FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CHARLES EDWARD TIGHE, II,

Claimant-Appellant,

vs.

ROBERT C. LANDESS, IOWA INDUSTRIAL COMMISSIONER,

Respondent,

MORTON BUILDINGS and HIGHLANDER INN & SUPPER CLUB,

Employers,

BITUMINOUS CASUALTY COMPANY and FIREMAN'S FUND AMERICAN INSURANCE COMPANIES,

Insurance Carriers,

Defendants-Appellees.

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2-61202

Appeal from the Polk County District Court - James P. Denato, Judge.

Plaintiff appeals from district court affirmance of Industrial Commissioner's ruling which denied his claim for workers' compensation benefits. Affirmed.

John A. Jarvis, of Chariton, for appellant.

William Scherle and Curtis L. Ritland, of Hansen, Wheatcraft & McClintock, of Des Moines, for defendants Morton Buildings and Bituminous Casualty Company.

W. C. Hoffmann, of Jones, Hoffmann & Davison, of Des Moines, for defendants Highlander Inn and Fireman's Fund.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff, Charles Edward Tighe, II, appeals from judgment of the district court affirming the ruling of the Industrial Commissioner which denied his application for workers' compensation benefits. We view plaintiff's appellate brief as presenting for consideration alleged misapplication of the rules of law regarding (1) the burden of proof; (2) the necessity of expert medical testimony on the issue of causation; and (3) the alleged misinterpretation of a departmental rule of the Industrial Commissioner relating to production and use in evidence of narrative medical reports. We affirm the trial court on all issues.

In the spring of 1974 plaintiff was hired by defendant Morton Buildings, Inc., as a laborer on a crew erecting pole barns. Plaintiff testified that on March 14, 1974, he felt something "pop" in his back while lifting a pole. He continued to work for five days then visited his family physician, Dr. Sage, on March 20. Plaintiff told Dr. Sage when and how he had injured his back and described the pain. Dr. Sage examined the plaintiff, ordered an X-ray, and after studying it, noted "evidence of sacralization of the 5th lumbar vertebra indicative of congenital unstable low back." Dr. Sage prescribed rest. After a five day rest plaintiff returned to work. In April, 1974, plaintiff left the job with Morton Buildings and moved to Iowa City to attend the University of Iowa. There, in July, 1974, he secured employment with Perkins Cake and Steak. One of his duties on that job was to help unload a weekly supply truck, including 100 pound bags of flour. In January of 1975, plaintiff began working for the Highlander Inn as a cook. Heavy lifting was occasionally required in that job as well. Plaintiff testified that after a few weeks on the Highlander job he began feeling increased back pain. He was examined by Dr. Bonfiglio on February 11, 1975. Dr. Bonfiglio advised him to avoid heavy lifting, prescribed isometric exercise and Bufferin, and gave him a back brace. On March 25, 1975, plaintiff entered University Hospitals for rest and tests. Three weeks after his discharge from the hospital he returned to work. He quit the Highlander job on May 11, 1975. In August of 1975 plaintiff filed his arbitration application naming both Morton Buildings and the Highlander Inn as defendants.

I. Initially we consider the motion of appellees Highlander Inn and Fireman's Fund American Insurance Co., (Highlander's insurance carrier), to dismiss the appeal as to them. The motion was ordered submitted with the present appeal by supreme court order of January 19, 1978.

We have studied the appellate briefs of the plaintiff and defendants Morton Buildings and Bituminous Casualty. The briefs present arguments and cite authority for claims concerning only those three parties. Issues which might have involved the other defendants, Highlander and Fireman's Fund, are therefore deemed waived. Rule 14(a)(3), Rules of Appellate Procedure. Zeman v. Canton State Bank, 211 N.W.2d 346 (1973). In addition, it has been conceded that the third party claim against Highlander and Fireman's Fund before the Industrial Commissioner was never perfected by service or other notice. Nor did the Industrial Commissioner take any action with respect to said claim. The appeal as to the Highlander Inn and Fireman's Fund is dismissed.

