BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LORENA GUERRA,

Claimant,

vs.

WHIRLPOOL,

Employer,
Self-Insured,
Defendants.

File No. 5042235

ARBITRATION

DECISION

Head Note Nos.: 1108, 2701

STATEMENT OF THE CASE

Claimant, Lorena Guerra, filed a petition for arbitration seeking workers' compensation benefits from Whirlpool, self-insured employer.

The matter came on for hearing on September 17, 2014, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 6; defense exhibits A through W, and the sworn testimony of claimant, as well as David Ross. The parties briefed this case and the matter was fully submitted on October 3, 2014.

ISSUES

The fighting issue in the case is whether the claimant has suffered any permanent disability as a result of her stipulated November 30, 2010 work injury. If the claimant did suffer any permanent disability, then the nature and extent is in dispute.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on November 30, 2010.

3. The commencement date for any permanent partial disability benefits is November 30, 2010.

4. The weekly rate of compensation is $461.53.

FINDINGS OF FACT

The claimant, Lorena Guerra, was 35 years old as of the date of hearing. She is a graduate of Theodore Roosevelt High School in Chicago, Illinois. She has worked at Whirlpool since 2001. Her job title at the time of hearing, and for the past several years, is "Brazer." (Exhibit V-4) This job involves putting two pieces of copper together and making sure they have a seal with the proper alloy. (Ex. V-4) Lorena suffered an injury on November 30, 2010, which arose out of and in the course of her employment with Whirlpool. This is a stipulated fact of the case.

On November 30, 2010, Lorena fell on ice while walking toward her car in the employer's parking lot. As she slipped, she fell forward, landing on her hands and knees. When she got up, she noticed that she had torn her clothes and had blood on her left knee. She described the fall as though "somebody pushed her from behind." (Ex. V-7) Lorena reported the injury at the medical station. The scrape was cleaned and she was provided ice. The following day, Lorena continued to complain and indicated she could barely walk. She was sent home.

Lorena claimed three previous work injuries. Specifically, she claimed she had sustained a July 21, 2008, left knee injury, a November 4, 2008 right knee injury and a December 11, 2008 low back injury. The parties ultimately agreed Lorena had suffered a work-related left knee condition and the matter was settled on an Agreement for Settlement on June 10, 2011. (Ex. A) Her treating physician was Fred Pilcher, M.D. He performed two meniscus surgeries on her left knee. (Ex. A-8; *see also* Ex. I-2 and 1-3) He also performed surgery on the right knee. Lorena claimed the right knee surgery was a sequela of the left knee injury. Dr. Pilcher disagreed. (Ex. C-4 and C-5) The right knee and low back injuries were settled in separate Compromise Settlement Agreements for $500.00 each on the same date. (Exs. B and C)

The record reflects Lorena has a long history of back and radicular leg pain. Her history of low back pain goes back to 2003. She treated with a chiropractor for low back and right leg pain, to some degree, fairly consistently since 2003. (*See* Ex. K-6; K-10; K-15; K-22; K-27) She saw numerous physicians over time for low back pain. She had physical therapy in 2004-2005. (Ex. L) She had extensive treatment through Steindler Orthopedic Clinic beginning in 2004. (Ex. N; *see also* Ex. P) In April 2009 she complained of a new onset of low back pain radiating into the left leg, although she stated there was no injury. (Ex. M-1) In 2009 she eventually had two surgeries through Brent Overton, M.D., at Steindler Orthopedic Clinic. (Ex. N-26 and N-28) Dr. Overton ultimately opined that the low back condition was not work-related or aggravated. (Ex. B-6 and B-7) The best evidence in the record reflects that Lorena has struggled with chronic low back pain since 2003 and has been symptomatic, at some level, since that time.

The record is not clear why Lorena did not receive any treatment between her injury until her first visit with UI Healthworks on January 1, 2011. She saw Patrick Hartley, M.D. Dr. Hartley documented Lorena's situation.

> She reports that she fell on ice in the parking lot [at] her work on November 30, 2010. She states that she fell forward landing on both knees. She states she had a cup of coffee in her left hand and her purse in her right. She states that she fell hard and in fact tore the pants leg over her left knee. . . . She states that she takes ibuprofen 800 mg three times per day, but admits that she was taking 800 mg twice per day even before her injury, for chronic back and knee pain. . . . She is reporting an increase in midline low back pain since her injury. She reports a history of chronic low back pain which he [sic] rates as 5/10. She does have a history of laminectomy x 2 for L4-5 disk herniation. She states that her current back pain is 6/10. She denies any radiation of pain to her buttocks or lower extremities.

