BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LAZARO VASQUEZ-DIAZ,

Claimant,

vs.

WELLS ENTERPRISES, INC.

Employer,
Self-Insured,
Defendant.

File Nos. 5053861, 5053862, 5056355

ARBITRATION

DECISION

Head Note Nos.: 1402.30, 2502, 2907

STATEMENT OF THE CASE

Lazaro Vasquez-Diaz, claimant, filed three petitions in arbitration and seeks workers' compensation benefits from defendant, Wells Enterprises, Inc., (Wells) as the self-insured employer. Hearing occurred before the undersigned on November 28, 2017, in Des Moines.

At the commencement of the hearing, claimant voluntarily dismissed File No. 5056355. Claimant's dismissal was verbally granted at the time of hearing. No findings of fact or conclusions of law will be made with respect to File No. 5056355.

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. 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 evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 20, and Defendants' Exhibits A through G.

Claimant testified on his own behalf and called Luis Guerrero to testify. Defendants called David Calhoun to testify. The evidentiary record closed at the end of the November 28, 2017 arbitration hearing.

However, counsel for the parties requested an opportunity to submit post-hearing briefs. Their request was granted. The parties filed their post-hearing briefs on December 22, 2017, at which time this case was considered fully submitted to the undersigned.

ISSUES

The disputed issues submitted for resolution include:

1. Whether claimant sustained an injury that arose out of and in the course of his employment with Wells Enterprises, Inc. on May 16, 2014 or May 18, 2014.

2. Whether claimant's asserted claims are barred for failure to give timely notice pursuant to Iowa Code section 85.23.

3. Whether either of the alleged injuries caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits.

4. Whether either of the alleged injuries caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

5. Whether claimant is entitled to an award of past medical expenses contained in Claimant's Exhibits 1 through 7.

6. Whether claimant is entitled to reimbursement of an independent medical evaluation fee pursuant to Iowa Code section 85.39.

7. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Lazaro Vasquez-Diaz is not certain of the actual date of his alleged work injury. However, he asserts that he injured his low back on either May 16, 2014 or May 18, 2014. Mr. Vasquez-Diaz testified that he went to work approximately one hour earlier than his scheduled shift because he was responsible for stacking and organizing cartons for the production area during the shift. Claimant testified that he was using a pallet jack that was loaded with a pallet of cartons.

Mr. Vasquez-Diaz testified that he was attempting to move the pallet. As he was attempting to turn a corner, claimant testified that he turned or twisted to look where he was going while pulling the pallet jack toward himself. As he did so, he felt something pop in his lower back and he felt immediate pain in his lower back. He stopped working for three to five minutes to let the symptoms subside. He then returned to work and performed his typical duties until his break time.

At break, claimant sat down. He testified that when he attempted to stand at the end of his break period, he experienced pain from his low back down his legs to his feet. Mr. Vasquez-Diaz testified that he went to use the restroom and was not able to get off the toilet without difficulties. Nevertheless, claimant testified that he returned to work after his break and attempted to perform his job duties. However, his symptoms were too significant and he had to leave the line.

Mr. Vasquez-Diaz testified that he reported the injury to the assistant operator, Luis Guerrero. Claimant also testified that he reported the injury to a supervisor, Rocky Schmitz, and filled out a written report in the supervisor's office. Following the completion of a written report, claimant was sent to the nurse's station. However, he testified that no nurse was present so he returned to work. The employer has no record of a written accident report being prepared on either May 16, 2014 or May 18, 2014.

Claimant returned to the nurse's station the day after his injury. He testified that he notified the nurse that he had back pain and that the nurse told him it was only sprained muscles. According to claimant's testimony, the nurse told him to take Aleve or Tylenol, use Icy Hot to assist the muscle sprain, and issued him an ice pack. However, claimant testified that he asked to be seen by a physician but the nurse would not schedule a doctor's appointment for claimant to be examined. Claimant further testified that the nurse told him he would be personally responsible for payment of any medical charges if he scheduled and attempted a medical appointment on his own.

