

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GERALD D. DONNELL,

Claimant,

vs.

LENNOX INTERNATIONAL, INC.,

Employer,

ACE AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5047570

A P P E A L
D E C I S I O N

Head Note Nos: 1402.30, 2502

FILED

JAN 11 2019

WORKERS' COMPENSATION

Claimant Gerald D. Donnell appeals from an arbitration decision filed on July 14, 2017.

On January 4, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

This case originally proceeded to hearing on January 11, 2017. In the resulting July 14, 2017 arbitration decision, the deputy commissioner found claimant provided insufficient evidence to prove his work activities caused or materially aggravated or accelerated his alleged depression, anxiety, and cognitive difficulties. The deputy commissioner similarly found claimant provided insufficient evidence to prove his work activities caused or materially aggravated or accelerated his shoulder conditions. As such, the deputy commissioner concluded claimant failed to prove he sustained either a traumatic or cumulative injury that arose out of and in the course of his employment with defendant-employer.

Having decided claimant failed to carry his burden to prove a causal relationship between his alleged mental and cognitive conditions and his work activities, the deputy commissioner found and concluded claimant was not entitled to the medical expenses contained in Exhibit 22, all of which related to treatment of claimant's alleged depression, anxiety, and/or cognitive complaints.

With respect to costs, the deputy commissioner concluded the reimbursement provisions of Iowa Code section 85.39 were triggered, entitling claimant to reimbursement of his independent medical examination (IME) with Marc Hines, M.D. However, the deputy commissioner declined to assess defendants with the remainder of claimant's costs.

On appeal, claimant argues the deputy commissioner erred in determining claimant did not sustain a work-related injury. Claimant instead asserts he is permanently and totally disabled due to his work-related injuries and is entitled to additional penalty benefits for defendants' unreasonable denial of his claim. Claimant also argues he is entitled to reimbursement for the medical expenses listed in Exhibit 22, along with all of his costs, including an IME with Frank Gersh, Ph.D.

Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner. I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on July 14, 2017 that relate to issues properly raised on intra-agency appeal.

I find no error in the deputy commissioner's decision that claimant failed to prove his work activities caused or materially aggravated or accelerated his shoulder conditions. I adopt the deputy's factual findings, conclusions of law, and analysis on this issue in their entirety.

I likewise find no error in the deputy commissioner's decision that claimant failed to prove his work activities caused or materially aggravated or accelerated his alleged depression, anxiety, or cognitive difficulties. I adopt the deputy's factual findings, conclusions of law, and analysis on this issue in their entirety, with the following additional analysis regarding claimant's claim of depression:

Claimant in his appeal brief suggests his work-related depression first surfaced in September of 2012 when he began reporting mild to moderate depressive symptoms. While claimant is correct that his "self-report" measure of depression was mild to moderate during his neuropsychological evaluation in late-September of 2012 (Exhibit A7, page 62), no doctor ever causally related these initial depressive symptoms to claimant's work activities. Bruce Jasper, Ph.D., who performed the testing, did not specifically comment on these measures or their causal relationship to claimant's work activities, primarily because claimant's overall neuropsychological testing was "within normal limits." (Ex. A7, p. 62)

Claimant's self-report of mild to moderate depressive symptoms in September of 2012, less than two months after his last day of work with defendant-employer, is notable given claimant's statements to numerous providers that he dealt with depression and anxiety long before his alleged work-related injuries. (See, e.g., Ex. A7, p. 59 ("Anxiety and bouts of depression since childhood; treatment with medications

beginning in his 30's. . . . Dr. Glanzer referred the patient for psychological evaluation about 15 years ago and according to the patient some anxiety/depression diagnosis was given."); Ex. A11, p. 88 ("[Claimant] says he has been dealing with anxiety for over 20 years."); Ex. A13, p. 101 ("[Claimant] reports onset of treatment for anxiety about 10 years ago . . . , and treatment for depression at some point unspecified but prior to 2012"); Ex. 1, p. 3 ("His panic attacks . . . began years ago before he was working for [defendant-employer].")) As claimant acknowledges in his brief, "[d]epression is not a condition that is experienced contemporaneous with an acute event." (Claimant Appeal Brief, p. 13) The fact that claimant had pre-existing and underlying anxiety and depression suggests a possibility that the mild to moderate depressive symptoms reported by claimant in September of 2012 was actually his "baseline."

