BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSHUA J. DOUGLAS, Claimant, vs. VERMEER MANUFACTURING, Employer, and EMC RISK SERVICES, Insurance Carrier, Defendants.	File No. 5062611 A P P E A L D E C I S I O N Head Note Nos.: 1100, 1108, 2907

Defendants Vermeer Manufacturing, employer, and EMC Risk Services, insurer, appeal from an arbitration decision filed on April 13, 2018. Claimant Joshua J. Douglas cross-appeals.

On October 11, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

In the arbitration decision, the deputy commissioner found claimant established a causal connection between his exposure to manufacturing, air-borne particulates at work and his pulmonary injuries. In making this finding, the deputy commissioner relied on the opinions of Sunil Bansal, M.D., Ravi Vemuri, M.D., and Anne Hellbusch, D.O., along with the temporal relationship between claimant's exposure to manufacturing particulates and the increase in the frequency and severity of his pulmonary symptoms. The deputy commissioner determined claimant sustained a 10 percent industrial disability as a result of his pulmonary injuries, and he also found claimant was entitled to temporary benefits from October 23, 2015 through November 30, 2015. The deputy commissioner additionally awarded claimant his claimed medical expenses and penalty benefits but determined claimant was not entitled to reimbursement for his independent medical examination (IME).

On appeal, defendant asserts the deputy commissioner erred by finding claimant established a causal relationship between his workplace exposure and claimed pulmonary injuries.

On cross-appeal, claimant argues the deputy commissioner erred in his determination that claimant was not entitled to additional weeks of temporary disability benefits or reimbursement for his IME.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on April 13, 2018 that relate to issues properly raised on intra-agency appeal and cross-appeal are reversed in part and affirmed in part.

This appeal turns largely on the deputy commissioner's determination that claimant proved a causal connection between his exposure to manufacturing, air-borne particulates at defendant-employer's plant and his pulmonary injuries. For the reasons that follow, this determination is reversed.

As an initial matter, I adopt the deputy commissioner's findings of fact from page 3 through the second paragraph on page 7. However, I diverge from the deputy commissioner's findings as they relate to the credibility and persuasiveness of the competing medical opinions and theories regarding the cause of claimant's pulmonary difficulties.

The deputy commissioner's causation findings were reliant on two main factors: the temporal relationship between claimant's work-related exposure to air-borne particulates and his increase in symptoms and the persuasiveness of claimant's expert medical opinion. I will first address the competing expert opinions.

The deputy commissioner found the opinion of Dr. Bansal, as supported by the opinions of Dr. Vemuri and Dr. Hellbusch, to be convincing evidence of a causal relationship between claimant's exposure to manufacturing particulates and his pulmonary injuries. I respectfully disagree.

When asked in his IME report whether claimant's impairment was causally connected to his job, Dr. Bansal offered the following response: "Yes. . . . The mechanism of being exposed to multiple airway irritants, especially welding fumes, is consistent with his several-year history of recurrent pneumonia." (Claimant's Exhibit 1, p. 17) While the two may be consistent from a temporal standpoint, Dr. Bansal stopped short of affirmatively stating the irritants *caused* claimant's recurrent pneumonia.

Like Dr. Bansal, Dr. Vemuri and Dr. Hellbusch also stopped short of affirmatively stating claimant's workplace exposure caused his pneumonia or pulmonary symptoms. Dr. Vemuri stated in his medical notes from October 23, 2015 that there was "some concern about the possibility of occupational exposure" and that "the factory floor

atmosphere *may be playing a detrimental role in his overall health*." (Joint Exhibit 5, p. 227) (emphasis added). In a letter written the same day, Dr. Vemuri again remarked that claimant's workplace exposures "is *potentially detrimental to his health*." (JE 5, p. 229) (emphasis added) At no point did Dr. Vemuri specifically opine, however, that claimant's workplace exposures to manufacturing particulates were *causing* his pneumonia or pulmonary injuries.

Dr. Hellbusch simply reiterated Dr. Vemuri's concerns and noted a "suspicion" that "perhaps something in [claimant's] work environment is causing him to continue to get pneumonia." (JE 2, p. 116) Like Dr. Vemuri, however, Dr. Hellbusch did not offer a specific or affirmative opinion regarding the causal relationship between claimant's workplace exposures to manufacturing particulates and his pulmonary injuries.

