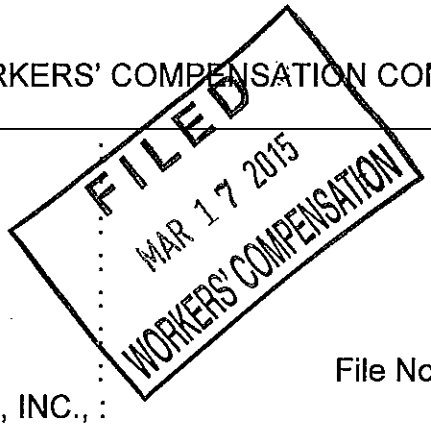
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



SOM KEOSAKOUN,

Claimant,

vs.

MARYANN'S SPECIALTY FOODS, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5048377

A R B I T R A T I O N

D E C I S I O N

Head Note Nos.: 1402.40, 1803

STATEMENT OF THE CASE

Claimant, Som Keosakoun, filed a petition in arbitration seeking workers' compensation benefits from Maryann's Specialty Foods, Inc. (Maryann's), employer, and Liberty Mutual Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on December 22, 2014 and fully submitted on February 16, 2015.

At hearing defendants objected to Exhibit 2 as being untimely served, and Exhibit 6 as being irrelevant. Exhibit 2 is a report from a vocational expert, Carma Mitchell, M.S., C.R.C. Records indicate it was served on defendants on or about November 19, 2014. Exhibit 2 was allowed into the record, and defendants were given 30 days to submit rebuttal to the vocational report. Defendants did submit rebuttal in the form of Exhibit I after the taking of evidence at hearing.

Exhibit 6 is a medical record concerning claimant's mental health. Exhibit 6 deals with claimant's treatment at Broadlawns. Exhibit 6 was found to be relevant and allowed into the record.

The record in this case consists of claimant's Exhibits 1-19, defendants' Exhibits A-I, and the testimony of claimant, Phet Phanivong, and Kelly Korleski. Serving as interpreter was Jennifer Hiracheta.

ISSUES

1. Whether the injury is a cause of permanent disability; and if so
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Commencement of payment of permanent partial disability benefits.
4. Whether there is a causal connection between the injury and the claimed medical expenses.
5. Whether defendants are liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 53 years old at the time of hearing. He was born and raised in Laos. Claimant finished the fifth grade in Laos. He has no other education. Claimant worked as a farmer in Laos. He immigrated to the United States in 1987. Claimant came to Iowa in 1995. In 2004 claimant became a US citizen. Claimant testified he has taken some ESL classes. He says he speaks very little English.

Claimant has worked as a welder. He has held jobs involving soldering and assembly line work. Claimant worked at a job assembling ammunition and in jobs involving plastics. Claimant worked applying sealant to boats. He worked at jobs involving laminating wood products and mixing paint. Claimant has also worked as a meat cutter. (Exhibit 2, pages 1-3; Ex. I, pp. 2-3)

Claimant began at Maryann's in July of 2012 as a production worker. As a production worker claimant cut and packed sausage, assembled boxes, and would fill tanks of barbeque sauce. Claimant worked the night shift and got off around midnight.

On August 15, 2012 claimant was climbing pallets to reach an area where the barbeque sauce was stored. Claimant grabbed a box and fell backwards off the pallet. Claimant said he believed he fell approximately eight feet. Claimant said he landed on a concrete floor on his lower back.

Claimant testified he went to an office at Maryann's and completed an accident report. He said he was told to go home first and then to a hospital the next morning.

On August 16, 2012 claimant was evaluated by Joseph Latella, M.D. Claimant was assessed as having a traumatic back injury and treated with medication. He was not allowed to return to work for a week. (Ex. 4, pp. 1, 5)

Claimant returned to Dr. Latella on August 17, 2012 with continued complaints of back pain. Claimant was referred to physical therapy and kept off work until August 22, 2012. (Ex. 4, pp. 2, 5)

On August 22, 2012 claimant returned in followup with Dr. Latella. Claimant was returned to work with no lifting over five pounds. (Ex. 4, p. 5) Claimant testified that when he returned to Maryann's for light duty, he was put back on work requiring full duty.

