BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHEILA BUTLER, Claimant, vs. HARDEES, Employer, and TRAVELERS INSURANCE CO., Insurance Carrier, Defendants.	File No. 5004929 A R B I T R A T I O N D E C I S I O N HEAD NOTE NOS.: 1108.50; 1803; 2500

STATEMENT OF THE CASE

This is a proceeding in arbitration that claimant, Sheila Butler, has brought against the employer, Hardees, and its insurance carrier, Travelers Insurance Co., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained on July 28, 2002. Pursuant to claimant's motion, claimant's claim against the Second Injury Fund of Iowa has been dismissed.

This matter came on for hearing before the undersigned deputy workers' compensation commissioner at Burlington, Iowa on March 10, 2004. The record was fully submitted as of March 19, 2004. The record consists of the testimony of claimant and of Sarah Lyons as well as of claimant's exhibits I through 4 and defendants' exhibits A through F.

ISSUES

The stipulations of the parties contained within the hearing report filed at the time of hearing are accepted and incorporated into this decision by reference to that report. Pursuant to those stipulations, claimant was married, and entitled to two exemptions on the date of injury. Gross weekly earnings were $450.00, resulting in a weekly rate of compensation of $302.62.

The issues to be resolved are:

1. Whether claimant received an injury on July 28, 2002 that arose out of and in the course of her employment;

2. Whether the alleged injury is the cause of claimed permanent disability to claimant's right hip and low back;

3. The extent of claimant's entitlement to permanent partial disability benefits, if any, including the question of whether claimant ‘s disability is limited to the schedule or extends into the body as whole; and

4. Whether claimant is entitled to payment of certain medical costs as fair and reasonable costs causally related to reasonable and necessary treatment received as a result of a work injury.

FINDINGS OF FACT AND ANALYSIS

The undersigned deputy workers' compensation commissioner, having heard the testimony and considered the evidence, finds:

Claimant's credibility is at issue in this matter. For reasons that will be discussed further below, veracity does not appear to be claimant's forte. For that reason, where discrepancies exist between claimant's testimony and perceptions and other more objective testimonial or documentary evidence, greater weight is given to the documentary evidence and other testimony.

Claimant is 48 years old, having a birth date of September 24, 1955. She has completed the 11th grade and received a GED in 1986. Before beginning work at Hardees, claimant had some brief work experience as a cook, salad maker, waitress and greenhouse worker.

Claimant began employment with Hardees in March 2001 as a biscuit maker. She soon advanced to shift leader and as of January 2002 had become an assistant manager. In that position, claimant would spend two to three hours each day on paper work and the balance of her time doing manual work alongside other staff. Claimant's job duties required that she retrieve product from the walk-in cooler.

Claimant testified that on Sunday, July 28, 2002, she went to the cooler to get French fries, slipped on ice on the floor, and fell on her right side into boxes of chicken. The deposition testimony of Amy Roederer supports claimant's contention that claimant had a work incident by way of a slip and fall in the cooler on July 28, 2002.

Claimant visited Russell J. Cox, D.C., on July 31, 2002, complaining of pain in her right upper back that radiated into her right pelvis as well as of right leg neuralgia and right knee discomfort. Claimant also reported on a patient case history completed July 31, 2002 that she may also then have had headaches, shoulder pain, upper back pain, neck pain and lower back pain and may previously have had arthritis.

Dr. Cox treated claimant with spinal manipulative therapy and rescheduled her for the follow-up appointment on August 2, 2002. Claimant was a no call, no show on that day. Claimant did not reappear for treatment with Dr. Cox until November 13, 2002. She then treated on November 18, November 20, and November 22, 2002.

