BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CRISTINO BRICENO a/k/a OMAR BARVOSA, Claimant, vs. SPARBOE FARMS, INC., Employer, and NATIONWIDE AGRIBUSINESS, Insurance Carrier, Defendants.	FILED APR 15 2015 WORKERS COMPENSATION	File No. 5044138 ARBITRATION DECISION Head Note Nos.: 1100; 1402.20; 1402.30

STATEMENT OF THE CASE

Claimant, Cristobal Briceno a/k/a Omar Barvosa, filed a petition in arbitration seeking workers' compensation benefits from Sparboe Farms, Inc., employer, and Nationwide Agribusiness, insurance carrier, both as defendants, as a result of an alleged injury sustained on December 3, 2012. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on May 1, 2014, in Des Moines, Iowa. The proceedings were translated by Evelyn Rudich. The record in this case consists of claimant's exhibits 1 through 9, defendants' exhibits A through M, and the testimony of the claimant, Jane Phillips, and Daren Dugan. The parties submitted post-hearing briefs, the matter being fully submitted on June 6, 2014.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on December 3, 2012 which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability;

3. Whether claimant is entitled to temporary disability benefits from December 7, 2012 to April 19, 2013;

4. Whether the alleged injury is a cause of permanent disability;

5. The extent of industrial disability;

6. Whether claimant is entitled to payment of various medical expenses; and

7. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

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

Claimant was 24 years of age at the time of hearing. Claimant was born in Honduras, where he attended 9 years of schooling. He has no other formal education or training. While in Honduras, claimant worked in agriculture and served in the military from 2007 to 2009. In 2009, claimant immigrated to the United States. Claimant initially resided in Texas, then Mississippi, before moving to Humboldt, Iowa in 2011. Claimant's work history in the United States consists of welding, cook, farm laborer, and general laborer. Claimant denied sustaining any injuries prior to beginning work at defendant-employer and similarly denied any treatment or restrictions upon his back. (Claimant's testimony; Exhibit 4, pages 40-42; Ex. A, Deposition Transcript pp. 4-10)

Claimant is a Spanish-speaker. His English language skills are less than fluent; claimant indicated he is able to understand, speak, and write some English. By way of example, claimant understood enough English to receive work-related instructions during his employment at defendant-employer. However, to understand important conversations, such as evidentiary hearing, or written documents, claimant requires assistance through an interpreter. (Claimant's testimony)

Claimant began employment at defendant-employer on July 13, 2012. (Ex. 6, p. 65; Ex. 7, p. 75) At the time of alleged work injury, claimant earned $10.00 per hour and generally worked around 50 hours per week. (Ex. 6, p. 70; Ex. 7, pp. 75-76; Ex. A, Depo. Tr. p. 15) Defendant-employer's new hire profile indicates claimant was hired as an egg processing worker. The profile designates an alternate title for this position of taper/stacker. (Ex. F, p. 14)

The evidentiary record contains job descriptions for several positions: floater, packer/candler, and tape machine operator. Floater duties include keeping packing supplies available to operators, running orders, and moving pallets of eggs. Floaters were also required to assist in the processing and warehouse areas if requested. Physical demands included the ability to lift 50 pounds and work on one's feet for 8 or more hours per day, 5 to 6 days per week. (Ex. 6, pp. 52-55) The position of packer/candler requires the ability to lift 15 to 25 pounds overhead and down to pallet height; work on one's feet 8 hours or more per day, 5 to 6 days per week; and engage in repetitive motion, including continuous use of wrists and arms, bending, and lifting.

(Ex. 6, pp. 56-59) The position of tape machine operator identifies physical demands of lifting 50 to 55 pounds; being on one's feet at least 8 hours per day, 5 to 6 days per week; repetitive motion, including lifting and carrying egg cases no further than 10 feet, lifting above head and shoulder height, bending, and stacking. (Ex. 6, pp. 60-63)

Claimant testified he rotated through positions at defendant-employer. His primary responsibility was stacking boxes of eggs weighing 40 to 60 pounds. Claimant was required to lift boxes from knee level to place on pallets in stacks which reached heights over his head. Claimant also performed duties packaging eggs in boxes, cleaning, and driving a forklift. (Claimant's testimony; Ex. A, Depo. Tr. pp. 13-14) Defendants' summary of an 8-hour work day indicates claimant was required to stand and/or walk for the entirety of a shift; frequently lift above shoulder level; engage in continuous pushing, pulling, twisting, and turning; and frequently lift and carry 25 to 50 pounds and 51 to 74 pounds occasionally. (Ex. 7, p. 77)

