BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NICHOLAS CHRISTENSEN,

Claimant,

vs.

POTTAWATTAMIE COUNTY,

Employer,

and

IMWCA,

Insurance Carrier,
Defendants.

File No. 5051440

ARBITRATION DECISION

Head Note Nos.: 1108.20, 1403.30, 2204

STATEMENT OF THE CASE

Nicholas Christensen, claimant, filed a petition for arbitration against Pottawattamie County, as the employer and IMWCA as the insurance carrier. An in-person hearing occurred on October 11, 2016. One day prior to the arbitration hearing, claimant filed an amended petition seeking to amend the date of injury. This amendment was filed after the close of discovery and was considered as a motion to amend at the commencement of hearing. The motion was sustained and claimant was allowed to amend the petition as desired.

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.

The evidentiary record includes claimant's Exhibits 1 through 11 and 13 and defendants' Exhibits A through M. After the conclusion of the hearing, claimant filed a request to submit additional evidence. That request was denied in a ruling filed October 26, 2016.

Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record was suspended at the conclusion of the in-person hearing on October 11, 2016. Claimant submitted an exhibit that was untimely under this agency's rules. Defendants objected to the submission. As a cure for any prejudice, the

undersigned granted defendants an additional 30 days to submit any additional desired evidence to respond to claimant's late evidence. Defendants elected not to submit additional evidence and the evidentiary record closed 30 days after the live hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. The request was granted. The parties filed their post-hearing briefs on December 22, 2016, at which time this case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on either October 22, 2014 or August 19, 2012 that arose out of and in the course of his employment with this employer.

2. Whether claimant gave timely notice of the alleged injury pursuant to Iowa Code section 85.23.

3. Whether claimant's injury claim is barred under the statute of limitations.

4. Whether the alleged injury caused temporary disability and whether claimant is entitled to temporary disability, or healing period benefits, from August 19, 2012 through February 28, 2013.

5. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

6. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses.

7. Whether penalty benefits should be ordered for an alleged unreasonable denial or delay in payment of weekly benefits.

FINDINGS OF FACT

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

Nicholas Christensen is a 37-year-old gentleman, who worked as a detention officer for Pottawattamie County. Mr. Christensen started working at the county jail in 2000. He last worked for the jail on August 19, 2012. Pottawattamie County officially terminated Mr. Christensen's employment on April 4, 2013. Mr. Christensen has not worked anywhere since August 2012.

On August 19, 2012, Mr. Christensen reported to work at the Pottawattamie County jail. During the middle of his shift, an inmate attempted to flood his cell.

Mr. Christensen was told to go get some towels to clean up the mess. This event and these instructions caused Mr. Christensen to experience a flash-back to a prior event he experienced at the jail in August 2011.

Specifically, the events of August 19, 2012 caused claimant to mentally "re-live" a prior, gruesome suicide event at the jail that occurred in August 2011. Mr. Christensen described that prior suicide scene during trial. Claimant was busy collecting razors in his cell block so inmates could shave when he received an emergency call over his radio. He completed his razor collection duties and reported to the scene of the emergency call.

As he entered the maximum security cell block, he passed another detention officer that left the scene upset and proclaimed that the inmate was dead and his concern that he was going to get fired. Claimant rounded a corner and observed a very gruesome suicide attempt scene. Claimant described seeing blood all over the walls and floor of the cell. He described seeing his co-workers covered in blood attempting to tend to the inmate. Claimant believed the inmate was dead given the amount of blood he had lost.

Claimant did not enter the cell but was instructed to get towels, presumably to clean up the scene. Mr. Christensen quickly proceeded down an elevator to get a stack of towels. Upon returning to the scene, the inmate was loaded on a gurney and was being moved by the rescue squad into the elevator. Claimant described the inmate as "coming to" and described his fright as he observed the inmate becoming conscious after believing him to be dead.

There is no doubt that the August 2011 suicide scene had a significant mental impact on claimant. This event was clearly a sudden and traumatic event for claimant. He certainly did not expect to observe what he observed and described it as much worse than any other scene he had observed at the jail in the past. Although I find that suicide attempts were relatively comment events and anticipated events at the Pottawattamie County jail and that detention officers and similarly situated employees were reasonably expected to experience suicide events and similar types of events at the Pottawattamie County jail and in other prison scenarios, I find that the August 2011 suicide event was sudden, traumatic and unexpected given its scope and gruesomeness.

Several other employees were present at the August 2011 event. The employer was clearly aware of the severity of the event, but offered no follow-up treatment and made no inquiries about claimant's ability to mentally deal with this observations after that event.

