BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH STREIT, Claimant, vs. STREIT CONSTRUCTION, INC., Employer, and EMC INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 5043612 REMAND DECISION

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WORKERS' COMPENSATION

This matter comes before the Iowa Division of Workers' Compensation on remand from the Iowa District Court for Webster County.

A May 7, 2015, arbitration decision found, in part, claimant carried his burden of proof he sustained an infection caused by septicemia, an infection of the blood, caused by methicillin-resistant staphylococcus aureus (MRSA) that arose out of and in the course of employment. Based on that finding, claimant was awarded healing period benefits and three hundred weeks of permanent partial disability benefits.

The December 7, 2016, appeal decision reversed the arbitration decision in its entirety, and found claimant failed to carry his burden of proof he sustained a MRSA infection that arose out of and in the course of employment.

The decision was appealed in a petition for judicial review to the Iowa District Court for Webster County. On November 20, 2017, the District Court remanded this matter back to this agency, finding, in part, this agency applied standards from Iowa Code Chapter 85A, rather than Chapter 85, in determining causation. The District Court ordered this agency to apply Iowa Code chapter 85 in determining causation.

FINDINGS OF FACT

Claimant was 54 years old at the time of the arbitration hearing. (Hearing Transcript, page 8) He graduated from high school. (Tr. p. 9) Claimant completed a one-year construction program at Iowa Lakes Community College following high school (Id.) Claimant started his own construction company in 1979 (Tr. pp. 9-10) Claimant's

company is the defendant-employer in this case. At the time of hearing, the company was still in business. (Tr. p. 79)

Claimant testified he performed physical and manual labor for his company from the day the company was started. (Tr. p. 10) He said he worked on both residential and commercial projects throughout his employment. (Tr. p. 11) Claimant testified his business has also performed a fair amount of concrete work (Id.)

Claimant testified October 13, 2012, was a normal day of work for him. (Tr. p. 23) He said he cleaned up on a job site that day. (Id.) He testified that particular day was to be the last day for his company to be at that job site. (Tr. pp. 23-24) He testified he worked alone that day (Id.) He spent part of the day picking up cement forms that weighed between 40 and 80 pounds (Id.) He did not recall doing anything at that job site on October 13, 2012, to injure his back. (Id.)

Claimant was evaluated in the emergency department at Trinity Regional Medical Center (TRMC) early in the morning of October 14, 2014, reporting back pain. (Exhibit 1, p.1) According to the ER note, claimant reported his pain was "present in the thoracic spine." (Id.) Claimant also reported left rib pain, arm pit-area pain with spasms into his left shoulder blade and down into the left side of his back. (Ex. 1, p. 4) Claimant was prescribed some medication and discharged to go home on October 14, 2012. (Ex. 1, pp. 3-4)

Claimant was seen at TRMC again on October 17, 2012, for back pain. The clinical note stated the following: "The pain is associated with no known injury." (Ex. 1, p. 8)

On October 18, 2012, claimant was evaluated at McCrary-Rost Clinic in Gowrie. According to the clinical note, claimant presented with "hip pain." (Ex. 1, p. 14) The history in the note indicated the following:

> Had pain in left side chest and left shoulder blade pain which developed Sunday afternoon. Patient states it was so severe he thought he was having a heart attack . . . He went to chiropractor on Tuesday. After his adjustment by the chiropractor, the pain moved to his right hip on Tuesday.
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> . . .
>
> Patient to be evaluated for hip pain.

(Id.)

Multiple tests were ordered by the physicians at McCrary-Rost Clinic, including a blood culture test. (Ex. 1, p. 17) The clinical note of October 19, 2012, indicated claimant's blood cultures came back positive and claimant was directed to go to TRMC. (Ex. 1, p. 18)

Claimant was admitted to TRMC on October 19, 2012, where he was evaluated and treated by James Comstock M.D., and the emergency room staff. Claimant was diagnosed with septicemia, an infection of the blood, caused by methicillin-resistant staphylococcus aureus (MRSA), a bacterium which causes infections in different parts of the body.

