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IN THE
COURT OF APPEALS OF INDIANA

ELIZABETH SALDIVAR-CRUZ,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 93A02-0909-EX-839
	)	
GUARDIAN INDUSTRIES CORP.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM WORKER'S COMPENSATION BOARD OF INDIANA
The Honorable Linda Peterson Hamilton, Chair
Cause No. C-186160

July 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Elizabeth Saldivar-Cruz ("Saldivar") filed an application for adjustment of claim with the Worker's Compensation Board of Indiana (the "Board") against her employer, Guardian Industries Corp. ("Employer"). On appeal, she raises the following restated issue: whether the Board erred when it denied her application for adjustment of claim.

We affirm.

FACTS AND PROCEDURAL HISTORY

In June 2006, Saldivar worked for Employer at its plant in Ligonier, Indiana. Her duties included inspecting, molding, and packing windshields for GMC trucks. Each windshield weighed between thirty-six and forty-two pounds. On June 11, 2006, Saldivar was working with another employee, Juan Carrizales ("Carrizales"), whose duties that day included inspecting each windshield on a turntable and then spinning the turntable toward Saldivar so that she could pick the windshield up off of the turntable, turn around with the windshield in hand, and place it on a rack to be packed.

Between 7:30 and 8:00 p.m. on the evening in question, Saldivar was taking a windshield off the turntable when Carrizales, unaware that Saldivar was still picking up the windshield, forcefully spun the turntable away from her causing the windshield to break against her. About a half-hour later, Saldivar reported the incident to the second shift supervisor and filled out an accident report. Three days later, Saldivar's supervisor informed her that the accident report had been lost, so Saldivar completed a second, but identical, report. *Appellant's Br*. at 3. Included in the report, as to the "Type of Injury/Parts of Body Affected," Saldivar indicated an injury to her left shoulder. *Appellant's App.* at 23.

On July 11, 2007, Saldivar filed an application for adjustment of claim, in which she requested a hearing before a member of the Board in connection with her worker's compensation claim for the June 11, 2006 incident. Prior to a hearing by the Single Hearing Member, the parties submitted their stipulations and respective contentions. *Ex. Vol.* at 1-3. Following the hearing, the Single Hearing Member denied Saldivar's claim, finding and concluding as follows:

STIPULATIONS OF THE PARTIES

1. Plaintiff was employed by Defendant on June 11, 2006 at an average weekly wage of [$]654.03.

2. Plaintiff alleges that she sustained an accidental injury as the result of an incident on June 11, 2006 when a coworker turned a turntable containing a windshield which struck Plaintiff while she was packing another windshield.

3. Plaintiff sought treatment with Dr. Ross, D.C. on or about July 9, 2006.

4. Plaintiff then sought care from Fort Wayne Orthopaedics on October 23, 2006 where she gave the doctor a history of left neck and shoulder pain since June 11, 2006 related to an injury at the workplace.

5. An MRI was ordered which showed a disc herniation at C5-6 and a cervical epidural steroid injection was then performed.

6. Plaintiff was referred to Dr. Shugart by Dr. Lutz. Dr. Shugart saw Plaintiff on February 7, 2007 and recommended a cervical fusion.

7. Plaintiff underwent an anterior cervical disectomy and fusion at L4-5 [sic] and C5-6 which was performed by Dr. Shugart.

8. Dr. Shugart has provided permanent restrictions and assessed an 18% permanent partial impairment rating to the whole body.

ADDITIONAL FINDINGS AND CONCLUSIONS

1. On June 14, 2006 an incident report was prepared.

2. According to Norman D. Ross, D.C. Plaintiff was seen on July 9, 2006 complaining of lower back, hip, left leg, neck and left shoulder pain.

3. On July 17, 2006 Plaintiff bent over and developed severe pain, mostly in her low back. According to her personal physician, Kim Waterfall, M.D., Plaintiff could not move or do much without help. Dr. Waterfall issued an "off work" slip.

