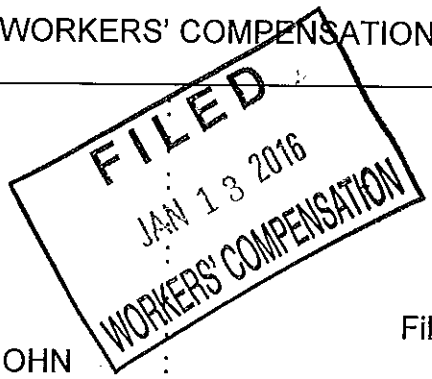
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JASON BLUML,

Claimant,

vs.

DEE JAYS INC. d/b/a LONG JOHN SILVERS,

Employer,

and

COMMERCE & INDUSTRY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5047125

ARBITRATION

DECISION

Head Note No.: 1106, 1402.30

STATEMENT OF THE CASE

Claimant, Jason Bluml, filed a petition in arbitration seeking workers' compensation benefits from Dee Jays Inc. d/b/a Long John Silvers (LJS), employer, and Commerce & Industry Insurance Company, insurer, both as defendants. This case was heard in Council Bluffs, Iowa on October 13, 2015, with a final submission date of November 13, 2015.

The record in this case consists of joint exhibits A through Z, defendants' exhibit 1, and the testimony of claimant, Kevin Jarosik, Cynthia McWhirt, and Lynn Bluml.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether the injury resulted in a temporary disability.

3. Whether the injury resulted in a permanent disability; and if so

4. The extent of claimant's entitlement to permanent partial disability benefits.

5. Whether there is a causal connection between the injury and the claimed medical expenses.

6. Whether defendants are liable for penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 42 years old at the time of hearing. Claimant graduated from high school. He has taken a few courses at the University of Nebraska.

Claimant has worked in restaurants. He has also worked as a manager in fast food restaurants. (Exhibit R, pages 23-30; Ex. S; Ex. U, pp. 5, 15; Ex. W)

Claimant's prior medical history is relevant. Claimant has a history of seizure disorder dating back to 2007. In February of 2007 claimant had his first documented seizure. (Ex. G, p. 4; Ex. 1, p. 1) In October of 2009 claimant had a seizure while driving, which resulted in a crash into a house. (Ex. G, p. 5) In May of 2010 claimant had, what is described in the medical records, as a "flurry" of three seizures. (Ex. G, p. 5; Ex. 1) Claimant was prescribed Dilantin to help with seizures. Record suggests claimant had not been taking Dilantin in the months leading up to February of 2012 and was self-medicating with alcohol. (Ex. B, p. 1)

Medical records also indicate claimant had an extensive history of alcohol abuse and was using alcohol for seizure control. (Ex. D, p. 4) Records indicate it was not uncommon for claimant to have one or two shots of vodka before going in to work. (Ex. B, p. 1)

At the time of his injury, clamant worked as the general manager at LJS. Claimant earned $10.00 an hour. (Ex. R, p. 8; Ex. U, pp. 5, 15; Ex. 7) Claimant also worked at a Sonic restaurant at approximately 20 hours per week. (Ex. W, pp. 1-2)

According to an accident investigation report, on February 15, 2012 claimant called in to work indicating he would be late and that he was not feeling well. (Ex. U, p. 5) According to a coworker, Matthew Klabunde, when claimant arrived at work an hour late, he looked ill and was quiet. (Ex. U, p. 5) Sometime between 5:30 and 7:00 p.m. Mr. Klabunde saw claimant dry-heaving into a trash can. (Ex. U, p. 6)

According to the investigation report, a customer saw claimant get stiff, grunt and fall straight back on the tile floor at work. (Ex. U, p. 5) A coworker, Amanda Cyr indicated she heard a loud yell. She looked up and saw claimant's body stiffen and fall. Ms. Cyr said she heard claimant's head hit the floor. Ms. Cyr went to where claimant was and saw him lying on his back with his arms straight up and shaking. (Ex. U, p. 7)

Craig Drew, another coworker at LJS, saw claimant straighten as he fell backwards. Mr. Drew heard claimant's head hit the floor. Mr. Klabunde and Mr. Drew rolled claimant aside to prevent him from choking. (Ex. U, pp. 6, 8)

Ms. Cyr called 9-1-1. When EMT staff arrived, claimant regained consciousness. (Ex. U, p. 6) Claimant was taken to Mercy Hospital in Council Bluffs. (Ex. A)

Claimant testified he has no recollection of the accident. He did recall the floor he fell on was a tile floor.

