BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SEBASTIANO OROZCO, Claimant, vs. CITY OF FORT DODGE-BLANDEN MUSEUM, Employer, and IMWCA, Insurance Carrier, Defendants.	File No. 21002991.01 A R B I T R A T I O N D E C I S I O N Head Note No. 1108

STATEMENT OF THE CASE

The claimant, Sebastiano Orozco, filed a petition for arbitration and seeks workers' compensation benefits from the City of Fort Dodge-Blanden Museum, employer, and IMWCA, insurance carrier. The claimant was represented by Janece Valentine. The defendants were represented by Jane Lorentzen.

The matter came on for hearing on April 25, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing system. The record in the case consists of Joint Exhibits 1 through 16; Claimant's Exhibits 1 and 2; and Defense Exhibit A. The claimant testified at hearing, in addition to Eric Anderson. Jane Weingart served as court reporter. The matter was fully submitted on June 10, 2022, after submitting excellent briefs.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury which arose out of and in the course of his employment on or about March 1, 2019.

2. Whether the alleged injury is a cause of any temporary or permanent disability.

3. Whether claimant is entitled to any temporary disability benefits.

4. Whether claimant is entitled to any permanency benefits, and if so, the nature and extent of his permanent disability.

5. Whether claimant provided timely notice of the alleged injury.

6. Whether the claimant is entitled to medical expenses, an independent medical examination, and alternate medical care.

7. Whether the claimant is entitled to costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. The parties contend the weekly rate of compensation is $448.38.

3. Affirmative defenses have been waived with the exception of timely notice under Iowa Code section 85.23.

4. There is no issue concerning credit.

FINDINGS OF FACT

Claimant Sebastiano "Joe" Orozco was 64 years old as of the date of hearing. He lives in Fort Dodge, Iowa near the Blanden Museum, the employer in this case. He testified live and under oath from his home via Zoom. Mr. Orozco is not technologically savvy. There were numerous difficulties with his equipment and his spouse had to provide technical assistance. His answers were long, argumentative, and often off topic, and his testimony was frequently emotional. He was generally a poor historian. His memory was not good, and he was not good with dates.

Mr. Orozco has a varied and interesting work history. He served in the United States Marine Corps from 1975 to 1981. He has worked in manufacturing, assembly, paint sales, maintenance, and safety. He has an Associate degree from Iowa Central Community College in welding and industrial mechanics. His last job prior to the Blanden Museum was working for an ethanol company performing inspection type functions at a good wage. He traveled some for this position.

In July 2017, he secured employment with the City of Fort Dodge at the Blanden Museum (hereafter, Blanden) as a maintenance custodian. He considered this position "light." (Transcript, page 27) He testified that his previous positions were generally much heavier. He performed a variety of maintenance and custodial tasks, both indoor and outdoor. His heaviest tasks were shoveling and removing ice. He originally reported to Eric Anderson, the Blanden Director. Eventually, he also reported to Troy

Brandt.

Mr. Orozco's tenure with Blanden was marked with a number of disciplines against him, none of which are particularly relevant in this case. (Joint Exhibit 3, pages 7-17) Mr. Orozco disputed the facts concerning each discipline. He was given a final warning on April 18, 2019. (Jt. Ex. 3, pp. 18-19)

Mr. Orozco contends he was not having any significant, ongoing neck or right arm or hand problems prior to the time of his alleged work injury. He contends that he sustained an injury while riding the elevator at the Blanden. His petition alleged an injury date of March 1, 2019. At hearing, Mr. Orozco denied this, stating he believed it occurred in April 2019. (Tr., p. 96) Mr. Anderson testified that a traumatic incident involving the elevator, in fact, did happen on March 19, 2019. (Tr., p. 143) This date corresponds to a documented malfunction with the elevator which required maintenance. (Jt. Ex. 3, pp. 23-24) Mr. Anderson testified he was in his office on that date when he heard "Joe scream, and then I heard pounding." (Tr., p. 143) For his part, Mr. Orozco testified that the elevator started shaking up and down and he was being tossed around. "The best way to describe it is that I was being tossed around like a Ping-Pong ball, or – like a little rag doll, but – and I started yelling out to Eric to stop it, …" (Tr., pp. 30-31)

