

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL HEMMINGER,

Claimant,

vs.

LENNOX INDUSTRIES, INC.,

Employer,

and

ACE AMERICAN INAURANCE
COMPANY

Insurance Carrier,
Defendants.

FILED

APR -7 2016

WORKERS' COMPENSATION

File No. 5040913

APPEAL

DECISION

Head Note Nos.: 1402, 2200, 2402

On March 22, 2016, Joseph S. Cortese II, Iowa Workers' Compensation Commissioner, delegated the authority to the undersigned to issue the final agency decision on the intra-agency appeal currently pending before this agency. The decision in this matter shall be the final agency decision.

This was an arbitration case that was heard on October 17, 2014, in Des Moines, Iowa, at the Iowa Division of Workers' Compensation. The case was deemed fully submitted on November 14, 2014, when the post-hearing briefs were filed. The presiding deputy workers' compensation commissioner issued the arbitration decision on December 19, 2014. The deputy did not award any benefits to claimant and each party was ordered to pay his/its/their own costs.

On January 5, 2015, claimant filed a notice of appeal. Claimant filed his appeal brief on March 23, 2015. Claimant posed two arguments. They are:

1. Whether the evidence supports the necessary causal relationship between claimant's work activities and the alleged cumulative injury to his shoulders; and
2. Whether the statute of limitations for claimant's alleged cumulative injury to his shoulders has expired.

On April 13, 2015, defendants filed a reply to claimant's appeal brief. Defendants replied in relevant portion:

The weight of the Evidence at Hearing Showed Claimant's Alleged Work injuries are Barred by the Statute of Limitations Under Iowa Code Section 85.26(1) and the Discovery Rule.

Claimant Failed to Meet his Burden of Proof that His Bilateral Shoulder Conditions Were Causally Related to His Work Activities at Lennox.

The undersigned reviewed the record de novo, including the evidentiary record and the detailed arguments of the parties. I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on December 19, 2014, which relate to issues properly raised on intra-agency appeal with the following analysis:

The deputy provided a competent analysis of all issues raised in the arbitration proceeding. I concur with the deputy commissioner's findings of fact and conclusions of law pertaining to all of these issues.

I concur with the deputy's finding that claimant did not sustain a compensable injury that arose out of and in the course of his employment. The hearing deputy explained:

I find claimant has failed to carry his burden of proof to show that he sustained an injury arising out of and in the course of his employment on June 1, 2012. I find the opinions of Dr. Mooney and Dr. Sneller carry greater weight than that of Dr. Kirkland. (Ex. AA, A5, A8, A10) Both doctors treated Mr. Hemminger over a long period of time. Dr. Kirkland only saw Mr. Hemminger on one occasion and it was not until 2014; over seven years after Mr. Hemminger's shoulder problems began and nearly two years after his right shoulder surgery. Neither Dr. Mooney nor Dr. Sneller causally connects Mr. Hemminger's bilateral shoulder problems to his work at Lennox. Dr. Mooney provided a rational basis for his opinions. Mr. Hemminger contends that Dr. Mooney's opinion should not be relied upon because the video job analysis that Dr. Mooney viewed is not an accurate description of his job. However, Dr. Mooney also reviewed the written job description which claimant admits is accurate. (Testimony) Dr. Kirkland does not feel that claimant's hobbies are related to his pain, but he does not provide any basis for this opinion. Overall, I find the opinion of Dr. Mooney to carry the greatest weight. Therefore, I find claimant has

failed to show by a preponderance of the evidence that his shoulder conditions arose out of and in the course of his employment with Lennox.

(Arbitration Decision, page 5)

I concur with the hearing deputy's other finding with respect to the filing of a claim pursuant to Iowa Code section 85.26. The hearing deputy wrote:

Even if claimant were able to carry his burden of proof to show that he sustained a compensable injury arising out of and in the course of his employment, he would not be able to show that he filed his petition in a timely fashion.

I find that by August 29, 2007, Mr. Hemminger was aware of the nature, seriousness, and probable compensable nature of his right shoulder injury. By this date Mr. Hemminger had notified his employer of his right shoulder symptoms, had been diagnosed with right rotator tendinitis which was consistent with a work-related condition, had been referred to a specialist for treatment and surgery had been recommended. (Ex. 1, pp. 1, 5, 12, 23-24)

I find that by January 31, 2008, Mr. Hemminger was aware of the nature, seriousness, and probable compensable nature of his left shoulder injury. By this time, claimant reported a worsening of his symptoms when he was pulling on a handle to get into a forklift, diagnosed with left AC arthropathy consistent with a work-related condition, he was instructed to avoid reaching across his body and over his head, and was referred to a specialist for treatment. (Ex. 1, pp. 32-37; Ex. 2, p. 73)

Despite this knowledge Mr. Hemminger did not file an original notice and petition with the Division of Workers' Compensation until August 2, 2012; well after the two-year statute of limitations.

Claimant contends he filed his petition in a timely fashion because he sustained a series of work-related injuries which constitute a cumulative injury. However, in this case claimant has failed to show that he sustained a series of work-related injuries or overuse injury after August 29, 2007, or January 31, 2008. The preponderance of the evidence does not show that claimant's condition in June of 2012 was the result of a new trauma or overuse. Dr. Sneller is the treating surgeon in this matter and his opinion carries substantial weight. Dr. Sneller has clearly indicated that there were no significant physiological changes to the right shoulder from August 2007 to April of 2012. (Ex. A11) Dr. Sneller saw Mr. Hemminger for bilateral shoulder symptoms and examined both shoulders in 2007 and 2012. Dr. Sneller has indicated that Mr. Hemminger presented with consistent symptoms during both of those time periods. Further, claimant testified that he did not sustain a new injury in 2012 this was all a

continuation of the 2007 and 2008 conditions. With regard to the left shoulder, the claimant has failed to show by a preponderance of the evidence that there has been any significant change in his left shoulder since January of 2008.

Claimant also attempts to overcome defendants' statute of limitations argument by contending that he did not know the seriousness of his condition in 2007 or 2008 because he did not have any lost time or surgery until June 1, 2012. However, this argument is not convincing because claimant chose to delay the right shoulder surgery until that time. Claimant admitted at hearing that the surgery he had on June 1, 2012 was the same surgery that was recommended on August 29, 2007 and again on January 31, 2008. (Ex. 1, pp. 23-24, 36, 53-54) Simply because claimant chose to delay the surgery does not negate the fact that he knew the seriousness of his condition at that time.

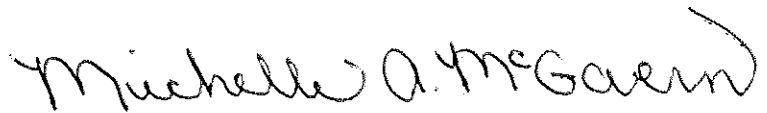
(Arb. Dec. pp. 5-6)

ORDER

THEREFORE, IT IS ORDERED: The arbitration decision of December 19, 2014, is AFFIRMED in its entirety.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 7th day of April, 2016.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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