BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHELLE R. BOKEN, Claimant, vs. PEAK INTERESTS, LLC, d/b/a PIZZA HUT PROSERVE CORP., Employer, NATIONWIDE MUTUAL INS. CO., Insurance Carrier, Defendants.	File No. 5056052 AMENDED ARBITRATION DECISION Head Note Nos.:1108, 1804, 2500, 2905

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WORKERS' COMPENSATION

MICHELLE R. BOKEN, Claimant, vs. PEAK INTERESTS, LLC, d/b/a PIZZA HUT PROSERVE CORP., Employer, NATIONWIDE MUTUAL INS. CO., Insurance Carrier, Defendants.	File No. 5040834 AMENDED REVIEW-REOPENING DECISION Head Note Nos.:1108, 1804, 2500, 2905

STATEMENT OF THE CASE

Michelle Boken filed a petition for arbitration and review-reopening seeking workers' compensation benefits from Peak Interests, LLC, d/b/a Pizza Hut Proserve Corp., and Nationwide Mutual Insurance Company.

The matter came on for hearing on September 2, 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 29; defense exhibits A through M; as well the sworn testimony of claimant, Michelle Boken. Two physicians testified via deposition, Ric Jensen, M.D., and Eric Phillips, M.D.

Buffy Newton was appointed the official reporter for this hearing. The parties briefed this case and the matter was fully submitted on October 14, 2016.

SUMMARY OF ISSUES AND STIPULATIONS

The parties have stipulated that the claimant suffered an injury which arose out of and in the course of employment on January 20, 2010. It is stipulated that this injury caused some temporary disability during a period of recovery. The parties settled that case on an Agreement for Settlement which was signed by the claimant on February 14, 2013, and approved by this agency on February 25, 2013. The claimant alleges she sustained a new injury which arose out of and in the course of employment on January 23, 2013. The claimant alleges she is entitled to permanent total disability benefits either upon review-reopening from the first injury, or from a combination of the two. While the defendants initially paid benefits on the second injury, they deny that the claimant sustained an injury which arose out of and in the course of employment. Therefore, the fighting issues are whether the claimant has proven entitlement to additional healing period and permanency benefits under the review-reopening standard or, alternatively, whether she suffered a new injury which would entitle her to such benefits.

FINDINGS OF FACT

Michelle Renee Boken is a pleasant, 43-year-old woman who lives in Atlantic, Iowa. She testified live and under oath at hearing in September 2016. I find her testimony to be credible in all respects. Her testimony is generally consistent with prior sworn testimony, as well as other reliable evidence in the record. There was nothing about Ms. Boken's demeanor which caused the undersigned any concern regarding her truthfulness.

Ms. Boken began working for Peak Interests in July 1999. Peak Interests does business as Pizza Hut in Atlantic, Iowa. (Transcript, page 16) She started as the morning opener, and worked her way up the ladder to the ultimate position of manager in approximately 2005. Prior to her promotion to the manager position, she served as shift manager and then assistant manager. As a Pizza Hut manager in Atlantic, Iowa, Ms. Boken was a working manager. In addition to be in charge of personnel and inventory, she also performed all of the functions of the staff.

Ms. Boken suffered a serious injury which arose out of and in the course of employment on January 20, 2010, when she slipped and fell on some ice while performing work. The fact of this injury is stipulated. In fact, the defendants settled this case with Ms. Boken on an Agreement for Settlement, approved by this agency, on February 25, 2013. (Claimant's Exhibit 1) The settlement documents were signed by

Ms. Boken on February 14, 2013. These documents set forth a snapshot of the claimant's condition as of February, 2013, wherein the following was agreed:

1. The parties stipulate and agree that the Claimant's industrial disability as a result of the January 20, 2010, work incident is thirty (30) percent. Dr. Phillips, the treating surgeon indicated that the claimant sustained an Eleven (11) percent impairment to the body as a whole under the AMA Guides. The rating and restrictions were addressed in a valid FCE that was performed on October 25, 2010. (Ex. A). The Claimant opted not to obtain any additional impairment ratings. The claimant did seek an opinion from a Certified Vocational Rehabilitation Counselor. (Ex.A). The percentage of industrial disability is based on the specific agreement of the parties based on all evidence present at the time of this settlement. Medical evidence of claimant's condition is attached hereto and by this reference incorporated herein. (Ex. A).

