BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANTONIO PALMER, Claimant, vs. NOR-AM COLD STORAGE, INC., and PREMIER SERVICES, INC., d/b/a J&L ENTERPRISES, Employer, and UNITED WISCONSIN INSURANCE COMPANY and WESCO INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5067030 ARBITRATION DECISION Head Note Nos. 2000, 2001, 1100, 1600, 1601

STATEMENT OF THE CASE

Claimant Antonio Palmer has filed a petition for arbitration seeking workers' compensation benefits against Nor-Am Cold Storage, Inc. and Premier Services, Inc. d/b/a J&L Enterprises, Employer, and United Wisconsin Insurance Company and WESCO Insurance Company, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on November 6, 2020, via CourtCall. The case was considered fully submitted on November 12, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-7, Claimant's Exhibits 1-9, Defendants exhibits A-E, G-M and AA-BB, along with the testimony of claimant, Angela Shafer, Maurice Johnson, and Araceli Vargas.

ISSUES

1. Whether claimant is an employee of defendant Nor-Am Cold Storage, Inc.;

2. Whether claimant is entitled to TTD from January 10, 2019, though February 12, 2020;

3. Whether claimant sustained a permanent disability, and if so, the extent;

4. Whether the permanent disability is limited to claimant's right lower extremity or is a whole body injury;

5. The commencement date of PPD benefits;

6. Whether claimant was intoxicated under Iowa Code section 85.16;

7. Whether claimant refused suitable work based on 85.33(3);

8. Whether claimant is entitled to reimbursement of medical expenses in exhibit 5;

9. Taxation of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

There are two different employers in this case. Defendant Premier stipulated that claimant sustained an injury arising out of and in the course of employment on October 8, 2018. Defendant Premier further agrees that the injury was the cause of a temporary and permanent disability.

Although the parties will not stipulate to claimant's entitlement to TTD benefits from January 10, 2019, through February 12, 2020, they do agree claimant was off work during this period of time.

At the time of the October 8, 2018 injury, claimant's gross earnings were $524.67 per week. He was single and entitled to one exemption. The parties believe the weekly benefit rate to be $324.68.

There are no credits sought against any award.

FINDINGS OF FACT

Claimant Antonio Palmer is a 42-year-old person at the time of the hearing. He has a GED and participated in the Job Corps of Iowa. His employment history includes C-18 through C-23.

Ashley Albers, an employee of Nor-Am Cold Storage, testified that claimant was employed by J&L. J&L was contracted to provide temporary staffing. (Ex BB, pp. 2-3) This agreement was memorialized in writing. (Ex AA) Pursuant to this agreement, Premier provided workers' compensation coverage and unemployment insurance. If Nor-Am wanted to hire a Premier employee, Nor-Am would pay a premium.

Claimant was shuttled by Premier to Nor-Am with other Premier employees. He clocked in at a different location and wore a hard hat of a different color. While Nor-Am could ask for a Premier employee to be removed from Nor-Am facilities, the hiring and firing of an employee remained with Premier. Premier handled all the disciplinary procedures. Premier paid claimant and issued a W-2 to claimant.

Claimant testified he contemplated applying for a job at Nor-Am, which showed he understood he was not an employee of Nor-Am at the time of his injury.

Claimant admitted that he was an almost every day user of marijuana prior to October 8, 2018. He testified that he smoked cannabis and ingested edibles the day before his injury. Claimant maintained on direct examination that he traveled to Denver, CO, on the weekend before his injury to engage in this activity, presumably because cannabis usage is legal in Colorado. However, Araceli Vargas testified that she saw claimant along with her stepson, Phillip Jackson, outside of her house at 11:00 PM on Saturday night. Claimant replied that he was with Mr. Jackson on Friday night rather than Saturday night.

Ms. Vargas' account is accepted as more accurate. She provided exact times, statements from the individuals with claimant on Saturday night, the location where they were going in Sioux City, and who was present. Claimant's account was slightly more vague, although he testified that they left for Omaha on Saturday morning around 8:00 AM and returned on Sunday around 7:00 or 8:00 PM.

