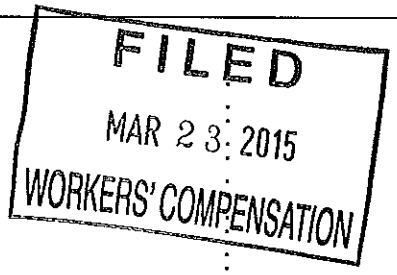
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



LYNNETTE MILLER,

Claimant,

vs.

PLYMOUTH MANOR CARE CENTER,

Employer,

and

IOWA LONG TERM CARE RISK MGMT. ASSOC.,

Insurance Carrier,
Defendants.

File No. 5044890

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman, on September 29, 2014, in Sioux City, Iowa. The record in the case consists of claimant's exhibits 1 through 12; defendants' exhibits A through O; as well as the testimony of the claimant, Jill Casson, and Kristi Utesch.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury that arose out of and in the course of her employment on July 31, 2013;

2. Whether the injury was the cause of any disability;

3. Whether the claimant is entitled to temporary total disabilities/healing period from August 22, 2013 through May 21, 2014;

4. The extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u);

5. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27;

6. Whether the claimant is entitled to reimbursement for an independent medical evaluation with Dr. Bansal; and

7. Whether the defendant is entitled to apportionment pursuant to Iowa Code section 85.34(7)(a).

FINDINGS OF FACT

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

The claimant at the time of the hearing, was 59 years old. She is a high school graduate and has an LPN certificate from Western Iowa Technical Community College. Her work history consists of work in nursing. Prior to starting her employment with Plymouth Manor in July 2003, the claimant underwent a functional capacity evaluation (FCE) which indicated that she had passed all of the physical tests and was physically capable of performing the job of an LPN. See Exhibit 11.

Claimant testified at hearing, that on July 31, 2013, while she was preparing to pass meds standing by the medication cart, she heard an alarm go off for a resident and she twisted immediately because such an alarm indicates that the resident needed immediate attention. The claimant asserts that the twisting incident caused an injury to her low back.

However, defendants challenge the credibility of this injury report. In her deposition, the claimant testified that she told Jill Casson the oncoming nurse for the next shift that claimant had injured herself. At the arbitration hearing, Ms. Casson testified that claimant did not advise her of a work injury and that the claimant's appearance on the evening of July 31, 2013 appeared to be normal. At the arbitration hearing, the claimant testified that she told Ms. Casson that she had done something to her back, but does not recall whether she told her about a work injury. In her deposition, the claimant testified that she could not remember whether she had told her supervisor, Kristi Utesch, about a specific work injury. Ms. Utesch testified at the hearing that the claimant never reported a work injury to her during their discussions on August 1, 2013 and that if the claimant had reported such a work injury during their discussion, she would have immediately given the claimant an incident report to fill out. The employer has a policy requiring employees to immediately report work injuries and the claimant acknowledges that she was aware of that. In fact, the employer has a sign near the time clock where employees punch in and out from work advising employees that punching out without reporting a work injury is attesting that they were not injured during their shift.

Ms. Utesch had numerous conversations with the claimant about the claimant's back condition (the claimant has a history of back problems, including two microdiscectomies at the L4-5 level, performed in 1997) from August 1 to August 19 and during none of those conversations did the claimant relate that she had injured her back at work.

On August 19, 2013, the claimant was called in to Ms. Utesch's office for discussion about the claimant's failures in job performance and it was at that time the claimant alleged that her back problems were work related. The claimant was then given an incident report to complete.

The claimant had 15 prior warnings in her file as a result of failures in job performance. In fact, she had received a warning earlier in her shift on July 31, 2013.

On August 1, 2013, the claimant saw her chiropractor, Dr. Zollman. Claimant testified in her deposition that she told Dr. Zollman about the work injury when she saw him on August 1, 2013. Dr. Zollman specifically denied that the claimant reported a work-related injury on August 1, 2013. See Exhibit H, page 49. Further, he indicated that the claimant told him that her pain had been bad since Saturday (August 1, 2013 was a Thursday, so the Saturday before, would have been July 27, 2013). See Exhibit H, page 48. Under cross examination at the arbitration hearing, the claimant indicated that the symptoms she was reporting having originated on Saturday, July 27, 2013 were only in her hips. Further, under cross examination at the arbitration hearing, the claimant indicated that she did not recall if she told her chiropractor, Dr. Zollman, about having sustained an acute injury on July 27, 2013.

