BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW CARFI, Claimant, vs. BRAND ENERGY SERVICES, LLC, Employer, and ILLINOIS NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JUL 19 2019 WORKERS COMPENSATION File No. 5065315 ARBITRATION DECISION Head Note Nos.: 1100; 1402.30

STATEMENT OF THE CASE

Claimant Matthew Carfi filed a petition in arbitration seeking workers' compensation benefits from defendants Brand Energy Services, LLC, employer, and Illinois National Insurance Company, insurance carrier. This matter was heard in Cedar Rapids, Iowa, on May 15, 2018, by Deputy Workers' Compensation Commissioner Erica J. Fitch.

On July 9, 2019, pursuant to Iowa Code section 17A.15(2), the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a proposed decision in this matter due to the unavailability of Deputy Commissioner Fitch.

Pursuant to the requirements of Iowa Code section 17A.15(2), I have read the entirety of the record created before Deputy Commissioner Fitch, as well as the parties' post-hearing briefs.

Although there are several factual disputes between the parties, neither party argues demeanor is the operative decision making factor in this case. Thus, I conclude I can proceed to issue a proposed decision pursuant to Iowa Code section 17A.15(2).

The parties submitted a hearing report prior to the commencement of the evidentiary hearing. On that hearing report, the parties entered into certain stipulations. Deputy Commissioner Fitch accepted that hearing report and entered an order at the time of hearing noting her approval of the stipulations and disputes noted on the hearing report. I therefore accept the stipulations noted on the hearing report, and no factual or

legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are bound by their stipulations.

The record presented to and accepted by Deputy Commissioner Fitch at hearing consists of Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 5, Defendants' Exhibits A through K, and the testimony of claimant. The evidentiary record closed on May 15, 2018. The case was considered fully submitted upon receipt of the parties' briefs on August 15, 2018.

ISSUES

The parties submitted the following disputed issue for resolution:

1. Whether claimant sustained a cumulative injury that arose out of and in the course of his employment.

2. If claimant sustained a work-related injury, whether he provided timely notice pursuant to Iowa Code section 85.23.

3. Whether claimant sustained any temporary disability as a result of his work-related injury, and if so, the extent of his entitlement to temporary disability benefits.

4. Whether claimant sustained any permanent disability as a result of his work-related injury, and if so, the extent of his industrial disability.

5. Whether claimant is entitled to payment of or reimbursement for his claimed medical expenses and associated mileage.

6. Whether claimant is entitled to penalty benefits.

7. Whether claimant is entitled to reimbursement for his independent medical examination (IME).

8. Whether claimant is entitled to a costs assessment.

FINDINGS OF FACT

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

Claimant was employed by defendant-employer as an industrial painter on three separate occasions between 2015 and 2016. (Hearing Transcript, p. 8) More specifically, he was employed from November 16, 2015 through January 13, 2016; March 7, 2016 through May 20, 2016; and June 17, 2016 through October 25, 2016. (Defendants' Exhibit I, p. 3)

Claimant's essential duties were the same during each stint of employment. (Hrg. Tr., pp. 8-9) Generally speaking, he was tasked with finishing up and coating pipes in a fertilizer plant. (Hrg. Tr., pp. 8-9) This required prepping the pipes and coating the pipes. (Hrg. Tr., p. 15-20) These duties were physical in nature and involved climbing, bending, stooping, and working in "awkward positions." (Hrg. Tr., pp. 15-19) Claimant also carried his tool bucket, which weighted 10 to 15 pounds. (Hrg. Tr., pp. 23-24)

Claimant testified he began having difficulties walking during his shift on July 19, 2016. (Hrg. Tr., pp. 26-27) He testified two of his foremen witnessed him limping and asked him what was wrong, to which he replied, "'I don't know what's going on. I just know it started hurting really bad.'" (Hrg. Tr., p. 26; see Hrg. Tr., p. 30) The foremen instructed claimant to go to the emergency room (ER). (Hrg. Tr., p. 26)

When claimant arrived at the ER he complained of leg pain that "started about one month ago, and has increased in intensity." (Joint Ex. 1, p. 1) Notably, the ER notes from July 19, 2016 are completely devoid of any mention of claimant's employment or work duties. He was discharged with what was believed to be a hamstring strain. (JE 1, p. 3; Hrg. Tr., p. 26)

