

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CELENIA GONZALEZ,

Claimant,

vs.

CARE INITIATIVES, INC., d/b/a
FONDA NURSING & REHAB CENTER,

Employer,
Self-Insured,
Defendant.

File No. 5048024

ARBITRATION
DECISION

Head Note Nos.: 1108.50, 1402.20

STATEMENT OF THE CASE

Celenia Gonzalez, claimant, filed a petition in arbitration seeking workers' compensation benefits from self-insured employer, Care Initiatives, Inc. d/b/a Fonda Nursing and Rehab Center. Hearing was held on January 29, 2015.

Claimant was the only witness testifying live at trial. The evidentiary record also includes claimant's exhibits 1-9 and defendant's exhibits A-S. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

At the hearing the claimant objected to the defendant's video evidence due to its length and claimant's inability to rebut the lengthy videos during her hearing time. The video evidence was admitted into evidence. The parties were informed that the undersigned would review all the submitted video and the parties were given additional time to submit additional rebuttal video evidence. This additional evidence has been marked as Exhibit J-1 and Exhibit S. Defendants mistakenly have entered two separate exhibits as Exhibit S. One is an application to Fonda and the other is a supplemental compilation video. The parties request the opportunity for post-hearing briefs which were submitted on March 6, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on May 18, 2013, which arose out of and in the course of employment.

2. What, if any, temporary disability claimant sustained as a result of the alleged injury.
3. What, if any, permanent disability claimant sustained as a result of the alleged injury.
4. If claimant did sustain permanent disability as a result of the alleged injury is the disability confined to a scheduled member or is the injury to the body as a whole?
5. The appropriate commencement date for any permanent partial disability benefits.
6. Whether claimant is entitled to payment of medical expenses.
7. Assessment of costs.

FINDINGS OF FACT

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

Ms. Gonzalez worked at Fonda Nursing and Rehab Center ("Fonda NRC") from 2008 to 2012. In early 2012 she voluntarily terminated her employment to spend more time with her family. She was rehired by Fonda NRC in November of 2012 as a CNA. Her duties included bathing and changing residents. She would assist them using the toilet, walking, feeding, and pushed their wheelchairs. She would also check on the residents' mental status. Her duties required walking, twisting, bending, and running if the alarms were set off. (Testimony)

In 2008 before she initially began working for Fonda NRC she had to undergo a physical. She was deemed to have a normal examination at that time. (Exhibit 7, pages 1-2) When she returned to work at Fonda NRC in 2012 she underwent another physical. The note from that examination indicates she was capable of performing the essential job functions. (Ex. 7, p. 3) The physical requirements of a CNA are set forth in Exhibit 9, page 7; Ms. Gonzalez agrees that these are accurate. (Ex. 9, p. 7)

At the arbitration hearing Ms. Gonzalez testified that on May 18, 2013, she was performing rounds, rotating residents, changing diapers, clothes, and bedding. As she was conducting her rounds she noticed that there was something different with her back, but she thought it was due to her long shift. She thought if she went home and showered she would be fine, so she did not report any type of injury. As the days went by her back did not improve. Over the next few days she experienced pinching, electrical-type sensation on her left beltline and all the way down her leg to her toes. This sensation did not go away.

At the arbitration hearing Ms. Gonzalez testified that from May 18, 2013 through May 29, 2013, she noticed pinching on her left side up on her buttocks by her waist. She admitted at hearing that she worked over eight hours on May 22nd and May 26th yet she never reported any problems with her back to her employer on either of those two days. (Testimony)

On May 29, 2013, she called her husband and he took her to her family physician, R. Roy Grant, M.D. Dr. Grant's May 28, 2013 notes state: "Pt c/o left lower back-mid back pain. Pt describes it has a "pinching" feeling. Pt reports pain occurred when she went to sit down in the car." The note also states: "32-year-old woman complaining of pain in her left lower back that started when she climbed into a car couple of days ago. It is a "pinching sensation" it is worse when she sits. No injury." She also reported no pain radiating down the leg. (Ex. B, p. 1) The doctor's assessment was lower back pain, overweight. He recommended she avoid heavy lifting or bending and to follow up if anything got worse. (Ex. B, p. 1)

