

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEN WHITAKER,

Claimant,

vs.

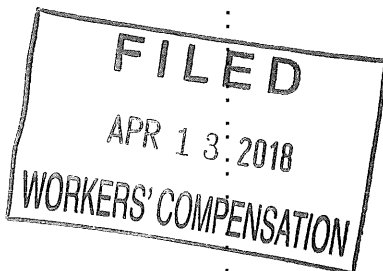
FRANK MILLARD, INC.,

Employer,

and

ILLINOIS NATIONAL INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File No. 5057548

ARBITRATION
DECISION

Head Note No.: 1402.30

STATEMENT OF THE CASE

Claimant, Ken Whitaker, filed a petition in arbitration seeking workers' compensation benefits from Frank Millard, Inc., (Millard), employer and Illinois National Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa, on March 6, 2018 with the final submission date of March 27, 2018.

The record in this case consists of Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 2, and the testimony of claimant, Scott Bessine, Jerry McCann, Michael Bredar, and Lyle Gibson.

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 that arose out of and in the course of employment on September 19, 2015.
2. Whether claimant's injury is the cause of permanent disability; and if so,

3. The extent of claimant's entitlement to permanent partial disability benefits.
4. Whether there is a causal connection between the injury and the claimed medical expenses.
5. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 55 years old at the time of hearing. Claimant worked as an electrician. Claimant also taught electrical studies at a community college.

Claimant's prior medical history is relevant. In 2007, claimant had a left rotator cuff tear caused by slipping on a ladder. Claimant had a left rotator cuff repair and was eventually returned to work. (Joint Exhibit 1, page 1)

In 2009, claimant was treated for pancreatitis and chest pain. Records from this period assessed claimant as having depression. (Exhibit 2, p. 2)

Claimant testified he originally began working for Millard in 2014 or 2015 as an electrician. Claimant worked for Millard for approximately six months before he was terminated for absenteeism.

Scott Bessine, testified he is the head of the electrical department with Millard. He said that his primary job for Millard is to do estimates for jobs. Mr. Bessine has been an electrician for approximately 32 years. Mr. Bessine said that claimant originally worked for Millard in approximately 2013 or 2014 as an electrician. He said the claimant was terminated, the first time, for not showing up for work.

Jerry McCann testified he is superintendent with Millard. He said that he supervised claimant. Mr. McCann testified that claimant was fired by Millard in approximately 2014 for not showing up to work.

Claimant testified that on September 14, September 15, or September 19 of 2015, he was going down a ladder. He said that there was an I-beam sticking out at the bottom of the rung of the ladder. Claimant said he slipped going down the ladder in an effort to avoid the I-beam. Claimant said he caught himself with his arms. He felt his arms come out of the sockets. He testified the ladder shown in Joint Exhibit 6 looks somewhat like the ladder he was using when he slipped.

Claimant testified that after his slip on the ladder, he took off his tool belt and the wiring he was carrying. He said he returned to work. He said that he gave notice of his injury to his foreman. Claimant said he returned to work the next day.

Claimant said that shortly after the accident, his father had a heart attack and stroke. Claimant said he took off work to help with his father.

Mr. Bessine said that claimant again starting not showing up for work in approximately late 2015. He said they had to finish up the job claimant was doing and completed the work approximately on September 18 or September 19 of 2015. Mr. Bessine said claimant never returned to work after that date.

Michael Bredar testified at hearing that he is the director of construction for Millard. He oversees estimates and accounts. He said he investigated claimant's worker's compensation claim and said claimant told him he did not return to work because he lost his phone, and because his father needed to go to a nursing home.

Lyle Gibson testified he is the director of safety and human resources for Millard. He said that he investigated claimant's claim for a slip and fall on a ladder at work. Mr. Gibson testified that after claimant left Millard's, he tried to contact claimant five to six times. He said he finally reached claimant and set up a meeting for them to discuss the slip and fall. Mr. Gibson testified he also went to the actual site, of the alleged incident, two to three times.

Mr. Gibson said claimant's supervisor told him claimant originally only reported hurting one shoulder. He said that Millard had concerns regarding claimant's version of a work injury because:

1. No one witnessed the accident;
2. Supervisor had indicated claimant had only claimed one shoulder was injured;
3. Claimant did not originally tell Mr. Gibson of his 2007 shoulder injury;
4. Claimant was frequently off of work following the injury.

On November 22, 2015, claimant was seen at the Keokuk Area Hospital emergency department. Claimant was found down for an unknown period of time. Claimant's neighbors indicated claimant had been drinking alcohol. (Jt. Ex. 2, p. 4)

On December 21, 2016, claimant underwent a CT scan at the Keokuk Area Hospital. Claimant was found outside and disoriented. He was found by a neighbor at night and brought to the emergency room. Claimant had no evidence of trauma. Alcohol use was involved. Claimant was disoriented. He was assessed as having acute alcohol abuse with confusion and disorientation due to alcohol. (Jt. Ex. 2, pp. 11-14) Claimant was discharged from the hospital and assessed as having an altered mental state secondary to alcoholism. (Jt. Ex. 2, p. 15)

Claimant testified he believed he was assessed during this period of having a stroke. Claimant said he became confused because of the stroke. There are no records or evidence to support this testimony.

