BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN SMITH,

Claimant,

vs.

CITY OF CEDAR RAPIDS,

Employer,
Self-Insured,
Defendant.

File No. 5053799

ARBITRATION

DECISION

Head Note Nos.: 1803, 2502, 2700, 1100

STATEMENT OF THE CASE

Brian Smith, claimant, filed a petition in arbitration seeking workers' compensation benefits against City of Cedar Rapids, self-insured employer, for a work injury date of July 31, 2015.

This case was heard on March 1, 2017, in Cedar Rapids, Iowa, and considered fully submitted on March 31, 2017, upon the simultaneous filing briefs.

The record consists of joint exhibits 1-7, claimant's exhibits 1-3, defendants exhibits A-O, testimony of the claimant, Brent Neighbor, and Jennifer Stefani.

ISSUES

1. Whether claimant's current condition is related to an injury sustained on September 22, 2015.
2. Extent of the claimant's permanent disability, if any;
3. Entitlement to an independent evaluation under Iowa Code section 85.39;
4. Whether claimant is entitled to future medical care.

STIPULATIONS

The parties agree the claimant sustained a work-related injury on July 31, 2015, which arose out of and in the course of his employment. They further agree that the alleged injury was the cause of some temporary disability during a period of recovery, entitlement to which is no longer in dispute if permanent benefits are awarded.

The parties agree that at the time of the injury the claimant's gross earnings were $284.85 per week. He was married and entitled to two exemptions. Based on the foregoing, the weekly benefit rate is $206.75. The commencement date is January 30, 2016.

FINDINGS OF FACT

Claimant was a 40-year-old person at the time of the hearing. He went through high school and achieved his GED in 1989. He took some postsecondary courses at Kirkwood Community School in 2003 for diesel mechanic work. In 2010, he received an auto mechanic diploma via an online school.

Claimant testified that he has always had problems at school. Reading and writing were a challenge. He was assigned to special education classes which allowed him to have one-on-one contact with the teacher. He can learn at his own pace but it takes longer.

His work history includes janitorial work, factory positions through temporary services, and then a laborer for the City of Cedar Rapids. Claimant was initially employed as a seasonal worker in the Parks and Recreation Department. His position started in May and ended in early November according to the testimony of Brent Neighbor, claimant's direct supervisor at the time of his work injury. Claimant's duties included providing labor and maintenance services for designated park recreation areas, including grounds keeping, grooming athletic fields, light construction or repair activities. (Exhibit B, page 2)

One of his duties for defendant employer included mowing grass. On July 31, 2015, he was involved in a mowing accident when a tractor he was using began to tip over. He jumped out and landed on his back. Immediately, he felt pain in his mid back. He was taken to the nurse provided by the defendant employer. He testified that he was given ice and sent home to rest.

Claimant was terminated from his position in October 2015 after a third and final write up. The first write-up was for not wearing a seatbelt. The second write up was for taking equipment onto public property when he used his tractor to pick up lunch at Taco John's. The third and final write up involved claimant failing to inform work of a tooth ache. Claimant disputes this alleged infraction and argues that he did call his supervisor the morning before his workday and indicated that he possibly might not be in due to his toothache.

Claimant suffered a work injury on July 31, 2015. He was first seen by Jennifer Motroni, RN at COHC because of his pain complaints. (Jt. Ex. 2, p. 1) He was then sent to Quy Tran-Lam, D.O., on August 3, 2015, who gave a prescription and ordered claimant to follow up with a primary care physician if symptoms persisted. (Jt. Ex. 1, p. 8) Claimant returned to work.

There were no other COHC records for the claimant after August 6, 2015. There was one medical entry for August 2, 2015, pertaining to a bilateral lung complaint. (Jt. Ex. 2) On August 4, 2015, COHC received a voice message from claimant indicating he would not be able to come to work because he was in too much pain. (Jt. Ex. 2, p.1)

Defendants point out that the work records indicate that claimant was able to work 32 to 40 hours per payweek until the week of September 24, 2015. Claimant also agreed he returned to his regular full duty work on August 6, 2015. Mr. Neighbor testified that claimant did not ask for any accommodations or complain of back pain.

