Childs, Tyler

TREATMENT

Burden of proof

Despite the lack of an explicit expert witness statement that no further treatment is required, a prima facie case for no further treatment can be made through medical testimony that there was no evidence of permanent injury and sufficient time had passed that the condition would have resolved. **….*In re Tyler Childs*, BIIA Dec., 15 18081 (2016)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: TYLER A. CHILDS	**)**	**DOCKET NO. 15 18081**
	)	
CLAIM NO. AR-49417	**)**	**DECISION AND ORDER**

In 2013, Tyler Childs jumped from a shelving unit seven feet off of the ground and strained his back while working for Petco. The Department affirmed an order that reversed claim closure and left Mr. Childs' claim open for authorized treatment and other benefits. Petco appealed the order, contending that the claimant needed no further claim-related treatment. Our industrial appeals judge dismissed Petco's appeal, concluding the employer had not made a prima facie case that Mr. Childs was not in need of treatment as of May 5, 2015. Petco argues that it made a prima facie case and that the Department and Mr. Childs did not establish that he was entitled to further treatment. We agree with the employer's contentions. We grant review to correct three evidentiary rulings and to hold that Mr. Childs is not entitled to further treatment. The Department order is **REVERSED AND REMANDED** with directions to: (1) determine that effective May 5, 2015, Mr. Childs was not in need of further treatment, and (2) close the claim.

DISCUSSION

On September 6, 2013, Mr. Childs was working as a sales associate for Petco. After arranging some product on a shelving unit about seven feet off of the ground he jumped from a sitting position down to the ground. Upon landing, he felt immediate sharp pain in one of his legs—he believes the right—from his hip to his knee. In the days that followed, he felt a duller pain that radiated from his hip and around his "sciatic nerves." Three weeks later, on September 30, 2013, he sought treatment with W. Kirk Harris, M.D., a family medicine physician. Mr. Childs was diagnosed with a lumbar sprain. He declined Dr. Harris's offers of anti-inflammatories or physical therapy. He sought no further treatment for the work accident between September 30, 2013, and his subsequent work accident on December 27, 2013, which occurred while he was self employed.

By October 2013, Mr. Childs was no longer working for Petco, and had his own business collecting and selling scrap pallets. The pallets averaged 48 by 40 inches and weighed 40 pounds. On average, Mr. Childs picked up and moved 40 to 50 pallets each day. While lifting a pallet on December 27, 2013, he injured his low back. He immediately dropped to his knees because of the pain, and felt severe spasms. In his view, the injury was "much worse" than his injury at Petco, and different in nature. He only felt leg pain, beginning from the hip downward, from the September 6, 2013 injury. From the December 27, 2013 injury, he felt intense back pain.

Mr. Childs did not return to Dr. Harris for treatment after his December 27, 2013 injury. Instead, he went to chiropractor Peter Klein, D.C., whom he had previously seen in 2010 for middle and low back pain. When he first presented to Dr. Klein the day after the pallet-lifting injury, on December 28, 2013, Mr. Childs completed a form in which he wrote that the "symptoms appear[ed]" on December 27, 2013, and consisted of "constant, sharp, aching, shooting, and swelling back pain." He also stated he had been engaging in "moderate exercise" and "heavy labor" around the time of the injury. He made no mention of his September 6, 2013 Petco injury at that time. It appears that Mr. Childs first mentioned the Petco injury to Dr. Klein only after the Department issued its order on January 21, 2014.

Dr. Klein treated Mr. Childs for his back complaints over 160 times between December 28, 2013, and sometime in July 2015. He diagnosed the claimant with segmental dysfunction at the thoracic, lumbar, and sacral levels of the spine.

At hearing, Mr. Childs stated that the pain that resulted from the September 6, 2013 Petco injury never went away before he suffered his December 27, 2013 accident, and he had to modify his lifestyle because of the pain. He offered no details. He also stated that he still suffers from back pain and sharp pain in both legs.

In support of its appeal Petco presented the testimony of Louis Kretschmer, M.D., and Edward Dagher, M.D. Dr. Kretschmer is an orthopedist who performed an independent medical examination of the claimant on December 17, 2015. Dr. Dagher specializes in internal medicine and physical medicine and rehabilitation, and he conducted a record review of the claimant's claim-related history in February 2016. Petco also presented a Petco assistant store manager named Jacob Barckley. The Department presented Mr. Childs' treating chiropractor Dr. Klein in defense of its order.

The Medical Opinions and Their Bases

Drs. Kretschmer and Dagher offered similar opinions. They each felt that Mr. Childs suffered only a lumbar strain or sprain as a consequence of his September 6, 2013 Petco injury. They testified that the low back symptoms the claimant presented with to Dr. Klein in late December 2013 were wholly the result of his pallet-lifting injury of December 27, 2013, and unrelated to his Petco injury. Dr. Dagher stated that a low back strain or sprain would naturally resolve within four to six weeks of occurrence, barring a permanent injury or complication. He explained that there was no evidence that Mr. Childs suffered any permanent injury or complication as a result of his Petco accident. He also noted the evidence that suggested that Mr. Childs' industrial injury at Petco fully resolved within

six weeks: Mr. Childs never returned to Dr. Harris or any other provider for any low back or leg treatment after September 30, 2013, and before his late December 2013 pallet-lifting accident. By October 2013, Mr. Childs was lifting and moving numerous heavy pallets daily without incident until his late December 2013 accident.

