BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BYRON HEDGES,

Claimant,

vs.

TRANSCO RAILWAY PRODUCTS, INC.,

Employer,

THE HARTFORD,

Insurance Carrier,
Defendants.

File No. 5061393

ARBITRATION DECISION

Headnotes: 1402.30, 2501, 2502, 2907

STATEMENT OF THE CASE

Byron Hedges, claimant, filed a petition for arbitration against Transco Railway Products, Inc., as the employer, and The Hartford, as the insurance carrier. This contested case proceeded to an in-person hearing in Sioux City on December 10, 2018.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 8, and Defendants' Exhibits A through C. Claimant objected to receipt of Defendants' Exhibit A, but the objection was overruled and all exhibits were received.

Claimant testified on his own behalf. Defendants called four witnesses: Charles Wing, Ronald Horne, Bill Moser, and Johnny Petersen. Claimant offered some rebuttal testimony, and the evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. Claimant filed his post-hearing brief on January 11, 2019, as ordered. Defendants served their post-hearing brief on opposing counsel on January 11, 2019 but failed to file the brief with the agency. The defendants' Closing Brief was submitted to the undersigned on February 8, 2019. Claimant waived any objection to receipt of the defendants' brief given that the brief was timely served upon opposing counsel. I find that no prejudice befalls claimant and I formally receive

defendants' closing brief. Although defendants' brief was not filed until later, this case was considered fully submitted to the undersigned on January 11, 2019.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on or about March 15, 2016, which arose out of and in the course of his employment with Transco Railway Products, Inc.

2. Whether the alleged injury caused temporary disability and, if so, the extent of any such temporary disability, or healing period, entitlement.

3. Whether the alleged injury caused permanent disability and, if so, the extent of any such permanent disability entitlement.

4. Whether claimant is entitled to be held harmless for past medical expenses contained at Claimant's Exhibit 4.

5. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

6. Whether defendants should be ordered to pay penalties and interest for delay in providing medical care.

7. Whether costs should be assessed against either party and, if so, in what amount.

In his post-hearing brief, claimant makes it clear that he has not yet qualified for any temporary disability, or healing period, benefits. He has no lost time from work as a result of the alleged right shoulder injury. Claimant also contends that he is not yet at maximum medical improvement. Therefore, the issue of permanent disability benefits is not yet ripe. Both parties argue this case in a manner that clarifies that temporary and permanent disability benefits are not yet ripe for determination and need not be addressed as part of this decision. Therefore, although these issues are noted as disputed on the hearing report, they will not be discussed in the body of this decision.

FINDINGS OF FACT

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

Byron Hedges obtained employment with Transco Railway Products, Inc. and worked for the company for approximately a year and a half in Sioux City, Iowa. He worked as a welder repairing rail cars. Mr. Hedges testified that he was lifting a valve that weighed 65-70 pounds up and over his head on March 15, 2016. He testified that he felt a pop in his right shoulder and experienced symptoms.

Mr. Hedges testified that he reported the injury to his supervisor shortly after it happened but on the same day. Claimant's supervisor, Charles Wing, confirmed that claimant reported an injury to him. He filled out an electronic document for the company with claimant's answers and referred claimant to speak with the valve supervisor, Ronald Horne.

Mr. Horne testified that he also recalls the incident in March 2016. He recalled claimant coming to speak with him and reporting that he had hurt his shoulder. He recalled it being a Friday, just as claimant did, and noted that they discussed the protocol if claimant would need treatment over the weekend.

Defendants point out that the injury date could not realistically be March 15, 2016 because claimant was actually at training in Montana on that date. Claimant concedes this point, but testified he believes it occurred on a Friday in March 2016. Apparently, management at the employer concurs that he reported it on a Friday in March 2016.

I find that there is not a legitimate dispute. Claimant proved that he sustained an injury to his right shoulder on a Friday in March 2016. However, he did not seek immediate attention. In fact, he did not seek medical treatment for the shoulder for months after it occurred.

In the interim, claimant quit his employment with the employer and began working in a similar welding position for Midwest Railcar Repair, Inc. in Brandon, South Dakota. On April 17, 2017, claimant finally seeks medical care for his right shoulder. At this appointment, Mr. Hedges apparently reported that he sustained the March 2016 injury, but also reported that the symptoms had resolved within 2-3 months and then experienced another incident a few days before his medical appointment while tugging on an extension cord. There is debate and dispute in the file about whether this extension cord event occurred at home or at claimant's subsequent employment. Ultimately, I find this issue irrelevant so I do not decide it.

Ultimately, claimant was referred to an orthopaedic surgeon, Jason L. Hurd, M.D., for evaluation. Dr. Hurd obtained an MRI arthrogram of claimant's right shoulder and diagnosed claimant with a possible labral tear and paralabral cyst as well as biceps tendon pathology. (Joint Ex. 1, p. 23) Dr. Hurd recommended surgical intervention to repair claimant's right shoulder.

