BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TRAVIS BROWNELL,

Claimant,

vs.

DEWEY DODGE,

Employer,

and

ZURICH INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5059689

ARBITRATION DECISION

Head Note Nos.: 1108.50, 1402.20, 1402.30, 2907

STATEMENT OF THE CASE

Travis Brownell, claimant, filed a petition in arbitration seeking workers' compensation benefits from Dewey Dodge, employer and Zurich Insurance Company, insurance carrier as defendants. Hearing was held on October 1, 2018 in Des Moines, Iowa.

Claimant, Travis Brownell, was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE4, Claimant's Exhibits 1-9, and Defendants' Exhibits A-F.

The parties filed a hearing report at the commencement of the arbitration hearing. On 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 parties submitted post-hearing briefs on November 5, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on September 20, 2016 which arose out of and in the course of employment.

2. If so, the extent of permanent disability claimant sustained as a result of the work injury.

3. If so, the extent of temporary disability claimant sustained as a result of the work injury.

4. If so, claimant's entitlement to past medical benefits.

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

6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Travis Brownell, filed a petition alleging that he sustained an injury to his back on September 7, 2016 which arose out of and in the course of his employment with Dewey Dodge. The hearing report alleges an injury date of September 20, 2016. Travis testified that he believes the alleged injury occurred on September 20, 2016. The record contains instances when Travis stated the injury occurred on September 7, 2016. Travis testified that he was simply wrong on the times he indicated September 7, 2016 as the date of injury. (Testimony) Defendants dispute either date of injury.

In September of 2016, Travis was employed as a mainline technician performing automotive repairs at Dewey Dodge. At the time of the alleged injury, Travis was lifting a tire off the ground when he felt a pop and pain in his right inner shoulder blade, near the base of his neck. He thought he pulled a muscle. He took some ibuprofen and continued working, but his symptoms did not improve. Travis told his boss, Matt, that he was going to see his chiropractor. (Testimony)

On September 20, 2016, Travis went to Nerem Family Chiropractic. When Travis was seen on September 20, 2016 he complained of continuous sharp discomfort in his upper back that increased with movement. He reported that his discomfort was constant and worse since his last visit. Travis's last visit was October 24, 2014. The chiropractor treated the cervical spine. He recommended that Travis not work the remainder of the day due to his severe neck and upper back pain. Travis was to return on September 22 and in the meantime he was to refrain from heavy work. There is no mention in the notes of any type of work injury. (JE1, pages 4-8)

Travis saw the chiropractor on several more occasions without any benefit. Nicholas J. Nerem, D.C. recommended Travis see his primary care physician to see if more could be done for him. After an x-ray and MRI were performed it was recommended that Travis see a specialist for his neck pain. Travis testified that the physician's assistant he saw in Grimes referred him to Dr. Hatfield. (JE1; testimony)

On October 24, 2016, Travis saw David E. Hatfield, M.D. at DMOS. The clinical note from the visit states, "Mr. Brownell presents as a 25-year-old gentleman here today with pain in his neck, upper back, and right upper extremity. This started 9/7/16. There

is no distinct work-related incident antecedent to this." (JE2, p. 33) Dr. Hatfield noted Travis had distinct changes in C5-6 with a component of change at C6-7. Treatment options included observation. However, Travis did not think this was a realistic approach given his ongoing symptoms and the effect they were having on his life. Epidural steroid injections were another option, but Dr. Hatfield doubted their usefulness in this case. Yet another option was a C5-6 anterior cervical decompression and fusion. Dr. Hatfield noted that Travis was going to go home, think everything over, and return in the near future for discussion. (JE1, pp. 33-34)

Several forms were completed as part of this initial visit with Dr. Hatfield. One such form is entitled "NECK/BACK PAIN NEW PATIENT HISTORY FORM." On this form Travis indicated that this was not a workers' compensation injury. He also indicated that the problem began on September 7, 2016. He stated that the problem began gradually (weeks) and at home. (JE1, p. 35)

Travis returned to see Dr. Hatfield on October 26, 2016. He continued to have neck and right greater than left upper extremity symptoms. Travis opted to undergo a C5-6 and C6-7 anterior cervical decompression and instrumented fusion. (JE2, pp. 41-42) On November 2, 2016, Dr. Hatfield performed a two level decompression and fusion of the cervical spine. (JE3)

The central dispute in this case is whether Travis sustained a work-related injury to his back. In addition to the treatment records there are two IME reports which offer opinions on causation.

On May 12, 2017, at the request of his attorney, Travis underwent an IME with Sunil Bansal, M.D. Dr. Bansal's report states that on "September 7, 2016, he sustained an injury to his neck." (Claimant's Exhibit 1, p. 2) Dr. Bansal also reports that Travis felt a "pop" in his neck on this date. This is the first documentation in the medical records of any type of "pop" or of the symptoms beginning at work. Dr. Bansal opined that on September 7, 2016, Travis sustained an injury to his neck. Dr. Bansal explained that from mechanistic and temporal standpoints, Travis's current cervical spine pathology was related to the September 7, 2016 injury. Even if Dr. Bansal were to use the September 20, 2016 alleged date of injury, his report fails to provide any rationale or explanation about the lack of documentation of any work injury in the medical records. I do not find Dr. Bansal's opinions to be persuasive. (Cl. Exs. 1 & 2)

Defendants offer the report of Scott B. Neff, D.O., who evaluated Travis on June 20, 2018. Dr. Neff noted the only reference in the medical records to a work injury was in Dr. Bansal's IME report. Dr. Bansal noted Travis felt a "pop" in his neck. Dr. Neff stated this was not an indication of a disc injury. Dr. Neff's report does not support Travis's claim that he sustained a work injury.