4. On July 24, 2006 Plaintiff saw Dr. Waterfall for symptoms in the sacroiliac region. Dr. Waterfall also noted "Also she has a lot of trouble with her shoulder but that is not new. She does quite a bit of heavy lifting at work and obviously there is no way that she can do that now."

5. On July 31, 2006 Dr. Waterfall noted that Plaintiff's back pain had improved and that she should stay off work until August 7, 2006.

6. On August 7, 2006 Dr. Waterfall noted that Plaintiff was still feeling some pinching in her low back, but that her condition had improved and that she could return to work as of August 14, 2006.

7. Plaintiff was seen at Fort Wayne Orthopaedics on October 23, 2006 for neck and left shoulder complaints. Plaintiff gave a history of left sided neck pain, left clavicle pain, pain down her spine and occasional numbness and tingling in her left hand. The notes indicate that Plaintiff had been seen by occupational health over the past two months. Plaintiff was given work restrictions.

8. On October 23, 2006 John Lutz M.D. reported that he suspected that Plaintiff's symptoms were coming from her cervical spine.

9. On November 6, 2006 Dr. Lutz reported that Plaintiff's symptoms had not improved with physical therapy. Dr. Lutz believed her symptoms were related to cervical spondylosis and recommended an MRI.

10. The MRI revealed a disc herniation at C5-6 compressing the nerve. Dr. Lutz recommended an epidural steroid injection.

11. On December 8, 2006 Plaintiff underwent an epidural steroid injection. Plaintiff experienced temporary relief of her symptoms.

12. On December 28, 2006 Plaintiff underwent a second epidural steroid injection. She reported no relief of her symptoms. Dr. Lutz then referred Plaintiff to Robert M. Shugart, M.D.

13. On February 7, 2007 Plaintiff saw Dr. Shugart, who recommended a cervical decompression and fusion at C5-6.

14. Dr. Shugart noted he was checking with Defendant's insurance carrier regarding the prognosis and authorization to proceed.

15. Dr. Shugart's note dated May 16, 2007 indicated that he saw Plaintiff and continued to recommend surgery, but noted that "With information from worker's compensation, at this point they are not covering it. They feel it is not related to her work." Plaintiff was kept on light duty work restrictions.

16. Plaintiff underwent another MRI, which demonstrated a **new** cervical dis[c] herniation to the left at C4-5.

17. On June 6, 2007, based on the new MRI findings, Dr. Shugart recommended a cervical fusion at C5-6, as originally planned, as well as C4-5.

18. On June 11, 2007 Plaintiff underwent the two-level fusion. Plaintiff continued to report symptoms after undergoing the surgical procedure.

19. On December 15, 2007 Plaintiff obtained a PPI rating from Dr. Shugart who reported that Plaintiff's condition would warrant a permanent impairment rating of 18% based on the disc herniations and surgery performed at two levels of Plaintiff's cervical spine.

20. On January 26, 2008 Dr. Shugart reported that he did not believe Plaintiff's cervical spine conditions were related to her employment.

AWARD

1. Defendant is responsible under the Indiana Worker's Compensation Act for any and all medical treatment and evaluation that it authorized

pursuant to the Act. Defendant is not responsible for other medical benefits or compensation under the Act.

2. The expert evidence does not establish a medical probability that Plaintiff's dis[c] herniation at C5-6 was related to the work incident of June 11, 2006.

3. It is found that Plaintiff's C4-5 herniation could not have been related to the work incident of June 11, 2006, as it developed long after the work incident.

Appellant's App. at 7-9 (emphasis added).

Saldivar requested and submitted a brief for Full Board Review. The Full Board issued an order adopting and affirming the "Single Hearing Member's Findings and Conclusions." *Appellant's App.* at 5. Saldivar now appeals from that administrative agency decision. Additional facts will be added as necessary.

DISCUSSION AND DECISION

The Indiana Worker's Compensation Act ("the Act") authorizes the payment of compensation to employees for personal injury or death by accident (1) arising out of and (2) in the course of employment. Ind. Code § 22-3-2-2(a). Saldivar contends that the Board erred in finding that her injury did not satisfy these requirements.

