BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT JOHNSON,

Claimant,

vs.

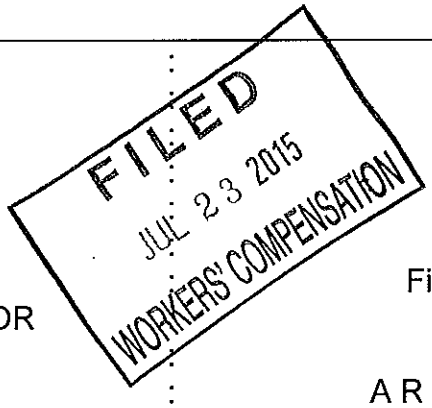
MJA INC., d/b/a ROY'S MOTOR SERVICE,

Employer,

and

PIONEER SPECIALTY INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5044699

ARBITRATION

DECISION

Head Note Nos.: 1100, 1402.20

STATEMENT OF THE CASE

The claimant, Scott Johnson, filed a petition for arbitration and seeks workers' compensation benefits from MJA, Inc., d/b/a Roy's Motor Service, the employer, and Pioneer Specialty Insurance Company, as the insurance carrier. The claimant was represented by Christopher Spaulding. The defendants were represented by Tina Eick.

The matter came on for a contentious hearing on November 4, 2014, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 14 and defense exhibits A through QQ. There were several objections to exhibits, which were all overruled. All exhibits were admitted. The claimant provided sworn testimony at hearing, as did George Estes, Kelly Ayers and Michael Gordon. Chris Quinlan was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on November 21, 2014 after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination.

1. The fighting issue in the case is whether the claimant sustained an injury which arose out of and in the course of employment on August 16, 2013.

2. If an injury was sustained, whether the claimant's disability is causally connected to the work injury.

3. The nature and extent of any disability, if proven.

4. Medical payments are alleged and disputed as outlined in claimant's Exhibit 12. The defendants dispute that these bills are causally related to any work injury for the employer.

5. Claimant further seeks alternate medical care.

6. The defendants have raised the issue of apportionment as an affirmative defense.

The parties did stipulate to some facts as well:

1. The parties stipulated that an employer-employee relationship existed as of the time of the alleged work injury.

2. Affirmative defenses, other than "apportionment" have been waived.

3. The parties have stipulated to all of the factors which comprise the rate of compensation. At the time of the alleged injury, it is agreed the claimant was single with one exemption and gross earnings of $547.50.

4. The parties have also stipulated that, if it is determined permanent partial disability benefits are owed, they should commence on September 2, 2014 and calculated pursuant to the industrial disability method.

FINDINGS OF FACT

Scott Johnson was 49 years old as of the date of hearing. Scott spent a significant amount of time in juvenile detention as a child. He has struggled with alcohol dependency, however, he claims sobriety since 2009. (Transcript, pages 48-49) He started high school while he was incarcerated, and he testified he has been diagnosed with a learning disability, including difficulty reading, writing and arithmetic. (Tr., p. 48) He has also struggled with mental illness and post-traumatic stress disorder. (Tr., pp. 48-50) Scott eventually attained a GED. He has held a number of jobs in his life. His work history is limited. He has worked primarily as a truck driver and as a machinist. (Defendants' Exhibit KK, pp. 8-9) His work history includes some periods as a "self-employed" truck driver. He also worked for Roto Rooter for six years. (Def. Ex. KK, p. 8)

Scott began employment with MJA, Inc., a/k/a Roy's Motor Service on August 8, 2013. (Tr., p. 71) He was supposed to have started on a prior date, but there was confusion of some sort. (Tr., p. 71) Scott was hired by Kelly Ayers, the owner of Roy's Motor Service, in late July 2013. (Tr., p. 73) He testified that Kelly had just purchased

the business and that she had let several employees go. (Tr., pp. 73-74) She offered him $15.00 per hour to come work for Roy's Motor Service. Prior to this job, Scott had been driving a truck for C.C. Carriers. The date he was offered work, he also met with Mike Ayers, Kelly's husband.

On Friday, August 16, 2013, Scott had only worked for Roy's Motor Service for just over a week. Scott alleges that on that day, he was injured.