Claimant was transferred to Iowa Methodist Medical Center (IMMC) on October 21, 2012. (Ex. 1, p.29) At IMMC, claimant was evaluated by multiple physicians, one of whom was Christopher D. Nelson, D.O. Dr. Nelson's note stated the following: "He is diagnosed with MRSA bacteremia. At this point, there is not an exact source." (Ex. 1, p. 36) Another note from IMMC states the following:

> The patient does report a long history of picking at sores and lesions from abrasions during his work. He says that when he sweats a lot he breaks out with sores on his scalp, within his beard, as well as his arms. He states he picks them a lot and occasionally they will have pus associated with them. He also reports this seems to have worsened approximately two summers ago. He does state he has chills on and off, although has not taken his temperature. He also reports his son has a history of MRSA skin infections yearly from wrestling in high school, starting in his freshman year approximately four years ago.

(Ex. 1, p. 38)

Claimant was evaluated by Sudhir Kumar, M.D., an infectious disease doctor, while he was a patient at IMMC. (Ex. 1, p. 40) Claimant was also evaluated and treated by David Boarini, M.D., neurosurgeon, while he was a patient at IMMC. (Id.) Claimant was treated by Dr. Boarini for discitis in his spine caused by the MRSA. (Ex. C, p. 2) Claimant was discharged from IMMC on October 26, 2012. (Ex. 1, p. 42)

Claimant testified at hearing that the doctors who treated him for the MRSA infection told him the MRSA has resolved. (Tr. p. 88) He testified he no longer receives medical treatment for MRSA. (Id.) Claimant testified he never had pain in his back and legs and numbness and tingling in his legs until he had the MRSA infection. (Tr. p. 63) He testified that the back and leg pain and the numbness and tingling in his legs continued after the MRSA infection resolved and was still present at the time of the arbitration hearing. (Id.) Claimant testified he also has frequent cramping in his right leg. (Tr. pp.43-44) He stated his back and leg pain affect his ability to stand and walk. (Tr. p. 44) He stated he has difficulty with balance. (Id.)

On December 7, 2012, in response to a question regarding whether claimant's MRSA diagnosis was work-related, Dr. Kumar indicated:

> Patient was not seen by me in the past for reported skin condition/ infections post injuries.
>
> I am unable to determine if his current infection is work related.

(Ex. A)

On January 22, 2013, Kayla Blanchard, Claims Adjustor for defendant-insurer, wrote to Dr. Comstock, the staff physician at Trinity Regional Medical Center who treated claimant when claimant was hospitalized at TRMC from October 19, 2012, through October 21, 2012. Ms. Blanchard asked Dr. Comstock to provide his opinion regarding causation of claimant's MRSA infection. (Ex. 7, p. 1) In an undated written response, Dr. Comstock indicated:

> Kenny Streit came to the Trinity Regional Health systems emergency room in the fall of 2012, suffering from an acute illness. This was his third visit to a health care facility in his attempt to discover the cause of, and obtain treatment for this illness. He appeared acutely ill, and indeed, had positive blood cultures for methicillin resistant staphlycoccus (sic) aureus obtained on a previous ER visit. By the time we saw him over a week had gone by since the onset of his illness, making it difficult to pinpoint the exact start of his illness. He was found to have a septicemia (blood stream infection), with remote sites of infection in his body. He was started on powerful intravenous antibiotics, and was ultimately transferred to a Des Moines hospital for further evaluation and care. MRSA infections (as these are called), typically start with a portal of entry by way of a skin or mucous membrane cut, abrasion, or microabrasion. It is unheard of to contract this sort of infection by other means (ie: ingestion or inhalation). Mr. Streit is subjected to microabrasions on a regular basis in the course of his work as a carpenter. It is very unlikely any other mechanism would be the cause of his illness. It would be unfair to make Mr. Streit determine which microabrasion was the start of his illness, as that would be humanly impossible. The overwhelming possibility is that his illness arose out of his working conditions.

