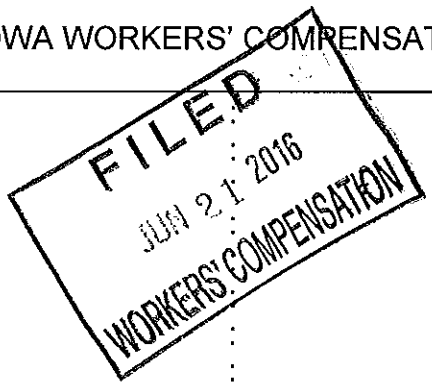
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JUANA CERDA,

Claimant,

vs.

PAE,

Employer,

and

NEW HAMPSHIRE INS. CO.,

Insurance Carrier,
Defendants.

File No. 5048854

ARBITRATION

DECISION

Head Note Nos.: 1402.40, 1803, 2502, 2701, 2907

STATEMENT OF THE CASE

Claimant, Juana Cerda, filed a petition in arbitration seeking workers' compensation benefits from PAE, employer, and New Hampshire Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on March 29, 2016 and fully submitted on April 22, 2016.

The record in this case consists of claimant's exhibits 1 through 12, joint exhibits A through K, and the testimony of claimant and Larry Lane. Serving as interpreter was Rafael Geronimo.

ISSUES

1. Whether claimant's injury is a cause of permanent disability; and if so
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.
4. Whether claimant is entitled to alternate medical care.
5. Costs.

FINDINGS OF FACT

Claimant was 53 years old at the time of hearing. Claimant was born in Mexico. She attended school up to the third grade in Mexico. Claimant understands some English, but her primary language is Spanish. Claimant understands basic instructions in English and can read a little of a newspaper in English.

Claimant has worked for PAE since 1999. PAE gets US mail equipment to inspect and organize. Equipment consists of mail bags, trays, and other mail containers. Claimant's job with PAE requires her to inspect, sort and stack trays, sleeves, lids and bags. Claimant also has to stack pallets. (Exhibit F, page 4) Claimant testified her job required her to lift 10 to 20 pounds with some overhead stacking of pallets. Claimant testified she rotated to different jobs at PAE.

Claimant's prior medical history is relevant. Claimant had a slip and fall accident in Texas. (Ex. I, p. 5; Deposition pp. 14-17) Claimant also had a slip and fall at a store in California. (Ex. I, pp. 5, 10; Depo. pp. 17, 36) There is no evidence in the record either fall resulted in a permanent impairment or permanent restrictions.

On September 11, 2013 claimant was hit by a tall cart filled with plastic trays. Claimant reported her injury and was sent to Concentra.

On September 11, 2013 claimant was seen at Concentra by Sherry Hutchins, D.O. Claimant had pain in the left hand and pain in the lower back. Claimant had no radicular symptoms. She was assessed as having a lumbosacral strain and treated with ibuprofen. (Ex. A, pp. 1-2)

On September 17, 2013 claimant returned to Concentra. Claimant was taking medications, undergoing physical therapy, and was not feeling better. Claimant complained of back pain at a level 9 on a scale where 10 was excruciating pain. Claimant was assessed as having a lumbosacral strain. (Ex. A, pp. 3-4)

Claimant returned to Concentra on September 24, 2013. Claimant indicated she was ready to return to regular work. Claimant was returned to regular duty on September 24, 2013. (Ex. A, pp. 5-6)

Claimant testified she did not tell doctors at Concentra she was ready to return to work. She testified she waited three hours for one of her appointments and was not allowed to bring her daughter to interpret. She said she did not return for followup care after September 24, 2013 with Concentra, as she was not treated well. She said she continued to work at PAE in pain. She said she did not believe she received good care at Concentra.

On March 27, 2014 claimant was evaluated at Family Medicine for left hip and leg pain and lower back pain. Claimant had pain since October of 2013 from a work injury. She was told she would need to get an MRI. Claimant was told she needed to

determine if she would receive treatment through her health insurance or through workers' compensation. (Ex. B, pp. 1-4)

On April 7, 2014 claimant returned to Concentra. Claimant was assessed as having a lumbar strain. She was given a 20-pound weight restriction and returned to physical therapy. (Ex. A, pp. 8-10) Claimant returned to Concentra on September 14, 2014. Claimant noted no improvement in symptoms. She was assessed as having a lumbar strain. (Ex. C, p. 3)

Claimant testified she requested care by a specialist outside of the Concentra system. When care was not provided, claimant filed a petition in alternate medical care. In an August 11, 2014 alternate medical care decision, defendants were ordered by the agency to provide treatment with a specialist not employed by Concentra.

