BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZACKERY LAWRENCE, Claimant, vs. CLOW VALVE COMPANY, Employer, and ACE AMERICAN INSURANCE COMPANY Insurance Carrier, Defendants.	File No. 5068594 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 2502

STATEMENT OF THE CASE

Claimant, Zackery Lawrence, filed a petition in arbitration seeking workers' compensation benefits from Clow Valve Company (Clow), employer, and ACE American Insurance Company, insurer, both as defendants. This matter was heard on October 6, 2020, with a final submission date of October 27, 2020.

The record in this case consists of Joint Exhibits 1-4, Claimant's Exhibits 1-6, Defendants' Exhibits A-H, 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 sustained an injury that arose out of and in the course of employment;

2. Whether the injury is a cause of a temporary disability;

3. Whether the injury is a cause of a permanent disability; and if so;

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

5. The commencement date of benefits;

6. Whether claimant is due reimbursement for an Independent Medical Evaluation (IME) under Iowa Code section 85.39;

7. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;

8. Costs;

9. Whether defendants are liable for penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 33 years old at the time of hearing. Claimant graduated from high school. (Exhibit C, page 13)

Claimant has worked at a car wash. He worked for Waste Connection. Claimant picked and filed orders for the Iowa Alcoholic Beverages Division. Claimant also worked for Vermeer. (Ex. C, pp. 14-15)

Claimant began employment with Clow in 2018. Clow makes valves and hydrants. Claimant was a maintenance helper at Clow. Claimant testified his main job at Clow was to keep silica sand off the floor and to keep belts on production lines running. Claimant said he also helped mechanics at Clow with other duties. Claimant testified the job was physically demanding. He said the job required a lot of shoveling and carrying large hoses around to connect to an industrial vacuum. Claimant estimated the hoses weighed between 50 to 60 pounds per section. (Transcript pp. 20-22)

Claimant's prior medical history is relevant. In April, 2019, claimant treated for intermittent low back and hip pain. Claimant was prescribed medication. (JE 4, pp. 24-25)

Claimant testified that, on May 7, 2019, he was pulling a section of hose up a flight of stairs when he felt something pop in his neck. Claimant said he believed the hose he was carrying weighed approximately 100 pounds as it had sand in it. (Tr. pp. 24-25) Video footage labeled Exhibit D1, dated May 7, 2019, shows claimant carrying and dragging a section of hose. One end of the hose is on claimant's right shoulder. The video shows claimant tugging at the hose and rounding a corner in the factory. The surface of the flooring shown in the video is smooth. The video is approximately 33 seconds long. (Ex. D1)

On May 8, 2019, claimant completed an employee incident form indicating he injured his right arm and shoulder when pulling hoses. (Ex. 3, p. 28)

In a May 13, 2019 witness incident report, Kevin Shilling indicated claimant said he hurt his arm and neck "doing the trash" at work on May 7, 2019. (Ex. 3, p. 30)

In a May 13, 2019 written incident statement, Oscar Lopez, indicated he saw claimant in pain at work on the evening of May 7, 2019. Claimant told Mr. Lopez he had neck pain, the pain was not bad, and claimant would let someone know if the pain got worse. (Ex. 3, p. 31)

In a May 13, 2019 witness incident statement, Shawn Paulk, said claimant told him he was sore in the middle of his shoulder blades. (Ex. 3, p. 32)

On May 8, 2019 claimant was evaluated by Mitzi Fisch, R.N. The records suggest Ms. Fisch was an in-house nurse at Clow at the time of the injury. Claimant indicated he was pulling hose on May 7, 2019, when he felt a sharp pain in his right shoulder. Claimant denied pain in the neck or back. Because of some alleged "inconsistencies," claimant was told to use his own personal insurance for the injury. (Ex. 3, pp. 28-29)

On May 8, 2019, claimant was evaluated by Mark Zacharjasz, M.D., for shoulder pain caused by pulling a large vacuum hose at work. Claimant was assessed as having a right trapezius strain. Claimant was restricted to lifting no more than five pounds on the right. (JE4, pp. 26-27)

Claimant was evaluated on May 10, 2019, by Christopher Vincent, M.D., for right shoulder pain. Pain began while pulling an industrial hose at work. Dr. Vincent believed claimant's pain was stemming from the cervical spine. (JE1, pp. 1-3)

Exhibit D2 is a video dated May 29, 2019 of claimant standing outside the Clow plant. (Tr. p. 72) The video shows claimant with a backpack on his left shoulder. Claimant is wearing red shorts and a baseball cap. Claimant appears to be holding work clothes in his left arm. Someone off camera is talking to claimant in the video about a cookout. That person hands claimant, what appears to be, two bottles of a beverage. Claimant and the person then walk away from the camera. The video is approximately one minute and ten seconds long. Claimant said he was in pain in the video. (Tr. p. 72)

