BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOUGLAS JONES, Claimant, vs. WAL-MART, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED FEB 27 2019 WORKERS COMPENSATION	File No. 5063564 ARBITRATION DECISION Head Note Nos.: 1101; 1106; 1402.30, 2502, 2907

STATEMENT OF THE CASE

Douglas Jones, claimant, filed a petition for arbitration against Wal-Mart, as the employer, and New Hampshire Insurance Company, as the insurance carrier. This contested case proceeded to an in-person hearing in Des Moines, on November 6, 2018.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 4, and Defendants' Exhibits A through D. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses testified live at the time of hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed post-hearing briefs on December 10, 2018, at which time the case was fully submitted to the undersigned.

However, after the evidentiary record closed but prior to the parties filing post-hearing briefs and issuance of this decision, the Iowa Supreme Court issued a decision in Bluml v. Dee Jay's, Inc., 920 N.W.2d 82 (Iowa 2018). The undersigned recognized

that the Bluml decision potentially affected the status of the law in Iowa and potentially the outcome of this case. Therefore, on February 7, 2019, the undersigned issued an order to show cause requiring the parties to file a statement either requesting or waiving the opportunity to present new evidence given the clarification of the law stated by the Iowa Supreme Court in Bluml.

Neither party filed a timely response to the order to show cause. The parties' lack of response is deemed a waiver of any opportunity to present new evidence. Therefore, this case was deemed fully submitted to the undersigned upon the expiration of the deadline to request new evidence on February 14, 2019.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on January 28, 2017 that arose out of his employment with Wal-Mart.

2. Whether claimant sustained an injury that occurred in the course of his employment with Mal-Mart on January 28, 2017.

3. Whether the alleged injury caused temporary disability, including a claim for healing period benefits from January 28, 2017 through July 28, 2017.

4. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

5. The proper commencement date for permanent disability benefits, if any are awarded.

6. Whether claimant is entitled to payment, reimbursement, or an order that defendants hold him harmless for past medical expenses.

7. Whether claimant is entitled to reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39.

8. Whether claimant is entitled to alternate medical care.

9. Whether penalty benefits should be assessed against defendants for an alleged unreasonably delay or denial of weekly benefits.

10. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Douglas Jones asserts that he sustained a fall at Wal-Mart prior to the commencement of his shift on January 28, 2017. The facts in this case are relatively undisputed surrounding Mr. Jones' fall. On January 28, 2017, Mr. Jones reported to Wal-Mart at 5:15 a.m., for a shift that was scheduled to begin at 7:00 a.m.

Claimant testified that he routinely reported to work this early. He would typically perform a pre-shift review of the deli area where he worked to determine what work he would be performing during his shift. He would then proceed to the employee break room and eat breakfast before his shift. If he had any remaining time before his shift, claimant testified he would walk around the Wal-Mart store until it was time to clock-in for his shift.

On January 28, 2017, claimant reported to work at 5:15 a.m., for his scheduled 7:00 a.m., shift. He did not clock in prior to his fall. Mr. Jones varied from his typical routine, however. Instead of proceeding to the deli first, he elected to go straight to the employee breakroom to eat his breakfast. While walking to the break room, Mr. Jones fell onto his back and struck his head. The fall occurred close in time to his arrival at the store, approximately one hour and 45 minutes before his scheduled shift was to begin.

There are only minimal benefits to the employer in having him arrive at such an early time before his shift. Realistically, claimant should have been able to eat his breakfast and, if he deemed it warranted, conduct his pre-shift walk-through within an hour. Claimant's arrival an hour and forty-five minutes before his scheduled shift is not reasonable. It exposes the employer to potential liability, such as this case, for an extended and unnecessary period of time before claimant's scheduled shift. Therefore, I find that claimant's arrival an hour and forty-five minutes before his scheduled shift on January 28, 2017 was not reasonable.

Claimant was injured in an employee area where he would be authorized to take breaks while at Wal-Mart. The floor where claimant fell was a smooth, flat, concrete surface. Nothing unusual was identified about the floor in this location. Nor could Mr. Jones explain what caused his fall. In fact, his trial testimony clearly demonstrated that he does not know why he fell. I find that his fall is unexplained in this evidentiary record. Nevertheless, it is clear that Mr. Jones fell, landing on his back and hitting his head.

Mr. Jones claims he suffered thoracic spine and head injuries as a result of the fall. There is some contradictory medical evidence within the record as to the severity, resulting diagnoses, permanent impairment, and resulting necessity for permanent work restrictions. However, I ultimately find that it is unnecessary to reach those factual issues because this case is decided on other grounds.