> On the second tow, I had a driveline that was stuck, severely stuck, and I needed a long leverage bar to - - in order to free it from the rear-end housing.
>
> And when doing so, it came out of there at such a violent rate that it hit me in the shoulder and basically bent my body over to the point that my - - basically my head was between my legs and I was eating the dirt below.
>
> . . .
>
> Because of the situation I was under, I was down on my knees, and I was fighting this driveline, and I - - I thought the best way to - - when it did come out, so I didn't lose the end caps - - there's end caps on the ends of these drivelines that you don't want to lose.
>
> Anyways, I pried it off. And when it fell, it come down on the back of my shoulder and pushed me straight down into the gravel.

(Tr., pp. 52-53)

There is a fact dispute regarding whether this occurred. In fact, it is the fighting issue in the case.

It is undisputed that Scott was working with a long-term co-worker, George Estes, on August 16, 2013. The vehicle they towed was a commercial vehicle owned by Cross Dillon Tire. An employee of Cross Dillon named Michael Gordon needed a tow. His truck had broken down. The breakdown occurred at the first Pella exit on Highway 163 westbound. (Tr., p. 181)

George Estes and Michael Gordon both provided statements and testified under oath that no injury occurred on August 16, 2013. (Tr., pp. 37-44; 179-190; Def. Ex. PP; Cl. Ex. 11) It is undisputed that George and Michael were at the rear of the vehicle making small talk while Scott performed the work under the vehicle. They were watching traffic. Based upon the facts in evidence, it is apparent that, if the injury had occurred in the manner in which Scott claimed, they would have at least heard it, or knew that it had happened.

George and Scott returned to the office. Scott testified that George and Kelly had an unrelated dispute about his work activities. Scott testified that he informed Kelly

he had been injured at that time. Kelly denied this in no uncertain terms. (Tr., pp. 141-42)

The parties agree that Scott called off from work on Monday, August 19. He apparently had not worked on August 17 or 18. Kelly claimed that Scott called in at 8:24 a.m., 24 minutes after his shift started. (Def. Ex. NN, p. 6) George called Scott to find out what was going on. "I called him to find out why he hadn't showed up for work. And that's when he explained to me that he was - - his back was sore and he was going to take a shower and he'd be in later or call." (Tr., p. 37) Kelly testified that George told her Scott had been in a fight with his daughter's boyfriend. (Tr., p. 144) George denied telling Kelly anything about a fight. George did testify that he knew on Monday Scott's back hurt.

There is no evidence in the record that Scott was ever provided any type of handbook, work rules or other communication that he was required to report to work at 8:00 a.m., nor is there any evidence in the record that he had ever been warned for failing to show up or call in by 8:00 a.m. Kelly did testify that she tells every new employee they need to be there by 8:00 a.m. There is simply no corroborating evidence for this. His time card does reflect that he usually reported for work at 8:00 a.m. for the two weeks he worked. (Def. Ex. NN, pp. 4-5) Scott asked Mike to have Kelly call him. (Tr., p. 58) Scott testified that he called back on Tuesday and Kelly was irate with him. He stated she would not allow him to speak. (Tr., p. 59) She terminated him at that time. Kelly testified that she was in the process of terminating Scott when he told her that he had been hurt. (Tr., pp. 146-47) She denied that she knew anything about his injury before this.

Kelly testified that she immediately asked George whether Scott had been injured while working and George denied that he had. (Tr., p 148) George confirmed this although his testimony was somewhat contradictory. (Compare Cl. Ex. 9, Estes Dep., p. 12 with Tr., p. 44)

On Tuesday, August 20, 2013 at 8:59 a.m., after Kelly fired Scott over the phone, he wrote her an email, which stated:

> Kelly
>
> As you know I sustained a back injury on Friday and called in Monday at or before my shift ...at that time I told Roy's towing and it's employees I couldn't drive.!! This is nothing short for O You got hurt bye !!
>
> I have a few personal affects at Roy's. .i will collect or you could mail seeing how you want to close my file
>
> Sincerely
>
> Scott Johnson

(Def. Ex. NN, p. 6)

Kelly responded with the following email at 9:19 a.m.

> Our phone logs dictate that you called on 8/19/13 at 8:20 am. 20 minutes after your shift began and today you called at 8:24 am. 24 minutes after you [sic] shift started. I was informed that you had been in a fight. I was not aware of the reason or nature for your injuries. I made it very clear to you in our conversations regarding your employment that you would be on probation as all employees at Roy's are for the first 30 days. You are welcome to stop by and pick up any items that belong to you.