Claimant returned to Dr. Latella on August 27, 2012 for followup. Claimant was found to have good flexion and extension. Claimant was discharged from care and returned to work with no restrictions. (Ex. 4, pp. 4-5)

Claimant testified his last day of work at Maryann's was October 4, 2012. He said he told his supervisor he hurt. Claimant said his supervisor told him to go home. Claimant said he hurt so bad that he did not return to work at Maryann's.

Kelly Korleski testified he is vice president at Maryann's. He said that in August of 2012 he held the marketing director and production manager positions at Maryann's. In that capacity, as a production manager, Mr. Korleski is familiar with claimant and his work injury.

Mr. Korleski testified that when claimant returned to work at Maryann's at light duty, claimant worked light duty and did jobs like labeling packages and taping boxes. He said Maryann's was able to give claimant light-duty work the entire time he was on light duty. He said the heaviest thing claimant lifted when on light duty was approximately two-and-a-half pounds.

Mr. Korleski testified that a production line worker would place sausage or barbeque items in a package and put the package into a packaging machine. He said workers also labeled packages, put packages into boxes, and put boxes on pallets. He said employees on the production line rotate positions approximately every two-and-a-half to four hours. He said the heaviest thing a production line worker would lift would be a bucket of sauce weighing approximately 40-45 pounds. Mr. Korleski said no production line worker would lift over 50 pounds. He said a production line worker might lift a bucket of sauce three times every 20 minutes.

Mr. Korleski testified that when claimant returned to work, Maryann's was able to accommodate his restrictions. He said when claimant returned to work he never complained of back pain. He said the job description of a production line worker, found at Exhibit 9, page 1, is correct except the worker needs to lift between 40-45 pounds.

Mr. Korleski testified that because of a change in production, production line workers worked less physically demanding jobs in October of 2012.

Mr. Korleski testified that claimant worked from August 27, 2012 until early October of 2012 when claimant suddenly stopped coming to work. He said he was unaware anyone told claimant not to come to work. Mr. Korleski testified he did not believe any supervisor of Maryann's told claimant to go home. He said claimant has not made any attempts to return to work at Maryann's.

On July 29, 2013 claimant was seen at Broadlawns Hospital. Claimant was seeking a refill of medication. Claimant had no other concerns. (Ex. B, pp. 4-6)

On September 3, 2013 claimant returned to Broadlawns to establish care. Claimant was assessed as having diabetes and hypertension. Claimant had no chronic pain. Claimant was able to move all extremities well and had normal gait. (Ex. B, pp. 8-11)

On October 3, 2013 claimant returned to Broadlawns with complaints of pain in the right hand radiating into his back. Claimant indicated he was hit in the back of the head approximately 20-30 years ago when in Laos. Claimant complained of longstanding lower back pain. He denied any injury. He was told to return to Broadlawns if symptoms worsened or did not reduce. (Ex. B, pp. 13-17)

On October 3, 2013 claimant returned to Broadlawns with complaints of anxiety. He was assessed as having anxiety and diabetes. Claimant was told to follow up at Broadlawns. (Ex. 6)

On February 5, 2014 claimant was evaluated by Malhar Gore, M.D. at Broadlawns. Claimant had pain and tingling in the upper extremities. Claimant had had problems for three to four years. He denied any new injury. Claimant had problems for three to four years since having a neck injury. Claimant was treated with medication and recommended to have nerve conduction studies. (Ex. 7)

Claimant testified he told doctors at Broadlawns he had back pain, but the interpreter he had was probably not very good. (Tr. 68)

On February 7, 2014 claimant returned to Broadlawns. He was evaluated by Daniel McGuire, M.D. Claimant indicated he fell to the floor approximately eight feet in 2012. He was assessed as having neck pain, cervical spondylosis, carpal tunnel syndrome and cubital tunnel syndrome. Medication was discussed as treatment. (Ex. 8)