Claimant continued working full-duty through the flash-back event on August 19, 2012. Upon experiencing that event in August 2012, claimant went home "ill" in the middle of his shift, curled into a ball in bed, and remained there for quite some time. Claimant never returned to work after August 19, 2012. The employer was clearly

aware that claimant was missing work after August 19, 2012 and even arranged for claimant to be provided disability benefits during his absence. (Claimant's testimony)

Claimant's wife was out of town on August 19, 2012. Upon returning, she scheduled claimant for a mental health evaluation. (Claimant's testimony) Mr. Christensen submitted for mental health treatment on August 23, 2012 through Paula Whittle, ARNP. At the initial evaluation, Ms. Whittle noted the prior suicide event and described work as a stressor. She also discussed other personal issues as stressors, including claimant's stress over the impending birth of his daughter. (Exhibit 1A)

Ultimately, claimant was diagnosed with post-traumatic stress disorder (PTSD) by his treating mental health providers. The employer required claimant to be evaluated by its own psychologist, Dale R. Halpain, Ph.D. Dr. Halpain evaluated claimant on January 22, 2013 and February 28, 2013. (Ex. 3) Dr. Halpain noted that claimant was unfit for duty because he was experiencing depression, anxiety and needed to continue to progress in coping with PTSD symptoms. (Ex. 3)

Claimant's treating psychologist, Jess Kryzkowski, Psy-D, opined that claimant has major depressive disorder, PTSD, and anxiety disorder. (Ex. 4U, page 1) Dr. Kryzkowski supports the idea that claimant's mental health conditions were caused or aggravated by his exposure to the suicide scene at work. (Ex. 4) Ms. Whittle clearly supports this opinion and the causal connection between claimant's work exposures and his subsequent development of PTSD. (Ex. 1HHH)

Mr. Christensen also obtained an independent psychological evaluation performed by Rosanna M. Jones-Thurman, Ph.D. on December 4, 2015. (Ex. 5) Dr. Jones-Thurman confirmed the PTSD diagnosis, as well as diagnoses of major depressive disorder, and an anxiety disorder. Dr. Jones-Thurman clearly believes claimant's cumulative exposures to events as a detention officer at Pottawattamie County caused these mental health diagnoses. (Ex. 5A, p. 14)

Defendants sought their own independent psychological evaluation, performed by Philip L. Ascheman, Ph.D., on May 10, 2016. (Ex. A) Dr. Ascheman identified some inconsistencies with claimant's evaluation and reported symptoms as well as his performance on standardized testing such as the MMPI. Dr. Ascheman noted that "[i]t is not feasible that an individual with even severe mental illness would so predominantly endorse items across such a broad range of psychopathology." (Ex. A, p. 14) Dr. Ascheman opined that claimant's performance on the MMPI was consistent with malingering, rather than a specific mental health diagnosis. (Ex. A, p. 14) Dr. Ascheman noted pre-existing symptoms, including anger, anxiety, alcoholism, and ultimately opined that claimant was malingering. (Ex. A, pp. 14-16)

Dr. Ascheman also noted suicide attempts and misbehavior by inmates are common experiences at the Pottawattamie County jail. Dr. Ascheman opined that claimant "has not experienced any event that would not be experienced by other jail employees." (Ex. A, p. 16) He further opined that "those events would not be

reasonably expected to result in PTSD symptoms." (Ex. A, P. 16) Dr. Ascheman opined that claimant returned to his baseline functioning and had no permanent disability as a result of the reported work incidents. (Ex. A, p. 16)

While the opinions of Dr. Ascheman cause some pause and concern about potential malingering, I ultimately find the opinions of Ms. Whittle, Dr. Halpain, Dr. Kryzkowski, and Dr. Jones-Thurman to be the more convincing opinions. Claimant presented testimony that was believable as to his observations and subsequent development of symptoms. Temporally, claimant's symptoms correspond with his events, including the August 19, 2012 event. Ultimately, I find that claimant proved that his observations and experiences at work caused him to develop or that it materially aggravated his anxiety, depression, and PTSD.