Claimant testified he returned to his job the next day but the pain progressively worsened to the point that defendant-employer would not allow claimant to work until he obtained a doctor's release. (Hrg. Tr., pp. 26-27) Claimant then presented to a chiropractor to "clear [him] to go back to work." (Hrg. Tr., pp. 27, 30) At the chiropractor, claimant reported pain in his left thigh "of unknown origin since 06/30/2016." (JE 2, p. 7) The notes from claimant's chiropractic visits are likewise lacking any mention of claimant's work duties as a possible cause of or contributing factor to claimant's symptoms. Claimant obtained a release from the chiropractor and planned to return to work. (Hrg. Tr., p. 32)

According to claimant, however, a ranking foreman approached him shortly thereafter and instructed him to sign a form indicating he was not hurt on the job. (Hrg. Tr., pp. 33) Claimant testified he signed the form because he was fearful of getting fired if he refused. (Hrg. Tr., p. 33) This form, if it exists, was not part of the evidentiary record produced at hearing. According to claimant, this foreman also told claimant to return to a doctor for another release. (Hrg. Tr., p. 33)

Claimant then presented to a different doctor, Jeffrey Juhl, D.O., on August 9, 2016, to obtain another work release, this time with paperwork in hand from defendant-employer. (Hrg. Tr., pp. 34-35) In the notes from the August 9, 2016 visit with Dr. Juhl, claimant reported "left leg pain going on 1 month." (JE 3, p. 13) Claimant told Dr. Juhl "it just developed 1 day" and "[h]e woke up with it." (JE 3, p. 13) Dr. Juhl performed a lumbar epidural steroid injection (ESI) on August 9, 2016 and again on August 29, 2016. (JE 3, pp. 13, 18)

Claimant returned to work after both ESIs and continued working until October 25, 2016, when he said he experienced a sudden increase in pain that left him unable to walk back to the break room. (Hrg. Tr., p. 36) Defendant-employer brought a golf cart to pick claimant up and then terminated his employment. (Hrg. Tr., p. 36)

After claimant's termination, he presented to Great River Orthopedic Specialists on November 3, 2016. He reported developing low back pain in January that eventually "began going into his left lower extremity." (JE 5, p. 23) The notes from this initial visit at Great River do not mention claimant's work duties, nor do they mention claimant's alleged sudden increase in pain at work just days earlier on October 25, 2016. (JE 5, p. 23) An MRI was recommended, which revealed degenerative joint disease. (JE 5, p. 26) Claimant was referred to Robert Foster, M.D., for surgery.

The note from Dr. Foster's initial examination of claimant reports low back and left leg pain and weakness that was "[o]ngoing for several months and getting progressively worse." (JE 5, p. 27) The note only mentions claimant being "a painter"; it does not discuss claimant's work duties or whether claimant's work duties could have been a cause of or contributing factor to claimant's symptoms.

Dr. Foster performed a lumbar laminectomy and decompression surgery on December 22, 2016. (JE 6, p. 55) After surgery, claimant participated in physical therapy. At his therapy session on January 20, 2017, claimant told the therapist he started experiencing low back pain in January of 2016 and left leg pain in February of 2016. (JE 1, p. 4) Claimant's work duties are not mentioned. (JE 1, p. 4)

Unfortunately, by claimant's follow-up appointment with Dr. Foster on February 3, 2017, he was reporting little improvement. (JE 5, p. 47) Dr. Foster recommended a second surgery. (JE 5, p. 47) That surgery, another laminectomy and decompression at a different level, was performed on February 10, 2017. (JE 6, p. 60) The second surgery was similarly unsuccessful. Dr. Foster referred claimant to the University of Iowa Hospitals and Clinics (UIHC) for a second opinion. (JE 5, p. 52)

Claimant presented to Andrew Pugely, M.D., at UIHC on March 9, 2017. There are no discussions regarding possible causes of the onset of claimant's symptoms in the notes from claimant's treatment with Dr. Pugely. Dr. Pugely ordered a new MRI that revealed a disc herniation at L2-L3, but claimant declined a third surgery. (JE 8, pp. 78-79)

