BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES P. LEVASSEUR,

Claimant,

vs.

NEW START FINANCIAL, INC., (d/b/a BIG DEAL AUTO),

Employer,

and

TECHNOLOGY INSURANCE COMPANY, INC.,

Insurance Carrier,
Defendants.

File No. 5048702

ARBITRATION

DECISION

Head Note Nos.: 1100; 1106; 1402.3; 2500

STATEMENT OF THE CASE

Claimant, Charles Levasseur, has filed a petition in arbitration seeking workers' compensation benefits from New Start Financial, Inc., d/b/a Big Deal Auto, employer, and Technology Insurance Company, Inc., insurer, both as defendants for an injury arising out of his employment on March 14, 2014.

The case was heard in Sioux City, Iowa, on May 6, 2015, and considered fully submitted as of May 12, 2015, upon the simultaneous filing of briefs.

The evidence in this case consists of the testimony of claimant; Claimant's Exhibits 1-8, Defendant Exhibits A-M, as well as the testimony of the claimant and Brian Berkenpas, the President of New Start Financial.

ISSUES

1. Whether claimant sustained an injury on March 14, 2014, which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

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

4. The appropriate commencement date of permanent disability benefits;

5. The extent of claimant's scheduled member disability;

6. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant.

STIPULATIONS

The parties agree that at the time of the claimant's alleged injury, his gross earnings were $600.00 dollars per week, that he was married and entitled to four exemptions. Based on those foregoing numbers, the weekly benefit rate would be $414.60.

FINDINGS OF FACT

Claimant was a 36 year old person at the time of the hearing. He has a high school degree. His past employment history includes work as a driver, painter/sander, and detailer. He had been fired from all three jobs held prior to his employment with defendant employer. (Ex. J)

He began working for defendant on May 11, 2011, as a lot manager. His duties included maintaining the cars on the lot, making sure that they are clean, getting cars ready for delivery, and running errands. The lot on which he worked was sizeable. Brian Berkenpas, owner and president of the defendant employer, testified that the total square footage of the lot is about 90,000 and the total square footage of hard surface is around 64,000.

In speaking with Sunil Bansal, M.D., an expert in the case, claimant noted that his pedometer recorded daily steps of 10,000 to 20,000 on average.

Claimant worked as a lot manager for approximately two and a half years when he was promoted to service manager of Nice Cars. The promotion came with a few additional responsibilities such as ordering parts for the mechanic, helping customers, and getting vehicles ready for sale. Nice Cars closed around March 2014 and claimant returned to his previous position as lot manager of Big Deal Auto.

In the two weeks leading up to March 14, 2014, claimant was assisting in the closing down of Nice Cars which involved, among other things, emptying out buildings and moving equipment.

He was walking from the sales floor across the lot when he felt a pop. He told the service manager that he though he hurt his foot.

He noted immediate pain and swelling and presented himself to the Emergency Department of St. Luke's on the same day. He was diagnosed with a fracture at the base of his left fifth metatarsal and placed in a CAM boot.

His day to day job duties included walking, pushing and pulling equipment, communicating with employees, and facilitating sales.

The surface of the parking lot is an asphalt blacktop lot. Claimant does not recall it being resurfaced in the years since he has worked there and it has only been repaired once. Mr. Berkenpas testified that the last time the lot was resurfaced was in 2002 and that repairs are performed on an as-needed basis.

At the time of the emergency room visit, claimant weighed approximately 428 pounds and was an everyday smoker, smoking 1-1 and 1/2 packs per day. (Testimony and Ex. 4, p. 1) The ED record is as follows:

> Patient is a 35 y.o. male with a PMHx of gout, HTN, neuropathy, metatarsal fracture, hernia, mood disorder, sleep apnea, and afib who presents to the ED with complaints of foot pain. He provides he was walking around 1600 today and felt a pop in his left foot, he was able to take a few more steps then started limping. The pain has worsened over the day, and he is now experiencing numbness and tingling. He denies any fever, chills, sore throat, visual disturbance, shortness of breath, chest pain, abdominal pain, vomiting, or dysuria. He states Dr. Nelson told him that he walks on the outside of his feet which causes him to have a history of stress fractures for the past 2 years. The patient has no other complaints at this time.

(Exhibit A, page 10)

There is no mention in the ED report of uneven surfaces. In his answers to interrogatories, he does not indicate that uneven surfaces contributed to his injury. He referred to two days of tenuous moving, lifting, cleaning and hauling equipment. (Ex. K) In his deposition, he stated that he may have stepped in a crack but that was speculation. (Ex. M, Deposition p. 53-56) Claimant admitted he was engaged in normal walking. Id.

