BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
AUG 30 2017
WORKERS COMPENSATION

BRADLEY M. ZIESER, Claimant, vs. GRAND HAVEN HOMES, INC. d/b/a LINN MANOR CARE CENTER, Employer, and IOWA LONG TERM CARE RISK MANAGEMENT ASSOCIATION ("ILTCRMA"), Insurance Carrier, Defendants.	File Nos. 5049790, 5049791 ARBITRATION DECISION Head Note No.: 1402.30

STATEMENT OF THE CASE

Bradley Zieser, claimant, filed two petitions for arbitration against Grand Haven Homes, Inc. d/b/a Linn Manor Care Center (hereinafter referred to as "Linn Manor"), as the employer and Iowa Long Term Care Risk Management Association, as the insurance carrier. The case came on for hearing before the undersigned on January 24, 2017.

Claimant filed a proposed amendment to his petition the day before trial, January 23, 2017. Specifically, claimant sought to assert a penalty benefit claim for alleged unreasonable delay or denial of weekly benefits. Defendants resisted the proposed amendment on the eve of trial. Argument was heard on the motion at the time of the arbitration hearing.

Pursuant to agency rule 876 IAC 4.9(5):

> A party may amend a pleading as a matter of course at any time before the party's discovery is closed, or if no order is entered closing the party's discovery, at any time before the case is assigned for hearing. Otherwise, a party may amend a pleading only by leave of the workers' compensation commissioner or deputy workers' compensation commissioner or by written consent of the adverse party.

Clearly, discovery had closed before the day before trial. (Hearing Assignment Order) Defendants resisted the proposed amendment and did not offer consent to the amendment. Therefore, claimant is only permitted to amend the petition with leave of this agency. Claimant's proposed amendment is considered as a motion to amend.

The Iowa Supreme Court repeatedly has held that allowing an amendment to a pleading is the rule; denial is the exception. Galbraith v. George, 217 N.W.2d 598 (Iowa 1974). Considerable discretion is allowed in determining whether or not leave to amend should be granted. Ackerman v. Lauver, 242 N.W.2d 342 (Iowa 1976).

Having found that claimant did not establish a compelling reason to permitting the last minute amendment and having found that the proposed amendment would shift the burden of proof and would be prejudicial to defendants, the undersigned denied the proposed amendment. Claimant's penalty claim will not be considered in this decision.

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 evidentiary record includes claimant's Exhibits 1 through 7. Defendants offered Exhibits A through S. All exhibits were received into the evidentiary record without objection.

Claimant testified on his own behalf and called Shannon Hinton and Kathy Zieser, to testify on his behalf. Defendants did not call any witnesses to testify live.

Pursuant to the undersigned's ruling on claimant's motion to continue on January 13, 2017, the evidentiary record closed at the conclusion of the arbitration hearing. However, the deposition transcript of John Kuhnlein, D.O., was not yet available at the time of the trial. The proposed deposition was received as an exhibit with the transcript provided at a later date.

At the conclusion of the arbitration hearing, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties filed their briefs simultaneously on February 24, 2017. The case was considered fully submitted to the undersigned upon filing of the parties' briefs.

ISSUES

In File No. 5049790, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on February 5, 2013, which arose out of and in the course of his employment with Linn Manor.

2. Whether claimant gave timely notice of the alleged February 5, 2013 work injury.

3. Whether the alleged injury caused permanent disability and the extent of claimant's entitlement to permanent disability benefits, if any.

4. The proper commencement date for permanent disability benefits, if any.

In File No. 5049791, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on July 7, 2014, which arose out of and in the course of his employment with Linn Manor.

2. Whether claimant gave timely notice of the alleged July 7, 2014 work injury.

3. Whether the alleged injury caused temporary disability and the extent of claimant's entitlement to temporary disability, or healing period, benefits.

4. Whether the alleged injury caused permanent disability and the extent of claimant's entitlement to permanent disability benefits, if any.

5. The proper commencement date for permanent disability benefits, if any.

6. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses contained at Exhibit 3.

FINDINGS OF FACT

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

Bradley Zieser is a pleasant gentleman and presented as a likable witness at trial. Mr. Zieser is a certified nursing assistant (CNA). He commenced working for the employer, Linn Manor, in 2006 and worked at that facility until 2014. In his position as a CNA at Linn Manor, Mr. Zieser was required to lift and turn patients. He described heavy job duties for Linn Manor. Mr. Zieser testified that he liked his job at Linn Manor and that he had no physical problems when he started working as a CNA.

