BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SERGIO RODRIGUEZ,

Claimant,

vs.

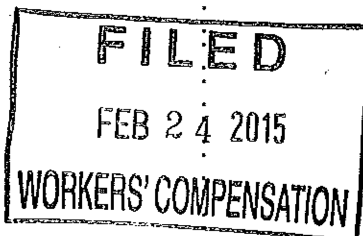
IOWA SELECT FARMS, LLP,

Employer,

and

ZURICH, N.A.,

Insurance Carrier,
Defendants.



File No. 5045077

ARBITRATION

DECISION

Head Note Nos.: 1100; 1108; 1400
1803

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Sergio Rodriguez, filed his original notice and petition with the Iowa Division of Workers' Compensation. He alleged he sustained a work-related injury to his whole body on or about April 19, 2013, the last day claimant worked for Iowa Select Farms, LLP. A petition was filed on July 26, 2013. A First Report of Injury was filed on July 12, 2013.

Defendant-employer is insured for purposes of workers' compensation by Zurich North American. Defendants filed their answer on August 9, 2013. Defendants denied the occurrence of the work injury.

The arbitration hearing was held on June 26, 2014 in Des Moines, Iowa at the Iowa Department of Workforce Development. The undersigned appointed Ms. Brittney Frericks as the certified shorthand reporter. She is the official custodian of the records and notes. Ms. Anna Pottebaum, state certified interpreter, acted as the official interpreter in the proceedings.

Claimant offered exhibits 1 through 11. Defendants offered exhibits A through H. All proffered exhibits were admitted as evidence as in the contested case proceeding.

The parties were ordered to file post-hearing briefs. The briefs were filed. The case was deemed fully submitted on August 4, 2014.

On November 17, 2014, the case had been delegated to Deputy Jennifer Gerrish-Lampe because the undersigned had been appointed the acting workers' compensation commissioner from September 9, 2014 through February 15, 2015. The case was returned to the undersigned deputy workers' compensation commissioner on February 16, 2015.

STIPULATIONS

The parties completed the requisite hearing report for the alleged injury date of April 19, 2013. The parties entered into the following stipulations:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Rate is not an issue at this time; the parties agree the weekly benefit rate is $372.87 per week;

3. If claimant is entitled to permanency benefits, the commencement date is April 20, 2013;

4. All affirmative defenses have been withdrawn by defendants;

5. No weekly benefits had been paid prior to the date of the hearing; and

6. The parties are able to stipulate to the costs that have been paid.

ISSUES

The parties agree the issues for resolution are:

1. Whether claimant sustained an injury on or about April 19, 2013 which arose out of and in the course of his employment, (The last injurious exposure is claimant's theory);

2. Whether the alleged injury is a cause of permanent disability;

3. If claimant is entitled to permanent disability, there is the issue of the extent of permanent disability to which he is entitled; and

4. Whether claimant is entitled to the payment of medical expenses pursuant to Iowa Code section 85.27.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant and Mr. William Foley, Chief Financial Officer at Iowa Select Farm, LLP, after judging the credibility of the witnesses, and after reading all of the evidence and the post-hearing briefs, makes the following findings of fact and conclusion of law:

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).

During the course of the arbitration hearing, the parties requested this deputy to take administrative notice of claimant's three prior files. The files were: 5029673, 5029674, and 5029675. All three files were resolved on a compromise special case settlement basis on June 16, 2010. There was no admission of any liability on behalf of defendants. In paragraphs A and C. of the settlement documents, the parties stated:

> A. A dispute exists under the Iowa Workers' Compensation Law, which the parties seek to resolve by a full and final compromise disposition of claimant's claim for benefits. The subject and nature of the dispute is whether Claimant's current symptoms are causally related to the original left ankle, left leg and BAW injury occurring on or about June 4, 2006, a left foot injury occurring on or about July 5, 2006, and a back, left hip and BAW injury occurring on or about February 17, 2009 or, alternatively, July 22, 2009 at Iowa Select Farms. A dispute also exists as to the nature and extent of Claimant's injuries.
>
> . . . .
>
> C. As a compromise of their competing interests, the parties agree to the payment and other terms of settlement contained in the attached page(s) or as follows:
>
> The parties expressly agree that Mr. Rodriquez will receive a lump sum payment of Thirty Three Thousand Dollars ($33,000.00) which equates to approximately 15.4% or 77.128 weeks at the weekly benefit rate of $427.86 for his left foot, left ankle, left leg, back, left hip, and BAW injuries occurring at Iowa Select Farms on or about June 4, 3006 [sic], July 5, 2006, February 17, 2009 or July 22, 2009. This one-time lump sum payment will operate as the final payment Claimant will ever receive from Defendants Iowa Select Farms and Zurich North America with regard to his injuries occurring on the above-noted dates, at Iowa Select, the nature of which remains disputed as discussed in paragraph (A) herein. The parties further agree that Defendants will pay any outstanding causally connected medical charges incurred prior to this settlement with express exception of the outstanding charges of $2,551.40 associated with the report of Dr. John Kuhnlein which Claimant expressly covenants and agrees he will pay immediately upon approval of this settlement agreement by the Iowa Division of Workers' Compensation.

