

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HARVEY HUNEMULLER,

Claimant,

vs.

WEITZ CONSTRUCTION
COMPANY, INC.,

Employer,

and

SENTINEL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5064471

ARBITRATION

DECISION

: Head Note Nos.: 1803, 1803, 2801, 4000

STATEMENT OF THE CASE

Harvey Hunemuller, claimant, filed a petition in arbitration seeking workers' compensation benefits from Weitz Construction Company, Inc. (Weitz) as a result of an alleged injury he sustained on April 16, 2018 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa on August 13, 2019 and fully submitted on September 30, 2019. The evidence in this case consists of the testimony of claimant, Kenneth Redd, Joint Exhibits 1 - 7, Defendants' Exhibits A and C - Q¹ and Claimant's Exhibits 1 - 8A. Both parties submitted briefs. Exhibit 3B, two pages, and Joint Exhibit 8, 40 pages, were admitted after the hearing. Claimant also submitted Exhibit 9.

Claimant objected to Exhibit Q, page 3 and questions related to that information based upon that exhibit. A ruling on the admissibility was objected to, and ruling was reserved on the objection. Exhibit Q concerns a record that has been expunged. The event was over 14 years ago. Defendants are correct that the rules of evidence before this agency are relaxed and not as stringent as a court. Iowa Code 17A (2019) provides in part:

¹ The transcript of the hearing is not clear that Defendants' Exhibits A and C - Q, with the exception of Exhibit Q, page 3, were formally admitted. Defendants' Exhibits A and C - Q, with the exception of Exhibit Q, page 3 are admitted and part of the record.

17A.14 Rules of evidence — official notice.

In contested cases:

1. Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record.

I find that Exhibit Q and testimony concerning that event are not the kind of evidence that a reasonably prudent person would rely upon to conduct in serious affairs. Exhibit Q is excluded as well as Exhibit 9, which was filed in response to Exhibit Q. Had Exhibit Q been admitted, I would not have found the evidence material on claimant's credibility.

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.

ISSUES

1. Whether claimant sustained an injury on April 16, 2018 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability and, if so,
3. The extent of any temporary disability;
4. Whether the alleged injury is a cause of permanent disability and, if so;
5. The extent of claimant's disability.
6. Whether claimant provided timely notice of an injury to the defendants.
7. Whether claimant is entitled to payment of certain medical expenses.
8. Whether claimant is entitled to alternate medical expenses.
9. Whether claimant is entitled to payment for an independent medical examination.
10. Whether penalty should be assessed.
11. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Harvey Joshua Hunemuller, claimant, was 37 years old at the time of the hearing. Claimant went through the 11th grade and has a GED. Claimant is referred to by his middle name, Josh, in a number of the records. Claimant's work history prior to his work for Weitz includes being a mechanic, framer, laborer and foreman for Olympic Wall Systems, and a foreman for Allied Corporation. Claimant worked for Weitz for a year and one half as a laborer. After his employment claimant worked for a towing company for two months, and at the time of the hearing he was a carpentry foreman for Sage Construction. (Exhibit P, pages 1 – 3)

Claimant described his work at Weitz as being pretty physical, and his work included pouring concrete, general clean up; with most of his work in clean up. (Transcript p. 27)

Claimant testified he was involved in a motor vehicle accident in 2013 or 2014. Claimant said he saw a chiropractor for two or three months. Claimant said he recovered and felt great. (Tr. p. 24) Claimant testified that a few months before the April 16, 2018 incident he was having soreness in his back and he went to a chiropractor, Ethan Kleckner, D.C. (Tr. p. 29) Claimant was told he had scoliosis and was told it might not hurt to see an orthopedic surgeon. (Tr. p. 29) Claimant said he had a treatment from Dr. Kleckner about a month before the April 16, 2018 incident.

