BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANGEL LOVE, Claimant, vs. ARBOR SPRINGS OF WEST DES MOINES, LLC., Employer, and IOWA LONG TERM CARE RISK MANAGEMENT ASSOCIATION, Insurance Carrier, Defendants.	File No. 19700104.01 ARBITRATION DECISION Head Note No: 1402.30

STATEMENT OF THE CASE

Claimant, Angel Love, filed a petition in arbitration seeking workers' compensation benefits against Arbor Springs of West Des Moines, LLC., ("Arbor Springs"), employer, and Iowa Long Term Risk Management Association, insurer, both as defendants. This matter was heard in Des Moines, IA, on October 27, 2020, with a final submission date of November 24, 2020.

The record in this case consists of Joint Exhibits 1-12, Claimant's Exhibits 1-5, Defendants' Exhibits A-P, and the testimony of claimant, Mindi Matthies and Elizabeth Farber.

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 claimant's claim for benefits is barred by application of intoxication under Iowa Code section 85.16.

3. Whether claimant's claim for benefits is barred by application of an alleged refusal of light duty work under Iowa Code section 85.33(3).

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

FINDINGS OF FACT

Claimant was 47 years old at the time of hearing. Claimant has a GED. Claimant has an associate's degree from Southwestern Community College and a bachelor's degree in business management from Buena Vista University. She also has a CNA certificate. (TR pp. 11-12)

Claimant has worked as an office assistant, a cook, cashier, childcare provider and a CNA. (Ex. 6, pp. 2-3)

Claimant began with Arbor Springs as a part-time employee in December 2017. Claimant began full time with Arbor Springs in March 2018. While working at Arbor Springs, claimant also worked two other part-time jobs. Claimant testified that she worked as a baker, cashier and curbside employee at The Cheesecake Factory. She also worked at Saints Restaurant in Waukee, IA, as a line cook. (TR pp. 26-27)

Claimant's prior medical history is relevant. In July of 2015 claimant was treated for a recurrent shoulder problem. (JE 2, pp. 5-6)

Between September 2015 and October 2015 claimant underwent physical therapy for a right shoulder problem. (JE 2, pp. 8-15)

In November 2015, claimant had a right shoulder injection. (JE 4, p. 25)

In August 2016, claimant had another right shoulder injection. (JE 4, p. 26)

In October 2016, claimant had an MRI of the right shoulder that showed a partial thickness rotator cuff tear and a SLAP tear. (JE 4, p. 28)

In November 2016, claimant discussed shoulder surgery with an orthopedic surgeon. Claimant eventually declined surgery due to work and insurance constraints. (JE 4, p. 29) In March 2018, claimant had a third shoulder injection. (JE 7, pp. 45-46)

In July 2018, claimant tripped and fell over a cat. Medical records from that injury indicate that claimant had "extreme discomfort" and had pain and decreased range of motion after the tripping incident. (JE 6, pp. 40-43)

Claimant testified that she was working at Arbor Springs on August 25, 2018, when a resident needed to be lifted from the floor to his bed. Mindi Matthies, LPN, who

is also claimant's supervisor, asked claimant to help lift the resident. Claimant said she lifted the resident with her right arm. (TR pp. 15-16) Claimant said she continued with her shift. She said at the end of the day she was in pain. (TR pp. 21-22)

Nurse Matthies testified at hearing that she was the coordinator of nursing at Arbor Springs. Nurse Matthies testified that she and claimant did the transfer of the patient at issue. She testified that she was on the right side and used her right arm to make the transfer. She testified that claimant was on the left side of the patient and used her left arm to transfer. Nurse Matthies said she did not do transfers with her left arm. (TR pp. 71-73, 77, 79, 81-82)

In an August 28, 2018 statement, Nurse Matthies indicated that claimant used her left arm to transfer the resident. (Ex. C)

On October 25, 2018, after working her job at Arbor Springs, claimant worked 4.42 hours at Saints. On October 26, 2018, claimant worked 3.85 hours at Saints. (Ex. K, p. 37)

Claimant reported the injury to Arbor Springs on October 27, 2018. Claimant's report indicates that she was " . . . not sure how/what exactly happened. It was a very busy day and upon leaving work and slowing down, I noticed discomfort and pain in the right elbow, shoulder and wrist." Claimant also indicated she was " . . . not sure what I did" to cause the injury. (Ex B, p. 7)

Claimant testified at deposition that she had taken THC edibles in August 2018, but had not used edibles on the date of the alleged injury. (Ex G, depo pp. 79-80) At hearing, claimant indicated she had taken THC edibles on the date of the injury. (TR pp. 40-41)

