

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DON FESSLER,
Claimant,

vs.

IOWA STATE PENITENTIARY,
STATE OF IOWA,

Self-Insured,
Employer,
Defendant.

FILED
APR 26 2019
WORKERS COMPENSATION

File No. 5061346

ARBITRATION DECISION

Head Note Nos.: 1402.30, 2502

STATEMENT OF THE CASE

Don Fessler, claimant, filed a petition for arbitration against the Iowa State Penitentiary, as the employer, and the State of Iowa. The undersigned heard this case on April 24, 2019, in Des Moines.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 and 2, Claimant's Exhibit 1 and Defendants' Exhibits A through D. Claimant testified via telephone. No other witnesses were called to testify. The evidentiary record closed at the conclusion of the arbitration hearing and the case was deemed fully submitted.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury arising out of and in the course of his employment on April 19, 2017.
2. Whether the alleged injury caused permanent disability.
3. Whether any permanent disability should be compensated as a scheduled member injury to claimant's right arm or with industrial disability as an unscheduled injury involving claimant's right shoulder.
4. The extent of claimant's entitlement to permanent disability benefits, if any.

5. Whether claimant is entitled to reimbursement of his independent medical evaluation charges.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Donald Fessler is a 50-year-old man. He is a convicted felon and is currently residing at the Iowa State Penitentiary, serving time for armed robbery. He also faces a conviction and scheduled time in a federal penitentiary as a career felon.

On April 19, 2017, Mr. Fessler resided at the Iowa State Penitentiary in Fort Madison, Iowa. He held a job within the prison as a weight yard orderly. In this position, he was required to clean up the weight room, including putting free weights and dumbbells away at the end of the day. Mr. Fessler testified that he was attempting to clean up the dumbbells on that date when he sustained an injury. Specifically, Mr. Fessler testified that he lifted a 100-pound dumbbell and placed it on the weight rack. He bend down to pick up the second 100-pound dumbbell when the first weight roll off the rack, struck the second dumbbell and he felt a "pop" in his right shoulder.

Mr. Fessler testified that he immediately told Jason Rung, his supervisor, about the injury. However, claimant asserts that Mr. Rung did not fill out the required accident report. He sought care through the penitentiary's infirmary. However, he testified that the prison nurse told him, "It is nothing."

Claimant asserted that he continued to request medical care but that there was no physician available at the prison to evaluate him. He stated that he was eventually evaluated and told that they had waited too long to treat his right shoulder and biceps and that it could not be repaired.

Mr. Fessler testified that he has a large divot in his right shoulder and a "Popeye" deformity of his right biceps. He testified that his right shoulder now only has about half of its normal strength. He continues to lift weights with the right arm, but modifies how he does the weight lifting and testified that he cannot lift nearly as much weight since the date of injury. Mr. Fessler testified that his right arm fatigues quickly now with physical activity. Claimant also testified that he wakes up due to symptoms if he sleeps on his right arm.

Nevertheless, he testified that he played handball and won the prison championship since the injury date. He testified that he tries very hard to keep in physical shape. He testified that he cannot do as many pushups now as he has done in the past but he continues to do "burpees."

Review of Mr. Fessler's medical records provides a different view of this claim. Medical records from the Department of Corrections demonstrate that claimant was experiencing shoulder symptoms in June 2015. Claimant was scheduled for a steroid

injection into his shoulder, but the injection was cancelled. In November 2016, claimant reported pain in his shoulder and reported doing multiple repetitions of "burpees." The treating physician in November 2016 recommended claimant rest his shoulder and be less active.

The first medical evaluation after this alleged injury occurred on April 21, 2017, two days after the injury date. A prison nurse evaluated claimant. The nurse recorded complaints of knee and right shoulder symptoms. The nurse also recorded that claimant was "[a]ble to rotate shoulder without difficulty." The nurse did indicate that claimant reported his shoulder popped with movement. She provided no diagnosis, or assessment, related to the right shoulder. Interestingly, although the nurse provided comprehensive notes about her evaluation, there is no report of an injury two days earlier or a report of an incident at work in the prison. (Joint Exhibit 1)

On May 9, 2017, a different nurse evaluated Mr. Fessler. She recorded claimant as reporting, "I seen the nurse a few weeks ago about my shoulder it is still jacked up dislocated or separated. It has bone sticking out my back." She also recorded claimant as reporting, "I think that my bicep muscle is completely separating." (Joint Ex. 1) The nurse noted this as a potential recent injury, but did report claimant as stating, "5 weeks ago I was working on the weight yard and a lift bar was wedged and I hurt it pulling it out." (Joint Ex. 1) This is similar to claimant's alleged mechanism of injury, but not exactly the same as he currently describes the injury.