(Def. Ex. NN, p. 6)

The email communications continued the following day.

> I don't know how you got me being in a fight, I have not been in a fight other than you not accepting my back problem ..Let me clear this up for you Kelly.. I HURT MY BACK WORKING FOR YOU!! ON AUGUST 16 2013 while pulling a drive line and being beat up and bounced down the highway towing from Pella Iowa to Altoona Iowa you where [sic] told on Friday you ignored it then on Monday again Tuesday over the phone you then fired me and hung up on me this is the fourth and last time I'm telling you!! I will be sending this out via certified mail ...Please don't call me, your rude and unprofessional attitude in this matter should be left via mail or email, Please keep my personal and medical information between us and not your employees, if you cant handle this professionally I will and can take this to the next level

(Def. Ex. NN, p. 7) Kelly responded as follows.

> You and I have never had a discussion of any kind with regards to your health or back or anything else. When I paid you on Friday you where [sic] in good spirits and did not appear to be in any kind of pain. I never spoke to you on Monday but I did speak to you on August 20 when you did not show up for work. You informed my employee George Estes on Monday at 8:20 that you had a "fight" with you [sic] son-in-law and injured your back. I am not interested in having any further communications with you sir. I encourage you to take whatever steps necessary to provide evidence to your claim.

(Def. Ex. NN, p. 7)

The parties ceased communicating with one another at this point. Scott went to the emergency room on Wednesday August 21, 2013. He was evaluated by Michelle Ann Tingle, D.O. She documented his version of the events. "Pt moving a

drive line off a semi and it fell onto the top of the shoulder rt side and tipped him over pushed his head to the ground but did not end up on the ground." (Cl. Ex. 1, p. 2) She noted his prior injuries. The examination showed decreased range of motion, tenderness and spasm. (Cl. Ex. 1, p. 4) Scott reported radicular symptoms through his right thigh and into both feet. (Cl. Ex. 1, p. 2) After taking some x-rays, she provided him with medications and instructed him to follow up with John Hembry, D.O. at the Waukee clinic. She also mentioned following up with a workers' compensation physician. (Cl. Ex. 1, p. 5) Dr. Hembry evaluated Scott in August and September 2013. He provided some medications as well. (Cl. Ex. 2, pp. 1-4)

Scott had no insurance and no treatment after this until January 2014. In January, he sought treatment from Mercy Waukee Medical Clinic. The following history was documented on January 4, 2014.

> Back pain. Pt present today with back pain. He injured his back pain [sic] about six months ago after accident, with discomfort since that time. The pain gradually improves for weeks at a time, but then worsens acutely with a sneeze or twisting the wrong way. Yesterday he had sneeze that acutely worsened his back pain again.

(Cl. Ex. 3, p. 1) The pain was radiating into his right leg and toes. With regard to the right shoulder, the concern was that he developed adhesive capsulitis. (Cl. Ex. 3, p. 2) Laura Bowshier, M.D., recommended MRI for his low back and right shoulder and prescribed medications. He was also restricted at this time from using his commercial driver's license. (Cl. Ex. 3, p. 7) In February 2014, Dr. Bowshier provided claimant's counsel with an opinion that, based upon his recitation of the history of injury, she ordered MRIs and referred Scott to specialists. (Cl. Ex. 3, p. 14)

On February 3, 2014, Scott was seen at Mercy Physical Medicine and Rehabilitation. Physical therapy was recommended, but Scott did not think it would help. It was noted in this record that Scott's "symptoms do not correlate with the findings on MRI." (Cl. Ex. 6, p. 3)

Scott treated with Stephen Ash, M.D., at Iowa Ortho beginning in February 2014 for his right shoulder pain. He documented the history of the work injury. (Cl. Ex. 4, p. 1) He diagnosed the condition as shoulder pain "question of impingement syndrome or cuff strain." (Cl. Ex. 4, p. 3) Dr. Ash recommended physical therapy and possibly some pain management treatment such as injections. (Cl. Ex. 4, p. 4)

For the low back, Scott was treated by Troy Munson, M.D., at Mercy Neurosurgery in March 2014. (Cl. Ex. 5, p. 1) Dr. Munson thoroughly documented the history he was provided as follows.

