BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PATRICIA WALTON,

Claimant,

vs.

RAMADA TROPICS RESORT,

Employer,

and

CONTINENTAL WESTERN INSURANCE,

Insurance Carrier,
Defendants.

File No. 5049342

ARBITRATION DECISION

Head Note No.: 1100

STATEMENT OF THE CASE

Claimant, Patricia Walton, filed a petition in arbitration seeking workers' compensation benefits from Ramada Tropics Resort, employer, and Continental Western Insurance, insurance carrier, both as defendants, as a result of an alleged injury sustained on June 12, 2014. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on January 7, 2016, in Des Moines, Iowa. The hearing was scheduled to begin at 1:00 p.m., but did not commence promptly in hopes of allowing claimant ample time to present. Upon agreement of the parties, the hearing commenced at 1:20 p.m. without claimant's presence. As claimant did not present for hearing, defendants moved to dismiss her claim with prejudice. Defendants' motion was denied by the undersigned and the matter proceeded to hearing for presentation of evidence.

The written record in this case consists of joint exhibits A through G. Claimant did not present for hearing and accordingly, offered no hearing testimony. No other witnesses were called by claimant's counsel. In lieu of defendants presenting the testimony of three live witnesses, defendants' counsel summarized the anticipated testimony of each potential witness and claimant's counsel stipulated that the summaries accurately reflected the anticipated testimony of these three potential witnesses, Hallie Durnaviche, Cory Mitchell, and John Sullivan. Post-hearing briefs were not required by the undersigned, nor requested by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on June 12, 2014 which arose out of and in the course of her employment;

2. Whether claimant's claim for benefits is barred for failure to provide timely notice under Iowa Code section 85.23;

3. Whether the alleged injury is a cause of permanent disability;

4. The extent of permanent disability to claimant's scheduled member right leg; and

5. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code section 85.39.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

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

The evidentiary record indicates claimant is a resident of Newton, Iowa. She graduated high school in 1984 and thereafter, pursued some postsecondary coursework towards an associates' degree in hotel and restaurant management. (Exhibit E, pages 65-66; Ex. F, p. 70) Claimant's work history includes work as a grocery store clerk in the bakery and produce departments, assistant manager at convenience stores, sales at a department store, bartender, machine operator and production work, fork truck driver, and employment at defendant-employer. (Ex. F, pp. 71-76) Claimant began work at defendant-employer on June 11, 2014 as a server. (Ex. B, p. 41; Ex. D, pp. 59-64)

At her deposition, claimant testified she sustained an injury at work on June 12, 2014 after slipping on a wet kitchen floor and falling to the ground. Claimant testified she developed right ankle and leg pain after the fall. Claimant indicated a coworker from the kitchen helped her to stand and thereafter, she told several coworkers of the injury. Although claimant testified she did not specifically recall the names of several coworkers whom she notified, she testified she informed "Vicky" and bartender, Cory

Mitchell. Claimant also testified she informed her supervisor, Courtney Brown, about the injury on a later date. (Ex. F, pp. 79-80)

One of the stipulated hearing statements pertained to the anticipated testimony of assistant general manager of defendant-employer, Hallie Durnaviche, who is tasked with handling workers' compensation claims for defendant-employer. By her stipulated statement, defendants represented Ms. Durnaviche had no knowledge of the alleged injury from claimant, any supervisor, or any coworker. Courtney Brown, claimant's supervisor, denied knowledge of an injury to Ms. Durnaviche. The original notice and petition filed by claimant served as Ms. Durnaviche's notification of the alleged injury of June 12, 2014.

A second stipulated hearing statement pertained to the anticipated testimony of John Sullivan, general manager of defendant-employer. Similar to Ms. Durnaviche, Mr. Sullivan received notification regarding the alleged injury by claimant's filing of an original notice and petition. Neither claimant nor any supervisor informed Mr. Sullivan of the alleged injury.

The third stipulated hearing statement pertained to the anticipated testimony of Cory Mitchell, bartender for defendant-employer. Mr. Mitchell worked in close proximity with claimant and did not observe any injury or ill effects from an injury. By Mr. Mitchell's account, claimant never informed him she was injured. Additionally, claimant lived with him for a short time after her employment at defendant-employer ended; he observed no evidence of injury at the beginning of this period and indicated claimant developed symptoms later.

