BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CINDY TALANDIS,

Claimant,

vs.

SEARS MANUFACTURING COMPANY,

Employer,

and

TRAVELERS INSURANCE,

Insurance Carrier,
Defendants.

File No. 5029427

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Cindy Talandis, the claimant, seeks workers' compensation benefits from defendants, Sears Manufacturing Company, the alleged employer, and its insurer, Travelers Insurance as a result of an alleged injury on February 20, 2007. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on May 3, 2010, but the matter was not fully submitted until the receipt of the parties' briefs and argument on May 17, 2010. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Exhibit 1-2:4."

The parties agreed in a written hearing report submitted at hearing that an employee-employer relationship existed between claimant and Sears Manufacturing at the time of the alleged injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant received an injury arising out of and in the course of employment;

II. The extent of claimant's entitlement to weekly temporary total or healing period benefits and permanent disability benefits; and,

III. The extent of claimant's entitlement to medical benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Cindy, and to the defendant employer as Sears.

Cindy, age 55, has worked for Sears for the last 14 years and continues to do so at the present time. Her work record is good according to her supervisor who testified at hearing.

Cindy claims to have injured her right shoulder and neck on February 20, 2007 when a hand pallet jack she was pushing suddenly stopped for some unknown reason, pushing back on her arms and body after which she claims to have felt her shoulder pop. Over the next few months, Cindy underwent right shoulder decompression surgery and right wrist carpal tunnel release surgery by Richard Kreiter, M.D. an orthopedist. She also underwent cervical fusion surgery by Todd Ridenour, M.D., a neurosurgeon. There is no question that she now has permanent activity restrictions limiting her to lifting no more than 25 pounds and no push/pull greater than 60 pounds. Sears is accommodating those restrictions and Cindy has returned to the same job she held at the time of the alleged work injury.

The fighting issue in this case is whether the incident described by Cindy actually occurred and whether such an incident was sufficient to cause or accelerate the need for her surgeries.

Cindy's biggest obstacle to showing causation is a long history of treatment for chronic bilateral shoulder, neck and back pain by her family doctor, David Marcowitz, D.O. He has been providing regular adjustments for these conditions since 2003. The treatments became more frequent in the months before the asserted work injury in this case with multiple treatments in December 2006 and January 2007. She had two adjustments for right shoulder pain on February 7 and February 17, only days before her alleged work injury. (Exhibit K)

Her first treatment after the alleged injury date was with Dr. Marcowitz on February 24, 2007 when she complained of primarily back pain and denied any recent injury. (Ex. K-72) It was not until her next visit on March 3, 2007 for bilateral shoulder pain that she reported an injury to the doctor, but nothing in particular about such an injury appears in the offices notes on that date. (Ex. K-75) Just looking at these last two office visits, they really don't look much different than the numerous other office visits Cindy had since 2003.

The events leading up to Cindy's report of this work injury are also troublesome for Cindy. She claims that she did not report the injury immediately to her supervisor

because he was gone for the day, but that she did mention this to a co-worker. Her supervisor, Daniel Judge, testified that Cindy was off work for three days after February 20, 2007 and did not call in sick during those days until the third day when she told him that she was injured at home when her dog pulled her off her porch. Cindy denies this and states that the dog incident happened on an earlier date. Her initial written report of injury submitted on May 5, 2007 only stated the right shoulder pop occurred just from pushing the cart. (Ex. L) It was not until her deposition that she mentioned an event of her cart suddenly striking something such as a piece of pallet wood or metal.

Cindy also has a problem with supportive expert opinion. Her initial authorized occupational medicine physician, Rick Garrels, M.D., initially felt this was work related, but after reviewing her history with Dr. Marcowitz, he opined that he was unable to causally relate the right shoulder or neck problem to a work related etiology, including any type of aggravation. (Ex. B-1).

Cindy's attorney claims in his post hearing brief that Dr. Kreiter opined that the work injury was a cause of his shoulder surgery. The brief provided no specific citation to the record for that assertion and I could not find such an opinion in Dr. Kreiter's office notes. (Ex. 3-1:58) Although the doctor notes a history of the work injury, his working diagnosis was simply arthritis and shoulder impingement.

Dr. Ridedenour also opined early in his treatment that the injury was a temporary aggravation, but most recently opined that such an injury was not a substantial cause of the need for his cervical fusion surgery. (Ex. A-1)

Only Dr. Marcowitz supports this claim. In a report he issued in February 2009, he opines that Cindy's neck and arm pain are from the years of repetitive motion at work and the injury of February 20, 2007. This report is the first time the doctor mentioned a pallet jack incident. As aptly pointed out by defendants, the only other time the doctor received a report from Cindy of a work related event was in 2005. (Ex. K-14)

Regardless of the medical opinions, I am unable to find that the work injury occurred as claimed by Cindy. I found the testimony of witness, Judge, more credible than Cindy and find that she initially reported a non-work injury which along with her past problems is the likely cause of her surgeries and her current condition. Cindy complains that defendants did not call her co-worker to testimony and I should conclude that the witness would verify her story. However, the same could be said of Cindy's failure to call that witness. There is no claim that this witness was unavailable to Cindy's attorney. After all, Cindy, not defendants, have the burden of proof and the occurrence of the work injury has long been a disputed issue in this case.

Further findings are unnecessary.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by of 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.

In the case sub judice, claimant failed to carry the burden of proof and demonstrated by the greater weight of the evidence that she suffered an injury arising out of and in the course of employment with Sears.

ORDER

1. Claimant shall take nothing from these proceedings.

2. Claimant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33.

Signed and filed this 14th day of July, 2010.

LARRY WALSHIRE
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.