On December 3, 2012, claimant testified he was performing his stacking duties when he lifted a box of eggs from his knee level. As he raised the box over his head, he felt a cramping sensation and developed pain in the lower right side of his back. Claimant testified the pain then radiated into claimant's legs, right greater than left. Claimant testified he did not believe anyone witnessed the injury. (Claimant's testimony)

Following the alleged injury, claimant testified he approached his supervisor, Jane Phillips, and tried to explain in English what had occurred. He testified he said his back was "broken" and asked to go to the hospital. He testified Ms. Phillips did not refer him to the hospital and he went back to work packing eggs, a task which he described as lighter work than his stacking duties. Claimant testified he returned to work the following day, Tuesday, and was assigned to clean and then pack eggs. On Wednesday, claimant returned to work and packed eggs. Claimant denied speaking to Ms. Phillips again about his back because he thought the pain would improve. (Claimant's testimony)

On Thursday, December 6, 2012, claimant testified he presented to work. Due to significant back pain, claimant testified he sought out an English-speaking friend, Carmelo. He and Carmelo then proceeded to the office of manager, Daren Dugan. Claimant testified he informed Mr. Dugan of the work injury and asked to go to the hospital. At that time, claimant testified Mr. Dugan stated claimant's claim was a lie and told claimant to punch out and leave, as he was only a "Hispanic." (Claimant's testimony)

At deposition, claimant provided similar testimony regarding the occurrence of the alleged work injury and the few days which followed. At that time, claimant testified he generally worked from 6:00 a.m. to 2:00 p.m. or 3:00 p.m. Around 10:00 a.m. on December 3, 2012, claimant indicated he picked up a box of eggs and lifted the box over his head to stack on pallet, when he felt a crack in his low back. (Ex. A, Depo. Tr. pp. 15-16) When asked if the alleged injury was witnessed, claimant testified he

"was with another guy but they also fired that guy." (Ex. A, Depo. Tr. p. 16) Claimant testified he approached his supervisor, Ms. Phillips:

> I told her that I had injured my back, that I was in a lot of pain, to help me, to send me to a hospital or to talk to the manager, but she didn't pay any attention.

(Ex. A, Depo. Tr. p. 17)

At deposition, claimant testified he finished his shift on Monday, although he was assigned to packing eggs rather than stacking. On Tuesday, claimant cleaned and packed eggs. On Wednesday, claimant again worked packing eggs. (Ex. A, Depo. Tr. pp. 17-19) Claimant testified he informed Ms. Phillips that he needed to pack in order to get better. (Ex. A, Depo. Tr. pp. 20-21)

On Thursday, December 6, 2012, claimant presented to work. Claimant testified he could no longer stand the pain in his back and went to the office to ask his manager, Mr. Dugan, for help. Claimant testified he brought a coworker, Carmelo, along to translate. Claimant testified when he informed Mr. Dugan of his injury, Mr. Dugan said his claim was a lie, and then fired claimant. According to claimant's deposition testimony, Mr. Dugan did not provide claimant any additional reasons for his termination. (Ex. A, Depo. Tr. pp. 21-23) By claimant's testimony, Mr. Dugan told claimant to punch out and go home because he was "just a Hispanic." (Ex. A, Depo. Tr. p. 21)

Defendant-employer's records indicate claimant was dismissed from employment for insubordination. (Ex. F, p. 15) Another document indicates claimant was terminated for a policy infraction. This document specifies the infraction as a third, witnessed occurrence of claimant spitting on the floor. (Ex. F, p. 16) Claimant testified he was never disciplined for spitting on the floor prior to his termination. (Claimant's testimony)

Defendant-employer's records also reveal claimant worked the following hours from December 3 through December 6, 2012: 7.73 hours on December 3, 2012; 10.62 hours on December 4, 2012; 7.26 hours on December 4, 2012; and 2.22 hours on December 6, 2012. (Ex. 6, p. 67)

On December 7, 2012, claimant presented Family Medicine – Humboldt and was evaluated by Theophile Barley, M.D., for complaints of sharp, constant low back pain since Monday. Claimant reported he felt something pop in his back while lifting 40-pound boxes at work. (Ex. A, p. 1A) X-rays of the lumbosacral spine were normal and revealed no acute fracture or dislocation. (Ex. B, p. 2) Following examination, Dr. Barley assessed low back pain and sprain. He recommended use of a back brace and medications. Claimant was removed from work and advised to follow up in two weeks. (Ex. 1, p. 1B) Dr. Barley noted he anticipated releasing claimant to return to full duty in two weeks. (Ex. 1, p. 1)

