BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PARKER ANDERSON, Claimant, vs. CUMULUS MEDIA INC., Employer, and AMERICAN ZURICH INS. CO., Insurance Carrier, Defendants.	File No. 19700094.01 A R B I T R A T I O N D E C I S I O N Headnotes: 1100, 1108.20, 1402.30, 2907

STATEMENT OF THE CASE

Claimant Parker Anderson filed a petition in arbitration seeking workers' compensation benefits from defendants Cumulus Media, Inc., employer, and American Zurich Insurance Company, insurer. The hearing occurred before the undersigned on October 20, 2020, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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 evidentiary record consists of: Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 9, and Defendants' Exhibits A through H. Claimant testified on his own behalf and Josh Loeffler testified for defendants. The evidentiary record was closed at the end of the hearing, and the case was considered fully submitted upon receipt of the parties' briefs on November 13, 2020.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment on July 31, 2018.

2. If claimant sustained a work-related injury, whether claimant provided timely notice of his injury under Iowa Code section 85.23.

3. Whether claimant is entitled to any temporary or permanent disability benefits.

4. Whether claimant is entitled to reimbursement for medical expenses and/or his independent medical examination (IME).

5. Whether claimant is entitled to alternate medical care in the form of treatment with James L. Gallagher, M.D.

6. Costs.

FINDINGS OF FACT

On either July 30, 2018 or July 31, 2018, claimant was involved in an altercation with Josh Loeffler, the general sales manager for defendant-employer. (See Hearing Transcript, pp. 17-18; Claimant's Exhibit 4B, pp. 36-39) Claimant and Mr. Loeffler dispute exactly what occurred, but at the very least, Mr. Loeffler gave claimant "a pat on the side shoulder" and at worst, Mr. Loeffler "punched" claimant near his clavicle. (Cl. Ex. 3B, pp. 37-38; Tr., pp. 19, 93)

The physical contact occurred after claimant, who worked in sales for defendant-employer, approached some on-air talent regarding a remote radio broadcast he sold. (Tr., p. 18) Mr. Loeffler was unhappy with the way claimant handled the logistics of the situation; he indicated he did not want claimant to go directly to the on-air talent but instead to follow the appropriate "process." (See Cl. Ex. 4B, p. 38; Tr., pp. 18-19) Claimant testified Mr. Loeffler was "very, very frustrated or aggravated" and used expletives to express his displeasure with claimant. (Tr., p. 20; Cl. Ex. 4B, p. 37) Mr. Loeffler, on the other hand, reported having a civil conversation with claimant. (See Tr., pp. 94, 96; Cl. Ex. 4B, p. 38)

After the incident, claimant went with Mr. Loeffler and another co-worker in Mr. Loeffler's vehicle to an off-site meeting. (Tr., pp. 19-20) Claimant acknowledged the meeting was held as if nothing had happened between he and Mr. Loeffler; he indicated he believed he "may have been in some short of shock resulting from what had occurred." (Cl. Ex. 4B, p. 37)

After the off-site meeting, claimant left the office and reported the incident to defendant-employer. (Tr., pp. 20-21) Mr. Loeffler was ultimately issued a disciplinary warning, which states:

> [Mr. Loeffler] realizes that he can sometimes be an intense individual. He understands that he must never touch another employee even if he thinks of it as a "bro punch." [Mr. Loeffler] will be mindful of his interactions with other staffers, control his intensity and refrain from raising his voice in anger or using his hands.

(Cl. Ex. 4B, p. 36)

Claimant testified he did not agree with the use of the term "bro punch," which he understands to be an act of horseplay between friends poking fun. (Tr., p. 22) Instead, he believes he was assaulted by Mr. Loeffler. (Tr., p. 22)

Regardless of the severity of the physical contact, claimant admitted he did not require any medical attention for any physical injury and that he was not physically "injured or bruised." (Tr., pp. 54-55)

In the days after the incident, Mr. Loeffler offered to apologize to claimant, which claimant declined, and defendant-employer indicated he could return to work and report to someone other than Mr. Loeffler, which claimant also declined. (Tr., pp. 24-25) Claimant testified he did not return to work for defendant-employer because he could not have "resume[d] any type of a normal workplace environment" with Mr. Loeffler still in the office. (Tr., p. 25)

Claimant eventually found work with a company called Adsposure where he sells advertising on public transit, but in the interim he was awarded unemployment benefits. (Tr., pp. 26-27, 73) Claimant continued to work for Adsposure at the time of the hearing.