Prior to the injury, claimant had previous metatarsal fractures. Medical records from August 21, 2011 indicate right foot problems. (Ex. A) He was treated at CNOS in May 2012 for a broken bone in the right foot. (Ex. B, p. 23) At that time, he noted that he had a previous fifth metatarsal fracture. This visit concerned a third metatarsal fracture. (Ex. B, p. 23) Later in September 2012, it was noted that he had fractures in the third and fourth metatarsals on the right side. (Ex. B, p. 26) A right lateral foot pain started "spontaneously" on Friday, October 10, 2012. (Ex. A, p. 3) He was diagnosed with right fifth metatarsal fracture. (Ex. A, p 8)

On October 27, 2012, he was seen for follow up care of the right fifth metatarsal fracture and it was noted that he had a previous left small toe metatarsal fracture. (Ex. B, p. 31) Raymond Emerson, M.D., suggested that claimant had a vitamin deficiency that caused his fractures. (Ex. B, p. 32) Claimant began taking a vitamin D

supplement. He testified he ceased taking them on the advice of Kostas Antanopolous, D.P.M.

His right small toe metatarsal healed slowly and there was some suspicion of a nonunion by December 2012. (Ex. B, p. 42) At Dr. Emerson's request, claimant was seen by Daniel R. Kensinger, M.D., who noted that claimant's problems were primarily his weight.

> I explained to him that his primary difficulty with these stress fractures is that he weighs 430 pounds. He does need to continue to lose weight otherwise I think this is going to be a recurrent situation for him. I explained that we could easily fix this fracture. However, I am concerned that he would just break through the screw and be in the same situation that he is in now if he does not lose some weight. At this point, I do not think a bone stimulator would be of any benefit because he is attempting to heal this. I suggested that he continue to try to offload his foot a little more than he has with the cane. He get [sic] back on crutches. In the long run I think his outcome is really going to be based on him being able to lose weight and also quit smoking. This was also discussed at length. I will be seeing him back in a month for repeat clinical and radiographic examination.

(Ex. B, p. 51)

The right toe continued to plague the claimant and he was off work for a number of months. It was recommended that he continue efforts to lose weight as well as cease smoking so as not to inhibit bone growth and healing. Ultimately, he was referred to GIKK Ortho Specialists in Omaha where he was seen by David J. Inda, M.D. (Ex. F) Their solution was an orthotic.

> At this point we did discuss his weight and he has made an effort to try and lose weight. We are going to try and insert to help offload this and in the interim allow him to go ahead and advance to full weight bearing in the boot without crutches. He is going to talk to his employer and see if he can work half days to begin with and then optimize that as time goes on. He has already been treated for a vitamin D3 deficiency, so he is optimizing that. We will forgo a bone stimulator at this point in time, because once gain it does show to be healed. I think more of his issue is just a mechanical stresses; one because of his size, and two because of his deformity that is contributing to the ongoing issue. I think unless and until that is addressed, ideally non-surgically, that he is going to be set up for recurrent fractures involving this area. This was discussed with the patient. He expressed understanding of everything that was discussed. We will see him back in six weeks, sooner if problems arise.

(Ex. F, p. 103)

The orthotic did contribute mild improvement to claimant's condition. (Ex. F, p. 104)

Claimant returned for treatment for his left metatarsal fracture on March 17, 2014, with complaints of intense pain, rating his pain as 8-9 on a 10 scale. (Ex. 4, p. 1) In his history to Dr. Antonopoulos, DPM, he admitted to a similar fracture on his right side that had mostly healed. (Ex. 4, p. 2) Dr. Antonopoulos recommended surgical repair which took place on April 2, 2014. (Ex. 2, p. 3) An x-ray taken post-surgery showed that there was a healed fracture of the four metatarsal along with screws projecting from the base of the fifth metatarsal. (Ex. 2)

He had regular follow ups and controlled his pain with oxycodone. (Ex. 4) Sutures from the surgery were removed on April 23, 2014. (Ex. 4, p. 15) Ultimately, he was returned to work on May 27, 2014, on restricted duty with no pushing, pulling, lifting or dragging anything greater than 15 pounds. (Ex. 4, p. 20)

Claimant continued to heal slowly and because of pain underwent an injection on June 30, 2014. (Ex. 4, p. 27) By July, 21, 2014, claimant's fractured metatarsal had not healed properly and Dr. Antonopoulos ordered a bone stimulator. (Ex. 4, p. 30) He was given a prescription for a compounding cream to apply twice daily and continued on light duty restrictions.

