

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FERLIN McALISTER,

Claimant,

vs.

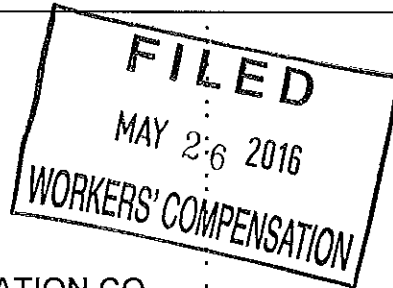
JACOBSON TRANSPORTATION CO.,
INC.,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5049509

ARBITRATION
DECISION

Head Note No.: 1402.30

STATEMENT OF THE CASE

Claimant, Ferlin McAlister, filed a petition in arbitration seeking workers' compensation benefits from Jacobson Transportation, Company, Inc., (Jacobson), employer, and Zurich American Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa, on February 4, 2016, with the final submission date of February 29, 2016.

The record in this case consists of claimant's exhibits 1 through 12, defendants' exhibits A through F, and the testimony of claimant.

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 claimant's claim is barred by application of Iowa Code section 85.23.
6. Whether there is a causal connection between the injury and the claimed medical expenses.

FINDINGS OF FACT

Claimant was 58 years old at the time of the hearing. Claimant graduated from high school. He served in the military and worked as a vehicle mechanic. Claimant took classes at a community college in the building trades and truck driving. Claimant also took classes to become licensed to sell real estate.

Claimant has worked for a railroad repairing and installing track. He has worked in real estate and sold homes and farms and did appraisals. Claimant was self-employed as a real estate agent. He worked at Vermeer Manufacturing as an Inventory Coordinator. Claimant has driven a cement mixer. He has also worked as a truck driver for various operations. (Exhibit 5, pages 2-3)

Claimant began working for Jacobson in March 2013, as a truck driver.

Claimant's medical history is relevant. Claimant testified he had been a smoker, but quit 30 years prior to hearing. Claimant was seen in 2009 for dust exposure while working at Vermeer. Claimant had a history of Barrett's esophagus. (Ex. C, p. 8) Claimant testified he has been assessed as having a Barrett's esophagus. This is a complication of gastric reflux that damages the esophagus.

Claimant testified at hearing he began coughing while driving for Jacobson between March to June 2013. He said that, at the time, he thought he had a cold. (Ex. E, pp. 2-3; Transcript p. 67) He testified that in June 2013 he drove on the east coast. He shared a truck, at that time, with another driver who smoked, but claimant said the smoke was not overwhelming. (Tr. p. 22) After the assignment on the east coast had ended, claimant returned to work for Jacobson in Iowa.

Beginning approximately late June to July, claimant worked as a flex driver for Jacobson. He shared a truck with another driver. Claimant said that the driver was a heavy smoker, and said the other driver would be smoking when he got out of the truck. (Tr. pp. 23-24) Claimant's route was from Des Moines, Iowa to Knoxville, Illinois. Claimant would drop off a trailer in Knoxville, and would return to Des Moines. He said his shift would take approximately 9 hours and when he returned the smoking driver would take over the truck.

Claimant said that when he got into the cab, from the Knoxville run, the cab would smell of cigarette smoke. He said that during this time his cough got worse. Claimant said at that time he still believed he had a cold or bronchitis. (Tr. pp. 25-27)

Claimant said the last time he drove for Jacobson, he got in the Jacobson truck, and the smell of cigarette smoke was overpowering. He said he called into Jacobson and said he could not drive the shift. Claimant said he was told he had no replacement. Claimant said he would drive his shift to Knoxville, Illinois. He said the smell and fumes were so overpowering that he had to drive with the windows down. He said he returned from the shift and went to the emergency room at the Veterans Administration (VA). Claimant testified he passed out in the "yard" at the VA Clinic hospital and eventually went to the emergency room. (Tr. pp. 27-28)

On August 27, 2013, claimant was evaluated at the VA Medical Center for chronic cough. Claimant was assessed as having chronic bronchitis. He was treated with medication. (Ex. 4, pp. 1-3)

