BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TIMOTHY GEHRING, Claimant, vs. ANNETT HOLDINGS, INC., d/b/a TMC TRANSPORTATION, Employer, Self-Insured, Defendants.	:	File No. 5054909 APPEAL DECISION Head Notes: 1402.20; 1801; 1803; 2501; 2502; 2701; 2907

Claimant Timothy Gehring appeals from an arbitration decision filed on May 17, 2018. Defendant Annett Holdings, Inc., d/b/a TMC Transportation, self-insured employer, responds to the appeal. The case was heard on March 7, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 16, 2018.

The deputy commissioner found claimant failed to carry his burden of proof to establish he sustained an injury or any permanent disability to his right shoulder as alleged as a result of the stipulated injury which arose out of and in the course of his employment with defendant on June 30, 2014. The deputy commissioner found that while claimant carried his burden of proof to establish he sustained injuries to his head and thoracic spine as a result of the work injury, claimant failed to carry his burden of proof to establish he sustained any permanent disability to his head or thoracic spine as a result of the work injury. The deputy commissioner found claimant is not entitled to receive any additional temporary disability benefits or any permanent disability benefits for the work injury. The deputy commissioner found claimant is not entitled to alternate medical care for the work injury. With regard to the past requested medical expenses itemized in Exhibit 4, the deputy commissioner found claimant is entitled to payment by defendant for those expenses related to claimant's head and thoracic spine, but the deputy commissioner found claimant is not entitled to payment by defendants for the medical expenses related to claimant's right shoulder condition. The deputy commissioner found claimant is entitled to reimbursement from defendant for the independent medical evaluation (IME) of claimant performed by Irving Wolfe, D.O., on October 24, 2016. The deputy commissioner ordered defendant to pay claimant's costs of the arbitration proceeding.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant did not sustain an injury or any permanent disability to his right shoulder as a

result of the work injury. Claimant asserts the deputy commissioner erred in finding claimant did not sustain permanent disability to his head and his thoracic spine as a result of the work injury. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive any additional temporary disability benefits or any permanent disability benefits for the work injury.

Defendant asserts on appeal that the arbitration decision should be affirmed in its entirety.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on May 17, 2018, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof to establish he sustained an injury or any permanent disability to his right shoulder as alleged as a result of the work injury. I affirm the deputy commissioner's finding that while claimant carried his burden of proof to establish he sustained injuries to his head and thoracic spine as a result of the work injury, claimant failed to carry his burden of proof to establish he sustained any permanent disability to his head or his thoracic spine as a result of the work injury. I affirm the deputy commissioner's finding that claimant is not entitled to receive any additional temporary disability benefits or any permanent disability benefits for the work injury. I affirm the deputy commissioner's finding that claimant is not entitled to alternate medical care for the work injury. I affirm the deputy commissioner's finding that with regard to the past requested medical expenses itemized in Exhibit 4, claimant is entitled to payment by defendant for those expenses related to claimant's head and thoracic spine, and claimant is not entitled to payment by defendants for the medical expenses related to claimant's right shoulder condition. I affirm the deputy commissioner's finding that claimant is entitled to reimbursement from defendant for Dr. Wolfe's IME. I affirm the deputy commissioner's order that defendant pay claimant's costs of the arbitration proceeding.

I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues with the following additional analysis:

On appeal, claimant criticizes the deputy commissioner because he does not cite or mention treatment contained in Joint Exhibit 7. Claimant cites a finding from the deputy commissioner on page nine of the arbitration decision in which the deputy commissioner found, "Claimant went over two (2) years from the date of injury before he

sought treatment for a work-related shoulder injury." This finding of fact is not inaccurate, but certainly leaves open for interpretation and argument that the deputy commissioner did not recognize the physical therapy records contained in Joint Exhibit 7.

Claimant was referred to physical therapy for treatment of his thoracic injury because claimant had not yet reported his right shoulder condition to a referring physician before August 14, 2014. Once claimant began physical therapy in Iowa, he reported right shoulder symptoms to the therapist. (JE 7, p. 1) In this sense, the deputy commissioner's finding of fact was accurate but could be interpreted as being a misunderstanding of the record. Therefore, I clarify this finding of fact based upon my review of the record.

Joint Exhibit 7 is the physical therapy records for the period from August 13, 2014, through August 27, 2014. Those records do reflect mention of right shoulder symptoms, as noted above. Of course, there was the long, two-year gap in treatment after this physical therapy where claimant did not report or seek treatment for the right shoulder between September 2014 and September 2016. During that period of time, claimant obtained an examination with his personal physician reporting no complaints, presumably including the right shoulder. (JE 8, pp. 6-9) Between September 2014 and September 2016, claimant also obtained three DOT physicals in which he denies symptoms in the arms. (Defendants' Exhibit K)

For clarity sake, I did review and I acknowledge there were reports of right shoulder symptoms in the physical therapy records in September 2014. However, I still concur with the deputy commissioner that the evidence produced by claimant fails to establish a right shoulder injury occurred in September 2014 or that claimant's right shoulder condition was materially aggravated by the June 30, 2014, work injury.