(Claimant's Exhibit 1, page 1) She followed up with Dr. Hartley on multiple occasions between January 6 and March 3, 2011. She received conservative care for aggravations of both knees and her low back. (Cl. Ex. 1, pp. 2-7) On February 23, 2011, her physician documented that Lorena "has had intermittent mild left lateral leg parasthesias and some intermittent left leg weakness since her back surgery but this has not worsened since her slip and fall accident." (Cl. Ex. 1, p. 6)

In the meantime, Robin Epp, M.D., evaluated Lorena on January 27, 2011 for both knees and her low back and then issued a report on February 27, 2011. (Ex. T-1) Dr. Epp made no mention of the November 30, 2010 work injury. Dr. Epp spent "one hour and 45 minutes with [Claimant] obtaining the history and performing the examination." (Ex. T-2) Dr. Epp's February 19, 2011 independent medical examination (IME) report described the following.

> Current Symptoms – Regarding low back, she describes the pain as being in the lumbar area with occasional left leg pain to the ankle. This occurs on a daily basis. She states that it is worse after work. She also notes tingling in her left foot. She rates the pain as 4/10 at best, 6/10 usually, and 9/10 at worst.
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> Regarding the left knee, she describes the pain as being located in the anterior and medial aspect. She rates the pain as 2/10 at best, 4/10 usually, and 6/10 at worst. She states that it feels like it will give out once a week, but she has not fallen.
>
> Regarding the right knee, she describes the pain as being in the patella in the anterior aspect. She rates the pain as 4/10 at best, 6/10 usually, and 9/10 at worst. She states that it feels like it will give out on occasion. She also notes that her knees "pop and crack" a lot, right greater than left.

(Ex. T-6 and T-7)

Dr. Epp, in her February 19, 2011 IME report, provided the following "Causation" opinions:

> It is my opinion that Ms. Guerra's left knee symptoms and the need for the two surgeries and her continued **left knee pain** are directly and causally related to the incident that occurred on July 21, 2008.
>
> . . . .
>
> Therefore, I would describe her **right knee pain** as coming about as a result of the left knee injury that occurred on July 21, 2008.
>
> . . . .
>
> Therefore, I would consider her current level of **back pain**, the need for two surgeries on her back, and the epidural steroid injections that were done to be as a result of an aggravation of a pre-existing condition. In my opinion, but for the left knee injury on July 21, 2008, and the gait change that ensued as well as the physical therapy done for this injury, she would not have developed a worsening of the pre-existing condition in her back.

(Ex. T-10)

On March 2, 2011, the medical notes reflect that Lorena began having radicular symptoms.

> Today the patient reports that although she has experienced a decrease in her right-sided low back pain, she has experienced an unfortunate increase in her left-sided low back pain and left leg pain. She describes experiencing a sharp pain that travels down the left gluteal region, posterior thigh, and continues into the left lateral foot.

(Cl. Ex. 1, p. 8) She was then sent for an MRI and eventually an orthopedist. Lorena saw an orthopedic specialist, Joseph D. Smucker, M.D., on April 4, 2011. (Cl. Ex. 2, pp. 11-15) Dr. Smucker stated "Lorena and I discussed her diagnosis, which is herniated nucleus pulposus on the right-sided L5-S1 causing exiting nerve root L5 type radiculopathy." (Cl. Ex. 2, p. 14) She was provided a nerve root injection on April 25, 2011. (Cl. Ex. 2, p. 19)

Lorena also followed up with Dr. Pilcher on April 12, 2011 for her knee. He opined that she had not sustained any new impairment as a result of the November 30, 2010 work injury. (Ex. I-8)

The employer essentially denied the November 30, 2010 work injury claim although there is no evidence of a formal denial in the record. Lorena testified that she ceased with medical treatment once the employer ceased paying for treatment. She

testified she could not afford further care.