In 2012, claimant began developing back pain. Mr. Zieser testified that he was aware that many individuals working as CNA's develop or experience back injuries. Claimant further testified that he believed his back pain was causally related to his work activities as a CNA at Linn Manor in 2012.

Mr. Zieser experienced low back pain as well as symptoms into his left leg and foot well before the alleged injury dates. The evidentiary record demonstrates that claimant reported tingling down his left leg to the ankle as well as left foot numbness by February 2012. (Exhibit 1, page 9) In that same month, he had an MRI performed on

his low back, which demonstrated disc bulges at L4-5 and L5-S1. (Ex. 1, p. 16) By March 2, 2012, claimant was discussing the effects of his low back symptoms on his potential future work and the possibility that he may need to seek alternate employment opportunities. (Ex. 1, p. 18) Claimant was referred to a neurosurgeon, Mary L. Hlavin, M.D., and reported left leg symptoms in March 2012. (Ex. 1, p. 42)

After consultation with Dr. Hlavin in March 2012, claimant did not seek further treatment for his low back until July 2014. During this same time period, claimant was treated multiple times by his personal physician with no specific references to symptoms or treatment of the low back. (Ex. B, pp. 25, 27-29, 32) In July 2014, claimant reported mid to low back pain. (Ex. 1, p. 39) Once again, he was referred to Dr. Hlavin's office. Dr. Hlavin opined that his repeat MRI was similar to the findings noted in 2012 and her office recommended against surgical intervention. (Ex. 1, pp. 54, 63-64) In a handwritten note on correspondence from defense counsel, Dr. Hlavin opined that claimant did not sustain a traumatic or cumulative injury as a result of his work activities at Linn Manor on either of the alleged injury dates. (Ex. C, p. 40)

Claimant's employment with Linn Manor was terminated in July 2014. (Ex. I, p. 86) Mr. Zieser filed an application for Social Security Disability benefits and was evaluated for purposes of that application. There was no mention of a work-related injury in that evaluation. (Ex. A, p. 5)

Claimant found new employment and submitted to a pre-employment physical on December 18, 2014. At that examination, Mr. Zieser denied any prior work related injuries and was found to have a normal back examination. (Ex. D, pp. 44-45)

Claimant's symptoms persisted and he was referred to a pain specialist, Stanley J. Mathew, M.D. Dr. Mathew evaluated Mr. Zieser in January 2016 and recommended an EMG of claimant's lower extremities. After completing the EMG, Dr. Mathew opined that there was some evidence on the EMG that claimant was demonstrating the beginning of a lumbar radiculopathy on the left side. (Ex. 1, p. 96) Dr. Mathew opined that claimant's low back condition was causally related to the repetitive work he performed at Linn Manor. He opined that Mr. Zieser sustained a 13 percent permanent impairment of the whole person as a result of his low back injuries and declared Mr. Zieser at maximum medical improvement on July 28, 2016. (Ex. 1, p. 108) Dr. Mathew recommended that claimant lift no more than 20 pounds and that he avoid prolonged standing, walking, bending, lifting, and squatting. He also recommended avoidance of the use of ladders, work at heights, or work with heavy machinery. (Ex. 1, p. 108)

Defendants sought an independent medical evaluation with John D. Kuhnlein, M.D., on November 16, 2016. (Ex. A) Dr. Kuhnlein recorded a history from claimant of symptoms in early 2012 with low back pain that was so bad in 2012 that claimant contemplated suicide. In fact, in August 2012 claimant discussed potential suicide with a co-worker and the employer intervened with assistance from law enforcement to have claimant evaluated for a potential suicide threat. Nevertheless, Mr. Zieser indicated to Dr. Kuhnlein that he did not report a work injury in 2012 because

he knew he was well beyond the time permitted to report an injury that it would not likely be covered as workers' compensation. (Ex. A, p. 4)

After performing his evaluation and obtaining a thorough history, Dr. Kuhnlein opined that he could not attribute claimant's low back condition to his work activities at Linn Manor. (Ex. A, p. 12) Dr. Kuhnlein opined that claimant has a seven percent permanent impairment of the whole person as a result of his low back condition, but opined that the permanent impairment cannot be attributed to claimant's work at Linn Manor. (Ex. A, p. 14) Dr. Kuhnlein also noted activity restrictions including a 40 pound waist to shoulder lifting limitation as well as limitations on claimant's ability to sit, stand, walk, squat, stoop, kneel, bend, use ladders or work at heights. (Ex. A, p. 15)

Ultimately, this case turns on which medical provider's opinion is accepted as most credible. Having considered the opinions of Dr. Hlavin, I note her credentials as a neurosurgeon and note that she evaluated claimant twice over an extended period of time. Her opinions carry some weight in this case, but are not well formulated. Dr. Hlavin's causation opinions are expressed only as a handwritten response on defense counsel's correspondence.