On May 28, 2019, claimant was written up for a fourth disciplinary issue within six months and was terminated. (Ex. 3, p. 37)

In a June 3, 2019, note, Dr. Vincent wrote to defendants' attorney following a conference call. Dr. Vincent saw the video of claimant dragging hose at work. Dr. Vincent noted inconsistencies with claimant and indicated claimant's range of motion and pain in his upper extremity seemed to improve when distracted. He also opined that claimant's complaints of pain were out of proportion to the physical exam and radiographic testing. (JE1, p. 6)

Dr. Vincent opined that there were inconsistencies in the way that claimant moved and the video footage taken at work when compared with claimant's exam. He

opined that claimant was unlikely to have significant material injury to the right shoulder by dragging hoses in the manner he saw in the video of the injury. (JE1, p. 7)

On July 24, 2019, claimant was evaluated by Trevor Schmitz, M.D. Claimant had a history of neck and arm pain, which was improving. A cervical MRI was recommended. (JE1, pp. 9-10)

On August 9, 2019, claimant had a cervical MRI. It showed severe foraminal stenosis at the C3-4 levels. (JE2)

Claimant returned to Dr. Schmitz on September 10, 2019. Claimant's MRI was discussed. Claimant was scheduled to have an epidural steroid injection (ESI) and physical therapy. (JE1, pp. 12-13)

In an October 14, 2019, letter, written by defendants' counsel, Dr. Schmitz indicated that he had reviewed the video footage of claimant at work on May 7, 2019. He opined claimant's current medical presentation and pain complaints were not caused the by work incident of May 7, 2019. Dr. Schmitz noted the findings on claimant's MRI were of a degenerative condition. (JE1, pp. 15-16)

On August 13, 2020, claimant underwent a functional capacity evaluation (FCE). Claimant was found to have given maximal consistent effort in the FCE. Claimant was found to fall in the light work category. Claimant was limited to rarely lifting 50 pounds to waist level, rarely pushing 70 pounds and carrying up to 10 pounds rarely in the front. (Ex. 2)

In an August 14, 2020 report, Charles Mooney, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of constant pain over the right nuchal angle, or the posterior region of the neck. Claimant also had occasional pain in the right arm. (Ex. A, p. 4) Dr. Mooney opined that Jamar grip testing was considered invalid due to submaximal effort. (Ex. A, p. 6)

Dr. Mooney opined that there were no pathological findings in the right upper extremity. He found claimant's exam inconsistent regarding upper extremity pathology. He found there was inconsistency in claimant's exam. He opined that claimant had no permanent restrictions or permanent impairment. (Ex. A, pp. 6-7)

Dr. Mooney noted that MRIs showed longstanding degenerative disc osteophytes at C3-4 and C5-6. He opined the findings at the C3-4 levels would result in radicular pain, but not with upper extremity weakness. Dr. Mooney reviewed the May 7, 2019 footage of claimant working and found no evidence of significant exertion or impact that would have aggravated claimant's cervical condition. (Ex. A, p. 7)

In an August 24, 2020, report, Jacqueline Stoken, D.O., gave her opinions of claimant's condition following an IME. Claimant was examined via telemedicine evaluation. Claimant indicated he was dragging 100 feet of ribbed hose up the stairs. The hose got caught, and claimant developed severe neck and right shoulder pain.

Claimant was unable to complete his carrying the hose up the stairs and reported an injury to his supervisor. (Ex. 1, p. 1)

Claimant complained of neck and right shoulder pain. Claimant had problems with sleep, climbing stairs, walking, driving, carrying up to ten pounds and doing portions of his job. (Ex. 1, p. 6)

Dr. Stoken opined claimant had a five percent permanent impairment to the cervical spine based on the finding that claimant fell in the DRE Category II of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. She found claimant had a 6 percent permanent impairment to the body as a whole for the shoulder injury. The combined impairments, under the Guides, resulted in an 11 percent permanent impairment to the body as a whole. Dr. Stoken recommended claimant avoid repetitive work at or above shoulder level. (Ex. 1, p. 7)

In a September 28, 2020, letter, written by claimant's counsel, Dr. Zacharjasz, opined his ongoing care for claimant was as a result of claimant pulling a 50-foot rubber hose across the floor and up stairs. He also opined that the functional capacity evaluation accurately reflected claimant's capabilities. (Ex. 6)

At the time of hearing, claimant was working for LDJ Manufacturing doing welding. Claimant's job at LDJ required him to lift up to 50 pounds without restrictions. Claimant indicated on an employment form for LDJ that he was physically able to perform the job of a welder. (Ex. F, pp. 22-24) Claimant began with LDJ in June of 2019. (Tr. p. 41)

Claimant testified he works between 45 to 50 hours a week at LDJ and makes more money than he did at Clow. (Tr. pp. 61-63) Claimant said that he needs to take breaks at LDJ as his right arm goes numb daily. (Tr. p. 44) He said that he also has neck pain from welding at work. (Tr. p. 45)

Claimant testified he has difficulty with sleep due to his arm and neck. (Tr. p. 47) Claimant testified he could not return to work at his work at Clow given his limitations. (Tr. p. 48)

Claimant testified at hearing he still has neck pain. (Tr. pp. 61, 65) In deposition, claimant testified his neck pain had resolved. (Ex. H, p. 35)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment.