The Board, as the trier of fact, has a duty to issue findings of fact that reveal its analysis of the evidence and that are specific enough to permit intelligent review of its decision. *Wright Tree Serv. v. Hernandez*, 907 N.E.2d 183, 186 (Ind. Ct. App. 2009), *trans. denied*; *Triplett v. USX Corp.*, 893 N.E.2d 1107, 1116 (Ind. Ct. App. 2008), *trans. denied*. The Board is not, however, obligated to make findings demonstrating that a claimant is not entitled to benefits; rather, "the Board need only determine that the claimant has failed to

prove entitlement to benefits." *Perkins v. Jayco*, 905 N.E.2d 1085, 1088 (Ind. Ct. App. 2009); *Triplett*, 893 N.E.2d at 1116. Because a claimant bears the burden of proving the right to compensation, the unsuccessful claimant who seeks to challenge the denial of his or her application appeals from a negative judgment. *Triplett*, 893 N.E.2d at 1116.

When reviewing a negative judgment, we will not disturb the Board's findings of fact unless we conclude that the evidence is undisputed and leads inescapably to a contrary result, considering only the evidence that tends to support the Board's determination together with any uncontradicted adverse evidence. *Id*.; *Cavazos v. Midwest Gen. Metals Corp.*, 783 N.E.2d 1233, 1239 (Ind. Ct. App. 2003). We examine the record only to determine whether there is substantial evidence and reasonable inferences that can be drawn therefrom to support the Board's findings and conclusion. *Christopher R. Brown, D.D.S., Inc. v. Decatur County Mem'l Hosp.*, 892 N.E.2d 642, 646 (Ind. 2008). As to the Board's interpretation of the law, "an appellate court employs a deferential standard of review to the interpretation of a statute by an administrative agency charged with its enforcement in light of its expertise in the given area." *Id*. (citing *Natural Res. Comm'n v. Porter County Drainage Bd.*, 576 N.E.2d 587, 589 (Ind. 1991)). The Board will only be reversed if it incorrectly interpreted the Act. *Id*.

Here, Saldivar contends that the Board erred when it concluded that she had not submitted enough evidence to support an award in her favor. The Act authorizes the payment of compensation to employees for "personal injury or death by accident arising out of and in the course of the employment." Ind. Code § 22-3-2-2(a). An injury "arises out of"

employment when a causal nexus exists between the injury sustained and the duties or services performed by the injured employee. *Outlaw v. Erbrich Prods. Co.,* 742 N.E.2d 526, 530 (Ind. Ct. App. 2001). An accident occurs "in the course of employment" when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is fulfilling the duties of employment or while engaged in doing something incidental thereto. *Id.* Both requirements must be met before compensation is awarded, and neither alone is sufficient. *Conway v. Sch. City of East Chicago,* 734 N.E.2d 594, 598 (Ind. Ct. App. 2000), *trans. denied.* The person who seeks benefits under the Act bears the burden of proving both elements. Ind. Code § 22-3-2-2(a).

Here, the parties stipulated that Saldivar "was injured while in the course of her employment when a co-employee turned a table containing a windshield . . . ." *Ex. Vol.* at 2. The dispute arises, however, with regard to the second element, namely, whether the neck injury for which she was ultimately treated "arose out of" that incident.

The Single Hearing Member denied Saldivar's claim on the basis that she had not proven a causal nexus between her neck injury and the June 11, 2006 incident. The evidence before the Single Hearing Member and the Full Board included two letters from Dr. Shugart, the surgeon who performed Saldivar's surgery. The first letter, dated April 14, 2007, was addressed to a representative of the Employer's worker's compensation managed care service and provided in pertinent part:

> I did receive your letter regarding clarification on the time line for the injury of patient, Elizabeth Saldivar-Cruz. Date of injury I have is June 11, 2006 when she injured herself lifting a windshield.

