BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SEENA IRVINE, Claimant, vs. B & D SERVICES, INC., Employer, and UNITED WISCONSIN INSURANCE, COMPANY, Insurance Carrier, Defendants.	File No. 5054750 ARBITRATION DECISION Head Note Nos.: 1402.30; 2502

FILED
FEB 27 2017
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant, Seena Irvine, filed a petition in arbitration seeking workers' compensation benefits from B & D Services, Inc., (B & D), employer, and United Wisconsin Insurance Company, insurer, both as defendants. This matter was heard in Cedar Rapids, Iowa, on November 14, 2016 with a final submission date of January 9, 2017.

At hearing, defendants objected to submission of claimant's exhibits 6 and 7 as untimely served. Claimant was given one week from the time of hearing to submit evidence of timely service. By e-mail dated November 17, 2016, claimant showed timely notice of service of records found in exhibit 6 and 7. In a November 22, 2016 ruling, defendants' objections were overruled and exhibits 6 and 7 were made a part of the record.

Claimant objected to exhibit Q, records from Philip Ascheman, Ph.D., as being untimely served under the rules. Defendants were given one week from hearing to show timely service of the records had been made.

By e-mail dated November 18, 2016, defendants counsel indicated records from Dr. Ascheman were not timely served, but requested exhibit Q be allowed into the record given the unique circumstances involved in this case.

As noted in the November 22, 2016 Order, defendants did attempt to have claimant evaluated by Dr. Ascheman. Because of claimant's mental and emotional condition at hearing, defendants were not able to fully cross examine claimant. Cross-

examination stopped approximately after 15 minutes at hearing. Based on the unique circumstances in this case, defendants exhibit Q was admitted into the record.

To offset any prejudice occurring by the submission of exhibit Q, claimant was given an opportunity to file rebuttal to exhibit Q. That rebuttal was sent by e-mail on December 19, 2016 and marked as exhibit 18 and is made a part of this record now.

The record in this case consists of claimant's exhibits 1 through 18, defendants exhibits A through Q, and the testimony of claimant, Malina Tegtmeier, Megan Irvine, and Missy Latwesen.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether the injury is a cause of temporary disability and the extent of claimant's entitlement to temporary disability.

3. Whether there is a causal connection between the injury and the claimed medical expenses.

4. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

5. Costs.

Neither party identified costs as an issue in the hearing report or at hearing. (Transcript pages 6-7) However, as both parties identified costs as an issue, to some extent, in post hearing briefs, costs will be addressed as an issue in dispute in this decision.

FINDINGS OF FACT

Claimant was 49 years old at the time of hearing. Claimant graduated from high school. Claimant received a CNA certification after high school, but at the time of the hearing it had expired.

Claimant has worked as a day care provider and a homemaker.

Claimant began employment with B & D in 2005 as a program assistant. Claimant testified her job required her to provide in-home care to clients with physical and mental disabilities. Claimant's job duties included, but were not limited to, taking clients grocery shopping, taking clients on appointments, and assisting clients with activities of daily living. (Exhibit 1, pages 1-3; Exhibit D, pp. 3-4)

On July 9, 2014, claimant was working an overnight shift in the home of two residents. (Ex. 10, p. 10) One of the residents, a client named "Sean", got into an

argument and eventually exited the back door of the home. The resident went towards the train tracks behind the home. (Ex. D, p. 95)

Claimant followed the resident out the back door. The resident eventually laid on train tracks and told claimant he wanted the train to run over him. (Ex. 10, p. 7)

Claimant tried to personally get Sean off the tracks, but was unsuccessful. Claimant could not physically move the client as he weighed approximately 250 pounds. (Ex. 1, p. 4; Ex. 10, pp. 7, 10)

Claimant testified in deposition that a coworker had responded to similar behavior by the same client, when Sean had laid down in a road. (Ex. D, p. 9; Depo. pp. 35, 95)