On April 16, 2018 claimant was at a job site, Prairie Meadows, while working for Weitz. Claimant was asked by his supervisor, Jeff Harrison, to help move some tables. Claimant said his back was sore after moving a couple of tables. Claimant and Mr. Harrison continued to move the remaining table. Claimant said they were lifting a table above their heads when he twisted and felt something in his back give. (Tr. p. 31) Claimant said he told Mr. Harrison that he had to put the table down, and his legs were numb and he tripped on a stair. Claimant said he was asked by Mr. Harrison how he was doing and claimant told him his back was killing him. (Tr. p. 31) Claimant said Mr. Harrison told him to take the time he needed to recover and then he could go back to fireproofing. (Tr. p. 31) Claimant testified that Mr. Harrison did not ask him to fill out any paperwork concerning this incident. (Tr. pp. 34, 35)

Claimant testified that about a week after the incident he asked Mr. Harrison if he thought he was going to be laid off from Weitz, as work was getting slow, and that he could go to a doctor to look at his back. Mr. Harrison said claimant would need to talk to Kenny (Kenneth Redd) about a layoff. Claimant said he went to speak to Mr. Redd and asked him if Weitz would lay him off so he could see his doctor and was told no. (Tr. p. 36) Claimant then said he asked about filling out workers' compensation papers and was told by Mr. Redd that since the incident happened two weeks ago Weitz could not do anything for him. (Tr. p. 36) Claimant said he told Mr. Redd he was going to talk to

Joe Harris, Mr. Redd's supervisor. (Tr. p. 36) Claimant said he talked to Mr. Harris on the same day he talked to Mr. Redd. Claimant was asked by Mr. Harris about how much time he needed off. Claimant said he did not tell Mr. Harris he had hurt his back or had a work injury. (Tr. pp. 38, 67) Claimant said he told Mr. Harris he was asking for time off for personal reasons and physical reasons. In his deposition claimant testified that he told Mr. Harris he wanted time off for personal reasons. (Tr. p. 68)

Claimant testified that he asked for a layoff rather than filing for workers' compensation based upon his experience in the union of employees being terminated when a work comp claim was filed. (Tr. p. 37)

Claimant was laid off from Weitz on April 18, 2018. (Ex. M, p. 1) Claimant filed for unemployment benefits the next day. (Tr. p. 79) Claimant used his personal medical insurance for treatment and did not have the treatment covered as a work injury. (Tr. p. 41)

Claimant went to Troy Munson, M.D. for low back pain that radiated into both legs. Dr. Munson's records do not reflect the claimant reported a work injury. Claimant testified that he talked to Dr. Munson about his injury and told him he was not sure how he wanted to handle his injury. (Tr. p. 41) Dr. Munson performed an L4-L5 fusion on May 23, 2018. (Tr. pp. 42, 63) Claimant said the surgery provided some relief, that it took away some of his numbness and he has more flexibility without as much pain. (Tr. p. 43) Claimant said he has "general pain and discomfort", that his back gets agitated when he moves or at work. (Tr. p. 46) Claimant has pain around the incision site and some pain down his left leg. (Tr. p. 46)

After Dr. Munson released claimant to return to work claimant contacted Weitz about returning. Claimant went to a pre-employment physical and informed the provider he had recent back surgery. Claimant had a release that allowed him to work full time and it did not have any restrictions. (JE 4, p. 11) Claimant was told that he would need a release from his surgeon. Dr. Munson would not completely release claimant and provided a 40-pound lifting restriction. Mr. Harrison informed claimant that he could not return to work with the 40-pound restriction. (Tr. p. 45) Claimant believes he still has the 40-pound restriction. (Tr. p. 47)

At the time of the hearing claimant was working for Sage Construction as a carpentry foreman. Claimant also supervises the spray insulation division. Claimant said he is able to perform this job within his 40-pound restriction. (Tr. p. 41) Claimant said he was receiving pain management at Broadlawns Medical Center and had discussion about a trial of a spinal cord stimulator. (Tr. p. 48)

Claimant testified that he was taking methadone for his pain. Claimant did not recall if he had informed the methadone clinic that he wanted the methadone so he could stop using illicit street drugs. (Tr. p. 53)

