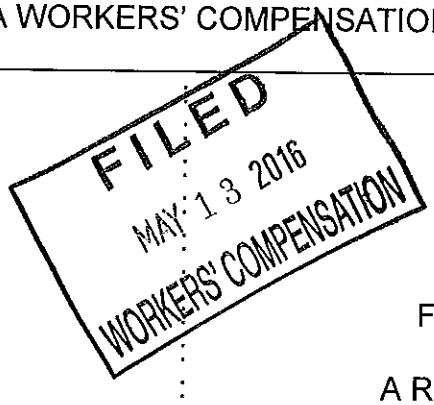
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JERAMY HANSEN,

Claimant,

vs.

KOUNKEL TRUCKING, LLC,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 5048494

ARBITRATION

DECISION

Head Note No.:1402.30

STATEMENT OF THE CASE

Claimant, Jeramy Hansen, filed a petition in arbitration seeking workers' compensation benefits from Kounkel Trucking, LLC, (Kounkel) employer, and Great West Casualty Company, insurer, both as defendants. This case was heard in Des Moines on January 19, 2016 with a final submission date of February 19, 2016.

The record in this case consists of claimant's exhibits 1-9 and 13-15; defendants' exhibits A through L; and the testimony of claimant and Melissa Hansen, claimant's wife.

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 apportionment is applicable under Iowa Code section 85.34(7)(b).

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

FINDINGS OF FACT

Claimant was 38 years old at the time of hearing. Claimant has a GED. Claimant took an online class in diesel technology from a community college. From 1996 through 2007 claimant worked primarily as a laborer. Beginning in 2007 claimant began working as a truck driver. Most of claimant's employment since 2007 has been as a truck driver. (Exhibit 14)

Claimant's medical history is relevant. In 2006 claimant had a lower back injury while employed with Gomaco. Medical records indicate claimant had a bulging disc at the L4-S1 levels. Claimant receives injections and physical therapy. (Ex. D, pages 56-60) The records indicate claimant's pain for the lower back condition was so severe claimant nearly fell. (Ex. D, p. 85) Claimant underwent a spine rehabilitation program. (Ex. D, p. 107) Claimant was found to have a 5 percent permanent impairment to the body as a whole. Claimant was limited to lifting 35-50 pounds based on a functional capacity evaluation (FCE). (Ex. D, p. 111; Ex. E)

On August 8, 2011 claimant was involved in a truck accident while working for Kounkel. Claimant had a shoulder injury and a post-concussive syndrome from the accident. Claimant was found, by Sunil Bansal, M.D., to have a 10 percent permanent impairment to the body as a whole due to the accident. (Ex. J, p. 302) Claimant settled that claim with Kounkel in a December 2014 agreement for settlement (AFS). Claimant was paid permanent partial disability benefits based upon an 11 percent loss of earning capacity. (Ex. J, pp. 296-297; Ex. K)

Claimant had a second motor vehicle accident while driving with Kounkel. On May 30, 2013 claimant was in Kansas when a car turned in front of him. Claimant said the truck he drove, in that accident, was too damaged to drive home. Claimant said he had occasional chiropractic treatment following the accident. He said he drove other trucks for Kounkel from June of 2013 through September of 2013.

Claimant testified that approximately September of 2013 he was returned to driving the truck that was involved in the May 30, 2013 accident. Claimant said the truck was difficult to drive and the driver's seat felt like it had a bar pushing him in the lower back.

Claimant testified he told his employer at least on three occasions the seat was bad in his truck. Claimant said Kounkel did try to repair the seat once in December of 2013, but the repair was not successful.

Melissa Hansen testified she is claimant's wife. She said she rode with claimant on a truck driving run for the month of October 2013. She said the truck drove poorly.

She said the back of the passenger's seat was broken and there was a rattle behind the driver's seat.

Claimant said on December 15, 2013 he was driving all day and his left leg got stiff. He said when he woke up on December 16, 2013 he felt a sharp pain in his left hip and had difficulty walking. Claimant testified he told Derrick Kounkel his hip was bothering him, but he was unsure if it was caused by sleeping. Claimant testified he did not tell Kounkel, at that time, his pain was work related.

Claimant said he returned from his road trip on approximately December 20, 2013. He said he went to the emergency room on Sunday, December 22, 2013.

Claimant testified in deposition he sent a text message to Kounkel, on December 23, 2013, indicating his visit to the emergency room was not ". . . work comp or anything to [sic] with that. It was something on my own." (Ex. I, p. 280; Deposition p. 23)

Claimant testified after the emergency room visit, he saw his family doctor, Albert Veltri, M.D., for back and hip pain. He said Dr. Veltri recommended physical therapy and an MRI. He said at approximately the same time he told his employer about his continued back problems and treatment. He said, at that time, he still did not tell Kounkel his injury was work related.