At hearing Ms. Gonzalez was questioned about the history in Dr. Grant's May 29, 2013 clinical note. The history states she injured her back when getting into a car. She testified she had it in her head that because she was in so much pain everyone knew that she was injured at work. She further testified that the doctor asked her what made it hurt more and she said getting out of her car made it hurt worse. (Testimony)

Ms. Gonzalez testified that she reported the injury and her restrictions to her employer on May 30, 2013. She also completed an employee incident report on May 30, 2013. I note she did not complete the portions of the form that ask for the location, date, and time of the incident. The form asks her how the incident occurred. She responded, "during my normal shift." When asked to describe the injury Ms. Gonzalez's response was "lower back pain." The form also asked what could be done to prevent the incident. Gonzalez responded by writing "unknown." (Ex. F, p. 1)

She was also asked to complete a form entitled employee's statement. In her responses to that form she indicated the date and time of her injury was the weekend of May 18th during her normal rounds. She stated it was "unknown" if she was lifting or handling an object at the time of the incident. She did know that she was alone at the time and that there were no witnesses. She was asked "Do you have any complaints now?" She responded "0." She indicated that her pain had decreased with medication. (Ex. F, pp. 2-3)

Based on the evidence it appears that Ms. Gonzalez sought medical treatment on May 30, 2013, but did not seek any additional treatment until July 8, 2013, when she returned to the Family Medicine – Buena Vista. At that time she reported she was having ongoing pain in her left lower back with some radicular pain down her left leg. She felt she had sustained the back injury at work. She was assessed with sciatica. (Ex. B, p. 3) She went to physical therapy that same day. She reported she was working on May 18, 2013, and it was a particularly hard night. She was working with a patient that normally took two people, and she was doing it by herself. The next day

she noticed she started having left back pain which got progressively worse. She also reported that she had no prior problems with her back. (Ex. E, p. 1) Based on the records the plan was to have her attend therapy three times per week for four weeks. (Ex. E, p. 1) Ms. Gonzalez was discharged from physical therapy on August 14, 2013, due to lack of patient followup. She had attended only three appointments and missed four appointments. (Ex. E, p.2)

She was seen again at Family Medicine – Buena Vista on August 2, 2013. She reported that her back pain had been bothering her for several months. She said she had been off work for two months and undergoing physical therapy, which she reported helped some. Ms. Gonzalez reported she was still in considerable pain, which was worse on the left side and now seemed to radiate down the leg. The note states: “[d]espite our initial conversation May 29th, at which time she did not report recalling specific injury, she has subsequently concluded that pain was caused by her work as a CNA, which is fairly physical.” (Ex. B, p. 4) The assessment was persistent lower back pain but probably not true sciatica. She was encouraged to continue with physical therapy. She was given a note authorizing activities which do not involve lifting or bending. (Ex. B, p. 4) She was released to resume normal activities on September 4, 2013. (Ex. B, p. 5)

Ms. Gonzalez returned to Family Medicine – Buena Vista on October 1, 2013. She reported she was still having low back and left side pain. She did not feel physical therapy was working so she was not attending therapy. The clinical notes state she had an MRI done a few months ago which showed no evidence of disc herniation or any nerve root impingent. The note indicates she exhibited less pain than she did a few months ago. It was recommended she see Dr. Wulfekuhler for an SI joint injection. (Ex. B, p. 6; Ex. D, p. 1)

Ms. Gonzalez was prescribed additional physical therapy in November of 2013. At that time she reported she could only walk about three blocks and then her pain became too significant to continue. She attended five visits and missed or cancelled three. The discharge summary indicates she made little improvement with physical therapy and that she had poor compliance. (Ex. E, p. 5)

