2014-009456 - Trial

STATE BOARD OF WORKERS' COMPENSATION
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Atlanta, Georgia 30303-1299
www.sbwc.georgia.gov

AWARD

A hearing was held on July 8, 2015, to determine the employee's entitlement to workers' compensation benefits.

STATEMENT OF THE CASE

The Employee requested a hearing in this all issues case. He has continued to work for the Employer, but seeks payment of medical expenses and an award of assessed attorney's fees. The Employer/Insurer contend that there was no timely notice of an injury and that the Employee has not sustained an accidental injury in the course and scope of employment. Based on the stipulations of the parties, consideration of all admissible evidence and an assessment of the credibility of the witnesses who testified at the trial of the case, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The stipulations of the parties establish that there is no issue as to applicability of the Act, the jurisdiction of the Board, venue in Fulton for this out of state claim, coverage, employment, average weekly wage and notice.

1. History of the Claim and Contentions of the Parties

The Employee has worked as a truck driver for the Employer for roughly ten years, and is considered a good employee. He continues to work for the Employer, and at present, the Employer has provided truck driving work that does not require him to unload freight.

The Employee testified that, as a practical matter, even though his deliveries were to a customer where there are contractual restrictions to have unloading be performed by customer employees and not the delivery truck driver, as a common course of business, drivers helped unload the smaller loose items that are not shrink wrapped on pallets for forklift drivers. The Employee stated that there were frequently loose items that are not shrink wrapped on the pallets unloaded by forklift drivers. He said that these smaller loose items are generally carried in the back of the truck or tucked on the side in the rear of the truck. Although this customer has a policy that drivers are not to unload the truck, the common practice was for the delivery driver to assist in unloading these smaller, carried items, both to move the unloading process along and as a matter of good customer service before the forklift driver started.

The Employee said that on February 25, 2014, he was helping to unload ten gallon buckets of hydraulic fluid when he felt immediate pain in his right shoulder. He continued to work, initially thinking it would stop hurting.

The Employee said that on the following day he was helping unload buckets of weed killer and grass seed when he again felt a pain in his right shoulder, this time much worse than before. He testified that he reported this pain to his dispatcher who told him to keep him informed. The Employee and the dispatcher had worked together for ten years.

The Employee testified that the next day the pain was bothering him a good deal, and he again reported the injury and told his dispatcher he did not think he could continue to drive his route and still help unload at the next stop. According to the Employee, the dispatcher promised to try to work out a job swap where the Employee would take over a different route, and a relay driver would take over his route, but that hoped for solution did not occur so he did the best he could and continued to work his regular route. The Employee said that he was told by the dispatcher that he would need to complete his route and he would have to see his doctor when he got back to town. The Employee got back into town Saturday afternoon.

The Employee went to the Family Medical Center on March 3, 2014, but was told he needed to consult with his personal physician, Dr. Oshehobo. The Employee went to Dr. Oshehobo on March 3, 2014, and the doctor's medical notes from that office visit record that the Employee "sustained shoulder pain at work". The Employee followed up with Dr. Oshehobo on March 10, 2014, and Dr. Oshehobo noted that the shoulder pain was increasing the Employee's blood pressure. Dr. Oshehobo recommended that the Employee treat with an orthopedic specialist.

The Employee went to an orthopedic, but was denied treatment when the Employee described the injury as related to work. The Employee was informed that he needed adjuster approval and a claim number in order to receive medical attention.

The Employer has a written policy that injuries are to be promptly reported and that medical treatment is to be provided by an authorized panel physician. The Employee acknowledged the policy in a document signed on May 23, 2010, several years prior to the present injury claim. According to company policy, he was to report an injury to his dispatcher or the terminal manager and follow up with notice to HR. The Employee testified that initially he forgot the policy and both sides agree that the dispatcher did not inform him of the panel, although the Employer/Insurer contend this was because the dispatcher had no reason to think the Employee's shoulder pain was caused by a work injury.

The Employee testified that he went "around March 10" to report the injury to the HR department. The former HR director came to the hearing to testify for the Employee. She testified that the injury was reported to her on March 10. She said that the Employee dropped in to see HR and initially he spoke with another woman named Laverne who brought him in to see her. Once the Employee told her he had reported the injury to his dispatcher, the HR director sent for the dispatcher. The dispatcher was called into the meeting and he agreed at that meeting that the Employee had reported shoulder pain to him, but according to the dispatcher, the Employee said he hurt his shoulder while sleeping, and did not report an injury that occurred on the job. The dispatcher testified that this HR meeting was on or about April 7, 2014.