At deposition, claimant testified the x-ray of December 7, 2012 revealed a "tear" in his back. (Ex. A, Depo. Tr. p. 23)

Claimant returned to Dr. Barley on December 20, 2012 and reported little relief in his complaints. Following examination, Dr. Barley assessed low back pain. He ordered a three-week course of physical therapy and medication use. Claimant was advised to return at the conclusion of physical therapy or in four weeks. In the meantime, Dr. Barley imposed restrictions against excessive twisting or bending. (Ex. 1, pp. 3-4, 6)

On January 31, 2013, claimant returned to Family Medicine – Humboldt and was evaluated by Keri Benjamin, ARNP. Claimant reported worsened low back pain. Despite the physical therapy order of Dr. Barley, claimant had not received follow-up information on scheduling. Ms. Benjamin issued a physical therapy order and provided claimant instructions for scheduling. (Ex. 1, pp. 7-10)

On February 14, 2013, Daren Dugan provided a verbal statement to defendant-insurance carrier regarding claimant's alleged December 3, 2012 injury. Mr. Dugan identified himself as a three-year employee of defendant-employer, serving as processing manager. He indicated he was tasked with supervising the daily production process. (Ex. G, p. 17)

Mr. Dugan indicated it had been brought to his attention that employees were spitting on the production floor, which violates food safety manufacturing process guidelines. He directed Ms. Phillips to conduct a meeting with employees advising that anyone caught spitting on the floor would be subject to immediate termination. Approximately one month later, an individual reported to Mr. Dugan that he/she had witnessed claimant spit on the floor. Mr. Dugan indicated he called claimant into his office on Thursday, December 6, 2012, and informed claimant he had been terminated for spitting on the floor. Mr. Dugan indicated it was after he informed claimant of the termination that claimant informed him of the alleged back injury on Monday and asked to go to the hospital. Mr. Dugan indicated he believed claimant was simply acting out because he was upset with the termination. (Ex. G, pp. 17-18) Mr. Dugan subsequently discussed the alleged injury with Ms. Phillips. Ms. Phillips informed Mr. Dugan claimant had not reported an alleged work injury to her personally. (Ex. G, p. 19)

Mr. Dugan testified at evidentiary hearing. During his testimony, Mr. Dugan reaffirmed his February 2013 statement. Mr. Dugan testified at the time of the alleged work injury, he served as processing manager for defendant-employer; he has since taken a role in maintenance management. On Thursday, December 6, 2012, Mr. Dugan testified he sent a coworker, Carmelo, to summon claimant to Mr. Dugan's office. When claimant arrived, Mr. Dugan testified he informed claimant he was being terminated as he had been witnessed spitting on the floor. (Mr. Dugan's testimony)

Mr. Dugan explained spitting on the floor is a violation of defendant-employer's manufacturing policies and a food safety concern. Mr. Dugan testified he verbally warned claimant about spitting on the floor on one occasion. At a later date, a

USDA inspector observed an employee spit on the floor. This report prompted defendant-employer to conduct an employee meeting, where employees were advised they would be subject to immediate termination should they be witnessed spitting on the floor. (Mr. Dugan's testimony)

Mr. Dugan indicated claimant did not ask any questions regarding his termination, but then reported he had injured his back on Monday and required medical evaluation. Mr. Dugan indicated he asked claimant why he had continued working full days since the alleged injury and only reported the injury after his termination. Mr. Dugan testified he ultimately advised claimant to punch out and leave, as he was no longer an employee of defendant-employer. Mr. Dugan denied making a disparaging remark regarding claimant's ethnicity and indicated defendant-employer employs other Hispanic workers. (Mr. Dugan's testimony)

Mr. Dugan's hearing testimony was consistent with his recorded statement, the testimony and recorded statement of Ms. Phillips, and defendant-employer's documentation regarding claimant's termination. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt his veracity. Mr. Dugan is found credible.