Claimant testified in deposition, he told his employer, he did not think he was eligible for workers' compensation for his back problem given his prior back injuries. (Ex. I, p. 280; Depo. p. 23)

On December 22, 2013 claimant was evaluated at Horn Memorial Hospital. Claimant had complaints of lower back and hip pain. He was treated with medication. (Ex. 1, p. 5-10) Claimant was taken off work until December 29, 2013. (Ex. 1, p. 14)

On December 30, 2013 claimant was seen at Horn Hospital for physical therapy. He indicated he was sleeping in his truck on December 15, 2013 and woke up on December 16, 2013 and had increased back pain. Claimant was given home exercise for stretching. (Ex. 1, pp. 19-20)

On January 2, 2014 claimant underwent a lumbar MRI. It showed an L4-5 disc herniation with some compression on the L5 nerve root, and a disc protrusion at the L5-S1 levels. (Ex. 1, pp. 22-23)

On January 8, 2014 claimant was given a lumbar injection at the L4-5 levels. Claimant indicated his back pain occurred after waking up from sleeping in his truck. (Ex. 1, pp. 25-26)

On January 16, 2014 claimant was evaluated by H.R. Woodward, M.D. for back pain. Claimant noted, on a patient intake form, that his back pain began after sleeping, and his symptoms began on December 16, 2013. (Ex. H, pp. 143-146)

On January 21, 2014 claimant was evaluated by Dr. Woodward for back pain. Claimant noted back pain was noticeable after waking up. He complained of back pain for six months attributed to his seat in his truck. (Ex. H, p. 154)

On January 27, 2014 claimant underwent an L4-S1 laminectomy and disc excision. Surgery was performed by Dr. Woodward. (Ex. 3, pp. 5-6)

Claimant testified in hearing that on, or about, January 28, 2014, he believed his wife texted his employer indicating his back pain was work related. (Transcript p. 39)

Claimant was kept off of work after surgery. A May 7, 2014 note from Scott Haughawout, D.O., found claimant unable to return to work on May 7, 2014. (Ex. 3, pp. 9-22)

On April 16, 2014 claimant was evaluated by Dr. Haughawout. He said he had continued back pain. (Ex. 3, p. 20) An MRI, performed on May 7, 2014, found a disc protrusion at the L4-5 and L5-S1 levels. (Ex. 3, p. 25) A second surgery was discussed and chosen as a treatment option. (Ex. 3, pp. 32-33)

On June 18, 2014 claimant underwent a revision of the L5-S1 laminectomy, and surgery was performed again by Dr. Woodward. (Ex. 3, pp.38-39)

Claimant saw Dr. Woodward in followup on July 29, 2014. Claimant still had buttock pain and numbness in the mid-foot. Claimant was prescribed physical therapy and medication. (Ex. 3, pp. 42-45)

On October 2, 2014 claimant underwent a third surgery consisting of a two-level fusion at the L4-5 and L5-S1 levels. Surgery was performed by Dr. Woodward. (Ex. 3, pp. 59-63)

On December 30, 2014 claimant was seen by Dr. Woodward in followup. Claimant indicated excellent relief from pain. Claimant was returned to light duty with no lifting over 20 pounds. (Ex. 3, pp. 77-78, 86)

Claimant testified he contacted Kounkel when he was released by Dr. Woodward to do light duty. Claimant said Kounkel told him they only had full-time work.

Claimant was returned to full-duty work, as pain allows, on March 15, 2015. (Ex. 3, p. 9)

In a May 19, 2014 report, Dr. Bansal gave his opinions of claimant's condition following an IME. Claimant indicated in September of 2013 he was returned to a truck that had been involved in a May of 2013 accident. Claimant indicated there was a bar in the seat that poked in his back while driving, and the cab in the truck was very bouncy. Claimant indicated because of being poked in the back by the bar he developed back pain and left leg numbness. Claimant still had right leg numbness. (Ex. 5, pp. 1-13)

Claimant indicated he could lift 20-30 pounds occasionally. Claimant could sit for up to one hour and stand for ten minutes. Claimant had difficulty walking up stairs. (Ex. 5, pp. 13-14)

Dr. Bansal found claimant at maximum medical improvement (MMI) as of March 6, 2015. Dr. Bansal opined the faulty seat in claimant's truck was a significant contributing factor to claimant's need for a fusion and materially aggravated claimant's preexisting condition. (Ex. 5, pp. 16-17) Dr. Bansal, used the range of motion method in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He opined claimant had a 31 percent permanent impairment to the body as a whole. He limited claimant to lifting up to 30 pounds occasionally and no frequent bending, squatting or climbing. He also limited claimant to sitting up to one hour at a time. (Ex. 5, pp. 17-21)

