BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LEWIS T. SMALL, Claimant, vs. CRINC, L.C., Employer, and EMCASCO INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED SEP 18 2015 WORKERS' COMPENSATION File No. 5041307 APPEAL DECISION Head Note Nos.: 1402.20; 2401; 2502

Claimant, Lewis Small, appeals from an arbitration decision filed on June 26, 2014. The case was heard on February 25, 2014, and it was considered fully submitted on April 29, 2014, in front of the deputy workers' compensation commissioner.

In the arbitration decision, the deputy commissioner found that claimant failed to prove he sustained an injury as alleged on or about November 1, 2010, which arose out of and in the course of his employment with defendant-employer, CRINC, L.C. The deputy commissioner also found that claimant failed to provide CRINC with timely notice of the alleged injury under Iowa Code section 85.23.

Claimant asserts on appeal that the deputy commissioner erred in determining he failed to prove he sustained a work-related injury as alleged on November 1, 2010. Claimant also asserts the deputy commissioner erred in determining claimant's claim for benefits is barred for lack of timely notice under Iowa Code section 85.23. Defendants assert that the decision of the deputy commissioner should be affirmed.

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 June 26, 2014, filed in this matter that relate to issues properly raised on intra-agency appeal with the following additional analysis:

Claimant contends that on or about November 1, 2010, he injured his back while shoveling glass and loading boxes at CRINC. Claimant testified he reported the injury

to his supervisor, Robert Beerbower. Claimant testified he took a few days off work and when he returned he worked slower than before. (Transcript, pages 44-46)

Josh Parmenter testified he worked with claimant. (Tr. p. 83) Mr. Parmenter said that in either late fall or early winter he saw claimant working hunched over and claimant told him his back was "out." (Tr. pp.85-86) Mr. Parmenter said he believed Mr. Beerbower knew claimant was having problems with his back. (Tr. p. 87)

Claimant's brother, Charles Odgen, testified he recalls that around Halloween of 2010 claimant indicated he injured his back at work and said he reported the injury. (Tr. p. 97)

Mr. Beerbower testified during his deposition that on March 17, 2010, claimant told him his back hurt. (Exhibit 20, p. 141) Mr. Beerbower stated claimant told him it was from a prior work injury which occurred before he came to CRINC and it was not related to his employment at CRINC. (Ex. 20, pp. 141, 151) Mr. Beerbower stated claimant told him on March 17, 2010, that working at CRINC occasionally made his back stiff. (Ex. 20, p. 141) Mr. Beerbower stated claimant never told him he hurt his back while working at CRINC or that his work at CRINC aggravated a pre-existing injury. (Ex. 20, p. 148)

Exhibit Q indicates that CRINC had no record of claimant's injury at the time it allegedly occurred and was not made aware of claimant's alleged injury until notice of the injury was received from claimant's attorney in April 2012. (Ex. Q, pp. 86-92)

Claimant did not receive medical care for his back until September 11, 2011, when he went to the ER at Mercy Medical Center in Des Moines. (Tr. p. 52, Ex. 1 and Ex. C) This was approximately eleven months after the alleged date of injury, and approximately six months after claimant left CRINC. Claimant testified that the delay in treatment was caused by his own stubbornness and the fact he had no insurance. (Tr. p. 52) The history contained in the ER record of September 11, 2011, was that claimant experienced abdominal pain and back pain when he helped a friend work on a house. (Ex. C, p. 17)

Claimant testified he got spasms in his abdomen and in his back after he climbed onto a roof to help a cousin do shingling. Claimant said he attempted to lay some shingles and quit after 15 minutes. (Tr. pp. 52-53)

Later medical records indicate claimant injured his back at CRINC. (Ex. 2, p. 6; Ex. 3, p. 14)

On May 1, 2012, claimant received treatment for his back at Mercy South Physical Therapy. Claimant indicated his back was injured at work, but he did not file a workers' compensation claim as he thought his back would heal on its own. (Ex. 4, p. 28)

On June 28, 2012, claimant sought treatment for back pain at Des Moines University Clinic. Records indicate claimant stated the injury happened when shoveling glass. Claimant indicated he did not report the injury at the time and soon after took unemployment insurance. (Ex. B, p. 8)

