BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES RAHN, Claimant, vs. MARTIN MARIETTA MATERIALS, INC., Employer, and INDEMNITY INS. CO. OF N. AMERICA, Insurance Carrier, Defendants.	File No. 5058556 ARBITRATION DECISION Head Note Nos.: 1402.30, 2502, 2907

FILED
MAR 19 2019
WORKERS COMPENSATION

STATEMENT OF THE CASE

James Rahn, claimant, filed a petition for arbitration against Martin Marietta Materials, Inc., as the employer, and Indemnity Insurance Company of North America, as the insurance carrier. This case was heard on December 18, 2018 in Des Moines.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 8, and Employer's Exhibits B through H. All exhibits were received without objection.

Claimant testified on his own behalf and called his wife, Melanie Rahn, to testify. Defendants called Scotty Gerbes and Matt Kaputska to testify. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed post-hearing briefs on January 25, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of claimant's employment at Martin Marietta Materials on March 21, 2016.

2. Whether claimant gave timely notice of his injury.

3. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits.

4. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, if any.

5. The proper commencement for permanent disability benefits, if any.

6. Whether claimant is entitled to an order of reimbursement, payment, or an order to hold him harmless for past medical expenses.

7. Whether claimant is entitled to reimbursement of his independent medical evaluation fees.

8. Whether claimant is entitled to alternate future medical care.

9. Whether costs should be assessed against any party and, if so, the extent of reimbursement that should be ordered.

FINDINGS OF FACT

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

James Rahn began working for Martin Marietta in October 2015. He worked operating heavy machinery in a mine near Ames, Iowa. Mr. Rahn alleges he sustained a work injury on or about March 21, 2016. He asserts that he hit a pot hole while driving his articulating dump truck out of the mine and that he struck his head on the ceiling of the vehicle, causing two compression fractures in his thoracic spine.

Mr. Rahn testified that he operated the dump truck at a maximum speed of 20 miles per hour. However, he testified that his head was only about 3 inches from the ceiling in the cab and that he struck the roof of the cab with sufficient force that he broke the lining of his company-issued hard hat.

Claimant testified that he felt shocked and had to stop driving after the incident. He testified that he reported the incident to his supervisor and requested a new hardhat liner from the company but was refused. The company vehemently denies this allegation and put on convincing evidence that it has a company-wide safety policy and culture that make it unlikely it would refuse to replace a hardhat liner for an employee. Even claimant conceded that Martin Marietta has a good safety culture within its company. Yet, he contends they deviated from that culture for no obvious reason in March 2016.

Mr. Rahn has a documented history of back pain prior to commencing his employment at Martin Marietta. In 2001, Mr. Rahn fell several feet off a railroad car. He sustained a broken left elbow, a fractured hip, a broken nose and a dislocated shoulder. He also sustained a concussion as a result of that fall. Subsequent medical records also documented that Mr. Rahn sustained a compression fracture at T12 of his thoracic spine. Claimant testified that he experienced symptoms from the 2001 fall for approximately 10 years but those symptoms eventually resolved. No treatment records appear for claimant's thoracic spine between 2011 and the alleged March 2016 incident at Martin Marietta.

Following the March 2016 alleged injury, Mr. Rahn testified that he reported the injury and was told by Martin Marietta to seek treatment. Claimant testified that he did seek treatment and reported the injury and symptoms to his personal physician after the incident. However, review of those medical records demonstrates no mention of the alleged injury at Martin Marietta nor thoracic spine symptoms. Claimant's explanation, through his independent medical evaluator, is that the physician likely recorded only complaints or symptoms pertaining to the specific issue for which claimant was being seen on a given date.

First, this assumes that claimant's primary complaint on any given date was something other than the injuries resulting from the alleged incident at work. This seems unlikely if he sustained a significant injury, resulting in two compression fractures, with significant back symptoms. If claimant sustained significant thoracic compression fractures on March 21, 2016, common sense would suggest that his primary complaint at least once during his early treatment to be his thoracic spine symptoms.

