BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY McMURRAY,

Claimant,

vs.

VERMEER MANUFACTURING,

Employer,

and

EMC INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 5047980

ARBITRATION

DECISION

Head Note No.: 1800

STATEMENT OF THE CASE

Claimant has a filed petition in arbitration and seeks worker's compensation benefits from Vermeer Manufacturing, employer, and EMC Insurance Companies, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the injury of January 3, 2014 is the cause of any permanency, and if so, the extent;

2. Commencement date;

3. Medical Benefits; and

4. Independent Medical Evaluation (IME).

FINDINGS OF FACT

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

The claimant was 56 years old at the time of hearing. He is a high school graduate. Claimant has certificates in motor controls and electricity from Des Moines Area Community College (DMACC). He previously worked at Goodyear. He began his employment with Vermeer in 1995 in corporate maintenance.

The claimant went off work for a non-work related cervical fusion in 2012 which was performed by David Boarini, M.D. The claimant returned to work in March of 2013 moving assembly lines and welding areas. On January 4, 2014, he slipped on a wet floor at work and fell onto his left side. The accident was witnessed and is stipulated as arising out of and in the course of employment with the defendant employer. He was seen nearly immediately by the Vermeer Occupational Health Department where he related a fall onto his left side with injuries to his left arm. Examination showed a left elbow contusion, and left wrist and cervical strain. (Exhibit 2, page 19) He was seen at Pella Regional Health Center on January 6, 2014. At that time, the claimant reported that he did not believe he had hit his head. An MRI on January 8, 2014 showed a right-sided disc herniation at the C6-7 level that was not observed at the time of the 2012 cervical fusion.

The claimant was referred to Dr. Boarini and seen on January 16, 2014. (Ex. 1, pp.9-10) Dr. Boarini reported he could find no objective evidence of an acute injury, that the herniation at C6-7 was small and on the right which was inconsistent with the claimant's complaints. (Ex. 1, p. 11) Dr. Boarini recommended a referral for a shoulder evaluation.

On February 3, 2014, the claimant was seen by Steven Aviles, M.D. (Ex. 4, p. 51) The claimant's complaints at that time were limited to the left shoulder with pain radiating into both arms. Dr. Aviles ordered an MRI which was interpreted as excellent. Dr. Aviles did not believe that the claimant's reported symptoms were related to the shoulder. (Ex. 4, p. 57 et al.) The claimant saw Dr. Boarini again on March 5, 2014. Dr. Boarini concluded there was no new acute injury to the neck and that claimant's symptoms were not consistent with the objective findings. (Ex. A, pp. 5-7) Dr. Boarini did order a functional capacity evaluation (FCE). The FCE was done on March 10, 2014 and deemed invalid due to inconsistent effort and symptom magnification. (Ex. A, pp. 15-25)

Due to continued pain complaints, the claimant was referred to Timothy Miller, M.D. On February 13, 2015, Dr. Miller opined that there was no degree of medical certainty to establish that the January 2013 accident aggravated the pre-existing neck condition. He opined post-cervical laminectomy syndrome, and referred the claimant back to Dr. Boarini. (Ex. 6, p. 67) Dr. Miller also noted that he believed that there was significant symptom magnification going on. (Ex. A, pp. 27-27A) Rather than return to Dr. Boarini the claimant went to see Daniel McGuire,M.D. Dr. McGuire noted that he was unable to determine if the change at C6-7 was due to aging, post-surgical changes, or the January 2014 accident. (Ex. A, pp. 44-45) On August 12, 2015, Dr. McGuire wrote a two page letter regarding his July 2015 evaluation of the claimant. (Ex. 8, pp. 79-80) Dr. McGuire does note that he found the claimant to be

credible, and that there were changes at C6-7 from the 2012 MRI. (Id.) He assigns no impairment to the September 2014 fusion "because this was not a work-related situation." (Ex. 8, p. 79) However, he assigned a 5 percent rating overall. (Ex. 8, p. 79) Overall, the opinions of Dr. McGuire are ambiguous.

The claimant saw Sunil Bansal, M.D., for an IME on July 10, 2014. Dr. Bansal failed to acknowledge the findings of Dr. Miller and ignores those of Dr. Boarini. Dr. Bansal based a substantial portion of his IME findings on a history of the claimant hitting his head and a loss of consciousness. (Ex. 9, p. 93, et al) Even at hearing the claimant stated that he could not recall a loss of consciousness. The lack of a contemporaneous report is noted above. Dr. Bansal rated the claimant's left shoulder as a 5 percent upper extremity loss due to loss of range of motion which he states, "is equal to a 34% impairment of the body as a whole." (Ex. 9, p. 21) Although it is probably meant as 3-4 percent (3 percent per the AMA Guides), the typo is further evidence of a less than careful and credible IME report. Also important is that Dr. Bansal did not test the right shoulder as is common sense and is directed by the AMA Guides at page 451. The report of Dr. Bansal cannot be given much weight. The opinions of treating doctors including Dr. Boarini, Aviles, and Miller that there is no evidence of a new injury of impairment from the January 2014 accident are accepted. The claimant had a work accident on January 4, 2014, but that accident is not a substantial or significant contributing factor in any impairment or loss of earnings capacity the claimant may have.

On the date of injury the claimant was married, entitled to three exemptions, and had gross earnings of $1,070.04 per week. The claimant weekly benefit rate therefore is $680.86. Claimant seeks Dr. Bansal's IME fee of $3,695.00. Claimant also seeks transportation expenses of $67.74 in connection with the IME. Claimant also seeks the fee of Dr. McGuire as a cost, and mileage of $76.81 for the appointment with Dr. McGuire.

REASONING AND CONCLUSIONS OF LAW

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. of App. P. 6.14(6).

The claimant has the burden of proving by of preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Ciha v. Quaker Oats Co., 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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 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. Cedar Rapids Community School v. Pease, 807 N.W.2d 839, 845 (Iowa 2011). 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). The finder of fact, must determine the credibility of the witnesses, weigh the evidence, and decide the facts at issue in a case. See Arndt v. City of LeClair, 728 N.W.2d 389, 394-95 (Iowa 2007). One factor the commissioner considers is whether an expert's opinion is based upon an incomplete medical history. Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)

The claimant did not meet his burden of establishing that his work injury of January 3, 2014 caused any permanent disability. He had a long standing neck and chronic pain problem for years prior to the injury here. Three treating doctors herein have opined no causation for that incident and current complaints. Dr. McGuire, a one-time evaluator, opinions are ambiguous at best. Only the IME doctor using an incomplete and inaccurate medical history causally connects the work incident to any permanent impairment. The claimant has not met his burden of establishing that he suffered permanent disability or permanent loss of earnings capacity from the work accident of January 4, 2014. Therefore all other issues other than IME are moot.

IME

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). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

After the defendants got opinions of no permanent impairment, the claimant chose to get an evaluation/examination to establish whether the injuries arose out of and in the course of employment, and whether they caused permanent impairment or disability. The claimant got that exam from Dr. Bansal, who charged a reasonable fee of $3,695.00 for the ratings. Defendants are responsible for paying/reimbursing that fee.

ORDER

THEREFORE IT IS ORDERED:

That claimant take nothing other than that the defendants shall reimburse/pay the three thousand six hundred ninety-five and no/100 dollars ($3,695.00) IME fee of Dr. Bansal.

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

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Defendants shall receive credit for benefits previously paid.

Signed and filed this 5th day of February, 2016.

STAN MCELDERRY
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.