BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BEN TALLMAN,

Claimant,

vs.

GUARDIAN BUILDING PRODUCTS,

Employer,

and

INDEMNITY INS. CO. OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5064125

ARBITRATION

DECISION

Head Notes: 1402.40, 1402.60, 2502, 2505

STATEMENT OF THE CASE

Claimant, Ben Tallman, filed a petition in arbitration seeking workers' compensation benefits from Guardian Building Products (Guardian), employer, and Indemnity Insurance Company of North America, insurer, both as defendants. This matter was heard in Davenport, Iowa on June 5, 2019 with a final submission date of June 26, 2019.

The record in this case consists of Joint Exhibits 1-5, Claimant's Exhibits 1-2, Defendants' Exhibits A through N, and the testimony of claimant.

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.

ISSUES

1. Whether claimant's injury is a cause of permanent disability; and if so

2. The extent of claimant's entitlement to permanent partial disability benefits.

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

4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 44 years old at the time of hearing. Claimant graduated from high school. Claimant attended Black Hawk College in Illinois for one year but did not graduate.

Claimant has worked as a department manager for Menards and Lowe's. He has done sales for Lowe's and for Kitchen Design. (Exhibit B, page 2)

Claimant testified he worked as an office manager, beginning in approximately 2010, for approximately six years, for a company called Hawkeye. Hawkeye was eventually bought out by Guardian. Claimant initially worked inside sales for Guardian when they first bought Hawkeye. At the time of injury, claimant was working outside sales for Guardian.

Claimant's prior medical history is relevant. Claimant testified he had treated on prior occasions with three chiropractors before the date of injury. (Ex. H, p. 6; Deposition pp. 18-21) Records indicate claimant received chiropractic treatment for his low back in 2015. (Jt. Ex. 2)

On March 21, 2017 claimant had a work-related accident when he was rear-ended from behind by another driver. (Ex. D) The car that rear-ended claimant left the scene of the accident. (Exs. C, D, E)

Claimant testified the accident did not deploy the airbag. (Ex. H, p. 7; Depo. p. 24) The accident report indicates claimant's car sustained $400.00 in damages. (Ex. C, p. 2) Claimant testified he was able to drive the car from the scene of the accident.

Claimant said when he went home after the accident, he took some over-the-counter pain medication and tried to sleep. Claimant said he had difficulty sleeping the night of the accident due to head and neck pain. (Ex. H, p. 8; Depo. pp. 29-30)

Records from Richard Hansen, D.C., indicate claimant received chiropractic treatment from him on March 21, 2017. Claimant indicated his condition for treatment began two days' prior after moving furniture. (Jt. Ex. 2, p. 1)

Claimant said on March 23, 2017 he was seen by his personal family doctor, David Ade, M.D. He said the doctor prescribed him some medication for pain. (Ex. H, p. 9; Depo. pp. 32-33)

Claimant testified Dr. Ade recommended he see Dr. Simmer, a chiropractor. Claimant testified the head of safety for Guardian told him he could see whatever doctor he wanted.

Claimant testified he later received chiropractic treatment from a Rodney Simmer, D.C. Dr. Simmer's records are not in evidence. Claimant said in deposition he saw Dr. Simmer for adjustments. (Ex. H, pp. 9-10; Depo. pp. 33-35) On June 8, 2018 and March 20, 2019, defendants requested records from Dr. Simmer's office. Dr. Simmer's office did not send the records. On May 18, 2019 defendants subpoenaed Dr. Simmer's office for records. Dr. Simmer's office ignored the subpoena. (Ex. F, pp. 1, 7; Ex. M)

Claimant said the only medical care he has received for his accident has been medication from Dr. Ade, and from Dr. Simmer, who has done adjustments for him. (Ex. H, p. 10; Depo. p. 35) Claimant said his symptoms lessened each treatment after seeing Dr. Simmer.

