

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KATHLEEN HAYES,

Claimant,

vs.

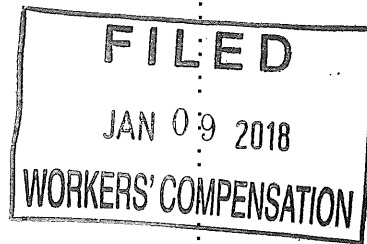
GRAPE TREE MEDICAL
STAFFING, INC.,

Employer,

and

RIVERPORT INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5062081

ARBITRATION DECISION

Head Note Nos.: 1801.1; 1803.1;
1803; 2502

STATEMENT OF THE CASE

Kathleen Hayes, claimant, filed a petition in arbitration seeking workers' compensation benefits against Grape Tree Medical Staffing, employer, and Riverport Insurance Company, insurer, for an accepted work injury date of August 31, 2015.

This case was heard on August 7, 2017, in Des Moines, Iowa. The case was considered fully submitted on August 28, 2017, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-9, Defendants' Exhibits A-G, and testimony of the claimant.

ISSUES

1. Whether the alleged injury caused temporary disability and the extent of claimant's entitlement to temporary disability benefits;
2. Whether the alleged injury was scheduled or industrial;
3. Whether the alleged injury caused permanent disability and the extent of claimant's entitlement to permanent disability benefits;
4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) pursuant to Iowa Code section 85.39.

STIPULATIONS

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.

The parties agree claimant sustained an injury arising out of and in the course of her employment with defendant employer on or about August 31, 2015. While the parties dispute claimant's entitlement to benefits, they stipulate claimant was off work from December 14, 2015, through March 3, 2016. They agree that the commencement date for permanent partial disability benefits, if any are awarded, would be March 3, 2016.

At the time of the injury, claimant's gross earnings were \$596.55 per week. She was single and entitled to one exemption. The weekly benefit rate is \$372.00 based on those foregoing facts.

Prior to the hearing, no benefits were paid and no credit is sought.

FINDINGS OF FACT

At the time of the hearing, claimant was a 30-year-old person. Her past education experience includes CNA, massage therapy, and insurance. She has a license to sell insurance.

Claimant began working for defendant employer on February 8, 2008. She was employed as a CNA. As part of her job duties, she would go into facilities that were understaffed or fill in for aides on break.

Her previous medical history is significant for prior complaints of pain and discomfort to the back and legs. On July 10, 2015, claimant filled out a form at a chiropractor's office asserting, lower back and knee pain. (JE 7:1) The knee pain was marked as 7 on a 10 scale. (JE 7:1) She described having backaches, swollen joints, foot trouble, and pain between the shoulders. (JE 7:3) Gary Englert, DC, saw claimant for approximately two visits. She gave a history of having "remarkably severe constant aching low back pain right side" and pain in the right hip that began on April 11, 2015. (JE 7:5)

On August 25, 2015, days prior to the work injury, claimant sought care with Steve Burke, PA at Community Health Centers of Iowa. (JE 1:1) She described right sided sciatic-type pain that began and lingered for the past two months. (JE 1:1) The pain was documented as "constant severe 10/10 no injuries never had before." (JE 1:1) She also indicated that previous medical care such as chiropractic treatment had not been helpful. (JE 1:1)

An x-ray showed possible mild narrowing of the L5-S1 neural foramina. (JE 2)

PA Burke noted claimant had a back rash and that she exhibited right-sided paravertebral tenderness at L5-S1. He prescribed Tramadol and Ibuprofen and referred her to physical therapy which she began after her work injury. (JE 1:4)

On August 31, 2015, claimant was injured while transferring a resident at the care facility to a chair using a Hoyer lift. She felt a pull or pop on her right side. At hearing, she testified the pop was in her back. In her work injury report, she indicated she felt a pop in her right leg. (Ex. B) She described the affected body part as "pain in right leg." (Ex. B) Sunil Bansal, M.D., an independent medical examiner hired by the claimant, recorded the injury as follows:

She believes a cord under the bed had gotten tangled up with the Hoyer lift base that she was pulling out from under the bed, with a resident in the lift. As she jerked hard on the lift, she felt a pop in her back and had immediate shooting pain in her right leg. She was pulling straight back on the lift with a resident who weighed approximately 250 pounds. She estimates that the lift itself weighed somewhere in the vicinity of 100 pounds.