Even when considered together, I find the opinions of Dr. Bansal, Dr. Vemuri, and Dr. Hellbusch do not establish an affirmative causal relationship between claimant's workplace exposures to manufacturing particulates and his pneumonia or pulmonary symptoms. Thus, when considering the expert medical opinions offered by claimant, I find insufficient evidence that his pneumonia and/or pulmonary symptoms were caused by or related to his working environment or the conditions of his employment.

Of course, 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. 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.

Given my finding that claimant's own experts do not establish his workplace exposures to manufacturing particulates as the cause or source of his injury, I conclude claimant is unable to satisfy his burden to prove he sustained an injury that arose out of his employment with defendant-employer.

Dr. Bansal went on in his report to cite medical literature relating to welding fumes and pneumonia. Notably, however, none of the passages cited by Dr. Bansal affirmatively state that welding fumes *cause* pneumonia; instead, the passages hypothesize that welding fumes may make welders *more susceptible to* pneumonia. (Cl. Ex. 1, p. 18) (quoting the following passages: "'Welders are at an *increased risk* of pneumococcal pneumonia.'"; "'[The findings] suggest that occupational exposure to metal fume *increases susceptibility* to infectious pneumonia . . . . '" (emphasis added))

Even assuming claimant's workplace exposures increased his susceptibility to pneumonia—which would arguably satisfy the increased-risk test (and therefore the "arising out of" prong) as set forth in Bluml v. Dee Jay's Inc., 920 N.W.2d 82 (Iowa

2018)—claimant still has to show that his pneumonia was acquired in the course of his employment. See Iowa Code § 85.3; Miedema, 551 N.W.2d at 311 ("The two tests are separate and distinct and both must be satisfied in order for an injury to be deemed compensable."). 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.

As credibly explained by Dr. Hartley, however, there is no way—absent biological testing that was not done in this case—to establish where claimant acquired the germs that caused his pneumonia. (See Hearing Transcript, p. 138) In this case, claimant's bouts of pneumonia were identified in the treatment records as either bacterial or viral, and they all responded to antibiotics and/or antiviral therapy. (Hrg. Tr., p. 146; Defendants' Ex. C, p. 15) In other words, claimant's bouts of pneumonia were identified as those coming from an infectious cause as opposed to a non-infectious cause, such as inhaling too much dust. (See Hrg. Tr., p. 147) Dr. Hartley explained there is no way to establish whether claimant's exposures to the infectious causes occurred at work or somewhere else. (See Hrg. Tr., pp. 136-138)

More specifically, when asked whether there was "any difference between the germs that you experience in public or the germs that you might experience at work," Dr. Hartley answered, "No. Typically it's the same germs, to use that term, and you acquire them from other people. So at work it's usually coworkers and in other settings it's the person besides you in the pew at church or in the shop - - in the line at Hy-Vee." (Hrg. Tr., p. 137) Dr. Hartley went on to explain that when there is a cluster of infections, there is testing available to determine whether the same bug is being transmitted from person to person, but no such testing was done in this case. (Hrg. Tr., pp. 137-138) Without such testing, there is no way to know whether claimant acquired his pneumonia at work or from somewhere else, such as at home with his children or at the grocery store. (See Hrg. Tr., p. 137-138).

Dr. Bansal's report contains no affirmative opinion that claimant's exposure to pneumonia or pneumonia-causing infections or germs occurred at work, nor do the treatment records from Dr. Vemuri, and Dr. Hellbusch. The only other evidence claimant offers is the temporal relationship between his employment and his symptoms.

As mentioned, the deputy commissioner found this temporal relationship to be persuasive. He noted that as soon as claimant was removed from the manufacturing floor at defendant-employer, his pulmonary difficulties resolved. Indeed, claimant testified that he has not had a bout of pneumonia since he lasted worked at defendant-employer's plant. (Hrg. Tr., p. 39)

While the resolution of claimant's pulmonary difficulties did coincide with his removal from the manufacturing floor, the resolution also coincided with the diminution of the dosage of claimant's immunosuppressant medications. As explained by the deputy commissioner, clamant was prescribed immunosuppressant medications after

an unrelated kidney transplant years ago. In turn, claimant's immunosuppressed state is more susceptible to communicable diseases and infections. In October of 2015, however, around the same time claimant was told by Dr. Vemuri to avoid the "shop floor," claimant's immunosuppressant medications were cut in half.[1] (Hrg. Tr., p. 66)

In other words, the temporal relationship between claimant's workplace exposures and his pulmonary injuries mirrors that of the reduction of his immunosuppressant medications and his pulmonary injuries. There is no evidence that one of these explanations is more plausible than the other; in fact, even the presiding deputy commissioner noted that "the timing of claimant's reduction in use of immunosuppressive medications could be suggestive that it was a possible cause or contributing factor to claimant's pulmonary difficulties in and prior to October 2015." (Arbitration Decision, p. 8) Given the plausibility of both scenarios, I do not find the temporal relationship asserted by claimant to be strong evidence that claimant acquired his pneumonia at work.

