

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES L. JOHNSON,  
Claimant,

vs.

IRWIN, INC.,  
Employer,

and

ACCIDENT FUND NATIONAL  
INSURANCE COMPANY,  
Insurance Carrier,  
Defendants.

File No.: 5052122

**FILED**

**AUG 25 2017**

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

WORKERS' COMPENSATION

Headnote No.: 5-9999

STATEMENT OF THE CASE

On July 27, 2017, Joseph S. Cortese II, Iowa Workers' Compensation Commissioner, delegated the authority to the undersigned to issue the final agency decision on the intra-agency appeal currently pending before this agency. The decision in this matter shall be the final agency action.

This arbitration hearing was held on December 16, 2015 in Davenport, Iowa. The parties filed post-hearing briefs. The case was deemed fully submitted on January 19, 2016. The deputy issued the arbitration decision on February 9, 2016.

The deputy commissioner determined claimant failed to carry the burden of proof and demonstrate by the greater weight of credible evidence that he suffered the claimed work injury.

On February 18, 2016, claimant filed a notice of appeal. The brief was filed on April 8, 2016. Claimant's brief argued the following:

- A. Whether claimant proved he sustained work related injuries to both shoulders on September 19, 2013;
- B. Whether defendants should be ordered to pay claimant's medical bills;
- C. Whether defendants should be ordered to provide additional medical care to claimant;
- D. Whether \$200.30 is the proper weekly benefit rate;

- E. Whether defendants should be ordered to pay healing period benefits to claimant; and
- F. Whether defendants should be ordered to pay a substantial award of industrial disability to claimant.

Defendants filed their appeal brief on April 29, 2016. Defendants asserted the deputy's decision should be affirmed in its entirety. In the appeal brief the defendants stated the alleged September 9, 2013 injury did not arise out of or in the course of employment at Irwin, Inc.

Claimant filed a reply brief on May 5, 2016. The focus of the reply brief was the independent medical report from Richard Kreiter, M.D.

The record in this case was reviewed de novo. Both sides dictated the issues to be determined on appeal. See: Iowa Code section 17A.15 and Rule 876 IAC 4.28(7). The party who would suffer a loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule App. P. 6.14(6).

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.15 and 86.24, I affirm as the final agency decision the proposed arbitration decision filed on February 9, 2016.

#### RATIONALE AND CONCLUSIONS OF LAW

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 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 (1967); Bodish v. Fischer, Inc., 257 Iowa 516, 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960)

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995).

There was no dispute. Initially, claimant told all medical providers he injured his shoulders on Wednesday, October 2, 2013 while assisting a friend lift an eighty pound dresser. Claimant testified he thought the providers at Mercy Hospital would refuse to treat claimant if he reported his shoulder conditions as work related. Claimant was receiving Medicaid and thought Medicaid would not cover the costs of a work injury. (Transcript, pages 42-44)

The evidence established claimant informed at least seven medical providers that he injured his bilateral shoulders while carrying a dresser with a friend who dropped his end of the dresser. See: Exhibit A, page 6; Exhibit B, page 1; Exhibit B, page 6; Exhibit C, page 1; Exhibit D, page 1; and Exhibit D, page 2.

The hearing deputy dismissed claimant's contentions because the deputy found claimant lacked credibility. The hearing deputy explained at page 5 of the arbitration decision the bases he found claimant to be less than credible:

However, I must agree with Dr. Kuhnlein. James and his wife appeared sincere at hearing, but I cannot tell which story is the truth from this record. It is certainly possible that claimant avoided reporting an injury to his providers so as to not delay his treatment. He may also have done so to withhold that information from Medicaid, which may not have allowed care for a work injury. However, it is just as likely that James had a non-work related injury, and when his Medicaid ran out, he decided to file a false claim for workers' compensation. His first letter to Irwin on October 30, 2013 was 28 days after he reported an injury moving the dresser on October 2, 2013. He may have had sore arms at work, but this would not be unusual for a person with a significant pre-existing bilateral shoulder problem for which he was receiving disability benefits. Assuming, he had soreness, such is insufficient to show a significant aggravation of his prior condition necessitating surgery.

Therefore, I am unable to find that James suffered the work injury to his shoulders, as he claims.

Further findings are unnecessary.

(Arbitration Decision, page 5)

ORDER

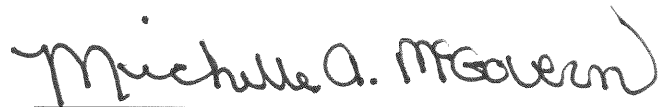
IT IS THEREFORE ORDERED that the arbitration decision filed on February 9, 2016, is affirmed in its entirety.

Claimant shall take nothing from these proceedings.

Claimant's claim for workers' compensation benefits is denied.

Claimant shall pay the costs of this action, the costs of the appeal, including the cost of the transcript pursuant to Rule 876 IAC 4.33.

Signed and filed this 25<sup>th</sup> day of August, 2017.



MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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