SCHELDRUP BLADES

Iowa Workers' Compensation Newsletter

VOL XL, SEPTEMBER 7, 2017

Does the Payment of Weekly Benefits Shield the Insurer from a Bad-Faith Claim?

Is the Insurer Acting in Bad Faith by Contesting a Petition for Partial Commutation?

Thornton v. American Interstate Insurance Company
No. 15-1032, Iowa Filed May 19, 2017

The claimant suffered spinal injuries in a June 25, 2009 truck accident in which the truck rolled over. The claims adjuster for the workers' compensation insurer and the claimant's treating physician concluded he was permanently and totally disabled. The insurer continued to pay weekly benefits but nevertheless denied permanent total disability and decided to go to hearing. A company claims adjuster stated the company had no reasonable defense but had a "right to go to hearing." The company never developed any substantial medical evidence the claimant was not permanently and totally disabled.

The hearing deputy awarded PTD and the claimant filed a petition for a partial commutation. He also requested a replacement wheelchair in an alternate care petition. The claimant filed a petition in district court alleging the insurer acted in bad faith in denying PTD, contesting the commutation and delaying a replacement wheelchair. The district court awarded partial summary judgement on the insurer's contesting of PTD after March 11, 2013 and contesting the commutation. The jury found bad faith at even earlier dates and awarded $25 million in punitive and $284,000 in compensatory damages.

The supreme court affirmed the award of bad faith. The insurer's claims adjuster and outside counsel both had agreed the claimant was totally disabled by March 11, 2013.

The court refused to lay down a blanket rule, but held the insurer did not act in bad faith by contesting the commutation on the facts in this case. Numerous factors in this case raised concerns about the claimant's ability to handle funds.

The district court erred in finding the insurer acted in bad faith in offering various settlement options that would have closed the file. The supreme court found the district court had jurisdiction to consider whether the delay in replacing the claimant's wheelchair was also in bad faith. The court ordered a new trial on the remaining bad faith claims, actual damages and punitive damages.

Attorneys for the Appellee: Tiernan T. Siems, Karen M. Keeler, MaKenna J. Dopheide

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Did the Claimant Prove His Employer Forced Him to Retire?

Zesch v. Fisher Controls
File No. 5039320, Review-Reopening Decision Filed May 16, 2017

The claimant worked as a journeyman electrician for the defendant. On September 10, 2010, he suffered a massive rotator cuff injury on the right side while trying to catch a falling piece of equipment. The treating doctor performed a rotator cuff repair on November 23, 2010. The claimant was restricted from overhead work and told he should not lift more than three pounds with his right arm. The deputy found the claimant had a thirty percent industrial disability.

On July 16, 2013 the claimant injured his left shoulder and developed low back and knee pain. The deputy awarded forty percent industrial disability for this injury. The claimant then filed a petition for review-reopening for his right shoulder injury.

Despite the overhead work restrictions, the claimant still had to do some overhead work. He alleged his supervisor and manager tried to force him into retirement since they did not think he could perform his job with his current restrictions. He retired on September 1, 2015.

The deputy considered whether the claimant suffered an economic change in condition due to a "constructive discharge" at work. The evidence showed that although the company initially excluded the claimant from electrical training, he later completed that training. He dropped a grievance filed with the union in connection with that issue. The deputy gave little weight to testimony that the claimant's supervisor did not like him and wanted him to retire. The co-worker who allegedly provided that information did not testify.

The claimant even went so far as to obtain a doctor's note stating that he could continue with his duties as an electrician. The case contained no medical evidence that

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Petitioners' Attorneys with the Most Cases Scheduled for Hearing

Rank/Name/Number of Cases Scheduled

1. James Hoffman **212**
2. Nicholas Pothitakis **87**
3. Jenna Green **52**
4. Randall Schueller **50**
5. Nicholas Shaull **42**
6. Eric Loney **41**
7. Dustin Mueller **39**
8. Al Sturgeon **37**

supported the claimant's assertion he suffered from stress and loss of sleep due to his treatment on the job. The deputy ruled that the claimant take nothing.

Attorney for the Defendants: Scheldrup Blades Attorney Kent M. Smith

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Did the Claimant Prove He Injured His Left Elbow When He Fell at Work?

Neal v. Menard, Inc.
File No. 5049640, Arbitration Decision Filed May 25, 2017

The claimant tripped over a piece of wood on the ground on December 10, 2013. He alleged an injury to his left wrist initially but changed his story to add an injury to his left elbow.

The deputy denied work-related causation for the alleged elbow injury. She noted that at a medical visit with the treating orthopedist on August 27, 2014 the claimant stated he did not recall injuring his left elbow. He only remembered landing on his left outstretched hand. The claimant did not initially identify his elbow as hitting a wood pile when he fell. The claimant had a history of left wrist, arm and elbow injuries prior to the fall.

The claimant's treating orthopedist at first stated that the work injury "may" have played a role in the elbow condition. She later changed her opinion to say the injury "likely" played a role. This change in opinion was not explained, however. The second doctor who opined that the fall caused the elbow condition did not receive all prior medical records. This doctor's opinion was therefore based on an incomplete history.

