BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAULINE GARVES-THOMPSON,

Claimant,

vs.

RICHARD RICKY HAWKES, d/b/a ESSEX GOLF CLUB,

Employer,
Uninsured,
Defendant.

File No. 5042442

APPEAL

DECISION

Head Note Nos.: 1601

Claimant Pauline Garves-Thompson appeals from an arbitration decision filed September 9, 2014. The case was heard on June 30, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner at the conclusion of the hearing.

The deputy commissioner determined that claimant's claim is barred by the intoxication defense under Iowa Code section 85.16(2) (2013) and claimant was awarded nothing.

Claimant asserts on appeal that the deputy commissioner erred in finding that defendant has a valid intoxication defense and in not awarding healing period benefits and medical benefits. Defendant asserts that the findings of the deputy commissioner should be affirmed on appeal.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code Sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on September 9, 2014, that relate to issues properly raised on intra-agency appeal with the following additional analysis:

STIPULATIONS

The parties submitted the following stipulations at the hearing:

1. The parties had an employer-employee relationship although defendant was uninsured as of the date of injury.

2. Claimant sustained an injury which arose out of and in the course of employment on June 10, 2012.

3. Permanent disability is not in dispute.

4. The weekly rate of compensation is $141.52.

5. Other than intoxication, affirmative defenses have been waived.

6. Defendant paid no benefits as of the date of hearing.

ISSUES ON APPEAL

1. Was claimant intoxicated when she was injured on June 10, 2012?

2. If claimant was intoxicated when she was injured, was claimant's intoxication a substantial factor in causing her injury?

3. If claimant was intoxicated when she was injured, and if claimant's intoxication was a substantial factor in causing her injury, did defendant waive the intoxication defense provided for by Iowa Code section 85.16(2) (2013)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant fell and broke both of her ankles on June 10, 2012, while retrieving golf balls from defendant's driving range. After she fell, claimant was transported to Montgomery County Memorial Hospital. Ambulance service records document that the injury occurred at approximately 12:54 p.m. (Exhibit A, page 2) Claimant began receiving medical treatment at approximately 1:10 p.m. (Ex. A, p. 2) The record notes the following: "Smell of Alcoholic Beverage on Breath/About Person." (Ex. A, p. 2) Upon claimant's arrival at the Montgomery County Memorial Hospital Emergency Room at 1:47 p.m., the following details were documented:

> The patient's belongings include a purse and a cell phone. Notes: Patient fell in hole at Essex Golf Course, right lower leg is deformed per Essex EMS. Patient is intoxicated. Bottle of liquor from purse thrown away per patient request so husband does not see it.

(Ex. B, p. 1)

The hospital notes indicate claimant had slurred speech, appeared ill and smelled of alcohol. (Ex. B, p. 3)

As an affirmative defense, it is the employer's burden to prove the elements of the intoxication defense. Iowa Code section 85.16(2) states:

> No compensation under this chapter shall be allowed for an injury caused:
>
> . . .
>
> 2. By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.

To be successful in such a defense, the employer has the burden to prove by a preponderance of the evidence that the injured worker was intoxicated at the time of the injury and that the intoxication was a substantial factor in causing the injury. Reddick v. Grand Union Tea Co., 230 Iowa 108, 115, 296 N.W. 800, 803 (1941); Everts v. Jorgensen, 227 Iowa 818, 289 N.W. 11 (1939). A person is under the influence of alcohol and considered intoxicated for purposes of section 85.16(2) when any of the following are true:

> (1) the person's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions.

Garcia v. Naylor Concrete Co., 650 N.W.2d 87, 90 (Iowa 2002) (quoting and adopting legal standard from Benavides v. J.C. Penney Life Insurance Co., 539 N.W.2d 352 (Iowa 1995)). The weight and credit to be given evidence of results of clinical tests for intoxication is for the trier of fact. Rigby v. Eastman, 217 N.W.2d 604 (Iowa 1974).

Michael L. Rehberg, BS, MS, D-ABFT, toxicologist, prepared a report which is in evidence which states claimant was intoxicated at the time of her injury and that the intoxication caused the injury. (Def. Ex. E) Because there is no expert evidence which challenges the findings stated in Mr. Rehberg's report, I find that defendant proved claimant was intoxicated when she was injured and I find claimant's intoxication was a substantial factor in causing her injury.