On September 25, 2013, claimant was seen at the VA emergency room. Claimant drove a truck to Illinois and his bronchitis was worse so he came to the emergency room. Claimant was treated with medication. (Ex. 4, pp. 4-6)

In an October 1, 2013 letter, Mohan Akella, M.D., with the VA Hospital, indicated claimant was off work from September 27, 2013 through October 11, 2013, secondary to a medical illness. On the same date, claimant saw Dr. Akella for follow up for bronchitis. Claimant was assessed as having bronchitis/COPD. Claimant was treated with medication. (Ex. 4, pp. 9-11)

On October 29, 2013, claimant was evaluated by Judith Nayeri, D.O., with Concentra. Claimant indicated he had bronchial symptoms from another driver smoking in the truck that he drove. Claimant indicated bronchial problems since June 2013. Dr. Nayeri opined claimant's condition was not work related. Claimant was returned to work on October 29, 2013. (Ex. A)

On November 6, 2013, claimant was evaluated by William Hutchison, M.D., a pulmonologist. Claimant indicated he had fits of coughing, and a hard time breathing, after driving in the cab where another driver had smoked. Claimant indicated he began wheezing in June 2013 when he began driving on the east coast with another trucker who smoked in the cab. (Ex. 4, p. 18)

Claimant noted he had difficulty walking since June 2013. Smoke and dust affected his breathing. Claimant was assessed as having possible asthma. He was treated with medications, including prednisone. (Ex. 4, pp. 19-22)

In a December 18, 2013 letter, Dr. Hutchison indicated claimant had asthma. He opined claimant had occupational asthma caused by driving in trucks driven by other drivers who smoke. (Ex. 2)

Claimant returned to Dr. Hutchison in follow up on January 23, 2014. He was assessed as having occupational asthma. Claimant was given a script for prednisone. Symptom triggers included dust, mold, and smoke. (Ex. 4, pp. 27-28)

On May 9, 2014, claimant was evaluated by Miles Sheffer, M.D., at the VA Hospital. Claimant indicated he was off prednisone for two to three months without worsening symptoms. Claimant indicated coughing spells with near syncope. Dr. Sheffer believed claimant had Chronic Obstructive Pulmonary Disease (COPD), rather than asthma. Claimant was kept on a nebulizer and prednisone. (Ex. 4, pp. 38-43)

On September 10, 2014, claimant returned in follow up with Dr. Sheffer. Claimant was again assessed as having COPD. Claimant was taking 40-45 mg of prednisone daily. Dr. Sheffer told claimant he could not live on prednisone the rest of his life. (Ex. 4, pp. 57-62) An exam by Dr. Sheffer on November 20, 2014 found claimant was doing well on 15 mg of prednisone per day. (Ex. 4, p. 74)

On April 23, 2015, claimant was evaluated by Stephen McGowan, M.D. Claimant attributed his breathing difficulty to environmental smoke exposure from driving in truck cabs where other drivers had smoked. Claimant's symptoms had improved, but not resolved, with a use of a bronchodilator and prednisone. Claimant's symptoms had not improved after exposure ended. Dr. McGowan assessed claimant as having moderate persistent asthma. (Ex. 4, pp. 84-88)

Claimant testified that following the April of 2015 exam, he was taken off prednisone in June of 2015 in order to perform additional testing.

In a June 10, 2015 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical examination (IME). Claimant indicated he began to notice symptoms in approximately June of 2013. At that time, he was working on the east coast. The day driver of the cab claimant used smoked in the truck. When claimant returned to Iowa, he again drove in a cab where the day time driver smoked. Claimant still had coughing fits that caused syncope. Claimant indicated difficulty with walking more than 60 feet due to shortness of breath. He indicated difficulty every day with coughing and catching his breath. (Ex. 1, pp. 1-11)

