BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUL 09 2018
WORKERS' COMPENSATION

ROBBIE ESCHER, Claimant, vs. INDUSTRIAL DISTRIBUTION GROUP a/k/a VALLEN, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5055866 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Robbie Escher, claimant, filed a petition in arbitration seeking workers' compensation benefits from Industrial Distribution (a/k/a Vallen) and its insurer, New Hampshire Insurance Company as a result of an injury she sustained on February 3, 2016 that arose out of and in the course of her employment. This case was heard in Des Moines, Iowa, and fully submitted on June 25, 2018. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 – 5, Claimant's Exhibit 1 and Defendants' Exhibits A – D.

Claimant requested a continuance of the hearing in order to obtain additional records. Defendants resisted. Claimant did not show good cause. The claim had been dismissed and re-filed. It had been continued previously. Claimant did not show good cause for a continuance and the motion was denied.

ISSUES

1. Whether the alleged injury is a cause of permanent disability and, if so;
2. The extent of claimant's disability.

3. Whether claimant is entitled to payment for the expense of an independent medical examination (IME).

STIPULATIONS

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.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Robbie Escher, claimant was 45 years old at the time of the hearing. She has two years of college, but does not have a degree or certifications.

Claimant testified that when she started working for Industrial Distribution she did not have any breathing problems. Industrial Destitution is a subcontractor that works in the Case New Holland plant in Burlington, Iowa. (Joint Exhibit 3, page 53) Claimant testified that as a child she did have breathing problems and needed to use an inhaler. Claimant stopped the use of inhalers at about age 11 and did not need to use inhalers until after her work injury of February 3, 2016.

On February 3, 2016 claimant and a co-worker were exposed to carbon monoxide at work. Claimant worked as a tool crib attendant at Industrial Distribution. The tool crib is enclosed in a building. The carbon monoxide was released into her work space by a heater. Claimant felt an extremely strong headache, dizziness and breathing problems. Claimant was taken to an emergency department and testing showed a high exposure to carbon monoxide.

Claimant was off work for a period of time and had her carbon monoxide levels checked periodically: Weekly to start, then about every two weeks.

Claimant testified she currently has shortness of breath. She does experience this shortness of breath climbing stairs. Claimant now uses an inhaler. Claimant uses an inhaler about four times a week. Almost all of the time she uses the inhaler at work, but very occasionally she will use it at home when she is off work.

Claimant testified that she believed Alvin Dandan, M.D. diagnosed her with reactive airways dysfunction syndrome (RADS). Claimant testified that she wanted to be able to have lifetime medical care for her work injury.

On February 3, 2016 claimant went to the emergency department of the Great River Medical Center. Claimant was diagnosed with acute headache and carbon

monoxide exposure. (JEx. 1, p. 5) Claimant was referred to her primary care provider, Lisa Lake, DNP.

Blood monitoring test showed carbon monoxide levels of 3.8 on the day of her work injury, 2.8 on February 8, 2016, 2.5 on February 15, 2016, and 2.2 on March 8, 2016. On May 11, 2016 claimant's carbon monoxide level was 1.6. (JEx. 2, pp. 23 – 27) On May 17, 2016 Dr. Lake informed claimant her levels were normal and that claimant should be able to return to work. (JEx. 2, p. 28) On May 23, 2016 Dr. Lake reviewed information from the University of Iowa Hospitals and Clinics (UIHC) Pulmonary and noted that claimant could return to work, assuming her workplace met OSHA air quality standards. (JEx. 2, pp. 29, 30)

On May 11, 2016 Fredric Gerr, M.D., of the UIHC examined claimant. Dr. Gerr is a Professor of Occupational and Environmental Health, Professor of Epidemiology and Professor of Pulmonary, Critical Care, and Occupational Medicine at the UIHC. (Ex. B, p. 1) Dr. Gerr found claimant's blood level for carbon monoxide to be normal. Dr. Gerr stated,

> In our opinion, Ms. Escher did experience acute effects of exposure to natural gas combustion products at the time of her initial ER visit on February 3, 2016. Specifically, we believe that her headaches and her respiratory symptoms were both caused by such exposures. Since removal from the workplace, her headaches have resolved and her respiratory symptoms and [sic] improved substantially. Her examination was normal during evaluation today.
>
> It is likely that Ms. Escher will experience a complete resolution of her symptoms. It is important to note that respiratory irritation of the kind Ms. Escher experienced may take several months before she becomes asymptomatic. Resolution of headache is likely to be more rapid.
>
> We recommend that Ms. Escher be released to return to work with the following restriction. No exposure to airborne irritants and no exposure to concentrations of carbon monoxide that exceed OSHA permissible exposure limits.

(JEx. 3, p. 45)

The UIHC addendum notes of March 8, 2017 reflect a review of medical records from Dr. Dandan which showed a normal pulmonary function test (PFT). (JEx 3, p. 49) Natalie Debernardi, M.D. of the UIHC's assessment was, "1. Dyspnea on exertion with seasonal variability of unknown etiology. 2. Normal PFTs" and the plan was,

> Based upon our obtained history, examination, and review of provided medical records, evidence that Ms. Escher has airway disease is unconvincing. Furthermore, Ms. Escher's history is not compatible with a

> diagnosis of asthma without latency. (i.e., Reactive Airways Diesase). However, because Ms. Escher's symptoms are potentially consistent with episodic excessive airway responsiveness, we believe methacholine challenge testing is indicated sooner rather than later. We recommend that the test be scheduled without delay.

