BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RONNIE TREMBLY,

Claimant,

vs.

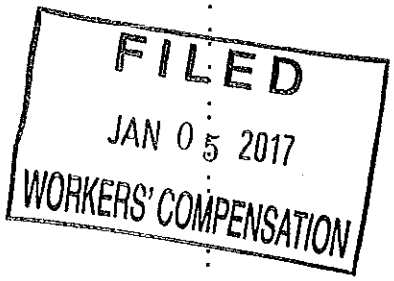
HY-VEE, INC.,

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5053539

ARBITRATION

DECISION

Head Note No.: 1100

STATEMENT OF THE CASE

Claimant, Ronnie Trembly, has filed a petition in arbitration and seeks worker's compensation benefits from, Hy-Vee, Inc., employer, and EMCASCO Insurance Company, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the claimant suffered an injury arising out of and in the course of employment on or about April 6, 2015;

2. Temporary benefits;

3. Benefit rate; and

4. Medical benefits.

FINDINGS OF FACT

The undersigned having considered all of the evidence and testimony in the record finds:

The main issue is whether the claimant suffered an injury arising out of and in the course of employment on or about April 6, 2015 via a trip and fall at a Hy-Vee store in Waterloo, Iowa.

The claimant alleges that on or about April 6, 2015 at Waterloo Hy-Vee #2 he fell hitting his left elbow and knocking his hat and glasses off his head when he stepped on, or tripped over, a bread cart. The defendants dispute whether the incident occurred.

Defendants dispute on several concepts. One is that a check of store video for April 4, 2015 does not confirm the claimant had a fall. That is not that helpful as the videos did not cover the whole store, had gaps, and were destroyed. The destruction does not rise to the level of spoliation of evidence as it was destroyed as part of a routine policy. But before it was destroyed it was recognized as potentially relevant evidence in a claim and thus it should have been preserved. Also, April 4, 2015 is not necessarily the correct date, as the petition is for April 6, 2015.

A second reason that defendants' dispute the occurrence is that the claimant's version of events has not been entirely consistent. That is true; there are inconsistencies. Claimant was initially pretty sure that April 4, 2015 was the date of injury, he pled an April 6, 2015 injury date in his petition, and later testified that he is now uncertain of the date of injury. In one version, he caught his foot in the bread cart, and in another, the cart slipped from under him. He was certain of who he talked to at the Waterloo store at one point and now is not. He filed for short-term disability for a personal injury and changed it to a work injury when he was told he did not have short-term disability benefits. The claimant also waited about a month and a half before reporting a work injury.

A third reason is the medical record. The first medical record is dated May 22, 2015. (Ex. 13, p. 56) It describes claimant "got his foot caught on a rolling table and he went down on his left elbox [sic]..." (Ex. 13, p. 56) That is somewhat inconsistent with the testimony at hearing.

A good friend of the claimant, Rodney Allen, provided an affidavit on January 2, 2016. Mr. Allen is also a driver for Hy-Vee. The affidavit is inconsistent with his testimony at hearing in that he was much more specific at hearing then he was in his affidavit as to when the incident happened (from a generic sometime in the spring 2015 to early April 2015), how the incident occurred, and when the claimant first informed him of the incident. (Exhibit J, Transcript)

The testimony of Rodney Allen, Kim Trembly (claimant's spouse), and the claimant were all consistent with the testimony of the other. The testimony was not entirely consistent with the claimant's initial report, transcribed statement, or his deposition testimony. It is curious that the testimony of the three is now absolutely consistent with a newer version of the incident that was to have occurred in the Waterloo Hy-Vee. However, the demeanor of the claimant was good and was not indicative of a deceitful witness. This is also true of Kim Trembly and Rodney Allen. It appears that they believed what they testified to. It is found that a fall occurred.

John Gachiani, M.D., replaced the spinal cord stimulator on August 4, 2015. (Ex. 14, p. 60) Dr. Gachiani has stated that falls are a common cause for a broken spinal cord stimulator and that it is medically probable that a fall was the cause of the failure of the first spinal cord stimulator that had to be replaced. (Ex. 12, pgs. 48-49) I find that a fall by claimant at Waterloo Hy-Vee #2 happened and that fall was the direct cause of the failure and replacement of the claimant's spinal stimulator. The failure of the stimulator is also why the claimant was off work from May 21 through September 5, 2015.

