BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES LAFON, JR., Claimant, vs. HAWKEYE ON-SITE VEHICLE SERVICES, Employer, and FARMERS INSURANCE EXCHANGE, Insurance Carrier, Defendants.	File Nos. 5055058, 5057153 APPEAL DECISION Head Note Nos: 1108, 1801, 1803.1 2209, 2501, 2502

FILED
FEB 25 2019
WORKERS' COMPENSATION

Claimant James Lafon, Jr., appeals from an arbitration decision filed on October 19, 2017. More specifically, claimant appeals only the adverse findings in File No. 5057153 regarding his right shoulder and neck. There is no appeal in File No. 5055058. Defendants Hawkeye On-Site Vehicle Service, employer, and its insurer, Farmers Insurance Exchange, respond to the appeal. The case was heard on April 20, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 22, 2017.

The deputy commissioner found claimant did not sustain a work-related injury resulting in neck and shoulder trauma. As such, all other issues were deemed moot.

On appeal, claimant asserts the deputy commissioner erred in finding he did not sustain an injury that arose out of and in the course of his employment. Claimant further asserts he gave timely notice of his injuries and timely filed his original notice and petition. Claimant also asserts he is entitled to temporary benefits, permanent partial disability benefits, and reimbursement for medical expenses.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the

proposed arbitration decision filed on October 19, 2017 is affirmed in its entirety with the following additional findings, analysis, and conclusions:

FINDINGS OF FACT

The deputy commissioner determined claimant did not sustain a work-related injury that resulted in neck and shoulder trauma. I agree.

Claimant alleges a traumatic workplace incident in October of 2014 caused an aggravation of his underlying cervical spine condition. As explained by claimant, he was in the process of jacking up an engine with a "porta power" when the block of wood the porta power was balancing on began to crack. (Hearing Transcript, p. 32) According to claimant, he had to jerk his hands and body out of the way to keep from getting smashed by the engine. (Tr., p. 32-33) Claimant testified he noticed difficulty picking up and lifting objects either that same day or the following day. (Tr., p. 33)

Claimant testified he reported the incident and his symptoms to Steve Geiss, the owner of defendant-employer. (Tr. p. 34) In fact, claimant testified he talked to Mr. Geiss about the incident "numerous times." Mr. Geiss, however, disputed this testimony; he testified he was never called or informed about the alleged incident and did not receive notice of it until after claimant was terminated in June of 2015. (Tr., pp. 122-125)

Notably, claimant could not recall the exact date the incident occurred, or even the time of day when the alleged incident occurred. (Tr., pp. 94-95; Exhibit 35, p. 208) Claimant was also adamant he was using a porta power at the time of the alleged incident, which allegedly occurred at a CenturyLink location, but Mr. Geiss testified the porta power always stays in the shop and CenturyLink does not have one of those tools. (Tr., pp. 123-124)

The first medical appointment claimant attended after the alleged incident was on December 16, 2014. (Ex. 11, p. 46) Claimant testified he believed the appointment was for both his right carpal tunnel (File No. 5055058) and his right shoulder and neck symptoms. (Tr. p. 35) Mr. Geiss, however, testified this appointment could not have been for the right shoulder and neck symptoms because, as of December of 2014, he was still unaware claimant was alleging injuries to his right shoulder and neck. (Tr., p. 125)

Notably, the notes from claimant's December 16, 2014 appointment with Scott Shumway, M.D., are completely devoid of any mention of right shoulder and neck symptoms. (Ex. 11, pp. 39-44) Perhaps more importantly, the intake form, which was completed by claimant, makes no mention of claimant's right shoulder or neck symptoms. (Ex. 11, pp. 45-47) For example, when asked why he was seeing the doctor, claimant reported numbness in his right hand, thumb, and index and middle fingers and pain in his hand, wrist, and arm. (Ex. 11, p. 46) When asked to mark his symptoms on a diagram of the human body, claimant marked only his right hand and

wrist. (Ex. 11, p. 46) If claimant believed the appointment was for his right shoulder and neck as he testified, it is odd that he did not mark these symptoms on his intake form.

Claimant tried to explain this oddity at hearing. He testified he was not finished filling out the paperwork when they called him back to see the doctor. (Tr., p. 36) However, I do not find that testimony credible, given the fact that every section on both pages of the form is completed in its entirety. (See Ex. 11, pp. 46-47) Claimant also signed and dated the form. (Ex. 11, p. 47) The greater weight of the evidence suggests claimant did not report his right shoulder and neck symptoms to Dr. Shumway at the December 16, 2014, appointment.

In fact, it does not appear from the record that claimant reported any of his alleged right shoulder and neck symptoms to any medical provider until his appointment with defendants' IME physician, Teri S. Formanek, M.D., in August of 2015. (Ex. A) Interestingly, however, Dr. Formanek's report contains no mention of the alleged traumatic incident from October of 2014. (See Ex. A, p. 1) Instead, a description of the alleged October 2014 incident does not appear in any medical records until November 2015 when Sunil Bansal, M.D., issued his report for his independent medical evaluation (IME) of claimant. (Ex. 26)

Claimant's failure to mention his alleged right shoulder and neck symptoms to his doctors in the months following the alleged incident, and his failure to describe the incident itself to any medical providers until roughly a year after the incident allegedly occurred, is especially peculiar given claimant's testimony that his alleged symptoms made it difficult to do his job with defendant-employer. (See Tr., pp. 37-38)

In light of these peculiarities, of which there are too many to overlook, claimant's description of the incident that allegedly caused his right shoulder and neck symptoms is found to be not credible.