Attorney for the Defendants: Scheldrup Blades Attorney Chuck A. Blades

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Must the Defendant Purchase a New Hot Tub for the Claimant's Therapy?

Sladek v. K-Mart Corporation
File No 5000113, Alternate Medical Care Decision Filed April 21, 2017

The claimant suffered an injury to her back in August of 1982. She bought a hot tub to use for therapy. The employer then bought two more hot tubs when the existing tubs wore out. On March 16, 2017, the treating physician for the claimant prescribed a new whirlpool since the existing one was fifteen years old. The price tag was $11,785.28.

The defendant argued that the claimant provided no documentation of a need for this special equipment. The claimant should be able to participate in a home exercise program without the whirlpool.

9. Ryan Beattie **35**
9. Steve Hamilton **35**
9. Dennis McElwain **35**
10. James Byrne **34**

Petitioners' Attorneys Who Go to Hearing the Most Often

(The number of hearings attended during the previous 12 months divided by the number of cases currently scheduled for hearing)

1. Paul McAndrew **90.9%**
2. Nathan Willems **83.3%**
3. Nathaniel Boulton **56.3%**
4. Steven Jayne **55.6%**
5. Nicholas Platt **45.5%**
6. James Byrne **44.1%**
7. Jean Mauss **37.9%**
8. Martin Ozga **36.8%**
9. William Bribriesco **35.3%**
10. Emily Anderson **28.6%**

The deputy noted the claimant testified she used the whirlpool twice a day. She did not drive and the defendant made no arrangements to take her to aqua therapy in a pool. The claimant stated the hot water and water jets reduced her back spasms and made her more flexible. She did her exercises in the whirlpool. While using the whirlpool, the claimant needed fewer medications. She could not do her exercises on the hard ground. No doctor had testified that a bathtub would be adequate for therapy, as the defendant suggested.

The deputy found the defendant was not providing reasonable care and ordered the installation of a new hot tub within sixty days.

Attorney for the Claimant: Thomas J. Currie

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Is the Claimant Entitled to Payment for a Service Dog?

Webb II v. Olivet Baptist Church

File No 5053248, Alternate Medical Care Decision Filed June 12, 2017

The claimant suffered a traumatic brain injury at work on April 7, 2013. He received a service dog for free through the Foundation for Service Dog Support, Inc. He requested payment for the dog's expenses, which the defendants refused.

The defendants argued the dog's expenses were not covered by Iowa Code section 85.27. The deputy found, however, that the dog could be considered a part of physical therapy, a medical supply or an appliance under 85.27(1). The service dog would help the claimant prevent falls, assist in crowds, ease anxiety, find help when needed and retrieve the claimant's cell phone.

The defendants argued that the costs of the dog were excessive. The deputy disagreed, noting that the dog, which usually would cost $10,000, was provided for free. Although this pure-bred dog would have higher medical costs, the defendants had not offered a cheaper replacement. The cost of the dog would be cheaper than hiring a staff person, and the dog would be available twenty-four hours a day. The deputy ordered the defendants to pay all costs for the dog.

Attorney for the Claimant: Nicholas G. Pothitakis

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Can a Ceramic Tile Floor in Itself Be a Work-Related Hazard?

Bluml v. Dee Jays Inc.

File No 5047125, Appeal Decision Filed July 20, 2017

The deputy found the claimant experienced an idiopathic fall caused by his non-work-related seizure disorder. The claimant's alcoholism aggravated his seizure disorder. The work environment did not contribute to this fall because the claimant was on a level floor and he struck no work-related hazards as he fell to the floor.

On appeal, the claimant asked the commissioner to recognize that his fall onto a hard-ceramic tile floor represented a work-related hazard in itself. The hardness of the floor clearly made the claimant's injuries more serious than if he had fallen onto a softer surface.

The claimant argued that Iowa should adopt the rule followed by a minority of jurisdictions, which holds that idiopathic falls on a level floor are compensable when the hardness of the floor increases the severity of the injury.

The commissioner declined to adopt the minority rule in Iowa. The type of flooring in this case was found throughout work and non-work structures. Therefore, the work environment in this

case did not contribute any special extra hazard beyond that found outside work. The claimant failed to carry his burden of proof that he sustained an injury which arose out of and in the course of his employment.

Attorney for the Claimant: Douglas R. Novotny

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Did the Claimant Contract Legionnaire's Disease at His Workplace?

McDonald v. EZ Payroll & Staffing Solutions, LLC
File Nos. 5043916, 5048361, Appeal Decision Filed July 27, 2017

On August 20, 2012 the claimant began working at a plastics manufacturing plant through a temporary agency. His job involved cleaning plastic molds using a water spray system. By September 3, 2012 the claimant required hospitalization for a fever that was diagnosed as Legionnaire's disease.

Several medical experts testified that the claimant's Legionnaire's disease came from his exposure to water spray at the plant. These opinions emphasized that, given the incubation period, the work exposure was the likely source. The experts pointed to the fact that this claimant used the water spray to clean the molds, while other workers used a dry method. The hearing deputy awarded permanent total disability and $192,916 in medical expenses.