Upon cross examination claimant agreed that there was no mention of a work injury on his visit to a doctor on April 17, 2018, and the medical note states claimant had pain for years. (Tr. p. 58) Further, when he saw Dr. Munson on May 8, 2018 the notes stated he had symptoms for years and there is no mention a work injury. (Tr. p. 59) Claimant admitted that for his pre-operative examination with Erin Swenka, D.O. there is no mention of a work-related back injury. (Tr. p. 61; JE 3, pp. 6-8) Dr. Swenka, on July 11, 2019 agreed that when she saw claimant for the pre-operative examination claimant provided a history of back pain for many years that had gotten worse over the last seven or eight months, and her records do not indicate claimant had a work injury. (Ex. C, pp. 1, 2) Claimant agreed that none of his treating doctors have in their reports that claimant told them he had a work injury. (Tr. p. 83)

Claimant testified that he was not told by Mr. Harrison that if he was claiming a work injury he would need to fill out paperwork. (Tr. p. 66)

Mr. Redd was a field supervisor for Weitz at the time claimant was working at Weitz. At the time claimant was working at Prairie Meadows for Weitz, Mr. Redd said an employee who had a work injury should report the injury to Mr. Harrison or himself. (Tr. p. 95) Mr. Redd said laborers are provided information that they are to report any work injury, no matter how small, so they do not come up a week or two later. (Tr. p. 96) Mr. Redd stated that if a worker reported an injury that happened last week "... [W]e're not going to believe them if they say they did it last week." (Tr. p. 97) Mr. Redd said Mr. Harrison informed him that he asked claimant in April 2018 if he wanted to file some sort of injury or accident report. (Tr. p. 97)

Mr. Redd testified that Mr. Harris told him claimant wanted to talk to him. That day claimant came to see him at work and asked Mr. Redd to be laid off. Mr. Redd said claimant told him his back had been bad for two years and that claimant's wife was furious at claimant for never getting the surgery. (Tr. p. 98) Mr. Redd said he told claimant that since he was hurt he could not continue to work, and Mr. Redd noticed that when claimant came to the job claimant's posture was slumped to one side. Mr. Redd told claimant to contact Mr. Harris. (Tr. p. 98) Claimant told him he had numbness and pain in his legs. (Tr. p. 98) Mr. Redd said claimant did not tell him he hurt his back lifting tables at work. (Tr. p. 99) On cross examination, Mr. Redd agreed that at the time he said claimant told him he needed surgery no doctor had told claimant he needed surgery. (Tr. p. 109) Mr. Redd said if an employee waited more than a week to report a work injury he would not believe the employee. (Tr. p. 107)

Mr. Redd provided sworn answers to questions to the defendants on November 13, 2018. (Ex. G, pp. 2 – 9) Mr. Redd stated that he was contacted by claimant on April 16, 2018 and told him he has had a back problem for a couple of years and that claimant's wife was mad at him for not having surgery. Claimant asked to be laid off and Mr. Redd said, "They can't really lay you off for an injury." (Ex. G, p. 5)

Mr. Harrison provided sworn answers to questions to the defendants on November 13, 2018. (Ex. E, pp. 2-6) At that time Mr. Harrison was no longer an employee of Weitz. Mr. Harrison was asked and responded:

Q. Did you have a conversation with him in - - it would have been on or about April 16 of 2018 about him having some pre-existing back problems?

A. Yes.

Q. What did he tell you that you recall?

A. He just said that he had had problems in the past with his - - with his back, and he was - - he was wanting to get to the surgeon to - - to have them do some work on him, I guess.

Q. Did you have a direct conversation with Harvey in person about this?

A. Yes.

Q. And did you ask him directly to his face if he was alleging that he had done anything at Weitz that caused any injury to him?

A. Yea, I - - I asked him. I said, "Josh, if - - if you're - - if you're hurt? - -

....

Q. Okay. Gotcha. So you said to Harvey, who you call Josh, what did you say?

A. Right, I said, "If you're hurt, Josh, we need to fill the paperwork out." He refused to fill the paperwork out that he was - - that he was hurt, you know. He never - - The only - - What he mentioned to me is it was pre-existing.