Claimant testified B & D had a written behavior plan for staff addressing how to deal with "Sean" when he laid down in a road. Claimant indicated that prior to the July 9, 2014 incident, she had received the behavior plan. (Ex. D, p. 9; Depo. pp. 35-98) Claimant testified she was aware a coworker had to respond to similar behavior by Sean. (Ex. D, p. 9; Depo. pp. 35, 95) She said she was aware the client had laid down in the road previously. (Ex. D, p. 9; Depo. pp. 35, 95; Tr. p. 24) Claimant testified she was aware police had been called a number of times at the home when Sean had laid in the road on prior occasions. (Tr. p. 37)

Claimant testified she had worked with Sean for nearly a year. She testified Sean was a behavior problem. The record indicates Sean had hit at claimant and had cursed her on prior occasions. (Ex. H, pp. 13, 14) The records indicate on one incident involving claimant, Sean had laid down in a store and refused to get up. (Ex. H, pp. 7-10)

A copy of the behavior plan for the client named Sean is found at Exhibit H, pages 20-25. The plan indicates that "Sean" had laid down in roads, had thrown items, and had walked towards the railroad tracks. (Ex. H, p. 20) Staff was informed and told to prevent Sean from getting on tracks and call for police assistance if necessary. (Ex. H, pp. 22-25)

Claimant testified when she was unable to get the client off the railroad tracks, she called 911. Claimant testified she was fearful a train would come while the client was on the tracks.

Claimant testified when police arrived at the railroad tracks, they were rude to her. Claimant said police told her they could not keep coming back to deal with the client that was lying on the railroad tracks. (Ex. D, p. 28) Claimant said police were eventually able to get the client off the tracks. She said the client threw rocks at the police and eventually laid down in front of the police car. Claimant said a coworker, from another group home, Chuck Lunning, also tried to get Sean off the tracks. (Ex. D, Depo. p. 28; Ex. H, p. 11)

Claimant testified she did not hear or see a train during the period of time when Sean was on the tracks. (Ex. D, Depo. p. 39) She testified in hearing that she was worried that Sean would get struck by a train.

After Sean returned home, claimant finished her 24-hour shift until the morning. (Ex. D, Depo. p. 24) After the incident, claimant called her supervisor and told her that she would be unable to work her next shift due to stress. (Ex. D, Depo. p. 41)

The incident occurred on a Wednesday. Claimant said she did not get much sleep over the next two nights and she continued to have what she described as flashbacks of the incident. (Ex. D, Depo. p. 42)

Claimant testified that, on the Friday following the incident, she drove around. Claimant said she was crying and did not know what to do. Claimant said she was texting people and she wanted to sleep and not wake up.

Claimant checked herself in a hotel room in Evansdale. This is approximately 15 miles from claimant's home.

Malina Tegtmeier testified she is claimant's sister-in-law. She testified she has known claimant for approximately 30 years and considers herself very close to claimant. Ms. Tegtmeier testified that on the Friday after claimant's incident, she began receiving texts from claimant that claimant needed help. She testified she thought the texts did not make sense. Exhibit 9, pages 1-2 are copies of texts sent by claimant at that time. Ms. Tegtmeier testified that claimant texted her and asked Ms. Tegtmeier and a friend named Kendall, to come and find claimant. Ms. Tegtmeier testified she found the hotel where claimant was at. The hotel room claimant was in was dark and claimant was in her underwear. Claimant told Ms. Tegtmeier she was very upset about an incident involving railroad tracks. Ms. Tegtmeier prayed with claimant and attempted to calm claimant down. She eventually left the hotel room.

Megan Irvine testified she is claimant's daughter. At the time of hearing, Ms. Irvine worked for B & D as a program assistant. She said she worked for B & D for approximately four years and worked with children. She testified that the entire time she worked for B & D, she never had a client who threatened to kill themselves.

Ms. Irvine testified that on the Friday night after the incident, she tried to contact her mother, but was unable to locate her. She said she began getting worried about her mother. She eventually located her mother at the hotel in Evansdale by using a location app found on claimant's iPad.

Ms. Irvine said she contacted her mother and was told by her mother that she did not want to see her. Ms. Irvine called Evansdale police to do a safety check on claimant.

A police officer was sent to claimant's room to check on claimant. Claimant testified this upset her even more given her negative experience with police two days prior.

