BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLEEN JOHNSON,

Claimant,

vs.

CITY OF WAUKEE,

Employer,

and

IMWCA,

Insurance Carrier,
Defendants.

File No. 5052374

ARBITRATION DECISION

Head Note Nos.: 1108, 1402.30, 1803, 2204, 2800

STATEMENT OF THE CASE

Charleen Johnson, claimant, filed a petition in arbitration seeking workers' compensation benefits from City of Waukee and its insurer, IMWCA, as the result of an injury she allegedly sustained on October 1, 2013 that allegedly arose out of and in the course of her employment. This case was heard in Des Moines, Iowa and fully submitted on May 2, 2016. The evidence in this case consists of the testimony of claimant and Joint Exhibits A – O. Both parties submitted briefs.

ISSUES

Whether claimant sustained an injury on October 1, 2013 which arose out of and in the course of employment;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability.

Whether claimant provided timely notice of the injury.

Assessment of costs.

STIPULATIONS

The parties have stipulated to the following:

The claimant was an employee at the time of the alleged injury.

Temporary benefits are not in dispute.

If a finding is made that claimant has a compensable injury, the injury is industrial and the commencement date is October 2, 2013.

The claimant's gross earnings were $401.49 per week, she was single and entitled to 2 exemptions and a weekly rate of $269.92 per week.

The stipulations are accepted by the undersigned and the parties are bound by their stipulations.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Charlene Johnson (f/k/a Charlene Cruchelow), claimant, was 29 years old at the time of the hearing. Claimant graduated from college with a degree in graphic design. Claimant began her work for the defendant, City of Waukee (Waukee), in 2005. Claimant worked as a salesperson part-time from 2003 – 2011. She began working part-time teaching junior golf at Sugar Creek Golf Course in 2006. (Exhibit C, page 1) The work was seasonal. Claimant also worked for a computer company since 2011 part-time. (Ex. A, p. 6) Claimant became an assistant manager in 2011. She was working part-time as an assistant manager at the golf course. (Transcript p. 11) In 2011, claimant's supervisor and golf pro Jim Webb initiated a sexual relationship with claimant. Claimant and other staff went to a restaurant and Mr. Webb requested that claimant return to the clubhouse and they had oral sex. Claimant testified that this relationship continued and that they would have oral sex frequently during the summer. Most of the time the encounter occurred at the club house and other times it took place at a park. Claimant testified that Mr. Webb did not force himself in any physical way, but claimant was afraid of losing her job or that he would tell someone. (Tr. p. 15).

Claimant did not see Mr. Webb during the off-season. Claimant testified that this relationship with Mr. Webb did not affect her work relationship until the end - the end of her relationship with Mr. Webb in 2013. (Tr. p. 17) Claimant testified that a few months before she left the golf course Mr. Webb would not make eye contact and would ignore her. That he would not communicate with her and it was difficult to do her job. (Tr. p. 20) Mr. Webb would respond to specific questions of claimant and would not make informal conversation. (Tr. pp. 54, 55) Mr. Webb would respond to questions related to the golf course. (Tr. p. 79) Mr. Webb ended their relationship in May 2013. (Tr. pp. 18, 54) Claimant was upset that Mr. Webb no longer stayed around in the evenings when she closed up shop. (Tr. p. 57) Claimant believed, but was not sure, that Mr. Webb started another similar relationship with another employee when he ended their relationship. (Tr. p. 20)

Claimant submitted a letter of resignation to Mr. Webb on October 13, 2013, effective October 31, 2013. (Ex. C, p. 36) The resignation letter did not mention any specific reason for resignation and was professional in tone. Claimant did not inform anyone with Waukee that her relationship with Mr. Webb had caused her depression

until her attorney notified Waukee after her resignation. (Tr. p. 34) Waukee was notified about the claim of a work injury when claimant's attorney sent a letter to Waukee on January 7, 2015. (Ex. A, p. 109; Ex. A, Ex. 1)