Claimant was also evaluated by Joseph Chen, M.D., at UIHC. During his appointment with Dr. Chen in April of 2017, claimant reported an improvement in his symptoms and indicated he would like to proceed with physical therapy. (JE 8, pp. 81-84) Claimant's treatment at UIHC was the most recent treatment he received prior to hearing. (Hrg. Tr., p. 38)

In addition to claimant's treatment records, both parties offered expert medical opinions to address whether claimant's pre-existing spine condition was aggravated by his work duties. Defendants obtained a letter from Dr. Foster, claimant's surgeon, who opined on October 20, 2017 as follows:

> [Claimant] has long-standing lumbar degenerative disc disease, particularly at the L4/L5 and L5/S1 level. There is no evidence from the patient's history, physical exam, or his studies that this is a result of cumulative trauma from his employment. Indeed, evidence-based medicine and clinical data refute the concept generally for cumulative trauma for spine pathology.

(Def. Ex. A, p. 1)

Dr. Chen also provided an opinion at defendants' request in a check-the-box style letter signed on November 3, 2017. He indicated he agreed with Dr. Foster that "no evidence from [claimant's] history [or] physical exam supported the position that [claimant] sustained a cumulative trauma from his job as a painter." (Def. Ex. B, p. 2) Dr. Chen opined claimant's condition was the result of pre-existing degenerative disc disease, and that there was nothing to establish his condition was the result of cumulative trauma from his employment. (Def. Ex. B, p. 3)

Claimant offered the opinions of his IME physician, Sunil Bansal, M.D. Dr. Bansal opined claimant's work with defendant-employer was a substantial contributing factor in permanently aggravating his degenerative disc disease. (Cl. Ex. 1, p. 17) More specifically, Dr. Bansal believed the heavy lifting, climbing, and bending claimant performed for defendant-employer contributed significantly to the aggravation. (Cl. Ex. 1, pp. 17-18)

Dr. Bansal's report fails to address or explain two significant discrepancies, however. First, Dr. Bansal's report fails to address the various and conflicting timeframes and descriptions given by claimant regarding the onset of his symptoms. Claimant testified at hearing that his pain started roughly a month before his foremen instructed him to go to the ER after they noticed him limping on July 19, 2016. (Hrg. Tr., p. 51) This is also what claimant reported at the ER. (JE 1, p. 1) In his deposition, however, claimant described a much briefer onset of his pain. He testified he began limping almost instantly—within a day—of the initial onset of his pain and that his supervisors noticed him limping "just a few days later". (Def. Ex. H, p. 6 [Cl. Depo. Tr., pp. 18-20])

This is not the only inconsistency. Claimant reported to at least two providers an onset of back pain in January of 2016 that developed into left leg pain, but to Dr. Bansal he reported a low back strain in January 2016 that resolved shortly thereafter. (JE 1, p. 4; JE 5, p. 23; Cl. Ex. 1, p. 13) Furthermore, in his deposition, claimant testified his leg pain began "after the day of work as [he] cooled down," yet to Dr. Juhl he reported "[h]e

woke up with it." (Def. Ex. H, p. 6 [Cl. Depo. Tr., p. 19]; JE 3, p. 13) Dr. Bansal failed to address any of these irregularities in his report.

Of even greater consequence, however, is that Dr. Bansal's opinion regarding causation is the outlier when compared to the totality of claimant's treatment records, none of which discuss claimant's work duties as a possible source of or contributing factor to claimant's symptoms.

As set forth above, the ER notes from July 19, 2016, the day on which claimant's foremen noticed him limping and instructed him to go to the doctor, make no mention of claimant's employment or work duties. Similarly, the note from claimant's chiropractor, to whom claimant presented to get cleared to return to work, does not discuss claimant's employment as a possible source of or contributing factor to claimant's pain. To the contrary, the chiropractic notes provide claimant's pain was "of unknown origin." (JE 2, p. 7) The records from claimant's treatment with Dr. Juhl are likewise silent regarding claimant's work duties as a possible origin of or contributing factor to claimant's pain; instead, the notes suggest claimant's pain developed spontaneously. (JE 3, p. 13) (noting pain "just developed 1 day" and "[h]e woke up with it")

The treatment records after claimant's termination, at which point he would have no incentive to hide or conceal whether his injury occurred at work, also fail to mention claimant's employment as a possible cause or contributing factor to claimant's symptoms. The notes from Great River Orthopedic Specialists, physical therapy, and UIHC contain no such discussions. Notably, not even claimant's alleged sudden increase in pain at work on October 25, 2016—which left him unable to walk back to the break trailer and ultimately led to his termination the same day—is mentioned in the notes from claimant's initial visit at Great River just days later on November 3, 2016.

