BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIKE BALLARD,

Claimant,

vs.

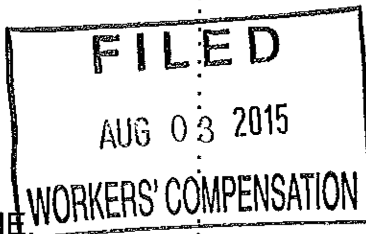
BRIDGESTONE/FIRESTONE,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5044580

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Mike Ballard, has filed a petition in arbitration and seeks workers' compensation benefits from Bridgestone/Firestone, employer and Old Republic Insurance Company, insurance carrier defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman in Des Moines, Iowa, on January 14, 2015 and was considered fully submitted on March 2, 2015. The record in the case consists of defendants exhibits A through Q; claimant's exhibits 1 through 14, as well as the testimony of the claimant.

ISSUES

The parties submitted the following issues for determination:

1. Whether the work injury of January 31, 2012 was the cause of any permanent disability;

2. The extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u);

3. The commencement date for payment of permanent partial disability benefits;

4. The claimant's weekly rate;

5. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27; and

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

FINDINGS OF FACT

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

The claimant at the time of the hearing was 62 years old. He is a high school graduate and has attended community college and obtained an associate's degree in electronics. He also has a real estate license. He is right-hand dominant. His work history consists of general laborer and welding.

The claimant began employment at Bridgestone in 1976 and retired November 30, 2014. During his employment, he worked in stock cutting where he ran the banners and built beads. This job was physical and required lifting 50 pounds at a minimum, but he was also allowed to use a hoist. Before this work injury, the claimant sustained a hernia, and underwent elbow and back surgery. The surgeries were in the early 1990's and after those he was released to full duty work. Approximately four years ago, he was diagnosed with bladder cancer and missed a month from work, but was able to return to work on full duty.

On January 31, 2012, the claimant was pulling on a bundle of beads when they let go. He went down a step and stuck out his right arm to keep from falling and came around with his left arm onto a flat tray falling to his left. The claimant described this as being like whiplash. The claimant continued to work but after an hour he could hardly move his neck and then reported the incident to his supervisor.

After the injury, the claimant saw the company physician with complaints of neck and shoulder pain. At that time, the claimant had full range of motion of the neck. He was treated conservatively. Eventually, the claimant had an MRI of his cervical spine on May 14, 2012 which showed mild multi-level degenerative disc disease and no distinct herniations. The claimant was released to return to work full duty without restriction. The claimant was not given any permanent impairment at that time.

The claimant continued to work 12-hour days after his injury. The claimant continued to ride his motorcycle, but complained of problems turning his head to the right. Claimant also hunts and fishes with his children but complains that it is more difficult. The claimant does 120 push-ups per day. The claimant retired on November 30, 2014. He was not directed medically to retire. He has obtained employment as a janitor at Morris Grade School in Bondurant, Iowa, where he earns $11.07 per hour. He is receiving $1,800 per month in Social Security retirement benefits, and $2,600 per month in pension from his employment at

Bridgestone/Firestone. Defendants had the claimant undergo an independent medical evaluation on March 26, 2014 with Scott B. Neff, D.O. Dr. Neff opined:

> Opinion and Recommendation:
>
> In my opinion, Mr. Ballard had a soft tissue strain. I do not think he has had a specific work injury to his neck as a result of his January 31, 2012, slip and fall. He has essentially full motion of the cervical spine and previous studies have shown significant cervical spine degenerative disease at multiple levels. This is not unusual in an individual this age. If he has nerve root entrapment at the C1-2 or C2-3 articulation, this can be associated with occipital nerve neuritis symptoms and those are currently being treated appropriately. Those symptoms are the result of degenerative disease of the cervical spine and not specifically the result of injury.
>
> This claimant exhibits essentially normal range of motion of the cervical spine, but we know from his previous studies that he does have degenerative disease at multiple levels of the cervical spine, not unusual for his age.
>
> I questioned him carefully during the history and he said that when he pulled hard on the bead and it subsequently suddenly let go, he fell backwards and fell towards the left. It is unlikely to opine that an alleged fall on the left outstretched arm would cause symptomatology on the right side.
>
> This patient has essentially normal range of the motion of the cervical spine. He has a normal range of motion on both shoulders. He has normal range of motion of both elbows and wrists. Consequently, I cannot attribute any impairment as a result of the alleged work-related circumstance. He does have degenerative disk disease in the cervical spine at multiple levels. This will continue to progress as he ages.
>
> I do not find any objective evidence to support the need for permanent work restrictions. He says that he is doing his normal job and he may continue to do so.