(Compromise Settlement, pages 1-2, June 16, 2010)

Claimant is a 51 year-old married grandfather. He commenced employment with defendant-employer on February 20, 2006. On April 19, 2013, members of management terminated claimant for his failure to produce a valid social security identification number. (Transcript, page 81). Since his termination, claimant has not held any gainful employment in the United States labor market.

Claimant performed only manual work for his employer. As an employee of Iowa Select Farms, LLP, claimant was required to work an 8 hour day. During his shift, he had to sit, stand and walk. Frequently, claimant had to bend, push and pull, and twist and turn. Occasionally, claimant was required to squat, climb, reach above his shoulder level, crouch, kneel, and balance. With respect to carrying, claimant was required to Lift and carry frequently up to 24 pounds. There was occasional lifting up to 50 pounds. Claimant did have to engage in simple and firm grasping with the right and left hands. (Exhibit 7, pages 80 and 81)

In early 2010, claimant was transferred to the nursery. (Tr., p. 31) He continued to work in the nursery until the date of his termination. (Tr., p. 31) Claimant testified he had to bend to lift piglets weighing up to 25 pounds. (Tr., pp. 32-33) On occasion, claimant lifted dead hogs which weighed up to 50 pounds and placed the carcasses into a cart. (Tr., p. 33) Claimant testified he developed back pain that deteriorated with time up to and including claimant's last day of employment. (Tr., p. 35) Claimant testified his pain was worse than the back pain he experienced in 2009. (Tr., p. 35) He testified:

> Q. Okay. Was the back pain that you had as of April of 2013 the same, less, or worse than it was back in 2009?
>
> A. Well, it's worse.
>
> Q. Okay. How so?
>
> A. Well, it's not the same. Before it will come and go. Now the pain is frequently.
>
> Q. Okay. Is the pain always there now in your low back?
>
> A. Yes, always.
>
> Q. What part of your back?
>
> A. The lower part of my back and then right into my left side.
>
> Q. So is it pretty much all of your lower back area and then stronger on your left side?
>
> A. Yes, that's right.

> Q. Okay. And what do you believe caused your back pain to worsen coming forward to April of 2013?
>
> A. Because of the constant repetitive work that it affected me.

(Tr. pp. 35-36)

On September 4, 2009, Timothy A. Gibbons, M.D., of the Mason City Clinic opined:

> This is in response to your letter dated August 13, 2009, concerning Sergio Rodriquez, claim #2700328138-001. I do not believe the patient's hip and back pain are related to his work at Iowa Select Farms.

(Exhibit, F, page 29)

On March 4, 2011, claimant had a general physical examination with Timothy J. Nagel, M.D., claimant's personal physician. Claimant did not discuss any issues concerning his spine or hip. He did mention his left ankle condition. Dr. Nagel's notes for the same date stated:

> His left ankle that he had surgery on in the past occasionally gives him problems. No numbness, tingling, or weakness.

(Ex. G, p. 30)

The medical records demonstrated claimant sought treatment for his back at Wright Medical Center, FPC on September 12, 2011. Dr. Nagel examined claimant for "complaints of pain in the low back region." (Ex. 1, p. 1) Claimant reported pain of six months in duration. Claimant denied "any trauma or injury to set if off." (Ex. 1, p. 1) Claimant described the pain as slightly worse with activity. (Ex. 1, p. 1)

Dr. Nagel diagnosed claimant with "Back strain." (Ex. 1, p. 1) The physician recommended over-the-counter Tylenol or Motrin and physical therapy. (Ex. 1, p. 1)

On September 14, 2011, claimant presented at Rehabilitation Services for physical therapy. (Ex. 1, p. 2) A plan of care was developed. (Ex. 1, p. 2) The initial therapy session commenced on September 16, 2011. (Ex. 1, p. 2) Claimant neglected to return to therapy following the first session. (Ex. 1, p. 2)

Claimant next sought treatment for his back on March 1, 2012. Dr. Nagel examined claimant. The family physician indicated the following in the clinical note for the same date:

> 1. The most bothersome to him is back pain that is persistent. Between 3-4 months ago he was referred by Dr. Nagel to see physical therapy. He attended 1 session of physical therapy and instead has been doing

> the home exercises he was shown by physical therapy. His pain has not subsided. He states that the pain is constant in nature regardless of position. It does not radiate. His pain is not worse at night and it does not keep him up or awaken him. He is not currently taking any medications for his pain, as he does not believe it is quite painful enough to warrant this.