On September 9, 2014 claimant was evaluated by Robert Rondinelli, M.D. Claimant complained of lower back pain radiating down her left leg to her foot. Claimant did not give full effort in exam. Dr. Rondinelli found claimant had significant symptom magnification and inconsistencies in reporting of symptoms. Dr. Rondinelli recommended further testing. (Ex. C, pp. 3-8)

Claimant returned to Dr. Rondinelli on January 20, 2015. Claimant had continued lower back pain. Claimant was doing her job without restrictions. Claimant's MRI revealed degenerative changes at multiple levels. An EMG showed a multilevel low-grade nerve root irritation showing a chronic L5 nerve root irritation. Dr. Rondinelli noted there was no trauma-related pathology to explain the nerve root irritation. Dr. Rondinelli found claimant had no ratable impairment. He did not give claimant any restrictions. (Ex. C, pp. 9-11)

Claimant returned to Dr. Rondinelli on June 11, 2015 with continued complaints of lower back pain. Dr. Rondinelli assessed claimant as having lower back pain with multilevel spondylosis. He found no causal connection between claimant's lower back pain and the September of 2013 work injury. Claimant was returned to work and was to continue using a TENS unit. (Ex. C, pp. 12-13)

Claimant returned to Dr. Rondinelli on August 6, 2015. Claimant had ongoing lower back pain. Claimant had evidence of scoliosis, and Dr. Rondinelli believed this might be contributing to claimant's back pain. (Ex. C, pp. 13-14)

On October 20, 2015 claimant saw Dr. Rondinelli with continued complaints of lower back pain. Claimant was assessed as having mechanical lower back pain with low-grade scoliosis and low-grade osteoarthritis. Claimant was continued to work with no restrictions. Dr. Rondinelli had no basis for an impairment rating. He found claimant had reached maximum medical improvement (MMI). (Ex. C, pp. 15-16)

On January 11, 2016 claimant underwent a functional capacity evaluation (FCE) performed by Todd Schemper, PT. Claimant was found to have given consistent effort.

Physical Therapist Schemper opined claimant's study showed she would be able to work in the sedentary work level. Claimant was limited to lifting up to 10 pounds occasionally. (Ex. K)

In a February 26, 2016 report John Kuhnlein, D.O., gave his opinions of claimant's condition following an IME. Claimant indicated no preexisting lower back pain before the September of 2013 incident. Dr. Kuhnlein gave claimant permanent restrictions of lifting 20 pounds from floor to waist and over the shoulder occasionally. He also indicated this was different from claimant's FCE, but noted the FCE understated claimant's ability. (Ex. J, pp. 1-12)

Dr. Kuhnlein found claimant fit into a lumbar category DRE II and III under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition and found claimant had a 9 percent permanent impairment to the body as a whole. He opined claimant had a permanent impairment based, in part, on EMG studies showing a chronic L5 nerve root irritation. (Ex. J, pp. 12-13)

Claimant testified her back still hurts. She said when she uses her arm, she feels something pulling her back. She said she has the most pain in her hips and her glutes. Claimant takes over-the-counter ibuprofen. Claimant indicates she takes 800 mg three times a day.

Claimant testified she believes her injury has affected her job performance at PAE. She said the supervisors have complained to her about her work productivity.

Claimant said for the last three months she has only done one job at PAE. Claimant said she has not been rotated to other jobs as she was before her injury. Claimant has had the same job title she had at the time of the injury. Claimant testified she works 40 hours per week and occasionally works overtime.

Claimant said she wanted to see a specialist for her back. She said she wants to continue to work at PAE.

Larry Lane testified he is a production supervisor at PAE. In that capacity he is familiar with claimant's job and the work claimant performs at PAE. Mr. Lane testified claimant is an inspector at PAE. He said for the last several months claimant has been working in the bag area. Mr. Lane said while it is rare for an employee at PAE to be doing one job for three months, he does know of a situation where workers perform some positions for several months. He said workers are placed in positions at PAE based upon production needs.

Claimant testified everyone at PAE rotates to different jobs, but she does not.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant had a permanent disability that was caused by the September 11, 2013 injury.

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 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).

Claimant has worked for PAE for approximately 16 years. There is no evidence claimant had any work injury prior to the September of 2013 event. There is no evidence claimant had any performance issues prior to the September of 2013 event.

Claimant had an accepted work injury on September 11, 2013. She initially treated with Concentra. Claimant's unrebutted testimony is that she stopped treating at Concentra because they did not treat her well. (Ex. A, pp. 5-12; Tr. pp. 20-21) Claimant eventually was authorized to treat with Dr. Rondinelli after filing a petition for alternate medical care. Dr. Rondinelli recommended EMG studies and an MRI. EMG showed a nerve root impingement consistent with a chronic L5 nerve root irritation on the left. (Ex. 2, pp. 1-2)

Dr. Rondinelli indicated claimant had a mechanical lower back problem with chronic low-grade radiculopathy. However, Dr. Rondinelli found claimant's symptoms were not work related. (Ex. C, pp. 10-14)

Dr. Kuhnlein opined claimant's injury of September 2013 lit up her degenerative joint disease, which had previously been asymptomatic. Dr. Kuhnlein noted EMG studies, showing a chronic L5 nerve root irritation, supported his opinion. (Ex. J)

Defendants contend Dr. Kuhnlein's opinion regarding causation and permanent impairment are unconvincing, as Dr. Kuhnlein did not have a history of claimant's prior slip and fall injuries in Texas and California. (Defendants post-hearing brief, p. 4) However, there is no evidence in the record that claimant's prior slip and fall injuries in Texas and California resulted in any permanent impairment or permanent restrictions.