Q. Okay.

A. He didn't mention to me nothing about him being hurt on the job.

Q. And that's - - that's specifically what I'm trying to figure out from you is did Harvey or Josh, as you call him, ever say to you, 'Hey, Jeff, I hurt myself doing this for Weitz Company'?

A. No.

(Ex. E, pp. 3-5) Mr. Harrison said that claimant refused to fill out paperwork against WEITZ. (Ex. E, p. 5)

Mr. Harrison testified via deposition. During some of the time he was employed by Weitz he was a supervisor; a Laborers Foreman. (Ex. 7, p. 2) Mr. Harrison was claimant's supervisor on April 16, 2018. (Ex. 7, p. 3) Mr. Harrison and claimant moved some tables at Prairie Meadows on April 16, 2018. (Ex. 7, p. 3) Mr. Harrison was asked if claimant was having any issues on April 16, 2018. Mr. Harrison's response was:

A. He did say his back was hurting, and I did ask him, 'If you're hurt, we need to fill some paperwork out,' you know, and Josh didn't - - he didn't want to fill the paperwork out.

Q. How did it lead to the conversation when you said, if you're hurting, you need to fill out paperwork?

A. How did that - - I gotta think. This has been awhile. Well, we was [sic] moving them for, I don't know, three or four hours. And he said, 'I don't think I can do this anymore, 'and I said, 'Josh, if you're hurt from the tables, or if you got issues where you are hurt, ' I said, 'let's fill the paperwork out,' because that's Weitz's policy, you gotta fill the paperwork out on everything.

Q. Yep.

A. And pretty much that was - - he didn't want to fill the paperwork out, so we ended up calling Kenny, and we ended - - and he ended up going to doing fireproofing.

Q. Did you call Kenny or did Josh?

A. I think Josh did, because I - - yeah, I think it was Josh.

Q. And you were around for that conversation? Do you know what Josh told him?

A. I really wasn't around for it.

Q. Did you talk to Kenny about it?

A. Yeah. I talked to Kenny about it, you know. Yeah, I did.

Q. What did you tell Kenny?

A. Well, I sked Kenny, I said, 'Hey, Josh wants to know if he can - - he wanted laid off, you know.' And I said, 'He hurt himself - - must have hurt

himself moving the tables.' I mean, I don't know - - I'm not a doctor so I can't say, you know, that he was - - he wasn't wanting to do the tables no more, you know, and it's a one-man - - two-man deal, and that left me by myself, and I can't move them by myself downstairs. So I think I did call Kenny and ask Kenny about, you know. Putting him on something a little bit, you know - - like a fireproofing job, so . . .

Q. So in some way shape or form, you let Kenny know that Josh has a problem today, he can't help we [sic] with the tables?

A. He wanted laid off, too.

Q. Did you tell him why he wanted laid off?

A. I can't recall if I did or if I - - I just told him that his back was bothering him, I believe. I think that's . . .

Q. But in any form or fashion, you talked to Kenny and said Josh isn't doing tables anymore today?

A. Yeah.

Q. Because of his back; right?

A. I need some help because he's having problems. What kind of problems, I don't know. I'm not a doctor.

Q. But you knew there were problems with the back?

A. I knew there was some issues with him hurting, you know, and I knew that he had from previous - - I knew that he had issues with his back previously.

Q. I understand that.

A. So I did know that.

Q. On this day, though, when you stopped doing the tables

A. Uh-huh.

Q. - - why did you stop doing the tables?

A. I didn't stop doing the tables.

Q. Why did Josh stop doing the tables?

A. Josh stopped doing them because he said that he was hurting.

Q. Where?

A. He was hurt.

Q. Where was he hurting?

A. He said his back.

(Ex. 7, pp. 3-4)

Mr. Harrison vaguely remembers claimant saying he wanted to be laid off so he did not hurt himself anymore. (Ex. 7, p. 5) Mr. Harrison testified that he told claimant if he was hurting from moving then "we need to fill the paperwork out." (Ex. 7, p. 5) Mr. Harrison was asked by defendants' counsel if he filled out an accident report for claimant for the April 16, 2018 incident and he said, "That was Kenny's [Redd] deal." (Ex. 7, p. 6) Mr. Harrison said claimant told him he did not get hurt moving tables. (Ex. 7, p. 7)

