BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JORGE ALVAREZ a/k/a EDGAR ALVAREZ, Claimant, vs. IOWA BRIDGE AND CULVERT, Employer, and BITUMINOUS INSURANCE COMPANIES, Insurance Carrier, Defendants.	FILED FEB 18 2016 WORKERS' COMPENSATION File Nos. 5040527 (DOI: 7/22/11), 5044156 (DOI: 3/16/12) A P P E A L D E C I S I O N Head Note Nos.: 1801; 2501; 3003; 4000.2

Defendants Iowa Bridge and Culvert, employer, and its insurer, Bituminous Insurance Companies, appeal from an arbitration decision filed on December 2, 2014. Defendants also appeal from a ruling on rehearing filed on December 30, 2014. The case was heard on February 7, 2014, and it was considered fully submitted on April 2, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner found that claimant Jorge Alvarez, a/k/a Edgar Alvarez, met his burden of proof in File No. 5044156 to establish a cumulative injury which arose out of and in the course of his employment with defendant-employer on March 16, 2012. The deputy commissioner awarded claimant a running award of healing period benefits. The deputy commissioner ordered defendants to provide medical benefits under Iowa Code 85.27, but defendants maintained the right to direct claimant's medical care. The deputy commissioner also awarded claimant penalty benefits in the amount of $4,725.00.

Defendants assert on appeal that the deputy commissioner erred in determining that claimant proved a compensable injury and in awarding running healing period benefits. Defendants asserts that the the deputy commissioner erred in awarding medical benefits and in awarding penalty benefits.

Claimant asserts on appeal that the deputy commissioner's award should be upheld.

The deputy commissioner also found that claimant failed to carry his burden of proof in File No. 5040527 to establish an injury arising out of and in the course of his employment on July 22, 2011. Neither party has appealed that decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner in the arbitration decision.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on December 2, 2014, which relate to issues properly raised on intra-agency appeal with the following additional analysis:

ISSUES ON APPEAL

(1) Whether claimant's right shoulder injury is causally related to the work activity.

(2) Whether claimant should have been awarded running healing period benefits.

(3) Whether claimant should have been awarded medical benefits.

(4) Whether claimant should have been found to be a non-credible witness.

(5) Whether penalty benefits should have been awarded concerning the March 16, 2012, date of injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Whether claimant's right shoulder injury is causally related to the work activity;

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only

cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961)

It is undisputed that claimant fell from a bridge on July 22, 2011, while working for defendant-employer. (Tr. p. 37-39). Claimant fell through an opening in the floor of the bridge which was just 16 inches wide. (Tr. p. 38). Claimant sustained abrasions and contusions when he fell as evidenced by the photos at Joint Exhibit 13 and documented by Robin Plattenberger-Gilmore, M.D., who described claimant's injuries as "contusions to the Lt. chest, no fractured ribs," and "bilateral contusions in the Rt./Lt/axilla." (Jt. Ex. 3, p. 1). Claimant was seen by Dr. Plattenberger-Gilmore on August 2 and August 9, 2011. (Jt. Ex. 3, pp. 1-7). No further treatment was received by claimant for the July 22, 2011, incident after August 9, 2011. The deputy commissioner found that claimant failed to carry his burden of proof to establish a permanent injury resulting from the July 22, 2011, incident and neither party has appealed that decision.

The medical records indicate the first time claimant reported right shoulder pain to a doctor was when he was evaluated by Servanez Jabbari, M.D., on March 19, 2012. (Jt. Ex. 4, p. 5). This was the first medical evaluation claimant had following the August 9, 2011, appointment with Dr. Plattenberger-Gilmore. The March 19, 2012,

appointment with Dr. Jabbari was scheduled by defendant-employer following claimant's complaint of shoulder pain to the employer on March 16, 2012. (Jt. Ex. 11, p. 7; Jt. Ex. 12, p.6).

