BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELSY TORRES,

Claimant,

vs.

PINE RIDGE FARMS,

Employer,

and

GREAT AMERICAN ALLIANCE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5053117

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Elsy Torres filed a petition for arbitration seeking workers' compensation benefits from, the employer, Pine Ridge Farms, and its insurance company, Great American Alliance Insurance Company.

The matter came on for hearing on May 23, 2016, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 12; defense exhibits A and B, as well the sworn testimony of claimant. Brittney Sposeto served as the court reporter. Anna Pottebaum was approved to serve as the Spanish-language interpreter. The parties argued this case and the matter was fully submitted on June 20, 2016.

ISSUES AND STIPULATIONS

The stipulations contained in the hearing order have been approved and are deemed ordered with the consent of the parties.

The parties have stipulated that the claimant suffered an injury which arose out of and in the course of employment on August 4, 2014. The parties have done an excellent job of narrowing down the real dispute in the case, which is the nature and extent of the claimant's disability, compensability of some medical benefits and an IME by Dr. Bansal.

Claimant contends she is substantially disabled, while defendants allege she has not proven any industrial disability which is causally connected to the work injury.

FINDINGS OF FACT

Elsy Torres, claimant, sustained an injury to the back and knees August 4, 2014 arising out of and in the course of employment. Claimant was working the scanner position when she was backed into by a forklift driver. Claimant was pinned between the forklift and some boxes. Claimant then fell forward on her knees to a concrete floor. Claimant sustained injury to the back and knees as a result of that incident.

Claimant initially sought authorized treatment from Methodist Medical Center in the emergency room. Claimant followed up with Occupational Health. She was given crutches and a modified assignment of sit down work only. Claimant then worked out of a chair making copies of billings statements. Claimant was then referred to Iowa Orthopedics. Scott Meyer, M.D., initially treated her, with additional treatment from a physician's assistant, Michael Clark, PA-C. Claimant next saw Cassim Igram, M.D., for the back injury. Dr. Igram diagnosed backache, pain in the thoracic spine, lumbago and ordered light duty. (Claimant's Exhibit 3, pp. 32-35) The claimant was assigned to light duty at a local shelter. She handed out bath items, such as shampoo, towels and soap. (Transcript, pp. 36-37) She stayed on this light-duty from August to November, 2014.

In September 2014, claimant returned to Dr. Meyer again who diagnosed patellofemoral pain syndrome. He recommended additional medical restrictions. Claimant received a MRI scan of her left knee confirming problems with the knee cap. Employer then sent claimant to Anthony Stark, M.D., who also diagnosed lumbago and again gave modified work restrictions. The medical treatment with Dr. Igram ceased. He declined to treat as claimant was seeing Dr. Stark. (Cl. Ex. 3, p. 52)

Dr. Stark then noted some improvement October 24, 2017. Dr. Stark returned claimant to work with no work restrictions. Claimant was ordered to take Tylenol and cease prescription medications. (Cl. Ex. 3, pp. 57-59) She was to continue her home exercises. In November 2014, claimant then returned to Dr. Meyer for treatment of her bilateral knee pain. Dr. Meyer diagnosed chondromalacia of the patella, patellofemoral pain syndrome and released claimant to return to work with no work restrictions. (Cl. Ex. 3, pp. 60-61) Neither treating doctor assessed permanent partial impairment; however, both physicians and defendants treated her as though she had no ratable impairment.

Claimant admitted that she did improve during the three months of treatment. She testified that the improvement occurred because of her restrictions and the sedentary work she was allowed to perform.

Employer did return claimant to the scanning position with an informal accommodation. Co-workers assist claimant with heavy-lifting. Claimant is also accommodated by taking multiple breaks per shift.

Claimant sought an independent medical evaluation with Sunil Bansal, M.D. On January 9, 2015, Dr. Bansal opined that the work injury caused permanent functional disability to claimant's bilateral knees and back. He also opined that the claimant's ongoing symptoms and complaints are consistent with the mechanism of injury. (Cl. Ex. 5) For the back injury, he rated 5 percent whole body based on radicular complaints, guarding, and loss of range of motion. Dr. Bansal rated the right and left knee patellafemoral syndrome at 2 percent, respectively, of the body as a whole. He suggested permanent work restrictions of no lifting over 30 pounds occasionally and no lifting over 20 pounds frequently. He also suggested no frequent bending, squatting, climbing, or twisting to avoid further injury. He suggested that she can stand and walk as tolerated but that standing in one position for too long may cause discomfort. Thus, he suggested limitation to avoid standing for more than 30 minutes and no walking for more than 30 minutes at a time.

