

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL FURMAN, Claimant, vs. GUARDIAN INDUSTRIES, Employer, OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	File No. 19004024.01 ARBITRATION DECISION Headnotes: 1108.50, 1402.30
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STATEMENT OF THE CASE

Claimant Michael Furman seeks workers' compensation benefits from the defendants, employer Guardian Industries (Guardian) and insurance carrier Old Republic Insurance Co. (Old Republic). The undersigned presided over an arbitration hearing on January 6, 2022. Furman participated personally and through attorney Nicholas L. Shaull. The defendants participated by and through attorney Abigail A. Wenninghoff.

ISSUES

Under rule 876 IAC 4.19(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) Did Furman sustain an injury arising out of and in the course of his employment with Guardian on September 16, 2019?
- 2) Did Furman give timely notice of the alleged injury?
- 3) Is Furman entitled to temporary disability or healing period benefits because of the alleged injury?

- 4) What is the nature and extent of permanent disability, if any, caused by the alleged injury?
- 5) What is the commencement date for permanent partial disability benefits, if any are awarded?
- 6) Is Furman entitled to payment of the medical expenses in Claimant's Exhibit 14?
- 7) Is Furman entitled to alternate care?
- 8) Is Furman entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?
- 9) Is Furman entitled to taxation of the costs against the defendants?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Furman and Guardian at the time of the alleged injury on September 16, 2019.
- 2) At the time of the stipulated injury:
 - a) Furman's gross earnings were eight hundred thirty-three and 01/100 dollars (\$833.01) per week.
 - b) Furman was single.
 - c) Furman was entitled to one exemption.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

FINDINGS OF FACT

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 7;
- Claimant's Exhibits (Cl. Ex.) 1 through 15;
- Defendants' Exhibits (Def. Ex.) A through G; and

- Hearing testimony by Furman, Tessa Paige Knoblauch, Guardian human resources employee Ginger Pingel, and Guardian manager Roy Stillwagon, who was a supervisor of Furman's.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Helen Johnson, an employee of Broadspire, conducted a recorded telephone interview of Furman on October 11, 2019, less than one month after the alleged date of injury. (Def. Ex. F) Johnson asked what symptoms Furman was experiencing and when they started. (Def. Ex. F, p. 54) The question was compound, but there is an insufficient basis in the evidence from which to conclude it confused him. (Def. Ex. F, pp. 54–55) Furman responded by informing Johnson that he had two conditions and one claim. (Def. Ex. F, pp. 54–55)

In Furman's answer to Johnson's question, he initially described his hernia from May 2018. (Def. Ex. F, pp. 54–55) With respect to his hernia, Furman stated:

I didn't feel initial onset of pain like there was an injury, you know, that indicated an injury like if you were to fall or if you were to lift something too heavy and then have pain like a rupture, but I just noticed one day when I was getting ready for work that there was a bulge in my groin area and when I would cough, I would be able to feel . . . I would be able to feel that internally, move or whatever

(Def. Ex. F, p. 54) Johnson followed up by asking what Furman thought caused the hernia and he replied, "The repetitive strain from my job and possibly shoveling. We have to shovel what is called cullet." (Def. Ex. F, p. 55)

Later in the interview, Johnson circled back and asked, "What started causing the issues with your back?" (Def. Ex. F, p. 56) Furman responded by explaining he had taken "a day off work here and there" because of back pain around the same time that he discovered his hernia. (Def. Ex. F, p. 56) Johnson followed up by asking, "What was causing the back pain, do you know?" (Def. Ex. F, p. 57) Furman answered:

The back pain is . . . in my guess, like educated guess would be from the resistance when you run a crane, an overhead crane, that's got a pack of glass that's so many thousand pounds, when that crane stops, there is a little bit of resistance, and sometimes, you have to spin, what's called spinning the stokes, which would be the packaged glass, because it has to face a certain way on the truck or the thing that you're loading it onto. So, there's a little bit of . . . you know . . . You have to use a little bit of muscle to spin that stoke, and over time, my guess on it is . . . that it's just wear and tear and it's just occupationally caused that.