Three experts have opined regarding causation of claimant's back condition. William R. Boulden, M.D., orthopaedic surgeon, saw claimant once for an IME on April 30, 2013. Dr. Boulden found claimant's condition was chronic. He also opined claimant's pain, particularly his radicular symptoms, did not come from the L2-3 level, the area of the small disc protrusion, but were caused further down at the L4-S1 levels. (Ex. A)

Robin Sassman, M.D., also evaluated claimant once for an IME on August 27, 2013. Dr. Sassman found claimant's injury was caused by repetitious work at CRINC. (Ex. 13, p. 101) However, Dr. Sassman did not address, or take into consideration, the initial medical visit at Mercy ER on September 11, 2011, which indicates claimant injured his back working on a friend's home. Dr. Sassman's report also does not take into consideration the fact claimant did not seek any medical care for approximately one year after the alleged date of injury. Because of these issues, I agree with the deputy commissioner's finding that the opinions of Dr. Sassman regarding causation are not convincing.

Robert Hirschl, M.D., evaluated claimant on January 7, 2013, for a surgical consultation. Dr. Hirschl also opined claimant's job at CRINC aggravated his underlying back condition. (Ex. 14, p. 106) He also opined claimant's back pain was due to an L2-3 spondylolisthesis and that claimant's complaints of leg pain are unexplained by the MRI findings. (Ex. 14, p. 105) However, Dr. Hirschl also noted claimant's incident of helping a friend on September 11, 2011, may have aggravated claimant's back pain, rather than work. (Ex. D, p. 19)

Claimant testified he hurt his back at work and notified his supervisor. A co-worker testified he saw claimant hunched over. His supervisor and the employer have no record of a reported work injury occurring on or about November 1, 2010. Claimant did not seek medical care for his alleged back injury until September 11, 2011, or nearly a year after the date of the alleged injury. Medical records from that visit suggest claimant injured himself shingling a roof. Claimant said he delayed treatment for so long because he was stubborn and because he did not have insurance. However, there is no evidence in the record claimant had insurance on September 11, 2011, when he first sought treatment, or after that, and yet he continued to receive treatment. Claimant's alleged lack of insurance did not keep him from seeking care on September 11, 2011, or afterward. I find that claimant's testimony that his alleged lack of insurance kept him from seeking medical care before September of 2011 is not credible.

Dr. Boulden opined claimant's work did not cause his injury. The opinions of Dr. Sassman regarding causation are not convincing because she apparently did not have the complete medical history. Dr. Hirschl opined claimant's work activities aggravated

his back condition, but also noted the back problems could have been caused by claimant helping a friend work on a roof. I therefore find that Dr. Boulden's opinion regarding the causation of claimant's back condition should be given greater weight.

I agree with the deputy commissioner's finding that because of the inconsistencies in the record regarding a potential intervening cause, and because of the long lapse between when the alleged injury allegedly occurred and when claimant first sought medical care, and for the other reasons detailed above, claimant failed to carry his burden of proof that his injury arose out of and in the course of his employment at CRINC or that he has any functional impairment rating that can be related to the alleged work injury

With regard to the issue of whether claimant provided notice of his alleged injury to CRINC within 90 days as required by Iowa Code section 85.23, there is no dispute claimant's attorney provided written notice to CRINC on April 24, 2012, that claimant allegedly was injured in November 2010. (Ex. 23, p. 176) Although the notice refers to a November 12, 2010, injury, this is clearly more than 90 days after the alleged injury.

The timeliness of the notice of injury issue largely involves claimant's credibility. Although the deputy commissioner made no specific findings as to claimant's lack of credibility, such a finding was implied as claimant testified he gave notice of the injury to his supervisor when it happened and filled out an injury report signed by both himself and the supervisor. No such injury report appears in the evidence.