Mr. Harris provided sworn answers to questions to the defendants on November 13, 2018. Mr. Harris stated the claimant contacted him and said he was having personal problems and wanted to be laid off. (Ex. F, p. 5) Mr. Harris stated he was not told by claimant that he needed time off due to his back. (Ex. F, p. 6) Mr. Harris said Weitz has a policy concerning reemployment after a layoff and that employees are contacted before 45 days after layoff to check on the status as to whether they want to come back to work. (Ex. F, p. 7) Mr. Harris said he called claimant around this time to see if claimant wanted to return to work. (Ex. F, p. 7) Claimant told Mr. Harris he was having back issues and had back surgery. (Ex. F, p. 8)

Claimant's medical history showed that he has received treatment for opioid abuse from Unity Community Services. Claimant was assessed on April 21, 2017. (JE 1, p. 1) Claimant was enrolled in a program and was prescribed methadone. Claimant was successfully discharged from the program on June 29, 2018. Claimant returned to Unity Community Services on November 11, 2018. Claimant told Unity Community Services that the medication he received after his back surgery was not working and he wanted to go back on methadone, as he was using street drugs. (JE 1, pp. 18, 19) Claimant was taking methadone at the time of the hearing. (Tr. p. 56)

On January 4, 2018 claimant saw Dr. Kleckner for a sore back. (JE 2, p. 2) Claimant described an ache in his lower back and hip down to the thigh. (JE 2, p. 3) Claimant described his pain as being more frequent over the past year and worse the last several weeks. Claimant rated his lower back pain as a 6 on a 1-10 pain scale. (JE 2, p. 4) Claimant was seen for treatments on January 6, 11, 18, 24, 29 and February 9 and March 20, 2018 by Dr. Kleckner. On his last visit claimant rated his back pain a 3 on a 1-10 pain scale. (JE 2, p. 25) On June 14, 2019 Dr. Kleckner wrote that the last time he treated claimant was on March 20, 2018 and at that time claimant was showing good signs of improvement. Dr. Kleckner noted that his notes concerning

referring claimant for an orthopedic visit was a recommendation for conservative care, not surgical intervention. (Ex. 2, p. 1)

On April 17, 2018 claimant was seen for low back pain by Barbara Heck, ARNP. ARNP Heck noted claimant had low back pain for years but worse recently. (JE 3, p. 1; Ex. D, pp. 1, 2) X-Rays of the spine showed severe degenerative changes in L4-5. Claimant was referred for an MRI. (JE 3, p. 3) On April 20, 2018 an MRI was performed and a recommendation was made to refer claimant to a neurosurgeon. (JE 3, p. 4)

On May 3, 2018 Dr. Munson of Mercy Neurosurgery examined claimant. Dr. Munson wrote claimant's symptoms had not been present for many years, but have become especially worse the last two years. Claimant reported that he had pain radiate down both legs for the last nine months. Dr. Munson recorded that claimant tried two months of physical therapy,² which did not work and he was miserable. (JE 4, p. 1) Dr. Munson's assessment was "Spondylolisthesis of lumbar region." (JE 4, p. 2) Dr. Munson wrote,

He has a significant grade 2 spondylolisthesis and presents with severe back pain and bilateral radiculopathy. He failed to improve with physical therapy and given his severe imaging findings I think he will undoubtedly require surgical intervention. He is a daily smoker and he promises to quit knowing the risks related to spinal fusion surgery. We discussed the surgical options and my recommendation would be for an open posterior L4-5 fusion likely with an interbody. We discussed all risk of surgery and the patient wishes to proceed as soon as possible.

