BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

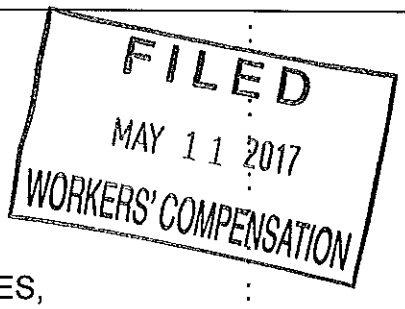
KIRK LEE,

Claimant,

vs.

FLEXSTEEL INDUSTRIES,

Employer,
Self-Insured,
Defendant.



File No. 5055232

ARBITRATION

DECISION

Head Note Nos.: 1108, 1803, 2502

STATEMENT OF THE CASE

Kirk Lee, claimant, filed a petition in arbitration seeking workers' compensation benefits against Flexsteel Industries, a self-insured employer, for an accepted work injury that occurred on March 21, 2014.

The case was heard on January 19, 2017, and considered fully submitted on February 9, 2017, upon the simultaneous filing of briefs.

The record consists of the testimony of the claimant, Claimant's Exhibits 1-9, Defendant's Exhibits A-M.

Dr. Hines' report in Exhibit 10 was excluded based on an issue of timeliness. Dr. Hines had not been designated in a timely fashion and the report was not served until on or about December 29, 2016. Claimant explained that Dr. Hines had been ill and December 29, 2016, was the earliest that the report could be sent.

Excluding evidence is not an easy decision; however, rules exist for a reason and if there are no consequences for disregarded rules then there is no reason to have the rules in the first place. In this case, two rules were disregarded. First, claimant did not designate the expert in a timely fashion, either 120 days before hearing or 60 days before hearing in case of a rebuttal. 876 IAC 4.19(3)(b). Dr. Hines was designated on December 29, 2016, 21 days before the hearing. Second, the claimant did not provide a report within 30 days of the hearing as mandated by the hearing report. Defendant did not have time to prepare a defense to the designation of Dr. Hines or his report. Therefore, because of the prejudice, the evidence is excluded.

At the end of the hearing, Dr. Hines' report was offered in rebuttal. During the hearing and after a review of the transcript, the timeliness issue was not cured. Evidence that was to be used in the case in chief does not become rebuttal evidence merely because it is offered at the end of the defendant's case-in-chief. Exhibit 10 remains excluded.

ISSUES

Whether the work injury proximately caused claimant's alleged permanent back disability;

If so, the extent of the claimant's entitlement to permanent disability benefits;

Whether claimant is entitled to reimbursement of his independent medical examination pursuant to Iowa code section 85.39.

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.

The parties agree the claimant sustained a work-related injury on March 21, 2014, which arose out of and in the course of his employment. They dispute that this claimant sustained any permanent injury but agree that if a permanent disability is found, the disability is industrial in nature and that the commencement date for permanent partial disability benefits would be October 1, 2014.

At the time of the injury the claimant's gross earnings were $1,078.85 per week. He was married and entitled to two exemptions. Based on those foregoing numbers the parties believe the weekly benefit rate to be $677.05.

FINDINGS OF FACT

At the time of the hearing claimant was a 60-year-old person. At the time of his injury, he was a shipping supervisor overseeing two loading docks. Part of his job includes negotiating rates for shipping processes. He does not do any manual labor associated with this position.

His past surgical history includes an appendectomy, hernia, ankle surgery, arthroscopy on both knees, shoulder arthroscopy in 2007 and a back surgery in 2014.

