BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RACHID ROUABHI, Claimant, vs. SCHENKER LOGISTICS, Employer, and CNA INSURANCE, Insurance Carrier, Defendants.	:	File Nos. 5058810, 5058846 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 1402.40, 2502

STATEMENT OF THE CASE

Claimant, Rachid Rouabhi, filed petitions in arbitration seeking workers' compensation benefits from Schenker Logistics, (Schenker), employer, and CNA Insurance, insurer, both as defendants. This matter was heard in Des Moines, Iowa on July 13, 2018 by Deputy Workers' Compensation Commissioner Erica Fitch.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibit 1, and the testimony of claimant.

By order of delegation of authority, Deputy Workers' Compensation Commissioner Jim Christenson was appointed to prepare the finding of facts and proposed decision in this case.

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

For file number 5058810 (date of injury May 27, 2016):

1. Whether claimant sustained an injury on May 27, 2016 that arose out of and in the course of employment.

2. Whether the injury resulted in a permanent disability.

3. The extent of claimant's entitlement to permanent partial disability benefits.

4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

For file number 5058846 (date of injury March 20, 2017):

1. Whether claimant sustained an injury on March 20, 2017 that arose out of and in the course of employment.

2. Whether the injury resulted in a permanent disability.

3. The extent of claimant's entitlement to permanent partial disability benefits.

4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 64 years old at the time of hearing. Claimant has a bachelor's degree in civil engineering. He has an AA degree from a community college in computer programming. (Transcript pages 7-8)

Claimant is from Algeria. (Tr. p. 8)

Claimant began working for Jacobsen in 1998. Jacobsen was a contractor for P&G. Schenker took over the P&G contract in 2005. (Tr. p. 26)

Claimant's prior medical history is relevant. Claimant had polio as an infant. Claimant testified polio has affected his right leg since birth. (Tr. p. 9) Claimant testified he walks with a limp. Claimant said he walks with a limp, as his right leg is one inch shorter than his left. Claimant uses insoles in his shoes. (Tr. pp. 27-28) Claimant had a right total knee replacement in October of 2016. (Tr. p. 28)

In 2008 claimant was evaluated at The University of Iowa Hospitals and Clinics (UIHC) for dizziness and headaches. Claimant was noted to have a history of scoliosis and lower back pain. (Jt. Ex. 1, p. 2)

Claimant testified in hearing that on May 27, 2016 he bent over to get a roll of film when he felt pain in his lower back. (Tr. p. 10)

On June 13, 2016 claimant was evaluated by James Milani, D.O. for back pain occurring on May 27, 2016 while lifting and stacking heavy boxes. Claimant was assessed as having lower back pain or strain. Claimant was recommended to have physical therapy. Claimant was put on work restrictions. (Jt. Ex. 2, pp. 28-31)

Claimant testified he underwent physical therapy following the May 27, 2016 work injury. (Tr. pp. 14, 48) Claimant testified after he completed physical therapy, he had no back pain and his symptoms were "completely resolved." (Tr. p. 49)

On July 28, 2016 claimant returned to Dr. Milani. Claimant's back had improved. A physical therapy note was reviewed indicating claimant was released from physical therapy. Claimant was assessed as having back pain/strain, greatly improved and resolving. Claimant was found to be at maximum medical improvement (MMI) on July 28, 2016. Claimant was found to have no permanent impairment. Claimant was put on work restrictions until August 1, 2016. (Joint Ex. 2, pp. 32-34)

Claimant testified he had no pain in his lower back when Dr. Milani released him to return to his job after his first injury. (Tr. p. 49)

Claimant testified that on March 20, 2017 he was picking up trays of labels and reinjured his lower back. (Tr. p. 16)

On an April 24, 2017 form, claimant's family doctor, Matthew Lanternier, M.D., completed information regarding claimant's request for accommodations under the Americans with Disability Act (ADA). Dr. Lanternier indicated claimant required a 15-pound lifting restriction. He identified claimant as having a neuromuscular and joint disease as a permanent impairment that can cause pain with prolonged activity. (Ex. 3)

On April 26, 2017 claimant returned to Dr. Milani with complaints of lower back pain. Claimant indicated his new job was more physical than the prior job. He indicated at the end of the day or week his back was more painful at work. Claimant did not report a traumatic injury. (Jt. Ex. 2, p. 36)

Dr. Milani spoke with claimant's physical therapist, who had recently treated claimant. The physical therapist was not aware of a discrete injury. Claimant was assessed as having lower back pain secondary to an underlying chronic medical condition. Dr. Milani believed claimant was developing symptoms associated with an underlying medical condition. Dr. Milani recommended permanent restrictions for claimant's underlying non-work-related medical condition. Dr. Milani identified claimant's condition as being non-work-related. (Jt. Ex. 2, pp. 37-39)

Claimant returned to Dr. Milani on May 2, 2017. Claimant wanted clarification regarding Dr. Milani indicating his condition was non-work-related in regards to the April 26, 2017 visit. Dr. Milani reiterated he believed claimant's back pain was not work

related, as there was no distinct injury and no mechanism at work that would permanently worsen or accelerate claimant's underlying condition. (Jt. Ex. 2, pp. 40-41)

In a February 2, 2018 report, Marc Hines, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of back pain and anxiety. At the time of the exam claimant was driving a forklift.