Dr. Cox has opined that he treated claimant on July 31, 2002 for subluxations and discomforts she had experienced after falling in a freezer at work on July 28, 2002. He has not opined that treatment rendered in November 2002 related to claimant's work incident. (Exhibit 1, pages 1 through 5 and 9 through 10)

Subsequent to July 31, 2002, claimant next sought medical care on September 4, 2002, when she treated with Stacy L. Greiner, ARNP, who practices under the supervision of Ronald R. Reschly, M.D. Claimant then complained of aching right hip and right knee pain that became severe at times. She characterized the knee pain as having started about two weeks earlier and characterized the hip pain as having existed for several years. (Ex. 1, pp. 6 through 8) Claimant apparently gave a history of having experienced right knee pain after jumping on a trampoline with her grandchildren earlier. (Ex. 2, p. 5) On examination claimant could touch her toes; straight leg raising was negative bilaterally. Claimant had no hip pain with either abduction or abduction. (Ex. C, p. 2)

Claimant next visited Dr. Reschly's office on September 12, 2002. She complained of being sore to touch at the right S.I. joint, into the groin and down the lateral side to the medial aspect of the right knee. On objective examination, claimant had right knee medial joint compartment tenderness. X-rays demonstrated mild right knee degenerative changes. A right knee MRI of September 16, 2002 revealed a medial meniscus tear. Dr. Reschly performed elective right arthroscopic surgery to correct an internal derangement of the right knee posterior horn medial meniscus tear on October 11, 2002. (Ex. 2, pp. 1 through 6)

On January 8, 2004, Dr. Reschly opined that claimant's right knee condition was not related to her July 28, 2002 work incident. He also opined, however, that based on an office note of Dr. Cox regarding the July 28, 2002 work incident, Dr. Reschly's treatment of claimant's low back problem with radiation down the right lower extremity related to her July 28, 2004 work incident. (Ex. 2, p. 8) A January 28, 2004 low back MRI showed mild lumbar spondylosis. (Ex. 2, p. 10) On March 5, 2004, Dr. Reschly opined that claimant's low back pain syndrome results in five percent whole person impairment, apparently, under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 2, p. 12)

John D. Kuhnlein, D.O., an occupational medicine specialist, performed in independent medical examination of claimant on October 3, 2003. In his examination report of October 16, 2003, Dr. Kuhnlein opined he was unable to relate claimant's low back condition to her work incident at Hardees. He further opined that claimant's hip pain probably related to her back pain and was not a separate condition. (Ex. A, pp. 1 through 9)

Claimant testified that prior to July 28, 2002, she had no right hip or low back pain that interfered with her ability to work. Claimant's testified that she had advised her own supervisor, Sarah Lyons, about the July 28, 2002 to work incident on the Tuesday after it occurred. Claimant testified Ms Lyons advised claimant that claimant would be fired if she reported a workers' compensation injury. Claimant also testified that she reported the incident to the district manager on the Thursday after it occurred. She further testified that he gave her the non-verbal impression that she should drop the subject. Claimant testified that other Hardees employees had been terminated for reporting work incidents. She could not recall the names of these employees, however.

Ms. Lyons testified that claimant only had advised Ms. Lyons of the July 28, 2002 work incident five days subsequent to the incident. Ms. Lyons further testified that she had not advised claimant and would never advise an employee against reporting and filing a workers' compensation claim. Ms. Lyons further testified that she was unaware of anyone in the Hardee's organization ever discouraging employees from reporting work injuries. Ms. Lyons stated that even before July 28, 2002, claimant had advised Ms. Lyons that claimant could not mop, sweep, or lift heavier items because claimant had hurt her hip and back while helping her daughter move. Claimant testified that claimant had never helped claimant's daughter move, and that claimant had told Ms. Lyons that arm pain prevented claimant's mopping.

Claimant acknowledged having had right hip pain prior to July 28, 2002, which pain she related to a non-work incident in the mid-1980s. She denied having told Dr. Cox that she has had arthritis.

Claimant voluntarily left employment with Hardees on August 15, 2002. Claimant testified that she left work because work conditions had become unbearable once Ms. Lyons took over management of the restaurant. Claimant testified that she has not sought work subsequent to August 15, 2002,as she does not believe that she could give "full effort" with her current physical limitations.

Claimant's demeanor and her overall attitude at hearing were such that her testimony is entitled to very little weight. Ms. Lyons was a credible witness.

Claimant's exhibit 3 is a recapitulation of claimant's medical expenses with Drs. Cox and Reschly.