II. To be entitled to workers' compensation benefits, a plaintiff must prove by a preponderance of evidence that injury arose both out of and in the course of employment. Buehner v. Hauptly, 161 N.W.2d 170 (Iowa 1968); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (Iowa 1967). The "in the course of employment" requirement refers to proof of the time, place and circumstances of the injury. Buehner v. Hauptly, supra. The "arose out of employment" standard requires the plaintiff to show that the condition complained of is causally connected to the injury received. Poole v. Hallett Construction Co., 261 Iowa 481, 154 N.W.2d 716 (Iowa 1967). The Industrial Commissioner found, and the district court agreed, that plaintiff had not made the necessary showing that the condition complained of was caused by an injury received while in the employment of Morton Buildings.

Plaintiff argues the Commissioner misapplied the rule of law regarding burden of proof. It is plaintiff's contention that once a claimant has presented a prima facie case for entitlement, the burden of proof shifts to the defendant to affirmatively establish, by a preponderance of the evidence, an independent cause of the condition complained of. This claim is without merit. The ultimate burden of persuasion does not shift; if the plaintiff generates a factual issue and defendant presents no evidence, the defendant simply risks a finding that plaintiff has met his burden of persuasion. McDowell v. Town of Clarksville, 241 N.W.2d 904, 908 (Iowa 1976). Nor does the fact that defendants formally alleged an independent cause obviate the necessity of plaintiff proving his own case with respect to the matter of causation.

III. Plaintiff next complains that the Commissioner erred by denying his claim solely for the reason that plaintiff presented no expert medical testimony on the issue of causation. The reviewing district court concluded that the Commissioner had placed no such burden on the plaintiff. According to that court, the Commissioner's decision merely considered the absence of such expert testimony in finding, under all the circumstances, that causation had not been proven by a preponderance of the evidence. After reading the ruling of the Industrial Commissioner, we cannot be certain whether he believed that medical testimony of causation is in all instances essential to recovery by workers' compensation claimants. Such uncertainty is not a problem, however, in view of the record before us.

Certainly it is recognized that there are some cases where the determination of whether a condition complained of has a direct causal connection with the employment is "essentially within the domain of expert medical testimony." Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 133 (1967); Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). In such cases, both medical testimony of a possible causal connection and lay testimony supporting the claimant's prior non-affliction are necessary to create a factual question on the issue of causation. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 910, 76 N.W.2d 756, 761 (1956). Medical testimony of a possible causal connection, without the additional lay testimony, is insufficient to create a factual question. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). Even if we assume that there are instances where expert medical testimony is not required because the evidence of causation is of such a nature as to be within the knowledge of laymen,[1] this is not such a case.

Dr. Bonfiglio, who examined plaintiff in February of 1975, was asked by plaintiff's attorney whether he could testify that a causal connection was possible. Bonfiglio responded by letter that he could not and suggested the names of other physicians who might. No evidence from these physicians was offered at the hearing before the Commissioner on the issue of whether plaintiff's condition at that time related back to the March 14, 1974 injury. Plaintiff's mother and father testified that he had no back

[1]See cases compiled in 3 Larson's Workmen's Compensation Law, §§ 79.51 - 79.54.

problem prior to March 14, 1974, and plaintiff testified as to the lifting incident on that date. But we conclude that such evidence is insufficient to establish that the condition for which plaintiff claimed compensation benefits was caused by the occurrence of March 14, 1974. Therefore, regardless of the basis for his conclusion, we find no error in the Industrial Commissioner's ruling that plaintiff has failed to establish causation.

IV. Plaintiff's final claim is that the Commissioner erred in interpreting the provisions of §§ 500 - 4.17, 4.18, I.A.C. relating to production and evidentiary use of narrative medical reports. Plaintiff contends that the letter from Dr. Bonfiglio responding to a specific inquiry made by plaintiff's attorney was not properly received in evidence under the foregoing rules. We agree. Without reaching the issue of privilege, it is apparent that the letter in question can in no way be characterized as a narrative report. Therefore the rules in question are not applicable. Nor has our attention been directed to any other theory upon which the letter could be received.

But admission of this letter was in no way prejudicial to plaintiff. Its substance has previously been referred to in this opinion. It does not serve to affirmatively negate the causal connection between plaintiff's condition and his employment with Morton Buildings. It simply states that Dr. Bonfiglio is in no position to confirm such connection. As considered in the prior division of this opinion, the claim fails because of the insufficiency of plaintiff's own evidence, and the letter in question neither adds to nor detracts from such determination.

We have considered all arguments advanced for reversal and finding no error, we affirm.

AFFIRMED.