Farid Manshadi, M.D. performed an independent medical evaluation (IME) of claimant on February 4, 2013, at the request of claimant's attorney. Dr. Manshadi opined that the injury to claimant's right shoulder and right upper extremity were the result of the July 22, 2011, work incident when claimant fell from the bridge. (Jt. Ex. 7, p. 11) Dr. Manshadi later reviewed additional documents including the deposition of Peter Hammes, who was claimant's supervisor from January through March 2012. Mr. Hammes described in his deposition the heavy physical labor claimant engaged in from January through March 16, 2012, which included operating jackhammers weighing 70 to 90 pounds. (Jt. Ex. 11, p. 5). Mr. Hammes also described being told by claimant on March 16, 2012, of the pain claimant was having in his right shoulder. Mr. Hammes then moved claimant to a different job which did not involve jackhammering. (Jt. Ex. 11, pp. 7-8). Dr. Manshadi then added to his prior opinion that claimant "probably has aggravated his right shoulder as a result of the further work injuries he sustained from January of 2012 through March 16, 2012, while performing his job duties for Iowa Bridge and Culvert." (Jt. Ex. 7, p. 14). Dr. Manshadi confirmed his opinions in a letter to claimant's counsel dated December 3, 2013, stating that the shoulder injury was materially aggravated by the work activities from January to March 2012. (Clt. Ex. 1, pp. 3-4).

Dr. Jabbari testified in two depositions on March 27, 2013, and December 6, 2013. In her first deposition, Dr. Jabbari testified that claimant's right shoulder condition was not related to the July 22, 2011, work incident. Dr. Jabbari based that opinion on the lack of shoulder complaints in the medical records near the time of the incident. (Jt. Ex. 9, p. 4).

In Dr. Jabbari's second deposition, she restated her opinion that the July 22, 2011, fall was not the cause of claimant's shoulder injury. (Jt. Ex. 9, pp. 52-53). However, Dr. Jabbari did provide equivocal opinions concerning the potential causal relationship between claimant's shoulder condition and the work claimant performed between January and March 16, 2012. When asked whether claimant's right shoulder condition is work-related, Dr. Jabbari stated "they could be." (Jt. Ex. 9, p. 53). When asked if she could say to a reasonable degree of medical certainty whether claimant's right hand and elbow symptoms are work related, Dr. Jabbari stated, "No". (Jt. Ex. 9, p. 53). When asked about the job duties claimant was engaged in from January to March, 2012, Dr. Jabbari stated that those job duties could have made both claimant's pain and his condition worse. Dr. Jabbari stated she held that opinion within a reasonable degree of medical certainty. (Jt. Ex. 9, p. 58).

Dr. Jabbari then testified in an apparent contradiction that claimant's work activities in the months prior to March 16, 2012, would have made the shoulder more painful, but that she could not say that it aggravated the condition. (Jt. Ex. 9, p. 61). Dr. Jabbari then stated she did not believe the right shoulder injury was related specifically to jackhammering. (Jt. Ex. 9, p. 61). However, Dr. Jabbari testified in her first deposition that operating a jackhammer by itself can cause shoulder pain. (Jt. Ex. 9, p. 9).

When Dr. Jabbari was asked about other physical activity beyond just jackhammering, the following exchange occurred:

> Q: Mr. Alvarez did more physical jobs than just jackhammering, didn't he, between January and March 2012?
>
> A: Yes.
>
> Q: Based on your review of Mr. Hammes', Jorge's supervisor, description of what Jorge did between January and March 2012, it remains your opinion within a reasonable degree of medical certainty, more likely true than not, that those work duties could have either, A, caused or, B, materially aggravated the findings that we saw on the MRI in 2013, correct?
>
> A: I can only state that his pain could have been made worse by those activities. I cannot state within a reasonable degree of medical certainty that it would aggravate his shoulder pathology.

(Jt. Ex. 9, p. 61).