On February 22, 2013, Jane Phillips provided a statement to defendant-insurance carrier. Ms. Phillips indicated she was a 38-year employee of defendant-employer, currently in the position of processing lead. (Ex. H, p. 20) She explained work injuries were typically reported to her or to Mr. Dugan. She indicated when a report is made to her, she takes the employee to the office to discuss details and fill out an accident report. (Ex. H, pp. 20-21)

Ms. Phillips indicated claimant did not report an alleged work injury to her on December 3, 2012. Rather, Ms. Phillips indicated she learned of the alleged work injury from Mr. Dugan after claimant had been terminated. Ms. Phillips informed Mr. Dugan claimant had not reported an injury to her and if he had, she would have followed protocol for completing paperwork. (Ex. H, p. 21)

Ms. Phillips testified at evidentiary hearing, at which time she reaffirmed her February 2013 statement. Ms. Phillips identified herself as a 39-year employee of defendant-employer, with 33 of those years as processing lead supervising the processing department. When an injury is reported to Ms. Phillips, Ms. Phillips testified she takes the employee to the front office to complete injury paperwork. At that time, it is determined whether medical attention is needed. (Ms. Phillips' testimony)

Ms. Phillips testified she did not recall claimant reporting an injury on December 3, 2012. When prompted with claimant's testimony stating he informed her that his back was "broken" and he needed to go to the hospital, Ms. Phillips testified she did not recall such a conversation. In the event claimant had so informed her, Ms. Phillips testified she would have escorted him to the office to complete paperwork. Furthermore, Ms. Phillips testified if claimant had reported a back injury, she would not have allowed him to pack eggs, as the task involves a considerable amount of leaning.

She testified a person with a back injury might be placed in a light duty assignment performing candling, as the duties involve standing and lifting one egg at a time. (Ms. Phillips' testimony)

Ms. Phillips testified she learned of claimant's alleged work injury when Mr. Dugan came to investigate claimant's report of injury, after claimant had been terminated. Prior to claimant's termination, Ms. Phillips testified she observed claimant spit on the floor on one occasion. As a result, claimant was verbally warned not to spit on the floor. At a later date, defendant-employer conducted an employee meeting where the staff was educated on food safety and instructed not to spit on the floor. (Ms. Phillips' testimony)

Ms. Phillips' hearing testimony was consistent with her recorded statement and with the testimony and recorded statement of Mr. Dugan. Her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt her veracity. Ms. Phillips is found credible.

On March 5, 2013, claimant returned to Family Medicine – Humboldt and was evaluated by Sharmini Suriar, M.D. Claimant reported some relief in complaints with physical therapy. Following examination, Dr. Suriar recommended continued physical therapy and medication use. (Ex. 1, pp. 11-12)

Defendants issued a formal denial of claimant's workers' compensation claim on April 5, 2013. (Ex. 9, p. 89; Ex. I, p. 23)

On April 19, 2013, claimant returned to Family Medicine – Humboldt and was seen by Ms. Benjamin. Examination revealed full range of motion. Ms. Benjamin imposed a 15-pound lifting restriction effective April 22, 2013 and advised claimant to return to the clinic for reevaluation and release when he felt capable of returning to normal activity. (Ex. 1, pp. 13-14, 16)

Claimant presented to board-certified occupational medicine physician Sunil Bansal, M.D., on May 10, 2013, for claimant's independent medical evaluation (IME). Dr. Bansal issued a report containing his findings and opinions on May 28, 2013. Claimant reported he sustained a back injury when he felt a tearing sensation in his low back while lifting a 60-pound box of eggs overhead. Claimant indicated he reported the injury to his supervisor, but was ignored. Claimant reported he returned to work the following day and reported continued pain to his manager; he was then terminated. (Ex. 2, pp. 19-20)

At the time of evaluation by Dr. Bansal, claimant reported continued constant, aching low back pain, right greater than left. He also conveyed a sharp, shooting pain with certain movements. Claimant reported radiating pain into the bilateral legs, as well as numbness, tingling, and weakness. He reported an average pain level of 6, but pain could reach a level 9 on a 10-point scale. Claimant reported an ability to sit or stand for 10 minutes before needing to change positions and the ability to walk for only 5 minutes. He expressed belief the 15-pound lifting restriction imposed by

Ms. Benjamin was reasonable, yet noted he was incapable of repetitive lifting or sustained lifting over a few seconds. He also reported difficulty with stairs and required use of a handrail for support while proceeding slowly and carefully. (Ex. 2, pp. 19-20)