In response to an inquiry from the defendants, Dr. Antonopoulos agreed that claimant was pre-disposed to issues with his feet due to weight and foot structure. (Ex. 4, p. 35) Dr. Antonopoulos could not state with any certainty that the foot injury was caused by the claimant's work duties. (Ex. 4, p. 35)

Dr. Kensinger, evaluated the claimant on December 10, 2012 at the request of the defendants. He opined that claimant's weight and foot structure was the cause of his injury and not claimant's work duties. (Ex. 5) He also believed that claimant would continue to be imperiled by his weight, foot structure, smoking and lack of good footwear. (Ex. 5, p. 2)

Dr. Inda evaluated the claimant on March 25, 2013, and May 21, 2013, for right foot injuries. (Ex. 6) Defendants returned to him and requested that he review Dr. Kosta's [sic] records. (Ex. 6, p. 3) After the review of Dr. Antonopoulos's records, Dr. Inda wrote a letter to defendants stating that it was his opinion that claimant's weight and foot posture were responsible for claimant's fracture and not his work duties. (Ex. 6, p. 4) He agreed with Dr. Kensinger that claimant would continue to have problems with metatarsal fractures unless he would lose weight. (Ex. 6, p. 4)

Dr. Inda and Dr. Kensinger are orthopaedists specializing in foot care.

Claimant was evaluated by Dr. Bansal, a board certified occupational medicine doctor, on March 2, 2015. (Ex. 7) He continued to have pain and swelling in the left foot. The pain ranged from 5 to 10 on a 10 scale. (Ex. 7, p. 8) He was able to lift 50 to

100 pounds on occasion and regularly engaged in heavy pushing at work. He reported to Dr. Bansal that he was able to fulfill all of his job duties but did take breaks throughout the day to rest his foot.

On examination, there was tenderness to palpation over the proximal side of the fifth metatarsal with some swelling. In the records, one of the questions posed to Dr. Bansal was posed as follows:

> Mr. Levasseur sustained an injury to his left foot on or about March 14, 2014 when moving equipment as part of his work activities at Big Deal Auto. He was working with co-workers to move a lot of furniture since the company was in the middle of moving. He sustained a fracture of the fifth metatarsal. . . .

(Ex. 7, pp. 9, 10)

Dr. Bansal's diagnosis was "closed displaced fracture of fifth metatarsal bone." (Ex. 7, p. 10) He further opined claimant was "walking on uneven ground, slightly inverted his left foot, and heard a pop." Therefore the uneven ground and the foot inversion was the cause of the fracture according to Dr. Bansal. (Ex. 7, p. 10) He agreed that claimant was predisposed to fractures of his metatarsal but attributed the cause to the "very uneven" lot. In all previous medical records, including the emergency room, there was no indication that the lot was uneven.

Dr. Bansal assigned a 7 percent foot impairment as a result of the fracture. (Ex. 7, p. 11) Dr. Bansal noted in his medical history summary that claimant had a previous fourth metatarsal fracture and possible right foot fractures but did not assign that any significance in summarizing his opinions.

Claimant was charged $2,495.00 by Dr. Bansal for the evaluation which he seeks to recover.

Claimant has received $10,293.49 in Medicaid benefits for health services provided for claimant's left lower extremity. (Ex. 1)

CONCLUSIONS 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).

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 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).

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).

Claimant testified at hearing that the cause of his left metatarsal fracture was due to heavy pushing and lifting as well as uneven ground. Claimant did not raise the issue of uneven ground until the medical consultation with Dr. Bansal in 2015. In his prior treatment records, there was no mention of uneven ground and it was not mentioned in his answers to interrogatories served in June 2014. Claimant speculated that he may have sustained the fracture when his foot turned into a crack or uneven surface of the lot where he worked.

Dr. Bansal is the only medical professional who connected claimant's work related tasks and the uneven ground to the claimant's injury. All three foot experts opined that it was either claimant's weight and the way in which his foot landed on the ground that contributed to claimant's injury or that there was no certainty as to what caused the left metatarsal fracture.

Claimant weighed over 400 pounds at the time of his injury. He had sustained numerous metatarsal fractures prior to his injury on both his right and left foot. He had

been counseled that he needed to lose weight and stop smoking so as to allow the fractures to heal and to prevent re-injury. He has done neither.

Dr. Bansal is an occupational medicine doctor who examined claimant for less than an hour. He did not appear to take into account claimant's previous injuries to his left and right metatarsals when arriving at his opinions. His opinions are given far less weight than the foot specialists—Dr. Inda, Dr. Kensinger, and Dr. Antonopoulos.

The three foot specialists are not doctors chosen by the workers' compensation insurer or the employer. They were doctors that claimant sought out on his own because defendants denied responsibility from the outset. Dr. Inda and Dr. Kensinger evaluated claimant before his injury and then again after the injury at the request of the defendants.

The more credible medical opinions and the ones given the greatest weight are those of Dr. Inda, Dr. Kensinger and Dr. Antonopoulos. Given claimant's weight, the structure of his foot, the way in which he places his foot on the ground given his body habitus, it is more likely than not that the cause of his left fifth metatarsal fracture does not arise out of or in the course of his employment.