This finding then requires that I determine when claimant knew or should have known the nature, seriousness, and compensable character of his injury. On direct examination at trial, claimant testified that he did not realize that he could not return to work until he was evaluated by Dr. Halpain and declared unfit for duty. In other words, claimant testified on direct that he did not realize he could not return to work until at least January 22, 2013. (Claimant's testimony; Ex. 3)

However, on cross-examination, Mr. Christensen acknowledged that he knew after his first evaluation by Paula Whittle in August 2012 that he was going to be on leave from his job for an indefinite period of time. (Claimant's testimony) Claimant also acknowledged on cross-examination at trial that people in law enforcement do not admit that things are bothering them. Claimant acknowledged that he did not tell others that he was experiencing problems. Instead, he continued to keep going and working until he could not go anymore. (Claimant's testimony)

Paula Whittle noted in her October 29, 2012 office note that claimant was "Questioning what to do w/ job—feels he wants own income but recognizes work as huge stressor/trigger." (Ex. 1J, p. 1) In other words, by October 29, 2012, claimant was contemplating that he may not be able to have his own income or work because of the stress involved with working. During his deposition, Mr. Christensen conceded that he knew by November 5, 2012, he might not be going back to work. (Ex. B, p. 27 (deposition transcript, p. 32))

All of the relevant traumas claimant asserts caused his mental health condition occurred at work. Mr. Christensen relays two specific events, as well as witnessing other suicide attempts in the past and being personally attacked at the county jail in the past. Mr. Christensen relays feeling sick in the middle of his shift on August 19, 2012 and needing to leave work. He relays curling up in a ball and staying in bed for several days after this event.

Mr. Christensen then sought treatment through Paula Whittle beginning on August 23, 2012. In her initial record, Ms. Whittle records that claimant was having flashbacks and that he feared for his safety and had anxiety when having to go back to work. Ms. Whittle recorded the suicide event in her initial record as well. (Ex. 1A, p. 1)

Certainly, by August 23, 2012, Mr. Christensen knew or, as an objective person, should have known the nature of his condition as arising out of work related incidents and exposure.

Claimant testified that he worked full duty and had no lost time from work between 2000 and 2012 as a result of any mental health issues or treatment. (Claimant's testimony) Given claimant's testimony that he continued working and did not report his ongoing problems until he could not work anymore, I find that he knew or should have known that his condition was serious by August 19, 2012. Certainly, after obtaining mental health treatment and being indefinitely removed from work, Mr. Christensen knew or should have known that his condition was serious. Mr. Christensen conceded he knew by November 5, 2012 that he may not be returning to work. I find that by at least November 5, 2012, as a reasonable person, Mr. Christensen knew or should have known that his condition was serious.

Mr. Christensen left work on August 19, 2012 and did not return to work thereafter. He was medically removed from work by his treating mental health provider on August 23, 2012. He sought and obtained FMLA leave. On November 5, 2012, Ms. Whittle issued a report stating that claimant "is not able [*sic*] function at a level required of their professional role. The length of time Mr. Christensen will remain on leave cannot be determined at this time." (Ex. F, p. 70)

In his deposition, Mr. Christensen conceded he knew by at least November 5, 2012 that he may not be able to return to work. (Ex. B, p. 27 (depo. tr., p. 32)) Mr. Christensen was clearly missing work, using FMLA leave and relying on his accrued sick leave and vacation by this date. I find that by November 5, 2012, Mr. Christensen, as a reasonable person, knew or should have known the compensable nature of his injury. Therefore, I find that Mr. Christensen knew or should have known by November 5, 2012, the nature, seriousness and probable compensability of his injury.

Mr. Christensen filed his original notice and petition in this contested case proceeding on December 1, 2014. (Original Notice and Petition; Ex. J, p. 113) Defendants paid no weekly workers' compensation benefits to claimant after the alleged date of injury.

CONCLUSIONS OF LAW

Claimant asserts that he sustained a mental injury as a result of his sudden as well as cumulative exposure to traumatic mental stimulate while working as a detention officer for Pottawattamie County. Claimant asserts that his exposure to stressful situations and specifically to a suicide attempt by an inmate in 2011 and another event on August 19, 2012 triggered claimant's recollection and reaction to the prior suicide event.

Mr. Christensen does not assert a claim for any physical injuries related to these incidents. Therefore, claimant is asserting what is referred to as a mental-mental injury. In Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995), the Iowa

Supreme Court recognized that mental-mental injuries are compensable under the Iowa workers' compensation statutes. In Dunlavey, the Court established a legal standard for mental-mental injuries that requires the claimant to prove medical causation between the mental stimulus encountered at work and the claimant's mental injury. In this case, I weighed the competing expert opinions and found that Mr. Christensen established by a preponderance of the evidence that his mental health difficulties, including PTSD, are medically related to the stimuli he was exposed to at work. Therefore, I conclude that Mr. Christensen has proven the medical causation factor necessary to prevail on a mental-mental claim.

