BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HEDAYAT KHALDAR SAGHIR,

Claimant,

vs.

MENARDS,

Employer,

and

XL INSURANCE,

Insurance Carrier,
Defendants.

File No. 5052229

APPEAL

DECISION

Head Note No: 1803

Claimant Hedayat Khaldar Saghir appeals from an arbitration decision filed on August 22, 2016. Defendants Menards, employer, and its insurer, XL Insurance, respond to the appeal. The case was heard on March 30, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 6, 2016.

The deputy commissioner found claimant failed to carry his burden of proof that he sustained permanent disability as the result of a stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on January 1, 2015. The deputy commissioner found claimant failed to prove entitlement to permanent disability benefits. The deputy commissioner ordered the parties to pay their own costs of the arbitration proceeding.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to carry his burden of proof that he sustained permanent disability as a result of the work injury. Claimant asserts the deputy commissioner erred in finding claimant failed to prove entitlement to permanent total disability benefits.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on August 22, 2016, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided sufficient analysis of all the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that he sustained permanent disability as a result of the work injury. I affirm the deputy commissioner's finding that claimant failed to prove entitlement to either permanent partial disability benefit or to permanent total disability benefits. I affirm the deputy commissioner's order that the parties pay their own costs of the arbitration proceeding. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues and I provide the following analysis:

FINDINGS OF FACT

Claimant was 46 years old at the time of the arbitration hearing and he resided in Fort Myers, Florida, at that time. (Hearing Transcript, pp. 8-9) He is a native of Iran, but moved with his wife, who is an American, to the United States in 2006. (Tr. pp. 10-11) He graduated from college in Iran in 1996 with a degree in civil engineering. (Tr. p. 10) Since coming to the United States, claimant has worked as a forklift operator for Proctor & Gamble, as a pizza delivery man, as a cleaner for Merry Maids, and starting in June 2013, as a yard team member for defendant-employer. (Tr. pp. 11-12)

Following a motor vehicle accident on July 3, 2013, claimant received treatment at the University of Iowa Hospitals and Clinics (UIHC) for diagnoses that included post-concussive syndrome, headache, and neck pain and stiffness (Exhibit E, p. 9) A CT scan encompassing the cervical through lumbar spine was negative. (Ex. E, p. 9)

On August 16, 2010, claimant was noted to be exaggerating his symptoms. (Ex. E, p. 17) He complained of blurry vision and muffled hearing, for which he saw an optometrist and an audiologist, respectively. After his audiological testing, the physician concluded "My impression is that Mr. Khaldar Saghir is exaggerating his hearing loss in his right ear based on today's test results. (Ex. E, p. 18)

Claimant was also sent to neurology for alleged symptoms associated with the July 3, 2010, motor vehicle accident. The diagnosis from neurology was mild concussion, depression and cognitive or personality change of nonpsychotic severity. (Ex. E, p. 23) Claimant was also sent to neuropsychology at UIHC. Neuropsychological testing in 2013 yielded "grossly defective performances with patterns that are highly atypical of patients with cognitive difficulties from concussion, and indicate a prominent role for non-neurological factors affecting motivation." (Ex. E,

p. 25) Further, claimant's complaints of depression "indicate that the atypical performances are not attributable to depression, but are strongly suggestive of motivational factors." (Id.) Daniel Tranel, Ph.D., noted claimant failed numerous direct and embedded symptom validity tests, indicating a deliberate effort to perform poorly on the neuropsychological testing. (Id.)

Dr. Tranel noted that the pattern was profound and pervasive, it affected all aspects of claimant's test performances, and it was the same as the previous assessments in the clinic. (Ex. E, p. 61) Dr. Tranel stated:

> There is nothing credible about the patient's neuropsychological test performances. Moreover, his claims about severe cognitive impairments, and his extremely defective test performances, are entirely inconsistent with his work situation. According to his supervisor at Dominos, he functions without difficulty as a pizza delivery person – this includes taking calls and orders, preparing food, and delivering food around Iowa City and Coralville.

(Ex. E, p. 62)

Dr. Tranel went on to note "with secondary gain issues in the picture, the inevitable diagnostic conclusion is malingering. (Id.)

No fewer than three independent physicians opined claimant was exaggerating or fabricating his eye, ear, cognitive and psychological injuries following his July 3, 2010, motor vehicle accident. (Ex. E, pp. 17-18, 61)

Following claimant's January 1, 2015, work injury, claimant was evaluated by Ernest Perea, M.D., who took CTs of claimant's cervical spine, head and low back. Those scans revealed mild degenerative disc disease at C6-7 and negative findings of the head and low back. (Ex. F, pp. 1-3) Dr. Perea referred claimant to Todd Ajax, M.D., at Neurological Associates of Iowa City.