Ms. Vargas did not appear to be aware of her stepson's cannabis usage, but her account of the evening of Saturday, October 6, 2018, was more believable than that of Claimant.

On October 8, 2018, at approximately 2:35 PM claimant suffered a crush injury to his right foot when his foot was caught between a pallet jack he was using and the wall. (JE 1:6) He was taken to the Floyd Valley Emergency Department and then was transferred to St. Luke's in Sioux City where Dr. Phinit Phisitkul, an orthopedic surgeon, took over the care. (JE 1:6, JE 2:41) It was noted that there was a family friend at the bedside. (JE 1:10)

Araceli Vargas, the work comp coordinator for Premier, testified at hearing that she was present from the time claimant arrived at St. Luke's until after his surgery. She testified that no other person was present but herself. Claimant disputes this, testifying that Mr. Jackson arrived after 7:00 or 8:00 PM before his last medication for the night.

St. Luke's medical records show that Claimant arrived at St. Luke's at approximately 4:06 PM (JE 1:1) He was taken into surgery at 5:00 PM (JE 2:44). The post-operative note is time-stamped 7:40 PM. (JE 2:46) Vargas testified claimant returned to his room around 8:00-8:30 PM. Her emails indicate that she was demanding a drug test as soon as possible. (Ex. L:53)

Claimant's drug test was positive for cannabis. (JE 1:13)

An external fixation was applied and claimant was hospitalized from 10/8/2018 to 10/13/2018. (JE 1;16; JE 2:45-46) Claimant returned to the ED on October 17, 2018, with complaints of increased pain. Id. He had fallen on the ankle and was suffering high-grade fevers and blisters. He was admitted to the hospital again. (JE 1:16-20) Gangrene was noted to set in and there was some discussion of an amputation. "In the best case scenario, he might have some parts of his foot preserved but chronic pain is likely unavoidable." (JE 2:55) On October 21, 2018, claimant was administered nerve blocks for the pain. (JE 1:33-34) On October 24, 2018, claimant underwent a below the knee amputation. (JE 2:57-58)

On November 4, 2018, claimant underwent counseling with Laurie N. Warren PA-C for the crush injury and pain. (JE 1:38-40) Lexapro was ordered along with a recommendation for claimant to seek outpatient treatment along with follow-up with a psychiatrist. (JE 1:40) Claimant did follow up with Emily Donoghue, LMHC, for therapy. (JE 4:79-81) Claimant was diagnosed with major depressive disorder and chronic pain. (JE 4:81)

Claimant was seen in follow-up for postop care by Clark & Associates. On November 14, 2018, the caregiver, Wally Kuntz, CP, LP, notes claimant was unemployed and noted to have no desire to return to work. (JE 3:68) At this time, claimant could hop 1/4 of a mile with the use of a prosthetic device. (JE 3:69)

Claimant began complaining of back pain on or around July 9, 2019. (JE 5:94) He described the pain in the lumbar region as 8 on a 10 scale. Id. The symptoms radiate into the buttock on the right. Id. Ultimately claimant was referred to therapy. (JE 5:104) He continued to complain about back pain well into 2020. (JE 5:108) With therapy, the pain did abate at times to 3 on a 10 scale, but the pain was never fully eliminated. (JE 5:110)

Claimant was eventually diagnosed with chronic pain syndrome and referred to a pain clinic. (JE 6:119) He began care with the pain clinic on June 25, 2019. (JE 7:137) Claimant's care was terminated for violating the pain contract for cannabis usage.