On February 21, 2014 claimant had EMG/nerve conduction studies. Testing was normal. (Ex. B, p. 18)

In a July 3, 2014 letter, written by defendants' counsel, Dr. Latella indicated claimant reached maximum medical improvement (MMI) for the August 2012 injury on August 27, 2012. He found claimant had no permanent impairment. He opined claimant did not need ongoing medical care for the August of 2012 injury. (Ex. A)

In a July 21, 2014 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant indicated he fell off of pallets on his back and that stacked pallets fell on him. Claimant indicated he lost consciousness. Claimant indicated he had to lift up to 100 pounds at work. Claimant had pain in his neck, upper and lower back. His pain radiated into both upper

extremities and into his fingers. Claimant had developed tremors in both arms and had numbness and tingling in both upper extremities. (Ex. 1, pp. 1-7)

Claimant was found to be at MMI on February 7, 2014. Dr. Bansal found claimant had a five percent permanent impairment based on a finding that claimant "qualifies for a DRE category II impairment." He limited claimant to lifting up to 50 pounds. He found claimant had no permanent impairment to the neck. He opined claimant would benefit by use of a TENS unit and trigger point injections. Dr. Bansal did not believe claimant could return to his former work. (Ex. 1, pp. 7-11)

In a November 18, 2014 report, Carma Mitchell gave her opinions of claimant's vocational opportunities. Claimant told Ms. Mitchell that he could only sit for 10-20 minutes, stand 10-15 minutes and could only lift 5-10 pounds occasionally. Given claimant's self-described limitations, Ms. Mitchell opined claimant would not be able to sustain full-time employment. She recommended claimant apply for assistance with the State Office of Vocational Rehabilitation. (Ex. 2)

In a deposition taken July 9, 2014 claimant testified that he had not applied anywhere and did not intend to apply for work. (Ex. H, deposition pp. 19-20) In a list dated November 18, 2014 claimant indicated he looked for three jobs on November 17, 2014, one job on July 21, 2014, and a job on an unknown date. (Ex. 11)

In a report dated January 23, 2015, Laura Sellner, M.S., C.R.C., gave her opinions of claimant's vocational opportunities. She opined claimant would be employable. Ms. Sellner performed a labor market survey and found a number of jobs claimant could perform within the restrictions given by both Dr. Latella and Dr. Bansal. (Ex. I)

At hearing claimant stood and sat throughout hearing. Claimant's arms had tremors and shook throughout the hearing. Claimant said because of his back pain he has difficulty doing anything without pain. He said he is unable to shovel snow or mow the lawn. Claimant said he used to go on long walks. He says he no longer can walk due to back pain.

Claimant testified that after leaving Maryann's, he worked one day with a temporary agency in a cemetery. He said his back hurt so much after one day's work, he did not return to work at the temporary job.

Claimant testified he did not believe he could return to work to any of his prior jobs given his back pain.

Phet Phanivong testified she accompanies claimant on doctor visits. Ms. Phanivong testified she is claimant's friend and met claimant at the Laotian Temple in Des Moines. Ms. Phanivong said she acts as an interpreter for claimant. She said Dr. McGuire told her claimant cannot return to work due to his back condition.

Ms. Phanivong testified she accompanied claimant on his visits to Broadlawns and with Dr. Bansal. Ms. Phanivong said claimant has applied for multiple jobs in 2013.

Mr. Korleski testified claimant could have gone to him regarding difficulty with performing work, but did not do so. He said the restrictions, given by Dr. Bansal, could have been accommodated by Maryann's so that claimant could have continued to work. He said if claimant reapplied to work at Maryann's, Maryann's would rehire claimant.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant's injury of August 15, 2012 resulted in a permanent disability.

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 R. App. P. 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).