Dr. Hines believed claimant's job at Schenker caused his back pain. He opined,

> The etiology of his difficulties, while it certainly does involve to some extent the fact that he has the post-polio syndrome and has degenerative changes in his lumbosacral area, is an exacerbation of the difficulties that are preexisting, as he had been well compensated in terms of these problems over many years until the last couple of years when he was moved to the label operator room position and lifting up to 40-pound cases/boxes repeatedly.

(Ex. 1, p. 11)

Dr. Hines believed claimant's job at Schenker caused his lower back pain. He also opined,

> I do not contend that the patient's post-polio syndrome is not a contributing factor, but rather that the patient was hired with full knowledge that he had this syndrome and placed in positions in which he could develop difficulties, even though he had worked for many years without significant problems and that all times while working Schenker he had the post-polio syndrome. It is clear that the type of work that he was changed to is the exacerbating factor for all of the above-related difficulties.

(Ex. 1, p. 12)

Dr. Hines found claimant had a 3 percent permanent impairment for sacroiliitis, and an 8 percent permanent impairment for a lumbosacral dysfunction. He also found claimant had a 5 percent permanent impairment for anxiety. The combined values for all impairments was a 15 percent permanent impairment to the body as a whole. (Ex. 1, p. 12)

In a March 20, 2018 report, Dr. Milani responded to defendants' questions regarding claimant's condition. Dr. Milani reviewed claimant's medical records and Dr. Hines' IME report. Dr. Milani reiterated claimant had no permanent impairment from the May 27, 2016 work injury. He indicated claimant's symptoms on April 26, 2017, were related to claimant's post-polio syndrome and his arthritis, and was not due to a work injury. He opined claimant's preexisting polio syndrome was not aggravated or accelerated by his work activities. He opined any restrictions given to claimant would be for a preexisting, non-work-related condition. Dr. Milani opined any alleged anxiety claimant had could not be found to be caused by work. (Jt. Ex. 4)

Claimant testified, at the time of hearing, he was still working for Schenker and was working seven days a week, eight hours a day, due to overtime. (Tr. p. 55) Claimant's job at the time of hearing was as a dock coordinator. (Tr. pp. 38-39)

Claimant testified that from November 26, 2016 through March 20, 2017 he worked four days a week an eight-hour shift. (Tr. pp. 45-46)

Claimant testified he had difficulty sitting for an extended period of time. He said he has difficulty with walking stairs. He said he has difficulty with mowing his yard due to back and leg pain. (Tr. p. 20) At the time of hearing claimant was not treating for lower back problems. He said he took over-the-counter medication for back pain. (Tr. p. 65)

Claimant testified at the time of hearing he was earning $18.25 an hour. In May of 2016 and March of 2017 he said he earned approximately $17.00 an hour. (Tr. p. 57)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injuries arose out of and in the course of employment.

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).

Regarding file number 5058810 (date of injury May 27, 2016), claimant testified he injured his lower back on May 27, 2016 while picking up a roll of film. On June 13, 2016 claimant was evaluated by Dr. Milani as having lower back pain after lifting at work. (Jt. Ex. 2, p. 29) There is nothing in Dr. Milani's records indicating the injury was not work related. Given this record, claimant has carried his burden of proof he sustained a back injury on May 27, 2016 that arose out of and in the course of employment.

Regarding file number 5058846 (date of injury March 20, 2017), claimant testified that on March 20, 2017 he was picking up trays of labels and reinjured his back. (Tr. p. 16) On April 26, 2017 claimant was seen by Dr. Milani with complaints of lower back pain. He indicated his new job at work was more physical. He did not identify a specific traumatic incident regarding his injury. (Jt. Ex. 2, p. 36)

Dr. Milani spoke with claimant's physical therapist. The physical therapist was not aware of a distinct injury. (Jt. Ex. 2, p. 37) Based on claimant's own history of back pain, and his communications with claimant's physical therapist, Dr. Milani identified claimant's reported injury as non-work-related. (Jt. Ex. 2, pp. 37-39)

Dr. Milani reiterated this opinion in his May 2, 2017 visit with claimant, and in his March 20, 2018 report. (Jt. Ex. 2, pp. 40-41; Jt. Ex. 4)

Dr. Hines examined claimant on one occasion for an IME. Dr. Hines appears to suggest claimant's back pain is work related. Dr. Hines' opinions regarding causation and permanent impairment are problematic for several reasons.