This is supported by the opinion of Scott Eastin, M.D., who opined that while claimant's work activities in July of 2012 may have caused "a brief exacerbation of his pre-existing mental health conditions," he returned to baseline by Dr. Jasper's evaluations in September of 2012. (Ex. A13, pp. 107-108)

I acknowledge claimant denied depressive symptoms or anxiety in his examination with Gregory Hotsenpiller, M.D., Ph.D., on August 30, 2012, roughly a month before his evaluation with Dr. Jasper. (See Ex. A6) However, it is very clear from Dr. Hotsenpiller's note that claimant was primarily, if not only, concerned with his alleged cognitive deficits at this appointment. (Ex. A6, pp. 55-56 ("[Claimant] is essentially fixated on the fact that he has had cognitive problems" and "his concerns are strictly related to possible cognitive deficits.")) Thus, claimant's denial of depressive symptoms at his evaluation with Dr. Hotsenpiller appears to be a reflection of claimant's focus rather than an absence of underlying and longstanding anxiety and depression.

Notably, claimant received treatment for his anxiety at family medicine clinics in 2013, and at no point is claimant's purported work-related stress from 2012 mentioned in any of the notes. On February 11, 2013, claimant presented for treatment at a new family medicine clinic because claimant's primary care physician was retiring. Although claimant reported "significant anxiety," there is no discussion about the work conditions that claimant now asserts to be the cause of his anxiety. (Ex. A8, p. 64) Two months later, at claimant's initial visit to establish care at a different clinic, the physician's records only notes "chronic anxiety" without further comment. (Ex. A9, p. 66) The absence of any mention of the working environment that claimant now alleges to be the cause of his depression and anxiety, along with claimant's self-reporting of longstanding anxiety, supports Dr. Eastin's opinions that claimant's ongoing depression or anxiety after September of 2012 was related to his pre-existing and underlying mental health conditions—not his work activities with defendant-employer.

In February of 2014, Mark Mittauer, M.D., diagnosed claimant with Major Depressive Disorder that "likely resulted from his strenuous work conditions and long hours" with defendant-employer. (Ex. 1, p. 5) However, at the time of this examination,

claimant had not worked for defendant-employer, and therefore had not been exposed to any strenuous working conditions, for more than one and a half years. Dr. Mittauer failed to explain why claimant's depression/anxiety continued to be attributable to his work environment despite the fact that he had not been exposed to that environment for an extended period of time. Further undercutting Dr. Mittauer's opinion is the fact that claimant never mentioned these strenuous working conditions to his primary care providers when he discussed his anxiety in 2013, as explained above.

Significantly, when claimant began therapy at the Abbe Center for Mental Health after Dr. Mittauer's initial evaluation, his reported stressors were not the strenuous work conditions from the summer of 2012, but rather the shoulder pain that he believed prevented him from returning to his past work. (See Ex. 6, p. 1) For example, the note from the initial assessment at the Abbe Center provides:

[Claimant] says that he has difficulty with everyday task[s] because of the pain. He is not able to lift more than 25 pounds without pain. He is also no longer to work at his previous profession and [this] hinder[s] his economic situation. *This life changing situation has lead [sic] to depression.*

(Ex. 6, p. 1) (emphasis added) A note from a follow-up assessment with Dr. Mittauer similarly states, "He's been depressed for the past several years *in the context of chronic pain, losing his job, and associated financial stress.*" (Ex. 6, p. 4) (emphasis added). Of great significance is the fact that Dr. Mittauer conducted this follow-up assessment. (Ex. 6, p. 7)

Having found and concluded claimant's shoulder conditions are not causally related to his work activities, I likewise find and conclude that any depression or anxiety resulting from claimant's shoulder conditions is not causally related to his work activities. The fact that Dr. Mittauer's own treatment note discusses claimant's depression in the context of claimant's pain and financial stressors without even mentioning the strenuous work conditions to which he previously (and subsequently) attributed claimant's depression greatly undercuts the credibility of Dr. Mittauer's opinions.

