BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARY L. WELCH,

Claimant,

vs.

JOHN DEERE DAVENPORT WORKS,

Employer,
Self-Insured,
Defendant.

File No. 5050710

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Gary Welch, claimant, has filed a petition in arbitration and seeks workers' compensation from John Deere Davenport Works, self-insured employer, defendant.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on October 6, 2015 in Des Moines, Iowa. The record in the case consists of joint exhibits A through WW, claimant's exhibits 1 through 3; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

1. Whether the claimant sustained an injury arising out of and in the course of employment on August 7, 2012.

2. Whether the alleged injury is a cause of temporary disability.

3. Whether the alleged injury is a cause of permanent disability.

4. Whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

5. The extent of the claimant's entitlement to permanent partial disability benefits.

Defendants assert an affirmative defense of an untimely claim under Iowa Code section 85.26.

FINDINGS OF FACT

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

Claimant testified he was at work on the date of injury when his supervisor Harold Akins asked him to help move a rack. Claimant went to help him slide the rack, which was heavy, so they tried to scoot it across the floor. Claimant put both hands in a slot on the rack and they slid it across the floor. As soon as he did, claimant felt a pop in his left side of his neck, and he felt a pain that went to his jaw and down his arm to his left thumb.

Claimant was taken to a hospital, where an MRI showed a herniated disc at L5-L6 level of his spine. He continued to treat with medical personnel. Mike Perry, a safety manager at John Deere, came and told claimant the employer he did not feel the condition happened at work, and referred to past medical records that showed three prior neck injuries on the same side. He said "we don't think it happened here".

Claimant had worked at John Deere for about 12 years. Claimant was afraid he might be fired or disciplined for having an injury. Claimant had an attorney who filed this petition on his behalf.

Exhibit 1 shows Timothy Millea, M.D., diagnosed him with a bone spur in the past. This new incident resulted in an MRI that showed a herniated disc.

On cross examination, claimant agreed he previously injured his neck at another employer in 2002. He felt pain down his left arm then as well. He also had numbness into his thumb. That injury resulted in a C6-C7 neck fusion. (Exhibit G)

On the date of the alleged injury, claimant agreed he was not lifting the item but dragging it. He also agreed he is not certain of the date the incident occurred, although he feels it was August 4, 2012. An email from Mr. Akins used August 3, 2012, and that date was used. Mr. Akins was his supervisor. Mr. Akins failed to appear for a scheduled deposition in California, where he now resides, and thus his statement is not in the record. Claimant feels the rack was moved about five feet before the pain occurred. Claimant has not been paid any workers' compensation benefits for this injury.

In September 2014, after this alleged date of injury, claimant had a forklift accident at John Deere. He was injured, receiving a compression fracture to his neck at the C5 level. That injury was accepted by John Deere. Dr. Millea treated him for that injury as well. Claimant was released to return to work in January 2015 . (Exhibits OO, PP) He was released without restrictions, and claimant agreed because he had bills to pay. At the time of the deposition, in May 2015, he was working 75 to 80 hours per week, much of it voluntary overtime. (Exhibit QQ, Claimant's Deposition) He now works about 40 hours per week, as work has slowed down. He was released back to

his old job. Claimant avoids lifting anything heavy due to his condition. At his deposition in May 2015, claimant stated he was not having any difficulty doing his job. (Exhibit QQ, page 136; Dep., p. 21, line 4)

Claimant has no current appointments scheduled with Dr. Millea. He is on no prescription medications today. Claimant stated his injury does bother him on certain jobs he does. If he uses a sledgehammer or works with anything over 50 pounds, he will have pain "like a sucker punch" in his low neck/upper back area. He wants someone to take responsibility for his neck for when he is 60 years old and needs a surgery.

Pursuant to questions from the undersigned, he stated he had no neck pain between his past injuries and the current incident. He was able to do all the duties of his job before this incident. He returned to work full time, and suffered no loss of earnings. He had no work restrictions because he would not be able to do his regular job and make his regular pay if he had any.

Christine Deignan, M.D., did an examination for defendants. She assigned a rating of permanent partial impairment of 21 percent of the body as a whole for claimant's neck conditions, but she was not able to assign that impairment to this work incident. Claimant had prior ratings of impairment from his 2002 injury. (Exhibit TT)

CONCLUSIONS OF LAW

The first issue in this case is whether the claimant sustained an injury arising out of and in the course of employment on August 7, 2012. Closely related are the issues of whether the alleged injury is a cause of temporary disability.

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 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).

Claimant asserts a work injury arising out of and in the course of his employment. He bases this in large part on the fact that before the incident, he was found to have only a bone spur in his neck. After it happened, he was found to have a herniated disc in his neck.

However, this alone is insufficient to establish the incident caused the worsening of the neck condition from a bone spur to a herniated disc. Claimant bears the burden of proof, but he has failed to provide a single medical opinion causally connecting his current herniated disc to the August 2012 incident. On the contrary, the record shows medical opinions indicating his current symptoms cannot be causally connected to claimant's condition.