On August 29, 2018, claimant was evaluated by Ashley Ebert, ARNP, for right shoulder pain. Claimant indicated to Nurse Practitioner Ebert she was not sure of the exact cause of the accident and that the incident probably occurred between 6:00 AM and 2:00 PM on August 25, 2018. Claimant indicated pain developed later that night. (JE 8, pp. 50-54)

In her deposition, claimant testified she knew at the time she left work on August 25, 2018, that lifting the resident with Nurse Matthies caused her injury. (Ex. G, depo p. 58)

In a September 12, 2018, recorded statement, claimant indicated she assumed that she injured her shoulder lifting a resident as it was the only heavy lifting she had done that day. (Ex. E, pp. 14-15)

On September 5, 2018, claimant was seen by David Stilley, M.D., for right shoulder and right elbow pain as a result of the injury on August 25, 2018. Claimant was prescribed medication and given work restrictions. (JE 8, pp. 59-62)

On September 28, 2018, claimant had an MRI of the right shoulder. The MRI showed a supraspinatus and labrum tear on the right. (JE 10)

Claimant returned for follow-up with Dr. Stilley on October 1, 2018. Claimant was recommended to see an orthopedic specialist. (JE 8, pp. 67-68)

On October 18, 2018, claimant was evaluated by Kyle Galles, M.D., an orthopedic surgeon. Claimant had right shoulder pain that was re-aggravated when trying to lift a patient. Dr. Galles indicated claimant's condition was probably an aggravation of a pre-existing condition. He opined work was more likely than not a significant contributing factor to claimant's current symptoms. Claimant had an A/C joint injection. Claimant was given lifting restrictions and recommended to have physical therapy. (JE 11, pp. 89-92)

On November 7, 2018, claimant was terminated from employment with Arbor Springs for allegedly sleeping on the job, engaging in disruptive behavior, and cell phone usage. (Ex. J; TR p. 86)

Claimant returned to Dr. Galles on December 13, 2018, for follow-up. Claimant had temporary relief from the injection. Dr. Galles recommended rotator cuff surgery. (JE 11, pp. 93-95)

Claimant testified that she made attempts to schedule the surgery. She said that when she contacted Dr. Galles' office to schedule surgery, she was told that approval was withdrawn. (TR pp. 33-34)

In a January 2, 2019 letter, Dr. Galles opined that claimant had a pre-existing right shoulder AC joint arthritis. He opined that claimant's activity of lifting a patient in August 2018 appears to have been a significant contributing factor to claimant's persistent symptoms. Dr. Galles indicated it was difficult to say whether or not claimant would ultimately have required surgery had she not lifted a resident in August 2018. (JE 11, p. 96)

In response to a March 15, 2019 letter written by defendants' counsel, Dr. Galles indicated he could not, with any reasonable degree of medical certainty, opine that claimant's right arm and shoulder symptoms were substantially caused or aggravated by her work activities at Arbor Springs on or about August 25, 2018. He indicated it was more likely the injections that claimant received in March 2018 had worn off and that claimant's right arm and shoulder pain returned regardless of her work activities at Arbor Springs. (Ex. A)

On August 12, 2019, claimant returned to Iowa Ortho. Claimant had continued right shoulder pain. Claimant was given an injection in the AC joint. (JE 11, p. 97)

In a September 10, 2020 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an IME. Claimant had daily pain in the anterior aspect of her right shoulder. Claimant had neck pain. (Ex. 1, pp. 1-8)

Dr. Sassman assessed claimant with right shoulder pain. She opined claimant was not at maximum medical improvement (MMI). Provisionally she found that claimant had reached MMI as of August 25, 2019. Dr. Sassman recommended claimant be referred to Dr. Meyer for further evaluation and possible surgery. (Ex. 1, pp. 10-12)

Dr. Sassman provisionally found that claimant had a 7 percent permanent impairment of the body as a whole. She restricted claimant to limit her lifting, pushing, pulling or carrying up to 30 pounds. She also recommended claimant do no lifting, pushing or pulling above shoulder level. (Ex. 1, p. 12)

After termination from Arbor Springs, claimant went to work at a daycare service. Claimant testified that because of her shoulder limitations, she was unable to provide childcare and only did clerical duties. (TR p. 36)

Since the date of the alleged injury, claimant has worked at The Cheesecake Factory. She says that due to her limitations, she only does cashier work. (TR p. 27)

At the time of the hearing, claimant ran a daycare out of her home. She said that family members perform cleaning and maintenance on her home due to her limitations. (TR p. 37)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury on August 25, 2018, 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 R. App. P. 6.904(3).

