

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID L. SWANSON,

Claimant,

vs.

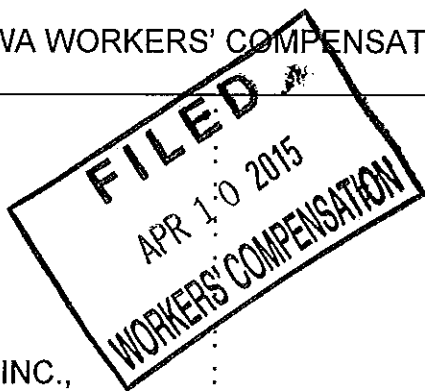
A.V. TRANSPORTATION, INC.,

Employer,

and

SPARTA INSURANCE,

Insurance Carrier,
Defendants.



File No. 5046934

ARBITRATION

DECISION

Head Note No.: 1402.30

STATEMENT OF THE CASE

Claimant, David Swanson, filed a petition in arbitration seeking workers' compensation benefits from A.V. Transportation, Inc., (A.V.), employer, and Sparta Insurance Company, insurer, both as defendants. This case was heard in Davenport, Iowa on February 19, 2015 with a final submission date of March 12, 2015.

The record in this case consists of claimant's exhibits 1-8, defendants' exhibits A-O, and the testimony of claimant, Melissa Liddle, and Jamie Liddle.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment on February 7, 2013.
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 claimant is entitled to alternate medical care under Iowa Code section 85.27.

FINDINGS OF FACT

Claimant began work for A.V. in December of 2008. Claimant worked with A.V. as an over-the-road truck driver. Claimant worked 50-60 hours per week. He testified he drove between 400 to 1000 miles per load. (Exhibit N, page 3; Deposition page 6) Claimant said he did a little loading and unloading, but usually did not touch loads. Claimant testified he has worked as a truck driver since 2003. (Ex. N, p. 3; Deposition pp. 7-10)

Claimant alleges he injured his right knee slipping on ice while stepping out of his truck cab when refueling his truck at the pump in the A.V. yard.

Claimant testified at hearing and in deposition the accident happened as he was climbing down from his truck while gassing up at the pump in the company lot at A.V. Claimant testified he stepped on the ground with his left foot on ice while his right foot was on the truck step. He said his right hand was on the rail of the truck that runs vertical along the cab. Claimant said his left foot slid on the ice. He said he did the splits while his right leg was on the truck step holding his weight. (Ex. N, p. 5, Deposition pp. 15-16)

Claimant said he felt an immediate shot of pain from the accident, but the pain subsided. He said he spoke to Jamie Liddle, the operations manager with A.V., shortly after the accident occurred. Claimant said he did not report the accident to Mr. Liddle, at that time, as pain was subsiding. He said he did not initially report the injury until approximately three weeks later, as his right knee did not begin hurting bad until that time. (Ex. N, pp. 5-7; Deposition pp. 17-24)

Claimant testified at hearing that there was ice around the fuel pumps the date of the accident. In deposition, claimant testified the A.V. lot was covered in ice. (Ex. N, p. 7; Deposition p. 24)

Claimant initially reported an injury occurring on February 14, 2013. Exhibit I, page 1 is a copy of the injury report completed by claimant. The form on the report shows a date of injury of "02/14/13". This date is lined out and in its place is written "02-15-13". Claimant said he changed the date to reflect a date of injury of February 15, 2013 when told by A.V. staff that records showed he had not refueled his truck on February 14, 2013. Claimant said he remembered the injury occurring on a Thursday. He said he got paperwork from his truck that indicated he fueled his truck on February 15, 2013, and changed the date of injury on the report to show a February 15, 2013 date of injury. (Ex. I, p. 1)

Melissa Liddle testified she is a safety person at A.V. In that capacity she is familiar with claimant and his workers' compensation claim. Ms. Liddle testified

claimant initially reported a date of injury of February 14, 2013. She said he changed that date to February 15, 2013 when told A.V. records showed claimant had not fueled his truck on February 14, 2013.

