

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THOMAS F. RICH,

Claimant,

vs.

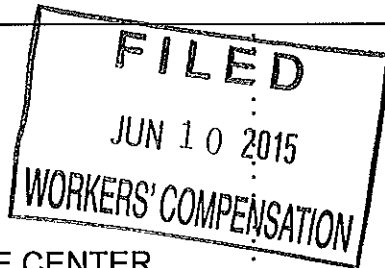
PLEASANT VIEW CARE CENTER,

Employer,

and

IOWA LONG TERM CARE
MANAGEMENT ASSOCIATION,

Insurance Carrier,
Defendants.



File No. 5046778

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 2502

STATEMENT OF THE CASE

Thomas Rich, claimant, filed a petition in arbitration seeking worker's compensation benefits from Pleasant View Care Center, as his employer, and Iowa Long Term Care Management, as the insurance carrier. This case proceeded to an arbitration hearing on February 11, 2015 in Des Moines, Iowa.

Claimant testified on his own behalf. Defendants called Kathryn Keane and Lori Jensen to testify. Claimant's exhibit list identified exhibits 1 through 7. Claimant withdrew and did not offer exhibit 7. Claimant offered exhibits 1 through 6. Defendants objected to claimant's exhibit 4, asserting that it was served beyond permissible deadlines established by this agency's administrative rules. Defendants also asserted that Sunil Bansal, M.D., the author of exhibit 4 was not timely certified as an expert.

I overruled defendants' objection to exhibit 4 and received exhibit 4 into evidence. However, in an effort to reduce or eliminate any prejudice caused by the claimant's failure to certify Dr. Bansal or exchange his report in a timely manner, I granted defendants additional time to obtain a responsive, or rebuttal, report from a treating surgeon, Ryan C. Meis, M.D.

At the time of hearing, defendants offered exhibits A through O. Claimant objected to defense exhibit N as being irrelevant. Claimant's objection was overruled and defense exhibits A through O were received. The evidentiary record was suspended pending receipt of defendants' rebuttal evidence, if any.

On March 11, 2015, defendants submitted their rebuttal evidence, marked as exhibit P. Defendants' submission is a March 6, 2015 report from Dr. Meis. Exhibit P is compliant with the verbal order the undersigned entered at the time of the arbitration hearing. Exhibit P is received.

On March 25, 2015, claimant filed a rebuttal exhibit list, as well as proposed exhibits 7 and 8. Exhibit 7 is a copy of a letter from claimant's counsel to Dr. Meis. Exhibit 8 is a supplemental report from Dr. Bansal dated March 24, 2015. Defendants objected to receipt of exhibits 7 and 8 via e-mail from defense counsel dated March 25, 2015.

Claimant was not granted additional time to submit rebuttal evidence after the conclusion of the live evidentiary hearing. The purpose behind suspending the evidentiary record and allowing defense rebuttal was because claimant did not timely certify his expert or timely exchange that expert's report. Suspension of the record and rebuttal evidence was granted to remedy or alleviate the prejudice caused by claimant's violation of this agency's administrative rules. Claimant's proposed exhibits 7 and 8 are not in conformity with the verbal order entered by the undersigned and certainly are not consistent with the spirit of the ruling made at the arbitration hearing. Claimant's exhibits 7 and 8 are not received into evidence and are not considered as part of this arbitration decision.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations are accepted and relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations and the parties are bound by those agreements.

Counsel for the parties requested the opportunity to file post-hearing briefs. This case was considered fully submitted upon the simultaneous filing of post-hearing briefs on April 14, 2015.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant has proven he sustained a right shoulder injury that arose out of and in the course of his employment with Pleasant View Care Center on October 13, 2012?
2. The extent of claimant's entitlement to permanent partial disability benefits, if any.
3. Whether claimant is entitled to reimbursement for an independent medical evaluation performed by Dr. Bansal?