In opposition to the employer's case, the Department presented the opinions of Dr. Klein. The treating chiropractor stated that Mr. Childs' December 27, 2013 pallet-lifting injury was merely an aggravation of his September 6, 2013 Petco injury, and that he needed at least chiropractic treatment for the original Petco accident and its sequelae as of May 5, 2015. Dr. Klein based his causation opinion on (1) the fact that his patient told him that he never got better after the Petco accident, and (2) his patient complained of pain upon performing the so-called Kemp's bending and twisting maneuver on December 28, 2013, indicating to Dr. Klein some "disc involvement."

Petco Presented a Prima Facie Case that Mr. Childs Needed No Further Treatment

The industrial appeals judge concluded that the evidence in Petco's favor in the record as a whole was insufficient to constitute a prima facie case in opposition to the Department's May 5, 2015 order.[1] We disagree.

On the motion, Petco's evidence must be accepted as true, viewed in a light most favorable to it, and with all reasonable inferences in its favor.[2] A prima facie case does not necessarily require direct evidence; it may be established by evidence that is indirect and circumstantial.[3] Moreover, medical opinion on the ultimate issue need not necessarily be presented in favor of, or in opposition to, a worker's entitlement to benefits: "It is sufficient if the medical testimony **shows** . . . [the answer to the ultimate issue] from the medical testimony given and the facts and circumstances proven by other evidence."[4]

Although, as our industrial appeals judge reasoned, neither Dr. Kretschmer nor Dagher **expressly stated** that Mr. Childs needed no further treatment for the Petco injury as of May 5, 2015, that proposition was shown by Petco's evidence when considered in its entirety, in a light most favorable to it, with all reasonable inferences in its favor. By that standard, Petco has shown that

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[1] Our IAJ made the conclusion on his own motion, which is permissible. *In re Rosamilla S. White*, Dckt. No. 14 11700 (July 9, 2015). Moreover, he properly looked at the entire record to resolve the motion. Because the Department chose to put on evidence in its own case, instead of resting on the employer's case, "**all of the evidence** [in the record must be reviewed] . . . to determine if . . . a prima facie case [was made]." *In re Jerry L. Gibbs*, Dckt. No. 11 14052 (October 8, 2012) (Emphasis added.)

[2] *In re Jerry L. Gibbs*, Dckt. No. 11 14052 (October 8, 2012).

[3] *In re Gila J. Burton-Curl*, Dckt. No. 09 15885 (September 29, 2010).

[4] *Sacred Heart Med. Ctr. v. Department of Labor & Indus*., 92 Wn.2d 631, 636-37 (1979) (Emphasis in original.)

Mr. Childs suffered a back strain only as a consequence of his Petco accident; that it led to no complications; and that the condition likely fully resolved and needed no further treatment by late October 2013 at the latest, over six weeks after the injury.

Petco met its burden to present a prima facie case that Mr. Childs needed no further proper and necessary treatment for his industrial injury as of May 5, 2015.

The Department and Mr. Childs Did Not Prove His Right to Further Treatment

Once Petco made a prima facie case, the burden shifted to Mr. Childs to establish by the weight of the evidence his right to additional treatment as of May 5, 2015.[5] The Department may assume the claimant's burden.[6] But here, the Department and Mr. Childs did not meet their burden.

The foundations for Dr. Klein's opinion are not strong. While the chiropractor relied heavily on the fact that Mr. Childs at some point told him that his symptoms from his Petco injury never resolved before he presented with his December 27, 2013 pallet-lifting injury, the weight of the evidence does not support Mr. Childs' claim. In the time frame after his one visit to Dr. Harris on September 30, 2013, and before his December 27, 2013 pallet-lifting injury, Mr. Childs sought no further treatment for his Petco injury. In that time frame, he was lifting and carrying heavy pallets daily without incident. When he presented to Dr. Klein the day after his late December 2013 injury, he r that his constant, sharp, aching, shooting, and swelling back pain had started just the day before. Additionally, by Mr. Childs' own admission at hearing, the back symptoms he experienced following his pallet-lifting accident were different from the leg pain he felt after the Petco accident. Dr. Klein also relied on a December 28, 2013 examination maneuver that he believed evidenced disc injury, but he did not explain how the finding meant that his patient more likely injured the disc in his Petco accident instead of in his "much worse" pallet-lifting accident one day prior. In contrast, the foundations for the opinions of Drs. Kretschmer and Dagher are much stronger. Based on the same facts that undermine Dr. Klein's opinion, they reasonably concluded that Mr. Childs' December 27, 2013 pallet-lifting injury was wholly distinct from and unrelated to his Petco accident. Based on those same facts, Dr. Dagher reasonably determined by implication that the claimant's Petco injury had fully resolved by late October 2013, and that he needed no further treatment after that point. Dr. Kretschmer offered nothing in his testimony to suggest that he did not agree with Dr. Dagher's implied opinion.

