BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AURA ORDONEZ, Claimant, vs. LEISURE SERVICES, INC. d/b/a HOTEL PATTEE, Employer, and CONTINENTAL CASUALTY COMPANY Insurance Carrier, Defendants.	FILED DEC 02 2015 WORKERS COMPENSATION	File No. 5037670 REVIEW–REOPENING DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Aura Ordonez, the claimant, seeks additional disability benefits from a review-reopening of a prior workers' compensation agreement for settlement from defendants, Leisure Services, Inc. d/b/a Hotel Pattee, the employer, and its insurer, Continental Casualty Company, as a result of a work injury on December 9, 2010. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on October 20, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on November 13, 2015. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. Joint exhibits were marked with double letters. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to a page number of a copy of the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. Claimant is not seeking additional temporary total or healing period benefits.

2. Claimant was fully paid for the healing period and permanent partial disability benefits agreed upon in the Agreement for Settlement dated January 7, 2013.

3. Prior to hearing in this review-reopening claim, defendants voluntarily paid claimant 30.8 weeks of additional permanent partial disability benefits.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to additional permanent disability benefits;

II. The extent of claimant's entitlement to payment for the unauthorized care of claimant by Todd Miller, DPM, and claimant's entitlement to additional care.

III. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Aura, and to the defendant employer as Pattee.

Aura, age 53 years, is an immigrant from Guatemala. She had a 9th grade education before she came to this country. She can understand a few English words, but is generally unable to read, write or converse in English. Her only significant past work experience has been as a housekeeper at a hotel/motel operated by Pattee

The original work injury of December 9, 2010 involved the right knee. This injury was diagnosed as a meniscus tear and treated surgically by Craig Mahoney, M.D., an orthopedic surgeon. Claimant was compensated for a ten percent loss of use to the leg at the agreed upon weekly rate of $214.48. (Exhibit A)

Claimant asserts that subsequent to the Agreement for Settlement, she returned to work at the same motel and due to her right leg disability, she overcompensated with her right leg and foot and then injured her left knee and both feet.

The additional problems in the left knee were again addressed by Dr. Mahoney. The doctor diagnosed a meniscus tear and again surgically treated this tear in 2013-2014. The doctor initially only opined that there may be a possible connection of the left knee condition to the right knee injury of December 9, 2010 based on a history

given by Aura that she overcompensated with her left leg. (Ex. B-1) However, on September 5, 2013, he opined that this causal connection was to a reasonable degree of medical certainty or probability. (Ex. B-3) Defendants initially paid no healing period benefits for the left knee care by Dr. Mahoney, but after his last opinion, they eventually began paying healing period benefits on December 11, 2013, when claimant received a lump sum check in the amount of $1,715.84 for past due weekly benefits. No reason was given for the three month delay in starting weekly benefits. In the post-hearing brief, defendants suggest that the causation opinions of Dr. Mahoney are somehow not binding on them because they are based upon subjective complaints of Aura that she overcompensated.

Dr. Mahoney last opined in May 2015 that claimant had reached maximum healing and required no further interventions. He opined using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, Table 17-33 at page 546, that Aura suffered a two percent permanent partial impairment to the lower extremity.

In May 2013, Aura began having right and left foot problems. Dr. Mahoney opined that these problems are not related to the knee problems. (Ex. B-2 and B-7) Defendants refused to provide medical treatment for the foot problems. Aura then sought medical care on her own from Todd Miller, D.P.M. Dr. Miller made various assessments for these problems such as peroneus brevis tendonitis, pes cavus with mid-foot pain left, left mid foot osteoarthritis, and plantar fasciitis of the right foot. (Ex. 1-1:6) In his last report dated September 22, 2014, Dr. Miller opined that none of the foot issues had reached maximum resolution and he had not as yet taken more aggressive treatment such as injection therapies, physical therapy, medications, alternative shoes and insoles or aspiration of the soft tissue mass in the right foot. Dr. Miller causally relates the foot problems to Aura's bilateral knee problems and resulting altered gait. (Ex. 1-7)

At the request of her attorney, Aura's left knee and bilateral foot problems have been evaluated by Jacqueline Stoken, D.O., a physical medicine and rehabilitation specialist. In her report dated August 31, 2015, Dr. Stoken agrees with the causation opinions of Dr. Mahoney concerning the left knee problems and with Dr. Miller's causation opinions for the foot problems. She opines using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, Table 17-33, at page 546, Aura has suffered an additional 10 percent permanent partial impairment to the left lower extremity due to the left knee condition. She also opines under these Guides that Aura has an additional 11 percent permanent partial impairment to both lower extremities for the foot problems due to lost range of motion to both ankles.