2. The parties stipulate and agree that it is their intention with this Agreement for Settlement, notwithstanding the provisions of Iowa Code Section 86.13 and 86.14 (2012), to fully and finally agree to the level of impairment and disability involving the back at the time this agreement was entered into as documented by the medical records in existence at the time this settlement was reached.

3. The parties stipulate and agree that Peak Interests, LLC d/b/a Pizza Hut Proserve Corporation is entitled to a credit and/or apportionment for payment of 30% industrial disability as a result of the work incident of January 20, 2010. The total dollar amount of all permanent partial disability (PPD) benefits paid to claimant as a result of the January 20, 2010 injury will be $71,473.50. Upon approval of the Agreement for Settlement, the claimant will be paid the remainder of the accrued PPD benefits in a lump sum. The unaccrued PPD benefits will be paid weekly as they accrue.

4. The parties stipulate and agree that at the time this Agreement was entered into the claimant had returned to her regular job at Peak Interests, LLC d/b/a Pizza Hut Proserve Corporation working full time. At the time this Agreement was entered into, the claimant was considered to be an employee in good standing with Peak Interests, LLC d/b/a Pizza Hut Proserve Corporation.

5. The parties state at the time this Agreement was entered into the claimant was not actively treating for her condition. Should the Claimant need future medical treatment or medication causally related to the January 20, 2010 work incident the claimant agrees that prior to seeking any further care, she will contact the Peak Interests, LLC d/b/a Pizza Hut Proserve Corporation Workers' Compensation Coordinator, who

> will, in coordination with the Nationwide Mutual Insurance Company will authorize and direct additional treatment or care based of the specific complaints or concerns presented at that time. The Claimant understands and agrees that unauthorized medical providers and medications will not be paid.

(Ex. 1, pp. 3-5)

Supporting documents were attached to the agreement, including a January 2011 vocational report, which opined Ms. Boken had suffered a loss of earning capacity in the range of 48 to 56 percent and a functional capacity evaluation from October 2010, demonstrating she could work in the light-medium classification. (Cl. Ex. 1, pp. 11-14) She also had an 11 percent impairment rating from November 2010, from her treating surgeon, Eric Phillips, M.D. (Cl. Ex. 1, p 19) "The patient will need to be followed in a yearly anniversary of her surgical date for two years. She is unfortunately smoking cigarettes again. It is hoped the disc arthroplasty will avoid adjacent level deterioration in this patient. Judicious use of the antiinflammatories if she has any symptoms may be necessary. As of her last visit on 10/25/10, she was taking no medications." (Cl. Ex. 1, p. 18)

Ms. Boken testified she suffered a second injury to her low back on January 23, 2013, just a few weeks prior to the Agreement for Settlement.

> There was a wide ... 2-foot wide shelf, 6 foot wide, and I was pulling pans off the bottom shelf and sliding them forward, lifting them up and pulling them off the salad bar cart and the lids, trying to move them so I could move the shelving, which I had put all on wheels at that point trying to configure the back room.
>
> . . . .
>
> Something shifted. There was a pull and a pop, like you would crack your back. But it was in the lower back area where that doesn't happen, so that immediately, you know, okay, I need to double check this, because that where Dr. Phillips had done the. . . .

(Tr., pp. 60-61)

Ms. Boken saw her regular chiropractor, Nicole Ball, D.C., sometime at the end of January 2013. The notes from this visit are somewhat sketchy or incomplete at best. It appears Dr. Ball saw Ms. Boken on January 24, 2013, and January 28, 2013. (Def. Ex. E7) There is a note at the very bottom of the page that states the following: "1/24/13 – pt reports having employee walk on her back to 'pop' it." (Def. Ex. E7) The context of this handwritten note is entirely unclear. There is no further documentation supporting this record and the only testimony in the record about this note is from the

claimant who indicated that she did not recall telling Dr. Ball that a worker walked on her back. In fact, she denied it. (Tr., pp. 63-65)

The Nebraska Spine Center (Dr. Phillips) documented that Ms. Boken called in on January 28, 2013. (Def. Ex. A1) This well-documented note indicated she called with increased low back pain and pain her hips and right lower extremity "while walking." (Def. Ex. A1) She was instructed to make an appointment which was eventually set up for February 4, 2013.