Claimant informed Dr. Bansal that during the time he was employed at defendant-employer, he also worked as a roofer. He explained he worked an additional 5 to 6 hours per day performing roofing, on top of his full time work at defendant-employer. Such work required heavy lifting up to 50 to 60 pounds. Claimant reported he was currently unemployed due to back pain, as he was untrained for any work other than heavy labor. (Ex. 2, p. 21)

Following records review, interview, and examination, Dr. Bansal assessed radicular low back pain. (Ex. 2, p. 22) In regard to the question of a causal link between claimant's alleged injury and his ongoing symptoms, Dr. Bansal opined claimant's reported mechanism of injury and immediate clinical presentation was consistent with claimant's symptomatology. Dr. Bansal further opined claimant's presentation was indicative of disc-related pathology and indicated claimant had not undergone adequate diagnostic testing. He opined claimant had not achieved maximum medical improvement (MMI), as he had not received an MRI to "further elucidate his probable disc pathology." (Ex. 2, p. 22) Given the lack of such testing, Dr. Bansal opined treatment recommendations were speculative, but could include surgery, injections, medications, physical therapy, and/or a TENS unit. (Ex. 2, p. 23)

Dr. Bansal further commented claimant did not complain of back problems prior to the alleged work injury and had been capable of performing his job duties without difficulty. Dr. Bansal opined it implausible for claimant to perform such duties on a sustained basis with the back pathology he currently displayed. (Ex. 2, p. 23) He therefore opined:

> Thus, from both a chronological and mechanistic standpoint it is clear that his current lumbar spine pathology/symptomatology is related to his work injury on December 3, 2012.

(Ex 2, p. 23)

Based on claimant's current presentation, Dr. Bansal opined claimant fell within DRE Lumbar Category II, having displayed loss of range of motion, guarding, pain, and radicular complaints. Dr. Bansal opined claimant qualified for a 5 percent whole person impairment. He also recommended permanent restrictions: no lifting greater than 15 pounds occasionally and 5 pounds frequently; no frequent bending, squatting, climbing, twisting, or kneeling; sit, stand, and walk as tolerated; and avoidance of use of multiple steps or stairs. (Ex. 2, p. 23)

After the April 19, 2013 visit with Ms. Benjamin, claimant testified his pain and symptoms worsened for approximately 1 to 1 ½ months. Claimant attributed the worsening to no longer taking medications or participating in physical therapy. It was during this period when claimant was evaluated by Dr. Bansal. After that period of

worsening, claimant testified his condition improved back to a level similar to that which existed when he was evaluated by Ms. Benjamin, with a highest pain level of 4/10 with activity. He therefore testified he is no longer subject to the same symptoms and limitations as when he was evaluated by Dr. Bansal. (Claimant's testimony)

Claimant served answers to interrogatories on June 13, 2013. At that time, claimant responded "no" to the propounded interrogatory which inquired if claimant had been offered any job, had tried to get any job or engage in self-employment, or had engaged in work of any nature, paid or unpaid, since the alleged work injury. (Ex. D, p. 9)

At evidentiary hearing, claimant denied working any additional jobs while working at defendant-employer. Claimant's attention was drawn to Dr. Bansal's report which indicated claimant was also employed part time as a roofer. Claimant then testified he did perform roofing for a friend occasionally, on his days off. He testified he did not disclose this employment during discovery because it did not occur regularly. (Claimant's testimony)

On June 18, 2013, claimant began work at Hog Slat, a company which produces feeders for hog facilities. Claimant's duties initially involved assembly work, but claimant's primary duty then became work in a warehouse. Claimant remains employed in this role, where he is tasked with filling orders for hog operation products such as feeders, parts, and feed. His duties require claimant to drive a forklift and operate a computer at times. Claimant's duties require occasional lifting, but do not require him to lift over 15 to 20 pounds. Claimant works 8:00 a.m. to 4:30 p.m., 5 days per week. At the time of his hire, claimant earned $10.00 per hour; he subsequently received raises to $11.25 per hour. (Claimant's testimony; Ex. A, Depo. Tr. pp. 27-32; Ex. M, pp. 36-37)

At defendants' arranging, claimant presented for IME on February 26, 2014, with board-certified orthopedic spine surgeon, Cassim Igram, M.D. (Ex. 3, p. 34; Ex. C, p. 5) Claimant reported suffering with back pain since lifting a crate of eggs on December 3, 2012. Claimant indicated he reported the injury to his supervisor that date. He did not return to work and was fired three days later. Claimant indicated he was searching for employment, but not currently employed. (Ex. 3, p. 34)