There was apparently a second incident in the elevator as well which was similar, but he was more prepared and managed to get the elevator stopped sooner. (Tr., p. 33) He estimated that the incidents were two weeks apart. The employer did maintain records which indicate there were elevator repairs during this timeframe. (Jt. Ex. 3, pp. 20-24)

Mr. Anderson testified that Mr. Orozco told him he was not injured in the incident. (Tr., p. 144) Mr. Anderson, however, did provide testimony that the traumatic incident in the elevator did, in fact, occur. He testified the date was March 19, 2019. "Basically, I was in my office when I heard Joe scream, and then I heard pounding; and so I came down to the first floor to try to get the elevator doors to open." (Tr., p. 143) Mr. Anderson further testified, "He told me he was okay but shooken [*sic*] up." (Tr., p. 144) In any event, Mr. Orozco did not immediately seek treatment. He did not ask to be sent to a physician or fill out an injury report. Based upon Mr. Anderson's testimony, I find that the employer had actual knowledge that a traumatic event which could have injured Mr. Orozco occurred on or about March 19, 2019.

Mr. Orozco did visit his chiropractor, W. Benjamin Acree, D.C., on April 24, 2019. Mr. Orozco testified that he went to the V.A. first and was directed to see a chiropractor. Dr. Acree documented the following: "Reports an acute complaint in the upper thoracic, right posterior trapezius, and right mid thoracic since 04/22/2019." (Jt. Ex. 6, p. 49) Dr. Acree's medical file includes a form describing the onset of the condition and description of the symptoms signed and dated by Mr. Orozco. (Jt. Ex. 6, p. 48) "Numbness in the back – right side, right arm, all the way to the pinky finger, start in neck right side." (Jt. Ex. 6, p. 48) In answer to the question "How did your problem begin?", Mr. Orozco wrote: "woke up & felt it." (Jt. Ex. 6, p. 48) He listed the date of

onset as April 22, 2019. In his clinical notes, Dr. Acree documented the following: "confirms past episodes 2001, 2007 or sometime around then, multiple whiplash injuries, 4-5 …" (Jt. Ex. 6, p. 49)

At hearing, Mr. Orozco testified that Dr. Acree did not record the correct history. (Tr., p. 103) Dr. Acree provided an off work slip for April 24. (Jt. Ex. 6, pp. 51-52) Mr. Orozco took this slip to Mr. Anderson and eventually began a leave of absence.

Mr. Orozco went to Fort Dodge Trinity Emergency Department on April 26, 2019. He presented with neck, right shoulder, and back pain. The following is documented. "The patient is unsure of what may have triggered the pain, and he denies any recent falls, injuries, or heavy lifting." (Jt. Ex. 5, p. 41) He was diagnosed with cervical radiculopathy after radiographs. (Jt. Ex. 5, p. 46)

He was next evaluated on May 9, 2019, at the V.A. The following history is recorded in the notes: "Neck pain has been going on for about 3 weeks. No history of injury or trauma. Woke up and arm was numb. Thought he may have slept on it wrong." (Jt. Ex. 10, p. 134) At hearing, Mr. Orozco appeared truly perplexed about this. He testified to the following:

> I don't understand what is going on here. This is all new to me. I, I don't know how to answer that. When I walked into the V.A., like I did everywhere else since this elevator accident happened, I told them what happened to me – not "I'm guessing I slept on it wrong."

(Tr., p. 106) In the assessment, the V.A. documented the following:

> Neck pain associated with Rt. Arm weakness. Numbness and atrophy of thenar eminence. Symptoms have been going on for the last 3 weeks. No known history of trauma. Was evaluated by PT and Chiropractor who both recommended EMG and MRI before proceeding with further treatments. Orders for EMG and MRI-CITC done. Tramadol refilled. FMLA paperwork filled out for patient.