In August 2014, Lorena visited Robert Milas, M.D. (Cl. Ex. 5) Dr. Milas has an impressive C.V. He is a Board Certified neurosurgeon. (Cl. Ex. 4) Dr. Milas reviewed Lorena's medical history. "The patient recovered such that she returned to work at Whirlpool in Amana and on November 30, 2010, sustained a fall on the ice." (Cl. Ex. 5, p. 32) He diagnosed, "Lumbar radiculopathy probably secondary to herniated lumbar disc at the L4-L5 level. Her prior operations were apparently at the L4-L5 level and hence, this would be a recurrent disc, since the patient was essentially asymptomatic prior to the fall." (Cl. Ex. 5, p. 33) He assigned high impairment ratings for Lorena's low back and knees, totaling 30 percent of her body as a whole. He also recommended an MRI of both knees and the lumbar spine.

Lorena has continued to work without restrictions following her work injury. She has experienced an additional work-related injury in 2013 as well.

CONCLUSIONS OF LAW

The question is whether the admitted November 30, 2010 injury is a cause of permanent disability, and if so, the extent of such disability. By a preponderance of evidence, I find that the claimant has failed to meet her burden of proof that the November 30, 2010 injury caused or permanently materially aggravated any condition in her low back or knees.

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).

This is an unfortunate case. Lorena clearly has serious impairments in her low back and both knees which are undoubtedly disabling. It is her burden to prove that her conditions are causally connected to her work injury. This type of claim must be proven with expert testimony which is often combined with lay evidence. She simply did not meet her burden.

I am unconvinced by the expert opinion of Dr. Milas. Dr. Milas clearly based his opinion upon a fact which is contrary to the evidence presented at hearing. Specifically, he believed that Lorena had been asymptomatic prior to the November 30, 2010 injury. Lorena was not asymptomatic. Lorena has a long history of low back and bilateral knee pain. She was taking 800 mg of ibuprofen two times per day consistently following her 2009 surgeries. Lorena acknowledged in her testimony as well as to the medical providers that she continued to have ongoing symptoms after her 2009 surgeries. (Cl. Ex. 1, p. 1)

It is clear that Lorena's back hurt worse following the November 30, 2010 slip and fall, at least for a period of time. The records, however, tend to prove that the pain was the same type of pain. In other words, the lay evidence does not particularly support Lorena's position. On her first medical visit after the fall in January 2011, she denied "any radiation of pain to her buttocks or lower extremities." (Cl. Ex. 1, p. 1) On February 9, 2011, she complained of occasional "pain down her lateral left leg with parasthesia but this is not new and has been present since her lumbar spine surgery." (Cl. Ex. 1, p. 4) She made a similar report on February 23, 2011. (Cl. Ex. 1, p. 6) On March 2, 2011, the claimant reported "an unfortunate increase in her left-sided low back pain and left leg pain. She describes experiencing a sharp pain that travels down the left gluteal region, posterior thigh, and continues into the left lateral foot." (Cl. Ex. 1, p. 8) In other words, Lorena actually developed new, more significant, radicular symptoms approximately three months after the work injury. This is not explained by any expert or medical provider and while it is not, by itself, fatal to her efforts to prove medical causation, the lack of an explanation is troubling.

In his report, Dr. Milas did not seem to appreciate these fine, but likely significant points, of Lorena's medical history. In fact, it is unclear what reports and medical history he relied upon. Dr. Milas did rely upon the unsustainable fact that Lorena had been asymptomatic prior to the work injury.

The defendant did not offer a great deal of expert medical opinion to refute Lorena's claim and instead relied upon the fact that it is Lorena's burden to prove medical causation. The most troubling part of the employer's defense is the fact that Lorena's treatment ceased in April 2011. The record is unclear about precisely what occurred. Lorena obviously had a long history of chronic low back pain and a more recent history of bilateral knee issues. The reality is, however, a hard slip and fall injury can be horrifically damaging to a person who has already undergone two back surgeries and a surgery on each knee. The employer admitted Lorena was injured and she began receiving appropriate treatment for the increased symptoms. The early records from UI Healthworks clearly reflect that there was a flare-up of the symptoms of all her

conditions. The fact that the employer ceased treatment without any explanation in the record, or any type of medical reports which justified the same, is troubling. I would be less uneasy about denying this claim if the treating physicians had obtained an opinion from an expert contemporaneously.