Following the alleged work injury, claimant continued to work for defendant-employer as a server. (Ex. B, p. 41; Ex. D, pp. 59-64) Defendant-employer terminated claimant's employment effective July 12, 2014. Termination records revealed claimant had previously been counseled regarding lateness and on July 12, 2014, claimant called approximately 1 ½ hours after the beginning of her shift to inquire if she needed to come to work. (Ex. B, p. 41)

On July 25, 2014, claimant sought care at Newton Clinic and was evaluated by Stephanie Bantell, M.D. Claimant complained of developing bruises on her legs with "no known trauma." Claimant further indicated she had quit her waitressing job due to "cramping leg pains" and right ankle pain, without known injury to the ankle. (Ex. A, p. 9) Dr. Bantell assessed Achilles tendinitis, for which she recommended conservative measures of rest, nonsteroidal anti-inflammatories, ice and heat. With regard to bruising, Dr. Bantell indicated claimant perhaps needed more iron and vitamin C in her diet. (Ex. A, p. 11)

Claimant returned to the Newton Clinic on July 31, 2014. On this occasion, claimant was evaluated by Steven Hill, M.D. Claimant described pain of the back of her right ankle. Dr. Hill noted no precipitating injury, with pain beginning the end of May or early June 2014. He assessed Achilles tendinitis and ordered a course of physical therapy. (Ex. A, pp. 12-13)

On August 26, 2014, claimant returned to the Newton Clinic and was evaluated by T.Y. Chan, D.O. in follow up of her Achilles tendinitis. Claimant reported the area was quite painful. Dr. Chan prescribed Mobic and provided a post-operative shoe to reduce flexion of the foot and ankle. (Ex. A, p. 16)

On September 29, 2014, claimant sought care at The Iowa Clinic with podiatrist, Eric Temple, DPM. Dr. Temple noted claimant injured her right Achilles tendon approximately 2 months prior. Claimant described constant pain at a level 9 on a 10-point scale. X-rays of the right ankle were read as normal, with the presence of soft tissue swelling. Dr. Temple assessed Achilles tendinitis and recommended use of a CAM boot. He further recommended an MRI of the right ankle, which was completed on October 8, 2014. (Ex. A, pp. 18-19, 21-22)

Claimant returned to Dr. Temple on October 10, 2014. Dr. Temple reviewed claimant's MRI and assessed Achilles tendinitis and an Achilles tendon tear. In discussion of treatment options, claimant elected to proceed with surgical repair. (Ex. A, p. 25)

On November 24, 2014, Dr. Temple directed a letter to claimant advising he would no longer offer her medical treatment due to claimant's failure to follow his medical advice and present to scheduled evaluations. (Ex. A, p. 26)

Subsequently[1], Dr. Temple authored a letter regarding his treatment of claimant. Dr. Temple indicated he diagnosed claimant with right Achilles tendonitis and a right Achilles tear, confirmed by right ankle MRI. (Ex. A, p. 29) At the time of claimant's first visit, Dr. Temple indicated claimant did not verbalize sustaining any work-related injury. He indicated at no point did claimant mention a slipping event as the cause of her pain. (Ex. A, p. 29a)

Dr. Temple opined claimant failed conservative treatment of use of a CAM boot and reduced weight-bearing. Dr. Temple indicated he then offered claimant physical therapy, heel lifts and a prescription for Meloxicam. Claimant declined this conservative care, claiming such treatments had been ineffective. Accordingly, Dr. Temple offered surgical intervention, with the procedure scheduled for November 11, 2014. However, claimant was a no show for surgery and Dr. Temple ultimately terminated his course of care. Dr. Temple noted following his notice of withdrawal of care, claimant telephoned and threatened to sue Dr. Temple for not completing the agreed treatment program. (Ex. A, p. 29)

Dr. Temple opined the typical mechanisms associated with Achilles tendinosis or tears are overuse, running and jumping activities, stair use, and the increased duration and intensity of training. He opined these conditions are not typically associated with slipping events. (Ex. A, p. 29a)

[1] Dr. Temple authored a letter containing his opinions dated November 11, 2015.

On February 3, 2015, claimant presented to the University of Iowa Hospitals and Clinics and was evaluated by Phinit Phisitkul , M.D. Dr. Phisitkul noted the evaluation was precipitated by a fall at work in July 2014. Claimant reported level 10 pain with walking and indicated she did not utilize the provided CAM boot due to contralateral pain issues. (Ex. A, p. 30) X-rays of the right ankle revealed some thickening of the Achilles tendon, suggestive of tendinopathy. (Ex. A, pp. 31, 36)

Dr. Phisitkul assessed Achilles tendinopathy with hypersensitivity during physical examination. He opined claimant's pain responses were inconsistent with imaging results and the reported injury. Accordingly, he referred claimant for a consultation with the pain clinic to evaluate the heightened pain response and provide pain management. Dr. Phisitkul provided claimant an aircast boot and ordered a course of physical therapy. (Ex. A, pp. 31, 35)

At the arranging of claimant's counsel, on December 4, 2015, claimant presented for independent medical evaluation (IME) with board certified occupational medicine physician Sunil Bansal, M.D. Dr. Bansal issued a report of his findings and opinions dated December 8, 2015. As elements of the IME, Dr. Bansal performed a review of claimant's medical records and a physical examination. (Ex. G, pp. 93-96) He also interviewed claimant, who reported suffering a fall on a wet kitchen floor at work on June 12, 2014, which resulted in a twisting of her right foot. (Ex. G, p. 95) Claimant complained of constant pain of the right foot and ankle, swelling of the areas, and difficulty with stairs and prolonged walking or standing. (Ex. G, p. 96)

Following records review, interview and examination, Dr. Bansal assessed a right Achilles tendon tear. He opined claimant sustained a permanent impairment of five percent right lower extremity as a result of decreased strength secondary to the condition. (Ex. G, pp. 96-97) With respect to the issue of causation, Dr. Bansal opined:

> The mechanism of injury, falling and twisting her left [*sic*] foot, along with her acute clinical presentation is consistent with her Achilles tendinitis and tendon tear.