Dr. Mathew is highly qualified with double board certifications in physical medicine and rehabilitation as well as in pain management. (Ex. S, p. 4) However, Dr. Mathew appears to have received less than full information upon which to base his causation opinions. For instance, Dr. Mathew did not know who claimant's employer was as the time of his evaluation in January 2016. (Ex. S, p. 6) Dr. Mathew did not even know what years claimant had worked at Linn Manor. (Ex. S, p. 16)

Although he documented leg numbness and tingling, Dr. Mathew did not record which leg was affected in his notes or report. (Ex. S, p. 7) It does not appear that Dr. Mathew is entirely aware of claimant's work history and when he left Linn Manor as compared to his reoccurrence and increase in low back pain necessitating the second MRI. Dr. Mathew did not know claimant's actual work duties at Linn Manor or the number of hours he worked there or how many hours claimant was working at the time of his evaluation. (Ex. S, p. 31)

Dr. Mathew provides no explanation or even statement of understanding of the gap in low back treatment from March 2012 until July 2014. He made no mention of claimant's hospitalization as a result of his suicide comments in July 2012. (Ex. S, p. 52) Dr. Mathew did not discuss claimant's denial of a prior work related injury on his job application and pre-employment physical in December 2014. (Ex. S, p. 59)

Dr. Mathew did not appear to be aware of or discuss any exacerbation of symptoms in 2015 before claimant returned for evaluation by Dr. Hlavin. However, in his deposition, Dr. Mathew acknowledged that "Definitely prior to seeing Dr. Hlavin in April of 2015 he did have an exacerbation." (Ex. S, p. 64) It is apparent from Dr. Mathew's deposition that he was not aware of the full history behind claimant's low back condition before rendering his causation opinion.

Dr. Kuhnlein appears to have had a good understanding of claimant's history and the development of his symptoms and low back condition. Dr. Kuhnlein provided a cogent and reasonable explanation behind his opinions, which is understandable and credible. It is also supported by the other evidence in this case. Having undergone examination by deposition, Dr. Kuhnlein was able to clearly explain his rationale and conclusions. Ultimately, Dr. Kuhnlein convincingly explained his rationale for concluding that there was no objective evidence to establish that Mr. Zieser's low back condition resulted from or was materially aggravated by his work activities at Linn Manor. (Ex. 5, p. 143)

Having considered all of the medical opinions, as well as the other evidence in this record, I find the medical opinions expressed by Dr. Kuhnlein to be most credible and consistent with the other evidence. To the extent that Dr. Hlavin provided a similar conclusion, I also find it credible. Having accepted the opinions of Dr. Kuhnlein and Dr. Hlavin as most credible in this record, I find that claimant failed to prove that he sustained a cumulative injury that arose out of and in the course of his employment with Linn Manor. Similarly, I find that claimant failed to prove that he sustained a material aggravation of his pre-existing low back condition as a result of his work activities at Linn Manor. To the extent that claimant asserts a claim for a mental injury arising out of the low back injury asserted, I find that claimant failed to prove the low back injury resulted from work at Linn Manor. Therefore, I similarly find that claimant failed to prove any mental injury arising from his low back condition is work related or arose out of and in the course of his employment with Linn Manor.

CONCLUSIONS OF LAW

Mr. Zieser asserts two dates of injury, both are asserted as cumulative injury dates and involve similar claims of low back injury and mental injury. The initial disputed issue in both cases is whether claimant sustained an injury that arose out of and in the course of his employment.

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 Elec. 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include

missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

I found that claimant failed to prove a material and permanent aggravation or a direct causal connection between his low back injuries and his work activities at Linn Manor, under either alleged injury date. I also found that claimant failed to prove a causal connection or that his mental injuries arose out of and in the course of his employment under either alleged work injury date. Therefore, I conclude that claimant failed to prove entitlement to weekly benefits or medical benefits in either file. Having reached these findings of fact and conclusions of law, I determine that all other disputed issues are moot.

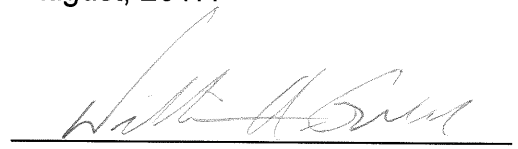
ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further.

Each party shall bear their own costs.

Signed and filed this 30th day of August, 2017.



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WHG/srs

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.