BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
FEB 16 2018
WORKERS COMPENSATION

LUKE BENNING, Claimant, vs. CLIMATE ENGINEERS, INC. & CLIMATE RIVER VALLEY, INC., Employer, and TWIN CITY FIRE INSURANCE CO., Insurance Carrier, Defendants.	File No. 5062758 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.30, 1403.30

STATEMENT OF THE CASE

Luke Benning, claimant, filed a petition in arbitration seeking workers' compensation benefits from Climate Engineers, Inc. & Climate River Valley, Inc., employer, and Twin City Fire Insurance Company, insurance carrier, as defendants. Hearing was held on October 11, 2017 in Cedar Rapids, Iowa.

Luke Benning, Bill Holst, Erik Lewis, and Pete Watson all testified live at trial. The evidentiary record also includes Joint Exhibits JE1-JE5, Claimant's Exhibits 1-8, and Defendants' Exhibits A-F.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on November 20, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on January 5, 2015, which arose out of and in the course of employment.

2. Whether claimant's claim is barred by operation of Iowa Code section 85.23 for failure to provide timely notice of his injury?

3. The nature and extent of permanent disability, if any, claimant sustained as a result of the January 5, 2015 work injury.

4. Whether claimant is entitled to past medical benefits?

5. Whether claimant is entitlement to an independent medical evaluation under Iowa Code section 85.39?

6. Assessment of costs.

FINDINGS OF FACT

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

Mr. Benning testified that his back began to bother him in August and September of 2014. He noticed the pain was worse with extended forklift operation, bending, twisting, and lifting heavier items. Mr. Benning sought treatment with Gordon B. Urbi, M.D. on September 23, 2014. Mr. Benning reported a 6 day history of back pain which was getting worse. He had pain in his legs when he twists around. He reported he did a lot of twisting and lifting at work and that he drove a forklift. The doctor's assessment was back pain, most likely muscular strain. He was given muscle relaxers, anti-inflammatories, and allowed to return to work on September 25, 2014. (JE1, pages 1-2; Testimony)

Mr. Benning testified that he mentioned his back pain to his supervisor, Bill Holst, in September of 2014. At hearing, Mr. Benning said that he told his supervisor he thought his back pain was probably from bouncing around on the forklift. According to Mr. Benning, Mr. Holst told him something to the effect that the pain would go away or deal with it. Mr. Benning testified that his pain progressed and became more continuous and sharp and eventually went down his leg. (Testimony)

Mr. Benning went to see his primary care physician, Savita V. Hegde, M.D. on January 5, 2015. By this point, his pain was affecting his activity level and made it hard for him to get out of bed. Dr. Hegde informed Mr. Benning that he was probably going to require surgery. He was eventually referred to Kevin Eck, M.D. (Testimony; JE1, pp. 6-9)

Dr. Eck performed a left micro-hemilaminectomy with discectomy at L4-L5 on April 22, 2015. Mr. Benning continued to follow-up with Dr. Eck and recovered well. Dr. Eck placed Mr. Benning at maximum medical improvement (MMI) as of June 30, 2016. (JE5)

On October 4, 2016, Mr. Benning was riding a motorcycle when he was involved in a motor vehicle accident. He was treated at UnityPoint where they noted pain and swelling in his low back. (JE1)

The first issue to be determined is whether claimant sustained an injury which arose out of and in the course of employment. There are several physicians in this case who have rendered their opinions regarding causation. The surgeon, Dr. Eck, stated:

> The pain form lumbar spondylosis and the paracentral disc herniation at L4-5 that resulted in left lower extremity radiculopathy necessitating surgery was more likely than not exacerbated by his manual work duties including driving a forklift. It is possible the herniation necessitating surgery was directly related to an injury he sustained at work.

(JE5, p. 98)

Defendants argue Dr. Eck's opinion should be rejected because they believe he provided a contradictory opinion. I do not find defendants' argument to be persuasive.

At the request of his attorney, Mr. Benning underwent an independent medical evaluation (IME) with Robin Sassman, M.D. on April 17, 2017. (Exhibit 3) Dr. Sassman opined that the work activities were a substantial factor in the development of his low back pain, radicular symptoms, his need for surgery, and his ongoing symptoms. Defendants argue that her opinion must be rejected because it is based on an incomplete history. However, I do not find this argument to be persuasive. A review of the entire IME report reveals that she did have and considered a complete history including the prior accidents and the subsequent motorcycle accident.

At the defendants' request claimant underwent an IME with Chad Abernathey, M.D. on September 8, 2017. Dr. Abernathey stated that the patient did not have a singular event which would have caused a small disc protrusion. He opined that the chronic low back pain was related to multiple injuries and degenerative changes of his lumbar spine. He felt there was no objective evidence to support a specific work accident. (Ex. B) I do not find the opinions of Dr. Abernathey to be persuasive. His report is not well-reasoned. Furthermore, his report fails to take an exacerbation or aggravation into account.

