BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NIKKI BEHNKE,

Claimant,

vs.

SP CANTERBURY, INC.,

Employer,

and

SECURITY NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5063221

ARBITRATION DECISION

Head Note Nos.: 1100, 1402

STATEMENT OF THE CASE

Claimant Nikki Behnke filed a petition in arbitration seeking workers' compensation benefits from defendants SP Canterbury, Inc. (d/b/a Subway), employer, and Security National Insurance Company, insurer. The hearing occurred before the undersigned on March 29, 2019, in Des Moines Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. In the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision, and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record consists of: Joint Exhibits 1 through 14, Claimant's Exhibits 1 through 5 and 7 through 11, and Defendants' Exhibits A through J. Claimant, who was unrepresented by counsel, testified on her own behalf. No other witnesses were called to testify. The evidentiary record closed on March 29, 2019. Claimant elected not to file a post-hearing brief. The case was considered fully submitted upon receipt of the defendants' brief on April 30, 2019.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on December 28, 2016 that arose out of and in the course of her employment.

2. If claimant sustained a work-related injury, the extent of claimant's impairment.

3. If claimant sustained a work-related injury, whether claimant is entitled to payment of past medical expenses and ongoing medical treatment.

4. If claimant sustained a work-related injury, whether claimant is entitled to penalty benefits.

FINDINGS OF FACT

Claimant alleges she sustained a head injury on December 28, 2016, during her shift as a "sandwich artist." (Hearing Transcript, page 38) She testified she was making a customer's sandwich when she felt the need to sneeze. (Hrg. Tr., pp. 41-43) She allegedly bent over in an attempt to sneeze into her legs but lost her balance and fell forward into a cupboard. (Hrg. Tr., pp. 43-44) Claimant testified the top of her head hit the cupboard. (Hrg. Tr., p. 44) She described the incident a "bonk to her head." (Hrg. Tr., p. 45) Claimant now attributes numerous symptoms to this alleged incident, including migraines, confusion, memory loss, comprehension problems, dizziness, and hand-eye coordination deficits. (See Claimant's Exhibit 5, pp. 38-40)

Defendants dispute whether claimant actually injured her head at work on December 28, 2016. They point to several text messages sent by claimant in the hours leading up to the alleged injury.

Prior to claimant's shift on her alleged date of injury, claimant engaged in a text message conversation with her supervisor, JoAnn Miller, which apparently started after Ms. Miller threatened to write up claimant for tardiness and insubordination. (Cl. Ex. 2, p. 2; see Cl. Ex. C, p. 13) Leading up to this text message exchange, claimant had been given several warnings for tardiness, and claimant was concerned she was going to lose her job. (Defendants' Ex. C, pp. 10-12: Joint Ex. 6, p. 49)

In response to being threatened with a write up, claimant threatened "going to legal aid" for discrimination. (See Cl. Ex. 2, pp. 6-10) Claimant also referenced a possible work injury, stating, "At any rate, if you write me up for how long it takes me to close its [*sic*] ageism. . . . So I either take a little longer or I get injured. Where would you like me to place my priority?" (Cl. Ex. 2, p. 9) This conversation ended at 1:29 p.m. (Cl. Ex. 2, p. 10)

Then, at 4:20 p.m., after claimant's shift had started but before her alleged work injury, Ms. Miller sent claimant another text informing her she had a write up on the desk and could contact Ms. Miller with questions. (Cl. Ex. 2, p. 10) The write up is in the record as Claimant's Exhibit C, page 13. It indicates it is claimant's "final" warning and any additional problems would result in "automatic termination." (Ex. C, p. 13)

Claimant responded at 6:51 p.m., after her alleged work injury: "Yep, we[']ll have to talk about it unless that's my copy. :-)" (Cl. Ex. 2, p. 10) Then, at 6:52 p.m., Ms. Miller stated, "That is your copy," to which claimant immediately responded, "Would you like me to start by saying I need to leave tonight? I just hit my head awfully hard on a metal handle, my head ache is increasing and I'm beginning to get dizzy. Should prolly go get checked out..." (Cl. Ex. 2, p. 11)

Notably, later that evening at 9:39 p.m., claimant sent a text message to her co-worker who apparently witnessed the fall, and she made no mention of the alleged work injury or her alleged symptoms. (Cl. Ex. 2, p. 3)

These text messages from claimant raise questions about claimant's motivations leading up to her alleged work injury on December 28, 2016.

After several text messages from claimant, defendant-employer's owner, Scott Canterbury, sent the following to claimant on December 30, 2016: "Nikki I have watched the video from the night you claimed to hit your head and I see no place on that video where that happened. . . ." (Cl. Ex. 2, p. 24) Unfortunately, claimant was told the surveillance video from December 28, 2016 no longer exists, and Mr. Canterbury was not present to testify at the hearing, so his statement regarding the video is given little weight.

