

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELAINE PRITCHETT,

Claimant,

vs.

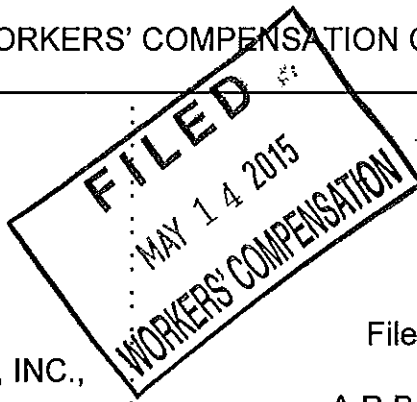
HUMILITY OF MARY SHELTER, INC.,

Employer,

and

WEST BEND MUTUAL INS. CO.,

Insurance Carrier,
Defendants.



File No. 5046962

ARBITRATION

DECISION

Head Note No.: 1402.30

STATEMENT OF THE CASE

Elaine Pritchett, claimant, filed a petition in arbitration seeking workers' compensation benefits from Humility of Mary Shelter, Inc., as her employer, and West Bend Mutual Insurance Company, as the insurance carrier. This case proceeded to an arbitration hearing on April 27, 2015, in Davenport, Iowa.

Claimant testified on his own behalf and defendants called the employer's program director, Cindi Gramenz, to testify. Claimant offered exhibits 1 through 10. Defendants offered exhibits A through C and E2 through H. All exhibits were received into the evidentiary record without objection.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations are accepted and relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations, and the parties are bound by those agreements. The evidentiary record closed, and this case was considered fully submitted at the end of the arbitration hearing on April 27, 2015.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a neck, right shoulder, and/or right arm injury that arose out of and in the course of her employment with Humility of

Mary Shelter on the evening of February 7, 2014 or the early morning hours of February 8, 2014.

2. Whether the alleged injury is the cause of temporary or permanent disability.
3. The extent of claimant's entitlement to temporary total disability, or healing period, benefits, if any.
4. The extent of claimant's entitlement to permanent partial disability benefits, if any.
5. Whether past medical expenses detailed and submitted in Exhibit 9 are causally connected to the alleged work injury.
6. Whether claimant is entitled to reimbursement of an independent medical evaluation expense pursuant to Iowa Code section 85.39.
7. Whether claimant is entitled to an order for alternate medical care to treat her injuries into the future.
8. Whether costs should be assessed against defendants.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Elaine Pritchett is a 53-year-old woman who lives in Davenport, Iowa. (Claimant's testimony) Ms. Pritchett started working for John Lewis Shelter in Davenport, Iowa in 2007, which was ultimately sold or transferred and became Humility of Mary Shelter in 2008. (Claimant's testimony; Claimant's Exhibit 5, page 2) Ms. Pritchett worked for the shelter as a shelter monitor, working the overnight shift. Essentially, she was required to interact with patrons of the homeless shelter, conduct bed checks for female residents, ensure compliance with shelter regulations, wash laundry, and generally just be a welcoming face for the shelter. (Claimant's testimony; Cindi Gramenz testimony; Ex. 6)

The exhibits contain two performance reviews for Ms. Pritchett during her employment with Humility of Mary Shelter. Both performance reviews demonstrate that Ms. Pritchett was a good employee and met or exceeded performance expectations. However, there were no performance reviews performed or included in claimant's personnel file for almost two years before the date of injury. (Ex. 7)

Cindi Gramenz, Ms. Pritchett's supervisor and the program director for the Humility of Mary Shelter testified that claimant was a reliable employee and was able to make appropriate judgment decisions as long as she was not in a stressful situation.

Unfortunately, stressful situations and police calls are expected events at the shelter. (Testimony of Gramenz)

On the evening of February 7, 2014 and early morning hours of February 8, 2014, the shelter housed a female that was being disruptive and disturbing other patrons of the shelter. Ms. Pritchett ultimately called the Davenport Police for assistance with the disruptive patron. (Claimant's testimony)

The police came and calmed the patron down. Ms. Pritchett testified that she elected to give the patron a second chance rather than having her removed from the shelter for the night. Unfortunately, the situation continued and escalated after the police left the premises.