Claimant testified he eventually changed the date of injury a third time to reflect a date of February 7, 2013 based on fueling records he had.

On February 27, 2013 claimant reported his injury to A.V. (Ex. I)

On February 27, 2013 claimant was evaluated by Mary Shook, M.D. for an injury to his right knee occurring on February 15, 2013. Claimant indicated he stepped to the ground with his right foot and slipped on ice. Claimant was assessed as having a right knee strain. He was told he could use a brace and to treat with over-the-counter medication. Claimant was returned to work. (Ex. B, pp. 1-3)

On the same day claimant was also assessed at Mercy Medical Center for a right knee injury occurring on February 15, 2013. (Ex. 1)

Claimant returned to Dr. Shook on March 8, 2013 and March 22, 2013 with continuing complaints of right knee pain. Claimant was again advised to use a knee brace and take over-the-counter medication. (Ex. B, pp. 8-14)

Jamie Liddle testified he is the operations manager at A.V. He said in that capacity he knows claimant and is aware of claimant's workers' compensation claim.

Mr. Liddle testified he wrote the report found at Exhibit J. The report indicates claimant was asked why he did not report an injury occurring on February 15, 2013, specifically since claimant spoke with Mr. Liddle a few minutes after the alleged injury occurred. Mr. Liddle indicates claimant had no response to that question. Mr. Liddle told claimant that he reviewed video footage of the yard at A.V. He said the footage did not show claimant falling. The statement indicates claimant told Mr. Liddle he may have fallen a week before the reported date of injury of February 15, 2013. The report also indicates that Mr. Liddle asked if claimant knew what his actual date of injury was. (Ex. J)

At hearing Mr. Liddle testified that when he spoke to claimant on March 22, 2013, claimant was unsure of the date of the alleged accident.

Both Mr. and Mrs. Liddle testified that A.V. has a 24-hour surveillance of the fuel yard. They said that the cameras are motion sensitive.

Both Mr. and Mrs. Liddle testified that they reviewed footage from February 7, 2013. The footage does show claimant's truck pulling into the fuel yard at A.V. The footage shows claimant stepping up and down in his truck cab several times. Both Mr. and Mrs. Liddle testified that after they reviewed footage from February 7, 2013, they could not see claimant falling at all.

Exhibit O is a CD of video footage of claimant refueling on February 7, 2013. The footage was viewed at hearing and by the undersigned after hearing.

Claimant viewed footage shown on Exhibit O marked as "20130207". Claimant testified that his truck is the one that pulls up on the screen on the right. Claimant said his truck is a Kenworth. Claimant is seen exiting his truck with his back to the camera and his right hand on the truck rail. Claimant steps to the ground but does not fall. The ground in the video appears to be muddy. The weather appears to be an overcast, rainy day. Claimant is seen in the video climbing in and out of his truck cab several times. Claimant is not seen falling at all on the video.

The video on the CD does occasionally jump. Both Mr. and Mrs. Liddle testified they believe the jumping on the video occurs because the cameras that shot the video are motion sensitive.

I viewed the video, found at Exhibit O, twice. This occurred both at hearing and later when reviewing the exhibits. The video found at Exhibit O shows claimant climbing in and out of his truck several times. The video does not show claimant falling.

Claimant testified he believed there were two minutes missing when he initially watched the video. Other than the short skips in the video, claimant could not identify, at hearing, any periods of time on the video where video allegedly missed his fall on ice at the A.V. lot.

