

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAULA L. ARREOLA,
Claimant,

vs.

BODEANS BAKING GROUP
HOLDING, LLC,
Employer,

and

FARMINGTON CASUALTY COMPANY,

and

INDIANA INSURANCE COMPANY,
Insurance Carriers,
Defendants.

File Nos. 5040956, 5040974

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

FILED

MAR 12 2015

WORKERS' COMPENSATION

Head Note No.: 1803

Defendants, Bodeans Baking Group Holding, LLC, and Indiana Insurance Company, appeal from an arbitration decision filed February 6, 2014. The case was heard on May 31, 2013, in front of the deputy workers' compensation commissioner and considered fully submitted on the same date. On February 20, 2015, the case was delegated to the undersigned to issue the final agency decision of the intra-agency appeal.

The deputy commissioner awarded claimant a permanent and total disability award arising out of an October 25, 2010 injury. Defendant employer and insurer assert on appeal that the deputy commissioner erred in his causation findings and disability findings.

Claimant asserts the findings of the deputy commissioner should be affirmed on appeal. The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo.

On February 6, 2014, the deputy workers' compensation commissioner issued an arbitration decision in consolidated case file numbers 5040956, 5040974. The deadline for appeal was February 26, 2014. Rule 876 IAC 4.27.

On February 21, 2014, Bodeans Baking Group Holding, LLC, and Indiana Insurance Company, File No. 5040974, filed a notice of appeal. On April 11, 2014, defendants requested an extension of time which was granted. Defendants timely filed the appeal brief on April 28, 2014.

On May 19, 2014, appellee filed her appeal brief. In the brief, appellee acknowledges that no appeal was taken as to file number 5040956. However, in the brief, appellee made this statement:

Deputy Pohlman's decision regarding Paula's permanent total disability is correct. His ruling that the injuries of October 25, 2010 are the cause of Paula's permanent total disability is clearly supported by the evidence. Alternatively, in the event that the Commissioner decides that the October 25, 2010 injuries are not the injuries that caused the permanent total disability, then the Commissioner should rule that Paula's permanent total disability was caused by her injury of April 1, 2009.

(Appellee's Brief, page 2)

On June 18, 2014, defendant Farmington Casualty Insurance filed its own brief objecting to claimant's attempt to appeal file number 5040956. Defendant Farmington cites several cases that prohibit appellate review of cases that have not been directly appealed even if a consolidated claim was appealed separately. See, e.g., Miller v Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Sioux City Brick & Tile Co. v. Emp. App. Bd., 449 N.W.2d 634 (Iowa 1989).

There is no cross-appeal by the claimant and no notice of appeal or appeal brief filed within the time allotted. There is also no reply brief.

Even though the cases were consolidated for hearing, the separate claims retain their own identity. Harpole, 621 N.W.2d at 416-17. Consolidation is a mere procedural device. Id. Claimant provided no case law (and devoted none of its brief) to the issue of whether a nonappealed case could be considered when a companion case was appealed.

As the Harpole decision pointed out, the claimant could have preserved her appeal by naming both employers in a single cross-appeal. Id. She did not file a cross-appeal or separate appeal notice. A sentence in the appellant's brief does not satisfy the procedural rules. Therefore, only file number 5040974 with the injury date of October 25, 2010, is considered on appeal.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the arbitration decision filed on February 6, 2014, that

relate to issues properly raised on intra-agency appeal with the following additional comments:

The underlying arbitration decision found claimant to be permanently and totally disabled as a result of the October 25, 2010 injury date. Defendants appealed on the basis that claimant's ongoing shoulder problems stem from a 2009 injury rather than a 2010 injury. In fact, defendants argue that there is no 2010 injury at all.

The defendants focus on three things in the appeal: first, whether claimant's ongoing pain and disability is related to the October 25, 2010 incident; second, whether claimant has sustained a permanent disability; and third, whether claimant is permanently and totally disabled.

The additional comment addresses the first issue only.

The defendants argue that the unanimous medical evidence found no causal link between claimant's ongoing disability and the October 25, 2010, injury.

The medical evidence includes opinions from Paul Cederberg, M.D., and Michael O'Neil, M.D.

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 MRI report of October 31, 2011, noted that there was evidence of a recurrent rotator cuff tear. (Exhibit 18, p. 2-3). Her treating physician Dr. Mark Morishige, M.D., an orthopedic surgeon, agreed with the radiologist's reports. "The MRI was reviewed. It does show re-tear of the supraspinatus area." (Ex. 18, p. 10) In other clinical notes, Dr. Morishige referred to the diagnosis as "failed previous left rotator cuff repair." (Ex. 18, p. 10)

Dr. Cederberg concluded that the recurrent rotator cuff tear on the MRI scan was supported by clinical findings and that the re-tear was due to a work-related condition

beginning with the October 25, 2010, injury. Defendants refer to this finding as a "statement in the passive form" merely reiterating the MRI diagnosis. (Appellant's Brief, p. 10) Yet that ignores Dr. Cederberg's answers to "Specific Interrogatories".

1. *Is the diagnosis correct and is supported by objective findings?*

In my opinion the diagnosis of a recurrent rotator cuff tear of the left shoulder is supported by the MRI scan findings and clinical findings objectively.

(Ex. BB, p. 4)

Dr. O'Neil disagreed. He opined that claimant's problems *predated* the October 25, 2010, injury.

The medical testimony was not unanimous as described by the defendants. Dr. Cederberg unequivocally found that claimant had suffered a new injury that manifested itself on October 25, 2010. Dr. Morishige and the radiologist agree that there was a re-tear of claimant's left rotator cuff tear. There was no un rebutted expert testimony that supported defendants' interpretation of the evidence on causation.

Testimony from claimant, as well as her course of behavior following her release without restrictions, supports the conclusions of Dr. Cederberg, the radiologist, and Dr. Morishige that claimant sustained a re-aggravation of her 2009 injury and that the re-aggravation is responsible for claimant's continued pain and disability. She returned to work on January 29, 2010, and worked the same job as she had held prior to the 2009 injury. She testified that because of new machinery installed at her position, there was more lifting after the injury than before. Further, while she had ongoing pain and discomfort she was able to continue to do her work without formal accommodations. Nine months later, the pain drove her to report a new injury to her employer.

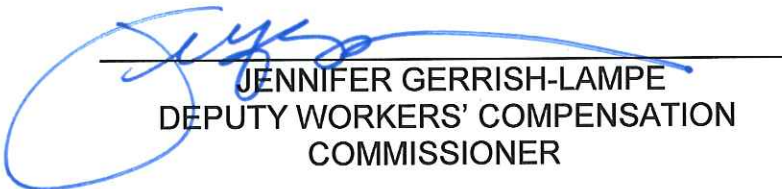
While the underlying arbitration decision didn't wholly set out Dr. O'Neil's opinions and claimant did complain of ongoing pain related to her left shoulder prior to October 25, 2010, the greater weight of the evidence supports a finding that claimant's current symptomatology stems from the October 25, 2010, injury. She had a re-tear of her rotator cuff which necessitated surgery.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of February 6, 2014, is AFFIRMED.

Defendants, Bodeans Baking Group Holding, LLC and Indiana Insurance Company, shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 12th day of March, 2015.



JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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