> Review of the time line, you note she injured herself on June 11, 2006 and it was reported as an incident but no treatment. She then worked for two weeks without any issues and then had two week [sic] of shut down. You noted then she was off work and you, yourself, told me that she was bending over cleaning cupboards. She then returned to work on August 15, 2006 and it was August 24, 2006 she complained of left shoulder and neck pain.
>
> Reviewing the information you have, and based on that history, I would concur that her symptoms of neck and shoulder pain would not be specifically related to that injury on June 11, 2006. If indeed she underwent nearly ten weeks of no symptomatology or until the complaint of August 24, 2006, I would concur that I would not related it back to her June 11, 2006 injury. Medically by history, it is related to some other event that occurred at home.

Ex. Vol. at 248.

The second letter, dated January 26, 2008, was addressed to Saldivar's appellate attorney and stated in pertinent part as follows:

> I did receive your letter regarding Elizabeth Saldivar-Cruz and information from Norman D. Ross, D.C. [the treating chiropractor].
>
> Previously, in my April 14, 2007 note, I did not feel that her symptoms were related to her work injury on June 11, 2006. Review of the note date March 21, 2007, by Dr. Ross notes that the patient was experiencing some back, hip, leg, neck, and left shoulder pain secondary to subluxations at L5, T3, T4, C1 and C2 vetebral levels.
>
> Based on her findings at surgery, which were cervical C-4-5 and C5-6, it appeared that the symptoms she was having when she was seen on July 9, 2007, would be unrelated, at least based on the information. This is because her symptoms were in the lower lumbar at L5, thoracic region at T3-4, and actually the cervical region at C1 and C2.
>
> Therefore my opinion will not change, even with that information, from my April 14, 2007 note in that her symptoms are not related to the injury from June 11, 2006.

Id. at 245-46. From these letters, the Board found that Saldivar had failed to prove a causal nexus between her neck injury and the June 11, 2006 accident and denied her claim.

On appeal to the Full Board, Saldivar submitted a brief in which she restated the reasons supporting a causal nexus between the June 2006 incident and her neck injury. Two of her co-workers had witnessed the accident. Carrizales, who was working on the other side of the turntable, confirmed that while Saldivar complained about her neck and left shoulder after the June 11, 2006 incident, he had never heard her lodge any complaints prior to that incident. *Ex. Vol*. at 7 (citing *Tr*. 42-43). Beth Davis, who was working near Saldivar on the evening of the incident, testified that Saldivar immediately filed a report regarding the incident. *Id*. at 8 (citing *Tr*. at 39). Like Carrizales, Davis testified that Saldivar had never complained about her shoulder or neck prior to the incident, but that after June 11, 2006, "[Saldivar] told [Davis] that she was 'hurting in her left shoulder and that it was going up into her neck.'" *Id*. (quoting *Tr*. at 40).

Included in her brief to the Full Board, Saldivar again stated that she was denied reasonable care for a substantial time after she reported the injury and that when she told her supervisors about her neck pain she was merely told to "put ice on it." *Id*. (citing *Tr*. at 16). Saldivar's injuries were compensable for nine months; however, they were no longer deemed compensable after Dr. Shugart concluded that her neck required a surgical repair. It was Saldivar's contention before the Board that the determination of non-compensability was based upon the perceived costs of the procedure and not the facts of the case. *Id*. at 11.

The Single Hearing Member heard the testimony of Saldivar and her co-workers, Davis, and Carrizales, all of whom testified that Saldivar's neck injury arose out of the work-related incident of June 11, 2006. He also reviewed the reports and letters from Saldivar's

treating physicians. From the evidence, the Single Hearing Member concluded that there was an insufficient nexus between the incident and the neck injury and denied Saldivar's claim. Finding that Saldivar had failed to prove entitlement to benefits, the Full Board adopted and affirmed the findings and conclusions of the Single Hearing Member and denied Saldivar's claim. *See Perkins*, 905 N.E.2d at 1088 (claimant must prove entitlement to benefits). Considering only the evidence and reasonable inferences that may be drawn therefrom that tend to support the Board's determination, we find there is substantial evidence to support the Board's findings and conclusions denying Saldivar's worker's compensation claim. *See Brown*, 892 N.E.2d at 646 (appellate court examines record only to determine whether substantial evidence and reasonable inferences drawn therefrom support Board's decision).

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.