The HR director is no longer employed with the company, and she acknowledged in court that she was upset when the Employer went to a risk management model and she was let go. She testified in court that she had gotten over her upset and was testifying truthfully. Her testimony was in direct contradiction to that of the company manager and certain logs and email information provided to the insurer. The HR director testified that she denied the claim upon direct orders from the company manager although she knew it was timely and she said her false communications with the insurer were as instructed by the manager. The company manager vehemently denied giving these instructions in court.

The HR director also testified that strategies the company manager wanted her to use to defeat this claim was to dispute what was on the truck manifest and to dispute that the driver was helping unload the truck, although she said the culture of the truck company was that drivers were known and expected to help unload the loose

objects stored in the truck as good customer service. The HR director stated that the company manager also told her that this out of state customer would never come to court to dispute his testimony.

The attorney for the Employer/Insurer cross examined the HR director. The HR director had provided information to his law firm and the adjuster on this case during the time she worked for the Employer which included conducting a web site search of the customer where the delivery was made that indicated there were no ten gallon buckets of hydraulic fluid listed for sale and stating that the claim was not made within thirty days and therefore not timely. She had also emailed the insurer that the report date was on April 7, 2014.

The dispatcher testified that he remembered the date of the confrontation with the Employee in the HR department as occurring after he returned back to work from vacation, which he said meant the report occurred on or after April 7, 2014.

The Employer management witness testified that there was no manifest listing ten gallon buckets of hydraulic fluid. He stated that the HR director was responsible for investigating the claim and making determinations as to whether or not the claim should be accepted. He denied directing the HR director as to strategy in falsely handling this claim.

2. Medical Evidence

Dr. Branch has opined that "this type of shoulder injury would not come from merely sleeping on one's shoulder in the wrong position" and has opined that there is a legitimate and real shoulder injury that requires both treatment and potential surgery. Although Dr. Branch took the Employee out of work initially for a period of time, the Employee always worked because he needed the income and he said that he has always worked since he was twelve years old and work is an ingrained habit.

The Employer/Insurer sent the Employee to Dr. McCollum for an Employer/Insurer independent medical examination ("IME"). Dr. McCollum has opined that the Employee's "history is consistent with the onset of these symptoms 2-25-14….I believe these problems are indeed work related and can be treated". Dr. McCollum also offered that the Employee's "subjective complaints are indeed appropriate compared to his objective findings".

There was no medical evidence to support the defense that the Employee was injured by sleeping on his shoulder wrong.

3. Shoulder Injury

The Employee has the burden of proof in this all issues case. To be compensable under the Workers' Compensation Act, the Employee must have suffered an injury by accident arising out of and in the course of employment. O.C.G.A. §34-9-1(4). An injury arises "in the course of employment", within the meaning of the Workers' Compensation Act, when it occurs within the period of employment, at a place where the employee reasonably may be in the performance of his duties, and while he is fulfilling those duties. New Amsterdam Casualty Company v. Summrell, 30 Ga. App. 682, 118 S.E. 786 (1923).

While noting the customer's safety policy that drivers are not to enter the truck while the forklift driver removed the merchandise, I found the Employee's testimony credible that the practice was that the driver frequently helped unload the unsecured items that were placed in the truck and which were unloaded prior to the forklift driver removing the bulk of the load.

The Employer's manager testified that ten gallon containers of hydraulic fluid were not in the truck manifest or listed for sale on the customer's website when a later check was made. While the Employee has the burden of proof, it is noted that the truck manifests were not entered into evidence to support the manager's testimony particularly as the HR witness stated that the manager's strategy to defeat the claim was going to be disputing

what was on the manifest. There was evidence that the customer does list five gallon containers of hydraulic fluid for sale online which the Employer/Insurer state weigh thirty nine pounds. Nor did the Employer's manager testify about grass seed and weed killer on the manifest. The Employee testified that he really experienced more significant pain after lifting the buckets of grass seed and weed killer and his undisputed testimony was that these buckets were in his delivery truck.

The dispatcher testified that no shoulder injury reported to him, but he remembered being told the Employee's shoulder was sore during the delivery run and that the Employee's wife thought he slept on his shoulder wrong. The dispatcher testified that he did not remember to follow up with the Employee about the shoulder pain because he did not think of it later, but the dispatcher remembered the shoulder pain/slept wrong report weeks later when he was called into the discussion in the HR department to discuss whether an injury was reported to him. The dispatcher would have been responsible, according to the HR witness, for filling out the first report of injury and there were internal requirements that the report be promptly made.