Mr. Vasquez-Diaz testified that he presented to the nurse's station three times for treatment of his low back symptoms in May 2014. Claimant testified that the first time he saw the nurse, she told him to use over-the-counter medications. During the second visit to the nurse's station, claimant testified the nurse gave him an ice pack. At the third visit, he testified that the nurse told him to use hot compresses and a salt bath for his symptoms. Although the nurses at Wells keep formal treatment notes, the company's nursing notes do not contain any entries for claimant to be seen or receive treatment on May 17, 2014 or May 19, 2014, which would represent the day after either of the alleged injury dates.

Claimant offered an affidavit from Luis Guerrero and called him to testify live. Mr. Guerrero testified that he was an assistant operator and in charge of the line where claimant was working in May 2014. He testified that Rocky Schmitz was the supervisor in charge of claimant's line as the supervisor on the alleged dates of injury. He also testified that claimant told him that he was injured in May 2014.

Mr. Guerrero testified that he has recollection of claimant going to the nurse's station a few times for his low back symptoms. He also testified that claimant missed work several times due to the low back injury.

On cross-examination, Mr. Guerrero conceded that he does not know the date of the claimant's alleged injury. Mr. Guerrero is confident that the nurse's notes at Wells would reflect that claimant reported low back complaints. Of course, Wells contends that it has no nurse's notes for the May 2014 timeframe.

Interestingly, Mr. Guerrero also noted in his affidavit (Claimant's Exhibit 18) that claimant also injured his neck while working at Wells. At trial, Mr. Guerrero testified that he does not know when claimant hurt his neck. Despite affirmatively testifying on claimant's behalf in an affidavit and at trial that he is aware claimant injured his neck while working at Wells, Mr. Guerrero was not aware that claimant has dismissed the neck claim and is not pursuing that at this time.

Mr. Guerrero testified that he is not friends with claimant. However, he did ride with the claimant to the trial.

Mr. Guerrero was terminated by Wells in September or October 2015. Mr. Guerrero requested leave time to attend a funeral. The leave was not approved, but Mr. Guerrero attended the funeral in spite of the fact that his leave was denied. He missed two or three days as a result of the funeral and the company terminated his employment. During his testimony pertaining to this issue, Mr. Guerrero appeared to be angry with Wells about the circumstances surrounding his termination.

Claimant continued working at Wells after the alleged May 2014 low back injury. He asserted that he sustained a subsequent neck and/or shoulder injury in July 2014. Again, he testified that he presented to the nurse's station for these symptoms. Wells was able to identify and produced nursing records, reflecting that claimant was evaluated at the nurse's station four times between July 25, 2014 and September 11, 2014. Those nurse's notes reflect that claimant reported upper back, neck, and shoulder symptoms. (Joint Ex. 1) By September 11, 2014, the nurse's note reflects that claimant reported he "feels better has no pain." (Joint Ex. 1, page 2) Claimant had no explanation on cross-examination why those nurse's notes do not reflect low back or leg symptoms.

Mr. Vasquez-Diaz continued working for Wells after the May and July 2014 incidents. He attempted to bid into four other positions with Wells, but was rejected. (Claimant's Ex. 14) He voluntarily terminated his employment with Wells in February 2015. (Claimant's testimony)

After leaving Wells, Mr. Vasquez-Diaz obtained employment in the construction industry doing concrete work. He worked for more than one construction company after leaving Wells. He also obtained employment working for Murphy Insulation performing insulation installation in residential and hotel settings. Claimant testified he could not perform these jobs because they were too physically demanding and increased his symptoms.

Claimant then obtained employment with Dean Foods. Claimant worked in an area that required clean up when a milk machine filling gallon containers would break. Claimant was responsible for recycling wasted plastic containers. He testified that the most he lifted was 11 pounds. He worked at Deans from July 2015 through January 2016. Due to his low back symptoms, claimant testified he was unable to continue working for Dean Foods. He has not worked since January 2016.

Although he testified he injured his back in May 2014, Mr. Vasquez-Diaz did not obtain any medical care for his low back or leg symptoms until November 2015. He testified that the company nurse would not schedule an evaluation and told him that he would have to pay for any treatment he obtained on his own. Certainly, if accepted as true, this explanation would explain why claimant did not seek treatment between May 2014 and his voluntary termination in February 2015. However, claimant worked heavy labor jobs in construction and subsequently worked at Dean Foods. He certainly could have sought medical care after leaving Wells, as it was clear to him at that time that Wells was not going to provide care through the company. Yet, he delayed another eight months to even seek care.

