BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAY 01 2017
WORKERS COMPENSATION

CAROLYN SPURGEON, Claimant, vs. HENNIGES AUTOMOTIVE, Employer, and TRAVELERS INDEMNITY COMPANY OF CT, Insurance Carrier, Defendants.	:	File No. 5053868 ARBITRATION DECISION Head Note No.: 1108

STATEMENT OF THE CASE

Carolyn Spurgeon, the claimant, seeks workers' compensation benefits from defendants, Henniges Automotive, the alleged employer, and its insurer, Travelers Indemnity Company of Ct. as a result of an alleged injury on March 18, 2015. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 28, 2017, but the matter was not fully submitted until the receipt of the parties' briefs and argument on April 11, 2017. Oral testimony 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 exhibit 6, pages 88 through 89 will be cited as, "E6-88:89." Citations to the hearing transcript of testimony such as "Tr-4:5," or to a deposition transcript such as "Ex. 14-4" shall be to the actual page number(s) of the original transcript, not to page number of a copy of the transcript containing multiple pages or to a page number of an exhibit package.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration

decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

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. Whether the claim is barred by Iowa Code section 85.23 for failure to provide timely notice to the employer.

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

IV. The extent of claimant's entitlement to an independent medical evaluation pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Carolyn and to the defendant employer as Henniges Automotive.

Carolyn, age 52 at hearing, has worked for Henniges Automotive for six years and continues to do so today as a production laborer. Henniges Automotive is a supplier of auto parts.

Carolyn states that on or about March 18, 2015 a cart she was pulling struck the back of her heel on her right foot. She admits that she was being treated for bone spurs prior to the injury, but she asserts that the injury aggravated her heel condition. Carolyn stated that she told her treating physician about this injury. Subsequent x-rays revealed a bone chip in her foot and that a piece of bone was catching on her Achilles tendon and repair surgery was required. She was off work for many months after this surgery.

Carolyn admits that she did not timely report her alleged work injury in writing to Henniges Automotive management because Henniges Automotive required that work injuries must be reported on the same day as the injury and when she did not do so, she felt that she no longer had a right to seek workers' compensation benefits for such an injury. However, she testified she told her supervisor about it and he just laughed it off because of all of the other incidents at the plant involving the carts. Apparently, she was eventually informed she still could file a claim for this injury and did so.

The medical treatment records in evidence indicate that Carolyn was treated by Richard Sowlles, D.P.M., beginning on February 23, 2015 upon complaints of right heel pain. His assessment at that time was Achilles tendonitis/bursitis and no recent trauma was reported. Eventually, Dr. Sowlles diagnosed retrocalcaneal exostosis (bone spur) of the right heel and on May 14, 2015 he performed a retrocalcaneal exostectomy or

removal of excess bone material in the back of the heel. The surgery report does not describe a removal and reattachment of the Achilles tendon. (EB-11)

Carolyn's heel pain did not resolve with Dr. Sowlles' surgery and persisted despite medications and physical therapy. Finally, Dr. Sowlles mentioned Haglund's deformity of the heel (a bony prominence in the in the area of where the Achilles attaches to the heel). Carolyn was then referred for a second opinion to Levi Gause, M.D. an orthopedist, who began treating Carolyn in September 2015. His assessment was recalcitrant insertional Achilles tendinopathy (IAT) with a ruptured Achilles. (ED-7) Dr. Gause performed a second surgery on October 10, 2015 that detached the Achilles tendon, removed more bone material from the back of the heel, and reattached the Achilles. Carolyn improved after that surgery and she was returned to work with no restrictions on January 20, 2016. (ED-11)

At the request of her attorney, Carolyn was evaluated by Richard Neiman, M.D., a neurologist. Dr. Neiman provided a permanent impairment rating of 7-8 percent to the body as a whole from the heel injury due to an antalgic gait. He opined that this impairment "could be related to injury that incurred at work." (E1-5) Dr. Neiman's understand of the mechanism causing the injury of March 18, 2015 was that the injury occurred from a "falling rack and inadvertently got the right foot."

At the request of defendants, Carolyn was evaluated by R.L. Broghammer, M.D., specialty unknown, from Medical Review Services in Cedar Rapids, Iowa. Dr. Broghammer discussed in detail the treatment records of Drs. Sowles and Gause as well as other records he was provided. Dr. Broghammer opines that none of the treatment records mention any work injury and that given her history of heel problems before the alleged work injury, the work injury is not a cause of any medical condition. (EE-11) He explains that the cause of Haglund's deformity is frequent pressure on the back of the heel such as wearing shoes that are too tight or stiff and this deformity is often called "pump bump" which is a reference to the use of pump-style women's shoes. There are other causes, but none from any traumatic injury. He states that if there was such an incident as described by Carolyn, it would only have caused a temporary aggravation of her condition. (EE-12)

I am unable to find that claimant suffered any injury to her heel that would have significantly worsened her right foot condition. The problem is that claimant lacks sufficient convincing expert opinion to support her claim. When there is a pre-existing condition that is producing the same symptoms as the injury, then this agency must rely more heavily upon expert opinion than we would if the injured worker's symptoms began with the work injury. In this case, the view of Dr. Neiman that such an injury was only possible is insufficient in this case when no treating doctor notes any change of presentation after the alleged work event or even mentions such an event in their records. Dr. Broghammer provides alternative causes for the injury that have nothing to do with Carolyn's work at Henniges Automotive.

The only physician retained by defendants to provide a disability assessment was Dr. Broghammer. His evaluation and report occurred after claimant retained Dr. Neiman. None of the treating physicians were retained or authorized by defendants.

Further findings are unnecessary.

CONCLUSIONS OF LAW

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 Elec. 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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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

The issues of notice and extent of entitlement to benefits are moot in light of the failure of claimant to show a work injury.

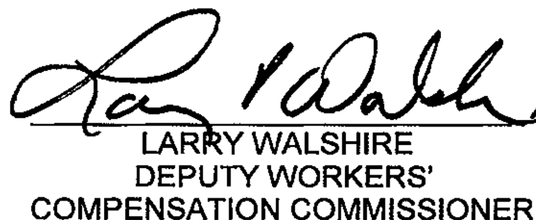
Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low.

In this case, claimant seeks reimbursement of the fees for Dr. Neiman's evaluation. However, there was no previous evaluation by an employer retained physician. Claimant is not entitled to reimbursement for Dr. Neiman's examination.

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 1st day of May, 2017.



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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.