Because claimant's injury did not arise out of or in the course of his employment, he is not entitled to a reimbursement of his Medicaid lien.

The only other issue to be determined is whether claimant's IME bill from Dr. Bansal should be paid for by the defendants.

Iowa Code section 85.39 provides:

> Whenever an evaluation of permanent disability has been made by a physician retained by the employer, and the employee believes this evaluation to be too low, he shall, upon application to the commissioner and at the same time delivery of a copy to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of his own choice, and reasonably necessary transportation expenses incurred for such examination.

Defendants assert that they are not responsible for an IME when the claim has been denied. In City of Davenport v. Newcomb, 820 N.W.2d 882, 893 (Iowa Ct. App. 2012) the Iowa Court of Appeals found that Iowa Code section 85.39 should apply even when liability for an injury has not been accepted. In the same decision, however, the Iowa Court of Appeals reaffirmed that reimbursement is not ordered unless or until liability has been established.

> Our supreme court has held that *reimbursement* for a medical examination under Iowa Code section 85.39 cannot be ordered until liability for an injury has been established. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980).

Id. at 892. However in Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008), found differently based on the IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001) decision.

> Fleetguard does not dispute that, under the plain language section 85.39, all of the explicit requirements for reimbursement were satisfied. However, it contends it should not be required to pay for the IME because "chapter 85 is limited to injuries arising out of and in the course of employment" and 'it would not be a logical construction of section 85.39 to require the employer to pay for a permanent impairment evaluation ... where the injury did 140 not arise out of and in the course of employment....'
>
> We disagree. Unlike section 85.27, section 85.39 does not state the employer's liability for medical expenses is dependent on the claimant's proof of compensability. See, e.g., Iowa Code § 85.27 ('The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish [medical services].'). Also, in a 2001 decision interpreting section 85.39 our supreme court did not identify any such implied requirement for reimbursement. See IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001). Instead, while explaining the purpose behind section 85.39, the court emphasized the unequal financial position of the parties:
>
> Under the Iowa statute, the employer is given the right to choose who will provide treatment for an employee's injury. In addition, the employer is allowed to subject the employee to reasonable medical examinations by other physicians, presumably of the employer's choosing. The quid pro quo for these employer rights is the right of the employee to have a physician of his choosing present at any IME conducted at the employer's request and to have an IME conducted by a doctor of his own choice if the physician retained by the employer has given a disability rating unacceptable to the employee. In an apparent attempt to equalize the generally unequal financial positions of the parties, the legislature has said that the employer must pay for the employee's IME under the latter circumstances.

Id. at 327 (internal citations omitted).

> In light of this stated purpose, the plain text of the statute, and the fact that we "liberally construe workers' compensation statutes in favor of the worker," Ewing, 592 N.W.2d at 691, we conclude section 85.39 does not include an implied requirement that the claimant ultimately prove the injury arose out of and in the course of employment. Because Dodd met all of the requirements under section 85.39, we reverse that portion of the district court decision which affirms the commissioner's conclusion that Dodd was not entitled to reimbursement of $1212.63 for the IME.

Id.

Defendants argue that Kohlhaas v. Hog Slat Inc., 777 N.W.2d 387 (Iowa 2009) supports their position. However, that case stands for the proposition that the obligation of reimbursement is not triggered until the employer has obtained a rating the same proceeding with which the claimant disagrees. Id.

In the present case, the defendants obtained opinions from Dr. Antonopoulos on October 29, 2014, and November 11, 2014; from Dr. Kensinger on October 14, 2014, and October 26, 2014; and from Dr. Inda on January 10, 2015, and again on April 19, 2015. All three were contrary to claimant's position that he had a work-related injury. Dr. Bansal's examination took place on March 2, 2015.

The sole question left is whether Dr. Inda, Dr. Kensinger, Dr. Antonopoulos can be considered "employer's physician's" for the purpose of 85.39. There is no guidance on this issue from the appellate courts. Defendants did not select the physicians in question but they did seek opinions from them. Given that the workers' compensation laws are to be liberally construed in favor of the worker, the opinions obtained by the defendants from Dr. Inda, Dr. Kensinger, and Dr. Antonopoulos are deemed to be "employer's physician's" for the purposes of applying 85.39.

Therefore, based on the precedents of Harker, Dodd, and Kohlhaas, the requirements of 85.39 are met. Defendants obtained three opinions regarding causation prior to the claimant obtaining an IME from Dr. Bansal. Claimant is entitled to reimbursement of the IME.

ORDER

THERFORE IT IS ORDERED:

Claimant shall take nothing.

That the defendant shall be ordered to reimburse claimant two thousand four hundred ninety-five and no/100 dollars ($2,495.00) for the cost of Dr. Bansal's IME in Exhibit 8.

That each party shall pay their own costs

Signed and filed this 8th day of June, 2015.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
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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.