It is necessary to point out that defendants obtained an independent medical evaluation performed by John D. Kuhnlein, D.O., on November 21, 2017. Dr. Kuhnlein offered an opinion about claimant's permanent impairment. Claimant obtained a responsive independent medical evaluation performed by Sunil Bansal, M.D., on September 18, 2018. Dr. Bansal reviewed and responded to Dr. Kuhnlein's report, including offering a competing permanent impairment rating. Dr. Bansal's charges are in-line with other medical provider's charges for similar services and are specifically found to be reasonable in this case.

CONCLUSIONS OF LAW

Defendants challenge whether claimant sustained an injury that arose out of his employment. They also challenge whether claimant's injury occurred in the course of his employment. These are two distinct challenges and claimant must satisfy both requirements to prove a compensable injury. Miedema v. Dial Corp., 551 N.W.2d 309, 310 (Iowa 1996).

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.

Initially, it should be noted that the Iowa workers' compensation statutes are to be interpreted liberally for the benefit of the injured worker. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980). However, the workers' compensation statutes are not general health insurance policies for all injuries that occur on the employer's premises. Miedema, 551 N.W.2d at 312. Claimant still must demonstrate that the injury was a rational consequence of a hazard connected with the employment. Id. at 311.

The Iowa Supreme Court has rejected the positional risk doctrine. Lakeside Casino v. Blue, 743 N.W.2d 169, 176-177 (Iowa 2007). Therefore, it is not sufficient that an injury occurred solely on the employer's premises.

This dispute requires me to delve into an unsettled area of the law and potentially predict the ultimate legal standard the Iowa Supreme Court will determine should be utilized to decide this case. Courts generally use one of three legal standards to decide

whether an injury arises out of employment. The first is the positional risk doctrine, which was clearly rejected by the Iowa Supreme Court. Id.

The second legal standard is the increased-risk doctrine. In Lakeside Casino v. Blue, 743 N.W.2d 169, 177 (Iowa 2007) (footnote 7), the Court critiqued the district court stating, "[a]lthough the district court purported to apply the actual-risk rule, its rationale is more consistent with the discarded increased-risk rule." Under this increased-risk rule, claimant would be required to establish that the circumstances of employment or the surroundings of the employment caused an increased risk of injury. Koehler Elec. v. Wills, 608 N.W.2d 1, 5 (Iowa 2000).

In Bluml, the Court acknowledged that it had generally abandoned to the increased-risk rule. However, it noted that limited exceptions exist and that the increased-risk rule was established in Koehler for idiopathic injuries and had not been overruled. Bluml, 920 N.W.2d at 85-86. The Court specifically noted that Lakeside Casino v. Blue, 743 N.W.2d 169 (Iowa 2007) did not involve an idiopathic fall and did not modify the applicable legal standard for idiopathic injuries. Bluml, 920 N.W.2d at 86.

The Court stated, "in idiopathic-fall cases, we believe the claimant should have both the burden and the opportunity to meet the increased-risk test." Id. at 91. The Court concluded that the increased-risk test was a factual test to be determined on a case-by-case basis. Id.

The third legal test to determine whether an injury arises out of employment, which is applicable in the vast majority of cases, is the actual risk test. In Blue, the Court noted that it had adopted the actual risk rule. Quoting Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990), the Court noted:

> If the nature of the employment exposes the employee to the risk of such an injury, the employee suffers an accident injury arising out of and during the course of the employment. And it makes no difference that the risk was common to the general public on the day of the injury.

Lakeside Casino v. Blue, 743 N.W.2d 169, 174 (Iowa 2007). Therefore, to prevail under the actual risk test, claimant need only prove that the employment exposed claimant to the risk of such an injury. Presumably, this is an easier legal standard for the claimant to meet than the increased-risk test.

Having found that Mr. Jones cannot explain what caused him to fall in this case; I found that this fall was unexplained, rather than idiopathic. The Iowa Court of Appeals has identified clear differences between idiopathic falls and unexplained falls. See Mercy Medical Center v. Plumb, 776 N.W.2d 301 (Iowa App. 2009) (Table of Unpublished Decisions); Ottumwa Regional Health Center v. Mitchell, 752 N.W.2d 35 (Iowa App. 2008) (Table of Unpublished Decisions); Bartle v. Sidney Care, Inc., 672 N.W.2d 333 (Iowa App. 2003) (Table of Unpublished Decisions).