(Ex. 7, p.2)

In a letter to Ms. Blanchard dated May 10, 2013, Kevin Cunningham, M.D., of Iowa Clinic Internal Medicine, stated the following, in pertinent part:

> . . . After review of the notes you provided related to this claim it is my opinion that there is no adequate evidence that his work was related to the cause of his infection. His occupation would not be considered a high risk occupation in the context of MRSA exposure and his available records did not indicate any history of specific exposure to high risk areas or surfaces. The record did not indicate any history of acute cellulitis or other skin/soft tissue infection directly related to work exposure either.

(Ex. B)

On October 29, 2014, claimant was evaluated by Shahnawaz Karim, M.D., neurologist in Fort Dodge. In his report, Dr. Karim stated the following in pertinent part:

> Kenneth is a 54 y.o. male who complains of back pain and tingling and numbness in his leg on the right side. The onset of symptoms was sudden in 2012. He had posterior epidural abscess (L2-L3) as well as bilateral psoas abscess.
>
> He also had sepsis and was treated with IV antibiotics, after which he received physical therapy and occupational therapy, but he continues to have back pain. He works in construction. Currently he does not have any limitations as far as his work is concerned, but he states that when he comes back home he is in a lot of pain . . . I have reviewed his MRI of the lumbosacral spine, which shows mild scoliosis at L3-L4 disk space and marked degenerative and diskogenic changes noted at L2-3. These are the sequela of the epidural abscess. He has been evaluated at the pain clinic and has been prescribed oxycodone for now.
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> . . .
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> ASSESSMENT AND PLAN: A 54-year-old male with back pain, likely from degenerative disk disease of the spine s/p epidural abscess and discitis and clinical exam also suggestive of lumbar radiculopathy. Currently there is no concern for peripheral neuropathy. I have counseled the patient that this condition will likely progress; however, we are not exactly sure about the extent of progression. I have advised physical therapy and occupational therapy for this patient to minimize any further degenerative changes in his spine.

(Ex. 1, pp. 72, 74)

Dr. Karim did not indicate whether he believed claimant's MRSA infection and its effect upon his pre-existing degenerative back condition is related to claimant's employment with defendant-employer.

At the direction of his attorney, claimant had an IME with John D. Kuhnlein, D.O. on January 6, 2015. (Ex. 2) Following his evaluation of claimant and his review of the medical records, Dr. Kuhnlein concluded that proving Claimant's diagnosis of MRSA is causally related to claimant's employment would require proof that claimant acquired the MRSA through dermal transmission through open cuts and sores while working in an environment in which claimant had actual exposure to MRSA in a fashion which would infect the cuts and sores. (Ex. 2, p. 15) Dr. Kuhnlein indicated, in part:

> . . . At this time, there is no objective evidence that the MRSA entered his body through one of the cuts on his arms – I do not find any evidence that the arms were cultured to show that they were MRSA infected. That is a reasonable presumption however.
>
> . . . Please note that all theories of work-relatedness depend upon actual exposure to MRSA that can be proven in a work-related setting. If there is no objective proof of work-related MRSA exposure, then it is speculative to assume that this was work-related MRSA. **Simply saying that one's arms have cuts and scrapes and therefore the MRSA is work-related is insufficient evidence to medically prove work place exposure.**
> . . .
>
> In brief summary, Mr. Streit did have cuts, abrasions and breaks in his skin. To close the causation loop and make his MRSA infection work-related, it must also be shown that he was infected by MRSA in a work-related scenario where it is likely the MRSA entered his cuts, scrapes or open sores. All must be present in this case. You cannot simply assume that because he had cuts and because he was working in a dirty environment, then he had MRSA. MRSA is community-acquired in very specific circumstances, and it can typically be proven to exist in those circumstances, such as in contact sports, in military camps, childcare centers and jails. If it can be proven he had such MRSA exposure in a work related fashion then the MRSA exposure would be related to his work, and all the conditions, including the back condition, would be work related.

