BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
SEP 01 2015
WORKERS' COMPENSATION

RUTH TOBIN,

Claimant,

vs.

REGIONAL TRANSIT AUTHORITY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5046811

ARBITRATION

DECISION

Head Note No.: 1100

STATEMENT OF THE CASE

The claimant, Ruth Tobin has filed a petition in arbitration and seeks workers' compensation benefits from Regional Transit Authority, employer, and Travelers Insurance Company, insurance carrier defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman on March 17, 2015 at Sioux City, Iowa. The record in the case consists of claimant's exhibits 1-11; defendants' exhibits A-Z as well as the testimony of the claimant and Hugh Lively.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury on January 8, 2014 that arose out of and in the course of employment;

2. Whether the injury was the cause of any permanent disability;

3. The extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u);

4. The commencement date for payment of permanent partial disability benefits;

5. Whether the claimant gave timely notice pursuant to Iowa Code section 85.23;

6. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27;

7. Whether the claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

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

The claimant at the time of the hearing was 79 years old. She is a high school graduate and earned a Bachelor of Fine Arts Degree in 1958. The claimant's work history consists of teaching vocal music and band from 1958 to 1980 in public schools. In 1980 she began working as a substitute in special education aide, which she continued to do until 1986. The claimant then performed sales work for a period of time before returning to working in job shadowing for the Area Education Agency 4. From 1990 to 2013 the claimant worked full time at Hope Haven as a support person for mentally challenged adults assisting them in their daily living activities. This became the claimant's primary job for 23 years. In addition to working at Hope Haven the claimant also worked as a bus driver for the employer in this case beginning in 1999 part time. Her job was to transport individuals using a bus or van. The claimant's employment was terminated in July 2013. After that she has not filed for unemployment benefits or made any applications for employment. The claimant decided to not work for personal reasons connected with her husband's health. The claimant has received Social Security retirement benefits since 1965 as well as IPERS from her past employment.

The claimant alleges a cumulative trauma injury to her right shoulder on January 8, 2014 from repetitive motion of lifting wheelchairs to secure the wheelchairs in the van that she was driving for the defendant. If the claimant drove the bus she had access to a wheelchair lift, but the van did not have one. Further, the claimant would have to push a wheelchair up a ramp to get into the van.

On January 8, 2014 the claimant had an MRI of her right shoulder, which revealed a full-thickness tear. See Exhibit 4, page 1. On July 10, 2014 the claimant wrote a letter of resignation, which she gave to her supervisor advising him of the MRI results and that she had been advised that driving a taxi would not be a good idea. The claimant filed a petition in arbitration on February 28, 2014. The claimant's independent medical evaluator, Marc Hines, M.D., opines that the claimant's heavy work caused the claimant's shoulder problems. Unfortunately, Dr. Hines was not given accurate information as to how often the claimant would have to push a wheelchair up the ramp into the van. The record indicates that at most the claimant had to push a wheelchair a few times a month, and many times not at all given that she was in an on-call work schedule. The record shows that between 2013 and 2014 the claimant had trip

assignments that involved a total of 15 wheelchair customers, and some of those may have been powered wheelchairs instead of manual wheelchairs, so the claimant would not have had to push at all. Bruce Elkins, M.D., the defendants' expert, did review the specific details of the claimant's work and opined that there was not a causal relationship between the claimant's shoulder condition and her work activities with this employer. See Exhibit O, pages 7, 8.

It is found that the claimant's shoulder condition is not related to her employment.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is whether the claimant has proven that she sustained an injury that arose out of and in the course of employment on January 8, 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 R. App. P. 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 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).

The greater weight of evidence in this case establishes that the claimant's work activities were not so repetitive as to have caused her shoulder problems. The claimant infrequently engaged in the activities that she described as causing her shoulder problems. The defendants' expert opinion is given greater weight because he was provided accurate information as to the nature of the claimant's employment. The claimant has not carried her burden of proof that she sustained an injury that arose out of and in the course of her employment. Therefore, the issues of extent, commencement date and timely notice, as well as medical expenses, are moot and will not be addressed.

The claimant also seeks reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The defendants did obtain an evaluation, which the claimant believed to be too low, so she is entitled to reimbursement for this independent medical evaluation.

ORDER

THEREFORE IT IS ORDERED:

The claimant shall take no weekly benefits or medical expenses from this file.

The defendants shall reimburse the claimant for her independent medical evaluation with Dr. Hines pursuant to Iowa Code section 85.39.

Costs of this action are taxed to the claimant pursuant to rule 876 IAC 4.33.

Signed and filed this 1st day of September, 2015.

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

E. W. Wilcke
Attorney at Law
1510 Hill Avenue
PO Box 455
Spirit Lake, IA 51360
ewwilcke@qwestoffice.net

Sarah K. Kleber
Attorney at Law
1128 Historic 4th St.
PO Box 3086
Sioux City, IA 51102
Sarah.kleber@heidmanlaw.com

RRP/sam

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.