Ms. Pritchett asserts that the unruly patron ultimately pushed claimant. Specifically, Ms. Pritchett claims that the unruly patron put both of her hands onto each of claimant's shoulders and pushed her. As a result of that push, Ms. Pritchett claims that she sustained a right shoulder injury and a neck injury. (Claimant's testimony)

The shelter has surveillance video of the alleged incident. (Ex. E2) The video is not high definition footage, but claimant confirmed that the video introduced depicts the events she alleges caused her injury. (Claimant's testimony) As I attempted to move the video frame by frame at the moment of the push, the patron's left hand appears to be up in the air and not on claimant's right shoulder at the time of the push. The video is not entirely clear, and the view is somewhat obstructed. However, I am not convinced that the patron even put her left hand onto claimant's right shoulder when the push occurred. (Ex. E2)

Following the incident, Ms. Pritchett followed shelter protocol and typed up an incident report. In her incident report, claimant indicated that the patron gave her a light shove. (Ex. C, p. 4) Indeed, the surveillance video does not depict any significant contact. At most, the push by the patron caused claimant to take one step backward. Realistically, it appears as though claimant reacted and stepped backward as the patron put her hands up to make contact. There is certainly no forceful or significant contact depicted between the patron and claimant on the video. (Ex. E2)

Following the incident, Ms. Pritchett did not request medical treatment from the employer. She did not specifically report to the employer that she sustained a right shoulder or neck injury. (Testimony of Gramenz)

The incident at issue in this case occurred in the early morning hours of a Saturday. On Monday, Ms. Gramenz called claimant and told her not to report to work that evening. She agreed to pay claimant for her shift but wanted to continue an investigation of the incident. Ultimately, the employer contacted the police officer that reported to the scene on February 8, 2014. The police officer reported that claimant appeared overwhelmed and unable to handle the stressful situation. (Ex. C, p. 6; Testimony of Gramenz)

Ms. Gramenz also testified that claimant violated confidentiality policies of the shelter on the evening of February 7, 2014 and the early morning hours of February 8, 2014. Ms. Gramenz testified that the videos depict other patrons present and that claimant discussed the situation with police officers while other patrons were present. Any such discussions with a patron or police in the presence of other patrons violate confidentiality policies established by the shelter. Given these policy violations and concerns about claimant's ability to control these types of stressful situations, the shelter elected to terminate claimant's employment on the Wednesday following the incident.

Claimant did not obtain medical treatment following the February 8, 2014 incident until February 26, 2014. At her initial medical evaluation, claimant reported her symptoms were chronic in nature and also reported tenderness in the posterior aspect of her right shoulder. (Ex. 1, p. 1) At trial, Ms. Pritchett pointed to the front of her shoulder, not the posterior of her right shoulder as the location of her symptoms.

Ms. Pritchett did report the pushing incident to her treating physicians and noted an increase in symptoms after the incident. (Ex. 1, pp. 1, 4; Ex. 2, p. 1; Ex. 3, p. 1) However, Ms. Pritchett also has a significant preexisting injury that affected both her neck and right shoulder. (Ex. 1, p. 1; Ex. 3, p. 1; Ex. A, pp. 5, 11, 13, 30, 32) Specifically, in 2006, claimant sustained a work injury while working for another employer. (Ex. A, p. 32) Claimant had longstanding symptoms in her neck and down her right arm after that work injury. (Claimant's testimony; Ex. 1, p. 1; Ex. A, pp. 5, 11, 13, 30, 32) She continued to treat for the 2006 injury as of August 7, 2013, only six months before the incident at issue in this case. (Ex. A, pp. 25-29)

Ms. Pritchett's medical records also include references to potential drug seeking behaviors after claimant's 2006 work injury. (Ex. A, p. 13) She had epidural injections into her neck after the 2006 injury and prior to this incident. (Ex. A, p. 30) She was evaluated by a neurosurgeon for potential surgical intervention on her neck after the 2006 injury and before the February 8, 2014 incident. (Ex. A, p. 32)

Ultimately, two physicians offer causal connection opinions in this case. Claimant offers the medical opinions of Sunil Bansal, M.D. Dr. Bansal conducted an independent medical evaluation on February 13, 2015 and opines that claimant's right shoulder injury is causally related to the February 8, 2014 incident that occurred at Humility of Mary Shelter. Dr. Bansal opines that he cannot opine that the neck injury is causally related to the February 2014 incident within a reasonable degree of medical certainty. (Ex. 4)

Ultimately, Dr. Bansal opines that claimant sustained two percent permanent impairment of the whole person as a result of the right shoulder injury he causally relates to the February 8, 2014 incident Humility of Mary Shelter. He assigned no permanent impairment for the alleged neck injury. Dr. Bansal recommends permanent work restrictions that include nothing more than 10 pounds of occasional lifting, no lifting

greater than five pounds over shoulder level and no frequent lifting above shoulder level with the right arm. (Ex. 4, p. 12)

Defendants offer the opinions of Camilla Frederick, M.D. Dr. Frederick conducted an independent medical evaluation on October 16, 2014. Dr. Frederick opines that she cannot identify any incident depicted on the surveillance video from Humility of Mary Shelter that would have caused an injury to claimant's neck, right arm, or right shoulder. (Ex. A, pp. 35-60)

During her evaluation, Dr. Frederick asked claimant to demonstrate how she was injured. She recorded:

I had her demonstrate the incident and she hit me hard in the RT anterior chest area. We then reviewed the video together. At 5:01:09 she said that must be where she hit me, I saw client put her arms up like to put both hands on her lateral upper arms then turned and walked away. There was minimal contact and at first I didn't even recognize there was any but on watching it repeatedly I saw the arms of the resident go up and then she turned away. This appeared to be a very minimal contact.