After the text message exchange with Mr. Canterbury, claimant sought medical treatment at the emergency room for what she described as increasing dizziness, headache, and intermittent blurry vision after hitting her head on a door handle while at work. (JE 5, p. 18) Claimant's physical examination was normal, as was the CT of her head. (JE 5, pp. 20-21) She was discharged without restrictions or instructions other than to follow up with a primary care provider if her symptoms worsened. (JE 5, p. 22) This negative workup two days after the alleged incident casts doubt on claimant's account of the incident.

Claimant's testimony regarding the timing and severity of her symptoms in the months following the alleged work injury additionally undercut her credibility. Despite testifying at hearing that she had daily headaches for roughly a month after allegedly striking her head at work on December 28, 2016 (see Hrg. Tr., p. 66), claimant made no mention of headaches during a psychiatric examination at the University of Iowa Hospitals and Clinics (UIHC) on January 5, 2017 or during an examination at an urgent care clinic on January 26, 2017. (JE 6, pp. 52-59; JE 7, p. 60) Several physicians also noted claimant's reported symptoms did not match her presentation during examination.

(See JE 5, pp. 37-38; JE 6, p. 46; JE 12, p. 81) I observed similar inconsistencies at hearing. For example, despite testifying she suffers from memory loss, claimant recounted several stories surrounding her prior head traumas with abundant and colorful detail. (See Hrg. Tr., pp. 103-108)

Claimant also has a history of illegal drug usage, including cocaine in the past and methamphetamine more recently, and has exhibited recent prescription-seeking behavior. (See JE 5, p. 13 (noting meth use in November of 2015); JE 6, pp. 55, 58 (noting cocaine addiction "years ago"; also noting "strong suspicion" that claimant was under influence "of something" and seeking Xanax during exam on January 5, 2016); JE 8, p. 62 (noting meth use in April of 2017))

Based on claimant's text messages, the inconsistencies between claimant's complaints and her presentation, and claimant's admitted drug use and related behavior both before and after December 28, 2016, I do not find claimant to be a credible witness. Because claimant's account of her alleged injury on December 28, 2016 is not corroborated by other contemporaneous evidence, such as medical records or witness testimony, there is insufficient evidence for me to find claimant sustained an injury during her shift on December 28, 2016.

However, even if I had found sufficient evidence of a work injury on December 28, 2016, there is insufficient evidence to causally relate that work injury to any of claimant's alleged disability, ongoing complaints, or need for medical treatment.

This is, in part, due to claimant's significant history of prior head traumas, which includes a domestic assault in 2000, a fistfight in 2002, a bar fight in 2014, and a battery with a mallet/hammer in 2015. (Hrg. Tr., pp. 101-116; JE 1, p. 2; JE 5, pp. 9, 11-16) Claimant also dealt with anxiety and depression well before and leading up to her alleged December 28, 2016 work injury. (See Hrg. Tr., pp. 38, 96-97; JE 1, p. 3; JE 5, p. 10) In fact, she requested an evaluation at UIHC for depression on December 14, 2016, just two weeks before the alleged work injury. (JE 6, p. 9)

Claimant also had at least two head traumas after her work injury, including a rollerblading accident in March of 2018 and an altercation with a police officer in November of 2018. (See Hrg. Tr., pp. 138-139; JE 5, p. 39-43; Cl. Ex. E, p. 17; Cl. Ex. J, p. 42)

In addition to her significant history of head traumas and pre-existing anxiety and depression, claimant also suffers from untreated hyperthyroidism. (Hrg. Tr., pp. 99-100; JE 10)

In late-2017, after her alleged work injury, claimant began treatment at Physicians' Clinic of Iowa (PCI) for what she believed to be a cerebrospinal fluid (CSF) leak due to head trauma, including her work injury. (JE 12, p. 80) She also complained

of slurred speech, balance and vision issues, and headaches. (JE 12, p. 80) Claimant was referred for neuropsychological testing. (JE 12, p. 81)

Before her neuropsychological examination, claimant followed up at PCI for her alleged CSF drainage. (JE 12, pp. 82-86) She was reassured that her symptoms did not match CSF leak and instead were more consistent with chronic rhinitis. (JE 12, pp. 83, 86)

Claimant returned to PCI on April 20, 2018 for her reported headaches and memory loss. (JE 12, p. 87) Robert Struthers, M.D., suspected claimant had "some type of mania." (JE 12, p. 88) He noted that although claimant blamed her symptoms on the head trauma, the head trauma from her work injury was "extremely minor." (JE 12, p. 88) He again attributed claimant's complaints to mania but also noted her thyroid disease could be the cause. (JE 12, p. 88) He told claimant he would try to move her neuropsychological appointment up. (JE 12, p. 88)

Claimant's neuropsychological evaluation was performed on July 13, 2018, by Megan Adams Rieck, Ph.D. (JE 5, p. 46) Dr. Adams Rieck noted claimant reported slurred speech, cognitive impairment, fatigue, mood swings, irritability, interpersonal problems, dizziness, blurred vision, headaches, imbalance, and photophobia, but these reported symptoms were "inconsistent with her presentation (e.g., speaking clearly while reporting slurring)." (JE 5, p. 46) Dr. Adams Rieck also indicated claimant's medical workup "has thus far been negative for neurological injury or disorder" and her "[h]ead CTs have been negative," including a scan on November 27, 2017. (JE 5, p. 46; see JE 5, p. 30)