First, as detailed, Dr. Hines' opinion regarding causation is ambiguous. His opinion of causation appears to suggest claimant's preexisting condition was exacerbated as, ". . . he had been well compensated in terms of these problems over many years until the last couple of years. . ." (Ex. 1, p. 11) It is unclear what this opinion actually means.

Second, as noted, claimant testified at hearing he reinjured his back picking up a tray of labels. (Tr. p. 16) Dr. Hines' opinion regarding causation does not identify a specific traumatic event. Instead, he seems to relate claimant's back pain to riding a forklift over a bump repeatedly (Ex. 1, p. 9), or lifting repeatedly. (Ex. 1, p. 11)

Third, Dr. Hines opines claimant has a work-related anxiety condition. Claimant did not plead a mental injury in his petition. Claimant's counsel did not argue claimant had a mental injury caused by work in either his post-hearing brief or at hearing. Dr. Hines is a neurologist. His CV suggests he lacks the qualifications to opine whether claimant has a mental work-related injury. Claimant did not testify on direct exam he had a work-related anxiety condition.

Finally, prior decisions with this agency question Dr. Hines' methodologies for finding causation and permanent impairment. See Perez v. West Liberty Foods, File No. 5033695 (Arb. September 15, 2011); Brown v. Menards, Inc., File No. 5040961 (Arb. November 5, 2013); Olson v. Brooks Park Resorts, File No. 5043565 (Appeal September 9, 2015); Olhausen v. 1st Step Chiropractic, File No. 5045054 (Arb. October 31, 2016); Kovach v. Titan Machinery, Inc., File No. 5053492 (Arb. September 13, 2016); Grouette v. Gilbane Building Co., File No. 5044473 (Appeal September 18, 2017); Jones v. Raining Rose, File No. 5048297 (App. Dec. February 13, 2018).

Dr. Hines' opinions regarding causation are ambiguous and unclear. His opinion regarding the mechanism of causation of claimant's injury differ from the testimony of claimant. His opinions regarding causation of an alleged anxiety condition conflict with claimant's testimony and pleadings. Given this record, and for the other reasons as detailed above, Dr. Hines' opinions regarding causation and permanent impairment are found not convincing.

Claimant testified at hearing he injured his back on March 20, 2017 while lifting. This testimony differs from the mechanism of injury shown in Dr. Milani's medical records. Dr. Milani treated claimant for an extended period of time. He found claimant's March 20, 2017 back condition was not work related. The opinions of Dr. Hines regarding causation and permanent impairment are found not convincing. Based upon this record, claimant has failed to carry his burden of proof he sustained an injury on March 20, 2017 that arose out of and in the course of employment.

As claimant failed to carry his burden of proof he sustained an injury on March 20, 2017 that arose out of and in the course of employment, all other issues, except for the reimbursement of the IME, are moot as to this date of injury.

The next issue to be determined is whether claimant's injury of May 27, 2016 resulted in a permanent disability. The case law sited above regarding causation and burden of proof applies here but will not be repeated.

Claimant saw Dr. Milani on June 13, 2016 for the May 27, 2016 back injury. Claimant underwent physical therapy following that injury. When claimant returned to Dr. Milani on July 28, 2016, claimant's back pain had improved. Claimant had been

released from physical therapy. On July 28, 2016 claimant was found to be at MMI. He was found to have no impairment regarding the May 27, 2016 date of injury. (Jt. Ex. 2, pp. 32-34) Claimant testified he had no lower back pain at the July of 2016 visit with Dr. Milani. (Tr. p. 49)

Claimant was found to be at MMI on July 28, 2016 for the May 27, 2016 date of injury. Dr. Milani found claimant had no permanent impairment from this date of injury. Claimant was released to return to work. Claimant testified he had no back pain following the July of 2016 visit with Dr. Milani. The opinions of Dr. Hines regarding permanent impairment are found not convincing. Given this record, claimant has failed to carry his burden of proof he sustained a permanent disability regarding the May 27, 2016 date of injury.

As claimant has failed to carry his burden of proof his May 27, 2016 date of injury resulted in a permanent disability, the issue of claimant's entitlement to permanent partial disability benefits for this file is moot.

The final issue to be determined is whether claimant is due reimbursement for an IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

In a July 28, 2016 report, Dr. Milani, the employer-retained physician, gave his opinions regarding claimant's permanent impairment. In a February 2, 2018 report, Dr. Hines, the employee-retained physician, gave his opinion regarding claimant's permanent impairment. Given this chronology, defendants are liable for reimbursement of the costs associated with Dr. Hines' IME.

ORDER

Therefore, it is ordered:

Regarding file numbers 5058810 and 5058846:

That claimant shall take nothing in the way of additional benefits from either file.

That defendants shall reimburse claimant for the costs associated with the IME with Dr. Hines.

That both parties shall pay their own costs.

Regarding file number 5058810 (date of injury May 27, 2016):

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 12th day of August, 2019.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.