Dr. Jabbari's opinions concerning whether claimant's shoulder condition is causally related to the March 16, 2012, date of injury are equivocal and I find those opinions to be unconvincing.

Defendants are critical of the deputy commissioner for accepting Dr. Jabbari's conclusion that there is no causal relationship between the July 22, 2011, work incident and claimant's shoulder condition while the deputy commissioner rejected Dr. Jabbari's opinion that there is no causal relationship between the March 16, 2012, injury date and claimant's shoulder condition. (Def. Br. p. 6). However, Dr. Jabbari's opinion that the shoulder injury was not caused by the July 22, 2011, work incident is corroborated by the lack of shoulder complaints in the medical records shortly after that incident occurred, while Dr. Jabbari's opinion that there is no causal relationship between the shoulder condition and the March 16, 2012, date of injury is equivocal and unconvincing.

Defendants also argue that Dr. Jabbari opined that the labrum injury sustained by claimant was not likely to occur from the work activity he was engaged in prior to March 16, 2012. (Def. Br. pp. 6-7; Jt. Ex. 9, p. 56). However, Dr. Jabbari also stated that the right upper extremity injury "could be related" to claimant's work (Jt. Ex. 9, p. 53) and Dr. Jabbari also stated jackhammering by itself can cause shoulder pain. (Jt. Ex. 9, p. 9).

The weight to be given an expert opinion is determined by the fact finder. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 417 (Iowa 1994).

There is no question claimant sustained an injury to his right shoulder. An MRI arthrogram performed on November 8, 2013, showed a "relatively long, mild separation of the capsule from the labrum" and a 4.5 cm tear of the labrum. (Jt. Ex. 2, p. 4) The chronology of events and other evidence support the deputy commissioner's conclusion that claimant sustained a cumulative injury with an injury date of March 16, 2012. Prior to that date, the claimant had been working heavy labor without restrictions. After that date, claimant complained of shoulder pain which resulted in medical treatment, a diagnosed labrum injury, and work restrictions.

I find the opinion of Dr. Manshadi more convincing, as did the deputy commissioner, that claimant's heavy work activities during the months leading up to claimant's report of right shoulder pain on March 16, 2012, materially aggravated and/or lighted up claimant's right shoulder condition.

Defendants argue that Dr. Manshadi's opinion should be disregarded because claimant's counsel stated to the doctor that claimant had complaints of shoulder pain prior to March 16, 2012. (Def. Br. p. 7). Defendants also argue that Dr. Manshadi modified his opinion to include a material aggravation of the shoulder condition from the January to March 2012 work activities, "based solely on information related by claimant's attorney." (Def. Br. p. 7). However, claimant's attorney also provided Dr. Manshadi with the depositions of Peter Hammes, described above, along with the deposition of Mary Nebel, another employee of defendant-employee. Therefore, defendants' contention that Dr. Manshadi relied only on information provided by claimant's counsel in formulating his opinions is not accurate.

Regarding the March 16, 2012, injury date, I affirm the deputy commissioner's finding that claimant met his burden of proof to establish a cumulative injury resulting from claimant's work activities in which claimant's right shoulder condition was aggravated and/or lighted up.

(2) Whether claimant should have been awarded running healing period benefits.

Iowa Code section 85.33(1) provides, in pertinent part:

> The employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, whichever occurs first.

Both claimant and his supervisor Mr. Hammes agreed that claimant reported shoulder pain on March 16, 2012. (Tr. pp. 50-51; Jt. Ex. 11, pp. 6-7). Mary Nebel, an employee of defendant-employer, had the responsibility of filling out forms for the employer when there were reported work injuries. (Jt. Ex. 12, p .2). Ms. Nebel testified in her deposition that she "made the call for the appointment," with Dr. Jabbari for evaluation of claimant's March 16, 2012, complaint. (Jt. Ex. 12, p. 6). March 16, 2012, was claimant's last day of work for defendant-employer. (Tr. p. 110).