The absence of any discussion by claimant's treating physicians about his work duties as a possible source of or contributing factor to his condition is troubling, as are the contradictions in the record regarding claimant's descriptions of the timing and onset of his symptoms. Given Dr. Bansal's failure to address these issues in his report, I do not find his opinions convincing.

Without a credible expert opinion or corroborating references to his work duties in the medical records, I find insufficient evidence that claimant's spine condition was aggravated by his work duties.

CONCLUSIONS OF LAW

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.

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. 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).

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).

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).

In this case, claimant offered the report of Dr. Bansal, who opined claimant's work for defendant-employer was a substantial contributing factor in permanently aggravating claimant's degenerative spine condition. As explained above, however, I did not find Dr. Bansal's opinion convincing. Dr. Bansal failed to explain the absence of any discussion regarding claimant's work duties in his treatment records and the contradictions in claimant's descriptions of the timing and onset of his symptoms. Without a credible expert opinion, or corroborating mentions of his work duties in his treatment records, I found insufficient evidence that claimant's work activities aggravated his pre-existing spine condition. I therefore conclude claimant failed to carry his burden to prove he sustained a cumulative injury that arose out of and in the course of his employment.

Claimant is critical of the opinions offered by Dr. Foster and Dr. Bansal. Claimant asserts Dr. Chen failed to address whether claimant's work duties for defendant-employer were a substantial contributing factor in aggravating his pre-existing spine condition. While claimant is correct that Dr. Chen did not specifically address whether claimant's employment was "a substantial contributing factor" to the aggravation, it is claimant—not defendants—who ultimately bears the burden of proof, and I did not find claimant's expert persuasive.

Furthermore, Dr. Chen's opinion that there was no evidence in claimant's history, physical examination, or studies to establish that his condition was the result of cumulative trauma from his employment is more consistent with claimant's treatment records—which, as discussed in detail above, are without any significant mention of his work duties as a possible source of or contributing factor to his symptoms. Thus, claimant's criticisms of defendants' experts do not impact my determination that claimant failed to satisfy his burden to prove he sustained a cumulative injury that arose out of and in the course of his employment.

My conclusion that claimant failed to prove a work-related injury renders several issues moot, including whether he provided sufficient notice pursuant to Iowa Code section 85.23, his entitlement to temporary and permanent disability benefits or penalty benefits, and his entitlement to payment or reimbursement for medical expenses and related mileage.

Regarding the reimbursement for claimant's IME, the Iowa Supreme Court in Des Moines Area Regional Transit Authority v. Young (hereinafter DART) held that reimbursement for IMEs under Iowa Code section 85.39 is only available if an evaluation of permanent disability has been made by an employer-retained physician. 867 N.W.2d 839, 844 (Iowa 2015). Relying on the DART court's strict and literal interpretation of Iowa Code section 85.39, the commissioner has since concluded there is a "distinct" difference between evaluations of permanent impairment and evaluations to determine causation. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 26, 2018).

In this case, the opinions offered by Dr. Foster and Dr. Chen were not evaluations of permanent impairment, but evaluations of whether claimant's condition was the result of workplace duties. Further, there was no impairment rating from any physicians chosen by defendants because it is defendants' position that claimant did not sustain a work-related injury. For these reasons, I conclude the reimbursement provisions of Iowa Code section 85.39 were not triggered, meaning claimant is not entitled to reimbursement for his IME under Iowa Code section 85.39.

Assessment of costs is a discretionary function of the agency. Iowa Code § 86.40. Having determined claimant failed to establish a work-related injury, I conclude defendants should not be taxed with any of the costs sought by claimant.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

Each party shall bear their own costs.

Signed and filed this 19th day of July, 2019.

STEPHANIE J. COPLEY
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.