Claimant reported worsening and persistent low back pain, as well as radiating symptoms of the bilateral thighs and right calf. (Ex. 3, p. 34) During examination, Dr. Igram observed claimant hold his right hand on his back, display difficulty rising from a seated position on the exam table, ambulate with a very slow and antalgic gait, and demonstrate extremely limited back range of motion. Dr. Igram also noted claimant displayed "quite a bit of nonorganic physical exam findings." (Ex. 3, p. 37)

Following records review, interview and examination, Dr. Igram assessed back pain. (Ex. 3, p. 37; Ex. C, p. 3) In regard to the question of causation between the alleged work injury and claimant's condition, Dr. Igram wrote:

> [Claimant] has a date of injury of 12/03/2012. There were no witnesses to the injury. He states he did not go back to work until he was terminated. According to records, the patient did return to work for the next two days and then was subsequently terminated three days after the injury. Apparently, he violated some sort of code of conduct at his place of employment. Also, according to the records, the injury was never reported to any supervisors on the day of injury. He did not report any back pain until he was terminated for violating his employment code of conduct.
>
> Based on my review of the medical records, I would indicate that this patient's back pain is not the result of an injury sustained at his place of employment. He is complaining of back pain that for all intense [*sic*] purposes could be deemed a back strain. I would likely have placed him at maximum medical improvement approximately three to six months after the injury for a back strain. With regard to this patient, there is no need to assign permanent partial disability and no need to assign work restrictions for a work injury, since, in my opinion, none was sustained at work.

(Ex. 3, pp. 37-38)

Dr. Igram subsequently expanded on this report to opine claimant at most, sustained a back strain as a result of the alleged work injury on December 3, 2012. This strain would have resolved, with claimant achieving MMI within three to six months, no later than June 3, 2013. He further opined any symptoms present after this three to six month period would not be related to the back strain. Dr. Igram opined claimant sustained no permanent impairment, required no permanent restrictions, and needed no further medical treatment. Dr. Igram also expressed disagreement with Dr. Bansal's findings and opinions. (Ex. C, p. 4)

Claimant testified he informed the interpreter present during his evaluation with Dr. Igram that he continued to work after the work injury until he was terminated on December 6, 2012. Claimant indicated he is uncertain what the interpreter reported to Dr. Igram. Claimant admitted informing Dr. Igram he had not worked since his termination. Claimant acknowledged this was a false statement, but testified he needed the job and did not want his new employer to get in trouble. . (Claimant's testimony)

Dr. Bansal was provided Dr. Igram's IME report for review. Following review, Dr. Bansal reaffirmed the opinions expressed in his May 2013 IME report. Dr. Bansal further stated Dr. Igram's reliance upon the lack of witnesses to claimant's accident was inappropriate, as medical experts should not comment on whether an incident did or did not occur, but should address whether claimant's symptomatology and presentation was consistent with the mechanism of injury claimant described. Dr. Bansal again opined the mechanism of injury reported by claimant was consistent with his presentation. (Ex. 2, p. 26)

Defendants secured Gratias Investigations, Inc. (Gratias) to perform surveillance of claimant. Claimant was observed on March 23 and March 24, 2014. Review of the

surveillance video reveals claimant carrying an object with both hands up a flight of stairs, without use of the handrails for support. Claimant was also recorded driving and entering Hog Slat. (Ex. L)

At evidentiary hearing, claimant testified he lives on the second floor of the residence recorded. Claimant testified he observed the surveillance and viewed himself carrying food, weighing 10 to 15 pounds, up a flight of stairs. Claimant testified he is capable of using stairs, although sometimes stair usage bothers his back. He also testified he is scared of ascending stairs, so he attempts to do so quickly. Claimant testified he also viewed himself on surveillance presenting to work at Hog Slat. (Claimant's testimony)

On April 1, 2014, defendants served claimant with the Gratias surveillance report and video. (Ex. J, p. 25)

On April 3, 2014, claimant's counsel authored a letter to defendants' counsel supplementing claimant's answers to interrogatories. Claimant indicated he had been employed by Hog Slat from June 18, 2013 to the present. His job title was identified as a feeder, involving warehouse work retrieving orders for animal food products. Claimant represented working full time and earning $11.25 per hour. (Ex. K, p. 26)

At evidentiary hearing, claimant acknowledged he did not inform defendants of his employment at Hog Slat until after defendants served surveillance revealing him presenting to work. Claimant testified he did not inform defendants of his employment because he did not believe it was necessary to do so and also because he was afraid revealing such information would get his new employer into trouble. (Claimant's testimony)