Claimant would begin his 13 week rate calculation with the week ending January 4, 2015 and end the 13 weeks with the week ending March 29, 2015 for average gross weekly wages of $1,209.82. Defendants would start with January 11, 2015 and end with April 5, 2015 for average gross weekly wages of $1,168.69. The claimant pleaded April 6, 2015 as the date of injury. He was married and entitled to 2 exemptions on the date of injury. His weekly benefit rate is $728.66 under defendant's calculations, and $751.82 if his calculations are accepted.

Claimant seeks payment/reimbursement of medical bills as detailed in exhibits 1-11. The bills are itemized in exhibit 1 and total $113,170.43. (Ex.1, p. 1) Blue Cross Blue Shield (BCBS) asserts a lien of $39,417.87. (Ex. 2) However they missed the July 9, 2015 visit to Mercy Neurosurgery for which they paid $57.60. (Ex. 5 for the bill, Ex. 6 showing the bill was paid by BCBS but is not in the asserted lien) BCBS would have an actual lien of $39,475.47).

REASONING AND CONCLUSIONS OF LAW

Causation.

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.

The claimant was found to have established that he was injured out if and in the course of his employment on or about April 6, 2015 when he suffered a fall at Waterloo Hy-Vee #2. There were inconsistencies, but the claimant was credible and his demeanor was consistent with someone telling the truth. The demeanor of his witnesses was also consistent with truthful testimony.

Temporary benefits.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

The claimant's injury did not cause permanent disability and impairment. Thus, the temporary benefits herein are temporary total and not healing period. The claimant was off work from May 21 through September 5, 2015 when he returned to work. The defendants are responsible for paying temporary benefits for this period to the extent they have not already done so.

Rate.

Under section 85.36, the gross weekly earnings of an employee who has worked for the employer for the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings over those 13 weeks, unless the wages do not fairly and accurately reflect the employee's customary earnings. See Griffin Pipe Products v. Guarinino, 663 N.W.2d 862 (Iowa 2003).

Claimant would begin his 13 week rate calculation with the week ending January 4, 2015 and end the 13 weeks with the week ending March 29, 2015 for average gross weekly wages of $1,209.82. Defendants would start with January 11, 2015 and end with April 5, 2015 for average gross weekly wages of $1,168.69. The claimant pleaded April 6, 2015 as the date of injury. Thus including the week ending April 5, 2015 would be correct. The claimant's average gross earnings were $1,168.69 per week. He was married and entitled to 2 exemptions on the date of injury; as such his weekly benefit rate is $728.66.

Medical benefits.

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).

Claimant seeks payment/reimbursement of medical bills as detailed in exhibits 1-11. The bills are itemized in exhibit 1 and total $113,170.43. (Ex.1, p. 1) Blue Cross Blue Shield (BCBS) asserts a lien of $39,417.87. (Ex. 2) However they missed the July 9, 2015 visit to Mercy Neurosurgery for which they paid $57.60. (Ex. 5 for the bill, Ex. 6 showing the bill was paid by BCBS but is not in the asserted lien) BCBS would have an actual lien of $39,475.47). Thus expenses were necessary and reasonable for the injury that arose out of and in the course of employment on or about April 6, 2015. The defendants are responsible for paying or reimbursing as appropriate those expenses.

ORDER

THEREFORE IT IS ORDERED:

That the defendants shall pay the claimant temporary total period benefits from May 21, 2015 through September 5, 2015 at the weekly rate of seven hundred twenty eight and 66/100 dollars ($728.66).

That the defendants shall pay/reimburse the medical expenses as detailed above.

Costs are taxed to the defendants pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 5th day of January, 2017.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Mark S. Pennington
Attorney at Law
5000 Westown Pkwy, Ste. 310
West Des Moines, IA 50266
mark@kphlawfirm.com

Anne L. Clark
Attorney at Law
Ste. 111, Terrace Center
2700 Grand Ave.
Des Moines, IA 50312
aclark@hhlawpc.com

SRM/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.