FINDINGS OF FACT

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

Thomas Rich started working for Pleasant View Care Center (hereinafter referred to as "Pleasant View") in November 1991. (Claimant's testimony) Pleasant View is located in Whiting, Iowa. (Original Notice and Petition; Answer) The employer hired Mr. Rich as a certified nursing assistant (CNA). Mr. Rich left Pleasant View for a short period of time in 1999 and 2000, but has otherwise worked continuously for Pleasant View since 1991. Mr. Rich has worked as both a CNA and in maintenance for Pleasant View. (Claimant's testimony)

On October 13, 2012, Mr. Rich was working as a CNA for the employer. He was attending to a male resident of the nursing home. Mr. Rich was attempting to maneuver the resident into his high back wheelchair using a Hoyer lift. As claimant operated the Hoyer lift to lift and maneuver the resident back into his wheelchair, he alleges he sustained a right shoulder injury. (Claimant's testimony)

Specifically, claimant testified that he experienced a "pop" in his right shoulder while he reached over the wheelchair and pulled the resident back into the wheelchair. Claimant explained the mechanism of the Hoyer lift, which essentially acts as a lift and swing to support a resident's weight. As the lift maneuvers the resident into the wheelchair, claimant explained that the CNA must use his or her right arm to pull on a handle on the lift swing chair to position the resident's back into the back of the wheelchair. It is during this maneuver that claimant asserts he sustained a right shoulder surgery. (Claimant's testimony)

Mr. Rich testified that he experienced the "pop" in his shoulder but finished his shift and did not think much about it. However, his symptoms worsened at home after his shift and he reported the injury to the employer the next day. Claimant sought medical care through Kevin G. Kollbaum, PA, at Family Medical Clinic, P.C. in Onawa, Iowa. (Claimant's testimony; Ex. 2)

Mr. Kollbaum recorded that claimant reported a right shoulder injury occurring at work five days before his evaluation on October 17, 2012. Mr. Kollbaum's examination revealed no swelling or erythema. It demonstrated normal strength and tone as well as normal sensation and reflexes. Mr. Kollbaum identified no laxity, instability, subluxation, fractures, neurovascular problems, or other deformities in claimant's right shoulder. (Ex. 2, p. 2) Mr. Kollbaum initiated Naproxen and recommended range of motion exercises for claimant's right shoulder. (Ex. 2, p. 3)

Claimant returned for evaluation by Mr. Kollbaum in late October with continued symptoms. Mr. Kollbaum's examination was essentially normal again with the exception of some pain on palpitation in the area of the head of the right biceps tendon.

(Ex. 2, p. 5) Mr. Kollbaum initiated physical therapy for claimant's right shoulder. (Ex. 2, p. 5)

Unfortunately, Mr. Rich's right shoulder symptoms did not resolve with physical therapy. On November 28, 2012, Mr. Kollbaum suspected a biceps tendon or muscle injury. He ordered an x-ray of the right shoulder and made a referral to an orthopaedic surgeon, Michael T. Espiritu, M.D. (Ex. 2, p. 10)

Dr. Espiritu evaluated Mr. Rich on January 3, 2013, noted an abnormal calcification in claimant's right shoulder and recommended a right shoulder MRI. (Ex. 1, p. 1) Mr. Rich returned to Dr. Espiritu on January 17, 2013. Dr. Espiritu reviewed the MRI and noted an osteochondroma and noted that the long head of the biceps deviated around that osteochondroma. Dr. Espiritu also noted some tendinosis in the area of the long head of the biceps tendon. (Ex. 1, p. 3)

Dr. Espiritu offered an injection into claimant's right shoulder. Claimant declined that course of care. Therefore, Dr. Espiritu started claimant on an oral anti-inflammatory medication. (Ex. 1, p. 3) After his conservative care recommendations failed to resolve claimant's symptoms, Dr. Espiritu referred claimant to a shoulder specialist, Ryan C. Meis, M.D.

Dr. Meis evaluated Mr. Rich on July 2, 2013 and diagnosed claimant with biceps pathology and underlying osteochondroma. Claimant declined any invasive treatment at that time. (Ex. 1, p. 8) However, claimant's symptoms continued. Claimant elected to give his shoulder some time to heal without any invasive treatments. Unfortunately, his shoulder did not heal on its own. On January 17, 2014, Dr. Meis recommended surgical intervention and claimant concurred that surgery was necessary. (Ex. 1, p. 13)

Dr. Meis took claimant to surgery on February 24, 2014. During that surgery, Dr. Meis identified and excised the osteochondroma in claimant's right shoulder. (Ex. 1, p. 14) In that process, he necessarily also detached claimant's right rotator cuff tendons and was required to surgically repair those tendons. (Ex. P) Surgery has not completely resolved claimant's right shoulder symptoms, though he continues to work for the employer at the time of the arbitration hearing. (Claimant's testimony)