Claimant testified he continues to suffer with back pain of varying severity. He denied pain when he is not engaged in activity; however, when he engages in activities, he develops pain in his low back. Claimant testified the most problematic activities are bending and lifting. He is also unable to lie in a single position for extended periods. Claimant testified he is capable of sitting for 30 to 40 minutes at a time, but then needs to move around and change positions to control his pain levels. Approximately twice per week, claimant reported developing radiating pain into the right leg. On occasion, claimant takes ibuprofen at night; this usage provides claimant some relief of symptoms. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury on December 3, 2012, which arose out of and in the course of his employment with defendant-employer.

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. 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 Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant alleges he sustained an injury to his back while lifting a box of eggs at work on December 3, 2012. Claimant testified he informed his supervisor, Ms. Phillips, and was assigned to lighter duties for the following 2 ½ days. Ms. Phillips denied claimant reported an injury and further disputed claimant's implication that Ms. Phillips recognized the back injury by placing him on lighter duties. Ms. Phillips indicated the primary duty claimant was assigned to in intervening days required significant bending and leaning, tasks not suitable for an individual with an alleged back claim.

Claimant also testified he sought out a coworker, Carmelo, and proceeded to Mr. Dugan's office on his own volition. At that time, claimant testified he informed

Mr. Dugan he sustained a back injury and was terminated as a result. He further testified Mr. Dugan made a disparaging remark regarding claimant's ethnicity. Mr. Dugan's testimony runs directly counter to claimant's. Mr. Dugan testified it was he, not claimant, who sought out Carmelo and asked him to bring claimant to Mr. Dugan's office. Mr. Dugan testified he terminated claimant for spitting on the floor, in violation of work policies. According to Mr. Dugan, it was only after he terminated claimant that claimant reported a work injury. Mr. Dugan also denied making a derogatory statement to claimant.

The undersigned found both Mr. Dugan and Ms. Phillips to be credible witnesses. This finding was based in large part upon the consistency between the recorded statements and hearing testimony of Mr. Dugan and Ms. Phillips. Having found both individuals credible and noting the obvious contradictions between these consistent accounts and the testimony of claimant, the undersigned must thoroughly address the issue of claimant's credibility.

Prior to delving into the details of claimant's accounts, the role of translators during the pendency of this claim must be acknowledged before determination of claimant's credibility can be made. For example, at deposition claimant testified a back x-ray revealed a "tear" when in fact, only a strain was diagnosed. The undersigned will not consider this testimony against claimant's credibility, as a potentially similar translation issue was observed at evidentiary hearing. The translated testimony at evidentiary hearing was that claimant suffered a "rip" in his back, a translation which was then clarified to mean "strain." Given the variation introduced by use of a translator, minor inconsistencies will not be weighed negatively against claimant.

It is claimant who carries the burden of proof in regard to establishment of his workers' compensation injury. As there were no witnesses to claimant's alleged work injury and no supportive documents created on December 3, 2012, claimant's accounts must be carefully scrutinized. At claimant's initial medical visit on December 7, 2012, claimant reported he felt a pop in his back while lifting a 40-pound box at work. At claimant's IME with Dr. Bansal, claimant reported feeling a tearing sensation in his back while lifting a 60-pound box of eggs. At claimant's IME with Dr. Igram, claimant reported suffering with back pain since he lifted a crate of eggs on December 3, 2012. Each of these reports of mechanism of injury is consistent with claimant's testimony. However, each of these accounts occurred after claimant had been terminated by defendant-employer.

In addition to consistency amongst claimant's reports of injury, other facts bear on claimant's credibility. As outlined above, there are clear contradictions between claimant's testimony and the accounts of Ms. Phillips and Mr. Dugan. Additionally, claimant has been less than forthcoming in informing defendants of the details of his employment outside of defendant-employer.

Claimant informed Dr. Bansal he worked five to six hours per day roofing while still working full time for defendant-employer. At evidentiary hearing, claimant denied any outside employment while in the employ of defendant-employer. When confronted

with Dr. Bansal's report, claimant admitted he did such work occasionally, on his days off. Although claimant became employed full time at Hog Slat on June 18, 2013, claimant did not supplement his answers to interrogatories regarding employment until April 3, 2014. Claimant also denied employment to Dr. Igram at IME on February 26, 2014. When claimant did supplement his answers to interrogatories, he did so only after defendants served a copy of surveillance which revealed him presenting to his new employer.