Second, claimant's explanation assumes that the treating physician actually only reported one of many concerns reported by claimant. Interestingly, no one asked the treating physician whether claimant actually reported an injury or thoracic spine symptoms after the alleged March 2016 incident.

Perhaps most telling are the records of claimant's personal physician, Steven T. Scurr, D.O. Mr. Rahn sought treatment through Dr. Scurr on March 25, 2016, four days after the alleged injury. The medical record from that date demonstrates that claimant reported for a DOT physical. That record documents concerns about claimant's

diabetes. (Joint Exhibit 4, page 1) It also indicates that claimant has "[n]o known problems." (Joint Ex. 4, p. 2)

Dr. Scurr documents that claimant's head examination was "atraumatic." Dr. Scurr noted under his musculoskeletal evaluation that claimant had no tenderness or bony abnormalities and had normal movement in all extremities. (Joint Ex. 4, p. 2-3) Dr. Scurr specifically indicated that claimant has a "normal" back/spine during his evaluation on March 25, 2016. (Joint Ex. 4, p. 6) It seems quite odd that claimant would have a completely normal musculoskeletal evaluation and report no tenderness or injuries occurring four days earlier.

It is even more strange that the medical history at Joint Exhibit 4, page 5 would indicate that claimant has never had neck or back problems. As noted above, claimant clearly had experienced prior back problems in 2001. If he had sustained an injury to his thoracic spine only four days earlier, I would expect it to be reflected in this medical history, which the claimant signed. It is troubling that claimant did not even report the 2001 injuries during this physical.

However, claimant did admit during his trial testimony that he did not know the exact day that the injury occurred. This is a possible explanation why the March 25, 2016 medical record did not demonstrate some specific information about the thoracic injury or work incident. It is possible the pothole incident occurred after March 25, 2016 and would not be reflected on the DOT physical.

Looking forward, Mr. Rahn sought care at Dr. Scurr's office on May 3, 2016. At that visit, claimant reported concerns that were diagnosed as bronchitis and sinusitis. Again, there was no mention of back pain, despite the passage of more than a month since the alleged injury at Martin Marietta. (Joint Ex. 4, pp. 12-13)

Mr. Rahn returned for evaluation by Dr. Scurr on June 1, 2016. At this evaluation, claimant reported issues pertaining to his diabetes but also reported concerns about skin irritation due to exposure to poison ivy. (Joint Ex. 4, p. 10) Dr. Scurr clearly documented more than one concern during this evaluation, contrary to the one visit-one concern theory espoused by claimant's independent medical evaluator, Jacqueline M. Stoken, D.O. Yet, this record contains no mention of thoracic pain or the work injury at Martin Marietta. (Joint Ex. 4, pp. 10-11) Again, common sense would suggest that two thoracic compression fractures causing symptoms likely would take precedence over some skin irritation at this evaluation.

At the June 1, 2016 appointment, Dr. Scurr provided multiple diagnoses, including contact dermatitis, hyperlipidemia, hypertension, and depressive disorder. Despite addressing four concerns in this one appointment, Dr. Scurr records no reported injury at Martin Marietta nor any thoracic spine symptoms. (Joint Ex. 4, pp. 14-15)

In July 2016, claimant again sought evaluation at Dr. Scurr's office. This time, there was notation of an injury to claimant's left knee resulting in a blood blister. Certainly, a blood blister seems much less severe than compression fractures in the thoracic spine and not likely to cause as many symptoms as the thoracic fractures. Yet, there is no mention of the alleged injury at Martin Marietta or reports of thoracic pain in July 2016. (Joint Ex. 4, p. 16)