When claimant saw Dr. Jabbari on March 19, 2012, claimant was placed on work restrictions. (Jt. Ex. 4, p. 10). Dr. Manshadi also assigned restrictions. (Jt. Ex. 7, p. 11). Mr. Hammes described the work claimant performed for the employer, which included digging, tying iron, driving stakes, chipping concrete, removing concrete, putting up fences, running a jackhammer, etc. (Jt. Ex. 11, p. 5). When asked about trying to find lighter work for claimant, Mr. Hammes stated: "all construction is heavy work to me." (Jt. Ex. 11, p. 10). I therefore find that the restrictions assigned by the physicians would prevent claimant from returning to employment substantially similar to the employment in which he was engaged at the time of the injury.

Defendants argue that claimant's activities since March 16, 2012, which have included shoveling snow, laying frames for sidewalks and watching another person weld, known as "fire watch," demonstrate claimant is medically capable of returning to employment substantially similar to the work he was engaged in at the time of the injury. Based upon the above discussion concerning the heavy nature of claimant's employment at the time of the injury and the restrictions, along with the sporadic nature of the post-injury work described here, which occurs mostly on Sundays and sometimes on Saturdays, but not during the week (Tr. pp. 54-55) I find this argument unpersuasive.

Defendants further argue that claimant's undocumented status provides a legal impediment to his return to the work which should prevent temporary total disability benefits. Defendants do not cite any legal authority for the position that a legal impediment to return to work supersedes the medical inability to return to work. The statute governing temporary total disability benefits, which is quoted above, does not

include consideration of legal status. I found above that claimant is medically precluded from returning to substantially similar work due to his work restrictions. The same remains true regardless of claimant's legal status. To the extent defendants' argument is directed at federal preemption of the Immigration Reform and Control Act of 1986 (IRCA) as a bar against the payment of temporary total disability benefits, that issue was determined in favor of the claimant by the Iowa Supreme Court in Staff Management v. Jimenez, 839 N.W2d 640, 652 (Iowa 2013).

I therefore affirm the deputy commissioner's running award of healing period benefits.

(3) Whether claimant should have been awarded medical benefits.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Because it is appropriate to award claimant healing period benefits until such time as he reaches MMI for his right shoulder condition, defendants are hereby ordered to provide claimant with medical treatment for that condition pursuant to Iowa Code section 85.27. It is appropriate for defendants to direct claimant's medical treatment pursuant to Iowa Code section 85.27.

(4) Whether claimant should have been found not to be credible.

The commissioner, as trier of fact, has a duty to weigh the evidence and measure the credibility of witnesses. Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011); Dunlavey v. Economy Fire and Cas. Co, 526 N.W.2d 845, 853 (Iowa 1995)

Defendants argue that claimant's credibility is negatively impacted because he alleged the March 16, 2012, date of injury only after Dr. Jabbari's deposition on March 27, 2013, in which the doctor offered her opinion that claimant's shoulder injury was not related to the July 22, 2011, fall from the bridge. (Jt. Ex. 9, p. 4) Defendants are critical of claimant for not immediately identifying March 16, 2012, as the correct date of injury for the alleged cumulative injury. However, Ms. Nebel testified defendant-employer also assumed the shoulder injury was related to the July 22, 2011, incident and they did not file a new first report of injury when the report of shoulder pain was made in March

2012. (Jt. Ex. 12, p .4). The fact that Dr. Jabbari's deposition may have educated the parties, and moved claimant to look at an alternate date of injury, does not work against claimant's credibility.

Defendants are also critical of claimant's assertions concerning the extent to which he speaks and understands English. Defendants also argue that claimant's history of operating a motor vehicle without a valid driver's license, along with operating while a license is denied, canceled or suspended, and public intoxication, also establish claimant's lack of credibility. The undersigned is not swayed by defendants' argument in this regard.