Claimant also pursued a civil employment suit against defendant-employer, which was subsequently dismissed in May of 2019. (Tr., pp. 57, 63)

Claimant's claim for benefits in this case centers on his allegation that his pre-existing anxiety was aggravated and worsened by the altercation with Mr. Loeffler. Claimant's pre-existing anxiety dates back to when he was a child, though he was not formally diagnosed with any anxiety or other mental health conditions until adulthood. (Tr., p. 39)

Claimant began taking Clonazepam for his anxiety in his mid-to-late-20s. (Tr., p. 40) Before moving to Des Moines and beginning work with defendant-employer, this medication was prescribed by Christopher Okiishi, M.D. (JE 1) Dr. Okiishi prescribed claimant one milligram of Clonazepam up to three times per day. (Tr., p. 42) Claimant was also managing his anxiety with exercise. (Tr., pp. 43-44)

Claimant was continuing to take clonazepam and being prescribed the same dosage at the time of the altercation with Mr. Loeffler. (Tr., p. 43)

Notably, though the altercation at issue occurred in July of 2018, claimant did not seek any treatment for his anxiety until several months later in November of 2018. On November 12, 2018, claimant was seen for the first time at Kavalier & Associates (hereinafter "Kavalier") "for someone to take over his medication management and possibly to start therapy as well." (JE 2, p. 14) As claimant explained, he sought care at Kavalier to replace Dr. Okiishi's role. (Tr., pp. 58-59)

There is no mention of claimant's altercation with Mr. Loeffler in the records from claimant's initial evaluation at Kavalier. In fact, there is no mention of the altercation in any of the records from Kavalier. (JE 2) When asked by his attorney at hearing whether he talked to anyone at Kavalier about the altercation with Mr. Loeffler, claimant stated, "I tried to impart that to the person prescribing medication . . . and she did not do that type of psychotherapy." (Tr., pp. 27, 28) Claimant testified the sessions were "very, very short" about how the medication was working. (Tr., p. 62)

While claimant is correct that the care he received at Kavalier was limited to medication management, there are mentions in the notes regarding claimant's civil lawsuit against defendant-employer. (See JE 2, p. 21) This indicates the providers at Kavalier did, at least on occasion, record what claimant was reporting as external stressors.

Furthermore, throughout his treatment at Kavalier after the altercation with Mr. Loeffler, claimant's prescription for Clonazepam was never increased. Claimant acknowledged he continued to be prescribed "the same baseline level of medication." (Tr., p. 28; see Tr., p. 43) Though claimant testified he began taking more Clonazepam after the altercation with Mr. Loeffler (Tr., p. 79), this is not reflected in the records. To the contrary, when he presented at Kavalier for the first time in November of 2018, he had been tapering off the medication and wanted to continue to do so. (JE 2, p. 18) Even claimant's own expert, Dr. Gallagher, noted claimant "does not escalate the dose." (Cl. Ex. 1, p. 8)

While claimant testified he believes his anxiety was "heightened" without a return to baseline after the incident with Mr. Loeffler, the providers at Kavalier continually indicated claimant's anxiety was "well managed," that he was "doing well," and was "stable." (Tr., pp. 32-33; JE 2, pp. 21, 23, 25) Even Dr. Gallagher noted "there are no apparent comments about causation or aggravation of such symptoms" and that "there seems to be no gross escalation of anxiety symptoms over the course of these notes." (Cl. Ex. 1, pp. 2, 8)

Claimant also testified that after the incident he became more "leery of folks" getting into his personal space and became more nervous getting on sales calls. (Tr., pp. 28-29) He described having "troubles" dealing with people. (Tr., p. 26) However, I do not find this testimony to be particularly credible given claimant's current employment. Claimant continues to have meetings with clients and gives sales pitches in his job with Adsposure just as he did in his role with defendant-employer. (Tr., pp. 73-74)

As mentioned, claimant was eventually evaluated by Dr. Gallagher for an IME. In his April 20, 2020 report, Dr. Gallagher opined as follows:

> I think there has been a worsening of symptoms referent to his generalized anxiety disorder because of what occurred in the workplace. . . . In addition, he has experienced some mood symptoms concurrent with this. He suffered a loss of self-esteem along with increasing stress, e.g. elevated blood pressure, palpitations, etc. Although he meets and does well with potential customers, he is anxious about it, and that has not lessened any.

(Cl. Ex. 1, p. 12)

As discussed above, however, this "worsening of symptoms" is not reflected in claimant's records with Kavalier, nor is it reflected in claimant's medication usage. Dr. Gallagher acknowledged as much in his own report.