> Mr. Johnson comes in for evaluation of low back and right lower extremity pain. The patient was injured at work in 2012 when he lives [sic] in North Carolina. At that time he had low back pain and left lower

> extremity radicular pain. He underwent surgery which appears by imaging to be an L3-4 and L4-5 left-sided laminotomies, and improve [sic] significantly but as he says not back to 100% Later on in 2013 he was again injured at work and now has recurrence of severe low back pain that radiates down his right lower extremity. He says the pain is always present in the right side of his low back where it goes into the buttocks and down the back of the right leg to the lateral and bottom of the right foot. He feels numbness and tingling in the side of his foot and the last 2 toes on the right foot. His pain in the right side of low back and leg to his foot it [sic] is present all the time it is quite bothersome. Occasionally however he experiences a sudden severe increase in the low back pain which is completely incapacitating and he is unable to perform any activities. This pain only happens intermittently and will come on suddenly and feels to him like a muscle spasm.

(Cl. Ex. 5, pp. 1-2) He diagnosed lumbar radiculopathy and lumbar spondylosis. "There appears to be significant compression of the traversing L5 nerve root on the right side." (Cl. Ex. 5, p. 3) Dr. Munson advised against surgical fusion but provided other treatment options including a discectomy surgery, pain management injections and physical therapy. (Cl. Ex. 5, p. 4)

Scott tried the injection on March 13, 2014. The right "L4-L5 transforaminal epidural steroid injection" was attempted by Clay Ransdell, D.O. at Metro Anesthesia. (Cl. Ex. 7, pp. 2, 3) It did not help. Shortly after the injection, Scott developed a severe migraine and eventually returned to see Dr. Bowshier on March 17, 2014. She provided him with narcotic pain medications. (Cl. Ex. 3, p. 16)

On June 30, 2014, Scott was seen by David Boarini, M.D., of the Iowa Clinic. Dr. Boarini documented the "drive line" injury and performed a thorough evaluation. (Cl. Ex. 8) Dr. Boarini diagnosed significant right-sided disc bulges at L3-4 and L4-L5. "I think the patient does have a lumbar radiculopathy. We have discussed a two level laminectomy and decompression." (Cl. Ex. 8, p. 3) Dr. Boarini performed surgery on July 8, 2014. (Cl. Ex. 8, p. 22) The surgery significantly improved his symptoms. (Cl. Ex. 8, p. 31) After a period of follow up visits and physical therapy, Dr. Boarini released Scott to work without any restrictions on September 2, 2014. Scott has returned to work as a truck driver, however, he was off work from July 8, 2014 through September 1, 2014. He did not make a healing period claim for benefits from August 2013 through July 2014.

The record reflects that Scott recovered well from the surgery. Scott further testified that the shoulder pain had resolved.

There is no doubt that Scott has had a long history of back problems and chronic back pain, the earliest notes in the record dating back to 1990. (Def. Ex. A) In 1995, he told medical providers that he could not hold down a steady job due to chronic back pain. (Def. Ex. C, p. 7) He has had fairly regular issues with his low back with a variety

of providers. (Def. Ex. A, B, C, D, E, F, G, N, O, S, and U) Scott has had several different work injury settlements related to his low back as well. (Def. Ex. MM)

CONCLUSIONS OF LAW

The primary fighting issue in this case is whether the claimant, Scott Johnson, met his burden of proof that he suffered an injury which arose out of and in the course of 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 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.

While this case is close, I find that the claimant has failed to meet his burden of proof that he suffered an injury which arose out of and in the course of his employment on August 16, 2013. The record is simply too murky.

To be sure, there is a significant amount of evidence which weighs in the claimant's favor. I do not find the employer's witnesses, Kelly Ayers or George Estes, to be particularly credible. The employer itself did not have particularly thorough human resource practices. Kelly hired the claimant with no written rules or clear guidelines for employment and then fired him for calling in to work sick two days in a row. It simply does not make sense to terminate the claimant for calling in two days in a row without any kind of a formal warning or reprimand to let the claimant know his job was in danger. Furthermore, Kelly did this in spite of the fact that the claimant had clearly told George during the conversation on Monday August 19, 2013, that his back was injured (although the record is disputed whether George knew the claimant was alleging the injury occurred at work).