The Dunlavey Court also established a separate legal standard that requires the claimant prove he experienced a stress at work that was "of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer." Id. at 858. The parties presented evidence regarding this legal standard in this case. Claimant asserted that the experience he had at the 2011 suicide attempt was something he had never seen before and was of a greater magnitude than typical suicide attempts experienced by claimant and other detention officers. Defendants contend that suicide attempts were not uncommon for detention officers, that similarly situated employees would experience similar events, and that claimant could not establish that his exposure was of a greater magnitude than the day-to-day stresses experienced by similarly situated employees.

Having found that suicide attempts were not uncommon events in a prison or jail setting and having found that detention officers were expected to and do experience suicide attempts by inmates on a regular basis, I conclude that claimant has not established the legal causation pursuant to the standard established in Dunlavey.

However, in Brown v. Quik Trip Corp., 641 N.W.2d 725, 728 (Iowa 2002), the Iowa Supreme Court noted that "the proof of legal causation for recovery under a mental/mental injury does not require evidence of stress experienced by similarly situated workers if the event or events giving rise to the claim" result from a sudden traumatic event. The Court stated, "[w]hen a claim is based on a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain, the legal causation test is met irrespective of the absence of similar stress on other employees." Id. at 729. The Court noted that the legal standard is met when the events "were sudden, traumatic, and unexpected." Id.

In this case, Mr. Christensen experienced or witnessed a suicide scene that was horrific. He described it as much worse than any prior suicide scene he had observed. He described the scene of the cell when he walked into the area. He described co-workers being covered in blood, the walls being covered in blood, and that he believed the inmate was dead. Mr. Christensen also described returning to the scene and observing the inmate "come to" on the gurney, which startled and frightened claimant unexpectedly.

Certainly, there is evidence in this record that suggests suicide attempts were expected events in the prison or jail setting. However, when they may occur, the nature

of the suicide attempt and the gruesomeness of the scene are not things that are predictable or expected. While an argument can be made that a suicide attempt is an "expected" event at a county jail, I interpret the Iowa Supreme Court's decision in Brown to suggest that the suicide event experienced or witnessed by claimant as being sufficiently unexpected, sudden, and traumatic as to satisfy the legal standard for a mental-mental claim. Therefore, I conclude that clamant has proven the legal standard necessary to establish his mental-mental injury claim.

Having reached the conclusion that claimant proved a mental-mental injury claim; I must address the defendants' affirmative defenses. Defendants asserted both a notice defense pursuant to Iowa Code section 85.23 and a statute of limitations defense pursuant to Iowa Code section 85.26.

The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

With respect to the notice defense, I found that the employer was clearly aware of the suicide attempt and claimant's exposure to that scene. The employer was also aware that claimant became suddenly ill on August 19, 2012 and went home "ill." The employer also knew that claimant did not report to work again after August 19, 2012. By November 5, 2012, Ms. Whittle was noting that claimant was not able to function in his job as a detention officer. Mr. Christensen also testified that it was common knowledge that law enforcement personnel do not report their difficulties.

The employer knew of claimant's exposure to the suicide scene but did not follow-up to ensure claimant was not adversely affected by that exposure. The employer knew claimant was off work after August 19, 2012 and knew that he was receiving mental health treatment. Having found that the employer had actual knowledge of the August 2011 traumatic, suicide event, I found that the employer had actual knowledge of the event that eventually led to claimant's mental-mental injury. I

conclude that the employer failed to prove its notice defense pursuant to Iowa Code section 85.23.

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

The Iowa Supreme Court has clarified that the discovery rule applies "[w]hether a work-related injury arises because of a single event or develops cumulatively over time." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 684 (Iowa 2015).

In this instance, the employer did not pay weekly worker's compensation benefits to claimant. Therefore, claimant was obligated to file his claim with this agency within two years from the date of the occurrence of the injury. However, the statute of limitations is tolled until claimant knew or should have known the nature, seriousness, and probable compensable character of his injury. Id. at 685.

Having found that claimant knew or should have known the nature, seriousness, and probable compensable character of his injury on or before November 5, 2012, I conclude that defendants have successfully proven their statute of limitations defense. I conclude that, although claimant sustained a compensable mental-mental injury as a result of his traumatic exposures at work, he failed to timely assert those rights and his claim is now barred by Iowa Code section 85.26(1).

Although I am sympathetic to claimant's plight and condition and acknowledge that he has experienced a horrific event and resulting mental difficulties, I also acknowledged that he also had a legal burden to bring his claim within the permitted

statutory deadlines. Ultimately, I found and conclude that claimant sat on his rights and lost his right to bring a claim against the employer. Therefore, I conclude that claimant has failed to establish entitlement to any benefits in this claim, that the employer established its statute of limitations defense, and that claimant's petition must be dismissed without an award of benefits.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

The parties shall pay their own costs.

Signed and filed this 23rd day of March, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/srs

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.