The Iowa Supreme Court has not specifically declared there to be a difference between unexplained falls and idiopathic falls. However, the Court has acknowledged that unexplained falls may occur. Lakeside Casino v. Blue, 743 N.W.2d 169 (Iowa 2007). It is not clear whether the actual risk test, increased-risk test, or the positional risk test is to be used for a truly unexplained fall.

The Court utilized the actual risk doctrine to find Ms. Blue's fall and resulting injuries to be compensable. However, the Court acknowledged that Professor Larson's treatise recommends using the positional risk doctrine for unexplained falls. Id. at 176. The Court noted, "Iowa has not adopted the positional-risk rule, and we decline to do so now under the circumstances presented by this case." Id. at 177. It is not clear from their decision whether the Court would adopt the positional risk rule for the limited circumstances of an unexplained fall. I conclude that they would not given their specific rejection of the positional risk doctrine and lack of any guidance to the contrary in Blue.

The Court could utilize the increased-risk test, as outlined for idiopathic falls, in Bluml v. Dee Jay's, Inc., 920 N.W.2d 82 (Iowa 2018). However, the court was very specific that the exception for use of the increased-risk rule was only meant to address idiopathic injuries. Therefore, I conclude that the Court would not utilize the increased-risk test for unexplained falls. That leaves the generally applicable actual risk rule. Again, this legal standard is presumably easier for the claimant to meet than the increased-risk rule.

I acknowledge that there is significant prior agency case law in Iowa and similar cases around the nation that appear to disfavor awarding compensation for falls occurring on level ground. I also acknowledge that there is literally nothing that the employer could do to prevent unexplained falls on hard, level ground. This leads to what I consider an odd result where the claimant cannot carry his burden to prove what happened to cause an accident, yet he prevails. It makes investigation and prevention of these types of injuries by the employer almost impossible.

I also acknowledge the dissent in Bluml v. Dee Jays, Inc., which notes, "[h]ard-surface floors are ubiquitous and not a hazard of employment." 920 N.W.2d 82, 92 (Iowa 2018). Realistically, people cannot lie in feather beds and avoid all interaction with the world. Walking on concrete is an activity experienced by most people on most days. It is not a risk inherently related to employment. There is certainly nothing unique to a typical employment setting that involves a concrete floor. In some employment settings, a concrete floor may actually reduce the risk of injury.

Yet, as every young person that has learned to ride a bicycle has likely discovered: a fall onto concrete presents an actual risk of injury. As every parent knows watching a toddler attempt to walk on concrete and stumble, a fall onto the concrete presents an actual risk of injury. Merely having concrete present does not guarantee a fall or injury, it may not increase the risk or severity of injury, but it presents an actual risk of injury.

If the applicable standard is actual risk, as I have concluded it is based upon current Supreme Court precedent, there is clearly an actual risk of injury if one falls onto a concrete floor. Having found that a concrete floor presents an actual risk of injury if someone falls onto it, I conclude that claimant has established that his unexplained fall onto concrete arose out of his employment with Wal-Mart. Therefore, I reluctantly conclude that claimant has established that his injury arose out of his employment with Wal-Mart.

Having concluded that Mr. Jones proved his injury arose out of employment, I must also determine if the injury occurred in the course of his employment. As noted previously, an injury only occurs in the course of employment if it happens at a time and place where the employee may reasonably be when performing employment duties or doing an activity incidental to those work activities. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996). However, the Iowa Supreme Court recognized long ago that an injury could occur in the course of employment even though the employee may not actually be working at the time of the injury. Bushing v. Iowa Ry. & Light Co., 208 Iowa 1010, 226 N.W. 719 (1929).

Generally, an employee who has both a fixed place to work and fixed hours to work is not covered by the workers' compensation law on the way to and from work. See Water Conditioning, Inc. v. Waterhouse, 561 N.W.2d 55, 57-58 (1997); Frost v. S.S. Kresge Co., 299 N.W.2d 646, 648 (Iowa 1980). The hazards encountered by an employee in going to or returning from work are not ordinarily incident to his employment within the meaning of the phrase as used in the workers' compensation law. Quaker Oats Co. v. Ciha, 552 N.W.2d at 150-51; Frost, 299 N.W.2d at 648. An employee traveling to work is engaged in personal business; the employment commences only after the employee reaches the employer's premises. See Otto v. Independent Sch. Dist., 237 Iowa 991, 994, 23 N.W.2d 915, 916 (1946). This is frequently referred to as the "going and coming" rule. The going and coming rule applies only to employees who have both a fixed place and fixed hours of work. McMullin v. Department of Revenue, 437 N.W. 2d 596, 599 (Iowa App. 1989).