The nurse evaluated claimant on May 9, 2017. Her findings demonstrated full range of motion in claimant's right shoulder and arm. She noted well-defined biceps, traps and deltoids when claimant flexes. Perhaps most importantly, the nurse noted, "No deformity noted between right and left. There is no bone sticking out in his back as he reports in sick call." (Joint Ex. 1) The nurse appeared skeptical of claimant's reported symptoms and condition. She specifically noted that there was no report of injury by claimant in April 2017. I would also note that five weeks prior to May 9, 2017 would place the alleged injury in early April 2017, approximately April 4, 2017. Claimant's report of a five-week history belies an injury on April 19, 2019.

On June 14, 2017, Steven Cook, M.D., evaluated Mr. Fessler. Dr. Cook noted that claimant has a history of three shoulder surgeries. He notes that claimant has a ruptured biceps tendon at that time, which he ascribes to a recent injury. However, he notes that claimant is a vague historian. Claimant was not vague during his testimony. He identified a very specific event and provided significant detail to the story about how he was injured. The doctor's impression that claimant was a vague historian back in June 2017 gives me concern about the accuracy of claimant's current version of events.

Dr. Cook also noted that claimant did not have a right shoulder dislocation and that he had full range of motion of the right shoulder on that date, including specific range of motion measurements taken on June 14, 2017. (Joint Ex. 1) Dr. Cook ordered a right shoulder x-ray. That x-ray demonstrated degenerative changes, which would be accounted for by the prior right shoulder injuries and surgeries. However, the x-ray

demonstrated no acute abnormalities in the shoulder. Dr. Cook did not record identifying a divot in claimant's right shoulder on June 14, 2017. (Joint Ex. 2)

On July 12, 2017, claimant presented for evaluation with a prison nurse. The nurse records claimant as stating, "I seen the Dr. about 1 month ago was told I needed x-ray and would be seen the next time he was here in two weeks. Still have not seen him again, was supposed to get a cortisone shot. Still in pain, going on 7 months." (Joint Ex. 1)

There are at least a couple of problems with this recorded statement from claimant. First, his alleged injury occurred in April 2017. His statement that his pain was going on 7 months again dates the injury prior to April 19, 2017. Second, there was no recorded plan for a cortisone injection. The medical records in this regard do not corroborate claimant's statement. (Joint Ex. 1)

Mr. Fessler returned for further evaluation by Suzanne Alt, D.O., on September 11, 2017. Dr. Alt notes that claimant has a bilateral shoulder deformity. This is inconsistent with an injury only to the right shoulder. Dr. Alt noted a biceps hollowing, which would support claimant's testimony. However, Dr. Alt noted that claimant had a reduced range of motion in the right shoulder. This is a significant change in the physical examination between June 14, 2017 and September 11, 2017. Claimant went from a full range of motion to "80% of full range of motion." No explanation is provided for the reduction in range of motion over this three-month period.

Dr. Alt recorded a history that varies slightly from the prior history. Now claimant reported that he was lifting a 25-pound plus dumbbell. This history varies significantly from the 100-pound dumbbell claimant testified to at the time of trial. Moreover, the history provided to Dr. Alt was that claimant was lifting heavier weights but makes no reference to the dumbbell rolling off the rack, as claimant described at the time of trial.

Interestingly, Dr. Alt's note of September 11, 2017 also records that claimant reported winning the prison handball tournament. This level of physical activity seems at odds with the significant symptoms reported and loss of function described by Mr. Fessler in those medical records and at trial.

Dr. Alt also records on September 11, 2017 that claimant "has had obvious biceps tendon tear right" which she dated to 2015. Again, this is inconsistent with a biceps tendon rupture in April 2017 and muddles the record further.

Department of Corrections medical records dated November 29, 2017 document that claimant was evaluated at the University of Iowa Hospitals and Clinics Orthopaedic Department on November 19, 2017. According to claimant, the orthopaedic clinic did not evaluate or do anything for his shoulder. This seems odd that claimant would not insist upon evaluation of his shoulder when evaluated by an orthopaedic surgeon. Mr. Fessler's trial testimony demonstrated that he is a fairly aggressive individual and has no problem getting his point across when speaking his mind. However, I do not have

the University of Iowa medical record in evidence to understand specifically what happened.