When initially asked about causation, Dr. Meis relied upon the oral history provided to him by Mr. Rich and opined that claimant's right shoulder condition and surgery were causally related to the alleged work injury on October 13, 2012. (Ex. 1, p. 33) However, after he was provided with claimant's deposition testimony and description of how the injury occurred, Dr. Meis changed his causation opinion. Dr. Meis opined:

After reading the deposition testimony transcript and hearing your description also of the events of 10/13/12 when Mr. Rich's alleged injury occurred, I feel it would be unlikely that a substantial shoulder injury would occur from helping to maneuver a patient into their seat utilizing the Hoyer

lift as described. In other words, I do not feel that it is probable within a reasonable degree of medical certainty that Mr. Rich's shoulder condition for which we treated him was related or caused by the incident he described in October of 2012.

(Ex. 1, p. 36) Defendants denied liability after receipt of Dr. Meis' causation opinion.

Claimant sought the opportunity to return to Dr. Meis for further evaluation and to discuss the causation issue. Defendants declined to authority a return evaluation. (Ex. 6, p. 2) Therefore, claimant sought an independent medical evaluation performed by Sunil Bansal, M.D., on January 12, 2015. (Ex. 4)

Dr. Bansal recorded a history that included,

On October 13, 2012, he sustained an injury to his right shoulder. He was getting a resident into a high-backed wheelchair using a Hoyer lift. With the resident in the lift, Mr. Rich was pulling back on the resident to get him into position to get into the chair. As he was pulling, he felt a pop in his right shoulder. . . .

He estimates that the resident weighed approximately 170 to 180 pounds. He had to pull quite forcibly on the resident to make sure he was positioned correctly before releasing him in the chair.

(Ex. 4, p. 7)

Dr. Bansal addressed the causal connection issue offering the following analysis:

Mr. Rich was forcibly pulling on a resident to position a resident into the chair. Though the resident was in a hoyer lift, to position properly, forceful pulling can still be involved. The hoyer lift simply diminishes the need to lift a resident. Combined with the clinical symptomatology of immediate pain and a feeling of a "pop" in the shoulder, the presentation is quite compelling that an acute rotator cuff tear occurred in this incident on October 13, 2012.

(Ex. 4, pp. 10, 11) Dr. Bansal provided a citation for authority to support his opinion that forceful pulling can cause a rotator cuff tear and he obviously believed that claimant's surgical diagnosis was a torn rotator cuff tear. (Ex. 4, p. 11)

Pursuant to the verbal order of the undersigned, defendants obtained permission to submit a rebuttal report from Dr. Meis. Defendants provided Dr. Meis a copy of Dr. Bansal's independent medical evaluation report. In his rebuttal report, Dr. Meis explains:

[T]here are a couple of points that I feel would be beneficial to clarify after having seen Dr. Sunil Bansal's independent medical evaluation. For

starters, on page 11, he notes that the rotator cuff tears can be caused by the injury mechanism that was described. He even quotes an article from the May Clinic on such. I think it is relevant to understand that the surgery that I performed on Mr. Rich was not for a rotator cuff tear. The surgery was for an irritated and partially torn biceps which was wrapped around a large growth called an osteochondroma. He had minor fraying of his rotator cuff which was debrided. He ended up with a rotator cuff repair because a portion of his rotator cuff was attached to the osteochondroma. Once the osteochondroma had been excised, this left a portion of the rotator cuff unattached and that is what required a reattachment.

(Ex. P)

Dr. Meis' explanation in exhibit P demonstrates that Dr. Bansal did not accurately understand the nature of claimant's right shoulder pathology. Dr. Bansal's causation opinion asserts that the incident on October 13, 2012 caused an injury that was not present upon surgical inspection. Having inspected claimant's shoulder joint directly on surgical intervention, Dr. Meis' inspection and description are superior to the assumptions and diagnoses offered by Dr. Bansal.

Determining whether claimant has proven he sustained a right shoulder injury at work on October 13, 2012 requires consideration and weighing of several facts and factors. First, claimant presented as a hard-working, pleasant gentleman. He was relatively believable at the time of hearing and is clearly a motivated individual. He has worked continuously, while also pursuing higher education and has aspirations of moving into nursing home administration in the future.