She reported the incident to her supervisor, but decided to try to finish her 16-hour shift. She worked with another resident that day who had a habit of sitting down when there was no chair under him yet. She had to lean to keep him from falling to the floor, which increased her back pain. After this she was then ready to leave work that day, and filled out another incident report. The second incident occurred close to the end of her shift so she completed paperwork to close out her day. She was scheduled to drive to another town for another eight hour-shift, which she was unable to complete, only working two hours of the eight. She took some Tylenol and perhaps some tramadol by the time she left her second job of the day.

(JE 9:4)

In the employee accident report, claimant described the injury as pain in the right leg that developed suddenly. (JE 9:10)

At hearing, claimant differentiated the pre-injury pain as gluteal pain on the right that was muscular in nature. Whereas, after the work injury, her pain was initially in the right calf.

She reported this injury to her employer who requested she be evaluated before returning to work. Claimant sought out her family health care provider, PA Burke. On the September 1, 2015, visit, he recorded her subject complaints as follows:

1. [R]ight thigh pain

28 yo female describes sudden onset right lower thigh pain yesterday at work. Heard "pop," thinks lower thigh is swollen. [R]ecent hx sciatica-type pain right leg taking ibuprofen and tramadol

(JE 1:6) In the comments section, he noted that claimant had right leg pain and a minimally antalgic gait. Her back was without deformity and no pain was noted in that region. (JE 1:9) He recommended an MRI and for her to continue on the meds he had prescribed on August 25, 2015 prior to the work incident. (JE 1:9) He took her off of work for six days. (JE 1:10) He wrote another work release on September 10, 2015, keeping her off of work until September 15, 2015. (JE 1:11)

On September 3, 2015, she began physical therapy. (JE 3:3) The medical diagnosis was sciatica and the subjective/reason for referral section reads as follows:

Ms. Hayes is a 28 y.o. female that reports that this started when her right hip was out of place and has had 3 chiro manipulations but instead of getting better it has gotten worse. She reports that she's tried ice, pain meds, rest and nothing had resolved her pain. She reports that her pain extends across the right buttock and into the lateral hip. She reports that the x-rays showed that she had an extra vertebrae in the low back. This recent episode of pain started approximately 2 months ago. She is a CNA and works for a medical company that provides CNA coverage to various facilities that are short staffed.

(JE 3:3) In the medical history section, she denied previous injuries as a result of a fall. (JE 3:3) The therapist believed that claimant's hip and/or radicular pain was either hip abduction pain syndrome or piriformis syndrome. (JE 3:4)

On September 8, 2015, claimant returned. The status section reads as follows:

Pt. reports that she is painful today rating her pain 8/10. Ms. Hayes indicates that Saturday her pain was low enough that she felt she could return to work however Sunday she indicates she road [sic] on back of motorcycle for 2, 20 min rides and last night and today her pain is increased. Pt. points to her right hip as location of pain.

(JE 3:7)

When she returned to Dr. Burke on September 23, 2015, he did not note any abnormalities but recorded that claimant continued to report right lower extremity pain. (JE 1:15) He referred her to an orthopedist.

Claimant resumed work but according to her physical therapy note of September 23, 2015, the work activities exacerbated her pain. "She reports a shooting in her glut, a pain like 'leg cramp' and tingle numb sensation in her foot." (JE 3:9)

The therapist concluded that "She is not showing any neuro deficits [sic] signs this AM. She has a Negative Slump and SLR. She has 5/5 strength. Yet she continues

to have a pain report of 5/10. I feel that she has Piriformis or Hip Abduction Pain Syndrome." (JE 3:11) The therapist recommended additional physical therapy. Due to lack of improvement, claimant was discharged on October 15, 2015. (JE 3:15)

Claimant was seen at Robert Foster, M.D.'s office on November 21, 2015, by Nurse Practitioner Shanna Conner. (JE 4:1) Claimant's subjective complaints included low back pain along with right-sided buttock, thigh, and lower leg pain. (JE 4:1) No work injury was mentioned although the medical records include the statement that "[e]xacerbating factors include activity as well as sleeping." (JE 4:1)

She returned to Dr. Foster's office and was evaluated for her back and leg pain. It was most severe in the right buttock, thigh, calf and foot. (JE 4:3) She rated it a 7-8 on a 10 scale. (JE 4:3) On this date, she had no left-sided complaints.

