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Issue Date: 14 May 2015

Case Nos.: 2015-LHC-00552; 2015-LHC-00555
OWCP Nos.: 02-305352; 02-306341

In the Matters of:

KIM COOPER,
Claimant,

v.

DEPARTMENT OF THE ARMY/NAF,
Employer,

and

ARMY CENTRAL INSURANCE FUND,
c/o CONTRACT CLAIMS SERVICES,

Carrier.

ORDER GRANTING IN PART AND DENYING IN PART CLAIMANT'S EMERGENCY MOTION FOR SUMMARY DECISION

This matter arises under the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. §901 *et seq*. On Apri1 28, 2015, I received Claimant's Emergency Motion for Summary Decision Due to Health, Safety, and Welfare Concerns (the "Motion"). On May 6, 2015,I received Employer's Opposition to Claimant's Emergency Motion for Summary Decision (the "Opposition"). On May 11, 2015, I received Claimant's Reply to the Opposition (the "Reply").

Briel1y, Claimant argues that there are no material facts in dispute concerning work-related injuries she sustained on June 7, 2014, and on July 22, 2014, Motion, at 1-2 and 4-9. She thus argues that "there are no genuine issues in dispute regarding the Claimant's injuries, need for medical care, and reimbursements and payments of medical expenses or entitlement to disability benefits from June 7, 2014 to the present and continuing." Motion, at 16.

Employer first responds that as discovery is continuing, "it is premature to consider a motion for summary decision" and "Claimant cannot ask the parties and the Court to rush to

judgment, when the Claimant herself has been slow to provide discovery in this case." Opposition, at 1.[1] Among other arguments, Employer responds that many material issues of fact are disputed, including: (1) whether "Claimant's work injury caused the need for surgery," Opposition, at 2; (2) whether Claimant was employable, either at another job or through "Employer's light duty job offer to the Claimant on October 9, 2014," Opposition, at 2; (3) what was Claimant's average weekly wage ("AWW"), Opposition, at 3; (4) whether the 20 minute driving restriction Dr. Herr imposed on Claimant was justified, Opposition, at 3; and (5) the extent of Claimant's disability, Opposition, at 3. Employer also stated that "[a]s to medical care, the Claimant has not identified any unpaid medical bills, nor has she shown section 7 compliance" and "[i]f the Claimant submits any unpaid bills, the Employer likely will pay them." Opposition, at 3.

Claimant replies that, because there arc no disputes as to whether Claimant was involved in accidents at work on June 7 and July 22,2014, as to whether those accidents caused her injuries, or as to whether Claimant's injuries required medical care, "[t]here is no dispute the Claimant's accidents *are compensable."* Reply, at 2 (emphasis in original). Claimant argues that Employer's having raised issues about the nature and extent of her disability, the need to depose her doctors, the need for a vocational evaluation, and the need to await the report fh1m the independent medical examination does not call into question the predicate facts necessary for a finding that "she is entitled to summary decision on the issue of compensability and entitlement to Section 7 benefits." Reply, at 2-3.

As detailed below, I find that there is no genuine issue of material fact regarding the compensability and entitlement to Section 7 benefits for Claimant's injuries resulting from the incidents of June 7 and July 22, 2014. Accordingly, to the extent the Motion seeks a finding that Claimant's injuries resulting from the incidents of June 7, 2014, and July 22, 2014, are compensable and that she is entitled to Section 7 medical benefits for those injuries, the Motion is granted. As t\l Claimant's argument for Section 8 compensation benefits, the status of discovery renders premature my consideration of that issue as Employer has not yet had the opportunity to ascertain all the relevant facts through discovery. Accordingly, to the extent the Motion seeks Section 8 compensation benefits, the Motion is denied as premature.

Factual Background

Claimant worked for Employer in Germany at a youth center on a U.S. Army post. While at work on June 7, 2014, she injured her right shoulder as she was putting babies into cribs for evacuation from the center during a fire drill. Motion, Exhibit B. In July 2014, Claimant had returned to work in light duty capacity following her June 7, 2014 injury. While at work on July

[1] In their filings, counsel address perceived delays in discovery and the causes for those delays. I need not address thcsc issues other than to note that it appears Claimant's deposition is now set for May 21, 2015, that a vocational evaluation was set for May 8, 2015, and that an independent medical evaluation was set for April 16, 2015. Reply, at 2 and at one of its exhibits (March 26, 2015 email from counsel for Employer to counsel for Claimant). As counsel for Claimant, in addressing perceived delays, pointed out that he was away from his office as a result of military duty, the parties are advised that I am an officer in the U.S. Army Reserve.

22, 2014, a chair Claimant was sitting in broke and she fell to the floor. TI1is incident caused her to injure her head and her back. Motion, Exhibits D, E, and F. [2]

Claimant received medical care at Landstuhl Regional Medical Center for both the injuries she sustained on June 7 and July 22, 2014. Motion, Exhibits C and F.

In its Opposition, Employer does not dispute that Claimant was involved in two incidents at work, the first on June 7, 2014, and the second on July 22, 2014. Moreover, Employer does not dispute that Claimant was injured as a result of these incidents. Finally, Employer docs not dispute that Claimant required medical care as a result of these incidents.

As T am denying the Motion to the extent it seeks Section 8 compensation benefits as premature, I need not address facts concerning the nature: and extent of Claimant's disability.