Both Dr. Bansal and Todd Harbach, M.D., opined that the alleged incident in October of 2014 aggravated claimant's underlying cervical spine condition. (Ex. 27, p. 130; Ex. 41, p. 275) However, both of their opinions are based on claimant's story that he noticed the onset of right shoulder and neck symptoms after the alleged incident at work in October of 2014, which I found was not credible I therefore find the opinion of Dr. Formanek to be more persuasive.

For these reasons, I find there is insufficient evidence to find claimant sustained an injury that was caused by, or occurred during, his employment in October of 2014. The deputy commissioner's findings with respect to this issue are therefore affirmed with my additional findings.

Assuming, arguendo, claimant sustained an injury that arose out of and in the course of his employment in October of 2014, defendants dispute whether claimant provided notice of his injury within 90 days.

As discussed above, claimant testified he informed Mr. Geiss of his injuries shortly after the incident in October of 2014 and numerous times thereafter. Mr. Geiss disputed that testimony.

Mr. Geiss' testimony is more consistent with the fact that claimant failed to mention or report any of his right shoulder and neck symptoms at his appointment with Dr. Shumway in December of 2014. Claimant also acknowledged defendant-employer provided medical treatment for each of his previous work-related injuries after claimant reported them. (Tr., pp. 92-93) Thus, it seems unlikely Mr. Geiss would go out of his way in this case to ignore numerous complaints from claimant. For those reasons, I find Mr. Geiss' testimony to be more persuasive than claimant's testimony.

Mr. Geiss acknowledged claimant may have complained of shoulder soreness at some point in time, although he could not remember when. (Tr., p. 132) Importantly, however, those complaints of shoulder soreness were not accompanied by any indication of work-relatedness. (See Tr., p. 132)

I therefore find Mr. Geiss had no knowledge regarding claimant's alleged right shoulder and neck injuries until after claimant was terminated in June of 2015. (Tr. p. 124-125)

Defendant-insurer received notice from claimant's counsel of claimant's alleged "right arm and shoulder" injury on March 12, 2015. (Ex. 33) This appears to be the first point at which claimant gave notice to either defendant of his alleged right shoulder injuries. Assuming for claimant's sake his injury occurred on October 31, 2014, I find the notice on March 12, 2015 was well beyond 90 days after the date of the occurrence of the injury.

CONCLUSIONS OF LAW

The threshold issue to be decided on appeal is whether claimant sustained an injury that arose out of and in the course of his employment in October of 2014.

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 Rule of Appellate Procedure 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 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 has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

In this case, I found that claimant's description of the alleged incident in October of 2014 was not credible. I also found Dr. Formanek's opinion to be more persuasive than the opinions of Dr. Bansal and Dr. Harbach given their reliance on claimant's unreliable story. As such, I found there was insufficient evidence that claimant sustained an injury that was caused by, or occurred during, his employment in October of 2014. I therefore affirm the deputy commissioner and conclude claimant failed to carry his burden to prove he sustained an injury that arose out of and in the course of his employment in October of 2014.

Even assuming, for purposes of argument, that claimant sustained a work-related injury in October of 2014, defendants raised an affirmative defense pursuant to Iowa Code section 85.23.

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 workers' compensation claim through information that 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).

As discussed above, I found Mr. Geiss' testimony to be more persuasive than claimant's testimony. Mr. Geiss testified the first time he learned about claimant's alleged work-related right shoulder and neck injury was after claimant was terminated in June of 2015. While Mr. Geiss acknowledged claimant may have complained of shoulder soreness prior to that point, I found those complaints did not include any implications of a work injury. Thus, even if claimant made such complaints, I conclude they could not have alerted Mr. Geiss to the possibility of a potential workers' compensation claim. For those reasons, I conclude Mr. Geiss did not receive notice or have actual knowledge of claimant's injury until June of 2015, which was well beyond 90 days after October 31, 2014.

The first instance of notice or actual knowledge on defendants' behalf occurred on March 12, 2015, when defendant-insurer received notice from claimant's counsel of claimant's alleged right shoulder and arm injury. This notice was received long after the 90-day notice period passed.

For those reasons, I conclude defendants satisfied their burden to prove claimant failed to provide timely notice pursuant to Iowa Code section 85.23. In other words, even if claimant sustained a work-related injury in October of 2014, I conclude his claim is barred by Iowa Code section 85.23.

Under either scenario, the remainder of the issues raised by claimant on appeal are moot.

ORDER

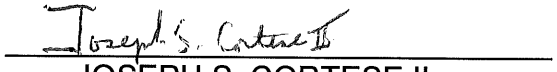
IT IS THEREFORE ORDERED that the arbitration decision filed on October 19, 2017, in File No. 5057153 is affirmed in its entirety with additional findings, conclusions, and analysis.

Claimant shall take nothing from these proceedings in File No. 5057153.

Pursuant to rule 876 IAC 4.33, in File No. 5057153 the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 25th day of February, 2019.



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