On examination, she showed full, symmetrical and nonpainful rotation of her left and right hip. She had a positive straight leg test on the right with pain in the buttock, thigh, calf and foot. (JE 4:4) The MRI showed a large central disc herniation at L4-5 with the right side having "significant obliteration of the spinal canal." (JE 4:4; JE 5)

Oxycodone was added to her prescriptions and it was decided she would go forward with a surgical repair. (JE 4:4) Decompression and discectomy took place on December 14, 2015. (JE 4:6)

In the first follow up visit which took place on January 7, 2016, claimant maintained that her pain was only minimally changed. She now had pain in the left calf. (JE 4:7) By March 3, 2016, claimant had still not achieved meaningful post-surgical relief. "She still complains bitterly of pain in the right buttock, the thigh, the leg, and the foot and particularly numbness and dysesthesias [*sic*] well." (JE 4:10) Claimant did not want to undergo another surgery so no secondary MRI was ordered. (JE 4:11) Dr. Foster suspected that she had a recurrent disc displacement and that she would need a fusion; however, claimant was not interested in that route. (JE 4:11) Dr. Foster felt that he could not continue to prescribe narcotics.

Claimant was referred to Rushmore Pain & Medicine for pain management. (JE 6:1) During examination, she exhibited normal gait, but extreme right-sided pain on the straight leg test. The remainder of her musculoskeletal examination was normal. (JE 6:3) She underwent a series of epidural steroid injections that appeared to offer no relief. (JE 6:8) Her objective examination results were normal. (JE 6:8)

On June 8, 2016, she exhibited tenderness in the midline throughout the entire cervical spine with restricted flexion. Her lumbar and sacral spine examination was normal. She tested positive for marijuana. (JE 6:10)

She continued to complain of severe pain in her back. (JE 6:19) Claimant's symptoms remained largely unchanged, as did her treatment. She had an opiate prescription, used a TENS unit along with home remedies. She was encouraged to increase her activity and cease smoking. (JE 6:30) Her diagnoses were radiculopathy,

spondylosis, thoracic spine pain, and pain in the right and left legs. The history given was spinal stenosis. (See e.g. JE 6)

On May 12, 2016, claimant underwent a mental status examination at the request of the Iowa Disability Determination Services Bureau. (JE 8:1) To the examiner, she identified back, knees and legs as her pain centers. (JE 8:1) Dr. Martin concluded that claimant had the cognitive ability to work a wide range of simple unskilled and semi-skilled positions. Her overall intellectual functioning appeared to be borderline to low average range, but her judgment abilities and her ability to interact with others were limited. (JE 8:4) He noted she was poorly motivated to seek out and maintain employment. (JE 8:4) He diagnosed her as suffering from chronic adjustment disorder with a depressed mood. (JE 8:4)

Claimant was released to return to work with no restrictions on December 2, 2016, by Tessa Murphy, ARNP at Rushmore Pain & Medicine. (JE 6:21) She testified at hearing that this release was given at her request.

In a February 17, 2017, letter, Dr. Foster opined that the claimant's medical illness was lumbar disc degenerative disease at the L4-5 and L5-S1 levels and that any current, residual complaints she was currently suffering were related to the disease due to a repeat MRI, which showed complete resolution of the disc herniation with underlying residual disc disease at L4-5 and L5-S1. (JE 4:12) He concluded her complaints and disease pre-existed the on-the-job incident and that her MRI showed "chronic findings compatible with long-standing lumbar degenerative disc disease." (JE 4:12) He went on to write, "She started developing symptomology complaints prior to her on-the-job incident. Furthermore, we were aware [*sic*] unaware of the Workmen's Compensation claim during her care and treatment here. Thus, there is no causal connection between her current diagnosis and the on-the-job incident of August 31, 2015." (JE 4:12)

She underwent an IME with Sunil Bansal, M.D., on March 24, 2017. (JE 9) Dr. Bansal's history begins on the date of claimant's injury and does not recite any treatment claimant had prior to the injury. He did not record that she had prior injuries.