(Ex. 1, p. 9) Later in the same clinical note, Dr. Nagel indicated claimant's back had no CVA tenderness upon palpation. There was tenderness along the vertebral bodies in the lower lumbar and sacral regions. However, there was no paraspinal muscle tenderness. (Ex. 1, pp. 9-10) Dr. Nagle diagnosed claimant with back pain. No cause was attributed to the back pain. (Ex. 1, p. 10) Dr. Nagel ordered lumbar and sacral x-rays for further diagnostic purposes. (Ex. 1, p. 10)

The x-rays were taken on March 1, 2012. Travis Petree, M.D., interpreted the x-rays of the spine to show: "Multi-level lumbar spine degenerative changes, most advanced at L5-S1." (Ex. 1, p. 11)

On October 11, 2012, claimant presented to Dr. Nagel for issues dealing with diabetes, hypertension, and hyperlipidemia. As an aside, claimant reported recurring back pain that radiated into the left leg. During the course of the examination, Dr. Nagel found minimal lumbar tenderness. (Ex. 2, p. 25) Dr. Nagel referred claimant to Shelley Wells, D.O.

On November 5, 2012, Dr. Wells examined claimant for the first time. (Ex. 2, p. 26) Claimant reported to the physician:

> ONSET OF SYMPTOMS
>
> Approximately pain started 3-4 years ago. The first episode of pain was caused by excessive work and heavy lifting/bending and the pain was gradually increased.

(Ex. 2, p. 26)

Dr. Wells found positive facet loading and some tenderness over the left PSIS region. She noted some arthritic changes on the x-rays. Dr. Wells opined claimant suffered from low back pain that was most likely consistent with facet mediated pain. (Ex. 2, p. 28) Dr. Wells ordered MRI testing of the lumbar spine. (Ex. 2, p. 28)

MRI testing of the lumbar spine occurred on November 16, 2012. (Ex. 2, p. 30) Alex Westenfield, M.D., interpreted the results as:

> IMPRESSION:
>
> 1. Minimal spinal stenosis at L5-S1 with slight effacement of the left S1 nerve root from a central to left paracentral disk protrusion at L5-S1.

2. L4-L5 left-sided neural foraminal narrowing from disk bulging but no nerve root effacement.

(Ex. 2, p. 30)

On December 13, 2012, claimant returned to Dr. Wells for follow up care. (Ex. 2, p. 33) Dr. Wells diagnosed claimant with:

ASSESSMENT:

1. Low back pain.
2. Facet degenerative changes.
3. Degenerative disk disease L5-S1.
4. Spinal stenosis L5-S1.

(Ex. 2, p. 33) Dr. Wells recommended bilateral lumbar medial branch blocks. (Ex. 2, p. 33)

On January 23, 2013, Dr. Nagel diagnosed claimant with "Back pain due to muscle pain." (Ex. 2, p. 36) Dr. Nagel found tenderness in the paraspinous muscles in the upper lumbar area. (Ex. 2, p. 36) The physician prescribed Diclofenac and Flexeril for inflammation and muscle spasms. (Ex. 2, p. 36)

On March 7, 2013, Dr. Wells administered bilateral L3, L4, and L5 facet blocks via the medial branches under fluoroscopic guidance. (Ex. 2, p. 39) The purpose of the procedure was to alleviate problems due to:

1. Low back pain.
2. Lumbar facet syndrome.
3. Degenerative disc disease L5-S1.

(Ex. 2, p.39) Claimant tolerated the procedure well. He was asked to follow up with Dr. Wells on March 18, 2013. (Ex. 2, p. 40) No medical record was produced to indicate claimant had complied with Dr. Wells' request.

The next medical record produced as an exhibit in the arbitration hearing was claimant's independent medical examination from John D. Kuhnlein, D.O., MPH. The examination occurred on June 18, 2013. Dr. Kuhnlein issued his report on July 16, 2013. At the time of the IME, claimant was not treating with any physician for a back condition. Claimant was taking over-the-counter Tylenol for his back pain.

Dr. Kuhnlein observed and examined claimant. The physician noted:

> He moved about the room with a normal gait. He was able to walk on his heels and toes without difficulty and was able to squat without difficulty. His pelvis was level. Axial rotation and compression were negative, as was light touch. Lumbar flexion was to 90 degrees with complaints of mild back pain. Lumbar extension was to 20 degrees, as were right and left lateral flexion. He did not have any lumbar tenderness to palpation, but continued to have left sacroiliac pain.