(JEx. 3, p. 50)

On March 8, 2017 Dr. Gerr noted that claimant had been feeling the experience of being winded when climbing one flight of stairs for about two years. (JEx. 3, p. 51) Dr. Gerr noted that claimant's symptoms were consistent with a diagnosis of asthma or other conditions; however, she had not undergone PFT testing or methacholine challenge. (JEx. 3, p. 57) Dr. Gerr said. "Given limitations in medical diagnostics and workplace environmental information, we are unable to render a medical opinion regarding Ms. Escher's respiratory diagnosis and its relation to work." (JEx. 3, p. 57)

On March 13, 2017 Dr. Dandan of the Great River Pulmonary and Allergy Department examined claimant. Dr. Dandan's assessment was,

> PFT 2015 – some flow volume obstructive limitation but numbers are all within normal limits.
>
> PFT 2017 – similar to 2015, normal numbers but has some flow limitation.

(JEx. 4, p. 61) Diagnostic results showed in 2017 the PFT was similar to 2015, normal numbers but has some limitations. (JEx. 4, p. 61) Dr. Dandan noted that his office did not specialize in occupational work hazards, but he could treat her for RADS. For ongoing exposure at work, Dr. Dandan said that would need to be addressed by the UIHC. (JEx. 4, p. 62)

On June 28 2017 Dr. Dandan wrote,

> Asthma/RADS: Pt had chronic carbon monoxide poisoning in the past which triggered her reactive airway disease. The most recent PFT did not show evidence of obstruction but the methacholine challenge testing showed a hyperresponsive airway clinching the diagnosis of asthma/RADS. She was maintained on symbicort 2 puffs bie [sic] with albuterol pm during the last visit and she has been stable since then. She is back to her normal baseline capacity and continues to work, fully functional without any major issues. No sob at rest or on exertion, no wheezing, no coughing, no chest tightness, no fevers, no chills during the encounter. Denies any weight loss.

(JEx. 4, p. 76)

Marc Hines, M.D. performed an independent medical examination on July 28, 2017. After reviewing medical records he noted that claimant was using Symbicort once per day and albuterol once a day for rescue. (JEx. 5, p. 91) Dr. Hines wrote,

> We discussed that we really do not have the data back that we need to make any final or firm statements about her impairment. There is finding, clearly, of her having a reactive airways disease, and this is important to note, since the patient is exposed to particulate airway problems, seeing that she still is seeing fog in the area." . . . Nonetheless, it would be very necessary, in terms of trying to determine impairment rating, to obtain the final product of the reports from Dr. ____ and/or Dr. Dandan in order to be able to try to put this in context from a pulmonary standpoint. . . . I have instructed her that that is the case, and that we should probably stop the development of an impairment rating at this point until we have that information.

(JEx. 5, p. 91)

Dr. Hines charged $3,900.00 for this report. The charges were broken down to; chart review -$1,866.66, physical examination $583.33 and report $750.00. (Ex. 1, p. 1)

On March 21, 2018 Dr. Gerr wrote defendants and answered two questions. Dr. Gerr stated that he was unable to conclude to a reasonable degree of medical certainty that claimant's work caused or contributed to any permanent respiratory condition. Dr. Gerr noted that he reviewed the medical records done in Burlington. Dr. Gerr did review the methacholine challenge test with claimant. He noted the test was borderline for airway reactivity, and due to lack of other information he could not make a diagnosis of occupational asthma. Dr. Gerr finally stated that the workplace exposure to carbon monoxide did not cause permanent damage to her lungs. (Ex. A, p. 3)

RATIONALE AND CONCLUSIONS OF LAW

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 was exposed to carbon monoxide at work on February 3, 2016. The issue which needs to be determined is whether claimant has proven by a preponderance of the evidence she has a permanent impairment due to her work injury of February 3, 2016. I find there is insufficient proof of permanent impairment due to work-related causes.

I acknowledge that Dr. Dandan has stated that claimant has RADS, which he attributed to the carbon monoxide exposure at work. I find the opinions of Dr. Gerr to be more persuasive. Dr. Gerr is a specialist in occupational medicine as well as pulmonary issues. He reviewed the testing performed by Dr. Dandan and concluded that medical causation could not be determined. His credentials are superior to Dr. Dandan, and I accept Dr. Gerr's opinions on causation.

Claimant has failed to prove her case and she is entitled to no permanent partial disability benefits.

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).

In this claim Dr. Gerr was retained by the defendants and opined that claimant did not have a permanent injury that could be causally related to her work injury in May of 2016 and March of 2017. This is the equivalent of a zero rating. I find claimant is entitled to reimbursement if the IME expense of $3,199.99.

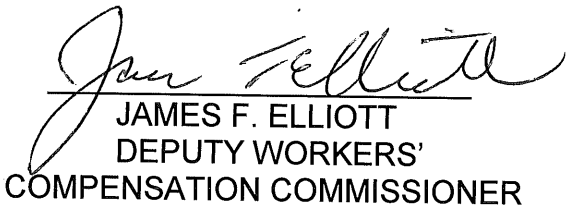
ORDER

Claimant shall take no further indemnity benefits in this case.

Defendants shall pay claimant three thousand one hundred ninety-nine and 99/100 dollars ($3,199.99) for the IME expenses.

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

Signed and filed this 9th day of July, 2018.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

James P. Hoffman
Attorney at Law
PO Box 1087
Keokuk, IA 52632
jamesphoffman@aol.com

Theresa C. Davis
Attorney at Law
PO Box 2107
Cedar Rapids, IA 52406-2107
tcd@shuttleworthlaw.com

JFE/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.