Claimant's past medical history includes treatment for back problems. (Exhibit D, page 1) MRIs in 2005 indicated mild degenerative wear at the L4 L5 level as well as mild spinal stenosis. (Ex. D, p. 5) His back pain was treated on and off for several years, worsening in 2008 when he had pain in both legs. (Ex. D, p. 10) He was given an injection and painkillers. (Ex. D, p. 11)

He was involved in a semi-serious motor vehicle collision in 2012. (Ex. D, p. 14; Ex. H) As a result of that, he suffered some increased neck pain. He returned to Dr. Field on June 4, 2013 with increased back pain. (Ex. D, p. 15) Dr. Field recommended that new MRI studies be performed. (Ex. D, p. 15)

On March 21, 2014 claimant slipped and fell on ice at work and complained of significant and lingering back problems. He was initially sent to Medical Associates where he was seen by Julie Muenster, ARNP. (Ex. F, p. 1) X-rays showed moderate midlevel lumbar degenerative change. (Ex. F, p. 3) Ms. Muenster diagnosed claimant with lumbago and noted that claimant had tenderness over the lower left lumbar region and over the left lateral hip region. (Ex. F, p. 1) He exhibited almost full range of motion, but it was done slowly and with pain. (Ex. F, p. 1) She did not impose any restrictions as claimant expressed belief he could do his work as a supervisor despite the injury. (Ex. F, p. 1)

Claimant returned to work, but despite limited manual labor, his back pain increased and he returned to Medical Associates on March 26, 2014. (Ex. F, p. 6) He moved slowly throughout the exam and had difficulty lying on his back. His pain had no relief and the pain may have even increased in intensity. (Ex. 4, p. 6)

A referral is made to Dr. Field. Claimant had been a patient of Dr. Field prior to the work injury. (Ex. D, pp 1-5) Claimant had expressed increased back pain in 2013, which was treated with a Medrol Dosepack. (Ex. D, p. 15) Dr. Field ordered a new MRI study which revealed high grade stenosis at level L4-L5. (Ex. D, p. 20) Dr. Field suggested a spinal decompression procedure. (Ex. D, p. 20) The surgery took place on May 14, 2014. (Ex. D, p. 21) His recovery was complicated by an arthritic right ankle. (Ex. D, p. 22) Claimant was kept on restricted hours as well as continued therapy. (Ex. D, p. 25) On November 17, 2014, claimant returned for follow-up and Dr. Field noted that claimant was still in therapy, but was improving. (Ex. D, p. 29)

Claimant then had a gap in treatment. Claimant explains this by the fact he returned to full duty work and while working he developed pain in his hip and left leg area.

He returned on March 15, 2016, with renewed complaints. X-rays showed anterior calcification at the L4 – L5 and L3 – L4 disc levels which Dr. Field felt was progressive and new. (Ex. D, p. 30) (Ex. H, p. 23)

During that visit claimant complained that his back pain had worsened and he felt weakness in his legs. (Ex. D, p. 31) He exhibited guarding but was able to heel and toe walk without difficulty and had no limited straight leg raising. Patrick tests were positive for soreness. In the medical record of Dr. Field, there is a notation that the claimant had tried to change the brakes on his car and that his back pain had worsened after that task. (Ex. D, p. 31)

Dr. Field was concerned that claimant was suffering from inflammatory arthritis in addition to his known spinal stenosis. (Ex. D, p. 32) Dr. Field was also concerned that claimant was suffering piriformis irritation along the sciatic nerve and considered possible injection therapy.

He returned on March 28, 2016 for review of the MRI, which did not reveal any significant pathology at all for L4-L5. The pain in the buttock area and piriformis area of

the hip responded by 50 percent to therapy and the one epidural steroid injection at the hospital. (Ex. 4, p. 23)

He returned to Dr. Field on April 25, 2016 for recurrent pain down the left leg. He had undergone a second epidural injection on April 13 which helped considerably, though the claimant had continued to have some pain. (Ex. 4, p. 21) He had requested 1/3 injection and while Dr. Field felt that it was feasible, he could not have it at this time. (Ex. 4, p. 21)

On May 23, 2016, claimant was sent to Chad D. Abernathey, M.D., for an evaluation of claimant's surgical options. (Ex. 5) Dr. Abernathey concluded that the claimant presented with a recent history of left sciatica possibly consistent with a small left L4-5 amino disc extrusion. The clinical signs were supported by the MRI studies. (Ex. 5, p. 26) Dr. Abernathey suggested surgical intervention, which carried only a 50-50 chance of success. (Ex. 5, p. 26) The claimant declined surgery at this time. (Ex. 5, p. 27)

On August 3, 2016, claimant returned to Dr. Abernathey with persistent low back pain and left lower extremity weakness. Because the neurologic function was intact and the MRI did not demonstrate significant neural compromise, conservative treatment was recommended. (Ex. B, p. 5) Dr. Abernathey advised claimant to return if there was any change in his symptoms.