On January 21, 2014, Ms. Gonzalez saw Steven J. Meyer, M.D., an orthopaedic surgeon at the CNOS. At the appointment she complained of severe lancinating radicular left leg pain from her lumbar spine into her buttock and down her entire left leg. She reported that even wearing tight blue jeans caused her pain to be significantly worse. He noted she had positive straight leg raising on the left that caused tearing. She also had some EMG findings consistent with a possible S1 radiculopathy, but Dr. Meyer was not able to find any demonstrable lesions on MRI or CT myelogram that would warrant surgical intervention. Dr. Meyer's assessment was lumbar radiculopathy. He noted this was a difficult situation because he believed the patient's pain was valid, but he could not find any objective degree of pathology that would warrant surgery. He referred Ms. Gonzalez to Dr. Wade Jensen for a second opinion. (Ex. 1, pp. 1-2)

On February 28, 2014, Ms. Gonzalez returned to Family Medicine – Buena Vista with lower back pain on the left side that radiated down her left leg. The note indicates she hurt her back last May while moving and pulling a patient at a nursing home. She reported she was worse now than she was before. At that time straight leg exam was negative on both sides and she was able to ambulate with only mild discomfort. She was assessed with lower back pain and sacroiliac pain. She declined a cortisone injection. She requested to see a back specialist. (Ex. B, pp. 7-8)

She returned to see Dr. Meyer on March 19, 2014, with what he described as classic sciatic type pain. An MRI revealed normal bony morphology without obvious significant pathology seen. There was perhaps a small lateral disk protrusion at L3-4. The assessment was left sciatica with low back pain. Epidural floods were indicated. The doctor felt the greatest importance was working on strength and flexibility via physical therapy and aerobic conditioning. (Ex. C, pp. 1-2) By July of 2014, she continued to have left radicular leg pain. She had undergone two epidural floods which provided very little, if any, relief. She reported her part-time cashier position was quite problematic for her from a pain standpoint. The assessment was ongoing "left radicular leg pain without discernible pathologic etiology." (Ex. C, p.3) In August of 2014 she reported radiating, unremitting buttock pain. A CT myelogram revealed "a very small broad-based disk bulge at L4-5, eccentric slightly to the left which would potentially be causing some irritation of the L5 nerve root." She received an L4-5 foraminal injection. (Ex. C, p. 4)

Another round of physical therapy was attempted in April of 2014. The notes indicate that she was not doing the home exercise program she had been given from her prior therapist. (Ex. E, p. 9) The discharge therapy note indicates that from April 2, 2014 until May 2, 2014 she attended three sessions, canceled zero sessions, and was a no show for three sessions. (Ex. E, p. 10)

Claimant's videotaped deposition was taken on June 17, 2014. (Ex. H) In her deposition testimony when asked how her injury occurred Ms. Gonzalez said she became "more tired" after doing her cares, but she could not recall a specific incident that occurred at work. (Ex. H, p. 2)

Ms. Gonzalez saw Dr. Meyer again on July 16, 2014. She reported low back pain and left radicular pain that extended down to the dorsum of her left foot along with occasional numbness/tingling into the second and third toes of her left foot. (Ex. C, p. 3) The doctor reviewed the July 2013 MRI again and stated: "she has really very little if any discernible pathology that would be able to explain her significant pain complex." The note also said: "...The perplexing part is that she has been really quite disabled by this pain and had to give up her job as a CNA because of the rigorous of lifting, bending and twisting. She is now working intermittently part time as a cashier at a convenience store which she also states is quite problematic for her from a pain standpoint. ..." (Ex. C, p. 3) Dr. Meyer recommended a CT myelogram. This was carried out on August 4, 2014. The study showed a small left para middle disc protrusion at L4-5 causing minimal foraminal stenosis. (Ex. D2, pp. 102)

On October 22, 2014, Ms. Gonzalez reported severe unremitting buttock and leg pain and occasional limping. On this date she had profound positive straight leg raising test. Dr. Meyer noted it was difficult to "ascertain the etiology of her obvious radiculopathy because she has had a positive provocative test with a foraminal injection." He recommended an EMG to try to locate the primary point of nerve compression. (Ex. C, pp. 5-6) The EMG showed there was no evidence of compressive neuropathy involving the lower extremities. (Ex. C, p. 7) Dr. Meyer did state that her EMG/NCV tests "revealed a possible left S1 radiculopathy." (Ex. C, p. 8; pp. 7-9)