(Exhibit A, page 4)

The claimant also underwent an independent medical evaluation with Robin Sassman, M.D., at his attorney's request. Dr. Sassman diagnosed the claimant with cervical pain with radiculopathy with respect to causation, she opines:

Causation

All opinions are expressed within a reasonable degree of medical certainty.

It is my opinion that the incident that occurred on or about January 31, 2012, aggravated the underlying degenerative changes in Mr. Ballard's cervical spine as noted on the MRIs. This opinion is supported by the fact that the mechanism of injury is consistent with his complaints. Additionally, while it is true that he had these degenerative changes prior to the incident, they were not symptomatic. It was not until he sustained the whiplash-type of injury that occurred on or about January 31, 2012, that he noted the cervical radicular-type symptoms. Therefore, it is my opinion that the incident acted as a substantial aggravating factor in the underlying degenerative changes causing the degenerative changes to become symptomatic.

This opinion differs from the opinions of Dr. Neff and Dr. Troll who both stated that there was no injury to the neck that occurred on or about January 31, 2012. Neither doctor, however, offers an alternative explanation as to why Mr. Ballard had no complaints of neck pain prior to this incident occurring and then after it occurred he had symptoms. Mr. Ballard's degenerative changes in his neck were present prior to the incident; however, they were asymptomatic. It was not until the incident occurred that they became symptomatic. Therefore, in my opinion, this incident was a substantial aggravating factor in bringing to light his current symptoms.

In my evaluation of Mr. Ballard, I have found his reports of pain to be credible and consistent with the medical evidence. In my opinion, absent further treatment, his pain levels are likely to continue at this level.

(Ex. 7, p. 155)

Dr. Sassman opines that the claimant has a 15 percent permanent impairment of the whole person due to radicular findings on examination and recommends restrictions:

Restrictions:

Of note, these may change with further treatment. I would recommend that Mr. Ballard limit lifting, pushing, pulling and carrying to 30 pounds occasionally from floor to waist, 50 pounds occasionally from waist to shoulder and 30 pounds rarely over the shoulder. Gripping and grasping as well as upper extremity activities should be limited to at or below shoulder height on an occasional basis. I would recommend the

> rare use of vibratory or power tools as these may exacerbate his symptoms.

(Ex. 7, p. 156)

The claimant had pre-existing significant cervical spondylosis. The record shows that he continued working after the accident on full duty. In fact, the record shows that he never missed any work for three years before he finally decided to retire. The undersigned concludes that the opinion of Dr. Neff is to be given greater weight. The claimant contends that his weekly rate is $972.74 based on gross weekly earnings of $1,565.60. Parties agree that claimant was married and entitled to two exemptions. The claimant argues that the defendants' rate calculation failed to include his bonuses for carbon black, allowance hours, COLA pay, and production bonuses. The record indicates that these were a regular part of the claimant's pay and thus should be included. The correct calculations of claimant's rate is found in his Exhibit 12 for gross earnings of $1,565.60 for a corresponding weekly rate of $972.74 for a married individual with two exemptions.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is whether the work injury is the cause of any permanent disability.

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).

The greater weight of evidence in this record indicates that the claimant did not sustain permanent disability as a result of his work injury. The opinion of Dr. Troll that the claimant's condition had recovered is supported by the objective testing that occurred at the time of the work injury. The claimant had multi-leveled mild degenerative disc disease with no herniations. Dr. Troll's opinion is also supported by the opinion of Dr. Neff. Dr. Sassman's opinion is not consistent with the medical record. As the claimant has failed to prove that he sustained any permanent disability, it is unnecessary to analyze his entitlement to permanent partial disability.

The next issue is whether the claimant is entitled to any payment of medical expenses pursuant to Iowa Code section 85.27.

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).

In this case, the claimant is seeking reimbursement for payments to his family physician, Terry Van Oort, M.D. The claimant was referred to Dr. Van Oort by Dr. Troll, but this appears to have been done because the claimant's condition was not work related. Thus, the claimant is not entitled to payment of those medical expenses.

The next issue is whether the claimant is entitled to reimbursement for his 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).

The defendants obtained an evaluation which the claimant believed to be too low. The statute allows the claimant to recover or be reimbursed for an independent

medical evaluation under those circumstances. Therefore, the claimant is entitled to reimbursement for the independent medical evaluation by Dr. Sassman.

In the claimant's brief, he argues for penalty benefits. This issue was not listed on the hearing report. None-the-less, the claimant would not have been entitled to penalty in this case because he failed to prove entitlement to benefits.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall reimburse the claimant for the independent medical evaluation with Robin Sassman.

Costs of this action are taxed to the claimant pursuant to rule 876 IAC 4.33.

Signed and filed this 3rd day of August, 2015.

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.