Robert Beerbower, claimant's supervisor, who testified by deposition, stated he never received any report from claimant that he was ever injured at work. However, Mr. Beerbower did admit that in March 2010, claimant told him his back was sore requesting other duty. Mr. Beerbower then temporarily assigned claimant to lighter duty. Also at that time, Mr. Beerbower had claimant sign a document declining medical care. The supervisor said claimant told him he injured or aggravated a prior condition of his back while working for a previous employer and not at CRINC. Mr. Beerbower said he asked claimant to sign the form as evidence that he was not injured at CRINC. The form (Ex. Q p. 92) states that claimant is declining medical treatment for an injury on March 2, 2010, and that claimant understands that the employer is not responsible for any medical expenses unless approved by CRINC's assigned treating physician. Consequently, the assertion by the supervisor that he never received a report of injury from claimant is not correct. The supervisor stated that he did receive a second complaint of a sore back and a request for lighter duty, but again he denies any report of an injury. He did not recall when this occurred. (Ex. 20, pp. 26-27) Despite all this, the only credible evidence shows CRINC did not receive notice of an alleged November 2010 injury within 90 days as required by Iowa Code section 85.23. Not long after the alleged injury, claimant took a voluntary layoff and received unemployment compensation. He testified that he then began to look for other work.

The discovery rule was not asserted by claimant because he contends he did provide timely oral notice of the alleged injury when it allegedly occurred. He testified in

his deposition that the back injury did not begin to impact his work until about three weeks after it occurred. (Ex. N pp. 74-75) Claimant supports his testimony by testimony from a co-worker and his brother. The co-worker testified that he observed claimant hunched over in late fall or early winter and was given different duties by his supervisor. He believed the supervisor was aware of claimant's back injury. (Ex. 17) Claimant's brother testified he was told by claimant sometime around Halloween that he hurt his back at work and completed an accident report. (Ex. 18)

I agree with the presiding deputy's reliance upon objective medical records which show claimant did not timely report his alleged November 1, 2012, injury. Jenilee Foster, PT, a physical therapist who evaluated claimant in May 2012, noted the following:

> . . . Pt. states he did not file a work comp claim when injury first started as he felt it would work itself out . . .

(Ex. 4 p. 28)

Melita Schuster, D.O., treating physician who evaluated claimant on June 28, 2012, noted the following:

> . . . Pt. is a new patient today. He is here b/c he was seeing Dr. McCoy at Mercy South for his PCP but was told he had to come here now b/c my name is on his card.
>
> Pt. has chronic back pain since 2010. He was working for glass company and was shoveling crushed glass. He felt pain in his back at one point, but kept going. A few days later, he had a lot of pain. He did not report it to BWC at that time and then soon after that he took long term unemployment for 1 year from his company . . .

(Ex. B, p. 8)

The record does not show what Dr. Schuster meant by "BWC" since it is not the initials of the employer or insurer. Possibly it means "Bureau of Workers' Compensation," but that is merely a guess. However, a statement by claimant that he did not report the injury at the time and then took a voluntary layoff is significant by itself, particularly in light of all of the other inconsistencies in the record.

Finally, the presiding deputy correctly points out that claimant did not seek medical care for his alleged back injury of November 1, 2010, until September 2011, over 10 months later, and then only after helping a friend install roof shingles. (Ex. C, pp. 16-17) As stated above, I also do not find convincing claimant's reasons for delaying treatment: i.e., his claimed stubbornness and his alleged lack of medical insurance. (Tr. p. 52) The deputy correctly noted claimant received continuous

treatment after September 2011 and there was no showing of a change in his alleged insurance situation.

The only remaining issue is the award to claimant of the cost of Dr. Sassman's IME. Despite receiving this award in the arbitration decision, the issue was raised on appeal by claimant, not defendants. In making this award, the presiding deputy relied upon Dodd v. Fleetguard, Inc, 759 N.W.2d 133, 140 (Iowa App. 2008) There is an issue in light of dicta in a later Court of Appeals decision which states that an admission or adjudication of liability is necessary before an IME under 85.39 can be awarded based on the Supreme Court's holding in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 184 (Iowa 1980). City of Davenport v. Newcomb, 820 N.W. 2d 882, 892 (Iowa App. 2012) In Newcomb, the issue was whether an admission or adjudication of liability was necessary before employers can utilize Iowa Code section 85.39 to force claimant to attend medical examinations.

However, defendants did not cross appeal. Defendants only response to that issue in their appeal brief was to simply state they paid for the IME. I consider this issue moot with that response.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of June 26, 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 18th day of September, 2015.

Joseph S Cortese II

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IOWA WORKERS'
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