At the arbitration hearing, Travis testified that he felt a pop or tear sensation and pain in his shoulder or neck while working with heavy tires on September 20, 2016. He further testified that he told his boss he was leaving and going to see his chiropractor. However, as defendants point out, there is no mention of any work-related accident in any of the treatment records.

On September 20, 2016, Travis saw his chiropractor. Travis had not seen Dr. Nerem for approximately two years. He reported an increase in symptoms since his last visit. However, even though the alleged injury is said to have occurred on the same day as the appointment, there is absolutely no mention of any type of work incident in the chiropractor's notes. (JE1, pp. 6-7)

On September 8, 2017, Dr. Nerem authored a to whom it may concern letter. In the letter he noted that Travis sought treatment with him on September 20, 2016. The chiropractor also noted that he had previously seen Travis with other muscular skeletal injuries, but Travis's last appointment before September 20, 2016 was in November of 2014 and was not related to his current injury. (JE1, p. 5) Once again, there is no mention of any work or work activity related to Travis's symptoms.

In June of 2018, Dr. Nerem was asked to answer a few written questions posed by claimant's attorney. The chiropractor was asked if he recalled Travis discussing any work-related factors that attributed to his complaints in September of 2016. The chiropractor's response was, "[t]o the best of my knowledge I remember Travis coming to the office from work that morning of the 20th of September with neck pain." (JE1, p. 32) The chiropractor was also asked if the physical work performed for the defendant employer leading up to the September 2016 treatment was a substantial factor in the worsening of the condition of his spine. Dr. Nerem replied, "[t]o the best of my knowledge repetitive manual lifting, torqueing and reaching in a [*sic*] off balance position 'ie' his job could be a factor in early degenerative disc disease or in his case disc bulge or disc injury." (JE1, p. 32) Although Dr. Nerem was presented another opportunity to state that Travis had reported the alleged specific work injury to him, he did not make any such statement.

Dr. Hatfield's records are even more troubling to the undersigned. Not only do his notes fail to indicate any type of work injury, his notes affirmatively state that there was not a work-related incident antecedent to his symptoms. Further, the intake form states that his symptoms had come on gradually, over a period of weeks, at home. (JE2, pp. 33-40)

At hearing, Travis testified that a staff person at DMOS advised him that if his case was presented as a work-related injury, then his surgery would be delayed. According to Travis, Dr. Hatfield's first opening for a surgery was not until February. However, Dr. Hatfield had a recent cancellation and the surgery could be performed within a week. A member of the DMOS staff told Travis they would not be able to get the approval from workers' compensation prior to that time. Travis said he was advised he could turn his injury and surgery into workers' compensation at a later date. I do not find this testimony to be persuasive. The intake packet specifically states that the packet must be completed in its entirety prior to the scheduled appointment. The form also states if the packet is not completed at the time of the appointment, then the appointment will be rescheduled. Thus, the form had to have been completed before Travis ever saw Dr. Hatfield and before he even knew he would have to undergo surgery with Dr. Hatfield. Claimant's stated motivation for saying the injury occurred at home and came on gradually did not exist at the time the form was completed.

I give greater weight to the contemporaneous treatment records and intake packet from the offices of Dr. Nerem and Dr. Hatfield than I give to the self-serving testimony of the claimant. It appears that Travis did sustain some sort of incident in September of 2016 to increase his neck symptoms. Unfortunately, there is very little evidence to support his claim that any such incident or injury occurred at work. Claimant argues there is no real evidence of an alternative theory of how the injury occurred. This argument fails. It is the claimant who has the burden of proof to show that the injury is work-related. I find claimant has failed to carry his burden of proof to demonstrate by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment on September 20, 2016.

Because claimant was not successful in his claim, I exercise my discretion and do not assess costs against the defendants in this matter.

Because claimant failed to carry his burden of proof to demonstrate by a preponderance of the evidence, that he sustained an injury that arose out of and in the course of his employment on September 20, 2016, all other issues are rendered moot.

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 Rule of Appellate Procedure 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).

Based on the above findings of fact, I conclude that claimant has failed to prove by a preponderance of the evidence that his injury arose out of and in the course of his

employment. The medical documentation simply does not support the claimant's contention that he sustained an injury at work on September 20, 2016.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was not successful in his claim, I exercise my discretion and do not assess costs. Each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Each party shall bear their own costs.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 18th day of January, 2019.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Nathaniel R. Boulton
Attorney at Law
100 Court Ave., Ste. 425
Des Moines, IA 50309-1307
nboulton@hedberglaw.com

Timothy W. Wegman
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266-2504
tim.wegman@peddicord-law.com

EQP/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.