In addition, there are other factors in the record that are more likely sources of his current condition. Claimant had a prior neck injury in 2002. At that time he reported the same symptoms of neck pain, left arm pain and numbness, etc. Also, claimant had a neck injury after this alleged injury, in September 2014. Again, he reported similar symptoms. Either of these incidents could be a likely cause of his current condition.

After the 2002 injury, claimant underwent a neck fusion at the C6-C7 level. At that time he was also treated by Dr. Millea, who has been his treating physician since 2002. Claimant was assigned a 15 percent body as a whole rating after the 2002 injury, and received work restrictions after several Functional Capacity Evaluations. In June and July 2011, a year before this incident, claimant returned for medical treatment complaining of pain in his neck and left arm, just as he did after this incident. At that time claimant attributed his pain to weightlifting. (Exhibit V)

The September 2014 forklift injury, occurring after this incident, affected claimant's C5 level of his neck. That injury has been accepted as compensable by John Deere.

Thus, the record shows at least three other possible causes for claimant's current neck condition other than this alleged work injury: the 2002 neck injury, which produced similar symptoms; weightlifting activities in 2011; and the September 2014 forklift injury, also involving the neck.

To carry his burden of proof that it was the August 2012 incident that caused his current condition and not the other possible causes, claimant would have to rely on medical opinions to that effect. He has not offered any medical opinions that say it was the August 2012 incident that is responsible for his current neck condition.

Indeed, the medical opinions in the record specifically find his current condition cannot be attributed to this alleged work injury. Dr. Millea, the orthopedic specialist who has treated claimant's neck since 2002, has said he cannot state within a reasonable degree of medical certainty claimant's neck condition is caused by the August 2012 incident. He cites the prior 2002 injury, the weightlifting, etc. as reasons he cannot say this incident caused his problems. He recites the fact diagnostic tests after his alleged incident did not show any trauma. Dr. Deignan found that within a reasonable degree of medical certainty she could not find that his symptoms were linked to the August 2012 incident, and that it was more likely due to weightlifting activities. (Exhibit TT, pages 10-11) She also stated the MRI on August 10, 2012, although it did show a herniated disc, does not show what caused the herniation.

Clearly something happened in August 2012. Claimant credibly testified he felt intense pain, extending from his neck to his fingers. It cannot be said there was no injury. The record shows the incident in August 2012 while dragging the heavy cart was an injury arising out of and in the course of his employment. He was at work, and it was heavy work activity that caused the incident of pain.

It is found claimant suffered an injury arising out of and in the course of his employment in August 2012.

However, there is no evidence the injury caused any permanent disability, as discussed above. Claimant has simply failed to carry his burden of proof to show that any of his current impairment is caused by this work injury, and therefore he has not carried his burden of proof to show the work injury has caused any permanent disability. But claimant has carried his burden of proof to show the work injury caused temporary disability.

The next issue is whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Defendants have stipulated that if a work injury is found, claimant is entitled to temporary total disability benefits for the periods set forth in the hearing report. Those benefits will be ordered.

The next issue is the extent of claimant's entitlement to any permanent disability benefits.

As claimant has not shown any permanent disability from his work injury, this issue will not be addressed.

Defendants assert an affirmative defense of an untimely claim under Iowa Code section 85.26.

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).

Claimant filed his petition on August 6, 2014 alleging a work injury on August 7, 2012. His attorney at that time chose August 7, 2012, as the date of injury, apparently to avoid any problems with the statute of limitations under Iowa Code section 85.26. There is no evidence in the record to suggest anything happened on August 7, 2012.

Claimant's supervisor was Harold Akins. Mr. Akins failed to appear for his scheduled deposition in California, so there is no testimony from him. Defendants relied on an email from Mr. Akins in which he states the incident occurred on August 3, 2012. Claimant is not sure when the incident occurred.

If the incident did occur on August 3, 2012, then claimant's petition is untimely filed, as it was filed on August 6, 2014, more than two years after the injury. Two years is the applicable time limit because no benefits were paid to claimant. If it occurred on August 6 or later, it would have been timely filed. Thus a span of two or three days makes a great deal of difference in this case.

Defendants bear the burden of proof to show this affirmative defense. They have only offered Mr. Akins' email, sent some time after the event. Yet claimant received medical treatment the day of the injury from the in house medical personnel at John Deere. It can be safely assumed they would have some record of that treatment, which would definitively show when the injury occurred. Those records are within the custody and control of defendants, who bear the burden of proof to show the petition was filed more than two years after the injury. Yet those records have not been produced.

Because of this, the undersigned cannot give any weight to Mr. Akins' email date and find claimant's entire petition untimely, when more definitive records could have been consulted and provided by defendants but were not. It is concluded defendants have failed to carry their burden of proof to show claimant's petition was not timely filed within two years under Iowa Code section 85.26.

ORDER

THEREFORE IT IS ORDERED:

Defendant shall pay unto the claimant temporary total disability benefits at the rate of nine hundred sixty-four and 33/100 dollars ($964.33) per week from October 23, 2012 through December 3, 2012, and from February 11, 2014 through March 19, 2014.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for benefits previously paid.

Defendant shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendant shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendants.

Signed and filed this 30th day of October, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.