

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PATTY FUNK,
Claimant,

vs.

GENERAL MILLS, INC.,
Employer,

and

LIBERTY MUTUAL INSURANCE CO.,
Insurance Carrier,
Defendants.

File Nos. 5054697; 5054698,
5054699; 5054700;
5054701

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

Head Note Nos: 1108, 1803, 2206,
2207, 2209

FILED
MAR 21 2019

WORKERS' COMPENSATION

Claimant Patty Funk appeals from an arbitration decision filed on April 24, 2018.

On March 15, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

Claimant initially sought benefits for a May 27, 2004 work injury (file number 5018157) after she was exposed to a high concentration of chemicals contained in an industrial cleaner. (See Joint Exhibit AA, p. 2) Claimant's claim proceeded to hearing in February of 2007. As a result of claimant's exposure and resulting respiratory injuries, a deputy commissioner found claimant sustained a 20 percent industrial disability. (See JE AA, pp. 4, 6)

Claimant subsequently filed a petition for review-reopening of the 20 percent industrial disability award in file number 5018157. Claimant also filed petitions for five additional dates of injury: October 27, 2013 (file number 5054697); March 23, 2015 (file number 5054698); July 13, 2015 (file number 5054699); October 6, 2015 (file number 5054700) and October 13, 2015 (file number 5054701). These claims were simultaneously considered at a hearing on January 9, 2016.

The deputy commissioner who presided over the January 9, 2016 hearing issued an arbitration decision and review-reopening decision on April 24, 2018. In that decision the deputy commissioner determined claimant's claim for review-reopening in

file number 5018157 was barred by the statute of limitations. Claimant did not appeal the deputy commissioner's decision in file number 5018157, so it will not be addressed herein.

As discussed above, claimant also alleged several new dates of injury. The October 27, 2013, March 23, 2015, and July 13, 2015 dates of injury were alleged as new respiratory injuries. The October 6, 2015 date of injury was a tinnitus claim. Finally, the October 13, 2015 date of injury was a cumulative injury claim for claimant's bilateral hips.

With respect to the alleged respiratory injuries on October 27, 2013, March 23, 2015, and July 13, 2015, the deputy commissioner found insufficient evidence that any of the exposures on these dates substantially or materially aggravated the underlying permanency of claimant's respiratory condition. Instead, the deputy commissioner concluded these exposures only resulted in temporary aggravations of claimant's respiratory condition and did not result in any additional permanent disability.

On appeal, claimant argues she sustained a material aggravation of her work-related respiratory condition on each of these dates and that her resulting industrial disability is significant.

Regarding claimant's tinnitus claim, the deputy commissioner determined claimant sustained a five percent industrial disability. While claimant initially appealed this determination, she indicated in her appeal brief that this appeal is now withdrawn. (Claimant's Appeal Brief, p. 51) Because no formal motion was filed, I will treat claimant's appeal brief as a motion to withdraw her appeal in file number 5054700. Claimant's motion is granted, and claimant's tinnitus claim will not be addressed herein.

Lastly, the deputy commissioner found claimant provided insufficient evidence that her work activities caused an injury to her bilateral hips.

On appeal, claimant argues she sustained a work-related cumulative injury to her bilateral hips on or about October 13, 2015 that resulted in a five percent industrial disability.

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

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, I affirm and adopt those portions of the proposed arbitration decision filed on April 24, 2018 that relate to

issues properly raised on intra-agency appeal. I add the following findings and analysis to the arbitration decision:

Claimant's review-reopening claim for her respiratory condition is barred by the statute of limitations. As such, claimant cannot simply rely on a gradual worsening of her condition over time to obtain an increased industrial disability award. Instead, before she is entitled to an increase in her industrial disability, she must show that the alleged "new" respiratory injuries were the cause of the worsening of her condition and that the worsening is permanent. I agree with the deputy commissioner that claimant failed to do so.