Claimant was evaluated by Camilla Frederick, M.D. on April 5, 2013. Claimant had continued complaints of right knee pain. Dr. Frederick believed claimant had a medial meniscus problem. An MRI was recommended. (Ex. B, pp. 16-18)

An MRI taken on April 12, 2013 showed a right knee torn meniscus. Claimant was put on restricted duty. He was recommended to see an orthopedic specialist. (Ex. B, pp. 21-25)

In a May 2, 2013 letter, claimant was informed that his claim for a date of injury of February 15, 2013 was denied based upon an investigation of the claim. (Ex. G)

On May 3, 2013 claimant was evaluated by John Hoffman, M.D. Claimant was assessed as having a medial meniscus tear on the right. Surgery was recommended. (Ex. A, pp. 1-5)

On May 8, 2013 claimant underwent a meniscectomy on the right. Surgery was performed by Dr. Hoffman. (Ex. 3)

Claimant testified he was off work for his injury and his surgery from May 6, 2013 through May 17, 2013. Claimant returned to work on May 17, 2013.

Claimant was returned to full duty on May 17, 2013. He was given a cortisone injection in the right knee by Dr. Hoffman on May 17, 2013 and July 19, 2013. (Ex. A, pp. 6-7)

In an October 25, 2013 report, Robert Milas, M.D. gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant indicated he injured his right knee on February 7, 2013 while exiting from his truck. Claimant indicated he had significant pain in the right knee and instability. Dr. Milas found claimant had a 25 percent permanent impairment to the right lower extremity, converting to a 13 percent permanent impairment to the body as a whole. He found claimant's accident of February 7, 2013 was a direct cause of his knee injury. He found that claimant was at maximum medical improvement (MMI). (Ex. 4)

Claimant testified Dr. Milas did not see video footage of him climbing in and out of his truck cab at the gas pump in the A.V. lot found at Exhibit O.

Claimant testified he still works for A.V. as a driver. He said he still has right knee problems. He said sitting, standing, or walking for an extended period of time will cause knee pain. He said his knee occasionally will pop.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury on February 7, 2013 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).

Claimant initially reported an injury to his right knee occurring on February 14, 2013. He said the injury occurred when he climbed out of his truck. He said the injury happened at the fuel pump at the A.V. truck yard when his left foot slid on ice. Claimant changed that date of injury to reflect a date of injury of February 15, 2013, after being told that he did not fuel his truck on February 14, 2013. Claimant changed the date of injury a third time to reflect a February 7, 2013 date of injury. (Ex. I; Ex. J)

Most of the medical records associated with claimant's treatment and care reflect a date of injury of February 15, 2013. (Ex. 1; Ex. A, p. 4; Ex. B, pp. 1-25)

Claimant did not report the injury for approximately three weeks, even though he spoke with Mr. Liddle shortly after the accident allegedly occurred. He testified at hearing he waited to report the injury because his pain initially subsided. Claimant told Dr. Milas he had significant pain after the injury resulting in instability of the knee. (Ex. 4, p. 1)

In deposition claimant testified the truck yard at A.V. was ". . . absolutely covered with ice. . ." on the date of the accident. (Ex. N, p. 7; Deposition p. 32) In the hearing claimant testified there was ice around the gas pumps in the A.V. yard. A review of the video taken on the alleged date of injury, found at Exhibit O, shows a rainy day and the ground covered with mud.

A review of the video, taken at the time of the alleged accident, does not show claimant falling at all. The video does have some skipping in it. Mr. and Mrs. Liddle testified the cameras used in creating the video are activated by motion. Although claimant claimed the video skipped several times, claimant was unable to point to any periods on the video where he was not shown climbing in and out of his truck.

Claimant alleges a traumatic date of injury. He changed his date of injury three times. Claimant testified slipping on ice caused his knee injury and that the ground, at the time of injury, was absolutely covered with ice. Video of the truck yard on the date and time of injury shows a mud covered ground and no ice at all. Video footage taken at the alleged time of injury does not show claimant slipping on ice on the cab of his truck at all. Given these facts, claimant has failed to carry his burden of proof his injury to his right knee arose out of and in the course of employment on February 7, 2013.

As claimant has failed to carry his burden of proof his alleged injury of February 7, 2013 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 10th day of April, 2015.



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.