Aura testified that she continues to have significant chronic pain and loss of use of the left leg due to her left knee and foot problems. She lost her housekeeping job at Pattee when it closed, but when the hotel later re-opened, her application to be re-hired was denied. She has not been employed since leaving Pattee, except for a brief period of time she attempted farm field work, but had to quit due to her leg problems.

I find that the work injury of December 9, 2011 is a cause of claimant's left knee problems treated by Dr. Mahoney. This is based on the uncontroverted opinions of Dr. Mahoney and Dr. Stoken. A physician's opinion based on subjective complaints is convincing when those subjective complaints are uncontroverted and credible.

I find that the left knee condition is a cause of a two percent permanent partial loss of use to the left leg. This is based on the impairment rating by Dr. Mahoney. Dr. Stoken asserts she used the same Table 17-33 in the AMA Guides used by Dr. Mahoney. However, she provided an impairment rating for both a partial medial and lateral menisectomy. Dr. Mahoney's surgery on the left knee was only a partial medial menisectomy. His prior surgery on the right knee was both a medial and lateral partial menisectomy which does result in a ten percent impairment under Table 17-33.

I find that the work injury of December 9, 2011 is a cause of claimant's bilateral foot problems treated by Dr. Miller. This is based on the more convincing views of Dr. Miller and Dr. Stoken. Dr. Miller is a specialist in foot conditions and Dr. Mahoney has not been shown to have specialized knowledge or experience in foot problems, despite his orthopedic specialty.

I do not find that the foot problems have reached maximum medical improvement. According to the uncontroverted views of Dr. Miller, further treatment of these problems is reasonable and necessary. Dr. Miller is the best doctor to provide this treatment given his clinical experience with the foot problems.

I find that further treatment of her left knee pain is required. Dr. Mahoney does not believe further intervention is required, but she still is having considerable pain from all of her leg and foot conditions and they are best treated by a pain specialist as recommended by Dr. Stoken, a specialist in physical medicine and rehabilitation.

Further findings concerning a possible industrial loss are unnecessary as will be discussed later in this decision

CONCLUSIONS OF LAW

I. A review-reopening claim initiated pursuant to Iowa Code section 86.14(2) requires proof that, after the award or settlement, the claimant's physical disability has increased in a scheduled member case, or his earning capacity has changed in an industrial disability case as a result of a worsened physical or non-physical condition caused by the original work injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa

1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

In this case, I found that claimant suffered additional permanent disability due to additional injury to the left leg caused by the original injury on right leg. When a worker suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. See Workers' Compensation, Iowa Practice 15, (2014-2015), section 4:4, pp. 32-33 and cases cited therein. Claimant has shown a worsened changed condition.

I found that the additional permanent disability is limited to the additional injury to the left leg, a scheduled member, from the left knee condition at this time as the foot conditions still require treatment.

However, claimant asserts that sequelae of an injury to a single arm, leg, hand, foot or eye which involves injury to another arm, leg, hand, foot or eye qualifies for disability benefits under Iowa Code section 85.34(2)(s). Under that Code section, if there is an injury to both arms, legs, hands, feet and eyes from a single accident, then this agency must first determine the extent of industrial disability or loss of earning capacity caused by the single accident. If there is a 100 percent or total loss of earning capacity, then clamant is entitled to permanent total disability benefits. If the injury caused a loss of earning capacity that is less than total or 100 percent, then permanent disability benefits are awarded only for a functional or scheduled of loss of use to each extremity. The percentage of the loss of use to each extremity is converted into a percentage of the body as a whole and combined together into one body as a whole percentage loss. Weekly benefits are then awarded as a percentage of 500 weeks. Simbro v. DeLong's Sportwear, 332 N.W.2d 886 (Iowa 1983); Burgett v. Man An So Corp., III Iowa Industrial Commissioner Reports 38 (App. November 30, 1982).

Claimant asserts that the subsequent disability to the left leg in this case, was caused by the initial injury to the right leg, due to overcompensation for the right leg disability. Claimant concludes that there is now an injury to both legs from the original injury and therefore, Iowa Code section 85.34(2)(s) applies in compensating claimant in this review-reopening proceeding.

