

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEREK J. BOTHWELL,

Claimant,

vs.

CARE INITIATIVES, INC., d/b/a AVOCA
NURSING & REHAB CENTER

Employer,
Self-Insured,
Defendant.

File No. 5047559

A P P E A L

D E C I S I O N

Head Note Nos: 1100, 1402.30, 1801,
1803, 3001, 5-9999

FILED

OCT 3 2017

WORKERS' COMPENSATION

STATEMENT OF THE CASE

On August 25, 2017, Joseph S. Cortese II, Iowa Workers' Compensation Commissioner, delegated the authority to the undersigned to issue the final agency decision on the intra-agency appeal currently pending before this agency. The decision in this matter shall be the final agency action.

This arbitration hearing was held on May 14, 2015 in Council Bluffs, Iowa. The parties filed post-hearing briefs. The case was deemed fully submitted on June 12, 2015. The deputy issued the arbitration decision on March 31, 2016.

The deputy commissioner determined claimant was entitled to: (1) temporary total disability benefits for the period from December 14, 2012 through January 2, 2013 at the rate of two hundred eighty-seven and 42/100 dollars (\$287.42); (2) certain medical expenses as detailed in the arbitration decision; (3) Accrued benefits shall be paid in a lump sum; (4) Interest shall be paid on unpaid weekly benefits; and (5) Defendant shall receive credit for all benefits previously paid.

On April 7, 2016, claimant filed a notice of appeal. The brief was filed on May 23, 2016. Claimant listed the issues on appeal as:

Did Derek Bothwell sustain a material aggravation of his pre-existing back condition on December 14, 2012, which would entitle him an award of permanency benefits?

Is Derek Bothwell an Odd Lot Worker entitling him to an award of permanent total benefits?

Is the proper weekly rate of compensation \$309.30 per week?

(Claimant's appeal brief, page 2)

Defendant filed its appeal brief on June 13, 2016. Defendant asserted the deputy's decision should be affirmed in its entirety. Defendant listed the issues as:

There is no convincing evidence that claimant sustained an injury on 12/14/2012 which arose out of and in the course of his employment.

Claimant is not permanently disability [sic] and entitled to benefits.

(Defendant's reply brief, page 1)

On June 13, 2016, claimant filed his reply brief. Counsel for claimant argues, "Defendants [sic] attempt to impugn Claimant's character by accusing Mr. Bothwell of fabricating things or trying to make up facts." (Claimant's reply brief, p. 2)

The record in this case was reviewed de novo. Both sides dictated the issues to be determined on appeal. See: Iowa Code section 17A.15; and Rule 876 IAC 4.28(7). The party who would suffer a loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule App. P. 6.14(6).

Pursuant to Iowa Code sections 17A.15 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on March 31, 2016, which relate to the issues properly raised on intra-agency appeal.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

In Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990) the Iowa Supreme Court wrote:

We have held that a fact finder has the duty to weigh proffered testimony and determine its credibility. Catalfo v. Firestone Tire and Rubber Co., 213 N.W.2d 506, 509 (Iowa 1973). To aid the appellate court in its review, those fact-findings should be detailed. Erb v. Iowa State Bd. Of Pub. Instruction, 216 N.W.2d 339, 342 (Iowa 1974).

Id. at page 471.

I find the deputy commissioner provided more than a sufficient analysis of all of the issues raised in the arbitration decision. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

The deputy commissioner placed a great deal of weight on claimant's lack of credibility. The deputy specifically determined claimant was not a credible witness.

Where credibility is a critical finding before a deputy workers' compensation commissioner, the commissioner often gives deference to the credibility findings of the deputy. See: Clay v. Dee Zee, Inc., File No. 5044016 (App. Dec. September 23, 2015).

The deputy wrote in relevant portion:

Claimant's physical presentation was consistent with that of an individual with significant limitations; however, review of the evidentiary record gives the undersigned pause regarding the veracity of claimant's statements. On claimant's pre-employment medical screening for Oakland Manor which took place on September 7, 2012, in response to inquiry as to whether claimant had "ever had" back or neck injury or surgery, pain into one or both arms or legs, a medical condition which limited his ability to work; the need to be off work due to an injury, or the need to consult a health care professional for an injury, claimant answered no. Similarly, on claimant's pre-employment physical for defendant on November 27, 2012, claimant denied suffering with any current or previous sprain or strain, and any current or previous injury, illness or surgery resulting in an orthopedic or neurological condition. He also denied ever having any current or previous restrictions and did not reference suffering with any "past" injuries or conditions.