(Ex. G, p. 97)

Claimant did not present to evidentiary hearing or otherwise allow the undersigned to observe her demeanor. Therefore, claimant's credibility can only be evaluated in terms of clarity and consistency between her deposition testimony and the remainder of the evidentiary record. While claimant alleges she sustained a work related injury on June 12, 2014, there is no written evidence supporting claimant's testimony that she contemporaneously reported the alleged injury. Claimant's counsel stipulated to the content of summaries of the anticipated testimony of three of claimant's former coworkers, none of whom expressed knowledge of claimant's alleged work injury in the manner described by claimant. Her former coworker and roommate, Mr. Mitchell, denied knowledge of an alleged work injury and further indicated he did not observe any symptoms in claimant until after her termination by defendant-employer.

Claimant's contemporaneous medical records also do not note a history of an injury at work. Dr. Bantell's record of July 25, 2014 indicates claimant quit her employment as a server due in part to right ankle pain, but no specific mechanism of inciting injury was reported. The first mention of any form of injury was Dr. Temple's notation of September 29, 2014, which simply states claimant suffered an injury two months prior. The first specific mention of a work related injury is noted in Dr. Phisitkul's record of February 3, 2015, nearly eight months after the alleged injury.

Given these inconsistencies, it is determined claimant's deposition testimony is not credible, nor are her descriptions of the alleged injury to any medical provider.

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury on June 12, 2014 which arose out of and in the course of her employment.

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 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 Elec. 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); 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).

As set forth *supra*, the undersigned finds claimant was not a credible witness or historian. While Dr. Bansal causally related claimant's right ankle conditions to the alleged injury of June 12, 2014, in doing so, he relied upon claimant's description of her mechanism of injury. Specifically, claimant informed Dr. Bansal she slipped, fell, and twisted her right ankle and foot. There is no evidence in the record which supports this alleged mechanism of injury except claimant's own statements. As identified *supra*, claimant's contemporaneous medical records denote no known injury. The record of Dr. Bantell references claimant's inability to continue her employment due to symptoms, but denies a specific injury; I would presume a discussion of her inability to continue working would have prompted claimant to describe a work injury to Dr. Bantell, had such an injury occurred. I therefore find Dr. Bansal's opinion is based upon an inaccurate and unsubstantiated history and is therefore, entitled to no weight on the issue of causation.

Furthermore, in the proverbial battle of the experts, I provide greater weight to the opinions of treating podiatrist, Dr. Temple. Both Dr. Temple and Dr. Bansal were selected by claimant or claimant's counsel. Dr. Temple possessed the opportunity to contemporaneously evaluate claimant and craft a treatment plan. During his treatment of claimant, he took patient histories, none of which referenced a slip and fall event at defendant-employer. Dr. Temple opined claimant's diagnoses of Achilles tendonitis and Achilles tear are not typically associated with slipping events. Rather, he indicated such conditions are typically related to overuse or physical activities such as running, jumping, stair use, and intensified training. As Dr. Temple is a practicing podiatrist, I find his opinion on the causes of Achilles injuries to be entitled to greater weight than the opinion of Dr. Bansal, an occupational medicine physician.

As I found claimant was not a credible witness or historian and having accordingly discounted the medical opinion of Dr. Bansal, it is determined claimant has failed to meet her burden of proof with respect to establishment of a work related injury. Specifically, I find claimant has failed to prove by a preponderance of the evidence that she sustained an injury on June 12, 2014 which arose out of and in the course of her employment with defendant-employer. Accordingly, consideration of the issues of causation and extent of permanent disability is unnecessary. Also moot is defendants' defense of lack of notice pursuant to Iowa Code section 85.23.

The final issue for determine is whether claimant is entitled to reimbursement for an independent medical evaluation 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).

Claimant requests reimbursement for the independent medical evaluation of Dr. Bansal in the amount of $1,295.00. (Ex. G, p. 98) In this matter, no employer-retained physician treated or evaluated claimant. Although Dr. Temple responded to inquires posed by defendants' counsel, Dr. Temple was not asked to opine as to the existence or extent of permanent impairment or claimant's need for permanent restrictions. Therefore, I find there was no opinion offered by an employer-retained physician which triggered claimant's right to a section 85.39 IME. Claimant is not entitled to reimbursement of Dr. Bansal's IME pursuant to Iowa Code section 85.39. Although not specifically requested by claimant, claimant is also not entitled to taxation of all or any portion of the cost of Dr. Bansal's IME fee under rule 876 IAC 4.33, as Dr. Bansal failed to itemize what portion of his fee was attributable to report preparation. See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to claimant pursuant to rule 876 IAC 4.33.

Signed and filed this 10th day of June, 2016.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/srs

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.