There is a line of cases which hold that when a worker's intoxication arises out of and in the course of the employment, the intoxication defense is inapplicable. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). "When an employer encourages or condones excessive drinking on the job and in fact profits from an employee's drinking, as in this case, the employer ought to be held responsible for foreseeable injuries suffered by the employee because of the resulting intoxication." Id. at 130.

Claimant admitted she drank alcohol on the day she was injured during the hours leading up to her injury. (Tr. p. 19) Claimant argues that around the time of her injury, which occurred on June 10, 2012, defendant was aware she drank on the job (Ex. L, pp. 30, 75; Tr. pp. 15-16, 113) such that defendant condoned claimant's drinking and therefore waived the intoxication defense.

Defendant denied he knew claimant was drinking on the job around the time she was injured. Defendant also denied he condoned claimant's drinking on the job. Defendant testified at hearing as follows:

Q. You hired Pauline in May of 2011?

A. Correct

Q. To do what?

A. Basically, to man the clubhouse so that there was someone in the clubhouse to wait on customers, to answer the phone, to clean the clubhouse, and to allow me to go out on the golf course and do the things I needed to do out there and still have the clubhouse open.

Q. When you hired her, were you aware of her prior alcohol problems?

A. No.

Q. And then apparently on June 29 of 2011, she had a panic attack at the clubhouse?

A. Right.

Q. Were you there for that?

A. I was.

Q. And became aware when she went to the hospital that she was intoxicated?

A. The only thing that I was made aware of was Leonard [claimant's husband] came to me and told me that they did an alcohol screen on her at the hospital and that she had apparently been drinking and told me that if she was - - if she would continue drinking that I would - - that he would have to - - she would have to quit.

Q Was that the first you became aware that she had an alcohol problem?

A. Yes.

Q. A prior alcohol problem, I should say?

A. Yes.

Q. And Leonard told you that?

A. Yes.

Q. And so what did say back to him?

A. Well, I told him that I didn't want to lose her and that she had - - that she had been a great help to me and that I felt secure leaving the - - you know, I felt that she said the appropriate things to people on the telephone, she was welcoming to any customers that came in. I needed her. I mean, I needed someone in her capacity and she was doing a good job of it as far as I could tell and - -

Q. What did you say to Leonard about keeping her from drinking?

A. Well, I told him that I would watch her and try to encourage her not to. I mean, other than that, I couldn't - - I couldn't stand on her neck and, you know, hold her hand all day long.

Q. But you told him that you would do everything in your power to keep her from drinking?

A. Yes. I told him that she was valuable to me and that I would try to keep her from drinking.

Q. So that event occurs on June 29 of 2011 and then this fall on the golf course occurs almost a year later on June 10 of 2012. Were you talking to Pauline during that time about drinking?

A. I probably approached her twice a week and basically put it right to her, Pauline, you're not drinking, are you, because, you know, if you do, I'll lose you. I can't afford to lose you. I don't want to lose you. And I would ask her to reassure me that she was not drinking, which she did every time. No, I'm not drinking.

Q. Is that what she would say?

A. Yes.

Q. Prior to the time that she fell on the morning of June 10 of 2012, do you have any inkling that she was drinking?

A. I had none - - I had no experience that I knew she was drinking. I had rumors and other customers that once in a while made a wisecrack about, you know - - about her drinking.

Q. But Pauline's assurances to you were always that she was not drinking?

A. Correct.

Q. You never saw her make a drink?

A. I did not.

Q. You - -

A. For herself.

Q. For herself, correct.

A. Yes.

Q. You were unaware that she was hiding a bottle at work?

A. I was unaware of that, yes.

(Tr. pp. 86-90)

There is nothing in the record which causes me to question the truthfulness of defendant's testimony. However, claimant's testimony causes me to find her claim that defendant knew of her drinking in the workplace to be unconvincing. The following testimony appears in claimant's deposition:

Q. All right. So did you make any efforts to conceal your alcohol consumption from either Mr. Hawkes or any patrons?

A. Could you make that simpler?

Q. I'm not trying to be tricky.

A. Right

Q. I'm just trying to figure out day in, day out when you were working, are you pouring a drink right in front of the customers or do you go do that in the back room?