Defendants have submitted surveillance video from August 31, 2013. Ms. Gonzalez is seen smiling and walking in a traditional Hispanic dress. She is holding the hem of the dress with her arms out, away from her body. She frequently twists her body and twirls her arms. Ms. Gonzalez is observed spinning around in her dress. She is seen walking in these clothes in a parade, wearing flip flops. She is also seen after the parade bending over to get some items off the floor of her van. She is observed conversing with others and moving about in no apparent pain. At one point she is able to reach up, remove a police officer's ball cap, playfully place it on her own head, casually look around while chatting, and then reach up to put the ball cap back on his head. She is also seen getting in and out of her minivan and leaning over to reach into the cargo part of her minivan without any apparent difficulty or pain. At one point she is seen quickly picking up a piece of poster board from the road and getting back into her vehicle without problem. Later that same day she is seen in a yard with children. She is also seen leaving a Wal-Mart store, carrying a bag, walking, and looking at a smart phone in no apparent distress. (Ex. J)

Exhibit J also contains video surveillance from September 1, 2013. Ms. Gonzalez is seen in the yard bending over to help place cardboard into a fire by the house. She also appears to sit on a bucket to sort cans. While sitting she is seen repeatedly bending at the waist. Again, she does not appear to have any difficulty repeatedly bending over to pick items up off the ground or to place items into the fire. She is also seen walking around without any difficulty or limp. (Ex. J)

There is also video surveillance from September 2, 2013. On this day Ms. Gonzalez is seen walking around her yard, bending to pick up items, and bending and tossing cans. She is seen carrying around at least one trash can. She is also seen playing with a small child. She is able to bend, squat, walk on uneven ground, pick up the small child, walk while holding the child, and bend over. She again is seen wearing flip flops. At one point she even play chases the small child around. Again, she never appears to be in any pain or have any difficulty. She also climbs inside a dome play area which requires bending and moving in awkward positions. At another point she is able to jump onto her husband's back for a short piggyback ride and then she is able to slide down his back until she reaches the ground without any problems. (Ex. J)

Ms. Gonzalez is currently employed at Casey's General Store. She applied there on May 17, 2014. Ms. Gonzalez testified that she was interviewed by

Samatha Tiefenthaler. Ms. Gonzalez said in her interview she revealed that she had a back condition and that she could not lift due to her back. The interviewer informed her that the cashier position would be the most accommodating position for her because the most she would have to lift would be 15-20 pounds as opposed to cooks who are required to lift more. The job description of a store employee is contained in Exhibit K. According to the job description a store employee is required to lift up to 50 pounds. (Ex. K, pp. 4-5) Claimant testified she does not believe she has ever had to lift 50 pounds. She testified that her duties included greeting customers, being polite, smiling, stocking cups for fountain drinks, and stocking napkins and condiments. She was also required to keep the floors clean with a dust mop. She testified she was not required to use a wet vacuum or a floor stripper. She worked from approximately 4:00 p.m. until 11:00 p.m. two to three days a week and averaged around 20 hours per week. (Testimony)

The defendants have offered footage from the security cameras inside the Casey's where Ms. Gonzalez worked after the alleged injury in question. The extensive footage is from June, July, and August of 2014. There is footage of the same periods of time from several different cameras. Ms. Gonzalez is observed working as a cashier. While working she does not appear to be in much, if any, discomfort throughout her working activities. The undersigned personally watched the hours and hours of video. The following is a list of just some of the activities Ms. Gonzalez is observed doing: Mopping and sweeping the floor, squatting to get into the safe, bending over to reach cigarettes on lower shelves, reaching up to get cigarettes from upper shelves, carrying flats of full cans of beverages, carrying large industrial sized coffee pots, changing garbage bags, leaning over the counter, carrying a bucket, carrying a step stool, taking out the trash, and bending while washing the glass on the front doors of the store. (Ex. K1-K7 and S)