Ms. Boken next saw Sarah Brend, P.A., on January 31, 2013, just a week after the alleged injury. The following is documented in the medical notes:

> Patient complains of low back pain. The discomfort is most prominent in the lower lumbar spine. This radiates to the right anterior thigh and right lateral thigh. She characterizes it as constant, moderate in intensity, dull, and aching. The pain originally began 2010. The course since the original on set has been coming and going. She states that the current episode of pain started 2 days ago. The event which precipitated this pain was nothing happened with this occurrence. She notes some pain relief with laying flat. The pain worsens with extended periods of standing. . . . She has concerns of: Has been doing well since her surgery several years ago but it has flared again. States at time feels like there is "something in her right shoe, like she is stepping on something."

(Def. Ex. B1) She also returned and saw Dr. Phillips on February 4, 2013. Again, no new injury was documented and he did not find any significant changes in her condition at that time. (Cl. Ex. 7, p. 28) Some films were taken at Cass County Memorial Hospital, which did not demonstrate any acute or new issues. (Def. Ex. C2) She also saw Elaine Berry, M.D., on or about February 4, 2013. She did document the injury as well as radiculopathic symptoms. (Cl. Ex. 8, p. 3) Ms. Boken then followed up with an emergency room visit to the hospital on February 7, 2013. Again, no new injury was documented in the emergency records. Severe pain in her back was noted with no radiculopathy. (Def. Ex. C4)

In spite of this flare-up, the claimant settled her case. She testified she believed her new symptoms were just a temporary flare-up of her condition, which would get better as it had in the past. (Tr., pp. 27) Again, the settlement was approved on February 25, 2013.

Ms. Boken's condition, however, did deteriorate significantly and fairly quickly after the Agreement for Settlement. In March 2013, just a few weeks after the settlement was approved, she returned to her surgeon, Dr. Phillips, at the Nebraska Spine Center. He documented that she was working 15-17 hour days and that she had developed pain in "the right medial arch of her foot." (Cl. Ex. 7, p. 31) "MRI scan obtained today. There is artifact from the total disc arthroplasty at L4-5 and L5-S1." (Cl.

Ex. 7, p. 34) He noted in this record, for the first time, that she alleged a new work injury on January 23, 2013. (Cl. Ex. 7, p. 34) At this point, Ms. Boken was placed on a restriction of no working more than 40 hours per week. (Cl. Ex. 7, p. 35)

In April 2013, Ms. Boken was seen by Ric Jensen, M.D. He rendered the following opinions:

> Michelle has been evaluated per Dr. Philips in the past per use of CT and MRI imaging of the lumbosacral spine. Findings of these imaging studies were reviewed. Suffice that discogenic pathology residing above the level of the lumbar intervertebral disc replacements appear to be present, including the potential existence of an annular disc wall tear at the L2-3 lumbar segment. It is unclear as to whether or not this was present prior to her initial operative therapy. In any event, there does not appear to be significant discogenic disease per se at the L3-4 lumbar level. Having said this, the CT scan imaging study of her lumbosacral indicates that there is moderate grade facet arthropathy. I informed Michelle that this is a frequent consequence of artificial replacement and that this pathology may, in fact, contributing to her current back pain syndrome. Additionally, Michelle harbors facet tropism/asymmetry within the L5-S1 lumbosacral junctional facet joints. This in association with mild facet arthropathy. The combination of facet joint pathology within Michelle's L4-5 and L5-S1 segments would tend to indicate the potentiality for adverse, biomechanical stress in the lumbar facet joints. . . .
>
> Michelle's current back pain tends to focus to the lumbosacral junctional region. She does not report symptoms of pain in the mid-to-upper lumbar area. She reports no radicular leg symptoms at this time. Prolonged sitting, standing, and ambulating will tend to exacerbate her symptoms whereas lying down will tend to relieve her symptoms. . . .