Review of claimant's medical records reveals a history of low back complaints which contradicts claimant's representations on his pre-employment screenings. Claimant's records reveal he suffered a low back strain with pain of the low back and right leg in April 2011. At that time, claimant was treated with prescription medication and removal from work. The condition seemingly resolved, as claimant sought no additional medical treatment until March 2012. In March 2012, claimant began a lengthy course of care for right low back pain with radiation into the right lower extremity, brought on by an event moving a mattress. Claimant's care included injections of pain medications; prescriptions for pain medications, muscle relaxers, and NSAIDS; an order for physical therapy; an MRI of the lumbar spine; and evaluations by a neurosurgeon and an anesthesiologist. The special evaluations occurred in May and June 2012, periods approximately three to five months prior to the pre-employment screenings. The medical records also reveal claimant refilled a prescription for hydrocodone, issued in response to ongoing complaints, as late at [sic] August 14, 2012.

Claimant attempted to justify his false answers on the pre-employment screenings by testifying he answered in this fashion as he was not having difficulties at the time of the evaluations. However, at the time of evidentiary hearing, claimant displayed no difficulty understanding the concept of ever suffering with conditions, previously suffering with conditions, or currently suffering with conditions.

Claimant's failure to disclose his history of low back and lower extremity symptoms is not limited to these pre-employment screenings. On the date of the alleged work injury, claimant denied suffering with prior low back issues to Dr. Brelje. Claimant also denied prior low back or right leg symptoms to Dr. Trihn on January 31, 2013. Dr. Trihn indicated he repeatedly asked claimant if he had a history of similar complaints, but claimant reported suffering with only normal occasional achiness, less than one time per year and which did not require particular treatment. While claimant informed Dr. Pigneri on February 13, 2013 that he had previously been diagnosed with degenerative disc disease, claimant denied suffering with similar problems pre-injury. Claimant informed Dr. Fuller on September 5, 2013 that he suffered with only one prior episode of low back pain several years prior, which was treated by his personal physician.

Of additional concern with respect to claimant's credibility is claimant's assertion he never suffered with left-sided symptoms and radiation to the left leg following the alleged work injury; by claimant's testimony, his symptoms have consistently been present on the right side of his low back and right leg since the event transferring the patient. Mrs. Bothwell offered supportive testimony, indicating she observed claimant favoring his right side post-injury and maintaining claimant consistently complained of right-sided complaints thereafter. However, at the time claimant reported the work injury on December 14, 2012, he reported left-sided low back and left leg complaints. The workers' compensation forms completed by claimant immediately after the alleged injury denote pain in the "lower left side back" and specify the part of body injured as the "lower left back." Nursing records from the emergency room denote complaints of low back pain into the left thigh; as do the records of Dr. Brelje of December 14, 2012. Left-sided complaints were noted by Dr. Brelje again on December 26, 2012 and by Dr. Erlbacher on January 2, 2013. While claimant may seek to explain the reference to left-sided complaints as a comprehension issue with respect to the workers' compensation forms provided by defendant, he offers no explanation as to why physicians noted complaints of left-sided complaints on three separate occasions contemporaneous with the alleged work injury.

Finally the undersigned is concerned with the factual underpinnings of claimant's submission of an AFLAC disability claim and an application for Social Security Disability benefits. The Social Security Administration specifically referenced concerns with respect to the credibility allegations offered by claimant in connection with his claim for benefits. Claimant testified he submitted the AFLAC policy on the basis of his need to care for family members after the motor vehicle accident of February 13, 2014. However, the only documentation offered by claimant pertains to the motor vehicle accident or claimant's personal medical conditions. Claimant also submitted the surgery record for the L5-S1 microcolumnar discectomy performed by Dr. Music in support of the claim for benefits from AFLAC. Claimant therefore represented to AFLAC that his back condition and need for surgery were related to the motor vehicle accident, while claiming in this proceeding that the back condition and resultant surgery were necessitated by the work injury of December 14, 2012.

Upon review of the entirety of the medical record, it is determined claimant is not a credible witness. The record simply contains too great a number of contradictory statements or omissions by claimant for the undersigned to provide credence to his statements, particularly with respect to the history of his symptomatology.

(Arbitration decision, pp. 23-25)

Because the hearing deputy weighed the proffered testimony in great detail, and because she explained at length why she found claimant not to be a credible witness for his claim, the undersigned is deferring to all findings of fact and conclusions of law made by the hearing deputy. No additional analysis is necessary.

ORDER

IT IS THEREFORE ORDERED that the decision filed on March 31, 2016, is affirmed in its entirety.

Costs of the appeal, including the cost of the transcript are assessed to claimant.

Signed and filed this 3rd day of October, 2017.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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