On August 4, 2013, the claimant went to the Floyd Valley Hospital emergency room. At the emergency room, the claimant denied an injury:

> Pt reports pain to lower back and right hip area. Reports pain started on Wednesday night. Pt went to Chiropractor and obtained no relief. Pt states pain at a 8. Pt denies fever or chills. Denies fall or injury. Denies n/v or SOB. Reports numbness or tingling down right leg.

(Ex. D, p. 5)

On August 15, 2013, she saw her family physician and specifically stated that she did not think that her problems had begun at work though she does indicate that there was an incident where she turned abruptly to answer a call light, but nothing was noted at that time as far as a pop in the back, pain, or numbness or tingling. See Exhibit 1, page 4. The claimant did not dispute on cross-examination the record from the family physician found at Exhibit 1, page 4. The claimant explained though that it was at this time she realized she had injured herself on July 31, 2013 at work.

On November 8, 2013, the claimant saw Dr. Ragnarsson (the same surgeon who had treated her in 1997) for treatment of her back problems that are the subject of this proceeding. At that time, Dr. Ragnarsson recorded this history:

> On July 31, 2013 while at work, she twisted her back suddenly. She was standing by a med cart in the nursing home she works at as a nurse when an alarm went off and she twisted her back suddenly and with that, had an acute onset of intense lumbar back pain associated with spasms in her back and a sensation of tingling and numbness into her legs and pain into the right buttock and thigh mostly. These symptoms have since persisted and have been quite intense and severe and have failed to improve. The day after the incident, she saw a chiropractor and had some treatments that did not help her and on August 4, 2013, she went to the emergency room because of intense back and leg symptoms. She was evaluated and medications given and she was dismissed home. She had some physical therapy treatments, 4-5 sessions but those failed to improve and actually aggravated her symptoms if anything. She continues to use medications for her symptoms including Hydrocodone, Flexeril, and Meloxicam.

(Ex. 3, p. 7)

Based upon this history, Dr. Ragnarsson has opined that the claimant's symptoms and problems were caused by a work-related incident of July 31, 2013.

At the arbitration hearing, the claimant's testimony about whether there was a pop in her back was inconsistent.

It cannot be found based on this record that the claimant sustained a work injury on July 31, 2013.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is whether the claimant sustained an injury on July 31, 2013, which arose out of and in the course of her employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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 Electric 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 has not proven in this record that she sustained an injury on July 31, 2013 to her low back in her employment with Plymouth Manor. The claimant's testimony regarding whether she reported this injury is inconsistent. The nature of the injury reported is inconsistent. The record indicates that there may have been reasons for the claimant reporting the injury that were related to her desire to avoid a termination of employment for failure in job performance.

While it is possible that a worker could experience an incident at work and not immediately realize that an injury had occurred the testimony and reports from the claimant in this case are not demonstrative of that situation. The claimant cannot contend on one hand that she sustained an injury that caused severe pain to her low back and reported it to a coworker and a supervisor the same day and the following day and on the other hand testify that it was weeks later that she made a connection between an incident at work and a low back condition that caused her to believe she sustained a work injury. In as much as the claimant has failed to prove an injury arising out of and in the course of her employment, the other issues in this file are moot and will not be addressed.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from this file.

Costs of this action are taxed to the claimant pursuant to rule 876 IAC 4.33.

Signed and filed this 23rd day of March, 2015.

Ron Pohlman

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Al Sturgeon
Attorney at Law
911 – 6th St.
Sioux City IA 51101
alsturgeon@siouxlan.net

Stephen W. Spencer
Attorney at Law
6800 Lake Drive, Suite 125
West Des Moines, IA 50266
steve.spencer@peddicord-law.com

RRP/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.