(Cl. Ex. 6, pp. 5-6) He recommended that she stay off work for 2 to 3 weeks and undergo a trial of facet joint injections. He stated that she might need surgery. (Cl. Ex. 6, p. 7)

She returned to Dr. Philips on May 22, 2013. At this point, he noted that she was in significant distress. "She continues to be tearful and in severe distress. She grades her pain as a 9-10 at times." (Cl. Ex. 7, p. 37) He referred to her situation as an "enigma" and he referred her for a bone scan. (Cl. Ex. 7, p. 37) "She is aware that she does have disc problems proximally in her spine and upper lumbar levels. These would not be work related problems in my opinion." (Cl. Ex. 7, p. 37) Following the bone scan, Dr. Phillips conferenced with Cheryl Larsen, a case manager for the defendants. He provided the following opinion on June 4, 2013.

> At this point it appears that the patient's problems are not related to her artificial disc or her work-related problems. She has a lifestyle choice of

> smoking and has further deteriorated her discs in her upper back. . . . At this time, I do not believe she can return to work based upon her pain complaints which are subjective in nature, however these are not problems that are related to her work injury.

(Cl. Ex. 7, p. 38)

This opinion set off a chain of events which were significantly detrimental to the claimant. A notice terminating weekly compensation benefits was mailed to Ms. Boken on June 19, 2013. (Def. Ex. K) In addition, she was terminated from employment on June 20, 2013. (Tr., p. 34) Her uncle, Tim Peterson, was the area manager. He went to her house on June 20, 2013, and told her that her condition was not work-related. (Tr., p. 34, lines 12-17) There is no written documentation in this record as to the reasons for the termination. Based upon the record before me, it appears that the employer believed that since the injury was not work-related, it had no responsibility to accommodate her restrictions. In any event, I find there were no reasonable accommodations which could have kept the claimant employed during this timeframe.

At this point, the claim was denied. Dr. Jensen took over Ms. Boken's care and attempted various treatments to improve her symptoms and pain. He attempted various conservative treatments, including medications, diagnostic testing (including a discogram) and injections. (Cl. Ex. 6, pp. 5-10) Her medical bills were mostly paid through her group insurance which she maintained through COBRA. (Def. Ex. H, pp. 11-13) Claimant filed for long-term disability benefits through a group plan at work, as well as Social Security Disability. She eventually secured both benefits. (Def. Ex. I, J; Cl. Ex. 20)

On November 14, 2013, Dr. Jensen performed a fusion surgery on L4-5. The surgery intended to stabilize and limit mobility of the spine. (Cl. Ex. 2, Jensen Depo, p. 66) Following surgery, Dr. Jensen continued to treat Ms. Boken for post-surgical care through September 2014, when he released her. (Cl. Ex. 6, p. 22) At that time, she was still taking significant pain medications including Lidoderm patches, Valium and Hydrocodone. (Cl. Ex. 6, p. 23) He also recommended she continue her independent physical therapy and opined she would likely require a referral to a pain management specialist or program.

Ms. Boken underwent functional capacity evaluation (FCE) testing in November 2014. (Cl. Ex. 9) She had valid results and was found to be capable of work in the sedentary physical demand level. (Cl. Ex. 9, p. 1) The claimant's limitations documented in the FCE are quite extreme. (Cl. Ex. 9, pp. 3-5) Dr. Jensen reviewed this report and concurred. (Cl. Ex. 6, p. 24) He provided an impairment rating of 20 percent of the whole body. (Cl. Ex. 6, p. 24)

In March 2016, claimant retained D.M. Gammel, M.D. to perform an independent medical evaluation (IME). Dr. Gammel reviewed all of the appropriate medical records and clearly understood claimant's medical history. (Cl. Ex. 4, pp. 1-35) A thorough

examination was also performed. (Cl. Ex. 4, pp. 38-39) Dr. Gammel made the following relevant diagnoses: (1) thoracic and lumbar strain with sciatica with annular tears and right sciatica L4-L5 and L5-S1; (2) status post artificial disc replacement L4-5 and L5-S1; (3)status post fixation of lumbosacral spine L4 to sacrum with posterolateral, interlaminar, and interbody arthrodesis L4-sacrum, as well as right L4-5 and L5-S1 transforaminal interbody partial discectomies and interbody arthrodesis at L4-5 and L5-S1 segments; and (4) post-laminectomy syndrome lumbar region. (Cl. Ex. 4, p. 40) Dr. Gammel opined that all of these diagnoses were related to her original fall on January 20, 2010, and "re-aggravation of her condition on 23 January 2013." (Cl. Ex. 4, p. 40) Dr. Gammel opined Ms. Boken suffered from a 25 percent whole person impairment and apportioned that rating between the two injuries. (Cl. Ex. 4, pp. 42-43)

Claimant also retained a vocational expert, Stephen Schill, MS, CRC. After reviewing the relevant records and taking history from Ms. Boken, Mr. Schill opined that claimant is "100% permanently disabled from any competitive employment." (Cl. Ex. 10, p. 3) I agree with Mr. Schill's assessment.