Dr. Ajax evaluated claimant on January 9, 2015, and he assessed claimant as having a concussion and cervical strain. Dr. Ajax prescribed medication and he directed claimant to follow up in three weeks. (Ex. 2, pp. 4-6) On January 28, 2015, claimant called Dr. Ajax's office stating he was thinking of hanging himself. Claimant went to the emergency room and underwent an MRI, which was normal. (Ex. 2, p. 8)

On February 7, 2015, claimant underwent a cervical MRI, which indicated a bulging disk to the left between C6-7. Dr. Ajax opined that this finding did not explain claimant's physical symptoms, and the doctor suggested depression and anxiety might be responsible. Dr. Ajax felt claimant's problems were best addressed from a mental health standpoint because, from a neurologic standpoint, claimant's symptoms did not make sense. (Ex. 2, pp. 11, 13)

On June 23 and 30, 2015, claimant underwent a two-day neuropsychological evaluation with Jessica Rivera, Psy.D., psychologist. (Ex. B) As with Dr. Tranel's neuropsychological findings in 2013, the findings from Dr. Rivera's evaluation demonstrated lack of effort, inconsistency, exaggeration, invalid results and other findings drawing into question the presence of any kind of injury. (Ex. B, pp. 9-10)

After reviewing Dr. Rivera's neuropsychological evaluation report, Dr. Ajax agreed claimant was at maximum medical improvement as of August 3, 2015, specifically stating claimant needed no further treatment for the work injury. (Ex. C, pp. 1-2) Dr. Ajax opined claimant needed no permanent work restrictions, and he opined claimant did not sustain any permanent neurological impairment as a result of the work injury. (Ex. C, pp. 2, 4)

On October 24, 2015, claimant was evaluated by Robert Mandelkorn, M.D., eye physician and surgeon. Dr. Mandelkorn's impression was that claimant suffered a traumatic brain injury as a result of the January 1, 2015, work injury. (Ex. 7) Dr. Mandelkorn opined that this impression was consistent with significant atrophy of the optic nerves observed in both eyes. (Ex. 7, p. 32) However, Dr. Mandelkorn apparently was unaware of the vision difficulties claimant had as a result of his July 3, 2010, motor vehicle accident.

Sunil Bansal performed an independent medical evaluation (IME) of claimant on January 22, 2016. (Ex. 8) Dr. Bansal opined claimant suffered a traumatic brain injury, aggravation of cervical spondylosis with C6-7 disc protrusion, and lumbar strain as a result of the January 1, 2015, work injury. (Ex. 8, p. 44) Dr. Bansal further opined that claimant's traumatic brain injury resulted in optic atrophy, migraines, dizziness/vertigo, concentration impairment, tinnitus, and gait disorder. (Id.) Dr. Bansal made no reference in his report to claimant's July 3, 2010, injury and subsequent treatment, despite apparently having access to those records.

On the date of injury claimant was married, entitled to four exemptions, and had gross weekly earnings of $533.99. As such, his weekly benefit rate is $368.44. The parties stipulated to an August 3, 2015, commencement date for permanent disability benefits, if any were awarded.

CONCLUSIONS OF LAW

The first issue is whether the claimant suffered permanent disability or loss of earnings capacity resulting from the January 1, 2015, work injury.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 14(f).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it arose out of and in the course of employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976);

Musselman v. Central Telphone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place and circumstances of the injury. Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1986); McClure v. Union County, 188 N.W.2d 283 (Iowa 1971).

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. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296 (Iowa 1974).

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. The weight to be given to any expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974); Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (Iowa 1974); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up, or acceleration of any prior condition has been viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. t need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980)

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995).

An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

I affirm the deputy commissioner's finding that claimant failed to meet his burden of proof in establishing any permanent disability or loss of earning capacity as a result of the January 1, 2015, work injury. The deputy commissioner's finding in that regard is supported by two major facts: (1) apparently neither Dr. Mandelkorn nor Dr. Bansal were aware of claimant's July 3, 2010, motor vehicle accident and (2) claimant was not a credible witness.