Claimant also challenges the deputy commissioner's decision as utilizing an improper legal standard. Claimant contends that, by accepting the opinions of Charles Mooney, M.D., and Joseph Chen, M.D. as most credible, the deputy implicitly adopted an inaccurate medical causation standard and committed legal error. Specifically, claimant argues:

> [F]or a medical condition to be "pre-existing," there must be medical evidence of a prior report or diagnosis of the same body part or treatment. For a condition to be "personal," there also needs to be medical evidence of a personal condition that made that person more susceptible to the condition claimed, or a personal condition which produces similar symptoms and complaints, e.g. diabetes.

(Claimant's Appeal Brief, page 9)

Claimant cites no authority for his assertions. Claimant's contention is actually a misconstruction of the proper legal standard. Claimant's argument appears to attempt to place a burden of production of evidence upon defendants to establish prior treatment, symptoms or condition before a pre-existing condition can be legally recognized. The Iowa Supreme Court has never adopted such a burden-shifting standard.

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).

In this case, claimant's best evidence of causation of the right shoulder condition is an opinion by the treating surgeon that the work injury "may" have caused the right shoulder condition. This is not a definitive opinion and it is not sufficiently convincing to prove a work injury to the right shoulder by a preponderance of the evidence.

Claimant's next best evidence is his IME performed by Dr. Wolfe. Unfortunately for claimant, the history claimant provide to Dr. Wolfe varies significantly from the other medical records in evidence. Dr. Wolfe records a history in which claimant reports he was struck on the head and then the right shoulder on the date of injury. This history is inconsistent with the contemporaneous reports of how the accident occurred. Dr. Wolfe's credibility suffers because the history he received from claimant was significantly different from the history reported to other medical experts.

Additionally, I concur with the deputy commissioner's analysis of Dr. Wolfe's opinion pertaining to headaches. Dr. Wolfe assigned a permanent impairment rating for claimant's ongoing headaches. However, at the time of hearing, claimant conceded he no longer has headaches. Dr. Wolfe's assessment that the headaches were permanent in nature and permanently disabling clearly was erroneous. Ultimately, I concur with the deputy commissioner and I find the opinions of Dr. Wolfe not convincing.

To avoid any confusion or assertion of legal error, I specifically find the evidence propounded by claimant was not convincing. While I find the opinions of Dr. Mooney and Dr. Chen to be more convincing than those offered by Dr. Wolfe and the treating surgeon, I find claimant simply failed to carry his burden of proof to establish a right shoulder injury arising out of and in the course of his employment on June 30, 2014. I find claimant failed to establish a material aggravation, acceleration, or worsening of the right shoulder condition caused by the work injury. I find that claimant failed to prove permanent disability resulting from the head injury or the thoracic spine injury. Accordingly, I concur with the deputy commissioner when he found:

> Claimant failed to carry his burden of proof his shoulder injury arose out of and in the course of employment. It is found that claimant failed to carry his burden of proof that he has a permanent impairment regarding his headaches or his thoracic spine. Based on this, it is found claimant has failed to carry his burden of proof he sustained a permanent disability caused by the June 30, 2014 work injury. As claimant has failed to carry his burden of proof he sustained a permanent disability caused by the June 30, 2014 work injury, the issue of claimant's entitlement to permanent partial disability benefits is moot.

(Arbitration Decision, page 10)

Therefore, I conclude that the arbitration decision should be affirmed with the additional analysis and findings contained in this appeal decision.

Costs are assessed at the discretion of this agency. Iowa Code section 86.40. Costs of this appeal, including the cost of the transcript, are taxed against claimant.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on May 17, 2018, is affirmed in its entirety with the additional analysis provided above.

Claimant shall take nothing in the way of temporary disability benefits or permanent disability benefits from these proceedings.

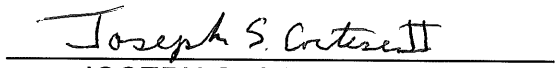
Defendant shall reimburse claimant for those medical expenses itemized in Exhibit 4, including medical mileage, which relate only to claimant's closed head injury and his thoracic spine injury.

Pursuant to Iowa Code section 85.39, defendant shall reimburse claimant for expenses related to Dr. Wolfe's IME.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 20th day of February, 2020.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Christopher D. Spaulding Via WCES

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