

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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DAVID CORTEZ,

Claimant,

vs.

LARSON CONTRACTING CENTER,  
LLC,

Employer,

and

AUTO OWNERS INSURANCE,

Insurance Carrier,  
Defendants.

**FILED**  
FEB 28 2019  
WORKERS' COMPENSATION

File No. 5062283

ARBITRATION

DECISION

Head Note Nos.: 1108.50, 1402.20

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STATEMENT OF THE CASE

David Cortez, claimant, filed a petition in arbitration seeking workers' compensation benefits from Larson Contracting Center, LLC, employer and Auto Owners Insurance, insurance carrier as defendants. Hearing was held on November 20, 2018 in Des Moines, Iowa.

There were no witnesses at trial. Claimant failed to appear for the hearing. The case was submitted on the record; the attorneys presented their arguments via post-hearing briefs. The evidentiary record includes joint exhibits JE1-JE6, claimant's exhibit 1, and defendants' exhibits A-J.

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 30, 2018.

## ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on March 1, 2016 which arose out of and in the course of his employment?
2. Whether the alleged injury was the cause of any permanent disability? If so, the extent, if any, of industrial disability claimant sustained.
3. Whether claimant's claim is barred by operation of Iowa Code section 85.23, for failure to give timely notice of the injury?
4. Whether claimant is entitled to be reimbursed pursuant to Iowa Code section 85.39 for the IME?

## FINDINGS OF FACT

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

Claimant, David Cortez, alleged he sustained a work-related injury on or about March 1, 2016. He further alleged that he injured his back and body as a whole while working. (Original Notice and Petition)

Although Mr. Cortez was not present at the scheduled arbitration hearing, his deposition testimony is in evidence. (Defendants' Exhibit A) Mr. Cortez testified that he began working for Larson Contracting Center, LLC (hereinafter "Larson's") in July of 2015. On or about March 1, 2016, he was pounding stakes into the ground at work with a sledgehammer when he experienced an acute onset of pain in his low back. His co-worker, Derek, noticed that Mr. Cortez was in pain and took over. Mr. Cortez could not bend over the rest of the day. He was working at the feed mill in Boyden, Iowa at the time of his injury. He went to the emergency room in Sheldon after work that day. Mr. Cortez testified that he continued working and eventually went to see a doctor at the Mercy Clinic. Mr. Cortez contacted his foreman, Dave, and told him that he was hurting and that he needed to have surgery. He asked his foreman what the company was going to do about his injury. Dave told Mr. Cortez that Travis said he was not going to do anything for him and that he should hire an attorney. He testified that when it was time for him to return to work he was terminated. (Def. Ex. A, pp. 19-23)

Defendants deny that Mr. Cortez sustained an injury which arose out of and in the course of his employment on or about March 1, 2016. The attendance records demonstrate that Mr. Cortez was absent from work from February 29, 2016 through March 4, 2016 for family reasons. (Def. Ex. G, p. 38) I find that claimant was not at work from February 29, 2016 through March 4, 2016.

A review of the medical records around March 1, 2016 also does not support claimant's contention that he sustained a work-related injury around this time.

The first medical record in evidence around the time of the alleged injury is dated March 11, 2016. On that date, Mr. Cortez was seen at MC MFC Buffalo Center. He reported back pain with an onset of two years ago; the problem was worsening in the last three months. He reported pain in his lower back that radiated to his left and right thigh. There is no mention of any type of work injury or incident. (Joint Exhibit 3, pp. 117-122)

On April 6, 2016, Mr. Cortez was seen at the Sanford Sheldon Medical Center. He presented with severe back pain. He reported that he had chronic back pain that had never been fully worked up due to lack of insurance. He was waiting for his insurance to begin on May 1. Periodically, his back flared up, and he woke up that morning with severe pain and tingling down his right posterior leg and foot. His pain was 10/10. The diagnosis was low back pain with radiation, right. He was prescribed medications and given a work release for two days. He was restricted to no repetitive bend, turn, or twist at the waist. Again, there was no mention of any type of work injury or incident. (JE2)

The record is void of any documents to support the claimant's contention that he sustained a work injury on or about March 1, 2016. In his deposition he testified that on the date of the alleged injury he went to the emergency room in Sheldon, Iowa. There is a record from the emergency room in Sheldon, but it is dated January 20, 2016. When he was seen at the ER, he reported back pain that radiated down his right leg since the age of 22. Mr. Cortez noted he had been in three major car accidents and had been told he had a spinal disease. His pain had gotten worse again the prior day when he woke up. (JE2, pp. 42-73)

There is mention of a work-related event in January of 2016 in some medical records from Albert Lea, Minnesota. However, the medical note references throwing something at work; there is no mention of any sledgehammer event. At that time, Mr. Cortez reported that the onset of his back pain was one year ago. (JE1)

Mr. Cortez's testimony that he injured his back at work around March 1, 2016 is not supported by the medical documentation that was generated around the time of the alleged injury. There is simply no evidence in the medical records to demonstrate that any type of incident took place at work around March 1, 2016. Furthermore, Mr. Cortez was not even at work from February 29, 2016 through March 4, 2016. I find Mr. Cortez has failed to demonstrate by a preponderance of the evidence that he sustained an injury to his back which arose out of and in the course of his employment on or about March 1, 2016. Because Mr. Cortez failed to prove that the alleged event even occurred, the issue of causation is moot.

Because Mr. Cortez failed to prove that he sustained a compensable injury, all other issues are rendered 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.

In the present case, the claimant failed to demonstrate by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment. Mr. Cortez was not even at work from February 29, 2016 through March 4, 2016. Furthermore, the medical documentation generated close in time to March 1, 2016 does not support his claim of a work injury. Because Mr. Cortez has failed to prove he sustained a compensable injury all remaining issues are moot.

ORDER

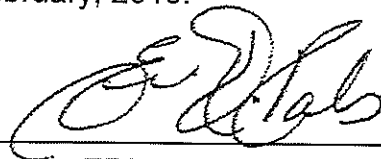
THEREFORE, IT IS ORDERED:

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 28<sup>th</sup> day of February, 2019.



ERIN Q. PALS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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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.