The surveillance produced also depicts claimant ascending a flight of stairs. While doing so, claimant carries an object in both hands and thus, did not make use of a handrail for support. Claimant also appeared to ascend the stairs at a fairly rapid pace and certainly did not appear tentative or physically limited in his ability to climb stairs. Claimant was also observed walking into Hog Slat without difficulty. This surveillance video of March 23 and March 24, 2014 is somewhat contradictory to claimant's physical presentation at IME with Dr. Igram on February 26, 2014. At the time of Dr. Igram's IME, claimant held his right hand on his back, displayed difficulty rising from a seated position, ambulated with a very slow and antalgic gait, and demonstrated extremely limited back range of motion. While Dr. Igram's examination did not mention claimant's ability to ascend stairs, the examination painted a picture of a notably limited individual. Such limitations were not observed on the surveillance taken less than one month later.

At evidentiary hearing, the undersigned observed claimant display slight movements indicative of an individual with back complaints. For example, claimant used the chair for support while changing positions and placed his hands upon his legs while repositioning. This consistent physical presentation does not however, automatically establish a work related injury.

While claimant's reports of injury have been consistent, none of the reports which are supported by independent evidence occurred prior to claimant's termination. Claimant asserts he was terminated for reporting a work injury, but his testimony runs counter to the credible testimony of Mr. Dugan and Ms. Phillips, and defendant-employer's internal documentation. While it could be argued defendant-employer, in connection with Mr. Dugan and Ms. Phillips, had motivation to fabricate the reason for claimant's termination, there is simply no evidence in the record to support such a leap in logic.

The only evidence which supports such a finding is claimant's testimony and claimant's credibility has been called into question in other aspects of this claim. Claimant demonstrated dishonesty by failing to disclose his employment roofing and at Hog Slat. Elements of claimant's physical presentation on surveillance video run contrary to his physical presentation to Dr. Igram and to a lesser extent, at evidentiary hearing. Quite simply, the evidentiary record presents reasons to question claimant's veracity; no such evidence exists to support questioning the contrary testimony of Ms. Phillips and Mr. Dugan. Given the above reasons, it is determined claimant is not a credible witness.

While the undersigned found claimant not credible, it remains possible for claimant to establish the existence of a work related injury. In his attempt to do so, claimant relies upon the opinions of Dr. Bansal. Dr. Bansal opined claimant's reported mechanism of injury and immediate clinical presentation was consistent with claimant's symptomatology. Although Dr. Bansal's report is supportive of claimant's claim, the opinion is ultimately entitled to little weight, as the undersigned found claimant was not a credible witness. Dr. Bansal based his causation opinion upon claimant's reported mechanism of injury. As the undersigned found claimant's account not credible, any medical opinions premised upon the veracity of that account are not entitled to any weight.

Defendants rely upon the opinions of Dr. Igram. The opinions offered by Dr. Igram are not without flaw, as Dr. Igram initially makes a legal determination regarding whether claimant sustained a work related injury. Such a judgment rests outside Dr. Igram's professional judgment. However, Dr. Igram also opined if an injury had occurred, the injury would have amounted to a temporary back strain.

While the undersigned has discounted both the medical opinions in evidence, it is ultimately claimant who bears the burden of proving by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with defendant-employer. The undersigned found claimant was not a credible witness and discounted the medical opinion which supported claimant's claim. The evidentiary record is void of any additional evidence which could meet claimant's burden of proof. Therefore, it is determined claimant has failed to meet his burden of proving by a preponderance of the evidence that he sustained an injury on December 3, 2012, arising out of and in the course of his employment with defendant-employer. As claimant failed to meet this burden, consideration of the additional issues presented for determination is unnecessary, as they are moot.

ORDER

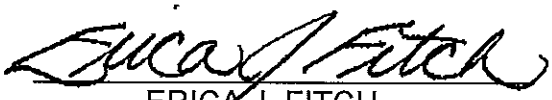
THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

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

Costs are taxed to claimant pursuant to 876 IAC 4.33.

Signed and filed this 15th day of April, 2015.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James C. Byrne
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266-1309
jbyrne@nbolawfirm.com

Jeffrey W. Lanz
Attorney at Law
2700 Westown Pkwy., Ste. 170
West Des Moines, IA 50266-1411
jlanz@desmoineslaw.com

EJF/srs

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.