(Ex. 3, p. 48)

Dr. Kuhnlein diagnosed claimant with:

> 1. Musculoskeletal low back pain. The lack of response to the facet blocks and medial branch blocks suggests that this is not facet-mediated pain. There is no evidence that this is discogenic pain at this time. This appears to be musculoskeletal back pain.

(Ex. 3, p. 48)

With respect to causation, Dr. Kuhnlein opined:

> In my 2009 report, I opined that Mr. Rodriquez-Pena's back pain was related to the bending and stepping that he did over a fence at work. I did not attribute the back pain to the specific injuries for which I saw him in 2009, but felt that his back pain was more likely than not related to his work activities for Iowa Select Farms. I continue to believe that. As he continued to work for Iowa Select Farms, Mr. Rodriquez-Pena relates that he continued to have ongoing back problems, which worsened, and worsened when he moved to another farm with larger pigs. The work for Iowa Select Farms was a substantial factor in his chronic low back pain, which appears to have worsened since I saw him in 2009.

(Ex. 3, p. 48)

Dr. Kuhnlein rated claimant as having a 6 percent permanent impairment for the back condition and for sacroiliitis. Dr. Kuhnlein also imposed restrictions, although the restrictions were imposed not only for the back but also for claimant's lower extremity condition. The restrictions imposed were:

> At this time, given the combination of his lower extremity and back condition, I continue to believe that permanent restrictions are in order. At this point, I would suggest that he lift 30 pounds occasionally from floor to waist, 40 pounds occasionally from waist to shoulder, and 30 pounds occasionally over the shoulder.

> With respect to nonmaterial handling, he could sit or stand on an as needed basis. Walking would be good for him. He could squat occasionally. He could bend occasionally now. He can crawl occasionally. He could still work on ladders on an occasional basis. He can still work on uneven surfaces, but should still be cautious. He could work occasionally at or above shoulder height because of the "moment arm" phenomenon in the lumbar spine with such activities. He could use vibratory or power tools occasionally at or above shoulder height because of the same "moment arm" phenomenon.
>
> There are no vision, hearing or communication restrictions, and there are no travel restrictions. There are no environmental restrictions. There are no personal protective equipment restrictions when his back is considered alone. The other restrictions I have assigned before for his ankle and left lower extremity injury still apply as well, with the changes because of the back condition now.

(Ex. 3, p. 50)

Subsequent to the occurrence of the independent medical examination, claimant sought no other treatment for his back condition.

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).

It is the determination of the undersigned; claimant has not met his burden of proof with the issue of causation to the alleged work injury. Claimant is arguing his back condition is related to the repetitive duties he performed at Iowa Select Farms, LLP. However, claimant's duties were not really repetitive in nature. He did not perform the same tasks over and over again. His duties varied throughout the normal day. Claimant testified the activities in the workplace which contributed the most to his back pain were sorting and vaccinating pigs. He said the back pain was due to bending. It is true bending was part of claimant's work duties but not in the sense of one working on an assembly line where one is bending hundreds of times per shift. (Tr., p. 36)

There was only one physician who attributed claimant's back condition to claimant's employment at Iowa Select Farms, LLP. That physician was the one time evaluating physician, Dr. Kuhnlein. Even Dr. Kuhnlein diagnosed claimant with "Musculoskeletal low back pain." (Ex. 3, p.48)

Neither claimant's family physician, Dr. Nagel, nor the pain specialist, Dr. Wells related claimant's back condition to his employment. Dr. Nagel examined claimant on a number of occasions. The family physician diagnosed claimant with "back pain." Dr. Wells found arthritic changes on the x-rays. She diagnosed claimant with "Low back pain. Most likely consistent with facet mediated pain." (Ex. 2, p. 28) Dr. Wells later diagnosed claimant with degenerative disk disease at L5-S1 and facet degenerative changes. (Ex. 2, p. 33) Objective testing like the MRI test results demonstrated spinal stenosis at L5-S1 and mild disk bulging. (Ex. 2, p. 30) The objective test results were in keeping with an age-related degenerative condition. Neither Dr. Nagel nor Dr. Wells attributed claimant's "back pain" to his employment at Iowa Select Farms, LLP.

All in all, the greater weight of the evidence does not support the conclusion that claimant's back condition was causally connected to his employment at Iowa Select Farms, LLP. As a consequence, claimant takes nothing from these proceedings.

ORDER

THEREFORE, it is ordered:

Claimant shall take nothing from these proceedings.

Defendants shall receive credit for all benefits previously paid.

Each party shall pay his/its/ their own costs pursuant to 876 IAC 4.33.

Signed and filed this 24th day of February, 2015.

MICHELLE A. MCGOVERN
ACTING 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.