(JE 4, p. 2) On May 23, 2018 Dr. Munson performed an L4-5 posterior fusion. Dr. Munson's post-operative diagnosis was, "Grade 2, L4-5 spondylolisthesis." (JE 5, p. 1) On July 16, 2018 Dr. Munson noted claimant was doing surprisingly well after surgery and Dr. Munson was okay with claimant returning to work the next week as tolerated. (JE 4, p. 9) Dr. Munson signed a return to work slip with no restrictions effective as of July 23, 2018. (JE 4, p. 11) On August 30, 2018 claimant requested clarification of his restrictions. Dr. Munson said claimant could lift 40–50 pounds intermittently. (JE 4, p. 14) Dr. Munson agreed on June 15, 2019 to a letter sent by defendants that at that time he first said claimant's back pain had become worse in the last two years and claimant did not report a work injury. (JE 4, p. 15)

On October 30, 2018 claimant went to a pain clinic for bilateral lower back pain and left leg pain and saw Dana Simon, M.D. (JE 7, p. 1) Dr. Simon's assessments were:

1. Chronic lower back pain

² Based upon the exhibits submitted it is likely the two months of physical therapy was the chiropractic treatment he received from Dr. Kleckner.

2. Left leg pain
3. Myofascial pain
4. Neuropathic pain

Throbbing pain down the left lower extremity which goes down to just below the knee, worse at the end of the day.

(JE 7, pp. 2, 3) Dr. Simon prescribed gabapentin, recommended pool therapy and discussed lumbar medial branch blocks. (JE 7, p. 3) Claimant's last visit at the pain clinic was on May 5, 2019. Claimant wanted a prescription for pain. Alohalani Taylor, ARNP noted the visit did not go well. Claimant was upset that the pain clinic was offering injections and not opiates. (JE 7, p. 8)

Claimant went to the Pain Management Center at Broadlawns Medical Center on June 4, 2019 and was seen by Robert Rossi, M.D. Claimant reported he had had ongoing pain since his surgery in May 2018. (Ex. 8, p. 1) Dr. Rossi's assessment was: 1. Post laminectomy syndrome 2. Chronic bilateral low back pain without sciatica. (Ex. 8, p. 6) Claimant was using the prescribed methadone and non-prescribed marijuana for his pain at that time. Claimant was referred for physical therapy evaluation, and discussion was had about utilizing a spinal cord stimulator (SCS). (Ex. 8, p. 6) On July 29, 2019 claimant expressed that he wanted to use medication management rather than an SCS or injections. (Ex. 8, p. 25) On August 12, 2019 claimant had agreed to a trial of the SCS. (Ex. 8, p. 30)

On October 16, 2018 John Kuhnlein, D.O. issued an independent medical examination (IME) report. (Ex. 1, pp. 1-9) Dr. Kuhnlein recorded that claimant has had intermittent back pain in the past with occasional left lateral thigh symptoms that were treated with chiropractic care. Dr. Kuhnlein noted claimant took methadone for chronic pain, not only for his back. (Ex. 1, p. 2) Dr. Kuhnlein's diagnosis was:

1. Grade II L4-L5 spondylolisthesis with radiculopathy and May 23, 2018, L4-L5 fusion (Munson)

(Ex. 1, p. 6) Dr. Kuhnlein stated that if the history claimant presented to him was accurate then the incident of April 16, 2018 produced new radicular symptoms that were surgically addressed by Dr. Munson. (Ex. 1, p. 6)

Dr. Kuhnlein noted claimant had persistent radicular findings on examination. (Ex. 1, p. 6) Dr. Kuhnlein provided a 25 percent whole person impairment based upon

the fusion surgery and persistent findings of radiculopathy. Dr. Kuhnlein recommended restrictions of:

Material handling restrictions would include lifting 30 pounds occasionally from floor to waist, 40 pounds occasionally from waist to shoulder, and 20 pounds occasionally over the shoulder, because of the 'moment arm' phenomenon in the lumbar spine with material handling activities.

Nonmaterial handling restrictions would include sitting, standing, or walking on an as needed basis. Mr. Hunemuller can stoop or squat occasionally, occasionally bend, or crawl occasionally. He can kneel occasionally. He can work on ladders or at height as long as he can maintain a three-point safety stance, and is not taking medications that alter his sensorium to the point he becomes a hazard to self or others. He can frequently climb stairs. He can work at or above shoulder height occasionally, again because of the 'moment arm' effect. Mr. Hunemuller can grip or grasp without restrictions. Mr. Hunemuller should not operate industrial machinery with his left lower extremity.