In a December 3, 2015 letter, the Iowa Department of Human Services indicated that, to date, it had paid Medicare expenses for claimant's medical care of $61,870.64. (Ex. 8, p. 1)

At the time of hearing claimant was driving a truck for Ruan, and delivering countertops and doors. Claimant made deliveries to places like Lowe's and Home Depot. He said he does not load or unload on the job. He said he has been offered and taken, some longer jobs with Ruan. He said he has difficulty with driving longer jobs, as he can only sit for an hour or two at the most, at which point he needs to stop and stretch. Claimant said Ruan told him they would accommodate his situation and allow him to drive shorter hauling jobs.

Claimant testified he earns approximately $1,100.00 per week with Ruan. He said if he were allowed to drive longer jobs, he believes he would earn approximately $1,600.00 a week. He said he drives approximately 2,000-2,500 miles per week doing short runs for Ruan.

Claimant said since his surgery he has had lower back pain, stiffness and numbness in his right leg from the calf to the toes. He said his physical problems limit him in playing with his kids and doing farm work.

Claimant testified he does not believe he could return to work to any of his prior employers. He said Dr. Woodward had not given him any permanent restrictions.

Ms. Hansen testified claimant has difficulty sitting for long periods of time. She said claimant has difficulty sleeping in the sleeping berth of his truck. She said claimant is physically limited in doing household chores and playing with his children. She said claimant takes over-the-counter medication for pain. She said claimant changes his position due to back pain. She said claimant has to move or walk to relieve his back pain.

CONCLUSIONS OF LAW

The first issue to be determined is did claimant sustain an injury that arose out of and in the course of employment on December 16, 2013.

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 sustained an injury to his back caused by a bar in the seat of a truck he drove for Kounkel.

Claimant testified at hearing, he initially felt back pain after sleeping in the sleeping berth of his truck. He said he did not initially tell his employer the injury was work related. (Tr. pp. 35-36)

Claimant testified he did not tell his employer his back injury was work related when he went to the emergency room on December 22, 2013. (Tr. pp. 38-39)

Claimant testified, he texted his employer, that the injury was not work related on or about December 23, 2013. (Ex. I, p. 280; Depo. p. 23)

Records from Horn Hospital, indicate claimant said his back pain was caused by sleeping in his truck. (Ex. 1, pp. 19-20)

On January 8, 2016 claimant had a lumbar injection. At that time he told healthcare providers his back pain was caused by sleeping in his truck. (Ex. 1, p. 25)

On January 16, 2014, claimant was seen by Dr. Woodward for back pain. Claimant indicated back pain after sleeping. (Ex. H, pp. 143-146)

On January 21, 2014, claimant indicated, for the first time to a healthcare practitioner, his back pain was due to a truck seat. (Ex. I, p. 154)

On January 27, 2014 claimant underwent his first back surgery. (Ex. 3, pp. 5-6)

Claimant testified at hearing that on or about January 28, 2014 he believed his wife texted Kounkel his back pain was work related. (Tr. p. 39)

Dr. Bansal found the faulty seat in claimant's truck was a significant contributing factor to claimant's need for surgery. (Ex. 5, pp. 16-17) However, Dr. Bansal offers no rationale why, for one month after the date of injury, claimant indicated, to several different providers, his back pain was not work related. Dr. Bansal also does not offer any rationale why initial medical records refer to claimant's back pain being due to sleeping in the sleeper berth of his truck. Given these discrepancies, Dr. Bansal's opinion regarding causation is found not convincing.

Claimant testified he told his employer his back pain was initially not work related. Initial medical records indicate claimant's back injury was caused by sleeping in a truck cab. Claimant did not report his injury as work related to his employer until one month after the alleged date of injury, and only after he underwent his first back surgery. Dr. Bansal's opinion regarding causation is found not convincing. No other expert has opined claimant's back condition was caused or materially aggravated by a faulty truck seat. Given this record, claimant has failed to carry his burden of proof his injury arose out of and in the course of employment.

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 take nothing from these proceedings.

That both parties shall pay their own costs.

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

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Mary C. Hamilton
Attorney at Law
PO Box 188
Storm Lake, IA 50588
mary@hamiltonlawfirmpc.com

Timothy Clausen
Attorney at Law
Mayfair Center, Upper Level
4280 Sergeant Rd, Ste. 290
Sioux City, IA 51106
clausen@klasslaw.com

JFC/sam

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.