I also acknowledge Dr. Gersh's opinions that claimant's depression was "a result of a workplace injury," but Dr. Gersh's evaluation took place in July of 2016, more than four years after he was exposed to the strenuous work environment to which he attributes his depression. For all of the above-stated reasons, I similarly find Dr. Gersh's opinion to be unpersuasive.

The deputy commissioner specifically found the opinions of Dr. Eastin to be more convincing than those of Dr. Gersh and Dr. Mittauer. For the above-stated reasons, I agree. I affirm the deputy commissioner's finding that claimant provided insufficient evidence to prove his work activities caused or materially aggravated or accelerated his

depression, and I therefore affirm the deputy's conclusion that claimant failed to prove his depression arose out of and in the course of his employment with defendant-employer.

Having affirmed the deputy commissioner's decision that claimant failed to prove a work-related injury, the issues of the extent of claimant's disability and penalty benefits are moot.

Because I agree with the deputy commissioner that claimant failed to carry his burden to prove a work-related injury, I also find no error in the deputy commissioner's decision that claimant failed to prove his entitlement to reimbursement for the medical expenses contained in Exhibit 22. I adopt the deputy's factual findings, conclusions of law, and analysis regarding this issue in their entirety.

Regarding costs, the deputy commissioner determined claimant was entitled to reimbursement for Dr. Hines' IME under Iowa Code section 85.39, but he declined to assess any of claimant's remaining costs to defendants. On appeal, claimant argues he is entitled to additional reimbursement under Iowa Code section 85.39 for Dr. Gersh's IME and should be awarded the remainder of her costs under Iowa Administrative Code rule 876-4.33.

In their reply, defendants argue claimant is not entitled to any reimbursement under Iowa Code section 85.39 because IMEs are not reimbursable until liability has been established, which did not occur in this case. Defendants, however, did not appeal the deputy commissioner's decision regarding the reimbursement of Dr. Hines' IME, so I will not address this issue. Instead, I will only address claimant's claim for reimbursement for Dr. Gersh's IME.

Claimant argues he is entitled to reimbursement under Iowa Code section 85.39 for both his IMEs because the reimbursement provisions of section 85.39 can apply "each time an employer requires the employee to submit to an evaluation of permanent disability by a new physician selected by the employer." Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 844 (Iowa 2015) (hereinafter DART). Claimant asserts both IMEs occurred after evaluations by employer-retained physicians.

When relying on this sentence from DART, however, claimant does not consider the entirety of the phrase "evaluation of *permanent disability*"; instead, he stops at "evaluation." Id. (emphasis added). The commissioner has previously held similar arguments to be contrary to the Iowa Supreme Court's literal interpretation of Iowa Code section 85.39 in DART. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal Dec. Mar. 26, 2018).

The Iowa Supreme Court in DART held that reimbursement for IMEs under Iowa Code section 85.39 is only available if an evaluation of *permanent disability* has been made by an employer-retained physician. DART, 867 N.W.2d at 844. In Reh, the

commissioner concluded there is a “distinct” difference between evaluations of permanent impairment and evaluations to determine causation. See Reh, File No. 5053428 (Appeal Dec. Mar. 26, 2018). In this case, the evaluation performed by Dr. Eastin was not an evaluation of permanent impairment, but an evaluation to determine causation. Further, there is no impairment rating for claimant’s alleged mental health or cognitive conditions from any physician chosen by defendants because it is defendants’ position that claimant did not sustain a work-related mental health or cognitive injury. For these reasons, I conclude the reimbursement provisions of Iowa Code section 85.39 were not triggered, meaning defendants are not responsible for reimbursing the cost of Dr. Gersh’s IME.

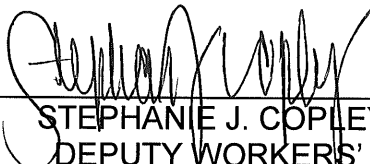
Regarding claimant’s remaining costs, I affirm the deputy commissioner and conclude the parties should bear their own costs in this action.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of July 14, 2017 is affirmed in its entirety with my additional analysis.

Claimant shall bear the costs of this appeal, including the cost of the hearing transcript, pursuant to rule 876 IAC 4.33.

Signed and filed this 11th day of January, 2019.


STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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