In response to defendant's submission of surveillance and security video claimant offered her rebuttal to Exhibits J and K. The claimant's rebuttal consists of her contention and specific reference to portions of the video where she contends she can be seen favoring her left leg, rubbing her leg, holding her back, or sitting to perform her duties. It is difficult to tell if claimant is holding her lower back or simply adjusting the waistband of her pants. There is no dispute that the woman seen in the video footage is Ms. Gonzalez. Even if the footage is characterized as claimant's supplemental surveillance video, submission suggests the claimant that is seen on the footage is a much different claimant than the one the undersigned observed at the time of the arbitration hearing. At hearing Ms. Gonzalez appeared to be in a great amount of pain. She was tearful; she was observed grimacing and wincing due to her pain. She had to change positions from sitting to standing and back to sitting during the hearing because of her back pain. She testified that just bending over caused her pain. She testified that she is in pain 24 hours per day, 7 days per week. She testified that if she is just "coasting" her pain is a 5 or 6 but if she is active it is an 8 out of 10. She testified that if she even walks 2-3 blocks she needs to rest. This testimony is not supported by the hours of video footage observed by the undersigned.

At the request of her attorney Ms. Gonzalez saw Sunil Bansal, M.D. for an independent medical examination (IME) on November 7, 2014. As a result of that examination and a review of medical records Dr. Bansal issued a report on December 23, 2014. Dr. Bansal stated: "Ms. Gonzalez presents with an L4-L5 disc protrusion. The mechanism of lifting and turning very heavy patients is consistent with her acute disc pathology." (Ex. 2, p. 9) He believes she reached maximum medical improvement (MMI) on August 13, 2014, which was the date of her last appointment with Dr. Meyer. Dr. Bansal assigned 7 percent body as a whole impairment. He also placed permanent restrictions on her activities. He restricted Ms. Gonzalez to no lifting over 15 pounds occasionally, no lifting over 5 pounds frequently. No frequent bending, squatting, climbing, or twisting to avoid further damage to the back and keep pain levels in check. He recommended sitting and standing as tolerated. She should avoid sitting for 30 minutes, standing for 30 minutes, and no walking more than 30 minutes at a time. (Ex. 2)

Dr. Bansal's report is troubling for several reasons. First, Dr. Bansal's diagnosis is L4-5 disc protrusion, but this was not seen on the initial MRI from July of 2013. (Ex. D, p. 1)

Second, Ms. Gonzalez provided Dr. Bansal with an inaccurate history. Specifically, Dr. Bansal notes that Ms. Gonzalez said she had no problems with her back prior to the injury of May 18, 2013. She told him she only had normal aches and pains, would treat with a chiropractor, and her symptoms would resolve within days. However, the medical records show that Ms. Gonzalez did have back pain prior to the date of injury in question. In 2001 she was diagnosed with "LS strain" and old coccyx fracture with some flare up. There was also evidence of degenerative joint disease in her lumbar spine as early as 2001. (Ex. A, p. 1) In early 2002 she was seen for low back pain which had been going on periodically for approximately one year. She reported pain in her neck, thoracic spine, and lumbar spine. She was prescribed physical therapy. (Ex. A, p. 1) She was seen again in 2007 for lower back pain. Physical therapy was again recommended. (Ex. A, p. 3) In May of 2007, she reported her pain was a level 7 out of 10. At that time she was working on the line at SaraLee. (Ex. A, p. 4) In June of 2009 she went to the doctor for left leg and buttock pain. She was assessed with limb pain. (Ex. A, pp. 7-8) In July of 2012, she reported that her extremities went numb while doing simple tasks and that sitting or standing for long periods made her legs go numb. She was assessed with intermittent paresthesias of both upper and lower extremities. The note indicates the provider had no reasonable explanation for her symptoms. (Ex. A, p. 9) The medical evidence is simply not consistent with the history Ms. Gonzalez provided to Dr. Bansal.

