BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
APR 15 2019
WORKERS' COMPENSATION

MANUEL GONZALEZ, Claimant, vs. WESTWIND LOGISTICS, LLC, Employer, and GREAT AMERICAN ALLIANCE INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 5063555, 5065811 APPEAL DECISION Head Note Nos: 1402.10; 1402.40; 2209; 2501; 2502; 4000

Claimant Manuel Gonzalez appeals from an arbitration decision filed on September 26, 2018. Defendants Westwind Logistics, LLC, employer, and its insurer, Great American Alliance Insurance Company, respond to the appeal. The case was heard on April 23, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 8, 2018.

In File No. 5065811, alleged injury date of February 15, 2017, the deputy commissioner found claimant failed to carry his burden of proof that he sustained permanent disability of his left upper extremity, his left shoulder and his neck as the result of an alleged cumulative injury which arose out of and in the course of claimant's employment with defendant-employer. The deputy commissioner found claimant is entitled to receive nothing in the way of permanent disability benefits in File No. 5065811.

In File No. 5063555, alleged injury date of February 23, 2017, the deputy commissioner found claimant was still in the course of his employment with defendant-employer when he was physically assaulted by his supervisor while still on defendant-employer's premises immediately after being terminated from his employment. However, the deputy commissioner also found claimant failed to carry his burden of proof that he sustained permanent disability of his left upper extremity, his left shoulder and his neck as a result of the assault. The deputy commissioner found claimant is entitled to receive nothing in the way of permanent disability benefits in File No. 5063555.

In both files, the deputy commissioner found claimant is not entitled to receive penalty benefits for alleged unreasonable delay or denial by defendants of weekly

benefits. The deputy commissioner did find claimant is entitled to receive reimbursement from defendants for 24 miles of travel incurred by claimant for medical treatment provided by authorized treating physicians. The deputy commissioner found claimant is not entitled to receive reimbursement from defendants pursuant to Iowa Code section 85.39 for the cost of the independent medical evaluation (IME) of claimant performed by Sunil Bansal, M.D., on September 8, 2017. The deputy commissioner found claimant is not entitled to receive reimbursement from defendants for 25 miles of travel incurred by claimant for Dr. Bansal's IME. The deputy commissioner ordered the parties to pay their own costs of the arbitration proceeding.

In File No. 5065811, Claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to carry his burden of proof that he sustained permanent disability of his left upper extremity, his left shoulder and his neck as the result of the alleged cumulative work injury. Claimant asserts the deputy commissioner erred in finding claimant is entitled to receive nothing in the way of permanent disability benefits in File No. 5065811.

In File No. 5063555, claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to carry his burden of proof that he sustained permanent disability of his left upper extremity, his left shoulder and his neck as a result of being physically assaulted by his supervisor. Claimant asserts the deputy commissioner erred in finding claimant is entitled to receive nothing in the way of permanent disability benefits in File No. 5063555.

In both files, claimant asserts on appeal that the deputy commissioner erred in finding claimant is not entitled to receive penalty benefits for alleged unreasonable delay or denial by defendants of weekly benefits.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

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

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on September 26, 2018, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

In File No. 5065811, I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that he sustained permanent disability of his left upper extremity, his left shoulder and his neck as the result of an alleged cumulative work injury. I affirm the deputy commissioner's finding that claimant is entitled to receive nothing in the way of permanent disability benefits in File No. 5065811.

In File No. 5063555, I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that he sustained permanent disability of his left upper extremity, his left shoulder and his neck as a result of being physically assaulted by his supervisor. I affirm the deputy commissioner's finding that claimant is entitled to receive nothing in the way of permanent disability benefits in File No. 5063555.

In both files, I affirm the deputy commissioner's finding that claimant is not entitled to receive penalty benefits for alleged unreasonable delay or denial by defendants of weekly benefits. I affirm the deputy commissioner's finding that claimant is entitled to receive reimbursement from defendants for 24 miles of travel incurred by claimant for medical treatment provided by authorized treating physicians. I affirm the deputy commissioner's finding that claimant is not entitled to receive reimbursement from defendants pursuant to Iowa Code section 85.39 for the cost of Dr. Bansal's IME. I affirm the deputy commissioner's finding that claimant is not entitled to receive reimbursement from defendants for 25 miles of travel incurred by claimant for Dr. Bansal's IME. I affirm the deputy commissioner's order that the parties pay their own costs of the arbitration proceeding.