Then, in November 2015, claimant obtained a referral from a friend, requested a referral from his personal physician, and sought evaluation and care through a neurologist, Leonel Herrera, M.D. Dr. Herrera's notes demonstrate that he first evaluated claimant on November 12, 2015. Dr. Herrera's notes from that date indicate that claimant's symptoms began in 2014 while pulling pallets with a forklift. Claimant apparently reported low back pain and numbness in his legs to Dr. Herrera. (Joint Ex. 2, pp. 2-3) Dr. Herrera had concerns about a herniated disk in claimant's lumbar spine and ordered an MRI. (Joint Ex. 2, p. 5)

Dr. Herrera re-evaluated claimant on December 7, 2015 and confirmed that the MRI demonstrated a large herniated disc at the L1-2 level. Although claimant had medical coverage through Title XIX, he elected to forego any surgical consultation until 2016, after he obtained private insurance through Dean Foods. (Joint Ex. 2, p. 6) Dr. Herrera did refer claimant for neurosurgical evaluation. (Joint Ex. 2, p. 8)

Matthew Johnson, M.D., evaluated claimant on March 4, 2016. Dr. Johnson noted a history from claimant that suggests he had back pain for a year, but that his pain was substantially worsened since December 2015. (Joint Ex. 4, p. 1) Dr. Johnson diagnosed claimant with a herniated disc at L1-2 and recommended surgical intervention. (Joint Ex. 4, pp. 2-3)

Dr. Johnson took claimant to surgery on March 31, 2016 and performed a bilateral L1-2 laminectomy, bilateral medial facetectomies and bilateral L1-2 diskectomy. (Joint Ex. 4, p. 4) Unfortunately, the initial surgery did not entirely relieve claimant's symptoms and Dr. Johnson took claimant back to surgery on March 27, 2012. Dr. Johnson performed a second L1-2 laminectomy as well as a L1-2 spinal fusion on March 27, 2012. (Joint Ex. 4, p. 21)

Defendants inquired of Dr. Johnson about whether claimant's low back injury and condition was causally related to his employment activities at Wells. Dr. Johnson responded to this inquiry on October 12, 2016, indicating that he cannot attribute claimant's employment duties at Wells as being a substantial or significant contributing factor resulting in claimant's low back condition. (Joint Ex. 4, p. 20)

Claimant's counsel inquired of Dr. Herrera about the cause of claimant's low back condition. Similar to Dr. Johnson, Dr. Herrera opined, "[i]n regards to identifying whether it is my opinion that Mr. Diaz's symptoms and injury are related to an injury that occurred on May 16 or 18, 2014, I cannot determine this to a reasonable degree of medical certainty. The date of this herniated disc is unknown." (Joint Ex. 2, p. 7)

Dr. Herrera also noted that claimant has reported significant new symptoms after his initial evaluation, suggestive of a stroke. (Joint Ex. 2, p. 7) Dr. Herrera also noted, "The findings in the lumbar spine of the herniated disc at L1-2 and the bulging disc at C3-4 do not seem to correlate with his symptoms. (Joint Ex. 2, p. 8)

Mr. Vasquez-Diaz sought an independent medical evaluation, performed by Sunil Bansal, M.D. Dr. Bansal evaluated claimant on June 28, 2017. Dr. Bansal ultimately concludes that claimant's work activities of pulling a heavy pallet jack are a substantial cause, of significant aggravating factor, of his low back injuries. Specifically, Dr. Bansal opined, "The mechanism of pulling a heavy pallet and twisting his back is a significant aggravating factor for his L2-1 herniation, which unfortunately reherniated and necessitated a fusion." (Claimant's Ex. 19, p. 10)