This being said, claimant's version of events and the cause of his injury appear to have changed a bit between his deposition and his description given to Dr. Bansal. In his deposition, claimant testified that he was required to "gently" pull the resident to the back of the wheelchair. He did not describe this maneuver as physically demanding or difficult. (Ex. O, p. 39) By contrast, Dr. Bansal describes that claimant "had to pull quite forcibly" in his report. (Ex. 4, p. 7) At trial, Mr. Rich testified that his deposition testimony was an accurate description of how he believes he was injured on October 13, 2012. (Claimant's testimony)

Defendants offered the testimony of two witnesses on the issue of the use and exertion required to operate a Hoyer lift and position a patient using a Hoyer lift. Kathryn Keane is the current administrator at Pleasant View. She has served in that capacity since October 6, 2014 and was not with the nursing home on the date of injury. However, she testified that she has practical experience using the Hoyer lift and has utilized these lifts alone in the residential setting. Ms. Keane testified that she has never felt that she had to use significant force to transfer a patient or resident while using a Hoyer lift. She testified that a Hoyer lift is physically very easy to use.

Defendants also called Lori Jensen, who has worked at Pleasant View as a CNA. Ms. Jensen knows claimant and speaks highly of his motivation to care for the elderly and disabled. Ms. Jensen testified that she has experience using the Hoyer lift at Pleasant View. She confirmed that a CNA uses the straps on the Hoyer lift swing to maneuver a resident. However, she testified that she is able with the use of only a couple of fingers to maneuver patients while in the Hoyer lift.

Ms. Keane's testimony and Ms. Jensen's testimony about the force required to maneuver a patient in the Hoyer lift is consistent with claimant's deposition description of "gently" maneuvering a resident. I find that only minimal amount of force is required to maneuver a patient that is suspended in a Hoyer swing and that claimant's deposition description of his alleged mechanism of injury is more accurate than the description recorded by Dr. Bansal.

As noted above, I find that the history or description of the mechanism of injury recorded by Dr. Bansal is not entirely accurate. Dr. Bansal appears to have been told or assumed that much more force was required to maneuver a patient than is actually the case while utilizing a Hoyer lift. Dr. Bansal further offers a diagnosis and causation opinion based upon a rotator cuff tear.

However, Dr. Meis actually performed the surgery and clarifies that Dr. Bansal's understanding of the reason for the surgery, the intra-operative findings, and the actual surgery performed on claimant's right shoulder are erroneous. I find Dr. Meis' explanation convincing since he inspected claimant's right shoulder intra-operatively. I find that claimant did not sustain a significantly torn rotator cuff as a result of the events on October 13, 2012.

When weighing the competing medical opinions of Dr. Meis and Dr. Bansal, I find the opinions of Dr. Meis to be more informed and more convincing. Dr. Meis evaluated claimant more than once. He performed surgery on claimant's right shoulder and obviously is aware of his intra-operative findings. Dr. Meis' causation opinion changed after he read the deposition testimony offered by claimant, which I find to be accurate. (Ex. P) Review of Dr. Bansal's report discloses that he was not provided a copy of claimant's deposition testimony. (Ex. 4)

I find that Dr. Meis had more and better information available upon which to base his causation opinion. Therefore, I find that claimant has not proven he sustained a right shoulder injury as a result of his work activities at Pleasant View on October 13, 2012.

Dr. Bansal evaluated claimant on January 12, 2015. (Ex. 4) No physician chosen by defendants offered an opinion about claimant's permanent impairment, if any, prior to Dr. Bansal's evaluation occurring.

CONCLUSIONS OF LAW AND REASONING

The initial dispute submitted by the parties for determination is whether claimant proved he sustained an injury to his right shoulder that arose out of and in the course of his employment with Pleasant View Care Center on October 13, 2012. 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); Dunlavy 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).

In this case, I found that claimant failed to prove he sustained a right shoulder injury that arose out of and in the course of his employment. Therefore, claimant failed to prove entitlement to any permanent partial disability benefits.

The final disputed issue is whether claimant is entitled to reimbursement for his independent medical evaluation with Dr. Bansal pursuant to 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).

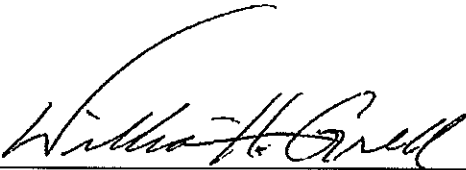
In this situation, no physician retained or chosen by defendants offered a permanent impairment rating. Therefore, claimant has not established entitlement to reimbursement of his independent medical evaluation fee.

ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

Signed and filed this 10th day of June, 2015.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/kjw

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.