Claimant was evaluated by Dr. Ade on January 23, 2018 with complaints of persistent back pain since his car accident. Claimant indicated chiropractic treatment had helped, but he still had spasms and pain. Claimant was undergoing "therapy," and used a TENs unit. (Jt. Ex. 1, p. 4)

On February 21, 2019 claimant was evaluated by Dr. Ade. Claimant requested an MRI. Claimant's range of motion in his neck and shoulders was found to be fairly good or okay. (Jt. Ex. 1, pp. 6-7)

In a March 4, 2019 report, Sangeeta Shah, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of severe neck pain. Claimant indicated pain radiating into the left shoulder and occasionally into the hands. Dr. Shah assessed claimant as having left shoulder pain and cervicalgia with a C5-C6 and C6-C7 radiculopathy. Dr. Shah found claimant was at maximum medical improvement (MMI). He opined claimant had a 6 percent permanent impairment to the body as a whole for his cervical condition. This was based on an opinion claimant fell into the DRE cervical category II under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He found claimant had a 5 percent permanent impairment to his body as a whole for the shoulder injury. Using the combined values table in the Guides, Dr. Shah found claimant had a combined permanent impairment of 10 percent to the body as a whole. (Jt. Ex. 4)

On May 17, 2019 claimant underwent a cervical MRI. It showed a left foraminal stenosis at the C6-7 levels that might correlate with claimant's symptoms. (Ex. J5)

In a May 23, 2019 report Michael Cullen, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of pain in the cervical area and bilateral trapezius area. Dr. Cullen assessed claimant as having chronic myofascial

pain. He opined claimant's treatment after April 4, 2017 was not related to claimant's March 21, 2017 accident. (Ex. N, pp. 1-5)

On exam, Dr. Cullen found claimant had full flexion and minimal decrease of extension in the neck. Claimant had full range of motion in the shoulder. Claimant's exam indicated normal strength and reflexes. (Ex. N, p. 3)

Dr. Cullen found claimant at MMI. He opined claimant had no permanent impairment. (Ex. N, pp. 1-5)

In a May 24, 2019 letter Dr. Cullen indicated he had reviewed claimant's May 17, 2019 MRI. The MRI showed no disc herniation. Dr. Cullen opined the findings in claimant's MRI revealed degenerative problems. He indicated the findings in the MRI were not traumatic and were not caused by claimant's work injury. (Ex. N, p. 6)

Claimant testified he continues to have pain in his neck and upper back. He testified no doctor has taken him off of work. Claimant testified he had no permanent restrictions.

In approximately April of 2019 claimant's job changed from doing outside sales to inside sales. Claimant testified at hearing he believed the changes occurred because he pursued his workers' compensation claim. Claimant testified in deposition he did not know why his job changed. (Ex. H, p. 3; Depo. p. 9) Claimant testified he made approximately 25 percent less since being moved to inside sales. He testified he believed the job for inside sales was physically more demanding than outside sales.

Claimant testified since his injury he has put brakes on his daughter's car, he has ridden an ATV, and has gone hunting.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury of March 21, 2017 resulted in a permanent disability.

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 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The parties stipulate claimant sustained an injury on March 21, 2017 that arose out of and in the course of employment. Claimant contends he sustained a permanent disability from the March 21, 2017 injury. Defendants dispute claimant's injury resulted in a permanent disability.

Claimant did get rear-ended by another car. The air bags in claimant's vehicle did not deploy. The officer who filled out the accident report in the record assessed the amount of damage to claimant's car to be approximately $400.00. (Ex. C, p. 2; Ex. N, p. 1)

On the day of the accident, claimant saw a chiropractor for left shoulder, upper back and hip pain that had occurred two days prior from moving furniture. (Jt. Ex. 2, p. 1)

Claimant testified he treated for chiropractic care with Dr. Simmer for about two years. Dr. Simmer's office refused to produce any records of this treatment. In short, there is no evidence in the record of any of the treatment from Dr. Simmer's office other than billings.

Claimant had a cervical MRI on May 17, 2019. It showed degenerative changes and no evidence of a traumatic injury. (Jt. Ex. 5; Ex. N, p. 6)

Two experts have opined regarding the extent of claimant's injury from the March 21, 2017 accident.

Dr. Shah evaluated claimant on one occasion for an IME. Dr. Shah opined claimant had a permanent impairment to both his neck and shoulder. (Jt. Ex. 4)

Dr. Shah's opinion is problematic for two reasons. First, Dr. Shah's report indicates he did not review claimant's prior chiropractic records. (Jt. Ex. 4) Because Dr. Shah's exam occurred prior to the MRI, he also did not have access to the cervical MRI. Given these discrepancies in Dr. Shah's report, it is found his opinions regarding the extent of claimant's injury is found not convincing.