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 Rule of Appellate Procedure 6.14(6).

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).

Claimant testified he injured his right shoulder and neck on May 7, 2019, while pulling hose up a stairway at work. Claimant said the hose became caught on the stairs, causing him to jerk his shoulder and neck. Claimant reported the injury the next day. Two coworker statements indicate that claimant told them he injured his arm and neck on May 7, 2019. Claimant's supervisor also indicated in an investigative statement claimant told them he had an injury in the area of his shoulder blades. (Exhibit 3, pp. 29-30)

Video footage taken the night of the incident shows claimant pulling a long hose on a flat surface. Claimant testified this video was taken after the injury.

An MRI of claimant's cervical spine showed severe foraminal stenosis at the C3-4 levels and mild to moderate stenosis at the C2-3 and C5-6 levels. (JE 1, p. 13) The stenotic changes are considered a degenerative condition. (JE 1, p. 16)

Five experts have opined regarding claimant's condition. Dr. Stoken evaluated claimant once for an IME. Dr. Stoken did not give an opinion regarding causation of claimant's neck and arm injury. (Exhibit 1)

In a statement written by claimant's attorney, Dr. Zacharjasz indicated he associated the necessity for ongoing care and treatment to the event of 5/7/19, where Mr. Lawrence was pulling a 50-foot long, 5-inch rubber hose across the floor and up some stairs. (Exhibit 6) Dr. Zacharjasz opinion regarding causation is problematic for several reasons. The opinion does not indicate that Dr. Zacharjasz reviewed Dr. Vincent's, Dr. Schmitz's, or Dr. Mooney's opinion regarding causation. It also does not appear that Dr. Zacharjasz saw footage of claimant taken the night of his injury. Because Dr. Zacharjasz has a lack of knowledge regarding other records concerning claimant's alleged injury, his opinion regarding causation is not convincing.

Dr. Vincent treated claimant for right shoulder pain. He reviewed the May 7, 2019, footage of claimant at work. Given claimant's MRI, Dr. Vincent could not explain claimant's upper extremity pain. (JE 1, pp. 3, 7) Dr. Vincent opined claimant had no significant injury to the right shoulder and it was unlikely claimant's May 7, 2019, incident was a material injury to the right shoulder. (JE 1, p. 7)

Dr. Schmitz treated claimant for a cervical injury. Dr. Schmitz reviewed claimant's May 7, 2019, video footage. In the letter written by defendants' counsel, Dr. Schmitz opined that claimant's cervical MRI showed a degenerative condition and that claimant's cervical condition was neither cause nor materially aggravated by the May 7, 2019 injury. (JE 1, pp. 14-15)

Dr. Mooney evaluated claimant once for an IME. Dr. Mooney also opined that claimant's neck and shoulder condition was not caused or materially aggravated by the May 7, 2019, incident. (Exhibit A)

In deposition, claimant testified he no longer had any neck pain. (Exhibit H, p. 35)

Dr. Stoken did not give a causation opinion. Dr. Zacharjasz causation and opinion is found not convincing. Drs. Schmitz, Vincent and Mooney all opined the claimant's neck and shoulder condition were not caused or materially aggravated by the May 7, 2019, work incident. Given this record, it is found that claimant has failed to carry his burden of proof he sustained an injury that arose out of the course of employment on May 7, 2019.

As claimant failed to carry his burden of proof he sustained an injury that arose out of the course of employment on May 7, 2019, all other issues, except for reimbursement of the IME, are moot.

The last issue to be determined is whether claimant is due reimbursement for an IME.

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.

On August 14, 2020, Dr. Mooney, the employer-retained physician, gave his opinion regarding claimant's permanent impairment. (Exhibit A) In an August 24, 2020, report, Dr. Stoken, the employer-retained physician, gave her opinion of claimant's condition. Given this chronology, it is found that claimant is entitled for reimbursement for the cost associated with Dr. Stoken's IME.

The final issue to be determined is cost. Costs are assessed at the discretion of the agency. As claimant failed to carry his burden of proof he sustained an injury that arose out of the course of employment, costs are not awarded to claimant.

ORDER

THEREFORE, IT IS ORDERED:

That claimant shall take nothing in the way of benefits from this proceeding.

That defendants shall reimburse claimant for costs associated with Dr. Stoken's IME.

That both parties shall pay their own costs.

Signed and filed this 17th day of February, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Robert C. Gainer (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.