At Mercy, claimant was assessed as having a subarachnoid hemorrhage and a subdural hemorrhage. Claimant required intubation. He was transferred to the University of Nebraska Medical Center. (Ex. B, pp. 1-3; Ex. C; Ex. D, p. 40)

A CT scan showed a bilateral hemorrhagic contusion, bilateral subarachnoid and intraventricular hemorrhages and a left frontal subdural hematoma. On February 18, 2012 claimant underwent a decompressive craniotomy. (Ex. D, p. 25)

On March 2, 2012 claimant underwent a tracheostomy and a PEG tube placement. (Ex. D, p. 25)

Claimant was transferred to Immanuel Medical Center for acute brain injury rehabilitation on March 12, 2012. On April 11, 2012 claimant was transferred to Quality Living Incorporated where he underwent rehabilitation consisting of physical therapy, cognitive therapy and speech therapy. (Ex. D, p. 25)

On June 6, 2012 claimant was readmitted to Nebraska Medical Center where he underwent a cranioplasty. (Ex. D, p. 26)

On September 19, 2012 claimant was evaluated at Methodist Health Systems by Christine Jeffrey, M.D. Records indicate claimant had significant cognitive impairment following his brain injury. (Ex. D, p. 7)

On December 12, 2012 claimant was evaluated by Dr. Jeffrey. Claimant was working as a cook in a nursing home. Claimant was not taking his seizure medication and had been drinking again. Claimant was assessed as post-traumatic brain injury and cognitive impairment. (Ex. D, pp. 9-10)

On December 23, 2012 claimant was taken to Lakeside Hospital Emergency Room with a seizure. Claimant was again taken to Lakeside on January 22, 2013 with a seizure. Claimant also had a seizure on March 30, 2013. Notes from that admittance indicate claimant had been drinking. (Ex. D, p. 26)

In March of 2013 claimant began working part time at Runza's Restaurant. Claimant testified he sometimes takes orders and works a fryer at the restaurant. Claimant earned $10.00 an hour at Runza's. Claimant testified he currently receives Social Security Disability, which limits him working more than 25 hours a week.

Kevin Jarosik testified he is a managing partner for Runza's. He said claimant works between 20-25 hours a week. He said claimant usually operates the fryer. He said he usually takes claimant to and from work. Mr. Jarosik indicated he did this

because he felt it was the "Christian thing" to do. Mr. Jarosik said claimant had difficulty reading and memory issues, which limited the type of jobs claimant could perform at the restaurant.

On April 8, 2013 claimant was evaluated by Dr. Jeffrey. Claimant had a history of seizures. Claimant was still drinking. Claimant was counseled not to drink. Notes indicated due to memory issues, claimant would probably forget being counseled not to drink alcohol. (Ex. D, pp. 12-14)

On January 20, 2014 claimant had another documented seizure. (Ex. D, pp. 20, 26)

Sometime in early June of 2014 claimant was placed inpatient for alcohol rehabilitation. He was discharged from the program in early July of 2014. (Ex. D, p. 23)

In a July 6, 2014 letter Dr. Jeffrey gave her assessment of claimant's condition. Claimant was found to be at maximum medical improvement (MMI). Claimant was assessed as having a traumatic brain injury, cognitive impairment, seizure disorder and alcohol abuse. Claimant's cognitive impairment resulted in him having a lack of insight and an inability to recall he needed not to drink. Dr. Jeffrey opined claimant was likely to have continued problems with cognitive impairment. Claimant had no permanent restrictions. (Ex. D, pp. 25-27)