(Ex. 2, pp. 17) (Emphasis added)

CONCLUSION OF LAW

The first issue to be determined, on remand, is whether claimant carried his burden of proof he sustained an injury, under Chapter 85, that arose out of and in the course of 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 R. App. P. 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 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); 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).

Four experts have opined regarding the causal link between claimant's alleged MRSA condition and his work. Dr. Comstock treated claimant for approximately three days. He opined "The overwhelming possibility is that his illness arose out of his working conditions." (Ex. 7, p 2) As noted in the appeal decision, it is again found that Dr. Comstock's opinion regarding causation does not satisfy claimant's burden of proof. As detailed above, 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). For this reason, it is found Dr. Comstock's opinion regarding causation is not convincing.

Dr. Kumar specializes in infectious diseases. The record indicates he has far greater experience and background in dealing with infectious diseases than does Dr. Comstock. Dr. Kumar opined he was unable to determine if claimant's MRSA infection was work-related. (Ex. A)

Dr. Cunningham opined there was not adequate evidence to determine if work was the cause of claimant's MRSA infection. (Ex. B)

Dr. Kuhnlein evaluated claimant on one occasion for an IME. Dr. Kuhnlein was an expert retained by claimant. Dr. Kuhnlein opined it was speculative, at best, that claimant's MRSA was work-related. (Ex. 2, pp. 15-18)

The record also indicates claimant potentially came in contact with MRSA through his son. (Ex. 1, p. 38)

Doctors Kumar, Cunningham and Kuhnlein all opined there was insufficient evidence to show claimant had work-related MRSA. Dr. Comstock's opinion regarding causation is found not convincing. The record suggests claimant potentially came in contact to MRSA at home. Given this record, claimant has failed to carry his burden of proof his alleged MRSA condition arose out of and in the course of his employment.

Claimant suggests his situation is similar to the claimant in IBP v Burress, 779 N.W. 2d 210 (Iowa 2010), and as such causation should be found in his favor. The Burress case is distinguishable from claimant's situation for at least two different reasons.

In Burress, the claimant was found to have contracted brucellosis while working at an IBP pork facility. The record in Burress indicates the claimant had documented cuts on his face, finger and elbow while working at IBP. The only expert opinion in the case regarding causation, from William Nauseef, M.D., a physician in the infectious diseases department at the University of Iowa, found claimant probably contracted brucellosis by pig's blood either through abrasions or by aerosol transmission. Burress 779 N.W. 2d at 212-213. See also Burress v IBP, File No. 5014209 (Arb. Dec. March 13, 2006)

In this case, three experts have opined there is insufficient evidence claimant contracted MRSA at work. Dr. Comstock's opinion regarding causation is not convincing.

Second, in Burress, the evidence indicated claimant had cuts on his hands, arm and face and that brucellosis was probably transmitted by pig's blood. Id. In this case, the record only indicates claimant had cuts on his scalp, beard and arms. There is no evidence claimant came in to contact with MRSA at work. The record actually suggests claimant may have come in to contact with MRSA at home. For these two reasons Burress is not applicable in this case.

Claimant failed to carry his burden of proof his alleged MRSA condition arose out of and in the course of employment. As claimant failed to carry his burden of proof that his alleged MRSA condition arose out of and in the course of employment, all other issues are moot.

ORDER

IT IS THEREFORE ORDERED that claimant shall take nothing in this matter.

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

Pursuant to rule 876 IAC 4.33, the parties shall bear their own the costs of the arbitration proceeding and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 1st day of June, 2018.

Joseph S. Cortese II

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