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" refer 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 Elec. 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 she injured her right shoulder while lifting a resident with Nurse Matthies on August 25, 2018. Claimant testified that she used her right arm to lift the resident while Nurse Matthies used her left arm.

There are several inconsistencies with claimant's version of how she injured her right shoulder.

First, as noted, claimant testified she lifted the resident with her right hand and arm. Nurse Matthies testified she lifted the resident with her right arm. (TR pp. 71-73, 77, 79, 81-82) Nurse Matthies' testimony is corroborated by a statement issued shortly after the injury that Nurse Matthies lifted the resident with her right hand and arm. (Ex. C)

Second, in deposition, claimant testified that she knew when she left work on August 25, 2018, that lifting the resident caused her injury. (Ex. G, p. 58) At hearing claimant testified she actually knew she injured her arm, due to the incident, four days after the alleged incident occurred on August 29, 2018. (TR pp. 54-55)

In her injury report at Arbor Springs dated August 27, 2018, claimant indicated she was not sure how the injury happened. (Ex. B, p. 7)

On August 29, 2018, claimant was evaluated by Nurse Practitioner Ebert. In that visit, claimant indicated she was not sure how her injury happened and that her pain did not develop until later that night. (JE 8, pp. 50-54) As noted above, the record indicates that claimant worked at Saints as a line cook on the same day after she left her job at Arbor Springs. (Ex. K, p. 37)

Two experts have opined regarding the causal connection of claimant's right shoulder problems. Dr. Sassman evaluated claimant on one occasion for an IME. Dr.

Sassman opined claimant's alleged work injury of August 25, 2018, was a substantial aggravating factor of the degenerative changes in claimant's right shoulder. (Ex. 1, p. 11)

There are several problems with Dr. Sassman's opinion regarding causation. First, Dr. Sassman's report makes no reference to the documentation written by Nurse Matthies that claimant actually lifted the resident with her left hand.

Second, Dr. Sassman seems unaware that on the date of the injury, after claimant left work, she worked a short shift as a line cook at a restaurant. She is also unaware that claimant again worked at Saints on August 26, 2018.

Dr. Sassman's report makes no mention that when claimant initially reported the alleged injury on August 27, 2018, claimant was unaware how the injury happened. Dr. Sassman's report makes no mention that at claimant's first medical care visit on August 29, 2018, claimant was still unsure how the alleged injury happened. (Ex. B, p. 7, JE 8, p. 50)

Finally, Dr. Sassman is unaware that claimant testified in deposition that by the time she left Arbor Springs on August 25, 2018, she knew that the August 25, 2018 lifting incident caused her shoulder pain. (Ex. G, depo p. 58)

As noted above, the record in this case, and claimant's testimony, has numerous inconsistencies regarding how claimant lifted the resident and when claimant knew her shoulder injury was caused by the lifting incident. Claimant worked two short shifts at another job as a cook before she reported the alleged injury to Arbor Springs. Because Dr. Sassman is unaware or does not address these numerous inconsistencies with the record and claimant's testimony, Dr. Sassman's opinion regarding causation is found not convincing.

Claimant tripped over a cat a month before her alleged injury. When she was treated for that injury, claimant indicated she had "extreme discomfort" in her shoulder. The record suggests claimant attempted to hide this injury from her employer during the investigation of this claim. (Ex. B, p. 7, Ex. E. pp. 18 and 27, Ex. G. depo pp. 41-42) Claimant testified in deposition that she knew the night she left Arbor Springs she injured her shoulder after lifting a resident. Claimant testified at hearing that she did not actually realize the cause of her injury until four days after the alleged incident occurred. Claimant's injury report makes no reference to lifting a resident as a cause of injury. Claimant's testimony of how she lifted the resident in question is contradicted by the testimony and documents from Nurse Matthies. Dr. Sassman's opinion regarding causation is found not convincing. Given this record, claimant has failed to carry her burden of proof she sustained an injury that arose out and of in the course of employment on August 25, 2018.

As claimant failed to carry her burden of proof she sustained an injury that arose out of and in the course of employment, all other issues, except for the reimbursement of the IME, are moot.

The final issue to be determined is whether claimant is due reimbursement of the IME under Iowa Code section 85.39.

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. Sassman, the expert retained by claimant, gave her opinion of claimant's permanent impairment in a report dated September 10, 2020. There is no expert opinion from defendants in the record regarding claimant's permanent impairment. Given this record, claimant has failed to carry her burden of proof she is due reimbursement of the IME under Iowa Code section 85.39.

ORDER

THEREFORE, IT IS ORDERED:

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

That both parties shall pay their own costs.

Signed and filed this 25th day of May, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Valerie Foote (via WCES)

Gregory Taylor (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.