In a July 16, 2014 followup report Dr. Jeffrey noted as soon as claimant was released from his inpatient treatment for alcohol abuse, he began drinking again. (Ex. D, p. 28)

In a September 3, 2015 report, Ronald Schmidt, M.S., C.R.C. gave his opinions of claimant's industrial disability and vocational opportunities. Mr. Schmidt opined, he believed, claimant met the definition of an odd-lot worker. (Ex. P)

On May 24, 2015 claimant was again taken to a hospital for having a seizure. (Ex. 1, p. 4)

In an August 14, 2015 letter Dr. Jeffrey gave an overview of her treatment of claimant. Dr. Jeffrey noted claimant had seizures in December of 2012, January of 2013, March of 2013, January of 2014, and May of 2015. Dr. Jeffrey suggested these were related to alcohol use. Claimant's cognitive impairment related to a lack of insight and an inability to remember he needed to abstain from alcohol. Dr. Jeffrey believed claimant would require further medical treatment including medication and ongoing therapy for help with cognitive ability. Claimant would also require ongoing medical care regarding relapsing concerning alcohol. (Ex. D, pp. 40-41)

Dr. Jeffrey opined claimant may need to be placed in a facility that could offer him more structure and supervision. (Ex. D, p. 42)

In an August 19, 2015 letter, written by claimant's attorney, Dr. Jeffrey opined claimant was at risk for operating a motor vehicle. (Ex. D, p. 43)

Claimant testified that since his accident he has had difficulty with reading. Claimant appeared to have difficulty at hearing with word finding and with processing information. At hearing claimant had difficulty with memory. Claimant testified he knows he has difficulty with memory.

Claimant testified he attends speech therapy classes once a week. At the time of hearing claimant was trying to learn to read the menu at Renza's Restaurant. Claimant testified he lives by himself. He says his father helps him pay his bills.

Cynthia McWhirt testified she is claimant's mother. Ms. McWhirt said claimant has difficulty with memory, specifically short-term memory. She said claimant has difficulty with reading. She said claimant has difficulty with finding words. She said claimant has difficulty with recalling names, businesses and streets.

Ms. McWhirt testified claimant has told her a number of times he will not drink. She says claimant will, however, drink alcohol. She said doctors have told her claimant forgets he should abstain from alcohol.

Ms. McWhirt testified claimant had seizures and alcohol problems prior to the February 15, 2012 accident.

Lynn Bluml testified he is claimant's father. He said he has power of attorney for claimant regarding health and financial issues. Mr. Bluml said since his injury, claimant has had difficulty with understanding. He said claimant cannot read. He said since the accident claimant has had difficulty with processing information and difficulties with memory.

Mr. Bluml said claimant should not drive. He said claimant has been involved with a few minor car accidents and left the scene of those accidents.

Mr. Bluml testified claimant receives Social Security Disability Benefits of approximately $1,524.00 per month. He said Medicaid has paid for most of claimant's bills. Mr. Bluml said claimant's medical bills were over $700,000.00 at the time of hearing.

Mr. Bluml testified claimant had seizure problems and problems with alcohol prior to the February of 2012 accident.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment.

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 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).

At issue in this case is whether claimant's injury arose out of his employment.

The records indicate claimant had a history of preexisting seizure disorder prior to the February of 2012 accident. (Ex. B, p. 1; Ex. C; Ex. G, pp. 2-4) Claimant had been prescribed Dilantin to deal with his seizures. Claimant stopped taking his medication up to the months leading to the February 15, 2012 injury. (Ex. B, p. 1) The

records also indicate claimant had a history of alcohol abuse and was using alcohol as a seizure control. (Ex. D, p. 4)

There is nothing in the record suggesting claimant's seizure was caused or materially aggravated by his work at LJS.

The next question, then is, was claimant's fall and subsequent injury somehow aggravated by his workplace. In some instances, falls from personal risks are compensable.

In Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000), the Iowa Supreme Court addressed a worker who fell from a ladder at work due to alcohol withdrawal:

> Generally injuries resulting from risks personal to the claimant are not compensable. Courts have, however, recognized an exception to this rule where the employment contributes to the risk or aggravates the injury....
>
> ....
>
> ...Our assessment of the law from other jurisdictions finds support from Larson in his treatise on workers' compensation law, who concludes that the general rule requires that the employment must contribute to the hazard of the fall. Koehler, 608 N.W. 2d 4-5. (emphasis added)(citations omitted)

In Albertsen v. Benco Manufacturing, No. 08-0746, filed February 4, 2009 (Iowa Ct. App.) Unpublished, 764 N.W. 2d 783 (Table), the workers' compensation commissioner applied the Koehler decision in addressing a case where a worker went to the restroom and may have passed out or blacked out, falling and hitting her head on a concrete wall. The evidence was conflicting whether the worker passed out or was hit on the back of the head by the rest room door. The Court noted that idiopathic falls, falls due to personal conditions, onto level surfaces, are generally not compensable.

In AARP v. Whitacre, No. 12-1519, filed May 15, 2013, (Iowa Ct. App.), Unpublished, 834 N.W. 2d 870 (Table), the Iowa Court of Appeals affirmed the commissioners findings that an office layout aggravated the effects of a claimant's fall. The Court noted that because the fall occurred in a small office, causing claimant to hit the corner of a desk and then the wall, the office layout aggravated the effects of the claimant's fall.

As the Iowa Court of Appeals noted in Benco, the treatise Larsons Workers' Compensation Laws, also recognizes that injuries from personal risks or internal weaknesses are generally not compensable unless the employment contributes to the risk or aggravates the injury. Larson's at 9-1. To be compensable, a fall due to a personal condition, such as a momentary loss of consciousness caused by a personal medical condition, must be shown to have been caused or precipitated in part by some

employment related factor or that the effects of the fall were worsened by the employment. Injuries from idiopathic falls from heights and stairways or the striking one's head on a work structure on the way down to the floor are generally viewed as sufficient to render the injury compensable. Larson's, section 9.01 at 9-2 thru 9-7.

However, idiopathic falls (falls due to personal conditions) onto level surfaces are generally not held compensable. Larson's, section 9.01(4) at 9-7 thru 9-9. See Ledbetter v. Michigan Carton Co., 74 Mich. App. 330 (1997) (idiopathic fall on level surface not compensable); Evans v. Hara's, Inc., 123 Idaho 473 (1993) (fall caused by seizure on level surface found not have risen out of employment); Gates Rubber Co. v. Industrial Com'n of State of Colo., 705 P.2d 6 (1985) (fall caused by seizure on a level surface was not a special risk of employment and not compensable) See also Larson Digest, Chapter 9, section 9.01D[4][a], pages D9-11 through D9-17

Claimant had a fall caused by a seizure. Claimant's fall was due to a personal condition. He fell on a level surface. There is no evidence in the record claimant hit any tables, chairs, or kitchen equipment as he fell to the floor. There is no evidence claimant struck his head on any kind of work structure. Claimant had an idiopathic fall on a level surface. As noted in the dicta in the Koehler, Benco and Whitacre decisions, and as detailed in Larson's, falls of this nature are not compensable.

I am empathetic to claimant and his family. Claimant sustained a brain trauma injury that has had a devastating impact on his life and the life of his mother and father. It is obvious these people have struggled to deal with the results of claimant's brain injury.

That said, the law appears clear that idiopathic falls to level surfaces are not compensable under Iowa law. Given this record, claimant has failed to carry his burden of proof he sustained an injury that arose out of and in the course of employment.

As claimant has failed to carry his burden of proof he sustained an injury that arose out of and in the course of employment, all other issues are moot.

ORDER

THEREFORE IT IS ORDERED:

That claimant shall take nothing from these proceedings.

That both parties shall pay their own costs.

Signed and filed this 13th day of January, 2016.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.