Claimant cites two prior arbitration decisions in support of this theory of compensation. Bonorden v. Ziegler, Inc., File No. 5045352 (Arb. January 23, 2015); Miller v. Conagra Foods, Inc., File No. 5027921 (Arb. July 1, 2010) affirmed (App. August 10, 2011). The same deputy commissioner wrote both arbitration decisions. In both cases, there was a subsequent loss of use at a later date to another limb or eye causally related to the initial injury to a limb. In Bonorden, the deputy awarded permanent total disability under Iowa Code section 85.34(2)(s). It does not appear that this decision was appealed. In Miller, the deputy did not find claimant permanently and totally disabled and only awarded scheduled member disability benefits. While this arbitration decision was affirmed by the workers' compensation commissioner on appeal, it does not appear that the issue of the application of Iowa Code section 85.34(2)(s) was raised on appeal and such an issue was not discussed in the appeal decision. Miller v. Con Agra Foods, Inc., File No. 5027921 (App. August 10, 2011). Consequently, as arbitration decisions are not binding on deputy commissioners, there are no binding agency precedents or court decisions applicable to this legal issue now before me.

The above cited arbitration decisions were based on the absence of the words "simultaneous injuries" in the statutory language; the words which are most often used in case law dealing with the application of Iowa Code section 85.34(2)(s). While that may be true, the words "single accident" does appear and logically means a single event or single injury causing a loss of use to both extremities or eyes, not multiple events or injuries causing a loss of use to both extremities or eyes. In cumulative trauma cases, a single accident means a single time period causing a loss of use to

both extremities or eyes, not multiple subsequent periods of time causing loss of use to those members.

In this case, we have an initial injury or event causing injury to only the right leg, and a second event or injury from subsequent work activity causing disability to the left leg. Although both events may be causally related, this is not an injury or disability to both legs from a single accident. Therefore, I conclude that Iowa Code section 85.34(2)(s) is not applicable to this case.

This is not to say that claimant does not have an industrial remedy for her loss of use to both legs. Compensation for lost earning capacity is available for these injuries under Iowa Code section 85.64 in a claim against the Second Injury Fund of Iowa.

Given my finding of an additional two percent permanent loss of use to the left leg from the original work injury, claimant is entitled to an additional four point four (4.4) weeks in permanent partial disability benefits. According to the hearing report, claimant has already been paid additional permanency benefits in excess of this entitlement. Claimant is not entitled to any further weekly benefits for permanent disability at least at this time.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, I found that the bilateral foot problems treated by Dr. Miller were causally related to the original work injury, but that claimant has not yet reached maximum medical improvement and further treatment by Dr. Miller is reasonable and necessary. Claimant will be awarded Dr. Miller's expenses and continued care by him.

While I agree that further intervention by an orthopedist is likely not needed at this time, she is having considerable chronic pain problems and as recommend by Dr. Stoken, defendants need to provide claimant with a pain management specialist.

III. Claimant seeks additional weekly benefits under Iowa Code section 86.13 (4), That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)). A reasonable or probable cause or excuse must satisfy the following requirements:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

(Iowa Code section 86.13(4)(c)).

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

In this case, there was a three month delay in initiating healing period benefits following a rather clear causation opinion by Dr. Mahoney. No excuse was provided other than to claim the doctor's views were not binding on defendants. I disagree and a three month delay is unreasonable. The amount of weekly benefits delayed is approximately $1,700.00. As there is no showing of a prior penalty imposed on these defendants, the penalty shall be $500.00.

Claimant's request for reimbursement for the costs of a functional capacity test and vocational evaluation are denied as this is not an industrial disability case and such reports are irrelevant to the issues in this case.

ORDER

1. Defendants shall pay to claimant the sum of five hundred and 00/100 dollars ($500.00) as a penalty for failing to have a reasonable excuse for not timely commencing healing period benefits.

2. Defendants shall pay the medical expenses for the treatment of her bilateral foot problems by Todd Miller, D.P.M. Defendants shall authorize Dr. Miller to continue treating claimant's bilateral foot problems at their expense.

3. Defendants shall select and authorize a pain management specialist to address claimant's chronic pain from her bilateral leg and foot problems.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, but not for any reports of a functional capacity test or vocational evaluation.

Signed and filed this 2nd day of December, 2015.

LARRY WALSHIRE
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.