CONCLUSIONS OF LAW

File No. 5056052 (Date of injury, January 23, 2013):

The first question is whether the claimant has proven by a preponderance of evidence that she sustained an injury to her low back on January 23, 2013.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from

cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Based upon the evidence in the record, I believe that Ms. Boken did suffer some type of minor injury while she was at work toward the end of January 2013. I believe her testimony that at some point, she felt her back shift or crack while she was at work. She was working a significant number of hours during this timeframe on a specific project. This injury is not well-documented in the medical records or any work injury reports, in all likelihood, because it was minor and insignificant. Ms. Boken herself, did not initially believe it was anything significant to the extent that she moved forward with a settlement of her January 2010 claim without even considering the possibility that her condition had worsened to a significant extent. She testified, in fact, that she thought it was a minor flare-up. Based upon the evidence in this record, I that she did suffer a minor incident of injury on or about January 23, 2013.

Having found that an injury did occur, the next question is whether the injury is a cause of any temporary or permanent 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).

While the evidence is convincing that the claimant's condition dramatically worsened in 2013, I do not find specific evidence in this record supports that the new injury caused the deterioration in her condition. The rationale shall be further set forth in the analysis below.

File No. 5040834 (Date of injury, January 20, 2010):

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.14, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2) (2013). In order to demonstrate eligibility for an increase of compensation under section 86.14(2), the claimant must demonstrate what her physical or economic condition was at the time of the original award or settlement. At a subsequent review-reopening hearing, claimant has the burden to prove that there is a substantial difference in such condition which warrants an increase in compensation. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The difference can be economic or physical. Blacksmith v. All-American Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). Essentially, two snapshots of the claimant's condition are taken; one in each hearing or settlement. The claimant must prove that there is something substantially different between the two snapshots such that it warrants an increase in benefits. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968).

The principles of res judicata apply and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Kohlhaas at, 392. Review-reopening is not intended to provide either party with an opportunity to relitigate issues already decided or to give a party a "second bite at the apple." The agency, however, is forbidden from speculating as to what was contemplated at the time of the original snapshot. Id.

The burden remains upon the injured worker to prove by a preponderance of the evidence that the current condition is proximately caused by the original injury. Kohlhaas, 777 N.W.2d at 392. When a work-related injury causes another injury to the worker, this new injury (sequela) may also be considered as a work-related injury under Iowa's workers' compensation laws.

> When an employee suffers from a compensable injury and another condition or injury arises that is the consequence or result of the previous injury, the sequelae rule applies. If the employee suffers a compensable injury and later suffers further disability, which is the proximate result of the original injury, such further disability is compensable. If the employee suffers a compensable injury and thereafter returns to work and, as a result, the first injury is aggravated and accelerated so that the employee is more greatly disabled than they were before returning to work, the entire disability may be compensable. The employer is liable for all consequences that naturally and proximately flow from the accident.

Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480 (1936).

The first snapshot of the claimant's condition was taken on February 25, 2013, the date of the Agreement for Settlement (AFS). The claimant's condition as of that date is well-documented and was agreed upon by the parties. As of that date, I find the following facts.

1. Ms. Boken sustained an eleven (11) percent whole body impairment for her low back condition following surgery. (Cl. Ex. 1, p. 3)

2. The surgery was described as "ProDisc total disc arthroplasty L4 through S1. (Cl. Ex. 1, p. 15)

3. She had been released by the authorized treating surgeon in November 2010 with no specific treatment recommendations. (Cl. Ex. 1, p. 18)

4. She had specific medical restrictions per a valid functional capacity evaluation (FCE). (Cl. Ex. 1, p. 14)

5. Per the FCE, she was capable of work in the light to medium work classification. (Cl. Ex. 1, p. 14)

6. She was employed full-time and in good standing as a store manager for the employer within her medical restrictions. (Cl. Ex. 1, p. 4)

7. She was not actively treating for her condition. (Cl. Ex. 1, p. 4)

8. A vocational assessment by Stephen Schill indicated claimant suffered a loss of earning capacity in the range of 48 to 56 percent. (Cl. Ex. 1, pp. 11-12)

Based upon these facts, the parties agreed, Ms. Boken had suffered a 30 percent loss of earning capacity. (Cl. Ex. 1, p. 4) I am not free to relitigate these facts. These facts are binding and they represent the "first snapshot" in the point of comparison.