The next day, Saturday, July 12, 2014, claimant spoke with her husband and he convinced her to seek treatment at an emergency room at Covenant Medical Center in Waterloo, Iowa.

On July 12, 2014, claimant was evaluated in the emergency department at Covenant Medical Center. Claimant was anxious and depressed as one of her clients attempted to commit suicide. Claimant did not feel "safe" for her client. One of the sheriffs had treated claimant poorly and acted like nothing had happened. The sheriff told claimant that the sheriff's department would not keep coming to the group home. Claimant indicated suicidal thoughts. Claimant was given Ativan and counseled regarding admission to the Crisis Center. Claimant did not want to be admitted to the Crisis Center. Claimant threatened to kill herself. A magistrate was contacted and claimant was eventually involuntarily admitted to the Crisis Center at Covenant Hospital. Claimant was assessed as having severe depression and suicidal thoughts. (Ex. 3, pp. 1-5)

On July 13, 2014, claimant was evaluated by Mohammed Iqbal, M.D. Claimant wanted the sheriff and staff from her employer to acknowledge that what she did was right so she could feel better. Claimant was told this was not possible. Claimant became hysterical. Claimant was assessed as having acute stress disorder. Claimant was given Risperdal. (Ex. 3, pp. 6-7)

Claimant was ultimately discharged from Covenant on July 15, 2014. (Ex. 3, p. 9; Ex. K, pp. 12-13)

On July 17, 2014, claimant was seen by a counselor at Keys to Living. Claimant was sleep deprived after the incident where a client laid on railroad tracks. The police and her supervisor were rude to her. Triggers that set off claimant were police and rude people. (Ex. 6, p. 4)

On July 18, 2014, claimant was seen by Sarah Kane, ARNP, at the People's Community Health Clinic. Claimant asked for staff to help fill out the FMLA paperwork and for medication to sleep. Claimant had a bad experience when a client laid down on the railroad tracks. The experience was made worse as emergency personnel threatened not to respond to future situations. Claimant found rude people triggered her anxiety reactions. Claimant was assessed as having post-traumatic stress disorder (PTSD) and treated with medications. (Ex. 5, pp. 1-3)

On August 7, 2014, claimant was evaluated at the emergency room at Advocate Condell Medical Center in Libertyville, Illinois. Claimant was on a roller coaster at an amusement park and had lost consciousness for 5-10 minutes. Claimant was assessed as having a probable vasovagal syncope. Claimant's husband indicated claimant's anxiety was uncontrolled since an episode, one month prior, when a client of claimant's had committed suicide. (Ex. 4, pp. 1-5; Ex. N, p. 8)

Claimant was evaluated at the University of Iowa Hospitals and Clinics (UIHC), on August 9, 2014 for tremors. Claimant thought it was due to taking a medication. Claimant was distracted and the tremors would stop. Claimant's tremors returned when distractions were terminated. Claimant's symptoms were thought to be related to acts of anxiety and pseudo seizure. Claimant was later discharged from care. (Ex. 8, pp. 1-8)

On September 25, 2014, claimant was evaluated by Nurse Practitioner Kane at People's Community Health Center for fracture of her foot. Claimant asked for and was given a slip to return to work. Claimant was released to return to work on August 1, 2014. (Ex. 5, pp. 12-14)

In an October 21, 2014 letter, Debra Lacock, MSW, LISW, indicated she was claimant's psychotherapist and had been working with claimant regarding her PTSD syndrome. Ms. Lacock indicated claimant would need help writing notes about the incident and that writing notes by herself would "retraumatize" any increased symptoms of PTSD. (Ex. 1, p. 12)

On October 29, 2014, defendant insurer informed claimant it would not pay benefits for the July 9, 2014 incident as an investigation determined the incident of July 9, 2014, did not meet the standards for a stress claim. (Ex. 1, p. 13)

Claimant returned to Nurse Practitioner Kane on December 31, 2014. Claimant had worsening anxiety. She said she had more problems with PTSD at work as a client was purposely doing things to trigger her PTSD. Claimant was treated with medications. (Ex. 5, pp. 15-19)

On February 6, 2015, claimant was seen at People's Community Health Clinic by Janet Eimers, MSSA, LISW. Claimant indicated she had worked with a client who had committed suicide by getting run over by a train. Claimant began having PTSD symptoms shortly after. Claimant was to continue with out-patient counseling. (Ex. J, pp. 1-2)

Notes from B & D indicate that on February 11, 2015 and February 12, 2015 claimant was reminded to turn in her progress notes from the July 9, 2014 incident. Claimant was told that she would have until February 20, 2015 to turn in the notes.