Discussion

Pursuant to 29 C.F.R. § 18.40(a), any party may move "'for a summary decision on all or any part of the proceeding." Section 18.40 parallels Rule 56 of the Federal Rules of Civil Procedure. *Buck v. General Dynamics Corp.,* 37 BRBS 53, 54 (2003). Summary decision may only be ordered "[w]hcre no genuine issue of a material fact is found to have been raised." 29 C.F.R. § 18.41(a). The moving party bears the burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The burden of showing the absence of a material fact is a heavy one. *Pitts v. Shell Oil Co.,* 463 F.2d 331 (5th Cir. 1972). In determining whether a genuine issue of material fact exists, the evidence must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Accordingly, an Administrative Law Judge must draw all inferences in favor of thc nonmoving party. *Morgan v. Cascade General, Inc.,* 40 BRBS 9 (2006). In opposing a motion for summary decision, the nonmoving party "may not rest upon the mere allegations or denials of such pleading," but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

Section 2(2) of the LHWCA requires that a claimant's injury arise out of and in the course of employment. Section 20(a) creates a presumption that the injury is causally related to the worker's employment *if* the worker makes a *prima facie* showing of causation. *Port Cooper/T. Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 287, 34 BRBS 96 (CRT) (5th Cir. 2000). In order to be entitled to the Section 20(a) presumption, a claimant must establish a *Prima facie* case by showing that she suffered a harm and that either an accident occurred at work or working conditions existed which could have caused the harm or aggravated a pre-

[2] I note that two documents written by Dr. Herr and found in Motion, Exhibit D, are in German and that Claimant did not provide a translation of these documents, Although I have read these document. I am not considering them for two reasons: first, and most importantly, I am not a certified German-English translator, and even if I were, it would not be appropriate for *an* adjudicator to translate documents submitted as evidence; second, foreign language documents should be translatcd into English before being submitted as evidence to ensure that all parties to a proceeding can understand their contents. To the extent I may have erred by reading these documents in the original Gem1an, any such error is mitigated by the fact that these documents do not go to compensability and entitlement to Section 7 medical benefits, but rather to nature and extent of disability and I am denying the Motion to the extent it seeks Section 8 compensation benefits as premature.

existing condition. *Id.* Once a claimant has established her *prima facie* case, Section 20(a) of the Act provides her with a presumption that her injuries are causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injuries were neither caused nor aggravated by her employment. *See Or/co Contractors. lnc. v. Charpentier,* 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied,* 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5[1]" Cir. 1999); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000); *Peterson v. Gen. Dynamics Corp.,* 25 BRBS 71 (1991).

As outlined above, in the Opposition Employer does not dispute the following three facts: **(I)** Claimant was involved in two incidents at work, the first on June 7, 2014, and the second on July 22, 2014; (2) Claimant was injured as a result of these two incidents; and (3) Claimant required medical treatment as a result of these two incidents. These facts arc well supported by the exhibits to the Motion. While I recognize that discovery has not yet been completed, neither the results of the IME conducted on Claimant nor the depositions of Dr. Schmidt (the doctor who conducted the IME), of Claimant, nor of Dr. Herr could contradict these three facts. 1 thus I find these three: facts undisputed. [3]

In contrast, the status of discovery prevents Employer from adequately responding to the Motion's statements of fact relevant to Claimant's entitlement to Section 8 compensation benefits. The results of Claimant's IME and the depositions of Dr. Schmidt, Dr. Herr, and of Claimant, and the vocational evaluation of Claimant, may well produce information that contradicts Claimant's statements of fact as to the nature and extent of her disability. As Employer is entitled to complete this discovery to present its case, I find it premature to grant the Motion to the extent it seeks Section 8 compensation benefits.

Moreover, even if this issue were not premature, I would find that based on the evidence Employer has submitted with the Opposition that there is a disputed issue of material fact at least with respect to the issue of Claimant's AWW. Opposition, at 3 and at Exhibit B; *compare* Opposition, Exhibit B, with Motion, at 14 n.2 and at Exhibit G. Accordingly, even if I had not found it premature to rule on the Section 8 issue given the state of discovery in this matter, I would have found that a disputed issue of material fact concerning Claimant's AWW precluded my granting the Motion to the extent it seeks Section 8 compensation benefits.

[3] I recognize there is a dispute as to whether certain medical treatment was reasonable and necessary. *See* Opposition, at 2 ("Employer wants to depose both the Claimant and Dr. (H]err as to their contention the work injury caused the need for surgery""). This dispute, however, does not preclude my concluding that the three factlisted above are undisputed. In the event that the results of Claimant's IME, the deposition of the doctor who conducted the IME, the vocational evaluation, or Dr. Herr's deposition call into question any of these three facts. Employer may file a motion to reconsider my grant of partial summary judgment within 30 days of the date of this order, or within IS days of becoming aware through discovery of information that specifically rebuts any of these three facts, whichever is later.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

I. Claimant's Emergency Motion for Summary Decision is GRANTED on the issue of compensability of her June 7, 2014 injury to her right shoulder and her July 22, 2014 injury to her head and her back;

2. Employer/Carrier shall pay Claimant for all reasonable and necessary medical care and treatment arising out of her work-related injuries to her right shoulder, head, and back pursuant to Section 7(a) of the LHWCA, in accordance with this order; and

3. Claimant's Emergency Motion for Summary Decision is DENIED AS PREMATURE to the extent it seeks compensation benefits under Section 8 of the LHCWA.

I am requesting that this order be issued by fax in addition to by regular mail.

SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.