Claimant did not file any sexual harassment complaint with Waukee or any civil rights agency. (Tr. p. 21) Claimant testified that at the time of her resignation she did not know that a person could file a request for workers' compensation benefits due to a mental injury. (Tr. p. 22)

On June 28, 2012, clamant saw Nathan McKellar, D.O., the day after she had made a suicidal gesture, and did not tell him about the relationship she had with Mr. Webb. She testified that her boyfriend and mother were in the room and she would not have told Dr. McKellar that information in their presence. (Tr. p. 40) She went to counseling once while employed—after her suicidal gesture in 2012. She did not inform her physician or counselor about her sexual affair with Mr. Webb. Her boyfriend and mother were not present at that appointment. (Tr. p. 44) Claimant said that she did not tell anyone for two years about her relationship with Mr. Webb. (Tr. p. 23) Claimant missed no time off work due to the emotional stress of her relationship with Mr. Webb.

Claimant and her boyfriend, Mr. Witte, separated in September 2013 and claimant moved into her mother's house. (Tr. p. 50)

Claimant testified that now it is difficult for her to participate in golf and that it is hard for her to work with people. (Tr. pp. 24, 29) Claimant acknowledged that counseling has been recommended, but she had not followed through to determine what her insurance will cover. (Tr. p. 30) She last had counseling in 2012. (Ex. A, p. 22) Claimant has helped teach golf at the request of a friend at Sugar Creek as well another golf course. (Tr. pp. 64, 65)

Claimant continued to work for the computer store after she resigned from Waukee. Claimant had good performance reviews at the computer store while she was working for Waukee and after her resignation. (Tr. p. 34)

Claimant was in a long term relationship with Jeremy Witte from 2006 through 2013. She had a child in March 2011. Claimant acknowledged that her relationship with Mr. Webb started a few months after her child was born. (Tr. p. 36)

Claimant began a relationship with her future husband, Jeremy Johnson, in October 2013. (Tr. p. 60) Claimant worked with Mr. Johnson in the computer store.

Claimant was seen by Dr. McKellar at Family Medicine on June 28, 2012, the day after her suicidal gesture. (Ex. J, pp. 1 – 4) Claimant's mother and boyfriend were with her at the appointment. Dr. McKellar noted claimant had increased her alcohol consumption. He prescribed a mood stabilizer and encouraged her to seek counseling. (Ex. J, p. 2) Claimant returned to Dr. McKellar on July 25, 2012 and he noted improvement and renewed her prescription. (Ex. J, p. 4) Claimant returned to Family Medicine in January 2013 with increased depression and claimant was engaging in

cutting behavior. Claimant was urged to obtain counseling. (Ex. J, p. 6) Claimant was seen at Family Medicine on July 23, 2013. Claimant denied a depressed mood at that time. She was advised to keep taking her depression medication for another 6 – 9 months. (Ex. J, p. 9) On January 1, 2014, claimant went to Family Medicine due to her pregnancy. The note of that visit states that claimant was diagnosed with post-partum depression after her previous pregnancy. (Ex. I, p. 8) Her depression medication was stopped and claimant was advised to obtain counseling if there were signs of depression. (Ex. J, p. 11)

On August 3, 2012, claimant was seen by Denise Hageria, LLSW. The presenting problem was noted as "The patient reports that she became suicidal four weeks ago after binge drinking and told several friends of her intent to [*sic*] suicide." (Ex, G, p. 1) Claimant informed Ms. Hageria that she had been drinking more the past several months and that her pregnancy and the birth of her daughter 16 months ago could be the trigger for her current depressive symptoms. (Ex. G, p. 1) Claimant noted persistent depressive symptoms since childhood and increasing severity over the past 18 months. Ms. Hageria noted claimant's history of abuse as a child and diagnosed claimant with major depressive disorder, recurrent, moderate. She recommended individual therapy of approximately 6 – 9 months. (Ex. G, p. 4)

On January 22, 2015, Arthur Konar, Ph.D., performed an independent medical examination (IME) of the claimant. (Ex. A, Ex. 3, pp. 1 – 9) Dr. Konar found,