Dr. Hurd was asked about whether the right shoulder diagnosis was related to claimant's March 15, 2016 work injury. Dr. Hurd opined, "I do think that his injury and need for surgery are due to his work injury." (Joint Ex. 2, p. 3; Joint Ex. 3, p. 1) He recommended surgical intervention for claimant's right shoulder. (Joint Ex. 2, pp. 2-3) Claimant testified that he has not proceeded with the surgical recommendation because he cannot afford to be off work for the length of time necessary to have the surgery performed.

Defendants challenged causal connection and sought an independent medical evaluation performed by Douglas W. Martin, M.D. Dr. Martin evaluated claimant on

May 17, 2018. After his initial review of medical records and evaluation of claimant, Dr. Martin opined that he could not causally connect claimant's right shoulder injury to the March 15, 2016 incident from a chronological standpoint.

However, Dr. Martin concurred with Dr. Hurd's diagnosis and rendered an assessment of a right shoulder labral tear and right shoulder biceps tendinitis. Dr. Martin concurred that surgical repair was the recommended medical option. Dr. Martin also opined that the mechanism of injury described by claimant was a possible cause of the type of injury he sustained. (Joint Ex. 7, pp. 5-6) Specifically, Dr. Martin noted, "the mechanism of injury that he describes is consistent with a labral injury and biceps tendon injury." (Joint Ex. 7, p. 6) Dr. Martin indicated, "I certainly can see how it would create the mechanism to have caused the injuries that we see here at hand." (Joint Ex. 7, p. 6)

After being provided additional medical records, Dr. Martin noted some inconsistencies in claimant's history, including failing to mention the electrical cord incident and failing to mention receipt of additional medical care when interviewed by Dr. Martin. These omissions are somewhat troubling and potentially suggest that claimant was attempting to hide something from Dr. Martin. After noting these inconsistencies, Dr. Martin essentially indicates that the lack of consistency in claimant's medical history makes it impossible for him to causally connect the current right shoulder symptoms to the March 2016 injury. (Joint Ex. 7, pp. 12-13)

Claimant also obtained an independent medical evaluation, performed by a board-certified orthopaedic surgeon, Brian M. Crites, M.D. Dr. Crites evaluated claimant on July 18, 2018. He also concurred with Dr. Hurd's diagnoses and recommended surgical intervention as the definitive medical treatment for claimant's right shoulder injury.

Similar to Dr. Hurd, Dr. Crites concluded that claimant's right shoulder condition was causally related to the March 2016 work injury. Specifically, Dr. Crites opined:

> [I]t is my professional opinion as a board-certified orthopaedic surgeon and board-certified sports medicine specialist that his injury on or about March 15, 2016, did directly result in his pathology. His physical exam is consistent with a labral tear and this has remained consistent within his medical records. His symptoms are consistent with a labral tear. It is noted that symptoms for labral pathology can wax and wane, or come and go, based on activity level. His MRI is consistent with a labral tear. His mechanism of injury as reported is consistent with a labral tear. His medical records are consistent with a labral tear and he has no other complaints or previous injuries or reports or documented visits of any previous right shoulder problems or pathology. As a result, the documented facts in this case are consistent with his injury at work directly causing his pathology and necessary surgical treatment. The timing does not refute this. The approximately seven-month interval between injury

> and first medical visit is irrelevant to causation. The injury either caused it or it did not, and timing in between cause and presentation to a medical professional is irrelevant. I frequently see patients who report injuries months or years previous to their initial presentation to me who finally just get fed up with living with the symptoms.

(Joint Ex. 4, p. 3)

I am a bit troubled by the fact that claimant did not reveal the prior treatment or the electrical cord incident to Dr. Martin. However, even the employer's representatives concede that claimant reported an injury in March 2016. (Testimony of Charles Wing and Ronald Horne) Something happened to claimant's right shoulder in March 2016 and that something is consistent with the diagnoses of all treating and evaluating physicians.

When I weigh the opinions of two board-certified orthopaedic specialists against the opinion of an occupational medicine physician, I find the opinions of the orthopaedic specialists more convincing. It is apparent that claimant reported something wrong with his right shoulder in March 2016. The mechanism of injury he reported at that time is consistent with the injuries in his right shoulder. The explanation provided by Dr. Crites specifically refutes at least some of the concerns about delay in treatment expressed by Dr. Martin. Ultimately, I accept the causation opinions of Dr. Hurd and Dr. Crites, two orthopaedic surgeons, over those of Dr. Martin. Therefore, I find that claimant has proven he sustained a right shoulder injury in March 2016 that arose out of and in the course of his employment with Transco Railway Products, Inc.