On September 22, 2015, claimant was seen at the emergency room for his back pain. (Jt. Ex. 3) The subjective complaint is recorded as follows: "low back pain, onset this AM. pt states he slipped, but caught himself, but has had pain since." (Jt. Ex. 3, p. 11) This slip occurred on steps at home. Another record indicates that he had no back pain until the slip. (Jt. Ex. 3, p. 2)

Claimant testified that the back pain from the work injury had never abated and the slip at home was additive. During the exam, the pain was described as strong but not radiating. (Jt. Ex. 3, p. 11) He exhibited limited flexion and rotation but no tenderness or swelling. (Jt. Ex. 3, p. 13) The diagnosis was acute low back pain consistent with muscular strain. (Jt. Ex. 3, p. 14) Claimant was given prescriptions and discharged.

Mr. Neighbor testified that claimant did not inform work of this injury.

Because of ongoing pain, claimant returned to Mercy Medical Center on November 2, 2015 with continued complaints of back pain which was now radiating into the right leg. (Jt. Ex. 3, p. 30, 35) He was seen by Marc Wilkinson, M.D. X-rays were taken which showed a compression fracture. (Jt. Ex. 3, p. 32) An MRI was ordered which confirmed the x-ray results that claimant had a mild anterior compression fracture of the L1 vertebral body which was "new since May 17, 2015." (Jt. Ex. 4, p. 48) May 17, 2015, was the date of a chest CT, predating the alleged work injury.

Claimant was then put in a brace for approximately three months. His care with Dr. Wilkinson ended when Dr. Wilkinson moved to Georgia. Claimant's last visit for his back appears to be November 20, 2015. (Jt. Ex. 3, p. 35)

On July 27, 2016, claimant underwent an IME with John D. Kuhnlein, D.O. (Cl. Ex. 1) Dr. Kuhnlein's examination revealed some tenderness in the upper lumbar spine while walking, squatting, and during examination. (Cl Ex. 1, p. 5) Range of motion was reduced on flexion and extension. There was some pain behaviors noted; however, the examination was consistent with the MRI results.

Dr. Kuhnlein does not record the September slip and near fall. In the causation portion of the report, he concludes that because there is no other injury that occurred

between May 2015 and November 2015, the July 31, 2015, incident was a substantial factor in producing the L1 compression fracture. (Cl Ex. 1, p. 6)

Dr. Kuhnlein recommended that claimant lose weight, perform core strengthening exercises and stop smoking. (Cl Ex. 1, p. 6) Those recommendations are unrelated to claimant's work injury. As it relates to the work injury, Dr. Kuhnlein suggested claimant be sent to a physical medicine specialist in Cedar Rapids. (Cl. Ex. 1, p. 6) If more care was provided, Dr. Kuhnlein concluded claimant would not be at MMI but if no further care was approved, the MMI date would be January 30, 2016, approximately six months after the injury. (Cl Ex. 1, p. 7)

Restrictions of lifting 20 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder and 20 pounds occasionally over the shoulder were also suggested by Dr. Kuhnlein. Sitting, standing and walking, should be done on an as needed basis and bending, stooping, squatting, kneeling, crawling, and work on ladders occasionally. (Cl. Ex. 1, p. 7)

On February 22, 2017, after a records review, Jeffrey A Westhpheling, M.D., issued an opinion that the July 31, 2015, incident was the cause of the L1 compression fracture but that the current symptoms/conditions suffered by claimant were the result of the September 22, 2015, incident. (Jt. Ex. 6, p. 54) He assigned 10 percent impairment as a result of the work injury but did not feel any restrictions were appropriate. (Jt. Ex. 6, p. 54) Claimant was not able to meet with Dr. Westpheling because he was in Florida at that time.

Barbara Laughlin performed an employability assessment relying on an in-person interview with claimant, the IME of Dr. Kuhnlein and the medical records of Dr. Tran Lam and Mercy Medical Center. (Jt. Ex. 2, p. 1) Based on the claimant's self-professed walking, standing, and sitting limitations along with the recommendations of Dr. Kuhnlein, Ms. Laughlin placed claimant in the sedentary or light exertional occupational levels and concluded over 77.9 percent of good and/or closely transferable jobs were foreclosed to him. (Jt. Ex. 2) Access to unskilled occupations would be around 38 percent. (Jt. Ex. 3) She recommended he undergo retraining. Ms. Laughlin's opinions rely heavily on claimant's subjective complaints in placing claimant into the light or sedentary work category. Claimant described his pain as an 8 or 9 on a 10 scale. (Cl. Ex. 2, p. 4) The medical restrictions, even from Dr. Kuhnlein, would not be as limiting. Much of Ms. Laughlin's report is a regurgitation of others she has conducted. At one point, Ms. Laughlin refers to a Dr. Manshadi rather than Dr. Kuhnlein.