Once again, the law is a bit murky and I will necessarily have to interpret prior appellate case law and predict what the Iowa Supreme Court would find to be an applicable rule or standard in this case. There is no bright-line rule that can be applied in this situation. Generally, once the employee reaches the employer's premises the premises rule applies. Bailey v. Batchelder, 576 N.W.2d 334 (Iowa 1998). Under the premises rule, injuries that occur once an employee arrives at the employer's location are considered in the course of employment. Id. at 339. This rule has limitations, however.

"The hours of employment include a reasonable amount of time before and after the scheduled work hours." Id. at 340. The Court has said that a reasonable amount of time is not dependent solely upon the time of arrival but that the circumstances and nature of the employee's activity after arrival should also be considered. Id.

In Bailey, the court noted, "other cases have held that arrival before work in a time span between thirty and sixty minutes was not so unreasonable as to take the injuries outside the 'course of employment.'" 576 N.W.2d at 341. However, the Court provided no specific factors nor any hard and fast timeframes that limit the premises rule's application. Instead, I interpret the Iowa Supreme Court's standard, as set forth in Bailey, to be a factual issue to be determined on a case-by-case basis by this agency.

Some of the facts of this case favor a finding that claimant's arrival time was reasonable. He intended to do a pre-shift walk through of his station to get a mental idea of the tasks that he faced for the day. Claimant's arrival time was consistent with his routine before work. Yet, the employer had never instructed him that he could not come as early to work. Mr. Jones was also attempting to have breakfast before his shift, which would presumably sustain him and give him energy during his work shift. In these ways, claimant's arrival time could be found to be reasonable. See Sandoval v. Farmland Foods, Inc., File No. 5015453 (Arbitration June 2006).

However, claimant's arrival time is well over the sixty minutes noted by the Iowa Supreme Court as reasonable in Bailey v. Batchelder, 576 N.W.2d 334 (Iowa 1998). An hour and forty-five minutes is quite an extended arrival time. There were no estimates provided in this evidentiary record to suggest that claimant's breakfast was going to be extended or that his pre-shift routine required extended time. The undersigned found that an hour and forty-five minutes was an unreasonably early arrival time, which unnecessarily exposes an employer to liability during extended "down" time.

Having reached a factual finding that claimant arrived unreasonably early for his work shift, I conclude that the premises rule is not applicable. Instead, claimant had not yet clocked in for his shift. He arrived an hour and forty-five minutes before his scheduled shift, which provided no significant benefit to his employer. Presumably, claimant could eat his meal within sixty minutes (given that many employers only offer a thirty minute lunch period during the actual work shift). Therefore, I conclude that claimant failed to prove his injury occurred in the course of his employment.

Having concluded that Mr. Jones failed to prove his injury occurred in the course of his employment, I conclude that he failed to prove a compensable work injury. Therefore, the issues pertaining to healing period, permanent disability, past medical expenses, alternate medical care, and penalty benefits are all rendered moot.

However, claimant does assert a claim for reimbursement of his independent medical evaluation fees. 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).

However, claimant must establish the pre-requisites of Iowa Code section 85.39 to establish entitlement to reimbursement. "An employer ... is not obligated to pay for an evaluation obtained by an employee outside the statutory process." Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015).

Having found that defendants obtained an independent medical evaluation and permanent impairment rating before claimant obtained a competing evaluation and impairment rating, I conclude that claimant established the pre-requisites of Iowa Code section 85.39. I conclude that claimant has established entitlement to reimbursement of Dr. Bansal's independent medical evaluation charges ($2,983.00) pursuant to Iowa Code section 85.39.

Mr. Jones also seeks assessment of his costs associated with this case. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has not prevailed in establishing a compensable work injury. Therefore, I conclude that all parties should pay their own costs.

ORDER

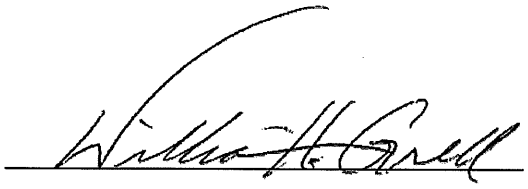
THEREFORE, IT IS ORDERED:

Defendants shall reimburse claimant for Dr. Bansal's independent medical evaluation fees in the amount of two thousand nine hundred eighty-three dollars ($2,983.00).

Claimant shall take nothing further.

All parties shall pay their own costs.

Signed and filed this 27th day of February, 2019.



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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.