. (Tr. pp. 61, 67) Ms. Freestone then completed a note about this stating it was due to a non-work incident as reported by claimant, but Ms. Freestone admitted she gave claimant a back brace and claimant was assigned to different duties after the incident. (Tr. p. 67; Exhibit 14, page 135) Ms. Freestone stated claimant did not ask for any medical treatment. (Tr. p. 68) Ms. Freestone also asked claimant about his back and whether he was wearing his brace on October 29, 2012, and claimant said he was wearing the brace. (Ex. 14, p. 135)

Ms. Freestone stated she did not complete an injury report because claimant said his back problems were due to a non-work related incident. (Tr. p. 68) When asked if it ever went through her mind that the work could also be contributing to claimant's back problem, Ms. Freestone responded that claimant was seldom on the job of handling boxes. (Tr. p. 73) Ms. Freestone's note was then forwarded to upper management. Upper management then decided to terminate claimant for lack of performance, but gave claimant the opportunity to resign, which he did. (Tr. pp. 28, 83-84) Robert Wheeler, first shift plant packaging supervisor for the employer, testified that claimant did not mention a back injury during his termination interview. (Tr. p. 85) Ms. Freestone testified that claimant had numerous prior disciplinary issues for various reasons and he performed below average in his job. (Tr. p. 69; Ex. E, pp. 1-6)

Everyone agrees that claimant submitted a two-week notice in mid-October 2012 which stated he was quitting. However, the same day he gave that notice, he requested that the notice be rescinded, and this request apparently was granted by management. (Tr. p. 82) However, management changed their minds later on and decided to terminate claimant. (Tr. pp. 83-84, 87, 94) However, the termination papers were

completed as a voluntary quit after giving a two-week notice that claimant was quitting, not as an involuntary termination. (Ex. 14, p. 138) Claimant filed for unemployment which was contested by the employer which then claimed it was an involuntary termination for cause, but the initial fact finder held that there was insufficient evidence presented to show misconduct and benefits were granted. (Tr. pp. 29-30)

Claimant first sought treatment for his alleged injury from Iowa Lutheran Hospital (ILH) on November 2, 2012. He reported onset of back pain two months earlier, gradually worsening, after lifting heavy objects. The assessment was back strain. Treatment prescribed was pain meds, rest, heat and cold packs, and avoid heavy work. Claimant was told to follow-up with his primary care doctor. (Ex. 1, pp. 1-8)

ILH providers saw claimant again on November 13, 2012. Claimant reported sudden onset of right back pain after hearing a pop in his back while putting air into a tire and now has pain down the right leg to bottom of the right thigh. The assessment at that time was no new mechanism of injury and claimant was given two epidural steroid injections (ESI). (Ex. 1, pp. 9-18)

Due to a lack of insurance, claimant was next seen at Broadlawns Medical Center on November 16, 2012. Claimant reported his pain started at work, from repetitive movement loading boxes and, when he told the employer, he was given a back brace and then fired three days later. Claimant was continued on pain medications and physical therapy was ordered. (Ex. 2)

Claimant's family physician, John Amspaugh, M.D., began treating claimant's back complaints in January 2013 with a history of back pain from work. (Ex. 3, p. 26) Claimant saw Dr. Amspaugh in September 2012 for various complaints, but not back pain. (Ex. D, pp. 3-4) Claimant admitted his back complaints were not serious enough at that time to report to his doctor. (Tr. p. 46) Claimant eventually obtained an MRI in May 2013 which revealed a disc protrusion at L5-S1. This changed Dr. Amspaugh's diagnosis to lumbar radiculopathy. (Ex. 3, p. 38)

On June 10, 2013, at the request of defendants, claimant was evaluated by David Boarini, M.D., a neurosurgeon. Dr. Boarini indicated the MRI revealed a lumbar disc protrusion, but stated this finding did not explain all of claimant's complaints. (Ex. 5, p. 51) Dr. Boarini recommended conservative care with an ESI, physical therapy and non-steroidal medications. (Id.) An ESI was given in June 2013 (Ex. C), but claimant told Dr. Amspaugh the ESI did not help. Dr. Amspaugh then told claimant to follow up with Dr. Boarini and further medications would have to come from a pain doctor. (Id.) Claimant continued treating with his family doctor until January 17, 2014. (Ex. 3, pp. 39-41)

Dr. Boarini performed surgery on claimant's low back at the L5-S1 level on February 13, 2014. (Ex. 5, pp. 58-59) Claimant testified that the surgery has not

helped and he continues to treat with Dr. Boarini who he claims has given him a five-pound lifting restriction. (Tr. 37)

Three physicians opined on causation in this case. Claimant's family doctor opined that despite the November 13 incident while putting air into a tire, the repetitive bending, lifting, and stacking of various boxes at Dee Zee was a substantial contributing factor in the aggravation of claimant's back condition and the November 13, 2012, incident would likely not have occurred but for the back problems claimant was already having due to his work duties. (Ex. 4, pp. 43-44)

Dr. Boarini opines on two occasions in support of defendants' position. He stated claimant's subjective reports of pain were out of proportion with objective findings; claimant's report of radicular symptoms into his left leg were non-anatomic and not consistent with the MRI findings; and the MRI findings are not the direct result of the October 26, 2012, incident at work. (Ex. B, pp. 1-2) Later on, Dr. Boarini opined that claimant did not suffer a cumulative injury from repetitive lifting at work; the initial treatment records at ILH show no radicular symptoms; the treatment at ILH after the November 13, 2012, incident at home shows radicular symptoms for the first time; and the need for ongoing treatment, including surgical treatment after November 13, 2012, is more likely related to the November 13 incident than the incident at work on October 26, 2012. (Ex. B, pp. 5-6)

Robert Broghammer, M.D. performed a review of claimant's medical records at the request of defendants. Dr. Broghammer stated he agrees with Dr. Boarini that the reason for the surgery and the key event associated with the surgery was when claimant bent over to place air in his tires on or about November 13, 2012. (Ex. A, p. 5)

While, I believe the medical evidence could be interpreted to support claimant's claim of a work injury, a fact-finder would have to rely on claimant's testimony to make such a finding. The supervisor admitted claimant alleged back pain while at work. Dr. Boarini's views are a bit equivocal, in that what is or what is not the "more likely" cause is not the issue. The issue is whether the incident at work was a substantial factor, even though it may not be the most significant or primary factor.

What is problematic is that claimant testified at hearing that he did not relate his pain to a bad mattress at home when the incident occurred at work. Two co-workers confirm that claimant said at the time his pain was due to his mattress at home. (Ex. 14, p. 137; Ex. I, p. 6-9) Had claimant admitted that he said that to his supervisor to just avoid reporting a work injury and risk his job or that he was unaware at the time that one could claim a gradual onset injury, he could have been believed. He may have even mistakenly felt it was due to his mattress, not being a medical expert. But claimant's denial of making that statement shows a lack of credibility which causes me to question everything else he asserts. Also, his claim that he worked most of the time lifting heavy boxes at work is refuted by credible testimony of his supervisor. Claimant's lack of credibility combined with the fact that it was only after the non-work event that he

suffered radicular symptoms defeats claimant's claim of injury. In assessing credibility, deference should be given to the presiding deputy. My ability to find the true facts that are affected by witness demeanor and credibility cannot be expected to be superior to that of the deputy who presided at the hearing.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of July 24, 2014, is AFFIRMED in all respects.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 23rd day of September, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
IOWA WORKERS'
COMPENSATION COMMISSIONER

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