In this case where testimony of the dispatcher, the HR manager and the company manager differed at times wildly and where charges of deceit and dishonesty were frequent, I found the Employee to be credible. The credibility of a witness is to be determined by the finder of fact. Harris v. State, 155 Ga. App. 530 (1980). He has worked for the current employer roughly ten years with no evidence of reprimands, and he was considered a good worker by those who knew him. He has never previously filed a workers' compensation claim.

I find that he was hurt on the job and while lifting loose items that were being delivered to the customer and that the actual practice of unloading merchandise included truck drivers helping to carry the smaller loose items stored in the truck. Consistent with the medical opinions of both Dr. Branch and Dr. McCollum, I find that the Employee sustained a shoulder injury on the job.

4. Timeliness of Report Issue

Having found that the Employee sustained an on the job injury, the next issue is whether the injury was reported timely. The Employer/Insurer contend that the injury was not timely reported. The Employee testified that he reported shoulder pain to his dispatcher right away. The dispatcher testified that the Employee reported shoulder pain but he thought he must have slept on his shoulder wrong and that he did not inquire further about the shoulder pain. These two men have worked together for ten years.

The medical notes of the Employee's personal physician, the first doctor to see the Employee after he got back from his route, indicate from the onset that the Employee described the pain and injury as occurring at work. There is no mention that the Employee might possibly have slept on his shoulder wrong in the doctor's notes. The Employee also reported the injury as occurring while working to the orthopedic specialist, and was denied medical treatment as a result because it was a workers' compensation injury. No contemporaneous medical record has any indication of a shoulder injury sustained while sleeping.

The Employee said that he was upset when he left the HR meeting where his claim was denied and went to speak with his pastor for help and then he retained an attorney. The cover letter from counsel for the Employee is dated April 7, 2014. The dispatcher testified that he remembered the HR meeting occurred after he returned from vacation and that the earliest possible HR meeting date would be April 7.

The Employer/Insurer dispute the timeliness of notice in this case. The burden is on the Employee to give such notice as will alert the Employer to the possibility of a job-related injury. Argonaut Insurance Company v. Cline, 138 Ga. App. 778 (1976). The notice of an injury does not need to be in a particular format or state that it is being given for the express purpose of filing a workers' compensation claim. Id. The test to determine if the Employee has given proper notice under O.C.G.A. §34-9-80 is whether the Employee puts the Employer on inquiry to make an investigation if it sees fit to do so. Gossage v. Dalton Fire Department, 257 Ga. 430 (1987); Schwartz v. Greenbaum, 236 Ga. 476 (1976).

I find that the Employee reported shoulder pain to the dispatcher and I find the Employee was credible when he testified that the pain was so severe that he told the dispatcher he was having trouble making deliveries. I find there was sufficient notice of an injury to oblige the Employer to investigate.

Having found there was timely notice to the dispatcher, it still seems necessary to address additionally testimony with regard to the report of an injury to the HR department as credibility issues have arisen. The testimony from the company management representative and the dispatcher was that the HR meeting was not within thirty days, and occurred roughly April 7, 2014. The former HR director testified that the meeting was within thirty days but that she was directed by the manager to raise the timeliness of this claim as a defense, and she did as she was directed. While I find that the Employee has the burden of proof, the testimony of current and former employees of this Employer was, quite frankly, disturbing. I found none of these witnesses consistently credible. The credibility of a witness is to be determined by the finder of fact. Harris v. State, 155 Ga. App. 530 (1980).

I find that the dispatcher had notice of shoulder pain immediately when the pain arose, and he did not offer medical treatment or make further inquiries. When the Employee later raised the issue in HR, the dispatcher apparently had very good recall about the conversation about the Employee having minor shoulder pain and possibly sleeping on his shoulder wrong. At the time the Employee initially sought medical treatment, he consistently explained the mechanics of the injury as a lifting injury sustained on the job even when he was treating with a private doctor and never mentioned sleeping on his shoulder wrong. His consistent reports on an injury at work were made before he retained an attorney and he has never previously made a workers' compensation claim. I found the Employee credible and find he gave timely notice to HR as well.

5. Assessed Attorney's Fees

This is a medical only claim. The Employee has continued to work. Counsel for the Employee has requested assessed attorney's fees in the amount of $6,000.00.

There is no medical evidence that the Employee hurt his shoulder by sleeping wrong. In fact, there is absolutely not one shred of credible evidence supporting this contention. There was also undisputed evidence that the Employee had grass seed and weed killer on his truck and that he helped unload loose items. While there was testimony, unsupported by actual copies of the manifest, that the manifest did not include ten gallon buckets of hydraulic fluid, the Employee's undisputed evidence was that he hurt himself the second day lifting buckets of grass seed and weed killer. I also find that the drivers helped unload loose items during delivery. I find the defense of the case based upon the assertion that the injury was not sustained in the course and scope of employment to be unreasonable, particularly the contention that this significant shoulder injury was sustained while sleeping.

