Oneida Tribal Judicial System

Onʌyote ʔ a·ka Tsiʔ Shakotiyaʔ Tolé hte

TRIAL COURT

Larry D. Jordan,
Petitioner

v.

HRD/Benefits, and
Crawford & Company,
Respondents

Docket No: **11-TC-137**

Date: **March 5, 2012**

DECISION

This petition has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers; Jean M. Webster, Mary Adams, and Leland Wigg-Ninham, presiding.

I Background

A. Summary

This case arises out of employee Larry Jordan's claim that he suffered a covered injury while at work on June 21, 2011. Mr. Jordan suffered a herniated disk, had surgery on June 24, 2011 and was off work until September 5, 2011. As a result, he seeks compensation for time off of work, for partial permanent disability and unreimbursed medical expenses. The medical expenses are at issue because Mr. Jordan received care from a provider not approved by the employer. We find Mr. Jordan's injury is not covered and therefore his claim is denied.

B. Facts

At the time the claim arose, Petitioner, Larry Jordan, had been employed over six years as a warehouse worker and forklift operator for the Oneida Bingo and Casino. On the afternoon of June 21, 2011, Mr. Jordan dismounted his forklift and heard a pop. Mr. Jordan did not initially have pain in his back but wrote on June 23, 2011 that "it just didn't feel right." According to

Post Office Box 19 • Oneida, WI 54155
Phone: 920-497-5800 • Fax: 920-497-5805

medical reports, later that afternoon he had pain in his buttocks. The pain got worse and went down his right thigh and the next day his calf was sore.

As the pain got worse, Mr. Jordan drove himself to the emergency room on June 23, 2011. After being examined and receiving an MRI, it was determined that Mr. Jordan had a herniated disk in his back. Medical records indicate the bulging disk was impinging on some of Mr. Jordan's nerve roots. Mr. Jordan had surgery to correct the problem the next day, June 24, 2011. Mr. Jordan was off work until September 5, 2011.

A co-worker of Mr. Jordan's, Shawn Lagere, testified that he saw Mr. Jordan limping on the morning of June 21, 2011, before the time when Mr. Jordan stepped off the forklift.

There is no dispute that Mr. Jordan timely reported his injury within 48 hours. Nor is there any dispute about the nature and extent of Mr. Jordan's injuries.

Mr. Jordan injured his back previously, about seven years ago.

There was expert medical testimony by a doctor for each side. For Mr. Jordan, Dr. Christopher VanSaders testified via video deposition. The first time Dr. VanSaders saw Mr. Jordan was June 23, 2012. Dr. VanSaders recommended Mr. Jordan have surgery immediately. He stated that if not done soon more damage would occur. Dr. VanSaders testified that everyone has some degeneration going on due to age, obesity and physical labor. Dr. VanSaders stated heavy work generally causes back problems such as a degenerative or ruptured disk. Therefore, a rip or tear can be caused by bending over and picking up something or exiting a car. Dr. VanSaders explained according to the x-ray it showed a herniated disk, therefore Mr. Jordan needed surgery. Dr. VanSaders stated Mr. Jordan told him he injured himself at work while exiting a forklift.

In summary, Dr. VanSaders testified that in his view, Mr. Jordan's herniated disk occurred when he twisted his back stepping off the forklift. Dr. VanSaders testified that the condition of Mr. Jordan's disk the circumstances of stepping off the forklift supported the view that this was an

acute injury. In other words; something that happened at that moment, not simply the last step in the long build-up of a degenerative condition.

Dr. Thomas Lyons testified on behalf of the Respondents. In his report he stated:

> Degenerative L5-S1 disk herniation. The work exposure of June 21, 2011, if accurate, namely stepping off his forklift is in my opinion beyond a reasonable degree of medical probability simply normal activity. Therefore, in my opinion again beyond a reasonable degree of medical probability, there was no injury or breakage on this date. This, therefore, is a mere appearance of symptoms consistent with a degenerative disk herniation.

The Tribe requires treatment for workers compensation injuries to be at its designated provider. It is allowed to do so under Sec. 13-8 of the Workers Compensation Ordinance. The Tribe's designated provider is the Bellin network. This change was affective May 1, 2008. Employees were sent three mailings in 2008 notifying employees of the change. In addition, there are posters throughout the Tribe stating that if an Oneida employee is injured on the job and it is not critical or life-threatening, they must seek treatment at a Bellin Occupational Health Clinic.