In a February 23, 2015 note, Ms. Lacock noted claimant was assessed as having PTSD. Claimant's symptoms began when a client laid down on the railroad tracks. Claimant indicated she was further traumatized by lack of staff support. Claimant indicated her anxiety increased when hearing a train whistle. (Ex. 6, p. 17)

On June 26, 2015, claimant was terminated from B & D due to absenteeism and poor attendance. (Ex. 1, p. 17) Missy Latwesen testified she is the director of human resources for B & D. In that capacity, she is familiar with claimant and the July 2014 work incident. Ms. Latwesen testified claimant was terminated for excessive absenteeism and also because claimant's absenteeism resulted in claimant not

attending a mandatory reporter training class. (Ex. G, p. 1) Ms. Latwesen testified that other B & D employees had to deal with the client "Sean", had to deal with his behaviors and with Sean laying in the road.

Ms. Latwesen testified that while claimant was on leave, the client, Sean, was discharged from B & D, as B & D determined Sean needed to be in a more restrictive environment.

Ms. Latwesen testified claimant was given FMLA leave, but eventually exhausted that leave.

In a September 9, 2015 letter, Ms. Lacock indicated she had been counseling claimant since July 17, 2014 and had seen claimant approximately 14 times. Claimant's PTSD symptoms began when a client laid on train tracks. Claimant was further traumatized by lack of support from her supervisor. Ms. Lacock indicated claimant would need ongoing therapy for an unknown amount of time. (Ex. 6, p. 17)

Notes from Ms. Lacock, dated March 10, 2016 indicated claimant felt suicidal and that she took sleeping pills. Claimant was taken to the emergency room. (Ex. 6, p. 16)

In a March 17, 2016 note, Ms. Lacock noted that at a March 10, 2016 session, claimant reported suicidal ideation. Claimant had taken five sleeping pills. Ms. Lacock indicated claimant had additional stress as various people were requesting mental and health information concerning claimant's litigation. (Ex. 6, p. 18)

On May 13, 2016, claimant was seen at Unity Point Psychiatric Clinic for depression and taking pills to make her sleep. Claimant was anxious and agitated. Claimant had panic attack-like symptoms from constantly thinking of a client laying on railroad tracks. Claimant was assessed as having PTSD, anxiety, and stress from her job and pending litigation. Diagnostic and treatment issues were discussed. Claimant was told to contact medical care providers when her problems arose. (Ex. 7, pp. 1-4)

In a June 22, 2016 report, Mark Mittauer, M.D., a psychiatrist, gave his opinions of claimant following an independent medical evaluation (IME). Claimant indicated her symptoms began when a client from a home she worked at laid on the railroad tracks. Claimant said she was concerned as someone had committed suicide on the same tracks one to two weeks prior. (Ex. 2, pp. 1-11) Claimant told Dr. Mittauer a 911 operator was rude to her and that a sheriff yelled at her. (Ex. 2, p. 11)

Dr. Mittauer opined claimant had classic PTSD symptoms. Claimant said she had periodic suicidal thoughts. Claimant had panic attacks seeing former coworkers, seeing or hearing trains, or becoming involved with rude people. (Ex. 2, pp. 11-12)

Dr. Mittauer assessed claimant as having PTSD and major depressive disorder. He opined claimant sustained these two health conditions as a result of the July 9, 2014 incident. He opined that even if claimant did receive optimal psychiatric and psychological treatment, it was unlikely her condition would improve. He opined

claimant's chest pains, shaking, and other symptoms were related to the July 9, 2014 incident. (Ex. 2, p. 11)