Claimant testified that crawling under cars placed too much pressure on his back and that there were several lifting tasks associated with automotive repair that he could no longer perform because of his injury. However, there were no tasks at home that his injury impeded. He is able to wash clothes, clean his house and other household activities.

Claimant would like to have pain management treatment.

CONCLUSIONS OF LAW

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 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 Electric 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 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).

In the present case, the expert opinion of Dr. Westpheling is given more weight. While Dr. Kuhnlein had the advantage of examining the claimant and Dr. Westpheling was only able to conduct a records review, the omission of the September 2015, slip and near fall and concomitant medical treatment, renders Dr. Kuhnlein's opinions incomplete.

Dr. Kuhnlein did not mention or take into consideration the September 2015 incident wherein claimant's slip and near fall was significant enough to send him to the emergency room for treatment.

Dr. Westpheling concluded that the claimant's fracture did arise out of the work injury but that the fracture healed prior to the September 22, 2015, slip and near fall,

and that the fracture resulted in a 10 percent impairment of the whole person. It is found that claimant sustained a work related injury of July 31, 2015 but had healed. However, the current symptomatology suffered by the claimant are the result of the September 22, 2015, incident.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant argues that he is seriously disabled and points to the vocational report as well as Dr. Kuhnlein's opinion in support of this. Ms. McLaughlin's report does place claimant in the sedentary to light duty work category, primarily upon claimant's verbal report of his inability to sit for long periods of time.

However, like Dr. Kuhnlein, Ms. McLaughlin does not take into account that claimant returned to work for nearly two months and performed his regular work duties without complaint or visit to the defendants' health care providers. Further, she relies on Dr. Kuhnlein's restrictions which were also imposed without taking into consideration claimant's return to work or the slip in September 2015 which exacerbated the previous work injury.

Claimant has not shown any motivation to return to work. There were no records provided that he has sought new employment since his termination in 2015. Nor has he undertaken any job retraining.

He is not an elderly worker and while he claims he is a slow-learner, he has attended post-secondary education and was able to achieve an auto mechanic diploma through an online course. Further, he testified that he is not restricted from doing his regular household chores or activities but that heavy lifting and lying on his back would be too onerous given his injuries.

His past work history included factory jobs through temp agencies as well as housekeeping and cleaning work. He did not testify that those tasks would be outside of his current condition.

Based on the foregoing, it is determined claimant has sustained a 15 percent industrial disability.

Claimant seeks ongoing care for his back condition.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Dr. Westpheling concluded that claimant's current symptomatology is related to his September 2015 slip and near fall. However, claimant is still entitled to care for his work-related injury. To the extent that there is any care necessary for his work-related injury, defendant employer is required to furnish such care.

Claimant also seeks reimbursement of an IME under 85.39. Defendants argue that reimbursement is not appropriate because there was no triggering examination.

Under Iowa Code section 85.39:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall ... be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice. . . .

If there is no prior rating by a doctor who was retained by the defendants that claimant's claim is too low, there can be no reimbursement of an examination through 85.39. Kohlhaas v. Hog Slat, Inc., 777 N.W. 2d 387, 393-395 (Iowa 2009) Dr. Westpheling's opinion was not rendered until February 22, 2017 whereas Dr. Kuhnlein's report was issued on July 27, 2016. There was no rating or evaluation of permanent disability prior to July 27, 2016. No reimbursement under 85.39 is appropriate.

Claimant argues that the report and/or examination should be reimbursed under rule 876 IAC 4.33. Unfortunately, the Iowa Supreme Court has foreclosed that avenue in Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015) (finding "even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because

the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.")

ORDER

THEREFORE IT IS ORDERED:

That defendants are to pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred six and no/100 dollars ($206.75) per week from January 30, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That claimant is entitled to medical treatment pertaining to his work related injury.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 25th day of July, 2017.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.