Mr. Jordan sought and received his initial treatment, including the surgery, at St. Mary's Hospital which the Tribe has not approved as a provider for workers compensation-related medical care. As a result, as of January, 2012, Mr. Jordan claimed $31,262 in uncovered and unpaid medical expenses.

Procedural history

On September 13, 2011, based on the opinion of Dr. Lyons, Crawford and Company, the administrator of the Tribe's workers compensation insurance program denied Mr. Jordan's claim for medical expenses, temporary total disability, and permanent partial disability.

Mr. Jordan timely filed his claim in the Oneida Tribal Judicial System on October 5, 2011. We have jurisdiction under Sec. 13-11 of the Workers Compensation Ordinance.

This matter came before the Oneida Tribal Judicial System for a pre-trial hearing on the 29th day of November, 2011 to address the Petitioner's denial for benefits as related to an injury occurring

on June 21, 2011. Petitioner, Larry Jordan, was represented by Attorney Daniel D. Whetter; Respondents, Christina Blue Bird and HRD Benefits, Jack Fleming, Crawford and Company Insurance were represented by Attorney Robert W. Orcutt, Oneida Law Office.

A scheduling order was issued and discovery took place between the parties. A one day trial was held on February 1, 2012. The initial panel consisted of three judicial officers. However, one judicial officer, Mary Adams, had a family emergency at lunch time, left the hearing and did not attend the afternoon proceedings. Before proceeding in the afternoon and after conferring on the record, both parties consented to going forward with the hearing with two judicial officers with the understanding that Judicial Officer Adams would be brought up to speed by reading the transcripts and consulting with the other two judicial officers.

C. Applicable Law

Several parts of the Workers Compensation Ordinance are involved in this case. We highlight the relevant sections. Section 13.3-5 defines injury or personal injury as "physical or mental harm to an employee caused by accident or disease which arises from exposure to conditions or circumstances beyond those common to occupational and/or non-occupational life and is predominantly work related." Similarly, Section 13.3-6 defines physical harm as:

> any injury arising out of an in the course of employment, unusual or peculiar to work, including specific injury, repetitive traumatic injury, or occupational disease, which arises from exposure to conditions or circumstances beyond those common to occupational and/or non-occupational life and is predominantly work related.

Section 13.3-12 defines a "covered injury/accidents" as:

> mental or physical harm to an employee caused by accident or disease arising out of and in the course of employment. Injury includes mental harm or emotional stress or strain without physical trauma, which arises from exposure to conditions or circumstances beyond those common to occupational and/or non-occupational life and is predominantly work related, extraordinary and unusual.

Section 13.3-13 addresses injuries or accidents not covered. Under this section no compensation is allowed for an idiopathic injury meaning an injury or condition arising from an obscure or

unknown cause (Section 13.3-13(L)), or for the natural deterioration of tissue, organ, or other body part (Section 13.3-13(n)).

Section 13.3-14 (b) states that if an employee fails to utilize providers or network providers designated by the employer, reimbursement of expenses will be decreased by a minimum of 50% except in the case of medical emergency.

II Issues

1. Is Mr. Jordan's injury a covered injury within the meaning of the Workers Compensation Ordinance?

2. Is Petitioner entitled to Worker's Compensation benefits for his medical expenses and lost work time from 6/24/11 to 9/5/11?

3. Is Petitioner entitled to Worker's Compensation for permanent partial disability?

III Analysis

Before we analyze Mr. Jordan's claims, we briefly review the arguments of the parties. Petitioner argues that his injury is a covered injury because the act of dismounting the forklift caused a pop and was an acute injury. Mr. Jordan cites Dr. VanSaders' diagnosis and comments as support. He argues that the medical evidence shows that this was not a slow build up, but rather a sudden acute injury caused by dismounting the forklift. He also argues that his medical expenses should be covered because, although it was two days after the injury, his situation was critical and emergent therefore he should not be denied coverage even though he sought medical attention outside of the Tribe's designated provider.