In addition, after terminating the claimant, Kelly accused him of having injured his back in a fight with his son-in-law. She wrote in an email Monday August 13, 2013, that Scott had told George that he had been injured in a fight with his son-in-law. She specifically stated that George told her that this was stated in the Monday August 19, 2013, phone conversation. This appears to be an intentional false statement since George denied he had any conversation with the claimant on Monday August 13,

2013 about the alleged fight. George also denied that he had talked with Kelly about it on that date (although he stated he had mentioned something about a fight to Kelly previously). All of these facts lead to a reasonable inference that Kelly was skewing the facts to justify her decision to terminate the claimant after he had made an injury claim. Furthermore, it makes the claimant's allegation that he told Kelly about his injury claim on Friday, August 16, 2013, and that she knew of his injury, more believable.

For his part, George Estes also lacks credibility in certain respects. Most importantly, George has a significant head injury and resulting memory difficulties by his own admission. George signed a sworn statement for the employer just a few weeks after the accident, which omitted the fact that he spent much of his time watching traffic and not directly observing the work the claimant was performing under the vehicle. The affidavit gave the strong appearance that George claimed he was directly working with the claimant for the entire period. "I was present and observed the entire process." (Cl. Ex. 11, p. 2) George admitted at hearing that he is not a good reader. Finally, George is protective of this employer and could have been inclined to bend his testimony in her favor.

The other factor which weighs in claimant's favor is the medical records. It is evident from the medical records that he was and is really hurt. He provided a consistent history to the medical providers since first seeking medical treatment on August 21, 2013. He conceded his previous low back injuries and pain without trying to cover it up, yet repeatedly told physician after physician that he had injured his back in the exact same manner he described at hearing. Most importantly, he had objective findings in the MRI reports which correlated with a new condition or an aggravation of his prior condition. (Cl. Ex. 5, p. 11) Specifically, the claimant had presented to Broadlawns in April 2013 several months before the alleged work injury. At that time, he complained of low back pain but there was no mention at all of radicular symptoms. (Def. Ex. AA, p. 4) The radicular symptoms therefore seemed to develop after April 2013. The first mention of radicular symptoms after this date, appear on August 21, 2013, five days after his alleged work injury which he attributed to the work injury in question.

If the burden of proof were on the employer, the claimant would win. The burden, however, is on the claimant, and in spite of the foregoing there is a significant amount of evidence which damages his case. The single most damaging piece of evidence against the claimant is the sworn testimony of Michael Gordon. There is nothing in the record of evidence that Michael Gordon has any motive to provide false testimony. He testified that he was at the scene of the alleged injury. The claimant's only attack on Michael Gordon's sworn testimony was that he was not closely watching what the claimant was doing. It is true that he spent much of his time watching traffic and making small talk with George Estes, however, when the entire circumstance of the alleged injury is viewed as a whole, I find it very likely that, had the claimant been injured in the manner he alleged, Michael Gordon would have had some idea that it had happened. I have given a great deal of consideration to whether the injury could have occurred while the witnesses were watching traffic such that they would not have seen

or had any idea that it had just occurred. Based upon the record, this is simply not likely. The claimant, Michael and George were all right there. They rode back together. Simply stated, someone is not telling the truth; either the claimant is lying or both George Estes and Michael Gordon are lying.

There is no realistic, believable reason in this record that I should discount Michael Gordon's testimony. It is also true that the claimant had only worked for this employer since August 8, 2013, before claiming this injury on August 16, 2013. He had a history of chronic low back pain and settlements for low back issues. He has a somewhat sketchy recent work history (at least through hearsay reports) and a failed attempt to secure Social Security Disability or Supplemental Security Income. None of these factors amount to much on their own, however, when combined with the adverse testimony, and viewed as a whole, he is unable to carry his burden of proof that he suffered an injury which arose out of and in the course of his employment.

For his part, I concede that the claimant appeared credible at hearing. He presented himself in a consistent manner. He testified consistently with his deposition and the hearsay statements in his medical records. There was nothing about his mannerisms or testimony that caused concern. I found his story to be believable and plausible. Given the damaging evidence recited above, however, the claimant has, by the narrowest of margins, failed to meet his burden of proof.

ORDER

THEREFORE IT IS ORDERED:

The claimant shall take nothing.

Each party is responsible for their own costs.

Signed and filed this 23rd day of July, 2015.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/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.