Ms. Boken's condition deteriorated badly throughout 2013. By the time of hearing, the "second snapshot" demonstrated the following facts.

1. Ms. Boken had undergone a significant period of additional treatment culminating in further surgery by Dr. Jensen. (Cl. Ex. 6, pp. 5-22)

2. Treatments included medications, increased medical restrictions, diagnostic testing and injections.

3. She was taken off work by Dr. Jensen on or about April 19, 2013. (Cl. Ex. 6, p. 4)

4. The surgery performed in December 2013 is described as "posterior instrumented lumbosacral spinal arthrodesis." (Cl. Ex. 6, p. 15)

5. Dr. Jensen released her on or about September 23, 2014. (Cl. Ex. 6, p. 17)

6. Her whole body functional disability rating at that time was 20 percent. (Cl. Ex. 6, p. 22)

7. Ms. Boken underwent a new FCE which was valid and provided specific permanent medical restrictions. (Cl. Ex. 9) This included a restriction of no lifting more than 10 to 15 pounds on an occasional basis. (Cl. Ex. 9, p. 1)

8. The permanent restrictions placed claimant in the sedentary work classification. (Cl. Ex. 9, p. 1)

9. In spite of the FCE, Dr. Jensen has refused to release her to perform any work. He further indicated that she should not be performing any repetitive lifting whatsoever. (Cl. Ex. 6, p. 29)

10. Ms. Boken was terminated from her position as manager for the employer. While the exact reason for termination is not documented in the record, it is apparent that Ms. Boken is no longer capable of performing her past employment for the employer.

11. She has applied for and received Social Security Disability benefits, as well as benefits pursuant to a long-term disability policy.

12. A vocational assessment by Stephen Schill determined Ms. Boken to be totally disabled. (Cl. Ex. 10)

13. Claimant credibly testified that she is now unable to perform a number of ordinary activities of daily living. (Tr., pp. 46-48)

14. At the time of hearing, Ms. Boken wears a back brace and takes the following medications: Hydrocodone, Diazepam, Flexeril, ibuprofen and Lodipine. (Tr., pp. 40)

A comparison of the two relevant snapshots leaves little doubt that claimant has proven entitlement to an increase in compensation. By a preponderance of evidence, I find she has met the legal requirements to reopen her case.

The defendants argue that there is no causal connection between the first injury and the claimant's subsequent treatment and condition.

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).

I find that the opinions of Dr. Jensen represent the best expert medical evidence in the record. He provided detailed opinions regarding his treatment of Ms. Boken and how it related back to the original January 2010 work injury, and in particular, the surgery performed for it. (Cl. Ex. 6, pp. 9-10, 15-16, 27) Dr. Jensen also testified via deposition wherein he explained in detail the challenges posed by implanting two artificial discs in the lumbar spine. (Cl. Ex. 2, Jensen Depo, pp. 29-35) Even Dr. Phillips conceded that the surgery was "off-brand" or "experimental" at the time he performed it. (Cl. Ex. 3, Phillips Depo, p. 28) Dr. Jensen opined that because of the challenges in such a surgery, Ms. Boken's condition regressed eventually following the surgery. (Cl. Ex. 2, Jensen Depo, pp. 36, 44-45) He then opined that her condition, for which he began treating her in April 2013, was related back to the January 2010 work injury, again providing detailed explanation for his opinion. (Cl. Ex. 2, Jensen Depo., pp. 37-41) Moreover, Dr. Jensen did not believe that any new injury had created any "obvious or new pathology which could be construed as a new injury to her spine" following the January 23, 2013, work injury. (Cl. Ex. 2, Jensen Depo, pp. 42-43) I find these opinions to be convincing. I find that they carry the claimant's burden of proof that her treatment and disability treated by Dr. Jensen are causally connected to her original January 2010 work injury. His opinions are supported, bolstered and fortified by the expert opinion of Dr. Gammel. (Cl. Ex. 4)