Respondents claim Mr. Jordan's injury is not covered. Respondents argue simply exiting a forklift does not normally result in an injury requiring back surgery and is not beyond circumstance normally encountered in the work place. Respondents assert Mr. Jordan's injury is a result of a degenerative disk disease and not covered under Oneida Worker's Compensation Law. They cite to sections 13.3-13(L) and 13.3-13(n) which disallow compensation for idiopathic injuries and natural deterioration of tissue. Respondents also argue that Mr. Jordan's health situation on June 23, 2011 was not emergent and that he was required to seek medical care

within the Tribe's designated network, Bellin Occupational Health. Therefore, Respondents argue, in accordance with Section 13.3-14(b), Respondents are not required to cover Mr. Jordan's unpaid medical costs.

Respondents rely on Dr. Thomas Lyons' September 12, 2011 Independent Medical Examination report. Dr. Lyons' report states:

> the work exposure of June 21, 2011, if accurate, namely stepping off his forklift is in my opinion beyond a reasonable degree of medical probability simply normal activity. Therefore, in my opinion again beyond a reasonable degree of medical probability, there was no injury or breakage on this date. This, therefore, is a mere appearance of symptoms consistent with a degenerative disk herniation.

In our view, this case turns on whether Mr. Jordan's injury is a "covered injury" as that term is defined in the ordinance. While we are sympathetic to the injury Mr. Jordan suffered and the aftermath of treatment and recovery, we find the injury does not meet the definition of a covered injury.

A covered injury is one "which arises from exposure to conditions or circumstances beyond those common to occupational and/or non-occupational life and is predominantly work related, extraordinary and unusual." Sec. 13.3-12. The act of stepping off a forklift, something Mr. Jordan has done many times in the course of his job, is not extraordinary or unusual nor is such an act beyond common occupational conditions. Such action is entirely common and normal.

Our decision today is supported by two previous decisions involving the issue of covered injuries. In *Oneida HRD, Crawford Insurance v. Smith et al.*, 06-AC-024 (2/16/2007), the Appellate Court ruled that "rolled up rugs in the path of where people normally walk are circumstances beyond those common to occupational and/or non-occupational life." Unlike the *Smith* case, nothing in Mr. Jordan's situation suggests any unique or extraordinary circumstances caused him to step awkwardly or otherwise injure himself. He simply stepped off the forklift and heard a pop. Likewise in *Cornelius v. Oneida HRD Benefits and Crawford & Company*, 10-TC-194 (3/7/2011), the trial court ruled that when a diabetic employee fell and injured herself after being denied a break for an extended period, the denial of a break was found to a be a

unique circumstance and thus the injury was covered under Chapter 13. In both the *Smith* and *Cornelius* cases, there was an obvious condition or circumstance which was beyond the normal workplace and precipitated the injury. In Mr. Jordan's case, we find no evidence to support such a conclusion.

It appears Mr. Jordan's injury was a result of degenerative disk herniation. The evidence did not convince the Court that stepping off a forklift could result in such an injury requiring spine surgery without some pre-existing degeneration or condition.

There is also some question as to how far Mr. Jordan's condition may have progressed up to the moment he stepped off the forklift. Mr. Jordan's co-worker, Shawn Lagere, testified he saw Mr. Jordan coming into work limping the morning of the incident which occurred in the afternoon. While Mr. Lagere's testimony was not decisive, it casts doubt on Mr. Jordan's claim that his disk herniated all of a sudden that afternoon.

Dr. Lyons' stated that Mr. Jordan's back injury is not an acute injury. An acute injury is an injury that just happened. A herniated disk is a ruptured disk, which over time results in pressure against the spine. Simply stepping off a forklift could not cause enough trauma for his spine to cause a herniated disk. Therefore, relying on Dr. Lyons' view, Mr. Jordan's injury was not a result of exposure to a condition or circumstance beyond his normal occupational environment.

With respect to the issue of Mr. Jordan going out of network for treatment, we are persuaded that Respondents have the better position on the facts and the law. Employees were notified three times in 2008 of the change to Bellin plus posters around the workplace plainly state that employees must be treated within the Bellin Occupational Health Clinic unless the injury is critical or life threatening. Mr. Jordan's injury allowed him at least 36 hours before it became so severe that he went to the hospital. Mr. Jordan drove himself. He could have just as easily driven himself to a Bellin facility. They are listed with addresses on the poster. We find that Sec. 13.3-14 applies and that if Mr. Jordan had suffered a covered injury, the Respondents would be entitled to reduce it by a minimum of 50%.

II Decision

The Court rules in favor of Respondents. Mr. Jordan's injuries were not covered under Chapter 13. Respondents' denial of benefits is affirmed.

It is so ordered.