Mr. Rahn was again evaluated July 29, 2016. The physician's assessments on that date included bronchitis, hypertension, diabetes, and depressive disorder. Despite considering four different medical issues at this one visit, there is no report of the injury at Martin Marietta or the thoracic spine symptoms. (Joint Ex. 4, pp. 24-25)

In November 2016, claimant returned to Dr. Scurr and needed paper work for FMLA leave. These notes discussed claimant's diabetes but make no reference to a work injury at Martin Marietta or thoracic spine symptoms. (Joint Ex. 4, pp. 31-32)

Then, on December 2, 2016, the medical notes first report thoracic pain. Dr. Scurr documents, "Two issues first if [sic] back pain. Pain medial to the right inner shoulder blade. Hurts to cough and sneeze. One week in duration." (Joint Ex. 4, p. 40) The second reported issue on this one appointment date was a cough at night. No report of the Martin Marietta injury was made and, again, Dr. Scurr noted a one-week duration of the pain, which clearly does not correspond with an injury in March 2016.

Martin Marietta terminated Mr. Rahn for unrelated safety violations or policy violations in mid-December 2016. Claimant urged a theory that he did not seek treatment for his thoracic pain while working for Martin Marietta because he did not have time off work (he worked 6 days per week and 12 hours per day) and because he was afraid he would be terminated. Yet, claimant did not report his March 2016 back injury at the time he was terminated. He did not demand treatment from the company once he was terminated in December 2016. In fact, despite being terminated and not obtaining new employment until January 2017, he did not seek additional care of his thoracic spine during this interim period.

Then, in February 2017, claimant reported to Dr. Scurr's office with abdominal pain due to constipation. Abdominal x-rays were taken, which demonstrated inadvertent findings of two thoracic compression fractures at the T7 and T12 levels. (Joint Ex. 4, p. 45) Once these thoracic compression fractures were confirmed by additional imaging, claimant reported his injury to Martin Marietta.

Ultimately, I find claimant's arguments about why reports of his injury in March 2016 and his allegedly resulting thoracic spine symptoms are not contained in his medical records soon after the alleged injury date to be unconvincing. Dr. Scurr clearly documented more than one problem during his evaluations of claimant. He documented much less severe issues than severe thoracic pain as a result of a work injury. Yet, there is no mention of the alleged work injury close in time to the injury occurring. Dr. Scurr was claimant's personal physician and would have no reason not

to treat his patient with severe back pain. I find that claimant did not report an injury to Dr. Scurr or request treatment for thoracic spine pain between March 2016 and December 2016.

I find that claimant first reported the thoracic spine pain to his personal physician, Dr. Scurr, in December 2016. At that time, he reported a one-week history of the thoracic pain. This report of an onset does not correspond with the alleged injury date of March 2016.

Claimant retained Dr. Stoken to perform an independent medical evaluation on September 4, 2018. Dr. Stoken is the only physician in this record to opine that claimant's thoracic spine fractures and symptoms are causally related to the March 2016 work at Martin Marietta. Dr. Stoken was not provided records documenting the prior T12 compression fracture in 2001. In her report, Dr. Stoken provides no analysis of claimant's pre-existing condition and no explanation of the December 2016 medical note indicating a one-week duration of thoracic symptoms. Rather, she simply opines, "Prior to the work injury of 3/21/16, Mr. Rahn was able to work full duty without restrictions. The thoracic fractures are causally related to his work injury on 3/21/16." (Claimant's Ex. 1, p. 7)

Dr. Stoken opined that claimant sustained a 23 percent permanent impairment of the whole person as a result of the thoracic injuries. Dr. Stoken is the only physician in this record to offer a permanent impairment rating.

Dr. Stoken's rationale and causal connection opinion are less than convincing. Mr. Rahn was, indeed, working full duty without restrictions before the March 2016 incident. He also continued working full duty without restrictions until the December 2016 medical note documenting a one-week duration of thoracic symptoms. Using Dr. Stoken's rationale, claimant clearly did not have the thoracic compression fractures prior to December 2016 because he was working full-duty without restrictions until that time.