However, Dr. Bansal does note and concede that claimant presented "with some complicating factors regarding his causational analysis, essentially not seeking medical care until November 2015. Further complicating still is that he resigned from Wells, and started working at Dean Foods in February 2015." (Claimant's Ex. 19, p. 10) Dr. Bansal ultimately rectifies, or eliminates his concerns, by accepting claimant's subjective explanation in which claimant asserted to Dr. Bansal that "he did indeed report his back pain shortly after his May 2014 injury." (Claimant's Ex. 19, p. 11)

Having considered each of the three causation medical opinions, I find the opinion offered by Dr. Herrera to be most convincing and credible. Mr. Vasquez-Diaz selected Dr. Herrera as his treating physician on referral from a friend. Dr. Herrera's causation opinion is in response to an inquiry from claimant's attorney. Dr. Herrera's causation opinion is also consistent with the treating surgeon, who performed two surgeries on claimant's low back and has the only intra-operative perspective.

By contrast, Dr. Bansal evaluated claimant one time. Dr. Bansal was clearly hired as a medical expert by claimant's counsel after the causation opinions of the treating physicians were unfavorable to claimant. Certainly, Dr. Bansal's opinion is fairly detailed and he provides an analysis of his causation conclusions. Yet, Dr. Bansal is board certified in occupational medicine and is not a specialist such as Dr. Herrera and/or Dr. Johnson. (Claimant's Ex. 19, p. 2) I was also not as convinced by claimant's

testimony about the events, reporting his injury, and the lack of nurses' notes, as was accepted by Dr. Bansal.

Ultimately, having accepted the causation opinions of Drs. Herrera and Johnson, I find that claimant failed to prove that his low back injury and condition are causally related to, or materially and significantly aggravated by, his work activities at Wells on either May 16, 2014 or May 18, 2014. Having reached this finding, I similarly find that none of the medical expenses sought by claimant are causally related to his work activities at Wells.

With respect to claimant's request for reimbursement of Dr. Bansal's independent medical evaluation fees, I find that defendants did not select any of the treating physicians in this case. I further find that defendants did not solicit a permanent impairment rating from any physician of their choosing.

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 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).

In this case, I accepted the causation opinions of Dr. Herrera and Dr. Johnson as the most convincing medical opinions. Having accepted those opinions, I found that claimant failed to prove by a preponderance of the evidence that his work activities at Wells on either May 16, 2014 or May 18, 2018 caused, or materially and significantly aggravated, his low back condition. Having found that claimant failed to prove the necessary causation issues, I conclude that claimant failed to prove that his low back injury arose out of and in the course of his employment and/or that his low back condition and medical treatment are causally related to his employment activities at Wells. Therefore, I conclude that claimant failed to establish entitlement to any weekly or medical benefits related to his low back.

Mr. Vasquez-Diaz seeks reimbursement of Dr. Bansal's independent medical evaluation fees pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this instance, defendants did not select any of the physicians that treated claimant or evaluated him. Defendants did not solicit a permanent impairment rating from a physician of their own choosing. Therefore, I conclude that claimant has not established the necessary pre-requisites to qualify for reimbursement of an evaluation pursuant to Iowa Code section 85.39. Claimant's request for reimbursement of Dr. Bansal's evaluation fee must be denied.

All other disputed issues are rendered moot by the above findings of fact and conclusions of law.

Finally, claimant also seeks assessment of his costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant has not obtained an award in any of the pending files. In this circumstance, I conclude that it is not appropriate to assess claimant's costs. Defendants did not seek any specific costs. Therefore, I conclude that all parties shall bear their own costs.

ORDER

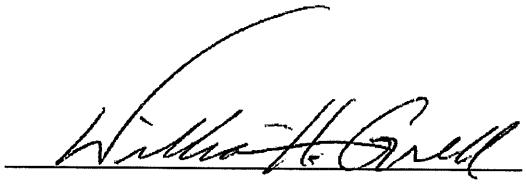
THEREFORE, IT IS ORDERED:

Pursuant to the verbal motion of claimant and the verbal order entered at the commencement of the arbitration hearing, File No. 5056355 is dismissed.

Claimant shall take nothing in File Nos 5053861 and 5053862.

Each party shall bear their own costs.

Signed and filed this 28th day of February, 2018.



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WHG/kjw

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.