

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES J. JOHNSON,

Claimant,

vs.

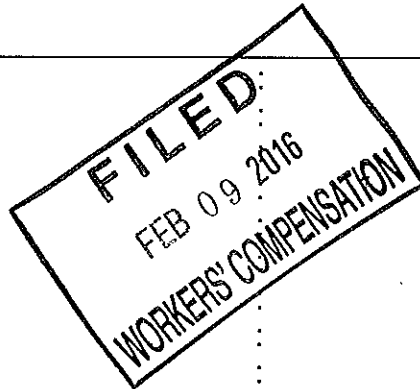
IRWIN, INC.,

Employer,

and

ACCIDENT FUND NATIONAL  
INSURANCE COMPANY,

Insurance Carrier,  
Defendants.



File No. 5052122

ACCIDENT FUND NATIONAL  
INSURANCE COMPANY  
ARBITRATION

DECISION

Head Note No.: 1100

STATEMENT OF THE CASE

James Johnson, the claimant, seeks workers' compensation benefits from defendants, Irwin, Inc., the alleged employer, and its insurer, Accident Fund National Insurance Company, as a result of an alleged injury on September 19, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on December 16, 2015, but the matter was not fully submitted until January 19, 2016. At hearing, the parties were directed to submit post-hearing briefs by January 8, 2016, but they ordered a hearing transcript. The transcript was not filed until January 11, 2016, and it did not reach my desk until January 19, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Only joint exhibits were submitted at hearing and they were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit A, pages 2 through 4 will be cited as, "Ex. A-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page number of a copy of the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and Irwin, Inc. at the time of the alleged injury.
2. Claimant is seeking healing period benefits from February 11, 2014 through September 15, 2014.
3. If the alleged injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.
4. At the time of the alleged injury, claimant was single and entitled to one exemption for income tax purposes.
5. Claimant is seeking medical benefits as set forth in attachments to the hearing report and alternate care.

#### ISSUES

At hearing, the parties submitted the following issues for determination:

- I. Whether claimant received an injury arising out of and in the course of employment;
- II. The extent of claimant's entitlement to weekly temporary total or healing period benefits and permanent disability benefits; and,
- III. The extent of claimant's entitlement to medical benefits.

#### FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, James, and to the defendant employer as Irwin, which is also the last name of the president and owner of Irwin, Inc., Harold James Irwin, who goes by the name Jim Irwin in this record.

Before working at Irwin, James, age 62, had not been employed since 2009. At the time he started at Irwin on September 16, 2013, James had been receiving social security disability benefits and medical benefits from an Iowa Medicaid program since 1998. James admits his prior disability was due to his back, knees, shoulders and eyes. (Tr-67) James admits that due to prior shoulder problems, he had a permanent activity restriction against lifting over 20 pounds. (Tr-68) The owner, Jim Irwin, who hired James, testified that he was aware of James' permanent restrictions and also that he was limited to what he could earn from employment while receiving disability benefits. (Tr.-84)

James, age 62, only worked for Irwin for four days, a little over 32 hours. He worked 8 hours a day. (Tr.-36) His job at this time consisted of placing small wooded boards, 4 inches wide, 4-6 feet long, and 1 inch thick (1x4x4'), onto a chain conveyer that runs to a saw machine and then stacking the cut boards into a box. (Tr. 87) He also was to cut wooded boards, 4 inches wide, 4 feet long and 2 inches thick (2x4x4') to a length of 3 feet, using a hand operated chop saw. He had to lift and place the 4 ft. boards onto the saw deck, operate the saw, and then stack the cut 3 foot boards onto a pallet. (Tr.-88) Irwin asserts that the chop sawing is done with only two boards at a time, and they do not stack the cut boards more than 4 feet high on a pallet. (Ex. O-2, Tr. 88) James said he cut and handled 3 boards at a time when using the chop saw and he stacked them 6 feet high. (Tr.-38) James testified that on the last day he was told to cut the 2x4s faster because they were running out of wood. He said that he then sawed and stacked 1500 to 1800 boards onto 2 ½ pallets. (Tr.-38) Jim Irwin testified that 2 ½ pallets would be 750-800 boards. In responses to discovery and Jim Irwin's testimony, defendants assert that the most James had to lift at any time was 5-6 pounds. (Ex. O-2, Tr. 88) James testified it was 10 pounds. (Tr.-68) There is little dispute that James' work tasks were repetitive.

James resigned on September 20, 2013. According to a co-worker who no longer works for Irwin, James told him at the end of his shift on September 19, 2013 that his arms were sore from his repetitive work and could not hardly move them. The co-worker advised James to talk to the owner or office manager. (Tr.-11:13)

James then went home and stated the next morning his arms worsened, and when he arrived at work, he talked to the office manager, Knoche. James testified that he told Knoche that he did something to his arms and was in a lot of pain and that he could not do the work anymore. (Tr-40) James then resigned. At hearing, Knoche denied receiving any report of a work injury and that he was only told the job was too difficult for him. (Tr.-119) James then provided Knoche with a handwritten note which states as follows:

Yesterday was last day. Just to [sic] hard on body. 9-20-13

(Ex. M)

James testified that Knoche told him that he would report this to the owner and someone would contact him, but no one did so. (Tr.-40-41)

There is no dispute as to the course of treatment for this alleged bilateral shoulder injury, and this treatment was provided under Iowa's Medicaid program. On October 3, 2014, James sought care from the emergency department of the Mercy Medical Center in Clinton, Iowa and subsequent orthopedic and physical therapy treatment locally. Eventually, his medical care was assumed at the University of Iowa Hospitals and Clinics (UIHC). Matthew Bollier, M.D., an orthopedist at UIHC, performed right shoulder surgery on February 11, 2014 and left shoulder surgery on April 29, 2014. (Ex. A-D)