Dr. Field signed a letter prepared for him by the defendant's counsel agreeing that within a reasonable degree of medical certainty the claimant's slip and fall at work did not materially cause or result in a permanent aggravation, worsening or acceleration of the claimant's pre-existing back condition nor was the March 21, 2014 work injury a material causal contributing factor for the surgery performed on May 14, 2014. (Ex. 7, p. 36)

Defendant also obtained an IME from Dr. Abernathey on December 14, 2016. (Ex. A, p. 1) Dr. Abernathey agreed with Dr. Field that claimant's work injury did not cause or permanently aggravate claimant's pre-existing condition. (Ex. A, p. 1)

Claimant maintains that while he did have past medical problems involving his back, the pain post his fall at work was different and worse. Currently he has a few self-imposed restrictions including no lifting more than 15-20 pounds and activities he fears would worsen his back condition.

He makes more money today than he did in 2014 due to annual raises. His duties have not changed. He has served as a shipping manager since the late 1980s. He has not looked for other work, but has been approached by other employers.

CONCLUSIONS OF LAW

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).

In this case, the experts agree that claimant's long-term symptomatology relates to a pre-existing condition. The medical records support this. Claimant received treatment throughout 2014 and then returned to work. He did not have any additional treatment to his back after surgery in 2015[1] and March 15, 2016. He then returned to Dr. Field after attempting to change the brakes on his car. It was after that task that claimant's pain returned.

Claimant was receiving treatment for his back in 2013 with Dr. Field. Dr. Field recommended new MRI studies be performed in June 2013 and that injection therapy might be useful. Dr. Field has been treating claimant for his low back since 2002. The pain would wax and wane. In 2005, MRIs showed degenerative wear at the L4-5 level with stenosis secondary to facet arthropathy and mild foraminal narrowing. He had

[1] No medical records are in evidence pertaining to the 2015 surgery and post-surgical recovery.

bilateral radicular pain in 2008 along with numbness and weakness in the right leg appearing in 2013.

Dr. Field then treated claimant throughout 2014 and concluded that the work fall on March 21, 2014, did not materially cause and/or result in a permanent aggravation nor was it the cause of the surgery performed on May 14, 2015. Dr. Field based this conclusion on his own long-term treatment of claimant along with the pre- and post-injury lumbar MRI studies. Dr. Abernathey reached the same conclusion.

Claimant testified that the low back pain post the injury was different in intensity and feel but medical records dispute that. Julie Muenster documented that the claimant felt that his symptoms on March 26, 2014, were the same but more intense.

Accordingly, the claimant did not carry his burden in proving a causal connection between his work injury and the ongoing back complaints.

The only other issue remaining is whether claimant is entitled to a reimbursement of an 85.39 examination of Dr. Hines. Section 85.39 does not require that a report or examination be used at hearing or that it be done within a defined time before hearing. Defendant asked for and received opinion letters from two different experts: Dr. Field on February 26, 2016, and Dr. Abernathey on December 19, 2016. Dr. Field opined that claimant's current condition was unrelated to the work injury. That was, in essence, a finding of no permanency. A rating of no impairment is a rating for section 85.39 purposes. Vaughn v. Iowa Power, Inc., File No. 925283 (Arbitration August 5, 1992). Claimant obtained a report from Dr. Hines on December 9, 2016. Therefore, the elements of 85.39 are satisfied. Pursuant to Des Moines Area Regional Transit Authority v. Young, claimant is entitled to be reimbursed for the examination portion of Dr. Hines' bill. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 at 844-847 (Iowa 2015).

ORDER

THEREFORE IT IS ORDERED:

Claimant shall take nothing but for the examination portion of Dr. Hines' fee.

Each party shall pay their own costs.

Signed and filed this 11th day of May, 2017.

JENNIFER S. GERRISH-LAMPE
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.