(Def. Ex. F, p. 57)

On October 14, 2021, defense counsel deposed Furman. (Def. Ex. G, p. 62) Defense counsel asked how Furman injured his back and he answered, "I was injured from shoveling broken glass, repetitive -- repetitive movements at my job." (Def. Ex. G, p. 69, Depo. p. 27) In Furman's answer to an interrogatory asking how he injured his back, he stated he "was shoveling broken glass that can weigh up to thousands of pounds and felt a sudden pain in his back." (Def. Ex. E, p. 51; Cl. Ex. 9, p. 21) He gave similar hearing testimony. (Testimony) Furman did not mention operating a crane as a cause of his back injury during his deposition, in his interrogatory answer, or in hearing testimony. (Def. Ex. G, pp. 62–79; Def. Ex. E, p. 51; Cl. Ex. 9, p. 21; Testimony)

During Furman's deposition, defense counsel followed up by asking if Furman's back injury happened over time or on one particular occasion and he answered, "From shoveling, there was one particular occasion." (Def. Ex. G, p. 70, Depo. p. 30) Furman provided more detail in response to additional questions as follows:

- Q. What happened that was unique on September 14th?
- A. The particular shift I'm talking about when I was shoveling cullet, I noticed an extremely sharp pain in my lower back.
- Q. Are we talking about 2019?
- A. That would be 2019.
- Q. When you felt that sharp pain on September 14th of '19, what did you do?
- A. I stopped shoveling the cullet and sat in the break room and took a break.
- Q. Then what?
- A. Went back to work, finished my shift. My supervisors were notified the next time I saw them, which I could not give you an exact time or date, but the next time I saw them. Sometimes we had supervisors there, sometimes we didn't.

(Def. Ex. G, p. 70, Depo. pp. 30–32)

During Furman's deposition he described the symptoms he attributed to the alleged back injury:

I have -- It's -- It's gotten -- It's gotten worse. I have sciatica in both my legs. My toes will be numb. I'll have balance issues. I lose sleep over it. It's very uncomfortable to walk or stand for long periods of time or to sit for long periods of time.

(Def. Ex. G, p. 71, Depo. p. 36) Furman's recitation of symptoms prompted the following exchange with defense counsel on follow-up:

Q. Did you have any of these symptoms before September of 2019?

A. No.

(Def. Ex. G, p. 71, Depo. p. 37) He elaborated that before September 2019, he had high blood pressure, groin pain due to his hernia, and, "Just the usual aches and pains, nothing -- nothing to the severity where it would affect my work or my quality of life."

(Def. Ex. G, p. 72, Depo. pp. 39-40) Defense counsel asked if Furman's 2018 groin injury caused any back pain and he replied:

That I -- I'm not a doctor. I can't -- I can't answer that. I know that there's -- they have stuff -- what's called referring pain, where you have one area that hurts so it makes another area feel like it's hurting.

It would be just your common -- feel like your common aches and pains. You know, if you overuse your shoulders or your back, you know, you'd have some back pain.

And there were times I took a day or two off, notified my supervisors of why, but it wasn't in the location that -- I didn't have the leg pain like I have now and the numbness, the coordination issues, things like that, and it wasn't constant sacrum pain.

I never once denied any of my pains to my doctors. I've been 100 percent honest with them. I mean, they can't treat you right otherwise.

(Def. Ex. G, p. 73, Depo. pp. 42, 44)

On March 21, 2018, Jonghyun Lee, D.O., examined Furman and noted he "report[ed] chronic back pain with sciatic pain" and prescribed non-steroidal anti-inflammatory drugs (NSAIDs). (Jt. Ex. 1, pp. 1-2) In the records from Furman's May 17, 2018 appointment, he noted Furman did not have much relief from the NSAIDs and "report[ed] weakness in lower extremities, intermittent paresthesia and [sic] buttocks, and had one episode of urinary retention last week." (Jt. Ex. 1, p. 3) Because Furman reported "red flag symptoms," Dr. Lee ordered magnetic resonance imaging (MRI) of Furman's lumbar spine that showed moderate size central disc protrusion L5-S1 causing moderate central canal stenosis. (Jt. Ex. 1, p. 4; Jt. Ex. 2, p. 6)