Concerning claimant's ability or inability to speak and understand English, the undersigned finds the testimony of claimant's co-worker, Mr. Edgar Manuel Villagrana Hernandez to be most convincing. Mr. Hernandez testified that as part of his job with defendant-employer, he stayed in hotels with claimant near job sites and spent hours in the car traveling with claimant for work. (Tr. pp. 83-85). Mr. Hernandez was asked about claimant's ability to speak and understand English and stated, "I mean, usually he talked more Spanish than English. He could kind of understand it, but some things he doesn't understand." (Tr. p. 85). Mr. Hernandez was the individual claimant relied upon to translate his request to see a physician after falling from the bridge in July, 2011. (Tr. p. 88). I find that claimant's difficulty with English or his history of traffic offenses does not impeach his credibility.

Defendants also argue that claimant's knowing use of social security numbers that were not his own, make claimant not credible. Claimant testified at hearing he used false information for employment purposes because he was "trying to make a better life for [his] family," (Tr. p. 34) something which is known generally to be a common practice.

The deputy commissioner, who was in a unique position to assess claimant's credibility, did not make a finding of a lack of credibility from claimant's demeanor or other factors at the time of the hearing. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly, made by the deputy who presided at the hearing. After consideration of the above arguments made by defendants, I find defendants' arguments regarding claimant's alleged lack of credibility to be unconvincing.

(5) Whether penalty benefits should have been awarded concerning the March 16, 2012, date of injury.

Regarding the award of penalty benefits, Iowa Code Chapter 86.13(4) provides that "the workers' compensation commissioner shall award benefits" of "up to fifty

percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse."

In this case, the claim was denied and benefits were not paid. Pursuant to 86.13(4)(b)(2), the question then becomes whether the employer can prove a reasonable basis for the denial. A denial or delay is deemed reasonable if all of the following conditions are met:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

(Iowa Code Chapter 86.13(4)(c)(1)-(3))

The deputy commissioner found that although defendants may have met their burden concerning paragraphs 1 and 2 above, they did not offer any evidence concerning paragraph 3, the contemporaneous conveyance of the basis for the denial to the employee. (Arb. Dec. p. 10) However, the deputy commissioner gleaned from the record that the authorized treating physician had a phone conversation with claimant's counsel on or about October 23, 2012, in which the doctor advised of the basis for the denial. Therefore, penalty benefits were awarded by the deputy commissioner the for the approximately 31-week period from March 17, 2012, through October 22, 2012. The deputy commissioner awarded a penalty of approximately 30 percent of the benefits owed for that 31-week period, for a total penalty of $4,725,00.

Defendants argue there should be no penalty assigned because the March 16, 2012, date of injury was not clearly asserted by claimant until May 6, 2013, when the petition was filed. (Def. Br. p. 13). However, is it not disputed that claimant reported shoulder pain to his employer on March 16, 2012. At that point, the employer had an obligation to conduct a reasonable investigation and contemporaneously convey to claimant the basis for the denial of weekly benefits. At best, the basis for the denial of weekly benefits was conveyed to claimant's counsel as determined by the hearing deputy, during the conversation between claimant's counsel and the authorized provider. I therefore affirm the penalty assessed by the deputy commissioner.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of December 2, 2014, is AFFIRMED in its entirety:

For File No. 5040527 (Date of Injury: July 22, 2011):

Claimant shall take nothing.

For File No. 5044156 (Date of injury: March 16, 2012):

Defendants shall pay claimant temporary benefits commencing March 17, 2012 at the weekly rate of five hundred eight and 20/100 dollars ($508.20) and continuing until claimant reaches maximum medical improvement (MMI).

Defendants shall pay four thousand seven hundred twenty-five and no/100 dollars ($4,725.00) in penalty benefits.

Defendants shall provide medical care to claimant as set forth in this decision.

Defendants shall pay accrued benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

Defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Defendants shall pay the costs of this matter and the appeal, including the preparation of the hearing transcript.

Signed and filed this 18th day of February, 2016.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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