Dennis Miller, D.O., re-evaluated claimant in the prison on January 3, 2018. In that medical note, Dr. Miller noted that claimant provided dramatic movements and expressed pain complaints that are not substantiated by the physical examination performed that date. Dr. Miller also noted specifically that claimant was able to remove his shirt without problems. Dr. Miller noted claimant was frustrated and became threatening toward the physician. Dr. Miller asked claimant to leave the examination. (Joint Ex. 1) Dr. Miller expressed concerns that claimant, "seems to be pain med seeking" at the January 3, 2018 evaluation. (Joint Ex. 1)

Claimant obtained a records review performed by Sunil Bansal, M.D. Dr. Bansal obviously did not have the advantage of performing a physical examination or an interview of claimant. Instead, it appears that he accepts claimant's description of events as stated in a recorded telephonic statement given by claimant on May 18, 2018. I do not have a copy of the telephonic statement in evidence to determine the accuracy of the information given to Dr. Bansal or whether my findings are consistent with the statements contained in that recorded statement.

Review of Dr. Bansal's report indicates that he reviewed at least most of the medical records I have detailed above. His summary does not include some of the findings I noted, such as the lack of deformity in claimant's shoulders on May 9, 2017. Dr. Bansal makes no reference to the full range of motion finding by Dr. Cook on June 14, 2017, and offers no explanation of why claimant's right shoulder range of motion deteriorated or changed between June and September 2017.

Instead, Dr. Bansal appears to accept claimant's statements without comparison or comment on any discrepancies. Based upon the claimant's undocumented statements, Dr. Bansal concludes that claimant sustained an aggravation of right shoulder impingement and biceps tendinopathy. I also find it curious that Dr. Bansal does not make a current diagnosis of a tear of the long head of the biceps given the findings noted by Dr. Cook on June 14, 2017 and by Dr. Alt on September 14, 2017.

Dr. Bansal provides no comment about the inconsistencies between claimant's current explanation of how the injury occurred and the recorded histories (or lack of history) in the prison medical records. Rather, it appears that Dr. Bansal simply accepts claimant's current description of the injury without consideration or concern for inconsistencies in contemporaneous medical records. I do not share that philosophy. I am troubled by the initial medical record's lack of any history of injury, coupled by the changing history of how the injury occurred in subsequent medical records by multiple medical providers.

Ultimately, this case comes down to the credibility of claimant's testimony and how the injury allegedly occurred. Mr. Fessler's current version of events is not corroborated by contemporaneous medical records. The initial record does not refer to

an injury. Subsequent records detail different mechanisms of injury. Therefore, it is important that Mr. Fessler's current testimony be considered credible and sufficient to overcome any inconsistencies.

Unfortunately, Mr. Fessler is a convicted felon. He is argumentative when discussing his criminal convictions and perceives those convictions (at least the federal conviction) as unfair. He denies certain aspects of the charges brought against him. For instance, Mr. Fessler denied that he committed kidnapping at trial and seemed incredulous at the charge. Yet, during his deposition, he conceded that he did force people to move against their will while committing an armed robbery. (Defendants' Ex. C, p. 7) His testimony about his criminal convictions does not instill significant confidence in his credibility.

This is coupled by an affidavit from Jason Rung, who effectively denies claimant's testimony about reporting an injury on April 19, 2017. Specifically, Mr. Rung states, "Mr. Fessler did not report a work injury to me on April 19, 2017. Had Mr. Fessler reported a work injury to me on that date, I would have completed the appropriate paperwork." (Defendants' Ex. A)

Mr. Rung did not testify live. It is difficult to assess his credibility without having heard or observed him. Yet, he is a prison employee assigned as a supervisor with some responsibility. I have no reason to doubt his affidavit, other than the testimony of claimant. Yet, Mr. Rung's denial of a reported injury rings true given that there is no report of an injury in the initial nurse note two days after the alleged injury. In this sense, the prison nurse and Mr. Rung are consistent, while Mr. Fessler's testimony is inconsistent.

Mr. Fessler appears to have difficulties with authority and is defiant if requested to do something against his will. Claimant also testified in his deposition that he essentially got into an argument with his halfway house when released previously. He was on work release, did not make it back to his halfway house at his designated time. After arguing with the halfway house personnel, he testified he "went on the run." (Defendants' Ex. C, p. 18) This was a knowing violation of parole and demonstrates a willingness by Mr. Fessler to defy authority and do whatever he desires, rather than follow the rules. Although Mr. Fessler proclaims he is not a liar during his trial testimony, his actions during his life do not instill a great deal of confidence in his testimony or his willingness to tell the truth even under oath.

During his deposition, Mr. Fessler proclaimed that he did not have treatment for his right shoulder between the surgery he had in the early 1990s and April 19, 2017. (Joint Ex. 1) This is clearly erroneous and was either a fabrication by Mr. Fessler or simply the result of a faulty memory. Joint Exhibit 1 contains medical records documenting shoulder complaints and treatment less than six months before the alleged injury date. It is difficult to believe claimant did not recall treatment of his shoulder less than six months before the injury date, but I will give him the benefit of the doubt and assume that his memory failed him.