Michael Dolphin, D.O., saw Furman on June 27, 2018, and noted:

The patient is a 35 year old male who presents with complaints of dull pain in the lumbar region that occurs constantly. The onset was gradual without injury many years ago. The patient's symptoms are aggravated by

walking. The patient's symptoms are relieved by rest. Pain radiates to the right hip, right lower leg, and right posterior thigh that is constant. He has occasional left hip, left thigh, and left lower leg. He has intermittent numbness in . . . both of [his] feet and lower legs. Rating his pain at 6/10 now but can reach up to 10/10.

(Jt. Ex. 3, p. 11) Dr. Dolphin noted x-rays of Furman's lumbar spine "show[ed] mild degenerative disc disease at L5-S1" and were "negative for spondylolisthesis" while the MRI of his lumbar spine "show[ed] central disc herniation at L5-S1 causing moderate central stenosis." (Jt. Ex. 3, p. 13) Dr. Dolphin noted he and Furman discussed treatment options and Furman elected for a midline L5-S1 epidural steroid injection. (Jt. Ex. 3, p. 13)

On July 5, 2018, Furman saw Maruti Kari, M.D. "for a consultation regarding chronic back pain" that started three months prior. (Jt. Ex. 4, p. 15) Furman reported to Dr. Kari he was experiencing "low back pain that radiate[d] into the right hip and right lateral thigh then the pain stops and starts into the posterior calf area with intermittent pain radiating into the left lower extremity." (Jt. Ex. 4, p. 16) Dr. Kari further noted Furman felt "numbness and tingling in his feet and arms which alternates with positions" and "occasionally ha[d] weakness in his arms and legs." (Jt. Ex. 4, p. 16) Furman rated his back pain at a five out of ten at its lowest level and ten out of ten at its highest. (Jt. Ex. 4, p. 16) Furman told Dr. Kari he had obtained care from a chiropractor "with no improvement" from it. (Jt. Ex. 4, p. 16) Furman decided to proceed with the epidural steroid injection after his hernia repair surgery. (Jt. Ex. 4, p. 19)

Furman called Dr. Dolphin's clinic seeking pain medication for his back on July 9 and July 30, 2018. (Jt. Ex. 4, pp. 21, 23) Serena Curler, A.R.N.P., saw Furman on August 2, 2018, and noted he complained "of no improvement in pain" and requested "medication for the pain" because he had been taking Kratom but the pain was "not tolerable at this time even with it." (Jt. Ex. 4, p. 24) Curler prescribed tramadol and gabapentin. (Jt. Ex. 4, p. 27)

Furman cancelled the steroid injection he had scheduled for August 6, 2018. (Jt. Ex. 4, pp. 31, 33) On September 5, 2018, Curler again saw Furman, who reported his pain was worse and described it as "stabbing sharp pains in neck and back." (Jt. Ex. 4, p. 28) Curler noted "tenderness to palpation in the bilateral lumbar paravertebral region." (Jt. Ex. 4, p. 30) The "problem list" from the appointment included degenerative disc disease, central disc herniation L5-S1 level, lumbar radiculopathy, and myofascial pain syndrome. (Jt. Ex. 4, p. 31) Curler prescribed acetaminophen. (Jt. Ex. 4, p. 33) On or about September 25, 2018, Furman requested a 90-day supply of gabapentin, which Desiree Jackson, R.N., called into the pharmacy. (Jt. Ex. 4, p. 34)

On November 2, 2018, Curler again saw Furman, who reported his medications were not helping to reduce his pain and he was not interested in injections. (Jt. Ex. 4, p. 36) He described his pain as "unchanged" and "constant." (Jt. Ex. 4, p. 36) According to Curler's note, Furman stated the pain would travel down his arms and legs. (Jt. Ex. 4, p. 36) The pain in his lower extremities was intermittent and "in the whole leg." (Jt. Ex. 4,

p. 36) Furman also complained of intermittent numbness and tingling in his hands, arms, and lower extremities. (Jt. Ex. 4, p. 36)