Without such evidence or a supporting expert medical opinion, I find there is insufficient evidence showing claimant's pneumonia was acquired in the period of employment or at a place where he was performing his employment duties. See Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979); Ciha, 552 N.W.2d 143. Thus, even if we assume claimant's workplace exposures satisfied the increased-risk test, I conclude claimant failed to satisfy his burden to show he acquired pneumonia in the course of his employment with defendant-employer.

In sum, I respectfully reverse the deputy commissioner's finding that claimant proved a causal link between his exposure to workplace exposures to manufacturing particulates and his pulmonary injuries. In doing so, I respectfully reverse the deputy commissioner's finding that the temporal relationship between claimant's employment and his pulmonary symptoms was convincing. I likewise respectfully reverse the deputy commissioner's finding that the opinions of Dr. Bansal, as supported by the opinions of Dr. Vemuri and Dr. Hellbusch, were most convincing.

Instead, I found claimant provided insufficient evidence that his workplace exposures to manufacturing particulates caused his pneumonia or pulmonary injuries. I also found claimant provided insufficient evidence showing that he acquired pneumonia while he was at work. As such, I conclude claimant failed to satisfy his burden to prove he sustained an injury that arose out of and in the course of employment.

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[1] Claimant in his appeal brief argues his immunosuppressant medications were actually cut in half in 2013. Claimant cites to several medical records wherein it appears the dosage of claimant's "CellCept" was decreased in 2013, but by December of 2013 medical records reveal the dosage was back up. Compare JE 2, p. 53 (October 19, 2013: CellCept 500 mg b.i.d.) with JE 2, p. 65 (December 13, 2013: CellCept 1,000 mg b.i.d.). Most importantly, claimant himself testified that his immunosuppressant medications were cut by half in October of 2015. Thus, I am not persuaded this change actually occurred in 2013. (Hrg. Tr., p. 66)

This renders moot claimant's issue on cross-appeal regarding his entitlement to additional temporary benefits.

The only remaining issue on appeal is claimant's entitlement to reimbursement for his IME. In the arbitration decision, the deputy commissioner declined to award reimbursement under Iowa Code section 85.39 because Dr. Bansal's evaluation occurred before Dr. Patrick Hartley's evaluation of permanent disability.

Iowa Code section 85.39 states reimbursement is available for a "*subsequent examination*," meaning an examination after an evaluation of permanent disability by an employer-retained physician that the claimant believes to be too low. See Iowa Code § 85.39 (emphasis added). In this case, claimant's examination with Dr. Bansal occurred on August 14, 2017. (Cl. Ex. 1, p. 1) This examination occurred before Dr. Hartley's examination (September 29, 2017) and his report (November 14, 2017). (Def. Ex. C, p. 8) In other words, when claimant was examined by Dr. Bansal, the reimbursement provisions of Iowa Code section 85.39 had not yet been triggered. I therefore affirm the deputy commissioner's determination that claimant failed to establish the pre-requisites to qualify for reimbursement under Iowa Code section 85.39.

Furthermore, the Iowa Supreme Court in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) held that reimbursement for IMEs under Iowa Code section 85.39 is only available if an evaluation of permanent disability has been made by an employer-retained physician. In Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal Dec. Mar. 26, 2018), the commissioner concluded there is a "distinct" difference between evaluations of permanent impairment and evaluations to determine causation. In this case, the evaluation performed by Dr. Hartley was not an evaluation of permanent impairment, but an evaluation to determine causation. Thus, pursuant to DART, I conclude claimant is not entitled to reimbursement under Iowa Code section 85.39.

Claimant on appeal also seeks a costs assessment of Dr. Bansal's report, which the deputy commissioner declined to award due to Dr. Bansal's failure to break down his bill. Assessment of costs is a discretionary function of the agency. Iowa Code § 86.40. Having determined claimant failed to establish a work-related injury, I conclude defendants should not be taxed with the costs of Dr. Bansal's report.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on April 13, 2018 is reversed in part and affirmed in part.

Claimant shall take nothing.

The parties shall split the cost of this appeal, including preparation of the transcript.

Signed and filed this 23rd day of October, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Erin M. Tucker (via WCES)

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