Claimant worked at PAE for approximately 16 years before her work incident. There is no evidence claimant had any prior work injuries or production problems prior to her injury. Claimant has consistently complained of lower back pain and pain in her legs since her injury. Diagnostic tests indicate claimant has a chronic L5 nerve root irritation. Claimant has continued to work after the injury. I respect the opinion of Dr. Rondinelli. However, it is not plausible that claimant, who has a solid work history, and has been reporting symptoms consisting with diagnostic testing, would have back pain unrelated to her work injury. Because of this, it is found the opinions of Dr. Kuhnlein regarding permanent impairment are more convincing than those of Dr. Rondinelli.

Claimant had a work injury in June of 2013. Claimant has had ongoing complaints of pain for approximately two and a half years. Dr. Kuhnlein's opinions regarding causation and permanent impairment are more convincing than those of Dr. Rondinelli. Given this record, claimant has carried her burden of proof that her injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Claimant was 53 years old at the time of hearing. Claimant went up to the third grade in Mexico. Claimant understands some English. She can understand basic instructions in English and can read a little bit of an English newspaper. Claimant has worked at PAE since 1999.

Dr. Kuhnlein opines claimant has a 9 percent permanent impairment to the body as a whole. He noted restrictions given to claimant in the FCE were not entirely valid. He gave claimant a restriction of occasional 20-pound lifting from floor to waist and over the shoulder. Claimant has not used that restriction at PAE. The evidence indicates even with that restriction, claimant will continue to work in her same job at PAE. Claimant continues to work full time at PAE since her injury and has done some overtime work. Claimant has not had any surgery.

There is some evidence claimant was put in a "bag" job for three months prior to hearing. Claimant contends this is an "accommodated job." (Claimant's post-hearing brief, p. 5) There is scant evidence in the record claimant's job at the time of the hearing was actually an accommodated job.

When all relevant factors are considered, it is found claimant has a 10 percent loss of earning capacity or industrial disability.

The next issue to be determined is if claimant is entitled to alternate medical care. Claimant requests she be seen by an orthopedic surgeon for further treatment. (Claimant's post-hearing brief, p. 10)

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Claimant has been treated at Concentra and by Dr. Rondinelli. Claimant testified she was not happy with the care at Concentra, and the care with Dr. Rondinelli was initially ordered by this agency following a petition for alternate medical care. There is also little evidence the care given by Dr. Rondinelli has been unreasonable. Claimant underwent an IME with Dr. Kuhnlein. Dr. Kuhnlein recommended claimant continue to use a TENS unit for pain. He also agreed claimant needs to have continued use of medication for pain. He recommended claimant lose weight, exercise more, and consider a change in statin medication. (Ex. J, p. 11) There is nothing in Dr. Kuhnlein's report suggesting claimant should be seen by an orthopedic specialist, or any other specialist. Given this record, claimant has failed to carry her burden of proof she is entitled to alternate medical care.

The next issue to be determined is if claimant is due reimbursement for an IME.

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).

Dr. Rondinelli, the employer-retained physician, opined on October 20, 2015 that claimant had no basis for an impairment rating. (Ex. C, pp. 15-16) Dr. Kuhnlein, the employee-retained physician, gave his opinions of claimant's permanent impairment in a February 26, 2016 report. Given this chronology, claimant is due reimbursement for the IME by Dr. Kuhnlein.

The final issue to be determined is costs.

876 IAC 4.33 indicates, in relevant part:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Rule 4.33 allows for the taxation of reasonable costs associated with obtaining two reports of medical providers. The relevant inquiry with regard to taxation of the FCE costs in question is whether the FCE was required by a medical provider as necessary for the completion of a medical report. In this instance, if the FCE was ordered to evaluate the claimant's permanent disability and need for restrictions, the cost is a reasonable cost under rule 876 IAC 4.33. If it is not, taxation of costs of the FCE is inappropriate.

The medical records suggest the FCE at issue was not requested by a medical provider. The record suggests the FCE was actually requested by claimant's counsel. Since the FCE was not requested by a medical provider, it is not a reimbursable cost under 876 IAC 4.33. Claimant's request for reimbursement for the FCE is denied. As the FCE is not reimbursable as a cost, interpretation services for the FCE are also not a reimbursable cost

Rule 876 Iowa Administrative Code 4.33 provides for taxation of costs, including "transcription costs [of evidential depositions] when appropriate." This claim actually relates to the cost of a copy of a transcript ordered by defendants. As provided in Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992):

> Allowable costs are limited to the cost of the original of depositions and do not include the expense of duplicate copies obtained for convenience of counsel.

(Coker, at 153)

See also, Higgins v. John Deere Engine Works, File No. 1253509 (App. July 12, 2002). Given agency law in Higgins, costs associated with claimant's deposition are not awarded. Claimant is awarded all other costs

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits at the rate of three hundred seventy and 55/100 dollars ($370.55) per week commencing on September 12, 2013.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall reimburse claimant for the expenses associated with Dr. Kuhnlein's IME.

That defendants shall pay costs as discussed above.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 21st day of June, 2016.

JAMES F. CHRISTENSON
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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.