The employer did attempt to send Lorena to Dr. Mysnyk, who, according to a nurse case manager, declined to see the claimant. (Cl. Ex. 3, p. 24) Lorena did see Dr. Pilcher for her left knee although his record is not in evidence. The visit was documented by the nurse case manager. According to her, Dr. Pilcher diagnosed a bone bruise and that it would be unlikely that falling on her knees would cause a meniscus tear. (Cl. Ex. 3, p. 25) He released her to full-duty at that time, at least for her left knee. In 2013, Dr. Pilcher verified this in a report written by defense counsel. I find Dr. Pilcher's expert opinion on the left knee to be compelling. He explained, around the time of the injury, Lorena's precise left knee diagnosis and that such diagnosis would result in no additional permanency. Thus, it made sense that the employer would not provide treatment for Lorena's ongoing meniscus issues when her diagnosis for the November 2010 issue is a bone bruise. It is troubling, however, that the treatment on the right knee and low back ended abruptly at approximately the same time with no similar conclusion or medical summary.

The defendant did obtain a medical evaluation with Jeffrey A. Westphelling, M.D. at St. Luke's Hospital in Cedar Rapids in June 2013. (Ex. U-2) This is approximately two and a half years after her accident. He opined that her "back complaints and/or bilateral knee pain are not a result of her alleged November 30, 2010 incident at Whirlpool." (Ex. U-1) I do not find this report particularly compelling for a variety of reasons. Because I am finding that the claimant has not met her burden, it is unnecessary to explore these reasons in depth, however, it is notable that the letter to Dr. Westphelling did not utilize the precise legal standard for medical causation. (Ex U-5) Counsel's letter and Dr. Westphelling's response both referred to Lorena's incident of injury as an "alleged" incident, when in fact the injury is a stipulated fact of the case. The word alleged appears to be added to cast doubt on what is, at the time of hearing, an agreed, stipulated fact of the case.

The employer argued in its brief that Lorena is "barred from any recovery due to the June 10, 2011 settlements" of her prior alleged injuries to the exact same body parts. (Def. Brief, p. 8) This is not true. Lorena settled her left knee on an Agreement for Settlement and the right knee and low back claims by Compromise Settlement Agreement. The fact that she had another injury to those same body parts prior to the completion of the settlement negotiations is inconsequential. She is free to settle those claims or not and pursue her new injury claim. The record suggests the employer denied the low back and right knee portions of the claim because of the settlements. Again, this is troubling and fails to comply with the spirit of Chapter 85. The employer has an affirmative obligation to act reasonably in making timely payment of workers' compensation benefits without being expressly directed to do so by this agency. Boylan v. American Motorists Ins. Co., 489 N.W.2d 742, 743 (Iowa 1992). "Acting reasonably means having a factual basis for all adjusting decisions that are made. It is not possible

to act reasonably without conducting a reasonable investigation to determine the facts. The investigation must address all pertinent factors of the claim." Kuntz v. Clear Lake Bakery, File No. 1283423 (Rehearing Decision, July 13, 2004).

The most unsettling factor for me in rejecting this claim is that the employer in this case did not truly act reasonably in processing this claim in regard to the low back and right leg. I believe the record would be less convoluted and more certain, had the employer simply solicited contemporaneous medical reports regarding medical causation for the right leg and low back. What exists instead is a convoluted record with unconvincing expert medical opinions on both sides. The law, however, clearly requires the claimant to prove by a preponderance of evidence that her work injury was a substantial contributing factor in the development of her condition. Based upon this record, Lorena has failed to meet her burden and I have no choice but to deny the claim.

The next issue is alternate medical care.

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. Iowa Code Section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

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).

Lorena proved that she had a temporary aggravation of her preexisting conditions in her low back and right leg. She has failed to prove that her ongoing symptoms in those body parts are causally connected to her November 2010 work injury. While it is certainly theoretically possible to order alternate medical care for a temporary aggravation-type injury, the claimant has failed to meet her burden that she is entitled to alternate care. Lorena has also proven that she suffered a bone bruise to her

left knee as a result of the November 2010 work injury. Based upon the record before me, Lorena is still entitled to lifetime medical care for her left knee as a result of the June 2011 Agreement for Settlement.

The final issue is whether Lorena is entitled to section 85.39 IME expenses.

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 case, Dr. Pilcher opined that Lorena had no additional disability for her left leg as a result of the November 2010 work injury. Lorena is entitled to a second opinion from this assessment. The fees charged by Dr. Milas were fair and reasonable.

ORDER

THEREFORE IT IS ORDERED:

The claimant is not entitled to permanent partial disability benefits.

The claimant is not entitled to alternate medical care.

The defendant shall pay the Iowa Code section 85.39 independent medical examination (IME) costs as outlined in claimant's exhibit 6.

Costs are taxed to defendant.

Signed and filed this 26th day of February, 2015.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/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.