(Jt. Ex. 10, p. 137)

On June 21, 2019, Mr. Orozco dropped off a written notice of injury to Mr. Anderson. It stated:

> I want to give written notice that I sustained a work injury this April when the elevator malfunctioned and may have aggravated things further while clearing snow and picking ice. You did not direct me to medical treatment, so I have been treating on my own.

(Jt. Ex. 3, p. 27) The Blanden responded on June 24, 2019, in a letter to Mr. Orozco indicating that he had violated City work rules by failing to report the injury sooner. (Jt. Ex. 3, pp. 28-29) On June 28, 2019, the Blanden wrote to Mr. Orozco indicating that his

FMLA paperwork was being rejected and providing him with seven days to correct it. (Jt. Ex. 3, p. 31)

On July 15, 2019, the Blanden terminated Mr. Orozco, listing an effective date of termination as June 17, 2019. (Jt. Ex. 3, p. 33) He had not worked since he went off work in April 2019. The insurance carrier investigated Mr. Orozco's claim and sent a formal denial letter in January 2020. (Jt. Ex. 3, p. 37)

Mr. Orozco continued treating through the V.A. for his neck and right arm symptoms. In July 2019, he was evaluated by a neurosurgeon and diagnosed with cervical stenosis. (Jt. Ex. 7, p. 68) The arm symptoms were not thought to be radicular, and he was also diagnosed with cubital tunnel at that time.

In August 2019, Mr. Orozco was examined by Kristina Johnson, PA-C, at ISH Orthopedics. He provided her with a history of neck pain, numbness and tingling after an incident on an elevator in April. (Jt. Ex. 8, p. 69) She provided the following unsolicited opinion: "I do feel that the axial loading from the jerking elevator likely played a role in this." (Jt. Ex. 8, p. 69) She recommended referral to the Mayo Clinic.

Mr. Orozco continued to follow up with treatment thereafter with various providers, including M Health Fairview Neurology Clinic at the University of Minnesota and eventually surgeon Kristen Elizabeth Jones, M.D. (Jt. Ex. 9) Dr. Jones performed surgery on August 25, 2020, for severe foraminal stenosis. (Jt. Ex. 9, p. 108) It appears his condition is significantly disabling.

In addition to the treatment records in this case, there are a number of expert medical opinions on causation in the record. Dr. Acree prepared a report which essentially reiterated what was in his contemporaneous medical notes, indicating that no injury was reported to him. (Jt. Ex. 6, p. 65)

In September 2021, David Walk, M.D., prepared a report for defense counsel. He opined, after obtaining a history, physical examination and electrodiagnostic study that Mr. Orozco's hand weakness was due to radiculopathy from his neck condition. He opined that "Mr. Orozco reported to me that his neck symptoms followed an event in an elevator at work. As we discussed, I cannot state to a reasonable degree of medical certainty whether that event contributed to this radiculopathy, other than what is reported to me by Mr. Orozco." (Jt. Ex. 9, p. 116) He also stated that while Mr. Orozco's condition is degenerative and developed over time, "it is plausible that there may be greater predilection to nerve injury from a traumatic event." (Id.)

Claimant retained a physician to perform an independent medical examination and prepare a report containing expert medical opinions. Robin Sassman, M.D., prepared a report dated March 25, 2022, on behalf of the claimant. (Jt. Ex. 13) Dr. Sassman interviewed Mr. Orozco, reviewed appropriate portions of the medical file, and thoroughly examined him. She diagnosed cervical pain with myelopathic symptoms and assigned a 45 percent whole body impairment rating pursuant to the AMA Guides, 5th Edition. (Jt. Ex. 13, pp. 291-292) She recommended severe restrictions which

essentially render Mr. Orozco unemployable. Regarding medical causation she opined the following:

> Mr. Orozco denies having any ongoing cervical symptoms or right upper extremity symptoms until the incidents occurred in the malfunctioning elevator where he was violently thrown about as the elevator rapidly ascended and descended between floors. After the initial incident occurred, he noted numbness in the right arm and eventually developed atrophy of the right hand. Imaging of his cervical spine showed cervical spinal stenosis. While it is true that the incident in the elevator did not cause the cervical spinal stenosis, it is my opinion that the incident in the elevator was a substantial aggravating factor of his underlying cervical spine stenosis causing the symptoms he experienced to develop as well as the need for surgery. Supporting this opinion is the fact that he had no previous ongoing symptoms in the cervical spine or right upper extremity prior to this event. Additionally, the mechanism is consistent with the injury.

(Jt. Ex. 13, pp. 290-291)

Mr. Anderson testified that Mr. Orozco had told him that he had symptoms with his right hand that preexisted the alleged March 2019 work injury. (Tr., p. 140) There are, in fact, V.A. records which support this. (Jt. Ex. 10, pp. 117-129)

CONCLUSIONS OF LAW

The first question submitted is whether the claimant sustained an injury which arose out of and in the course of his employment in March or April 2019.

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" 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. 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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of

trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

By a preponderance of evidence, I find that the claimant did sustain a work-related injury due to elevator malfunction on March 19, 2019. This is based upon the testimony of Mr. Anderson, as well as the elevator repair records in evidence. While Mr. Anderson testified that Mr. Orozco told him he was "fine" after the incident, the finding of an "injury" is a minimal finding. The question is simply whether there was any type of a traumatic incident which caused the worker pain. I find that the claimant has met this minimal burden.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The actual notice question is only complicated by the fact that Mr. Orozco indicated he was "fine" following the incident. I find, however, that Mr. Anderson witnessed the immediate aftermath of the incident and knew that a traumatic incident occurred which could have caused injury to Mr. Orozco. I find that this alone satisfies Iowa Code Section 85.23.

The more complex question in this case is whether the traumatic incident on March 19, 2019, is a cause of any temporary or 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).

On this issue, I find that the claimant has failed to meet his burden of proof. The evidence in the record which renders claimant's burden insurmountable is the medical records from Dr. Acree's office, the emergency room records and the initial records from the V.A. All of these records document that when Mr. Orozco first sought treatment, he made no mention of the elevator incident. In fact, these records state there was no precipitating event and he simply slept poorly. For this reason, I reject the causation opinions of Dr. Sassman and Kristina Johnson, P.A.

The burden is on Mr. Orozco to prove that the work injury is a substantial cause of the development of his condition. In light of the foregoing records, combined with the evidence of his preexisting claim for right hand disability contained in the V.A. records, his burden is insurmountable.

It is noted that, generally speaking, medical records contain factual errors at an alarming frequency. Stated another way, it is my experience that it is not uncommon at all for medical records to contain factual errors. This is an unfortunate reality. In this case, Mr. Orozco was unable to provide any type of explanation as to why the first three medical providers he consulted had the same history, which he now contends is wrong. The chiropractor, the V.A. and the emergency department all had a history that there was no history of trauma and that he slept on it wrong. It is noted that Mr. Orozco has a poor memory and he was not a good historian. There could be valid explanations for these incorrect histories. The problem is, these examinations were actually closest in time to the incident. They are not vague or unexplained. While it is possible that these medical records are all incorrect, in this record, I simply cannot find that this is the most likely scenario.

For all of these reasons, I cannot find that claimant has met his burden of proof that his work injury is a cause of any temporary or permanent disability or any of his medical expenses with the V.A.

The final issue is costs.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Utilizing the discretion afforded in Section 86.40, each party shall pay their own costs.

ORDER

THEREFORE IT IS ORDERED:

Claimant shall take nothing further by way of indemnity or medical benefits.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Each party shall pay their own costs.

Signed and filed this 10th day of November 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Janece Valentine (via WCES)

Jane Lorentzen (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.