Dr. Cullen also evaluated claimant on one occasion for an IME. Dr. Cullen reviewed claimant's prior medical records including his chiropractic records. He also was able to evaluate claimant's MRI. Dr. Cullen found claimant had full flexion and minimal decrease in extension in the neck. He found claimant had full range of motion in the shoulder. Claimant had normal strength and reflexes. (Ex. N, p. 3) Dr. Cullen opined claimant's MRI showed degenerative changes, and was not indicative of a traumatic injury. (Jt. Ex. 5; Ex. N, p. 6)

Dr. Cullen's physical exam is more detailed than that of Dr. Shah. Dr. Cullen had claimant's prior chiropractic records to review. Dr. Cullen was also able to review claimant's MRI. Based on these facts, and as detailed above, it is found the opinions of Dr. Cullen regarding permanent impairment are more convincing than those of Dr. Shah.

Dr. Cullen's opinions of claimant's permanent impairment are found to be more convincing than those of Dr. Shah's. Claimant's MRI shows mostly degenerative changes and does not indicate a traumatic injury. Evidence from claimant's accident suggest a low-impact rear-end accident. Claimant has no permanent restrictions. Given this record, and that as detailed above, claimant has failed to carry his burden of proof his injury resulted in a permanent disability.

As claimant has failed to carry his burden of proof his injury resulted in a permanent disability, the issue regarding the extent of claimant's entitlement to permanent partial disability benefits is moot.

The next issue to be determined is whether there is a causal connection between claimant's injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred

for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The employee has the burden of proof to show medical charges are reasonable and necessary, and must produce evidence to that effect. Poindexter v. Grant's Carpet Service, I Iowa Industrial Commissioner Decisions, No. 1, at 195 (1984); McClellan v. Iowa S. Util., 91-92, IAWC, 266-272 (App. 1992).

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodard State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company , No. 1 Industrial Comm'r report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v Vieth Construction Corp., File No 5044430 (App. May 27, 2016)(Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills)

Claimant seeks to have defendants pay bills for medical expenses of approximately $11,000.00. These bills are in regards to chiropractic treatment with Dr. Simmer, as shown at Exhibit 11. Exhibit 11 is a summation of medical charges from Dr. Simmer's office from March 23, 2017 through March 4, 2019. As noted in the finding of facts, on three occasions defendants sought the medical records from Dr. Simmer's office. Dr. Simmer's office ignored all three attempts to get those medical records. There are no records in evidence regarding what treatment was given to claimant from Dr. Simmer's office. There is no evidence in the record regarding the medical care provided by Dr. Simmer to claimant. There are no records the charges detailed in Exhibit 11 are causally connected to the work injury.

It is recognized that at least some of the evidentiary problems regarding the medical bills are due to the lack of cooperation from Dr. Simmer's office. However, claimant has the burden of proof the claimed medical expenses have a causal connection to the injury. Claimant failed to provide supporting evidence his chiropractic bills, shown in Exhibit 11, are causally connected to the work injury. As a result, claimant has failed to carry his burden of proof the expenses as shown in Exhibit 11 are causally connected to the work injury. Given this, defendants are not liable for the claimed medical expenses shown at Exhibit 11.

The final issue to be determined is whether claimant is due reimbursement for the IME from Dr. Shah.

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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Shah, the employee-retained physician, issued his IME opinion on March 4, 2019. (Jt. Ex. 4) Dr. Cullen, the employer-retained physician issued his report on May 25, 2019. (Ex. N) Given the chronology of the reports, claimant has failed to prove he is due reimbursement for costs associated with Dr. Shah's report under Iowa Code section 85.39.

Costs are taxed at the discretion of this agency, and claimant has failed to prevail on any issue in this case. For this reason, claimant is also not due reimbursement of the costs associated with Dr. Shah's report as a cost under rule 876 IAC 4.33.

ORDER

Therefore, it is ordered:

That claimant shall take nothing from these proceedings in the way of benefits.

That both parties shall pay their own costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 2nd day of July, 2019.

JAMES F. CHRISTENSON
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.