Following claimant's July 3, 2010, motor vehicle accident, he alleged the following: headaches, neck pain, post-concussive syndrome, muscular neck pain, blurry vision and muffled hearing. Claimant also complained of severe depression as a

result of that injury. Any discussion of those injuries was notably absent from Dr. Mandelkorn's report and from Dr. Bansal's report. Dr. Bansal's oversight, in particular, is notable because he begins his report with an overview of claimant's medical history from May 9, 2007, through July 4, 2013, and there is absolutely no reference to claimant's extensive medical treatment for the 2010 motor vehicle accident. (Ex. 8, pp. 33-34) Dr. Bansal makes one brief reference to the accident saying, "Mr. Saghir was involved in a motor vehicle accident six to seven years ago, after which he had some headaches, but they resolved after about one or two years." (Ex. 8, p. 40) No mention is made of claimant's alleged neck pain, post-concussive syndrome, muscular neck pain, blurry vision, or muffled hearing that were claimed after that accident, nor is any mention made of the neuropsychological testing results and the opinions of the treating physicians that claimant's alleged symptoms were deliberately exaggerated and otherwise were completely unreliable.

In addition to essentially ignoring the fact that claimant's complaints after the work injury were the same as his complaints following the 2010 motor vehicle accident, as well as ignoring that the neuropsychological testing and medical opinions that the claimant's complaints in both instances were exaggerated, inconsistent and invalid, the opinions of both Dr. Mandelkorn and Dr. Bansal also fly in the face of the medical opinion of the neurologist who treated claimant after the work injury, Dr. Ajax, who concluded claimant's complaints made no sense from a neurological standpoint, and that the work injury caused no impairment and no need for any work restrictions.

The deputy commissioner correctly noted that Dr. Bansal's failure to account for claimant's July 3, 2010, injury "Is a critical omission." Neither Dr. Mandelkorn's opinions nor Dr. Bansal's opinions considered claimant's alleged work injury in light of claimant's previous injuries. Without this information, neither physician could possibly render a reliable opinion on the causation of any of claimant's symptoms allegedly related to the work injury because it was impossible for Drs. Mandelkorn and Bansal to assess whether the alleged injuries are attributable to pre-existing conditions or whether those alleged injuries were aggravated by claimant's work injury on January 1, 2015. Claimant also does not address this omission in his appeal brief.

I also affirm the deputy commissioner's express finding that claimant was not a credible witness. The deputy commissioner stated in the arbitration decision:

> . . . The claimant was not a credible witness. Although it is possible that the claimant's demeanor was the result of brain injury it was very consistent with a deliberate effort to exaggerate and conceal. His memory appeared to get much, much worse on questions that cast doubt on his case on cross-examination, for example. . .

(Arbitration Decision, p. 2)

Claimant's deliberate exaggeration and concealment at hearing is consistent with his malingering during medical examinations both in 2010 and

2015. Following claimant's July 3, 2010, motor vehicle accident, he was noted to be exaggerating his symptoms during routine examination, audiological testing and neuropsychological testing. (See, e.g., Ex. E, as noted above at pp. 2 and 3) On November 11, 2013, Dr. Tranel even noted claimant's failures of direct and imbedded symptom validity tests indicated a deliberate effort to perform poorly. (Ex. E, p. 61) Claimant's exaggerations at hearing and during medical testing clearly support the finding he is not a credible witness and his subjective statement should in no way be used to determine causation or impairment.

The deputy commissioner who presided at the arbitration hearing observed claimant's demeanor and other personal attributes, and the deputy commissioner was uniquely able to assess claimant's lack of credibility in light of those observable factors. Since the deputy commissioner's assessment is consistent with the explicitly expressed findings and conclusions of multiple neutral medical professionals, I affirm the deputy commissioner's finding that claimant was not a credible witness.

Claimant's failure to return to work is not evidence of causation in this matter as claimant contends. (Claimant's Appeal Brief, pp. 4-5) As defendants point out, if anything, claimant's failure to return to work highlights his malingering and lack of motivation to return to work, as indicated by the neurological testing and other medical records. As defendants point out, even if Dr. Bansal's opinions could be accepted, his proposed work restrictions do not prevent claimant from working. Claimant could find work within those restrictions if he was so motivated. (Defendants' Appeal Brief, p. 6)

Claimant has provided no reliable causation opinion, no reliable functional impairment rating, no reliable permanent restrictions and he has exhibited a lack of motivation to return to work. Claimant has also clearly exhibited a lack of credibility. I therefore affirm the deputy commissioner's finding that claimant did not meet his burden of proof to establish any permanent disability or loss of earning capacity as a result of the January 1, 2015, work injury. As such, all other issues raised in this matter are moot.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 22, 2016, is affirmed in its entirety.

Claimant shall taking nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed on this 19th day of February, 2018.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Randall Schueller
Attorney at Law
1311 – 50th St.
West Des Moines, IA 50266
randy@loneylaw.com

Lindsey Mills
Attorney at Law
225 - 2nd St. SE, Ste. 200
PO Box 36
Cedar Rapids, IA 52406
lmills@scheldruplaw.com