In File No. 5063555, I affirm the deputy commissioner's finding that claimant was still in the course of his employment with defendant-employer when he was physically assaulted by his supervisor while still on defendant-employer's premises immediately after being terminated from his employment. I provide the following analysis for my decision in that regard:

FINDINGS OF FACT

On February 23, 2017, claimant arrived at work before 6:00 a.m., and clocked-in, as usual, for work. (Hearing Transcript, p. 27) After his second break at 12:15 p.m., claimant was instructed to report to the office. He complied with that instruction. (Tr. p. 29)

Upon reporting to the office, claimant was notified his employment was terminated. (Id.) Claimant told his manager, Top, he was going to go onto the shop floor to obtain some personal belongings, including a work apron and a mask. Claimant's manager instructed claimant not to return to the shop floor. However, the supervisor who was present at the termination meeting indicated that claimant could return to the shop floor to collect his belongings. (Tr. pp. 29-30)

A surveillance video demonstrates claimant's return to the shop floor. (Exhibit 9) It is apparent that upon returning to the shop floor, claimant was grandstanding for co-workers, waving around his final check, which he had been provided while in the office. (Id.) Claimant's supervisor ultimately became angry with claimant's demonstration, confronted claimant, and ultimately assaulted claimant. (Id.) Although the exchange cannot be heard and is somewhat difficult to clearly view on the video, it is apparent claimant is not the aggressor in the altercation and that claimant is struck during the incident. (Id.)

Claimant ultimately left the premises without his belongings. (Tr. p. 32) He asserted he sustained acute injuries as a result of the February 23, 2017, assault.

I affirm the deputy commissioner's finding that claimant was authorized or permitted to return to the shop floor to collect his personal belongings. I affirm the deputy commissioner's finding that prior to being able to collect his personal belongings, claimant was confronted by a supervisor and was struck by that supervisor. I affirm the deputy commissioner's finding that claimant was not given a reasonable period of time to retrieve his personal belongings and exit the employer's premises before he was physically assaulted by the supervisor on the shop floor.

Defendants dispute whether claimant was an employee at the time of the alleged February 23, 2017, work injury because he was formally terminated moments before the assault occurred.

There is no real factual dispute about this issue. Claimant was terminated on February 23, 2017. After his termination occurred, he returned to the production floor and was assaulted by his supervisor. Instead, this is a legal question about claimant's employment status and his legal right to make a worker's compensation claim for his alleged injuries.

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.

Claimant contends he should be considered to be within the scope and course of his employment because he was injured before leaving the production facility after his termination. Defendants contend that the employer-employee relationship formally ended upon claimant's termination and that any injury occurring after claimant's formal termination cannot be within the employer-employee relationship. Neither party identified any controlling authority on this issue, nor provided a definitive legal argument on the issue.

The Iowa Supreme Court has addressed similar issues and arguments twice. First, in Mitchell v. Consolidated Coal Co., 195 Iowa 415, 192 N.W. 145 (1923), the Iowa Supreme Court held that a miner, who had terminated his work continued to be within the scope and course of his employment as he finished the agreed upon work and collected his tools. Mr. Mitchell was injured returning into the mine to check on the retrieval of his tools. His claim was held compensable because it "was the custom at that mine and all other mines over the district" that a miner should complete his work and be allowed to retrieve his tools before leaving the work site. Mitchell, 195 Iowa at 417; 192 N.W. at 145. The court concluded that this was a factual issue and deferred to the findings of the agency.

However, in Johnson v. City of Albia, 203 Iowa 1171, 212 N.W. 419 (1927), the court revisited this issue under different factual circumstances. In Johnson, the injured worker "had accomplished *all* the work he was required or expected to do under his employment. He had no orders whatever that required him to ever return to the premises. His duties had fully terminated." Johnson, 203 Iowa at 1176, 212 N.W. at 422. In fact, Mr. Johnson completed his shift, left for the day, and returned to the job site the next day to collect his tools. He kindly attempted to assist his replacement when he was injured. The court concluded, however, that Mr. Johnson was not in the course and scope of his employment and, at best, he was a casual employee at the time of his injury.

The relevant Iowa cases are quite old and consider significantly varying factual scenarios. This case is much more like Mitchell, where the worker remained on the employer's site to finish work and collect tools as opposed to the worker who left the work site and returned the next day. On the other hand, claimant in this case was not completing any work at the time of his alleged injury on February 23, 2017. Neither Iowa precedent is entirely on point or clearly dispositive.