A. Not in front of customers.

Q. Okay. So you would go - - how would you do it? How would you conceal it from - -

A. When there was no customers in the clubhouse.

Q. You would do what?

A. Pour a drink.

Q. And that would be Canadian Woods and Diet Pepsi?

A. Yes.

Q. All right. And the Canadian Woods would either come from your purse or from off the bar?

A. Yes,

Q. Why didn't you pour a drink in front of customers?

A. Because I felt it was not the right thing to do.

Q. Would you pour a drink in front of Mr. Hawkes?

A. I don't believe I did.

Q. So you waited until he was gone as well?

A. No.

Q. Tell me.

A. He - - sometimes he'd be in his office.

Q. Okay. He would be in the building but not in front of you.

A. Right.

Q. So you would wait until he was out of sight and customers were gone or out of sight and you'd pour yourself a drink?

A. Not out of sight because he would be in right there, but he would be in his office where - - like I'm sitting here and he would be sitting over there (Indicates), but his back was turned to the wall.

Q. He couldn't see you?

A. Correct.

Q. And that was intentional on your part.

A. (Shakes head in a side-to-side motion.) No.

(Ex. L pp. 30-32)

Q. And tell me how you'd build your regular drink. What kind of a cup was it in?

A. It was in like a coffee cup.

Q. Like a mug? Like this kind of mug? (Indicates)

A. No. No. It had a lid on it.

Q. Like a convenience store - -

A. Not - - not that big.

Q. Not the Thirst Crusher?

A. No.

Q. But I mean we're talking about one of those plastic convenience store mugs? Is that what we're - -

A. Yes.

Q. - - talking about? With a lid on it?

A. Yes.

Q. Now you and I both know that those come in all sizes under the sun.

A. Um-hmm.

Q. Was this like a 16-ounce or a 24-ounce?

A. I would say it's about this tall. (Indicates)

Q. How big around?

A. (Indicates) About like that.

Q. So Mr. Johnson here has a 12-ounce can of Pepsi Cola?

A. Yes.

Q. Is it bigger than that?

A. Yes.

Q. So it's maybe a 16-ounce mug. Does that sound about right?

A. Yes.

Q. A pint?

A. Yes.

Q. Okay. And tell me how you'd build your drink. Did you fill that full of ice?

A. First, I would put some Canadian Woods in it. Then I would put ice in it, and then I would put my Pepsi in it.

Q. And would the Pepsi come out of the gun at the club?

A. Yes.

Q. All right. And as I understand your prior testimony, you would usually wait until customers were not around to do that?

A. Yes.

Q. And if Mr. Hawkes was around, you would at least wait until his back was turned and he was in the office?

A. Yes.

(Ex. L pp. 34-36)

At hearing, claimant testified as follows:

Q. And you then started working for Rick, as I understand it, in May of 2011 and, according to your deposition testimony and your testimony today, you started drinking shortly thereafter?

A. Yeah approximately four or five months, right around there. I can't give you the exact month.

Q. I understand. And you told me in your deposition that at that point, you were buying a 1.75 milliliter - - what we call a handle - - of Canadian

Woods every week?

A. Not at that time, no.

Q. And where were you hiding that bottle?

A. When I brought it, I would put it underneath the cabinet at the golf course.

Q. So the idea was, then, that you had your own bottle hidden at work?

A. Yes.

Q. And that that hiding was, of course, from your husband?

A. Right.

Q. And from your employer?

A. Right.

(Tr. pp. 37-38)

If defendant was aware claimant was drinking on the job and condoned that behavior, there would have been no need for claimant to hide her bottle in the cabinet under the bar. There would have been no need for claimant to wait until both defendant and customers were out of sight before claimant made herself a drink. There would have been no reason for claimant to wait until defendant either left the building or went into his office before claimant made herself a drink. Also, if defendant was aware claimant was drinking on the job and condoned that behavior, claimant would have no need to hide her drinks in a convenience store mug. If what claimant alleges is true, she would have been free to keep her bottle wherever she wanted to, she would have been free to mix her drinks in front of defendant and she would not have needed a special container to make it appear she was drinking non-alcoholic beverages. Based on all of those considerations, I find that claimant failed to prove defendant knew claimant was drinking on the job or condoned that behavior, or otherwise waived the intoxication defense provided by Iowa Code section 85.16(2) (2013). I find defendant has a valid intoxication defense in this matter.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 9, 2014, is AFFIRMED in its entirety.

Claimant takes nothing.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 6th day of October, 2015.

Joseph S Cortese II

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WORKERS' COMPENSATION
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