Dr. Stoken gave her deposition in this case. During her testimony, she had to change her opinion on causation with respect to the T12 compression fracture. She opined that the T12 fracture was likely due to the 2001 fall and aggravated by the 2016 incident. However, this logic does not correlate with the causation opinion in her report. The reason she was able to causally relate the compression fractures to the March 2016 injury date is because claimant was working full-duty without restrictions prior to March 2016. Yet, in her deposition, she was forced to concede that the T12 compression fracture pre-dated the 2016 injury date. At this point, Dr. Stoken's logic breaks-down and is not convincing.

Dr. Stoken also testified that claimant did not disclose his prior back problems during her evaluation. (Defendants' Ex. G, p. 25) This is troubling. Yet, Dr. Stoken conceded during her testimony that there is nothing that would convince her that claimant was malingering. (Defendants' Ex. G, p. 33) This is perhaps even more troubling.

Dr. Stoken conceded that a compression fracture typically results in immediate onset of symptoms. (Defendants' Ex. G, p. 23) Yet, her only explanation why the medical records did not document thoracic symptoms between March and December 2016 is that the physician likely utilized the theory of one visit, one problem. For the reasons set forth above, I reject that argument. Dr. Scurr clearly documented more than one problem at various visits. Claimant reported and Dr. Scurr documented much less severe injuries such as a blood blister and skin irritation. Yet, there are no reports of thoracic pain for the first nine months after the injury allegedly occurred.

Dr. Stoken also suggests that claimant had symptoms after the compression fracture and simply, acted as men do (according to Dr. Stoken), and toughed it out because he feared he would be terminated. Yet, claimant even conceded that Martin Marietta has a safety conscious environment. There is no credible evidence that claimant was under a threat or concern of termination. Dr. Stoken's assertion is unfounded speculation. Her assumptions as to how men act are generalizations that do not accurately reflect Mr. Rahn's willingness to seek treatment for bronchitis, a blood blister, depressive disorder, and other issues while working at Martin Marietta. Nor do Dr. Stoken's opinions explain why Mr. Rahn did not request treatment immediately after he was terminated. I do not find Dr. Stoken's opinions to be convincing in this evidentiary record.

Defendants retained William R. Boulden, M.D., a board certified orthopaedic surgeon, to perform a records review in this case. Dr. Boulden did not have the advantage of personally interviewing or examining Mr. Rahn and the credibility of his opinions can be challenged on that basis. Dr. Boulden also offers some opinions that are not specifically founded in the medical evidence in this case. For instance, Dr. Boulden opines that claimant may have a developmental compression fracture and refers to an underlying osteopenia. Yet, there is no evidence that claimant has ever been diagnosed with osteopenia. Dr. Boulden had to concede this point during his deposition.

However, Dr. Boulden has superior training and knowledge of this orthopaedic condition. He opined that the T7 fracture is likely a developmental deformity that is a known phenomenon and not likely an actual compression fracture. (Defendants' Ex. H, p. 30) He opined that the T12 compression fracture is more likely the result of the fall off the rail car than related to the March 2016 incident. (Defendants' Ex. H, p. 45)

I have some concerns with Dr. Boulden's opinions. Yet, they are more convincing in this evidentiary record than those offered by Dr. Stoken. Dr. Boulden opines that the thoracic issues reported by claimant are not likely related to the alleged incident in March 2016. I find that claimant has not proven by a preponderance of the evidence that the thoracic compression fractures are causally related to a work injury at Martin Marietta in March 2016.

CONCLUSIONS OF LAW

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.

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).

Having found the opinions of Dr. Boulden to be most persuasive and credible in this evidentiary record, I found that claimant failed to prove he sustained the alleged thoracic injuries as a result of, or arising out of, his employment with Martin Marietta on or about March 21, 2016. Therefore, I conclude that claimant failed to carry his burden of proof to establish a compensable work injury. As a result, I conclude that claimant is not entitled to weekly or medical benefits for his alleged work injury.