Dr. Mittauer opined B & D's requirements that claimant complete her client notes regarding the July 9, 2014 incident aggravated her condition. He opined the July 9, 2014 incident impaired claimant's activities of daily living, her social functioning, and her concentration. (Ex. 2, p. 15)

Dr. Mittauer recommended claimant not work at a job involving long hours or working at a rapid pace. He recommended against claimant working in an environment where she needed to perform customer service. He also recommended claimant try a course of anti-depressants. (Ex. 2, pp. 15-17)

On August 12, 2016, claimant was seen at Unity Point for follow up for PTSD. Claimant was depressed when thinking of how she was treated at work. No medical changes were made. Claimant received counseling. (Ex. 7, p. 5)

In an August 27, 2016 report, Philip Ascheman, Ph.D., gave his opinions of claimant's condition following a records review. Records indicated Dr. Ascheman had initially planned to evaluate claimant in person. Claimant's husband insisted on being present during the exam. Dr. Ascheman told claimant and her husband he did not allow third parties to be present during the evaluation and claimant and her husband left. (Ex. Q, pp. 1-2)

Dr. Ascheman did not believe claimant met Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5) criteria for PTSD or for a major depressive disorder. This was largely based on the opinion that the event, where claimant's client laid on train tracks, did not expose claimant to actual or threatened death, serious injury, or sexual violence. (Ex. Q, p. 8)

DSM-5 indicates the diagnostic criteria for post-traumatic stress disorders require exposure to actual or threatened death, serious injury, or sexual violence. (DSM-5, p. 271)

Dr. Ascheman opined the exposure to the claimed trauma was no greater than would be reasonably expected for other individuals in claimant's employment area and workplace. He also opined claimant did not require further treatment and that she should have no permanent or temporary limitations. (Ex. Q, pp. 8-10)

In an October 16, 2016 letter, written by claimant's counsel, Raja Akbar, M.D., indicated he agreed claimant had PTSD and major depressive disorder caused by the July 9, 2014 incident. He agreed the July 9, 2014 incident resulted in a mental injury and was the cause of claimant's pain, shaking, and other symptoms. Dr. Akbar agreed with Dr. Mittauer that the July 9, 2014 incident led to an impairment of claimant's activities of daily living, social functioning and adaptive abilities. He agreed with Dr. Mittauer's restrictions. He believed that if claimant was allowed to continue treatment, claimant's condition would improve. (Ex. 7, pp. 8-10)

In a December 9, 2016 letter Dr. Mittauer reiterated that claimant met criteria for PTSD and a major depressive disorder. He argued that claimant's client, laying down on railroad tracks, posed a significant risk of serious injury or death if the client had been struck by a train. He believed that even though no train was present, the situation should still be considered a "threatened death". (Ex. 18, p. 2)

Claimant testified at hearing that trains, train whistles, rude people, and police officers are triggers for her anxiety and other symptoms. She said that when she sees a train, she has chest pain and covers her eyes. She finds it difficult to breathe when seeing trains. She said she tries to avoid rude people. She testified in deposition that no doctor had given her any work restrictions. (Ex. D, p. 4, Depo. p. 16)

At the time of hearing, claimant was working by helping an older couple with their activities of daily living. Claimant testified she stayed at the couple's home six to seven times every two weeks. (Ex. D, p. 16; Depo. p. 63-64)

Megan Irvine testified that since the July 2014 incident, her mother has changed. She says that her mother cannot stand being in stores, and cannot stand hearing the sounds of trains.

Claimant testified in deposition that following her termination from B & D, she received unemployment insurance benefits. She indicated in deposition she only applied for work during the period she was receiving unemployment insurance benefits. She testified in deposition that she stopped looking for work once her unemployment benefits expired. (Ex. D, p. 6; Depo. 23; Ex. E, p. 3)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained an injury that arose out of and in the course of employment. Claimant alleges she sustained a mental/mental injury caused by the work related incident

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

Nontraumatically 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).

Mental injury cases that do not include a physical injury are referred to as "mental/mental" injuries. "Mental /mental" injuries require a somewhat higher standard to show causation than physical injury or a "physical/mental" injury. The Iowa Supreme Court has held this difference does not violate equal protection. Asmus v. Waterloo Community School Dist., 722 N.W.2d 653 (Iowa, 2006).