Claimant continued to experience pain and was sent back to Dr. Meyer June 8, 2015, for further evaluation. Dr. Meyer found increasing pain symptoms and gave a 10 pound lifting restriction with direction to avoid squatting, climbing and kneeling. (Cl. Ex. 3, pp. 64-67) Dr. Meyer ordered testing for rheumatoid arthritis. The employer then denied liability for the injury after hearing of the possible diagnosis of arthritis. (Tr., pp. 45-46)

Claimant saw Deana Hoganson, M.D., for the arthritis test, which came back negative. (Cl. Ex. 6) Dr. Hoganson indicated that the pain is most likely myofascial in nature. (Cl. Ex. 6, p. 206) She agreed that claimant had an aggravation of the knee cap condition and generally agreed with Dr. Bansal's work restrictions. Claimant was directed to continue to take medication for her painful conditions.

Claimant has continued to work for the employer at the same job, with some accommodations, and at a substantially similar rate of pay. She is plagued by pain on a daily basis yet maintains the ability to perform her duties as instructed.

Claimant is an El Salvadorian immigrant with limited English speaking skills. She cannot read or write English and speaks broken English at best. She has no formal education beyond high school. Claimant's work experience is entirely unskilled manual labor. Claimant has maintained her job with employer since 1998. Ongoing employment with this employer appears stable at the time of hearing.

Claimant incurred significant medical treatment and associated expenses after the employer denied care due to a concern over arthritis. Since the arthritis test came back negative, the employer's denial is unfounded. The medical expenses charged for continued treatment after June 8, 2015, appear to be entirely causally connected to the original injury. Speculation regarding a non-work related issue is not good cause to deny liability. The expenses in claimant's exhibit 12 are for causally connected medical treatment.

Claimant also seeks payment for Dr. Bansal's IME. The employer's doctors did not specifically rate any functional impairment but both did release claimant to return to work with no restrictions. The opinions of the authorized treating physicians are tantamount to ratings of no impairment. The defendants relied upon these opinions to pay no permanent disability benefits.

CONCLUSIONS OF LAW

The first question is whether the admitted August 4, 2014 injury is a cause of permanent disability, and if so, the extent of such disability.

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).

By a preponderance of evidence, I find that the August 4, 2014 injury is a proximate cause of disability in the claimant's back and both knees. The functional impairment rating by Dr. Bansal indicates that the injury is a cause of permanent partial disability to the body as a whole. (Cl. Ex. 5, p. X) The continued use of medication as recommended by the treating doctors also weighs toward a finding of permanent disability. The work restrictions and claimant's need for accommodation weigh in favor of a finding that the work injury is a cause of permanent disability to the body as a whole.

Having found the injury caused permanent disability to the body as a whole it follows that the injury must be evaluated industrially.

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.

Claimant is 50 years old. With limited English speaking skills and no formal education beyond high school in El Salvador, she has a work history primarily in unskilled manual labor. Claimant has maintained employment with this employer for an extended period of time, closing in on 20 years. The long-term nature of this employment relationship indicates that continued employment is expected at the same or similar rate of pay. The work restrictions imposed by Dr. Bansal do not coincide with the actual ability to perform manual labor. Claimant has demonstrated the ability to work beyond those work restrictions yet clearly needs some accommodations to do her job. The employer is and has been willing to accommodate claimant with respect to ongoing disability. Nevertheless, it is undeniable that in the competitive labor market, claimant is a less desirable employee as a result of her disabilities. Viewing the entirety of her situation without regard to accommodation, she undoubtedly has some industrial disability.

Having considered all of the industrial disability factors it is held that claimant sustained 20 percent industrial disability as a result of the August 4, 2014 work injury. It is the claimant's ongoing ability to maintain gainful employment with the same employer at a similar compensation schedule that weighs against a holding of significant industrial disability. Should claimant lose this job she would be at a distinct disadvantage in the competitive labor market. Her work is, however, gainful work. Therefore, this is not a case where a high award of industrial disability is appropriate.

The next issue concerns the award of Iowa Code section 85.39 examination 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).

The employer has presented a highly technical defense that no physician provided an impairment rating. Nevertheless, the fact that two authorized treating doctors issued return to work orders with no work restrictions is controlling. The claimant has met her burden of proof that there is a rating of impairment. These medical opinions are tantamount to a zero rating. I find the IME with Dr. Bansal is compensable.

The final issue concerns the compensability of medical expenses pursuant to Iowa Code section 85.27.

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-Reopening October 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

The employer denied ongoing medical due to speculation of arthritis. This denial was unfounded. There is no evidence to break the causation of treatment to the care provided. The medical expenses listed in claimant's exhibit 12 are held causally connected to the work injury of August 4, 2014.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four twenty-four and 09/100 ($424.09) per week from November 11, 2014.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks of compensation previously paid.

Defendants shall pay Iowa Code section 85.27 medical expenses as outlined in claimant's exhibit 12.

Defendants shall pay Iowa Code section 85.39 examination expenses for Dr. Bansal totaling two thousand nine hundred seventy-five and no/100 dollars ($2,975.00).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

Signed and filed this 19th day of April, 2017.

JOSEPH L. WALSH
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.