I find the opinions of Dr. Eck and Dr. Sassman to carry greater weight in this case. I further find that Mr. Benning has shown by a preponderance of the evidence that he sustained an injury to his back which arose out of and in the course of his employment with the defendant employer.

The next issue to address is whether Mr. Benning gave timely notice of his injury to the defendants.

Claimant contends that he told Bill Holst and others at work, at least in passing, that his back pain was related to bouncing around on the forklift. Mr. Benning testified

that when he told Mr. Holst about the forklift causing pain, Mr. Holst told him to just deal with it. In later testimony, Mr. Benning stated that when he told Mr. Holst about the forklift causing back pain, Mr. Holst said he did not have to complete an injury report because there was no specific date of injury. Mr. Holst denies that Mr. Benning ever told him that the forklift was causing him pain. Mr. Holst also testified that if Mr. Benning had said the back pain was related to the job, then he would have sent him to the safety director, Erik Lewis, to have him complete an injury report. (Testimony)

After the January 5, 2015, medical appointment, Mr. Benning met with Pete Watson, the President of Climate Engineers. Mr. Benning testified that he told Mr. Watson he was going to have back surgery. According to Mr. Benning, Mr. Watson was not interested in the cause of his back pain. Mr. Watson decided to lay off Mr. Benning so Mr. Benning could collect unemployment benefits. Mr. Benning understood that once he was cleared to return to work after the surgery, then the defendant employer would have a position for him. Mr. Benning testified that it was only he and Mr. Watson at that meeting. Mr. Benning admitted that he never directly told Mr. Watson that his back pain was from operating the forklift. Mr. Benning said that he told Mr. Holst and Mr. Watson, so he figured the chain of communications gave the information to Mr. Watson. After the January 5, 2015 meeting, the only Climate employees that Mr. Benning spoke with were Pete or an office lady transferring him to talk to Pete. (Testimony)

However, during a later part of his testimony under direct examination, Mr. Benning testified that Mr. Watson asked him if the back pain happened at home and Mr. Benning said no. Mr. Benning testified that he might have also told Mr. Watson that bouncing around on the forklift caused his back pain. (Transcript pp. 53-54) Mr. Watson admitted that Mr. Benning never told him that his back pain was work-related.

Mr. Benning also testified that he did not complete an injury report for his January 5, 2015 back injury. From prior experience, he knew it was Climate's policy that when you were hurt at work you were to report the injury to your immediate supervisor and then complete an accident or near-miss accident report. Mr. Benning had completed accident reports on two prior occasions due to other work-related injuries. However, Mr. Benning did not complete a report for his back injury because Mr. Holst told him he did not need to complete a report because there was not a specific incident or specific date of an accident. Mr. Benning testified that after he was laid off he probably told Mr. Holst, Mr. Watson, and Mr. Lewis in one of the messages he sent them, that his back pain was probably from bouncing around on the forklift. (Testimony)

The undersigned notes that there is conflicting evidence and testimony from both sides. Because of the conflicting evidence, the issue of notice is a close call. However, I find that defendants have demonstrated by a preponderance of the evidence that claimant failed to provide timely notice. All three of defendants' witnesses testified that they did not receive notice from the claimant. Further, Mr. Benning testified that in the fall of 2014, he told Mr. Holst and others at work that his pain was related to driving the forklift; however, this testimony conflicts with his own testimony. On March 3, 2015,

Mr. Benning completed a patient questionnaire. On that form he indicated that his back pain was not a workers' compensation claim. (JE4, p. 76) When asked about this at the hearing, Mr. Benning said that he checked no "[b]ecause at that time workmen's [*sic*] comp was not discussed, it was not offered, it wasn't even on my radar. It wasn't until later on that it became on my radar." (Tr. p. 72) I find that this action is not consistent with the actions of an employee who had reported a work injury to his employer. There are simply too many inconsistencies in Mr. Benning's account of how and when he provided notice to the defendants. Thus, I find that claimant failed to provide notice of his work injury to the defendants within 90 days of the injury. As such, claimant's claim is barred by operation of Iowa Code section 85.23.

Because claimant was not successful in his claim I exercise my discretion and do not assess costs in this matter. Each party shall bear their own costs.

All other issues are rendered moot.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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).

Based on the above findings of fact, I conclude that claimant did sustain an injury to his back that arose out of and in the course of his employment with the defendant employer.

However, I find that claimant's claim is barred by operation of Iowa Code section 85.23. The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed. 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).

Based on the above findings of fact, I conclude that the defendants have shown by a preponderance of the evidence that the claimant failed to provide timely notice of his work injury.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. As stated above, each party shall bear their own costs. 876 IAC 4.33.

All other issues are rendered moot because claimant's claim is barred by operation of Iowa Code section 85.23.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Each party shall bear their own costs.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 16th day of February, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
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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.