Dr. Adams Rieck stated that while it was likely claimant experienced a number of mild traumatic brain injuries, "they are not the likely explanation for her current concerns." (JE 5, p. 47) Instead, Dr. Adams Rieck attributed claimant's symptoms to claimant's "[p]ast and current substance abuse as well as untreated hyperthyroidism." (JE 5, p. 47)

On November 28, 2018, Dr. Struthers responded to a letter drafted by defendants' attorney. In it, Dr. Struthers opined that claimant's December 28, 2016 work injury was "**at most a temporary aggravation** of [claimant's] pre-existing problems/complaints/symptomology." (Def. Ex. A, p. 4) He went on to opine that he did not believe the work injury caused or materially aggravated any neurological or neuropsychological problems or complaints causing permanent impairment or restrictions or the need for treatment. (Def. Ex. A, p. 4)

Defendants obtained a similar letter from Winthrop Risk, M.D., who was claimant's treating neurologist at the time of the hearing. On January 29, 2019, Dr. Risk opined claimant's December 28, 2016 work injury was "**at most a temporary aggravation** of [claimant's] pre-existing problems/complaints/symptomology." (Def. Ex. B, p. 8) Like Dr. Struthers, he also agreed that claimant's work injury did not cause

or materially aggravate any neurological or neuropsychological issues causing permanent impairment or restrictions or the need for treatment. (Def. Ex. B, p. 8)

On March 21, 2019, Dr. Risk responded to a questionnaire drafted by claimant. In question 20, claimant asked, "If this work injury hit to the head caused several *new* symptoms which the worker did not have previously, *and* affected her abilities to function as an adult and in making sound decisions, how is this considered a *mere aggravation* of the previous, non-work injury?" (Cl. Ex. 4, p. 34) Dr. Risk responded, "Because the previous injuries may have predisposed the person to worsen symptoms that they may not have experienced with a single blow." (Cl. Ex. 4, p. 34) (emphasis added) In question 22, claimant asked, "[D]o you still feel that the effects post work injury are merely *temporary* aggravations or do you feel that it is at least possible that the effects and symptoms I still currently have are due to the work injury . . . ?" (Cl. Ex. 4, p. 35) Dr. Risk responded, "Yes possible." (Cl. Ex. 4, p. 35) (emphasis added)

Dr. Risk also added an additional comment to his response to defendants' counsel. He provided:

> Upon further reflection, it is not an unreasonable argument that one seemingly minor bump to the head on top of prior head injuries is enough to result in effects beyond what one would expect from an otherwise benign bump. This is speculation on my part. Head injuries are complicated and a field of active research.

(Cl. Ex. 11, pp. 52-53) (emphasis added)

Importantly, however, when asked by clamant if he had changed his opinions from his January 29, 2019 response to defendants, Dr. Risk did not respond. (Cl. Ex. 4, pp. 35-36) Thus, I find that while Dr. Risk acknowledged the possibility of the scenarios set forth by claimant, he also indicated that changing his opinions to reflect claimant's theory of causation would be based on speculation.

Ultimately, no physician opined with any certainty that claimant's ongoing symptoms were due to her alleged work injury. Relying on the opinions of Dr. Risk and Dr. Struthers, which were buttressed by the report of Dr. Adams Rieck, I find insufficient evidence that claimant's December 28, 2016 work injury was the cause of claimant's ongoing complaints, alleged disability, or need for medical treatment.

CONCLUSIONS OF LAW

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.

In this case, I found claimant was not a credible witness. Because her account of her alleged work injury is not supported by evidence other than her own testimony, I found there was insufficient evidence that claimant sustained an injury during her shift at work on December 28, 2016. I therefore conclude claimant did not satisfy her burden to prove she sustained an injury that arose out of and in the course of her employment with defendant-employer. This renders the remaining claims moot.

However, even if claimant had satisfied her burden to prove she sustained an injury that arose out of and in the course of her employment on December 28, 2016, I conclude claimant failed to satisfy her burden that any of her alleged disability, ongoing complaints, or need for medical treatment are causally related to that injury.

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).

In this case, no expert opined with any certainty that claimant's ongoing symptoms were related to her alleged work injury. In fact, several physicians opined otherwise. I therefore found insufficient evidence to support claimant's claim that her alleged December 28, 2016 work injury was the cause of any of her ongoing complaints, alleged disability, or need for medical treatment. Thus, even if claimant proved she sustained a work-related injury, I conclude she failed to satisfy her burden to prove a causal connection between that injury and any of her symptoms, conditions, disability, or medical treatment.

In either scenario, claimant failed to establish her entitlement to disability benefits, payment for past medical treatment, or ongoing medical care, and her claim for penalty benefits is moot.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

Signed and filed this 14th day of May, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SJC/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.