Dr. Bansal opined claimant had occupational asthma caused by driving a cab that had tobacco fumes. He indicated there was a wealth of medical literature supporting the association of second hand smoke and occupational asthma. Based on that literature, and the temporal onset of symptoms, he opined claimant's occupational asthma was caused by being in a truck cab with tobacco fumes. Based on the AMA Guides to the Evaluation of Permanent Impairment, Dr. Bansal found claimant had a 10 percent permanent impairment to the body as a whole. He limited claimant to walking 10 minutes at a time and to avoid stairs and hills. Claimant could only work in an environment free of air contaminants. (Ex. 1, pp. 11-14)

In early July of 2015, claimant had severe coughing that led to him passing out and falling. Claimant was treated at the Des Moines VA Hospital on July 3, 2015 He was assessed as having exacerbation of problems that were worsening since steroids

were stopped. (Ex. 4, pp. 89-92) Claimant was assessed by Maya Johnston, M.D., as having chronic asthma with exacerbation. (Ex. 4, p. 101)

In a July 8, 2015 letter, Dr. Johnson opined claimant suffered from severe asthma. Claimant had secondary problems due to steroids. She opined claimant was permanently disabled and could not return to gainful employment. (Ex. 3, p. 1)

On October 28, 2015, claimant was evaluated by Fredric Gerr, M.D., at the University of Iowa Hospitals and Clinics (UIHC). Dr. Gerr gave his opinions of claimant's condition following an IME. Dr. Gerr is a professor of occupational and environmental health in pulmonary and occupational medicine. (Ex. B, p. 13) Claimant indicated he began to feel ill in May or June 2013. Claimant had worsening shortness of breath in August 2013. Claimant indicated his illness was stable. At the time of the exam, claimant was taking 65 mg of prednisone per day. Claimant could walk 50 feet or climb one flight of stairs slowly. Claimant indicated chlorine, ash, and cigarette smoke made his symptoms worse. (Ex. B, pp. 4-9)

Claimant indicated he had a wood burning fireplace. Claimant also attended campfires. He had no trouble breathing around the fireplace or the campfires. (Ex. B, p. 5)

Dr. Gerr opined, it was unlikely claimant's employment with Jacobson was the cause of his pulmonary illness. Dr. Gerr agreed with Dr. Sheffer that claimant had COPD with a partial reversibility following use of bronchial dilators. Dr. Gerr opined claimant had COPD with an asthmatic component. Dr. Gerr articulated claimant's exposure as third-hand smoke and not second-hand smoke. Third-hand smoke is residual tobacco smoke remaining after a cigarette is extinguished. Second-hand smoke is actual smoke from burning tobacco products such as cigarettes, cigars, or pipes. (Ex. B, p. 10)

Dr. Gerr indicated there were no published peer reviews establishing causation between third-hand smoke and the development of asthma or COPD in adults. In addition, because claimant continued to attend campfires and used a wood burning fire place in his home with no triggering of symptoms, it is unlikely claimant was sensitized to generic smoke exposure. Dr. Gerr opined claimant's condition is occupational asthma with latency. This type of asthma improves when a person is not exposed to the cause of symptoms. Claimant's condition never improved but only got worse. (Ex. B, pp. 10-11)

In a January 4, 2016 report, Carma Mitchell, M.S., gave her opinions of claimant's vocational opportunities following evaluation of claimant. Based on his limitations, Ms. Mitchell did not believe claimant would be able to return to any of his past work, or would be able to return to any full time work on a competitive basis. She found claimant had lost access to 100 percent of the jobs he had access to prior to his work injury.

In a January 29, 2016 report, James Carroll, M.Ed., CRC, gave his opinions of claimant's vocational opportunities. Using Dr. Bansal's restrictions, Mr. Carroll found that claimant had a 94 percent loss of employability, and a 22-36 percent loss of earning capacity. Even given Dr. Bansal's restrictions, claimant could still perform sedentary indoor jobs. (Ex. D)

Claimant testified he has side effects of taking prednisone long term. They include shaking, weight gain, deteriorating bone density, blotching skin, and shaking of his hands and legs. Claimant said he uses a cane for balance due to prednisone. He said he also still has coughing and breathing problems. Claimant said his coughing has gotten worse since leaving Jacobson.