With regard to the issue of the timeliness of the report of the injury, I find that the Employee did timely and adequately report a shoulder injury to his dispatcher. The Employee has the burden of proof as to the timeliness of the report.

There was contrary evidence between the former HR employee who said that a deliberate strategy was adopted by management to deny this claim based upon timeliness of the report, although it was timely reported directly conflicts with the testimony of the dispatcher and management witness who said they became aware of the claim only around April 7 or later.

The Insurer claims it relied upon the report date information supplied by the HR employee who initially told them the claim was not timely reported but later retracted that after she was let go as well as the dispatcher. Some of the claims made by the former HR witness as to ongoing efforts to stifle a number of legitimate workers' compensation injuries through deceit and intimidation was not persuasive although I did not find the

witnesses for the Employer/Insurer entirely persuasive either. I found it less than credible that the dispatcher would remember many weeks later that he had been told the Employee had a sore shoulder because he slept on it wrong. I found the management representative credible that the company supports injured workers with support, for example, holiday gift baskets.

While it must be emphasized that the Employee had the burden of proof on an all issues case, it seemed odd that the management witness did not bring the truck manifest he said did not list ten gallon buckets of hydraulic fluid and he did not deny that buckets of seed and weed killer were in the truck. Nor did the management witness offer any testimony about whether there were five gallon buckets of hydraulic fluid, which the Employer/Insurer acknowledge weigh roughly thirty nine pounds along with buckets of grass seed and weed killer on the manifest.

The Employee's testimony was he was initially hurt himself lifting hydraulic fluid, but the pain became much greater later when he lifted buckets of grass seed and weed killer. I find that the Employee initially hurt himself lifting hydraulic fluid but the pain became almost unbearable after he lifted buckets of grass seed and weed killer. There was no testimony from the management witness denying grass seed and weed killer was on the manifest.

Under O.C.G.A. §34-9-108(b)(1), an award of assessed attorney's fees may be granted if a proceeding has been prosecuted or defended in whole or in part without reasonable grounds. Whether reasonable grounds exist for the imposition of assessed attorney's fees is a question of fact to be decided by the Board. Printpack, Inc. v. Crocker, 260 Ga. App. 67, 579 S.E. 2d 225 (2003); Mount Vernon Mills, Inc. v. Gunn, 197 Ga. App. 109, 397 S.E. 2d 603 (1990). I find the defense of the case that the Employee was not hurt in the course and scope of his employment was unreasonable, noting that there is no credible evidence that the Employee hurt himself by sleeping wrong on his shoulder and a good deal of credible evidence that the Employee immediately reported to medical providers and sufficient notice to his dispatcher that he was hurt at work lifting cargo, long before he filed a compensation claim.

This is a highly unusual case, given the assertions of systematic suppression of workers' compensation claims by management, the claim that false evidence was presented to the Board and to the insurer over the course of years, and allegations of systematic deception in compensation claims. In analyzing this case alone, the simple truth is that a credible Employee was hurt on the job and he timely reported the injury sufficiently to put the Employer on notice of a claim but the claim was denied.

The Employee has continued to work, and the Employer has currently placed him at a position where he has been able to continue to work so he does not presently request income benefits. The Employee wants medical treatment and, under the Act, he is entitled to medical treatment. I designate Dr. Branch as the Authorized Treating Physician ("ATP") and direct that past medical bills for treatment shall be paid in accordance with the Act.

This Employee continues to work for the Employer, and he said that he likes his job. While I do find the defense of the case that the Employee did not hurt his shoulder in the course and scope of employment was unreasonable and award assessed attorney's fees as a result, it is recognized that these parties are involved in an ongoing working relationship. The management witness testified as to his company's commitment to injured workers and it is hoped that the ongoing working relationship with this worker will reflect that commitment. I find, in my discretion, that an award of assessed attorney's fees should be granted for an unreasonable defense, noting in particular that there is no support for the argument that the Employee was hurt while sleeping. I further find, in my discretion, that the requested $6,000.00 assessed fee is reasonable.

AWARD

The Employee's request for medical treatment with Dr. Branch is granted. The Employee's request for an award of assessed attorney's fees in the amount of $6,000.00 is granted.

IT IS SO ORDERED, this the 10th day of August, 2015.

STATE BOARD OF WORKERS' COMPENSATION

This order is electronically signed and approved.
Meg Hartin
ADMINISTRATIVE LAW JUDGE