Mr. Rahn also seeks an order requiring defendants to reimburse his independent medical evaluation fees 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 Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). See Cortez v. Tyson Fresh Meats, Inc., File No. 5044716 (Appeal December 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. The Commissioner has held that there must be a permanent impairment rating rendered by a physician selected by the defendants before claimant qualifies for an independent medical evaluation pursuant to Iowa Code section 85.39. Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018).

In this case, Dr. Stoken offered the only impairment rating in the evidentiary record. Therefore, I conclude that claimant has not established the pre-requisites to establish entitlement to Dr. Stoken's independent medical evaluation fees pursuant to Iowa Code section 85.39.

Other than costs, all other factual or legal issues are rendered moot by these findings and conclusions. Finally, all parties seek an award of costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

Mr. Rahn seeks assessment of costs, including his filing fee, the expense of obtaining Dr. Stoken's report, the functional capacity evaluation report prepared by Daryl Short, and the cost of Dr. Boulden's deposition. Having concluded that claimant failed to prove a compensable work injury, I conclude that it is inappropriate to assess claimant's costs.

Defendants also seek assessment of their costs. Specifically, defendants seek reimbursement of the deposition costs for claimant's deposition, Dr. Boulden's deposition, and Dr. Stoken's deposition. Defendants also request the expense they paid to Dr. Stoken for her time to give her deposition.

Claimant's deposition was introduced into the evidentiary record in its entirety. However, it was mostly duplicative and introduction of the entirety of the deposition transcript was not necessary. I conclude that assessment of this cost is not appropriate under the circumstances of this case.

Agency rule 876 IAC 4.33(2) permits the assessment of transcription costs. I find that it was reasonable and appropriate to take Dr. Stoken's deposition. I conclude that it is appropriate to assess the cost ($577.05) of the transcript for this deposition. 876 IAC 4.33(2).

Claimant requested and took the deposition of Dr. Boulden. That deposition was reasonable and appropriate in this case. I conclude that it is appropriate to assess the cost ($154.90) of the transcript of this deposition. 876 IAC 4.33(2).

Defendants also request assessment of $1,712.50 for Dr. Stoken's charges to give her deposition. Agency rule 876 IAC 4.33(5) permits the assessment of the cost of a doctor's deposition testimony, "provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72."

Iowa Code section 622.69 applies to general witness attendance, fees and expenses. It is not directly applicable to Dr. Stoken's deposition. However, Iowa Code section 622.72 specifically deals with expert witness fees. It permits fees for an expert witness but provides that the "compensation shall not exceed one hundred fifty dollars per day." Given that agency rule 876 IAC 4.33(5) limits the assessment of costs to those allowed in Iowa Code section 622.72, I conclude that it is appropriate to assess $150.00 in expert witness fees against claimant toward the fees charged by Dr. Stoken for her deposition.

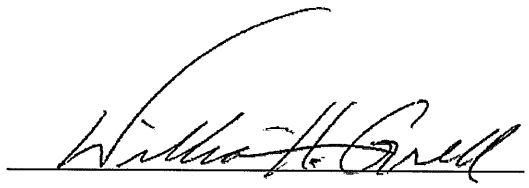
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

Claimant shall reimburse defendants' costs totaling eight hundred eighty-one and 95/100 dollars ($881.95).

Signed and filed this 19th day of March, 2019.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Bruce H. Stoltze
John Q. Stoltze
Attorneys at Law
300 Walnut, Ste. 260
Des Moines, IA 50309
Bruce.stoltze@stoltzelaw.com
John.stoltze@stoltzelaw.com

Tiernan T. Siems
Attorney at Law
10330 Regency Pkwy. Dr., Ste. 100
Omaha, NE 68114
tsiem@eslaw.com

WHG/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.