(Ex. A, p. 41)

Dr. Frederick opined that there was no injury or aggravation to claimant's underlying conditions as a result of the events depicted in the video of the February 8, 2014 incident at the employer's premise. Given her conclusion that claimant did not sustain an injury as a result of the February 8, 2014 incident, she also opined that claimant sustained no permanent impairment as a result of that incident. (Ex. A, p. 46)

By comparison, Dr. Bansal lists the surveillance video as a piece of evidence he reviewed. (Ex. 4, p. 6) However, he did not review the video with claimant or offer any comments about the content of the video. (Ex. 4)

In his history, Dr. Bansal records that Ms. Pritchett told him that the shelter patron "forcefully shoved her with a jerking motion." (Ex. 4, p. 7) The video does not demonstrate or depict a forceful shove with a jerking motion. (Ex. E2) Dr. Bansal makes no mention of the actual content of the surveillance video. He offers no commentary or explanation of the discrepancy between claimant's history to him and the content of the video. (Ex. 4) This raises some concern for me about whether Dr. Bansal actually reviewed the surveillance video. Certainly, the fact that he does not mention the discrepancy between the events of the video and the history offered by claimant at his independent medical evaluation causes me to question the basis of his causation opinions.

Dr. Bansal does not appear to have had access to claimant's initial incident report. However, the self-reported incident report from Ms. Pritchett describes the incident as a light shove. (Ex. C, p. 4) This is much more consistent with the content of

the video. Claimant's initial reports are more credible and consistent with the actual footage of the incident than the history recorded by Dr. Bansal.

Given that Dr. Bansal makes no reference to the actual content of the video, offers no explanation about how the events depicted on the video could actually cause the alleged injuries, and given that the history recorded by Dr. Bansal is not consistent with the video footage or claimant's initial reports of the injury, I find that Dr. Bansal's recorded history is not accurate and that the basis of his opinions is weak. Dr. Bansal's opinions are not worthy of significant credibility or weight in this case given these deficiencies.

Instead, I find the opinions of Dr. Frederick more convincing in this case. Her description of the incident after reviewing the video is much more consistent with my viewing of the incident. I accept Dr. Frederick's medical opinion regarding causation issues as the most credible medical opinion in this record. Therefore, even if I assume that the unruly patron did use her left hand and touch claimant's right shoulder, I find that claimant has not carried her burden of proof to establish that she sustained a right shoulder or neck injury as a result of the events of February 8, 2014. I similarly find that claimant has not carried her burden of proof to establish that the events of February 8, 2014 caused either a temporary or permanent aggravation of her underlying condition.

CONCLUSIONS OF LAW AND REASONING

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); Dunlavy 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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In this case, I found the opinions of Dr. Frederick to be more convincing than those of Dr. Bansal on the issue of causation. My review of the video of the incident at issue did not demonstrate any significant contact or injury. Therefore, having found that claimant failed to prove that the alleged injury caused an injury or materially aggravated her underlying condition, I conclude that claimant has failed to establish entitlement to any weekly benefits or medical benefits.

Claimant seeks reimbursement of her independent medical evaluation fees from Dr. Bansal. 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, Dr. Frederick performed an independent medical evaluation and rendered causation and permanent impairment opinions on October 16, 2014. Dr. Frederick was selected by defendants. Dr. Frederick's evaluation triggered the provisions of Iowa Code section 85.39 and permitted claimant to obtain an evaluation with a physician of her choosing. Dr. Bansal's evaluation did not occur until February 13, 2015. Claimant has established the requisite elements necessary to qualify for an evaluation at defendants' cost pursuant to Iowa Code section 85.39. Dr. Bansal's fee was \$2,795.00. This fee is found to be in line with other evaluation fees seen by this agency and is found to be reasonable. Therefore, defendants will be ordered to reimburse claimant for Dr. Bansal's fee. Iowa Code section 85.39.

Ms. Pritchett also seeks assessment of her filing fee as a cost in this case pursuant to 876 IAC 4.33(7). Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. In this case, claimant has not proven entitlement to the majority of her claimed benefits. Therefore, exercising the agency's discretion, I decline to assess costs against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall reimburse claimant's independent medical evaluation fee from Dr. Bansal in the amount of two-thousand seven-hundred ninety-five and 00/100 dollars (\$2,795.00).

Claimant takes nothing further.

Signed and filed this 14th day of May, 2015.



WILLIAM H. GRELL
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.