Almost two years later, claimant was seen by Mr. Kuntz again for a fitting of his prosthetic. (JE 3:78) It was noted claimant had reports of back pain. Mr. Kuntz attributed this to the prosthetic device being too short. (JE 3:78) Claimant did have issues with his prosthetic, but treatment was delayed due to the pandemic. (JE 6:132)

Sunil Bansal, M.D., performed an IME on February 12, 2020. (CE 8:110) Claimant stated the following for how the incident occurred:

> At the time of his injury, Mr. Palmer was employed by North American Cold Storage. On October 8, 2018, he sustained an injury to his right foot and lower leg.
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> He was a certified forklift drive, and had stopped to help someone. Someone else then hopped on his forklift and took off on it. At the beginning of his shift, he had to check out a forklift. He got another forklift that he had not checked out, and there was something wrong with it. He showed the maintenance man and told him that there had been something wrong with this forklift for years. The maintenance man told him to take it back.
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> He got on the forklift to take it back, and as he was riding down the hallway a co-worker came out of the breakroom, so he slowed down. As his co-worker passed him, he started to pick up speed and tried to turn the forklift. However, it sped up and jerked towards the wall. He tried to turn it, but it would not turn. He tried to jump off of it, and as he jumped off the forklift hit his right foot and crushed his foot into the wall. He had immediate severe pain and bleeding, and an ambulance was called. He was taken to an emergency room.

(CE 8:119)

Claimant's current conditions include phantom pain in his right lower extremity including nerve pain with shocking sensation, frozen toes, squeezing sensation. (CE 8:120) He also complained of low back pain due to the altered gait. Id.

Dr. Bansal determined claimant sustained the right lower extremity injury as well as back pain resulting from claimant's crush injury. (CE 8:122) Dr. Bansal assigned 70 percent impairment to the lower extremity or 28 percent impairment to the body as a whole for the amputation and 5 percent whole body impairment due to the lumbar complaints. (CE 8:124)

Dr. Bansal recommended no lifting greater than 20 pounds, no frequent bending or twisting, no prolonged standing or walking greater than 15 minutes at a time. (CE 8:124)

Claimant underwent an IME with Dean Wampler, M.D. on June 4, 2020. (EX A:1) Dr. Wampler issued a 70 percent lower extremity impairment rating for the amputation and a 7 percent lower extremity impairment rating for the phantom pain. (Ex. A:7) Dr. Wampler also opined claimant sustained muscular low back pain arising out of the work injury, but that there was no functional loss and therefore no impairment. (Ex A:8)

Dr. Wampler recommended restrictions of limiting lifting to no more than 15 pounds from floor infrequently and 20 pounds overhead frequently and avoiding frequent stairs. (Ex. A:8)

Claimant is not currently working. He has significant ongoing pain in his stump, his phantom lower extremity, and his low back as well as the inability to walk or stand for any significant period of time. He has applied for a few positions such as a retail sales associate, but has not received any job offers. He does do some car detailing at his home and would like to build that business if possible.

As it relates to claimant's alleged intoxication, claimant offered the opinions of two toxicologists. John Vasiliades, Ph.D., a toxicologist, issued a report on the matter of claimant's purported use of marijuana. (CE 7:74) Dr. Vasiliades stated that the urine sample taken 12 hours after the accident was not confirmed positive by gas chromatography or liquid chromatography mass spectrometry and, therefore, could be a false positive. (JE 7:74) The levels detected also point to the lack of a recent ingestion, but instead that the use occurred approximately 20 hours prior to the time of the sample collection and, therefore, claimant was not under the influence of THC (marijuana) at the time of the accident. Id. at 74-75.

This is not consistent with claimant's testimony that he smoked a vape pen in the hospital. In fact, a different toxicologist, Eugene J. Youkilis, Ph.D., opined that the results from the blood specimen obtained showed "acute exposure to marijuana, in this case within an average of 4.2 hours of elapsed time prior to the collection time of his blood specimen." (CE 7:97-98)

CONCLUSIONS OF LAW

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. 6.904(3).

Defendant Premier Services, Inc. admit claimant was an employee at the time of the alleged injury but argue the affirmative defense of intoxication. Defendant Nor-Am denies claimant was an employee at the time of the alleged injury.