On appeal, the commissioner reversed the award of permanent total disability and awarded no benefits. One crucial fact the commissioner emphasized was that the two experts who found work-related causation did not address or seem to have known information from an affidavit by the company Environmental Health and Safety Manager. This affidavit listed numerous measures the company had taken to avoid contamination of plant water supplies.

By contrast, the defendants' medical reviewer did discuss the affidavit. He emphasized that other plant employees also performed water cleaning of molds. No other employees, however, developed Legionnaire's disease while working at the plant. The exposure could have come from numerous other non-work sources.

Attorneys for the Defendants: Scheldrup Blades Attorneys Chuck A. Blades & Jason P. Wiltfang

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Did the Claimant Prove that Dropping a Can of Paint on Her Foot Aggravated Her Pre-Existing Condition?

Clemons v. Menards, Inc.
File No. 5054641, Arbitration Decision Filed July 24, 2017

The claimant started work with the defendant on April 17 of 2008. She attributed problems with a bunion on her left foot to walking on the job. On March 27, 2013, the claimant had the treating doctor remove the bunion.

From April through September 2013 the claimant reported various additional injuries to her left foot, primarily from workers stepping on her left toe. She saw the doctor on September 30, 2013 to complain of foot discomfort and neuropathy. The doctor prescribed gabapentin and Vicodin.

On October 30, 2013, the claimant sought treatment when she accidentally dropped a five pound can of paint on her left foot. She filed a claim for benefits, alleging she developed

complex regional pain syndrome and other consequences from the October injury.

The deputy found the claimant failed to prove she suffered any permanent injury. Several physicians found the claimant developed complex regional pain syndrome, chronic pain syndrome and an aggravation injury. Nevertheless, those doctors failed to discuss how dropping the paint can in October of 2013 aggravated the existing injury that the claimant had already reported on September 30.

Attorney for the Defendants: Scheldrup Blades Attorney Chuck A. Blades

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Did the Roofing Business Hire the Claimant as an Employee?

Itzep-Chavez v. Schrunk Roofing, LLC

File No. 5052850, Arbitration Decision Filed August 25, 2017

On April 29, 2015 the claimant fell while doing roofing work at the defendant's project. The roofing company owner argued the claimant was not his employee, but rather the employee of a subcontractor at the project. The claimant testified he fell from the top of the roof to a lower section, injuring his hand.

The business owner testified he had no employees on projects, but contracted with a separate individual named "Luis" to provide additional help when needed. Luis did not have workers' compensation insurance.

The hearing deputy found the claimant was the employee of the roofing company working on the project. The evidence showed that the roofing company provided all materials. The claimant did not provide any tools and was paid by the hour. The claimant and Luis did not have the authority to hire assistants. The roofing company set the work schedule.

The case contained no evidence of any documents, such as a 1099 form or contract, which would have indicated that Luis was a subcontractor for the roofing company. The deputy found the defendants' story that the claimant fell in an alley behind his house while drinking not credible. The deputy noted the owner of the roofing company had listed his eleven-year old daughter as the employer on the Workers' Compensation Insurance Coverage Verification document. That evidence hurt his credibility.

Attorney for the Claimant: Judy L. Freking

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Did the Claimant Prove Permanent Impairment from His Fall?

Grouette, Sr. v. Gilbane Building Company

File No. 5044473, Appeal Decision Filed August 14, 2017

In June of 2012 the defendant hired the claimant as a forklift driver and oiler. This claimant had a pre-existing history of left knee and low back pain, tension headaches, knots in the neck, difficulty sleeping and anxiety. The claimant alleged that on August 31, 2012 he tripped at work, rolling over after striking the ground.

He claimed injuries to his neck, back, both shoulders, both upper extremities, one hip and both hands. He later alleged carpal tunnel syndrome (CTS). The hearing deputy found the claimant permanently and totally disabled. The arbitration decision gave greater weight to the treating orthopedist and a neurosurgeon who performed the IME for the claimant. Those doctors believed the fall aggravated the pre-existing cervical and shoulder conditions.

On appeal, the commissioner reversed the arbitration decision completely, finding the claimant had no permanent impairment. The commissioner noted that none of three IME physicians

causally related the claimant's shoulder impairment or carpal tunnel syndrome to the fall at work. No doctor provided a permanent impairment rating for CTS or shoulder impairment.

In the same way, no treating doctor diagnosed the claimant with a sacroiliac joint condition or provided any treatment for that problem. The claimant's IME doctor did not explain how he could find cervical radiculopathy when medical tests ruled that condition out. The defendants' IME physician provided a more persuasive opinion overall. He thought the fall resulted in a strain of the cervical spine that should have resolved long ago. Any current complaints related more to an ongoing degenerative condition or medicolegal issues.

Attorney for the Defendants: Scheldrup Blades Attorney Jason P. Wiltfang

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Deputy Scorecard
2017
Prior years **2016**
2006 2007 2008 2009 2010 2011 2012 2013 2014 **2015**

Commissioner Scorecard
2017
Prior years **2016**
2006 2007 2008 2009 2010 2011 2012 2013 2014 **2015**

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