Third, Ms. Gonzalez provided Dr. Bansal with a description of the injury that is different from the incident report and her testimony of how the injury occurred. Ms. Gonzalez told Dr. Bansal that during her May 18, 2013 shift she realized her back felt different after lifting and assisting several residents. In her initial statement to Fonda NRC she said it was "unknown" how her injury occurred. (Ex. F, pp. 1-3) On May 29, 2013, she told Dr. Grant that she did not have an injury. She said the pain started after

climbing into a car. (Ex. B, p. 1) Thus, the mechanism of injury that Dr. Bansal relies on is not consistent with the medical evidence generated close in time to the alleged injury. For these reasons I do not find the opinions of Dr. Bansal to be persuasive.

At her attorney's request, Ms. Gonzalez was seen for another IME by Jacqueline M. Stoken, D.O. on December 9, 2014. As a result of the examination and review of records Dr. Stoken issued a report on December 18, 2014. At the time of the examination Ms. Gonzalez complained of pain in her left low back that radiated down her left leg to the ankle. She described the pain as "aching, shooting, stabbing, sharp, tender, burning, exhausting, continuous, numb, and miserable." (Ex. 3, p. 5) On a scale of 1 to 10, her pain ranged from a 6 to a 10. Ms. Gonzalez stated her pain averaged an 8 and at the time of the exam it was a 9. She reported that medicine helped for short periods. "Bending, sitting, walking, turning, stretching, laying, and touching shoes and clothes makes her worse." (Ex. 3, p. 5) She reported that she was employed part time as a gas station cashier. The note states she "does self-limit what she does with no bending, sweeping, and carrying." (Ex. 3, p. 5) The physical examination portion of the report indicates that Ms. Gonzalez was in no acute distress. Dr. Stoken's diagnosis included: "[s]tatus post work injury on 3/18/13 with acute low back strain, left sacroiliac joint dysfunction, and left lower extremity radiculitis" and "[c]hronic low back pain, left sacroiliac joint dysfunction and left lower extremity radiculitis." (Ex. 3, p. 6) It is worth noting that Dr. Stoken's diagnosis differs from that of Dr. Bansal. Regardless, Dr. Stoken causally related her diagnosis to the work injury of March 18, 2013, but failed to provide any rationale as to why she felt the diagnoses were related to the alleged work injury. Dr. Stoken opined that she had sustained 8 percent impairment of the whole person due to the lumbar injury. She assigned permanent work restrictions to avoid repetitive bending, lifting, and twisting. She is also to avoid lifting more than 20 pounds on a frequent basis. (Ex. 3, p. 7)

I find that Dr. Stoken's opinions are not persuasive. Dr. Stoken based her opinions, at least in part, on the information provided to her by Ms. Gonzalez. According to the report, Ms. Gonzalez reported that she does not bend, sweep, or carry when she works as a cashier. The evidence in the record demonstrates this is not true. The evidence shows that Ms. Gonzalez does in fact, bend, sweep and carry items while working as a cashier. Also, I note that the mechanism of injury Ms. Gonzalez provides to Dr. Stoken is different than the history she gave to Dr. Bansal. Further, Dr. Stoken failed to provide any rationale or basis for her opinion regarding causation. Without any rationale or basis to support the statement that the diagnosis is related to the alleged work injury it is difficult to give the opinion much, if any, weight.

It is noted that a repeat MRI was performed on January 5, 2015. The MRI demonstrated an L4-L5 lobulated disc bulge and an L5-S1 disc bulge with tiny annular tear. The overall impression was mild degenerative disc changes of the lower lumbar spine. (Ex. D3, pp. 1-2)

After a review of the entire record I find that claimant has failed to carry her burden of proof to show she sustained an injury arising out of and in the course of her

employment with Fonda NRC on May 18, 2013. A review of the record as a whole demonstrates that Ms. Gonzalez failed to show by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with Fonda NRC.