There is also no dispute that James told all providers initially that he injured his shoulders on October 2, 2013 while lifting a heavy dresser while assisting a friend to move from his residence. James asserts that he lied to his medical providers at this time because he was afraid they would deny him if he told them his condition was work related based on a previous experience he had with a work injury in Florida. (Tr.-42:43)

When James started physical therapy sessions in October 2013, his physical therapist stated that his physical therapy under Medicaid was limited, and he would need to come up with \$3,000.00 on his own to complete the sessions. James then wrote Irwin a handwritten letter on October 30, 2013. In this letter, James stated he wanted to inform the owner that after his last day of work he could not move his arms and thought he may have pulled something in his arms. James then described his treatment up to that time and stated he was "not writing him to blame or get Work Comp or anything like that," but he needed money to pay for the rest of his therapy and asked Irwin to financially assist him. (Ex. P-1:2) Apparently, this letter was delayed in getting to Jim Irwin, because it was received by Knoche, the office manager, who then went on vacation before forwarding it. Receiving no response to this letter, James wrote a second letter to Irwin stating because he did not receive a response to his first letter, he had now talked to his lawyer and was told he could still file a workers' compensation claim and repeated his request for help indicating the possibility of surgery. (Ex. Q-1) James then sent a third letter on December 3, 2013 asking to meet and talk about his request. (Ex. R-1)

After Jim Irwin finally received James' letters, he became upset and felt he was being blackmailed with threats of litigation and did not consider the letters a report of a work injury. (Tr. 85:87) The owner then sent a letter to James indicating he considered the letters as a request for a loan, which he is unwilling to do. He then agreed that there should be a meeting set up with James and his safety consultant, Mark Shaffer, and Knoche, the office manager. (Ex. T) This meeting was conducted on December 27, 2013. (Tr.-103) A video taping of the meeting was attempted, but Irwin asserts that the equipment malfunctioned. James testified that he again reported his work injury at this meeting. (Tr.-53) Irwin and Shaffer testified that James still did not clearly or specifically report a work injury or deal with his delay in reporting the incident in this meeting. (Tr.-91, 113) Knoche testified that James was claiming at this meeting he hurt himself at work, but could not recall James stating that this occurred on the last day of work. (Tr.-125)

Apparently, after talking to his attorney, James on February 24, 2014 began reporting to his medical providers that his shoulder problems were work related. He sent a letter to the treating orthopedist, Dr. Bollier, at UIHC informing the doctor that he injured his shoulders at work and requested the doctor provide a statement saying that his condition was caused by this work injury. (Ex. A-18) There is no response to that request from the doctor in this record.

At the request of defendants, James was evaluated in July 2014 by John Kuhnlein, D.O., an occupational medicine physician. After his review of the medical records and his examination of claimant, Dr. Kuhnlein opined that the stress to his shoulders at work was insufficient to cause the bilateral shoulder conditions treated in this case. The history of the work activity at Irwin reported by Dr. Kuhnlein was substantially the same as claimed by James. Also, given the change in his history of how the injury may have occurred, the doctor states James was a nice man, but one cannot be certain when he is actually telling the truth. The doctor queried whether James was telling the truth about the dresser incident, or telling the truth months later that he was injured at Irwin. (Ex. E-11)

At the request of his attorney, James was evaluated in January 2015 by Richard Kreiter, M.D. an orthopedic surgeon. Dr. Kreiter opines that James' work at Irwin aggravated a prior condition resulting in permanent partial impairment of 12 percent to the body as a whole and permanent restriction of no lifting greater than 20-25 pounds and no repetitive pushing and pulling. (Ex. G-1) There is no mention of a dresser incident history in Dr. Kreiter's report.

First, I do not find convincing the story of Jim Irwin and his managers that they were not given notice of a work injury. The first letter to Irwin in October 2014 is a notice of injury, and the matter should have been turned over to the insurer at that point. Whether or not he believed James or not, the letters sent to Irwin and the testimony of the owner and managers establish that Irwin was placed on notice of a possible work injury in early November 2013, well within the 90-day required notice under Iowa law.

However, I must agree with Dr. Kuhnlein. James and his wife appeared sincere at hearing, but I cannot tell which story is the truth from this record. It is certainly possible that claimant avoided reporting an injury to his providers so as to not delay his treatment. He may also have done so to withhold that information from Medicaid, which may not have allowed care for a work injury. However, it is just as likely that James had a non-work related injury, and when his Medicaid ran out, he decided to file a false claim for workers' compensation. His first letter to Irwin on October 30, 2013 was 28 days after he reported an injury moving the dresser on October 2, 2013. He may have had sore arms at work, but this would not be unusual for a person with a significant pre-existing bilateral shoulder problem for which he was receiving disability benefits. Assuming, he had soreness, such is insufficient to show a significant aggravation of his prior condition necessitating surgery.

Therefore, I am unable to find that James suffered the work injury to his shoulders, as he claims.

Further findings are unnecessary.

## CONCLUSIONS OF LAW

I. The claimant has the burden of proving by of 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.

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).

In this case, I found that claimant failed to carry the burden of proof and demonstrate by the greater weight of credible evidence that he suffered the claimed work injury.

Claimant shall take nothing from these proceedings.

## ORDER

1. Claimant's claim for workers' compensation benefits is denied.

2. Claimant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33.

Signed and filed this 9<sup>th</sup> day of February, 2016.



LARRY WALSHIRE  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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LPW/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.