On May 10, 2017, claimant was evaluated at the Community Health Center. Claimant was depressed and had memory problems. Claimant was not taking his medication. Claimant's medication was increased and claimant was counseled to exercise. (Jt. Ex. 3)

Claimant was evaluated by Scott Urch, M.D., on August 25, 2017. Claimant complained of bilateral shoulder problems. Claimant had fallen on a ladder in September 2016. Claimant was assessed as having shoulder pain bilaterally. Claimant was treated with medication. (Cl. Ex. 2, pp. 11-12)

Claimant returned to Dr. Urch on November 16, 2017. Claimant did not attend physical therapy as instructed. An MRI was recommended. (Cl. Ex. 2, pp. 19-20)

On November 24, 2017, claimant had an MRI of the left shoulder. It showed a re-tear of the supraspinatus and infraspinatus tendons. (Cl. Ex. 2, p. 26)

A December 12, 2017 MRI of the right shoulder showed a near complete full thickness tear of the supraspinatus tendon. (Cl. Ex. 2, p. 28)

Claimant returned to Dr. Urch on December 15, 2017. Claimant was assessed as having chronic rotator cuff tears in both shoulders. He was given an injection in both shoulders and told to follow up with physical therapy. (Cl. Ex. 2, pp. 35-36)

In a January 15, 2018 report, William Boulden, M.D., gave his opinions of claimant's condition following a records review. Dr. Boulden indicated there was nothing objective in the record that indicated claimant had an injury in September 2015. Dr. Boulden opined that if claimant did have a September 2015 traumatic injury to both shoulders, he would have been expected to immediately seek medical care. Instead claimant went for nearly two years without getting medical care. Dr. Boulden saw nothing in the MRI consistent with a fall occurring in September 2015. (Jt. Ex. 4)

In a February 1, 2018 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of pain in the right shoulder with popping and clicking in both shoulders. Dr. Bansal found that the mechanics of falling and hanging from a ladder were consistent with the bilateral rotator cuff tears. He found claimant had a 4 percent permanent impairment to the body as a whole regarding the left and the right shoulder. (Ex. 5)

Claimant testified he has difficulty raising his arms. Claimant can raise his right arm at approximately shoulder height. Claimant is unable to lift his left arm unless he uses his right arm to pick it up. Claimant testified he has lost strength and range of motion in both shoulders.

Claimant testified that he taught electrical classes at a community college from approximately June 2016 until December 2016. Claimant said that because of his alleged stroke he was unable to return to teaching. Claimant said he has not looked for work since leaving Millard. Claimant said he does not believe he could return to work as an electrician, given his shoulder condition.

CONCLUSIONS OF LAW

The first issue to be determined is whether the claimant sustained an injury that arose out of and in the course of his employment on September 19, 2015.

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).

Claimant contends he injured his shoulders bilaterally when he slipped climbing down a ladder.

Claimant testified he injured his shoulder on either September 14, September 15, or September 19, 2015.

In November 2015, claimant was treated in the emergency department in the Keokuk Area Hospital for an accident that appears to be alcohol related. There is no indication in the records from this period of any shoulder problems. (Jt. Ex. 2, p. 4)

In December 2016, claimant was again treated for an incident related to extreme use of alcohol. Records from this period indicate claimant was hospitalized from December 21, 2016 through December 23, 2016. There is no reference in these records of any shoulder problems. (Jt. Ex. 2, pp. 11-15)

The first time claimant sought medical care for his shoulders was in August 2017, when he sought treatment with Dr. Urch. This is approximately two years after the date of injury. Records from Dr. Urch indicate claimant injured his shoulder in September 2016. (Cl. Ex. 2, p. 11)

Dr. Boulden opined that the injury shown in claimant's MRI was not consistent with an acute injury, but instead it was chronic in nature. He found nothing objective in claimant's medical records to support claimant had an injury to both his shoulders in September 2015. (Ex. 4)

Only Dr. Bansal opined claimant's injuries to his shoulders occurred while slipping on a ladder in September 2015. Dr. Bansal offers no analysis or rationale why medical records from September 2015 and December 2016 make no reference to shoulder problems. He also offers no analysis or rationale why Dr. Urch's medical records suggest a date of injury of September 2016. Given these discrepancies, the opinions of Dr. Bansal regarding causation are found not convincing. (Ex. 5)

Claimant testified to three possible dates for a traumatic injury. He received care in November 2015 and December 2016 at Keokuk Area Hospital. There is no reference in any of the records from this time regarding a bilateral shoulder injury. Dr. Urch's records suggest a date of injury of September 2016. Dr. Boulden opined that there is no objective evidence to support that claimant had a traumatic injury to both shoulders in September 2015. Dr. Bansal's opinion regarding causation are found not convincing.

Given this record, claimant has failed to carry his burden of proof that he sustained an injury on September 19, 2015 that arose out of and in the course of employment.

As claimant has failed to carry his burden of proof that he sustained an injury on September 19, 2015 that arose out of and in the course of employment, all other issues are moot.

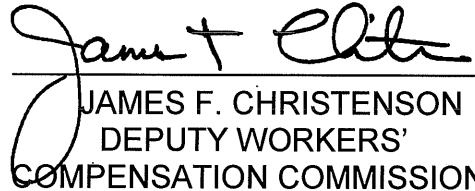
ORDER

THEREFORE, IT IS ORDERED:

That claimant takes nothing from these proceedings.

That both parties shall pay their own costs.

Signed and filed this 13th day of April, 2018.


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.