Claimant testified he believes the smell of smoke in the cab was the triggering event that caused his pulmonary problems. He testified that over his years as a truck driver, he has been exposed to fumes, and been in cabs where other people have smoked.

Claimant testified his DOT license has been downgraded and limited to intra-state driving. Claimant testified he can do a little vacuuming and can push a lawn mower for about 20 minutes. He said he can no longer shovel snow.

Claimant testified that because of these limitations, he does not believe he can perform any of his prior jobs.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury 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 contends he developed occupational asthma or COPD from the exposure from cigarette fumes in different truck cabs. Claimant testified his symptoms began between March and June 2013 (Tr. 67, Ex. E, pp. 2-3) He also testified he began to notice a cough when he worked on the east coast in June 2013, but the fumes in the cab at that time were not overwhelming. (Tr. p. 22) He also testified that he first noticed symptoms in June and July 2013 when he drove a route from Iowa to Knoxville, Illinois. During that period of time, claimant drove a truck where another driver was a heavy smoker. (Tr. pp. 66-67)

A number of experts have given opinions regarding the causation to tobacco fumes with claimant's difficulty coughing and his pulmonary illness.

Dr. Hutchison is a pulmonary specialist. He treated claimant from approximately November 2013 through March 2014. Dr. Hutchison assessed claimant as having occupational asthma. He opined claimant's asthma was caused by claimant breathing smoke fumes from truckers who smoked in cabs that claimant drove. (Ex. 2; Ex. 4, pp. 15-33)

Dr. Bansal evaluated claimant on one occasion for an IME. He also assessed claimant as having occupational asthma. Dr. Bansal opined claimant developed a pulmonary condition as a result of exposure to second-hand smoke fumes from driving a truck used by a smoker. (Ex. 1, pp. 12-14)

Dr. Nayeri evaluated claimant once and found claimant's respiratory problems were not work related. There is little analysis why Dr. Nayeri found claimant's condition was not work related. (Ex. A)

Dr. Gerr evaluated claimant on one occasion for an IME. Dr. Gerr is a professor in pulmonary and occupational medicine. He is also a director of an occupational medicine training program at the UIHC. Dr. Gerr assessed claimant as having COPD, (a chronic condition), along with a latent asthma (a reversible condition). Dr. Gerr did not find it likely claimant's employment with Jacobson caused or contributed to claimant's chronic respiratory illness. (Ex. B)

Dr. Gerr's opinion is based on several rationale. First, claimant's exposure to tobacco fumes at Jacobson is third-hand smoke, not second-hand smoke. Third-hand smoke is defined as residual fumes remaining after a cigarette is extinguished. Dr. Gerr, who oversees a teaching program at the UIHC, indicated that there were no peer-research articles establishing a relationship between third-hand smoke and the development of pulmonary diseases in adults. (Ex. B, p. 10)

Claimant suggests that Dr. Gerr's use of the term "third-hand smoke" is an attempt to confuse the issue of causation. (Claimant's Post Hearing Brief, p. 6)

However, on-line resources support Dr. Gerr's use of the term "third-hand smoke." According to the Mayo Clinic's on-line resources, third-hand smoke is generally considered to be residual nicotine and other chemicals left on a variety of indoor surfaces by tobacco smoke. Third Hand Smoke: What Are The Dangers To Nonsmokers <http://www.mayoclinic.org/healthy-lifestyle/adult-health/expert-answers/third-hand-smoke/faq-20057791>

See also Scientific American, What Is Third hand Smoke, <http://www.scientificamerican.com/article/what-is-third-hand-smoke/> and Thirdhand Smoke: A Select Bibliography of Recent Studies from the Tobacco Control Legal Consortium. <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-thirdhand-smoke-bibliography-2013.pdf>