[5] *In re Ana Zavala*, Dckt. No. 09 23491 (March 31, 2011).
[6] *Olympia Brewing Co. v. Department of Labor and Indus*., 34 Wn. 2d 498 (1949).

For these reasons, we find that as of May 5, 2015, Mr. Childs did not need further treatment due to his September 6, 2013 industrial injury and his claim should be closed.

DECISION

In Docket No. 15 18081, the employer, Petco Corporate Office, filed a protest with the Department of Labor and Industries on July 9, 2015. The Department forwarded it to the Board of Industrial Insurance Appeals as an appeal. The employer appeals a Department order dated May 5, 2015. In this order, the Department affirmed an earlier order that reversed closure of Mr. Childs' claim and left it open for authorized treatment and other benefits. This order is incorrect and is reversed and remanded with directions as set forth below.

FINDINGS OF FACT

1. On September 1, 2015, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. On September 6, 2013, Mr. Childs was working as a sales associate for Petco and suffered an industrial injury. After arranging some product on a shelving unit about seven feet off of the ground, he jumped down to the ground from a sitting position. As a consequence, he suffered a lumbar sprain.

3. As of May 5, 2015, Mr. Childs' lumbar sprain, proximately caused by the industrial injury, was fixed and stable and did not need further proper and necessary treatment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. Mr. Childs' lumbar sprain proximately caused by the industrial injury was fixed and stable as of May 5, 2015, and he is not entitled to further treatment as of that date. RCW 51.36.010.

3. The Department order dated May 5, 2015 is incorrect and is reversed. This matter is remanded to the Department to: (1) determine that effective May 5, 2015, Mr. Childs was not in need of further treatment, and (2) close the claim effective May 5, 2015.

Dated: September 22, 2016.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
DAVID E. THREEDY Chairperson

/s/ _____
JACK S. ENG Member

Addendum to Decision and Order
In re Tyler A. Childs
Docket No. 15 18081
Claim No. AR-49417

Appearances

Claimant, Tyler A. Childs, Pro Se

Employer, Petco Corporate Office, by Dynan & Associates, P.S., per Mark J. Dynan

Retrospective Rating Group, Association of WA Business- Retail, Wholesale, Services #10128, None

Department of Labor and Industries, by The Office of the Attorney General, per John Barnes

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on June 22, 2016, in which the industrial appeals judge dismissed the appeal. The Department filed a response to the employer's Petition for Review.

Evidentiary Rulings

We reverse three evidentiary rulings that are prejudicial as they presently stand.

(1) Causation Opinion Offered by Claimant: In nonresponse to a question asked, Mr. Childs testified:

> I've learned from my doctors that [my sharp pains in my legs and my back problems] have stemmed from that injury at Petco.[7]

Petco objected and moved to strike as nonresponsive. Our hearing IAJ overruled the objection.

The answer was in fact unresponsive, and injected inadmissible hearsay from a layperson on an ultimate medical question. Petco's objection is sustained, and the claimant's statement is stricken.

(2) Exhibit 1: Exhibit 1 is the patient registration form completed by Mr. Childs when he first presented to Dr. Klein on December 28, 2013, one day after his pallet-lifting accident. Our hearing IAJ denied Petco's offer of the exhibit in evidence, siding with the Department that its admission would be cumulative, since some of the information on the form had already been summarized by Mr. Childs orally.

Exhibit 1 is admitted. The form contains highly material information about the nature of the claimant's back symptoms after his pallet-lifting accident that was not discussed orally by Mr. Childs, so that information is not cumulative. Additionally, the fact that some of the information contained on the intake form is in the claimant's own hand arguably gives it additional probative value that the fact finder should be able to view and weigh for his or herself.

(3) Exhibit 2: Exhibit 2 is Dr. Dagher's February 10, 2016 report of his independent record review. It includes his detailed summary of the materials he reviewed and of his opinions. At the end of Dr. Dagher's perpetuation deposition, Petco moved for the report's admission without explanation.

[7] 2/19/16 Tr. at 35.

The Department objected, contending that the report was cumulative. In the Proposed Decision and Order, the industrial appeals judge admitted the report.

Exhibit 2 is rejected. Petco offered no reason the report might be admissible, nor are we aware of any. The report is rife with inadmissible hearsay. Moreover, its admission could lead a fact finder to give undue weight to the doctor's opinions because they have been presented in writing.

The Board has reviewed the other evidentiary rulings in the record of proceedings. Except as corrected above, the rulings are affirmed.