CONCLUSIONS OF LAW

First considered is the question of whether claimant received an injury that arose out of and in the course of her employment on July 28, 2002.

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. of App. P. 6.14(6)

The claimant has the burden of proving by of preponderance of the evidence that the alleged injury actually occurred and that it both arose out of

and in the course of the employment. Ciha v. Quaker Oats Co., 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.

It is concluded that claimant has established a work incident of July 28, 2002 in which she slipped and fell on ice in the cooler at her employer's restaurant.

Next considered is the question of whether claimant's claimed permanent disability to her right hip and low back relates to the July 28, 2002 work incident.

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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 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).

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).

Only Dr. Cox has related the treatment he rendered claimant on July 31, 2002 to her July 28, 2002 work incident. His undated note does not causally connect his November 2002 treatment of claimant to her work incident. As of August 2, 2002, claimant apparently had recovered sufficiently from the July 28, 2002 work incident that she felt no need to continue treatment with Dr. Cox. Claimant then received no further treatment until she visited Dr. Reschly's office on September 4, 2002. She then gave a history of having had right hip pain over several years. Dr. Reschly's January 8, 2004 opinion that a causal relationship exists between claimant's low back and right hip pain and the July 28, 2002 work incident is premised on Dr. Cox's treatment note. Therefore, Dr. Reschly's opinion is entitled to weight only insofar as it relates to the care Dr. Cox rendered claimant on July 31, 2002.

Dr. Kuhnlein did not relate claimant's low back and right hip complaints of October 2003 to her July 28,2002 work incident. That opinion is consistent with claimant's having felt no need for continued medical or chiropractic care for her low back or right hip from July 31, 2002 through September 3, 2002. One would expect aggressive medical care to be most condition immediately subsequent to any work incident to which the treatment related. At most, claimant sustained a very temporary aggravation of her preexisting low back and right hip conditions as a result of her July 28, 2002 work incident.

It is concluded that claimant has established a temporary aggravation of her preexisting low back and right hip condition as a result of her July 28, 2002 work incident.

It is further concluded that claimant has not established a causal relationship between any permanent low back and right hip conditions and her July 28, 2002 work incident.

As claimant has not established a causal relationship between her work incident and her claimed permanent disability, the question of the extent of any permanent partial disability need not be decided.

Finally considered is the question of whether claimant is entitled to payment of medical expenses contained in exhibit 3.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v.

Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-reopen 1975).

Claimant's failure to continue care with Dr. Cox after her initial July 31, 2002 visit and her failure to seek other forms of treatment for low back and right hip complaints between that date and September 4, 2002 strongly suggests that claimant had no need for medical treatment for low back and right hip conditions during that time. As noted above, work-related conditions would be expected to be most acute and most symptomatic in the immediate aftermath of the precipitating incident. Apparently, this was not the case as regards claimant's symptomatology. For that reason, it is more likely than not that the care claimant received from both Dr. Reschly and Dr. Cox on and subsequent to September 4, 2002 related to her underlying low back and right hip conditions and not to the work incident of July 28, 2002.

It is concluded that claimant has established a causal relationship between her medical care with Dr. Cox on July 31, 2002 and her work incident of July 28, 2002.

It is concluded that claimant has established that the care Dr. Cox rendered on July 28, 2002 was reasonable and necessary care and that the charge of $84.00 was a fair and reasonable charge for that care.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay the costs claimant incurred with Dr. Cox on July 31, 2002 in the amount of eighty-four dollars ($84.00).

That defendants file subsequent reports injury as this division requires.

That defendants pay claimant's filing fee in the amount of sixty-five dollars ($65.00).

That claimant and defendants otherwise each pay their own costs in this proceeding.

Signed and filed this ____5TH_____ day of May, 2004.

_____
HELENJEAN M. WALLESER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Mr. Nicholas G. Pothitakis
Attorney at Law
P.O. Box 337
Burlington, IA 52601-0337

Mr. Peter J. Thill
Attorney at Law
111 E 3rd St., Ste. 600
Davenport, IA 52801-1524

HJW/smb