> She does meet criteria for a diagnosis of major depression. She has anhedonia, is sad and [*sic*] difficulties sleeping, and feels exhausted and ashamed. She feels like she is being unfairly punished. She still has urges to cut on herself. Suicidal thoughts creep into her head, but she doesn't believe that she has to act on it. When she is dealing with her negative thoughts "once I get to the low, low, it's always on my mind. And I have other things in my life that aren't happy experiences, and those come up as well." These symptoms are all associated with Major Depression.
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> She has aspects of but does not meet criteria for a diagnosis of Posttraumatic Stress Disorder. The issue of prior trauma is clear, and its extent appears phenomenal. Her trauma has been reintroduced by the reported sexual exploitation and subsequent neglect and rejection from Jim Webb. Yet she does not meet enough criteria to have the diagnosis. Unfortunately, these issues make her depression much harder to treat and recover from.

(Ex. A, Ex. 3, pp. 7, 8) Dr. Konar diagnosed claimant with major depressive disorder, recurrent, moderate, stable under medication. (Ex. A, Ex. 3, p. 8)

In response to the following question posed by claimant's counsel, Dr. Konar responded,

> 2. What relationship if any does Charleen Johnson's mental health conditions bear to her physical work-conditions she experienced with the City of Waukee?
>
> There is no question that the psychological trauma bear [*sic*] to her physical work-conditions she experienced with the City of Waukee. The issue of prior trauma is clear, and its extent appears phenomenal. Her trauma has been reintroduced by the reported sexual exploitation and subsequent neglect and rejection from Jim Webb.

(Ex. A, Ex. 3, p. 8) Dr. Konar opined claimant was not seen as malingering and described her as stoic and attempting to deny and repress psychological pain. He did not believe claimant was at maximum medical improvement and thought that claimant would benefit from additional treatment. (Ex. A, Ex. 3, pp. 8, 9)

On January 12, 2016, Scott Jennisch, M.D., provided an IME report based upon a review of records and examination of the claimant in October 2015. (Ex. N, pp. 5 – 27)

Dr. Jennisch concluded that claimant had a psychiatric history consistent with a diagnosis of major depressive disorder, recurrent. He noted the condition predates the October 1, 2013 alleged date of injury and that the symptoms were well controlled and in part to full remission. (Ex. N, p. 22) Dr. Jennisch noted claimant experienced a recurrence of depression in college and after the birth of her two children. (Ex. N, p. 23) Concerning her relationship with Mr. Webb he noted, "In aggregate, this does not suggest a traumatic, abusive relationship." (Ex. N, p. 24) Dr. Jennisch noted claimant had a number of psychosocial stressors at the same time as her relationship with Mr. Webb. (Ex. N, p. 25) Dr. Jennisch was unable to conclude that claimant's relationship with Mr. Webb was a principal causal factor or an exacerbating factor in claimant's recurrent major depressive disorder. (Ex. N, p. 26) Dr. Jennisch noted that claimant's depression is under control and no restrictions have been recommended by any health providers. (Ex. N, p. 26)

The medical evidence from 2011 through 2014 does not reflect that claimant was having any unusual stress due to her relationship with Mr. Webb. Claimant did have a suicidal gesture in June 2012. The medical records show an increase in alcohol consumption. Claimant was diagnosed with post-partum depression after the birth of her child in March 2011. Claimant testified that the relationship with Mr. Webb was stressful and was the cause of her cutting and depression. Claimant testified that Mr. Webb's refusal to interact with her in any way other than answering business questions and her belief that Mr. Webb was having another relationship with an employee caused her to submit her resignation.

I find that claimant's weekly workers' compensation rate is $269.92 based upon a gross weekly income of $401.49 and being single with 2 exemptions.

RATIONALE AND CONCLUSIONS OF LAW

Iowa Code section 85.23 provides:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

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).

The time period for giving notice 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). See also Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015).