Under Dunlavey, mental injuries caused by work-related stress are compensable if, after demonstrating medical causation, the employee shows that 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 Corp., 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 Dunlavy, 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).

A number of states have compensated PTSD as an accidental injury. Generally, these cases involve PTSD that resulted in proximity to one or two traumatic events. *See, e.g.,* Belcher v T. Rowe Price Found, Inc., 77 N.Y. 2d 79, 564 N.Y.S. 2d 704, 565 N.E. 2d 1255 (1990) (overruling appellate decision that denied benefits for secretary suffering from PTSD after witnessing construction accident); Wood v. Laidlaw Transit, Inc., 77 *N.Y.*2d 79, 564 *N.Y.S.*2d 704, 565 *N.E.*2d 1255 (1990) (awarding accident benefits to school bus driver who suffered PTSD after witnessing gruesome car accident); Jordan v. Cent. Piedmont Cmty. Coll., 124 *N.C.App.* 112, 476 *S.E.*2d 410 (N.C.Ct.App.1996) (permitting prison instructor to bring accidental injury claim for PTSD arising from witnessing prison brawl); Bailey v. American Gen. Ins. Co., 154 *Tex.* 430, 279 *S.W.*2d 315 (1955) (permitting compensation for claimant who witnessed co-worker plummet eight stories off scaffolding to his death); Daniel Const. Co. v. Tolley, 24 *Va.App.* 70, 480 *S.E.*2d 145 (1997) (permitting accident recovery in case in which claimant suffered PTSD following large explosion at work).

As claimant contends her alleged injury resulted from the incident where a client laid on railroad tracks, the Brown standard is the test to be used in this case.

There are a number of problems with claimant's contention that she has sustained a mental/mental injury under Iowa law.

First, the question is, is the situation involving claimant's client on the railroad tracks similar to that as 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 Ms. Irvine's situation similar to a store clerk cleaning up blood after a gunfight and later being held up? (Brown v. Quiktrip)

The answer is obviously 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 Ms. Irvine.

The problem with the event involved in this case, is while it is odd, or even bizarre, it does not appear to be life-threatening. It was certainly not life-threatening to claimant's life. It is unlikely it was life-threatening to the client's life. There was no indication a train was coming towards the client. There was no train seen at the event. There was no train whistle heard at the event.

The record suggests claimant and her husband may recognize this problem with her case. In a few of the records with providers, claimant and her husband indicate the client involved in the incident, actually committed suicide. (Ex. J, p. 1; Ex. N, p. 8)

When claimant met with Dr. Mittauer, claimant indicated the reason she felt the client's life was threatened was because someone had actually laid on the railroad tracks at issue and had successfully committed suicide. (Ex. 2, pp. 10-11) There is no evidence in the record that a death occurred on the railroad tracks at issue a few weeks before the incident in this case. This suggests claimant was aware the incident of a client merely laying on the tracks where no train was coming, no whistle was heard and no train was thought to arrive, was not a traumatic event. The record suggests claimant exaggerated the event to Dr. Mittauer.

Second, a number of claimant's complaints with the event of July 9, 2014 are that people were rude to her or did not appreciate what she had done when her client laid on tracks. The record has a number of references that claimant's reactions to the event of July 9, 2014 were due to the rudeness of police, the 911 operator, or claimant's supervisor. (Ex. 6, p. 4, 17; Ex. 5, pp. 1-3; Ex. 2, p. 11; Ex. 7, p. 5)

Triggers that now affect claimant's anxiety, involve not only trains, but include police and rude people. (Ex. 6, p. 4; Ex. 5, pp. 1-3; Ex. 2, p. 11)

Dr. Mittauer indicates, in his December 9, 2016 letter, he does not contend that claimant's interaction with police caused or contributed to her PTSD. (Ex. 18, p. 2) However, claimant's description of the incident to providers, and her complaints of the incident in the records, all involve the rudeness of supervisors, the 911 operator, and police. The record indicates incidents triggering her anxiety today include rude people, police, or recollections of how she was mistreated at work. The record suggests a part of claimant's problems were caused by her perception of rudeness by police, her

supervisor, or 911 operator. Clearly these interactions, with alleged rude people, are not compensable as a mental/mental injury under the Brown analysis.