First, claimant's treating pulmonologist, Joel Kline, M.D., referred to claimant's exposures to chemicals and perfumes since 2004 as "acute asthma exacerbations" and "discreet episodes." (Claimant's Ex. 2, pp. 1-2) While certainly not dispositive, this verbiage suggests the episodes were temporary in nature. Further, while Dr. Kline opined these episodes contributed to her overall decline, he never specifically stated whether they materially or substantially aggravated her underlying condition or caused increased permanent disability. Thus, I agree with the deputy commissioner that it is unclear from the record whether any worsening of claimant's condition is due to the normal course of the condition or whether the new exposures substantially or materially aggravated the condition.

Going a step further, Dr. Kline never opined that the worsening of claimant's condition was permanent. Instead, he only warned that future exacerbations would increase the risk of a permanent decline: "The more acute exacerbations [claimant] experiences, the greater the risk of a permanent decline in her pulmonary function." (Cl. Ex. 2, p. 2) This statement suggests the worsening of claimant's condition had not yet become permanent but could at some future point. Thus, I find claimant provided insufficient evidence that any worsening of her condition was permanent.

In sum, I find there is insufficient evidence that claimant sustained a permanent worsening of her condition or an increased permanent disability, and even if she had sustained a permanent change in her condition there is insufficient evidence that the new exposures were the cause of that change. Ultimately, therefore, I agree with the deputy commissioner that the new exposures on October 27, 2013, March 23, 2015, and July 13, 2015 caused only temporary flare-ups of claimant's respiratory condition.

This renders all other issues on appeal moot in file numbers 5054697, 5054698 and 5054699.

Regarding claimant's bilateral hip condition, claimant on appeal criticizes the deputy commissioner's finding that the opinions of Suleman Hussain, M.D., were the most persuasive in the record. While Dr. Hussain's independent medical examination (IME) report contains flaws, as pointed out by claimant in her brief, claimant overlooks the fatal flaws in her own experts' reports.

For example, the report signed by David Hart, M.D., claimant's orthopedist, and the IME report authored by Farid Manshadi, M.D., both assumed claimant was on her feet on concrete "at all hours during work" and that claimant had to "walk on uneven ground." (Cl. Ex. 1, pp. 1-2; Cl. Ex. 3, pp. 1-2, 9). As claimant testified at hearing, however, she did not stand for the entirety of her shift, nor was she always on concrete while she was standing. (Hearing Transcript, pp. 76-78) Further, consistent with the testimony of several of defendants' witnesses, I agree with the deputy commissioner that the floors depicted in Defendants' Exhibit W do not appear to be "uneven"; they are slightly sloped, if anything. (Def. Ex. W; see Tr., pp. 150, 162, 188-89) Because both Dr. Hart and Dr. Manshadi relied on assumptions that are inaccurate—or at the very least inflated or exaggerated—I do not find their opinions to be persuasive. See Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845, 853 (Iowa 1995).

Therefore, like the deputy commissioner, I find there is insufficient evidence that claimant's bilateral hip condition was caused or substantially or materially aggravated by her work activities with defendant-employer. As such, I conclude claimant failed to satisfy her burden to prove her work activities caused an injury to her bilateral hips that arose out of and in the course of her employment.

This renders moot all other issues on appeal in file number 5054701.

In summary, I find no error in the presiding deputy commissioner's analysis in file numbers 5054697, 5054698, 5054699, and 5054701, and I reach the same result. I concur with his analysis, findings, and ultimate determination that claimant should take nothing in these files.

ORDER

THEREFORE, IT IS ORDERED:

For File No. 5054700:

Claimant's motion to withdraw her appeal is granted.

IT IS FURTHER ORDERED that the arbitration decision filed on April 24, 2018 is affirmed with my additional findings, conclusions, and analysis.

For File Nos. 5054697, 5054698, 5054699:

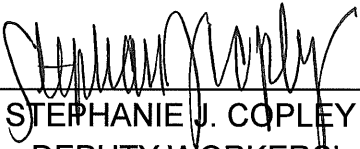
Claimant shall take nothing further.

For File No. 5054701:

Claimant takes nothing.

Claimant shall bear the costs of this appeal, including the cost of the hearing transcript.

Signed and filed this 21st day of March, 2019.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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