Specifically, I find these opinions more convincing than the opinions of Dr. Phillips. Dr. Phillips opined that claimant's ongoing symptoms after the AFS were causally related to her smoking and deteriorated discs in her upper back. (Cl. Ex. 7, p. 38) I simply do not find this evidence convincing. In fact, Dr. Phillips could not opine to a reasonable degree of medical certainty that it would have made any difference if claimant had stopped smoking. (Cl. Ex. 3, Phillips Depo, p. 25) The medical evidence is clear that Ms. Boken was unable to quit smoking even after being advised to do so by

multiple physicians, however, an injured worker need not prove that the work injury is the sole or even primary cause of the disability. Rather, an injured worker is merely required to prove that the work injury is a substantial factor in her disability. Similarly, her deteriorated condition in her "upper back" may also have contributed to her ongoing disability. None of this, however, changes the fact that her original work injury is a substantial causal factor of her ongoing disability.

The defendants also argue that the claimant is precluded from filing review-reopening because she suffered her second injury prior to the Agreement for Settlement (AFS). "Since both injuries occurred before the memorializing of the Agreement and there existed medical records pertaining to her alleged 2013 aggravation, the Agreement encapsulates both injuries and forms the baseline upon which the commissioner is to determine if there had been a change in condition." (Def. Brief, p. 9) This is a novel legal argument. I disagree.

First, in order to prove the elements of review-reopening, an injured worker is not required to prove a new injury or event. The injured worker is only required to prove that her condition warrants an increase in benefits from the original AFS. Usually, this is done by showing a worsening of the condition. In fact, while I have already found that while claimant did at least technically suffer a new injury, the new injury was likely minor and the claimant failed to prove that the January 2013 injury was a substantial cause of her disability. The most compelling expert opinions in the record are those of Dr. Jensen. Dr. Jensen opined that claimant's condition worsened in 2013 as a natural consequence of the original injury and surgery.

Second, an AFS for a specific injury date does not automatically settle all injury dates prior to the date of the approved settlement. This legal principle is not really even relevant in this case because of my factual findings. The legal principle which is relevant here is that the agency is bound by the facts articulated in the AFS itself. The AFS specifically agreed that claimant's impairment was 11 percent of the whole body, she was released by the treating surgery to the light-medium work category and she was performing full-time gainful employment for her employer. This is the point of comparison by which I am bound upon review-reopening.

The next issue is extent of disability.

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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

I find that Ms. Boken is permanently and totally disabled as a result of her January 2010, work injury. Her condition worsened dramatically in 2013 resulting in additional treatment and surgery. The finding of total disability is based upon the medical opinions of Dr. Jensen and Dr. Gammel, the vocational assessment of Mr. Schill and the credible testimony of the claimant.

The next issue is medical expenses.

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.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Claimant has provided documentation of her medical expenses, including those paid by her private insurance and Medicare, as set forth in Claimant's Exhibits 23 through 27. I find these expenses to be causally connected to the work injury. I find these expenses to be reasonable and necessary. I find these expenses were reasonably suited to treat claimant's work injury. The expenses set forth therein are owed by defendants. Defendants are entitled to a credit against the medical as stipulated in the hearing report.

ORDER

THEREFORE IT IS ORDERED:

With regard to File No. 5056052 (Date of injury, January 23, 2013):

Claimant shall take nothing further.

Each party shall pay their own costs.

With regard to File No. 5040834 (Date of injury, January 20, 2010):

Defendants shall pay the claimant permanent total disability benefits commencing on the date the review-reopening petition was filed (February 6, 2015).

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 as set forth in the hearing report.

Defendants shall pay the medical expenses as set forth in Claimant's Exhibits 23 through 27.

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 14th day of November, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Edward F. Noethe
Attorney at Law
20 North 16TH St.
Council Bluffs, IA 51503
enoethe@mcginnlawfirm.com

Jane V. Lorentzen
Attorney at Law
2700 Grand Ave., St. 111
Des Moines, IA 50312
jlorentz@hhlawpc.com

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.