Indeed, similar to his trial testimony, Mr. Fessler's memory appeared to be somewhat of a problem during his deposition. Ultimately, he testified during his deposition that he has a bad memory and that his medical records are probably a better source of information than his memory. (Defendants' Ex. C, p. 38) Ultimately, this is also what I found. I relied more upon the contemporaneous medical records than claimant's memory and testimony. Dr. Bansal relied more upon claimant's memory than the medical records. For that reason, I reject his analysis and causal connection opinion.

While I acknowledge there is some evidence within this record that suggests claimant sustained his injury as a result of work activities, I do not find that evidence convincing. In reviewing the various testimony of claimant and the reports of injury contained in medical histories in this case, I identify at least four versions of the alleged events and at least three possible timeframes when the injury occurred.

The alleged injury possibly occurred on April 19, 2017. (Claimant's testimony) It also could have occurred in early April 2017. (Joint Ex. 1—5/9/17, Nurse's Note). The alleged injury could have occurred in March 2017. (Joint Ex. 1—9/11/17, Medical Note authored by Dr. Alt)

Claimant's right shoulder and biceps injuries could be the result of, or an aggravation caused by, claimant's work on April 19, 2017. (Claimant's testimony; Claimant's Ex. 1) Of course, the actual mechanism of injury also has different possibilities. The injury could have occurred as claimant was cleaning and one dumbbell fell off a rack, striking the second dumbbell claimant was attempting to lift. (Claimant's testimony) The injury could be the result of lifting a weight bar that was wedged while attempting to pull it out. (Joint Ex. 1—5/9/17, Nurse's Note) It could be the result of lifting a barbell that was stuck or caught on something. (Joint Ex. 1—9/11/17, Medical Note authored by Dr. Alt) It is also possible that the dumbbell rolled off the rack and struck claimant in the right arm. (Claimant's Ex. 1)

Of course, this injury could be the result of pre-existing difficulties or a degenerative condition. (Joint Ex. 1—11/28/16, Nurse's Note; Joint Ex. 2) It is also possible that this injury is the result of claimant's personal activities, including potentially lifting weights. (Defendants' Ex. A) Given the three potential injury timeframes and the six potential injury scenarios, claimant needed to provide convincing and credible testimony to explain the differences and convince the undersigned of the actual cause or mechanism of injury. Claimant did not present sufficiently credible testimony and has conceded he has memory issues and that the contemporaneous medical records are likely more accurate than his memory. The initial medical record of April 21, 2017 does not refer to a new injury.

Therefore, I find that Mr. Fessler failed to prove a causal connection between his work at the Iowa State Penitentiary on April 19, 2017 and his shoulder and/or biceps injuries. Having reached this factual finding, I similarly find that Mr. Fessler has not

proven he sustained permanent disability as a result of his work activities at the Iowa State Penitentiary on April 19, 2017.

With respect to claimant's claim for reimbursement of Dr. Bansal's independent medical evaluation, I find that Dr. Bansal is the only physician that rendered a permanent impairment rating in this case. I specifically find that the defendants did not obtain a permanent impairment rating from a physician of their choosing prior to Dr. Bansal's record review and independent medical evaluation report being authored.

CONCLUSIONS OF LAW

The initial disputed issue is whether claimant sustained an injury arising out of and in the course of his employment on April 19, 2017. The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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); Dunlavy 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).

Having rejected Dr. Bansal's causation opinion, having found difficulties and inconsistencies between claimant's testimony and contemporaneous medical records, I ultimately found that claimant failed to prove he sustained a work injury at the Iowa State Penitentiary on April 19, 2017. Therefore, I conclude that claimant failed to carry his burden of proof to establish a compensable work injury on April 19, 2017. I further conclude that claimant failed to establish any entitlement to permanent disability benefits.

The final disputed issue I must address is whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39. Mr. Babcock seeks an order requiring defendants to reimburse Dr. Bansal's independent medical evaluation fees pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The Iowa Supreme Court has strictly interpreted the requirements of Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). Claimant failed to establish that the employer obtained a permanent impairment rating from a physician of their choosing before Dr. Bansal's evaluation. Therefore, I conclude that claimant failed to establish the prerequisites to qualify for

reimbursement of an independent medical evaluation fee pursuant to Iowa Code section 85.39. Id.

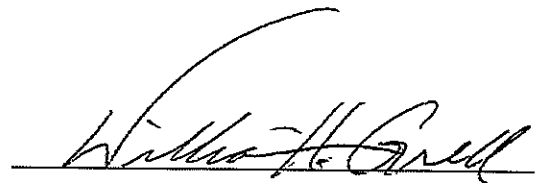
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

All parties shall pay their own costs.

Signed and filed this 26th day of April, 2019.



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DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.