In his opinions supporting causation, Dr. Bansal makes reference to several studies that purport to support his opinion that smoke residue and fumes in the cabs claimant drove caused his pulmonary disease. However, several of those references refer to second-hand smoke and not third-hand smoke. See Wakefield M Association Between Exposure To Workplace Secondhand Smoke And Reported Respiratory And Sensory Symptoms, Journal of Occupational and Environmental Medicine, 2003 June; 45(6)(detailing exposure of cigarette smoke from smoking employees by non-smoking coworkers); Leuenberger P, Passive Smoking Exposure In Adults And Chronic Respiratory Symptoms, American Journal of Respiratory and Critical Care Medicine, Volume 150, Issue 5 (November 1994)(detrimental effects regarding inhaling second hand tobacco smoke). (Ex 1, p. 12)

Dr. Gerr also noted claimant had asthma with latency, and his sensitivity to tobacco smoke fumes developed over time. He noted that symptoms, of this type of asthma, improve when a person is no longer exposed to a causative agent. Claimant's symptoms never got better when he left Jacobson, and instead got worse. Based upon these factors, and others as described above, Dr. Gerr opined that claimant's employment at Jacobson did not cause or contribute to his respiratory illness.

Claimant offered no rebuttal to Dr. Gerr's opinions.

Neither Dr. Bansal or Dr. Hutchison, or any of the experts rebutted Dr. Gerr's opinions regarding causation. For this reason, it is found that the opinions of Dr. Gerr regarding causation were found more convincing than those of Dr. Bansal or Dr. Hutchison.

In addition, as noted above, it is a bit unclear from claimant's testimony when claimant's respiratory injury actually manifested itself. As noted above, claimant testified his symptoms began between March and June 2013. (Tr. pp. 67; Ex. E, pp. 2-3) He also testified he began to notice a cough when he worked on the east coast for Jacobson in June 2013, but those fumes were not overwhelming. (Tr. p. 22) He testified he first noticed his symptoms in June or July 2013 when he drove a route from Iowa to Knoxville, Illinois. (Tr. pp. 66-67) While this ambiguity is not a decisive factor in this case, it does make finding in claimant's favor more difficult.

It is difficult to find a time, or even a period of time, when claimant's disease manifested itself. Dr. Gerr opined that claimant's case is one of third-hand smoke. According to Dr. Gerr, there is no research causally connecting respiratory illnesses in adults with third-hand smoke. Dr. Gerr opines the characteristics of claimant's respiratory illness indicate claimant's condition should improve once claimant stopped driving a truck cab that had cigarette smoke fumes. Claimant's condition did not improve, but actually worsened. The causation opinions of Dr. Bansal and Dr. Hutchison are found less convincing than the opinions of Dr. Gerr. Based on these facts, claimant has failed to carry his burden of proof his injury arose out of and in the course of employment.

I'm empathetic to claimant's situation. I believe he has a respiratory illness. It is also clear from the record that his long-term use of prednisone has detrimental effect on his health. However, issues regarding causation raised by Dr. Gerr in his October 2015 report cannot be ignored. Claimant does have the burden of proof to prove his injury arose out of and in the course of employment. While it is difficult to not find in claimant's favor in this case, Dr. Gerr's opinions were not rebutted. As such, claimant has failed to carry his burden of proof his injury arose out of and in the course of employment for Jacobson.

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

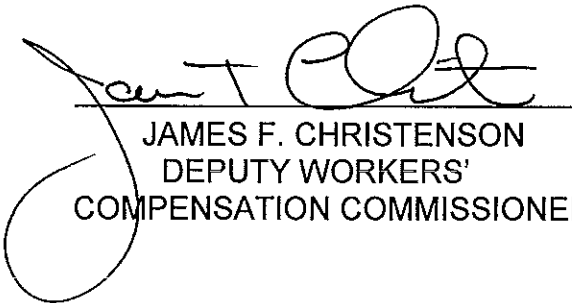
ORDER

THEREFORE IT IS ORDERED:

That claimant shall taking nothing from these proceedings.

That each party shall pay its own costs.

Signed and filed this 26th day of May, 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.