Claimant missed no time from work after the suicidal gesture in June 2012. There is no report from a physician indicating that her depression at that time was a permanent injury. Claimant had a number of stressors in her life at that time, as well as the affair and lack of affair with Mr. Webb. She continued to work at the golf course for the City of Waukee. Claimant was able to perform all aspects of her job up until the

time of her resignation. Defendants argue that there is no mental injury from work and at the same time argue that claimant should have recognized a work related mental injury and provided notice to her employer. Given claimant's issues with depression before she started working for the City of Waukee, Waukee argues claimant should have known she had a work–related mental injury that she should report. I find that claimant did not reasonably know that she had a compensable injury. Defendants have not proven that claimant failed to provide timely notice.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact-based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been a viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

While a close question, I find that the stress of claimant's relationship with her supervisor, Mr. Webb, did aggravate her prior major depression symptoms. While claimant had many psychosocial stressors prior to her relationship with Mr. Webb, I find that the relationship with her supervisor did materially aggravate her depression. I find the report of Dr. Konar to be more convincing than that of Dr. Jennisch as to the causation of work related "mental/mental" injury. Dr. Konar performed extensive testing of the claimant. He considered the trauma of sexual exploitation and her rejection by Mr. Webb. While the relationship was consensual, claimant's history of physical and sexual abuse was aggravated by her relationship with her supervisor, Mr. Webb. Claimant's suicidal gesture, increased use of alcohol and resumption of cutting happened during or after her relationship with her supervisor, Mr. Webb.

I do note, as Dr. Jennisch pointed out, claimant had many psycho-stressors in her life including childhood physical and sexual abuse, financial difficulties, post-partum depression, alcohol and relationship issues with her boyfriend. I find that the

relationship with Mr. Webb at work and that he was her supervisor was also a psychosocial issue that aggravated her condition.

I found that claimant's relationship with Mr. Webb did aggravate her pre-existing major depressive disorder. This relationship was a substantial, but not the only factor, in her current depression. Her depression is well controlled and no restrictions have been imposed by any health provider. Additional counseling has been recommended by a number of providers.

Claimant has proven medical causation. The next question is whether she has proven legal causation.

In Asmus v. Waterloo Community School Dist., 722 N.W.2d 653, 656-657 (Iowa 2006) the court held;

> In Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845, 853-58 (Iowa 1995), this court recognized that a purely mental injury may be compensable under the workers' compensation laws in the absence of an accompanying physical injury. In order for a mentally injured worker to prevail on such a claim, Dunlavey required proof of both medical causation and legal causation. Dunlavey, 526 N.W.2d at 853. Medical causation simply requires a claimant to establish that the alleged mental condition was in fact caused by employment-related activities. Legal causation, on the other hand, presents a question of whether the policy of the law will extend responsibility to those consequences that have in fact been produced by the employment. Id. Dunlavey formulated the standard for legal causation as whether the claimant's stress 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. (footnote omitted)
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> Although the standard of legal causation involves an issue of law, see Dunlavey, 526 N.W.2d at 853, the application of that standard to a particular setting requires the commissioner to render an outcome determinative finding of fact. A court on judicial review is bound by that fact-finding if it is supported by substantial evidence.

The issue in this is that claimant testified her stress was caused by the end of her relationship and by lack of attention and different treatment by Mr. Webb after he broke off the affair. Claimant testified that after the affair stopped in spring 2013, Mr. Webb ignored her and would not engage in general conversation with her. He would only communicate about work issues. Mr. Webb would interact in order to conduct golf course business. I do not find that his interaction to keep their relationship on a strictly business relationship is stress of a greater magnitude than the stress of co-workers.

Claimant has failed to prove legal causation for her claim and as such she does not prevail in this case.

Claimant has not provided citation to any similar cases in Iowa or elsewhere that would allow recovery under the facts of this case.

ORDER

THEREFORE, IT IS ORDERED:

The claimant shall take nothing in this case.

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

Signed and filed this 19th day of January, 2017.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.