Furman called the clinic and spoke with Nicole Lessard, R.N., on January 24, 2019. (Jt. Ex. 4, p. 41) Lessard noted Furman reported he was “in a lot of pain and not getting any relief.” (Jt. Ex. 4, p. 41) He described the pain as “in low back” and “radiat[ing] down bilateral legs.” (Jt. Ex. 4, p. 41) Furman also complained of joint pain. (Jt. Ex. 4, p. 41) Lessard suggested seeing a rheumatologist but Furman was “not interested.” (Jt. Ex. 4, p. 41)

On February 7, 2019, Dr. Kari examined Furman at the pain clinic and noted he complained of “low back pain from the tailbone that radiates into the right lower extremity.” (Jt. Ex. 4, p. 42) Furman also told Dr. Kari he experienced muscle spasms and cramping in his calves. (Jt. Ex. 4, p. 42) Furman also reported his feet would go numb at times when he is seated and he is unable to feel the floor when walking. (Jt. Ex. 4, p. 42) Dr. Kari prescribed acetaminophen, cyclobenzaprine, gabapentin, meloxicam, hydrocodone-acetaminophen, and pregabalin. (Jt. Ex. 4, p. 4, p. 47)

Furman was hesitant to receive any injections, so he and Dr. Kari discussed a possible referral to a surgeon for surgical intervention of his lumbar spine if physical therapy and the medication change did not improve his pain. (Jt. Ex. 4, p. 45) However, Furman did not schedule any physical therapy. (Jt. Ex. 4, pp. 49–50) The pain clinic dismissed Furman as a patient after an abnormal urine drug screen. (Jt. Ex. 4, pp. 58–59)

Thus, the medical records establish Furman’s description in his deposition and hearing testimony of his pre-September 2019 back pain, related symptoms, and the care for these symptoms is inaccurate. He received care for back pain for months. Furman’s pain was so bad he was ultimately referred to Dr. Kari, a pain specialist, who prescribed hydrocodone for it. During this course of care, Furman consistently described symptoms more severe than “common aches and pains” caused by overuse of a body part. Furman’s attempts to minimize his symptoms from before September 2019 with an inaccurate description hurt his credibility.

Further undermining Furman’s credibility is the fact that he changed his story with respect to how he alleges he sustained a back injury while working. On October 11, 2019, Furman expressly stated he thought the cause of his hernia was shoveling cullet at work; however, he did not similarly link his back injury to shoveling cullet. Instead, Furman stated he believed operating a crane was the cause of his back injury. During his deposition and hearing testimony, Furman stated he sustained an acute injury while shoveling cullet but made no mention of operating the crane. Taken together, Furman’s misleading characterizations of his symptoms from 2018 and early 2019, incorrect statements regarding the medical care he received for those symptoms during that time period, and different explanations for how he sustained a back injury while working make his testimony on the cause of his back injury not credible.

Claimant's counsel arranged an independent medical examination (IME) with Sunil Bansal, M.D, on October 22, 2021. (Cl. Ex. 12, p. 28) Dr. Bansal reviewed medical records relating to Furman's care for back complaints and performed an examination of him. (Cl. Ex. 12, pp. 28–36) Dr. Bansal issued an IME report in which he described Furman's job duties as follows, "He operated cranes and forklifts, and shoveling glass was an ongoing job duty. They audited the glass, which required breaking it and then shoveling it. The glass could weigh from 4,200 to 9,000 pounds." (Cl. Ex. 12, p. 35)

On causation, Dr. Bansal opined:

At the time of his injury, Mr. Furman was employed by Guardian Industries. As a result of his repetitive and physically demanding work activities, he sustained an injury to his back coming forward to September 16, 2019. His job involved, over a four year period, shoveling glass, with repetitive bending and twisting. He began to notice low back pain, and at one point he had a jolt of pain and felt an electric shock sensation go down his right leg into his foot. The pain has continued since then.