On examination, he noted tenderness to palpation over the lower lumbar paraspinals, a positive straight leg raise test on the right, loss of sensory discrimination over the great toe, and reduced range of motion. (JE 9:6) He concluded she sustained a permanent back injury resulting in a 12 percent whole person impairment. (JE 9:7) Dr. Bansal charged \$1,495.00 for the claimant's examination and his report. (JE 9:8)

Claimant testified that her meeting with Dr. Bansal was brief and that most of her time was spent with Dr. Bansal's nurse.

After surgery, she was released to work but told she could not return to CNA duties. There are no restrictions currently in the record. She maintains that after she left work, she was never told to return. She has not been employed since being kept off of work after her surgery.

Physically, she cannot lift what she used to and she testified to having a ten pound weight restriction at hearing. She has sent out applications for work after June 5, 2017, but has not been successful in obtaining new employment. She has problems sleeping due to her pain, which is primarily down her right side.

CONCLUSIONS OF LAW

Claimant asserts she is permanently partially disabled from her injury which occurred on August 31, 2015. Claimant maintains she has back, right hip, right leg, and left leg pain arising out of this work injury. Defendants assert claimant sustained an injury to her right leg which resolved shortly after her injury.

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 Elec. 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).

There are two primary medical opinions in evidence. The first is Dr. Foster's opinion. Dr. Foster treated and operated on claimant for her right-sided disc herniation. In a February 2017 letter, Dr. Foster denied that his treatment was for any work-related injury and that her current condition was the result of a chronic disease. He did not state explicitly that the surgery was unrelated to the work, but did opine that the complaints and degenerative disc disease predated her August work injury. He also went on to note that he was not aware of any workers' compensation claim. This is consistent with the contemporaneous medical records which do not reference any work injury. The pain clinic records also do not reference a work injury.

The only records which refer to a work injury are PA Burke's. However, the treatment claimant had with PA Burke was primarily for her back. The therapist claimant saw in September 2015, believed that the source of the right leg pain stemmed from the hip and not a calf or leg injury.

Dr. Bansal attributed the back condition, including the surgery, to claimant's work injury. However, he did not take into consideration her previous medical treatment for her back, nor did the situs of the injury in his report match that of the claimant's testimony or her written complaint of pain documented shortly after the occurrence. On August 25, 2015, claimant described right-sided sciatic-type pain that was 10/10. She had sought out chiropractic treatment in July 2015 for back pain. The course of treatment after her injury focused on her back pain and referred to the August 25, 2015, visit.

Dr. Bansal's examination was also quite short, per the claimant's testimony.

The opinions of Dr. Foster are more consistent with the medical records as well as claimant's hearing testimony that her pain after the injury was concentrated in the leg. Her current medical complaints stem from a degenerative back condition that pre-dated the work injury and are found to be not related to the work injury.

Her leg injury resolved on or about December 14, 2015, when she began to see Dr. Foster. At that point, claimant's complaints centered on the right side that had begun in June of 2015. It is found claimant sustained an injury to her right leg but not to her back, right hip, or left leg.

Claimant is not entitled to temporary or permanent disability benefits for her back-related complaints. The remaining issues are moot but for claimant's request for reimbursement of an IME.

Iowa Code section 85.39 allows an injured worker to obtain an IME.

After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's

own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination.

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, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, 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.

(Iowa Code section 85.39)

Section 85.39 entitles an injured worker 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. Proof of employer's liability for the alleged injury, is not a requisite for entitlement for an 85.39 IME. Dodd v. Fleetguard, 759 N.W.2d 133 (Iowa App. 2008).

In this case, Dr. Foster issued an opinion on February 2017 identifying no liability. However, Dr. Foster was not an employer-retained physician. Claimant began treating with Dr. Foster on a referral from her family practice health professional. Therefore, there was no triggering event.

Claimant is not entitled to a reimbursement of an IME.

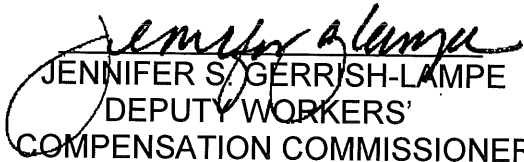
ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

Each party shall pay their own costs.

Signed and filed this 9th day of January, 2018.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

James P. Hoffman
Attorney at Law
PO Box 1087
Keokuk, IA 52632-1087
jamesphoffman@aol.com

Jean Z. Dickson
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
jzd@bettylawfirm.com

JGL/srs/kjw

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.