First, claimant has provided inconsistent histories about the onset of her back pain or the mechanism of injury. The first time she sought medical treatment following the alleged date of injury was with Dr. Grant. She reported to him that the pain began when she went to sit down in a car. (Ex. B, p.1) When she completed her incident report she was asked if she was lifting anything, and she said "unknown." (Ex. F, pp. 1-3) During physical therapy in July of 2013, she reported that on May 18, 2013 she was working with a specific patient and the next day she noticed she started having left back pain. She said she did not report the pain to her employer. (Ex. E, p. 1) When she saw Dr. Grant in August of 2013, he noted that despite not recalling a specific incident when he saw her on May 29th she has since concluded that the pain was caused by her CNA work. (Ex. B, p. 4) In February of 2014, she apparently told Bernadette Gyano, M.D. that she injured her back last May while moving and pulling a patient. (Ex. B, p. 7) In her deposition on June 17, 2014, claimant testified that she could not cite anything that occurred with a specific resident on May 18, 2014. (Ex. H, p.2) She told Dr. Bansal that at some point during her shift she realized her back felt different. (Ex. 2, pp. 4-5) Ms. Gonzalez reported to Dr. Stoken that she began having back pain while she was taking care of the residents and it got worse during her shift. She also said that she did report it to her supervisor but was denied care. (Ex. 3, pp. 1-2) At the arbitration hearing she testified that as she was doing her rounds she noticed something was different with her back. However, she thought she just had a long shift and if she went home and showered she would be fine, so she did not report anything to her supervisor about her pain. (Testimony) Ms. Gonzalez's inconsistent accounts of how the alleged injury occurred cast doubt on the alleged injury.

Second, Ms. Gonzalez saw Dr. Grant one time on May 29, 2013. She did not seek any additional treatment until July 8, 2013. This large gap in treatment does not support her contention that she had been in constant pain, 24 hours a day, 7 days a week since the alleged injury.

Third, Ms. Gonzalez's presentation at the arbitration hearing is in stark contrast to what is observed in the extensive videos of Ms. Gonzalez. (Ex. I, J, K, and S) At the time of hearing Ms. Gonzalez appeared to be in constant pain. She was tearful; she grimaced, and winced in pain. She had to change positions from sitting to standing during the arbitration hearing because she was so uncomfortable due to her alleged injury. She testified that since the injury she cannot move normally without pain. However, her appearance and behavior at hearing is much different than what the undersigned observed in the hours of video footage of Ms. Gonzalez. The video footage showed Ms. Gonzalez performing duties such as bending, sweeping, and carrying which she denied doing to some of the doctors. The footage also showed a woman who was able to work as a cashier, a woman who was able to work in a yard, and walk in a parade without the pain behaviors she displayed at the time of the

arbitration hearing. The contradiction in Ms. Gonzalez's appearance during the hearing and testimony about her own capabilities compared to what is seen on the videos is such that I find her testimony is simply not credible.

Fourth, the record is void of a reliable expert medical opinion which causally relates Ms. Gonzalez's symptoms to the alleged work injury at Fonda NRC. For the reasons set forth above the opinions of Dr. Bansal and Dr. Stoken are not persuasive. The totality of the evidence simply does not support Ms. Gonzalez's contention that she injured her back at work.

Having found that claimant failed to carry her burden of proof to show that her injury arose out of and in the course of employment the remaining issues are moot.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

In this case, I found that claimant failed to prove by a preponderance of the evidence that she sustained an injury on May 18, 2013 while performing work duties. Therefore, I conclude that claimant failed to carry her burden of proof in this case.

All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner. Having found that claimant failed to carry her burden of proof to show she sustained a compensable injury I do not find it is appropriate to assess costs against defendant. Therefore, 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.

Defendants 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 17th day of April, 2015.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Mary C. Hamilton
Attorney at Law
PO Box 188
Storm Lake, IA 50588
mary@hamiltonlawfirmnpc.com

Joseph D. Thornton
Attorney at Law
PO Box 249
Council Bluffs, IA 51502
jdthornton@smithpeterson.com

EQP/sam

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.