Claimant was injured at work after falling off of pallets. Claimant fell on his back approximately eight feet to a floor. Claimant received treatment from Dr. Latella. Dr. Latella took claimant off for one week and returned him to light duty for one week. On August 27, 2012 Dr. Latella returned claimant to work without restrictions. He found claimant was at MMI on August 27, 2012 and that he had no permanent impairment. (Ex. 4, p. 5; Ex. A)

Claimant worked at Maryann's for over a month. He left Maryann's on or about August 4, 2012. There is a disagreement as to how claimant left Maryann's. Claimant testified he was told to go home, by a supervisor, after he complained of pain. Claimant did not return to work at Maryann's. Mr. Korleski testified claimant just left work and never returned. Mr. Korleski doubted any supervisor sent claimant home. There is no evidence claimant ever made any effort to return to Maryann's or contact Maryann's staff regarding a return to work after his injury.

After claimant left Maryann's, in October 2012, he did not seek medical treatment until July of 2013. Between July of 2013 and October of 2013 claimant treated at Broadlawns on at least four occasions. There is no mention in any of the records during this period of time that claimant had treatment for back pain or any work-related back pain. (Ex. B, pp. 4-16; Ex. 6)

On February 5, 2014 claimant returned to Broadlawns to treat with Dr. Gore. Claimant complained of upper extremity problems. Claimant indicated problems had persisted for three to four years since his neck injury. Claimant denied any new injury. There is no indication, from this visit, claimant complained or was treated for back pain related to work. (Ex. 7)

On February 7, 2014 claimant was evaluated by Dr. McGuire for back pain related to a fall at work. (Ex. 8)

Claimant was returned to work by Dr. Latella on August 27, 2012 with no restrictions. From August 27, 2012 up to February 7, 2014 there is no record claimant treated, or complained of back pain caused by a work injury. This is a period of time of almost one and a half years. Claimant did treat with physicians during this time, but not for back pain. Claimant testified at hearing he told Broadlawns physicians he had back pain, but they ignored him, in part, because his translator was poor. (Tr. 68) The record at hearing, suggests claimant's friend, Ms. Phanivong, was claimant's interpreter at Broadlawns. On February 7, 2014 claimant did complain of back pain from a work injury to Dr. McGuire. (Ex. 8)

In a July of 2014 IME report Dr. Bansal found claimant had permanent impairment related to the August of 2012 fall at work. His report indicates that after the fall, pallets fell on claimant and claimant lost consciousness. (Ex. 1, pp. 5-6) There is no other evidence in the record, including claimant's own testimony at deposition and at hearing, that pallets fell on claimant and claimant lost consciousness. Dr. Bansal limited claimant to lifting 50 pounds occasionally and opined claimant could not return to work at Maryann's. There is no evidence in the IME report Dr. Bansal knew much, if anything, of claimant's work at Maryann's. The record indicates maximum lifting for the production line job at Maryann's was 45 pounds. Dr. Bansal's notes indicate claimant lifted 100 pounds at work. Based on these discrepancies, it is found Dr. Bansal's opinion regarding causations are not convincing.

Claimant is an admirable person. Despite his limitations with English, he came to the United States, learned to weld, and managed to obtain citizenship. Mr. Keosakoun exhibited tremors in his arms at hearing. I have no reason to doubt his tremors are real. However, for one-and-a-half years after his return to work, claimant never saw a doctor for any work-related back pain. He saw doctors for other conditions, but not back pain. There is no explanation for this discrepancy in the record other than the interpreter failed to properly interpret claimant's condition to Broadlawns physicians. The record suggests claimant's interpreter at the Broadlawns' appointments was Ms. Phanivong, claimant's friend.

Given this record, claimant has failed to carry his burden of proof that his August 2012 injury resulted in a permanent disability.

As claimant has failed to carry his burden of proof his August of 2012 injury resulted in a permanent disability, all other issues in this case are moot.

ORDER

THEREFORE IT IS ORDERED:

That claimant shall take nothing in the way of benefits from this proceeding.

That each party shall pay their own costs.

Signed and filed this 17th day of March, 2015.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.