Similar cases have arisen in numerous other jurisdictions. Professor Larson has considered this issue and urges, "[c]ompensation coverage is not automatically and instantaneously terminated by the firing or quitting of the employee. The employee is deemed to be within the course of employment for a reasonable period while winding up his or her affairs and leaving the premises." Arthur Larson, Larson's Workers' Compensation Law, Volume 2, § 26.01 (2008).

> Many courts . . . reason that whether an employee voluntarily quits the employment or is discharged by his or her employer, he or she is entitled

> to a "reasonable time" to leave the premises before it can be said that the relation of employer and employee is so completely severed as to render inapplicable the law which governs that relationship.

10 A.L.R. 245, *Right to workers' compensation for injuries suffered after termination of employment,* § 2[b].

"The English rule is that where a workman remains on the premises or returns thereto to obtain his pay after work ceases, he is still acting in the course of his employment." Parrott v. Industrial Comm'r of Ohio, 60 N.E.2d 660 (Ohio 1945). The Supreme Court of Tennessee recently performed a survey of the law on this issue and concluded, "the great majority" of jurisdictions hold that "leaving the workplace is incidental to the employment relationship" such that "a terminated employee who 'sustains injuries while leaving the premises within a reasonable time after termination' of the employment is deemed to have suffered a compensable injury." Duck v. Cox Oil Co., 2017 WL 5713077 at 4 (Tennessee 2017) (unpublished as of this date) (citing Price v. R & A Sales, 773 N.E.2d 873 (Ind. Ct. App. 2002); Ventura v. Albertson's, Inc., 856 P.2d 35 (Colo. App. 1992); Ardoin v. Cleco Power, 38 So. 264 (La. 2010)).

The Alabama Civil Appellate Court faced a situation similar to the facts presented in this case. In Cook v. AFC Enterprises, Inc., 826 So.2d 174 (Ala. Civ. App. 2002), the worker was terminated. However, a heated discussion continued after the termination occurred. Ultimately, the claimant's manager threw hot water on the claimant and the claimant was burned. The Alabama court held that the exclusive remedy for this injury was via workers' compensation. The court offered a good explanation and summary of the majority rule, stating:

> However, even following an employee's termination, the employee must be given a reasonable time to leave the premises before the employer-employee relationship is considered severed and the Workers' Compensation Act is rendered inapplicable.

Id. at 177.

In Woodward v. St. Joseph's Hospital of Atlanta, Inc., 288 S.E.2d 10 (Ga. App. 1981), the Georgia Court of Appeals held that "the act of discharging an employee is an integral part of the employment relationship, making injuries arising out of discharge causally connected to that employment." (quoting Hill v. Gregg, Gibson & Gregg, Inc., 260 So.2d 193, 195 (Fla. 1972)). The Woodward Court held, "since the aggressive acts of the defendant supervisor were part of the res gestae of the discharging of the plaintiff, the injuries which resulted from those actions arose out of and in the course of employment." Woodward, 288 S.E.2d at 11.

A California court held that a claimant remained in the scope of employment while traversing the employer's premises to leave so long as the claimant did not unreasonably delay in leaving the premises. Peterson v. Moran, 245 P.2d 540 (Cal.

Dist. Ct. App. 1952). Therefore, the court found that a worker assaulted by a foreman after termination remained within the scope of employment. Id.

The Colorado Court of Appeals concluded that the act of discharge is an integral part of the employment relationship. However, the court concluded that the issue of whether "the claimant was injured as the result of an accident arising out of his employment must be determined on the particular facts of each case." Alpine Roofing Co. v. Dalton, 539 P.2d 487 (Colo. App. 1975).

One of the earliest cases dealing with an assault after termination arose in Massachusetts. In Zygmuntowicz v. American Steel & Wire Co. of New Jersey, 134 N.E. 385 (Mass. 1922), the claimant was terminated but objected to the termination. The supervisor seized the claimant and threw him to the ground causing injury. In that case, the Supreme Court of Massachusetts held that the entire incident "was incident to his work" even though it occurred after the formal termination was related to the claimant. Id.