(Ex. 1, pp. 7, 8)

On July 2, 2019 Scott Neff, D.O. performed an IME. Dr. Neff was provided statements from Mr. Harrison, Mr. Redd and Mr. Harrison as well as medical records. Dr. Neff noted that claimant told him he started having back problem less than a year ago, which Dr. Neff noted was not consistent with the medical records. (Ex A, p. 3) Dr. Neff's impression was:

Mr. Hunemuller has developmental and degenerative abnormality of the spine that significantly predates his date of injury. He has had back pain off and on for a prolonged period of time. Over the years, he has taken prescribed and illegal narcotics for his 'aches and pain' secondary to working. He had not had a specific injury recorded anywhere in the history prior to his work at Weitz.

(Ex. A, p. 8) Dr. Neff stated that claimant may have twisted his back at work on April 16, 2018, but it only was a temporary aggravation. Dr. Neff disagreed with Dr. Kuhnlein that claimant suffered a significant aggravation of his preexisting condition. (Ex. A, p. 9) At most, Dr. Neff opined claimant had a short-term increase in symptoms, but no substantial aggravation of his "chronic, progressive, degenerative circumstance which relentlessly progresses over time." (Ex. A, p. 9) Dr. Neff opined that a 50-pound lifting limitation was appropriate for claimant's current condition. (Ex. A, p. 9)

On July 8, 2019 William Boulden, M.D. reviewed medical records and statements, as well as Dr. Kuhnlein's IME. Dr. Boulden stated there is no way there has been an injury that is verifiable for claimant's need for surgery. Dr. Boulden did not

agree with Dr. Kuhnlein that claimant had a material aggravation of his back condition. (Ex. B, p. 3)

Claimant has requested costs including the \$100.00 filing fee and \$2,805.00 for the IME performed by Dr. Kuhnlein. (Ex. 8A³, pp. 1, 2)

RATIONALE AND 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.

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

³ Claimant submitted two different exhibits as Exhibit 8. I have changed the first set of Exhibit 8 to Exhibit 8A.

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant has the burden of proof to show that his injury arose out of and in the course of his work at Weitz. Plainly speaking, claimant's testimony is not always consistent and credible. He minimizes his past drug usage. He has provided inconsistent information about how long he has been having significant back problems, as he told Dr. Neff his back problems started a year ago, and other providers he said two years.

I find that claimant has not proven by a preponderance of the evidence that he suffered a permanent or temporary injury due to the April 16, 2018 incident when claimant was moving tables. There are many notations in the medical record indicating that claimant was having increasing back symptoms for two years before April 2018 and that in the last several months his back symptoms were worse. There were reports in the records that claimant was having radiating pain in his legs seven or eight months before his injury. There is strong motivation to be completely candid with physicians who are going to perform surgery. The medical record is completely absent of any notation from a treating physician or medical provider that claimant ever related his back symptoms to the April 16, 2018 incident.

Dr. Kuhnlein is the only physician who found a work injury and qualified his opinion based upon the information claimant provided him, which I did not find credible.

The record shows that claimant suffered a temporary increase in pain due to a pre-existing back condition on April 16, 2018. The employer had actual knowledge that claimant aggravated his back at work when claimant told Mr. Harrison he hurt himself moving tables.

Claimant stated that he discussed the possibility of a work injury with his treating physicians, but there is no record of any discussion. The claimant has not met his burden of proof that this incident caused, significantly aggravated or lighted up his back condition.

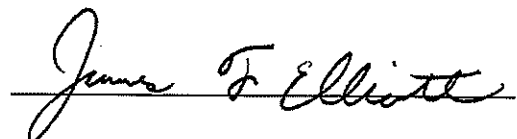
As claimant has not prevailed, all other issues are moot and will not be ruled upon.

ORDER

Claimant shall take nothing.

Each party shall be responsible for their own costs.

Signed and filed this 9th day of December, 2019.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Timothy Wegman (via WCES)
Nick Platt (via WCES)

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.