All of the physicians concur that claimant has not yet achieved maximum medical improvement. Rather, claimant requires surgical intervention for repair of labral tear, possible repair of his biceps tendon and possible surgical work on his acromioclavicular (A/C) joint. Mr. Hedges concedes that he has not lost time and will not agree to surgery and lose time from work unless he prevails in this litigation. Therefore, I concur with the parties' briefs that neither the issue of temporary disability nor the issue of permanent disability is ripe at this time.

Review of the medical bills submitted as Claimant's Exhibit 4 demonstrates those medical expenses are causally related to treatment of claimant's right shoulder. I find those expenses causally related to the work injury in March 2016. Defendants stipulated that the charges were related to the alleged injury and that the charges were reasonable and necessary. (Hearing Report)

CONCLUSIONS OF LAW

The initial and primary disputed issue in this case is whether claimant sustained an injury to his right shoulder on March 15, 2016 that arose out of and in the course of his employment with Transco Railway Products, Inc.

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).

Having found that claimant proved he sustained a right shoulder injury that arose out of and in the course of his employment with Transco Railway Products, Inc. on or about March 15, 2016, I conclude that claimant has established a compensable worker's compensation injury.

Mr. Hedges also asserted a request for payment or satisfaction of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the

injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Having found that the medical expenses contained in Claimant's Exhibit 4 were causally related to a work injury on March 15, 2016, I conclude that defendants are responsible for payment, reimbursement, or satisfaction of all past medical expenses introduced by claimant at Claimant's Exhibit 4. Defendants will be ordered to hold claimant harmless for these expenses.

Mr. Hedges seeks an order requiring reimbursement of Dr. Bansal's independent medical evaluation pursuant to Iowa Code section 85.39. 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).

Having found that defendants did not obtain a permanent impairment rating and that none of the physicians, including Dr. Crites, have offered an impairment rating, I conclude that claimant has not established the prerequisites of Iowa Code section 85.39 have been met. Specifically, claimant cannot establish that defendants obtained a permanent impairment rating from a provider of their choosing. Therefore, I conclude that the structure and requirements of Iowa Code section 85.39 were never triggered in this case and that defendants are not responsible for reimbursement of claimant's independent medical evaluation charges. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Mr. Hedges asserts a claim interest for defendants' delay in providing medical treatment. The only statutory provision providing for interest is Iowa Code section 85.30. It provides that interest should be payable for a delay in payment of weekly compensation. No interest provisions provide for payment of interest for delay in providing medical care to a claimant. As such, I conclude that claimant failed to prove a claim for interest.

Mr. Hedges also asserts a claim for award of penalty benefits for delay in providing medical care. Iowa Code section 86.13 is the statutory provision that provides

for penalty benefits. Iowa Code section 86.13(4) provides for payment of penalty benefits for unreasonably denied or delayed weekly benefits. The Code does not provide for payment of penalty benefits for delay in providing medical care.

I acknowledge claimant's argument and request that penalty benefits be awarded on some later healing period benefits or permanent disability benefits. However, that is a novel theory. To date, healing period benefits are not due. They cannot be unreasonably delayed if they are not yet due. Similarly, with respect to permanent disability, this case is not yet ripe for determination or award of permanent disability benefits. Therefore, I conclude that such benefits cannot be unreasonably denied or delayed at the present time. I conclude the claim for penalty benefits must fail.

Finally, Mr. Hedges requests costs be assessed against defendants. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

Claimant has prevailed on the primary disputed issues. He could not have obtained medical care at defendants' cost without bringing this suit. Therefore, I conclude that it is reasonable and appropriate to assess costs in some amount against defendants.

Mr. Hedges seeks assessment of the cost of Dr. Crites' evaluation and report as a cost of this action. However, claimant's request is contrary to the directive of the Iowa Supreme Court in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). Pursuant to the Young case, only the cost of drafting the physician's report can be taxed as a cost "because it is used as evidence in lieu of the doctor's testimony." Id. at 846.

I conclude that it is appropriate to assess the cost of Dr. Crites' report. Review of his invoice at Claimant's Exhibit 5 demonstrates that Dr. Crites charged $300.00 for dictating his report. I conclude that it is appropriate to assess $300.00 in costs against defendants pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall reimburse claimant for any out-of-pocket medical expenses, reimburse any third-party payor(s), pay any outstanding medical expenses directly to the medical providers, and hold claimant harmless for all medical expenses contained in Claimant's Exhibit 4.

Claimant shall be entitled to all causally related future medical care at defendants' expense for his right shoulder injury.

Defendants shall reimburse claimant three hundred dollars ($300.00) as taxable costs of this action.

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 15th day of February, 2019.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.