Third, Dr. Mittauer's opinion that the July 9, 2014 event caused claimant's PTSD is based in part that claimant "...was worried because she [claimant] stated that one or two weeks ago, that someone had indeed laid on railroad tracks, been struck by the train and thus successfully committed suicide." (Ex. 2, pp. 10-11)

There is no evidence in this case that prior to the July 9, 2014 event another person had successfully committed suicide on the railroad tracks at issue.

As detailed above, the DSM-5 indicates that for the PTSD diagnosis to apply, a person should have, "exposure to actual or threatened death, serious injury, or sexual violence." (DSM-5, p. 271) It appears Dr. Mittauer believed claimant was exposed to a threatened death, based, in part, on claimant's story that someone had actually committed suicide on the tracks one to two weeks prior to the July 9, 2014 incident. That does not appear to have occurred.

Dr. Mittauer opines that the situation on July 9, 2014, contributed to a "threatened death" even though there was no train present. There was no indication a train was moving towards the client on July 9, 2014. There were no train whistles. There was no indication at all that a train was heading towards the client on July 9, 2014. Despite claimant's story, there does not appear to have been a prior suicide on the tracks at issue. Given these facts, I find it difficult to understand how claimant can be assessed as having post-traumatic stress disorder under the criteria shown in the DSM-5.

All Iowa cases, finding a mental/mental injury under the Brown v. QuikTrip analysis, involve instances where an employee is personally threatened, or witnesses a gruesome injury or the death of another. That is not the fact pattern in this case. The record suggests claimant's symptoms may be caused or due in part to claimant's perception of rude police officers or supervisors. Those situations do not rise to a mental/mental injury under the Brown analysis. Dr. Mittauer's opinion, that claimant suffered a "threatened death", appears to be based, in part, on a belief that a suicide had occurred on the railroad tracks at issue. That did not occur. Dr. Mittauer's opinion that the incident at issue contributed to a "threatened death" under the DSM-5 guidelines is also questionable. Given these facts, claimant has failed to carry her burden of proof she sustained a mental/mental injury using the analysis under Brown v. QuikTrip. Given this, claimant has failed to carry her burden of proof she sustained an injury that arose out of and in the course of her employment.

As claimant has failed to carry her burden of proof she sustained an injury that arose out of and in the course of her employment, all other issues, other than reimbursement of the IME by Dr. Mittauer are moot.

The final issue to be determined is whether claimant is due reimbursement for Dr. Mittauer's IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

Iowa Code section 85.39 is the sole method for reimbursement of an exam by a physician of the employee's choice. If an injured worker seeks reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015).

Claimant seeks reimbursement for the IME and the reports from Dr. Mittauer. The records indicate Dr. Mittauer, claimant's expert, issued his initial report on June 22, 2016. Dr. Aschemann, defendants' expert, did not issue his report until August 27, 2016. Based on the chronology of the reports, claimant is not due reimbursement for Dr. Mittauer's IME report under Iowa Code section 85.39.

Claimant is still due reimbursement of the costs associated with the December 9, 2016 report, found at Exhibit 18, as detailed in the November 22, 2016 order.

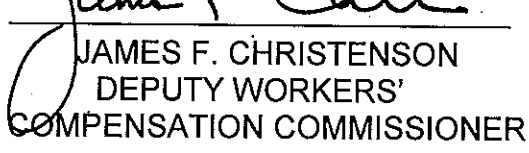
ORDER

THEREFORE IT IS ORDERED:

That claimant shall take nothing from these proceedings.

That both parties shall pay their own costs.

Signed and filed this 27th day of February, 2017.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Nate Willems
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406-0637
Nate@rushnicholson.com

Laura J. Ostrander
Attorney at Law
PO Box 40785
Lansing, MI48901-7985
Laura.ostrander@accidentfund.com

JFC/kjw

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.