Zygmuntowicz was cited as convincing authority by the South Dakota Supreme Court in Anderson v. Hotel Cataract, 17 N.W.2d 913 (S.D. 1945). The court concluded that "[d]ischarge by the employer, and quitting by an employee, are but incidents of all employments. A discharged employee is allowed a reasonable time in which to leave the premises of his employer." Id. at 917. The Court held "that an employee who quits remains in the course of his employment until afforded a reasonable opportunity to leave the employer's premises." Id.

The Tennessee Supreme Court noted that the approach taken by the majority of jurisdictions is "consistent with the approach taken in Professor Larson's Workers' Compensation Law" treatise. Duck, 2017 WL 5713077 at 4. However, the Tennessee high court acknowledged that there is a minority of jurisdictions that "apply an immediate termination approach, under which workers' compensation coverage terminates immediately when an employee quits or is fired." Id. at 6. Interestingly, the Tennessee Court cites the Iowa case of Johnson v. City of Albia, 203 Iowa 1171, 212 N.W. 419 (1927) as a leading authority among the "minority" jurisdictions.

The Wisconsin Supreme Court found the Zygmuntowicz court's analysis convincing when it held, "it seems to be conceded that an employee is under the protection of the Compensation Act after his discharge, provided he be injured upon the premises of his employer while remaining there for reasons connected with his former employment." Pederson & Voechting v. Kromrey, 231 N.W.2d 267 (Wisc. 1930). However, in the Kromrey case, the court held that the employee's injuries were not compensable because the employee had already left the premises and was returning to collect personal belongings. The court reasoned that the former employee was not rendering services under a contract of employment at the time of his injury and, therefore, not within the scope and course of his former employment.

A federal court in Missouri held that a garbage man, who was terminated and returned to the employer's main office to collect his belongings and discuss pay arrangements was not in the course of his employment when assaulted by a supervisor. Davis v. Bennett, 114 F. Supp. 790 (W.D. Mo. 1953).

Iowa law is not well-developed on this issue. The two Iowa cases dealing with post-termination injuries have significantly different factual scenarios from each other and from this case. There is no evidence in this record that there was a practice or custom that allowed terminated employees to return to the shop floor at this location, or other premises of the employer. On the other hand, claimant was proceeding to the area where his personal belongings were located to collect those after his termination. I affirm the deputy commissioner's finding that the Iowa precedents are not directly on point.

The general rule in Iowa is that the workers' compensation statutes should be interpreted liberally for the benefit of the injured worker. Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250 (Iowa 2010); Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009); 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995).

Construing the statutory definition of Iowa Code section 85.61 of an employee liberally to the benefit of the injured worker, I affirm the deputy commissioner's finding that a discharged employee is allowed a reasonable amount of time to collect his or her belongings and leave the premises of the employer. Anderson v. Hotel Cataract, 17 N.W.2d 913, 917 (S.D. 1945); Mitchell v. Consolidated Coal Co., 195 Iowa 415, 192 N.W. 145 (1923). Therefore, I affirm the deputy commissioner's finding that claimant in this case, although terminated at the moment when he was assaulted by his supervisor on February 23, 2017, remained in the course of his employment until afforded a reasonable opportunity to collect his personal belonging and leave the employer's premises. Anderson, 17 N.W.2d at 917. Having found claimant was not afforded a reasonable opportunity to leave the premises before he was assaulted, I affirm the deputy commissioner's finding that claimant established that the February 23, 2017, assault occurred within the course and scope of his employment with defendant-employer and that an employer-employee relationship continued at the time of the assault. I affirm the deputy commissioner's finding that claimant should be permitted to pursue a claim for a work injury occurring within the employer-employee relationship under the Iowa Workers' Compensation statutes for the February 23, 2017, assault.

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).

In this case, I affirm the deputy commissioner's finding that claimant has not proven by a preponderance of the evidence that he sustained acute neck or left shoulder injuries as a result of the assault by his supervisor on February 23, 2017. Therefore, I conclude that claimant has not proven entitlement to either treatment or permanent disability benefits for his alleged left shoulder or neck injuries allegedly resulting from the assault.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 26, 2018, is affirmed in its entirety.

Claimant shall take no weekly benefits in either file.

Defendants shall reimburse claimant for medical mileage for twenty-four (24) miles incurred by claimant for medical treatment provided by authorized treating physicians, at the rate of fifty-four cents ($0.54) per mile, or a total of twelve and 96/100 dollars ($12.96).

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed on this 15th day of April, 2019.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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