On the issue of joint or dual employment, in Iowa, leased employees are usually held to be employed by the lessor or the provider of the workers, not the lessee company where they may actually work. Jones v. Sheller-Globe, 514 N.W. 2d 891 (Iowa 1994). This issue is fact based and the determination must be made on a case by case basis. In this case, claimant was driven to the work premises by Defendant Premier Services. He was issued a hard hat of a different color as were the other Premier Services employees. While his day-to-day activities were supervised by Defendant Nor-Am, he was under the control of Premier Services. I find that claimant was not a dual employee of both Defendant Premier Services and Defendant Nor-Am but solely an employee of Defendant Premier Services.

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).

The mechanism of claimant's injury was his foot being crushed between the pallet jack he was operating and the wall. Defendants maintain claimant was intoxicated at the time of the injury and, therefore, is barred from recovery. In support of this, defendants point to the positive toxicology test and the testimony of Araceli Vargas, an employee of Premier.

During the 2017 legislative session, the Iowa legislature made a significant change to Iowa Code section 85.16(2). The statute now provides in relevant part:

> No compensation under this chapter shall be allowed for an injury caused:
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> . . .
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> (2) (a) By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.
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> (b) For the purpose of disallowing compensation under this subsection, both of the following apply:
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> (1) If the employer shows that, at the time of the injury, or immediately following the injury, the employee had positive test results reflecting the presence of alcohol, or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug which drug either was not prescribed by an authorized medical practitioner or was not used in accordance with the prescribed use of the drug, it shall be presumed that the employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury.
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> (2) Once the employer has made a showing as provided in subparagraph (1), the burden of proof shall be on the employee to overcome the presumption by establishing that the employee was not intoxicated at the time of the injury, or that intoxication was not a substantial factor in causing the injury.

The 2017 changes to Iowa Code section 85.16(2) did place a greater burden on an employee to show they were not intoxicated at the time of injury or that intoxication was not a substantial factor in causing the injury. However, the employer, under the law, still has the burden of proof of producing evidence that the employee had a positive test result reflecting the presence of alcohol or other drugs. Iowa Code section 85.16(2)(b)(1).

Defendants have satisfied this burden.

Antonio Palmer provided the testimony of two toxicologists, but the opinions of the toxicologists contradict each other. One suggests that the lab tests show that claimant inhaled cannabis close in time to the drug test and well after the time of injury. The other suggests that the lab tests show that the drugs were consumed well in advance of the injury. Based on the contradiction neither toxicology opinion is helpful.

Claimant pointed out that he was driven to the job site by Premier, that he interacted and was observed by employees from Nor-Am and Premier, and that none

came forward to testify that he was impaired. Araceli Vargas testified that she saw claimant sitting outside her house with her stepson two days before he came to work. She did not investigate whether he was impaired at work nor did she seem to be concerned prior to the injury that the claimant was impaired while on the job.

However, there were no employees that testified in favor of the claimant either. The lack of testimony in this case does not prove the negative—the claimant was not impaired at the time of the injury.

Claimant was a habitual user of cannabis. He admitted that he ingested cannabis sometime the day before he worked and in the hospital while awaiting surgery. After the injury, claimant's pain treatment ceased due to violations of the drug policy. He was a habitual user of cannabis both before the injury and after the injury date. His testimony that his friend brought him a vape pen prior to surgery is not likely given that he arrived shortly after 4:00 PM to St. Luke's and was in surgery in under an hour.

Based on the contradictory toxicology reports, claimant's own testimony that he smoked cannabis from a vape pen at least the night before his work day, and his habitual use of the drug after, it is found that claimant did not overcome the presumption of intoxication and, therefore, he is barred from recovery.

Based on that ruling, no additional conclusions of law need to be issued.

ORDER

THEREFORE, it is ordered:

Claimant shall take nothing.

The parties shall be responsible for their own costs and the cost of the transcription shall be apportioned one-third to the claimant, one-third to defendant Premier and one-third to defendant Nor-Am.

Signed and filed this 29th day of March, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mary Hamilton (via WCES)

Andrew Portis (via WCES)

Andrew Tice (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.