(Cl. Ex. 12, p. 37)

Dr. Bansal's opinion on causation is thus based at least in part on the understanding that Furman had an acute incident while on the job, though he provides no details in his causation opinion regarding the job duty that caused the "jolt of pain" and "electric shock sensation" in Furman's right leg and foot. Because Dr. Bansal's opinion on causation is based at least in part on Furman's account of how it happened, it is not credible. The weight of the evidence in this case does not support the finding that Furman sustained either an acute injury to his back while shoveling cullet or, in the alternative, a cumulative injury caused by his work duties.

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

1. Causation.

An employer covered by the Iowa Workers' Compensation Act must "provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury." Iowa Code § 85.3(1).

“A claimant must prove by a preponderance of the evidence that the injury is a proximate cause of the claimed disability.” Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) (quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa 2002)). “Ordinarily, expert testimony is necessary to establish the causal connection between the injury and the disability for which benefits are claimed.” Id. The same standards apply to expert opinions in the disability context as medical causation context. Id.

“Medical causation presents a question of fact.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844 (Iowa 2011). The answer to this question lies “essentially within the domain of expert testimony.” Id. at 845 (quoting Dunlavey v. Econ. Fire. & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)). The agency may accept or reject an expert opinion in whole or in part. Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) (quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa 2002)). In doing so, the agency “has the duty to determine credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion.” Dunlavey, 526 N.W.2d at 853. The agency determines the weight to give an expert opinion based on consideration of:

- 1) “[T]he accuracy of the facts relied upon by the expert,” Schutjer, 780 N.W.2d at 560 (quoting Grundmeyer, 649 N.W.2d at 752);
- 2) “[T]he completeness of the premise with which the expert is given,” Dunlavey, 526 N.W.2d at 853; and
- 3) “[O]ther disclosed facts and circumstances.” Id.

Medical causation disputes can take two forms under the Iowa Workers’ Compensation Act. One is whether the injury arises out of an actual risk of the claimant’s employment. See Bluml v. Dee Jay’s Inc., 920 N.W.2d 85, 85–86 (Iowa 2018); see also Lakeside Casino v. Blue, 743 N.W.2d 169, 173–74 (Iowa 2007); Meyer v. IBP, Inc., 710 N.W.2d 213, 223 (Iowa 2006); Almquist v. Shenandoah Nurseries, 254 N.W. 35 (Iowa 1934). The other is whether the injury caused a compensable disability. See Schutjer, 780 N.W.2d at 560 (quoting Grundmeyer, 649 N.W.2d at 752).

As found above, Furman gave misleading accounts of his pre-September 2019 symptoms and care. He also has provided two different explanations for how he sustained a back injury at work: Less than one month after the alleged injury, Furman attributed it to operating a crane and during litigation, Furman changed his story to allege he sustained the work injury at issue when shoveling cullet, the act of which he claimed caused a sharp pain sensation and worse symptoms. Dr. Bansal’s causation opinion is largely based on Furman’s second account, which is not credible, and this makes Dr. Bansal’s opinion on causation unpersuasive. For these reasons, Furman has failed to meet his burden of proof on causation. Because Furman has failed to prove causation, this decision does not address the other disputed issues between the parties, except for IME reimbursement as discussed below.

2. IME.

Before the 2017 amendments enacted by the legislature, the Iowa Workers' Compensation Act required an employer to hold an employee harmless for the cost of an IME regardless of whether the alleged work injury was ultimately found compensable. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa Ct. App. 2008); see also Miracle v. UFP Tech., Inc., File No. 5056559 (App. Mar. 13, 2019). After the amendments, however, Iowa Code section 85.39(2) provides in pertinent part, "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." Applying the amended statute to this case, Furman is not entitled to an award of the cost of Dr. Bansal's IME because he failed to show the alleged work injury is compensable.

ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) Furman shall take nothing more from this case.
- 2) The parties shall be responsible for paying their own hearing costs.

Signed and filed this 11th day of August, 2022.



BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Nicholas L. Shaul (via WCES)

Abigail A. Wenninghoff (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.