Defendants obtained the expert opinion of Bruce Gutnik, M.D. In his August 20, 2020 report, Dr. Gutnik opined claimant's pre-existing anxiety was not materially or permanently aggravated by the altercation with Mr. Loeffler. (Def. Ex. B, p. 7) Dr. Gutnik offered the following explanation: "I should note that this is an individual with an anxiety disorder since the 3rd grade. I also note that after the above noted incident, he didn't seek treatment for 3 ½ months. I found no evidence to suggest an increase in his anxiety after the incident." (Def. Ex. B, p. 7)

Given the absence of any objective evidence of an increase in claimant's anxiety, I find the opinions of Dr. Gutnik to be more persuasive than those of Dr. Gallagher. I acknowledge Dr. Gutnik's report was based entirely on a records review; however, Dr. Gutnik's opinions are more consistent with the evidence—particularly that claimant waited months after the incident before seeking treatment, there are no mentions of the altercation in the treatment records, there was no uptick in the frequency of claimant's mental health treatment, and there was no increase in the dosage of his medication. To the contrary, the treatment records at Kavalier reflect a claimant whose mental health symptoms were stable. For these reasons, I find insufficient evidence to support claimant's claim that he sustained an aggravation of his pre-existing anxiety as a result of the altercation with Mr. Loeffler.

This finding is unaffected by which version of the altercation is true. Even assuming claimant truly was punched by Mr. Loeffler, as claimant asserts, the lack of any objective evidence of an increase in claimant's anxiety remains. In other words, even if claimant's version of the altercation is true, the preponderance of the evidence does not support claimant's allegation that the altercation aggravated his pre-existing anxiety.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

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 is asserting two alternative theories for recovery: a physical-mental injury or a traumatic mental-mental injury.

With respect to physical-mental injuries, the court has found psychological problems developing from physical trauma to be compensable in certain circumstances. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 733 (Iowa 1968) ("[W]hen there has been a compensable accident, and claimant's injury related disability is increased or prolonged by a trauma connected neurosis or hysterical paralysis, all disability, including effects of any such nervous disorder, is compensable.") In physical-mental injury cases, claimant still bears the burden of proving causation. Id. at 737 ("In that regard this court has consistently held, where an employee is afflicted with some known disease or infirmity which is aggravated, accelerated, worsened or 'lighted up' by an employment connected injury so as to result in a disability found to exist, the claimant is entitled to compensation accordingly.")

In the alternative, "a purely mental injury is compensable without an accompanying physical injury under certain circumstances." Brown v. Quik Trip Corp., 641 N.W.2d 725, 727 (Iowa 2002). In such cases, a claimant must establish both medical causation and legal causation. See id. (citing Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845, 853-58 (Iowa 1995)). The test for establishing legal causation differs depending on whether the mental-mental injury was the result of a traumatic incident or non-traumatic stressors, but the test for medical causation remains the same. See Brown, 641 N.W.2d at 729. That test "is whether the employee's injury is

causally connected to the employee's employment." Dunlavey, 526 N.W.2d at 853 (citation omitted).

Thus, under either theory of recovery, claimant in this case must prove medical causation—that his injury, an alleged aggravation of his anxiety, is causally connected to his employment, which in this case is the altercation with Mr. Loeffler. As discussed above, I found insufficient evidence for claimant to satisfy this burden.

I found the opinions of Dr. Gutnik to be more persuasive than those of Dr. Gallagher, particularly because of the absence of any objective evidence to support claimant's testimony. Again, claimant waited for months after the altercation with Mr. Loeffler to seek treatment, there are no mentions in the treatment records from Kavalier about the altercation, claimant did not seek treatment more frequently after the altercation, and claimant's medication dosage did not increase after the altercation. Other than claimant's testimony, the overwhelming weight of the evidence indicates claimant was stable after the incident. For these reasons, I conclude claimant failed to carry his burden to prove his anxiety was materially aggravated, accelerated, worsened or lighted up by the altercation with Mr. Loeffler at work. I therefore conclude claimant failed to carry his burden to prove he sustained an injury that arose out of and in the course of his employment.

This renders several issues moot, including the notice issue, claimant's entitlement to disability and medical benefits, and claimant's entitlement to alternate medical care.

The only remaining issues are claimant's entitlement to reimbursement for his IME and costs.

Turning first to claimant's IME, Iowa Code section 85.39 provides:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall . . . be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury.

Iowa Code § 85.39(2) (2018).

In this case, claimant obtained his IME with Dr. Gallagher before defendants obtained the opinions of Dr. Gutnik, Dr. Gutnik did not perform an evaluation of permanent disability, and I found claimant's anxiety was not a compensable injury. For these reasons, the reimbursement provisions of Iowa Code section 85.39 were not

triggered. I therefore conclude claimant is not entitled to reimbursement under Iowa Code section 85.39.

With respect to costs, assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Because claimant was not successful in his claim, I decline to tax defendants with any of claimant's costs.

ORDER

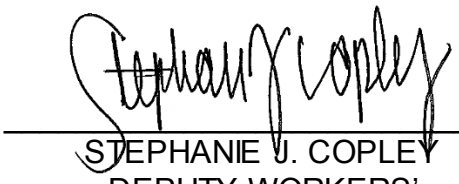
THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, 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 2nd day of December, 2020.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Robert Gainer (via WCES)

Jason Kidd (via WCES)
Garrett Lutovsky (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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.