BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA E. ORELLANA, Claimant, vs. RYAN'S FAMILY STEAKHOUSES, INC. Employer, and ZURICH NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5024821 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803; 1803.1; 2502; 2907

STATEMENT OF THE CASE

Claimant, Maria Orellana, filed a petition in arbitration seeking workers' compensation benefits from Ryan's Family Steakhouses, Inc. (Ryan's), employer, and Zurich North America, insurer, both as defendants. This case was heard in Des Moines, Iowa, on February 11, 2009. The record in this case consists of claimant's exhibits 1 through 14, defendant's exhibits A through H and J through K, and the testimony of claimant. Serving as interpreter was Wyman Borts.

ISSUES

1. Whether the 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 apportionment, under Iowa Code section 85.34(7), is appropriate;

5. Costs.

FINDINGS OF FACT

Claimant was 45 years old at the time of the hearing. Claimant went to school for approximately 6 years in El Salvador. She did not graduate from high school and does not have a GED. Claimant's speaks a little English. She cannot read or write English.

Claimant immigrated to the United States in 1998. She has worked at buffet style restaurants cleaning tables and making salads. She has also worked as a custodian cleaning restrooms in a truck stop.

Claimant began with Ryan's in 2003. At Ryan's claimant made salads and helped clean the salad bar. Claimant testified the job required her to be on her feet continuously. It also required her to lift 35 to 40 pounds. Claimant testified she had to rely on coworkers to communicate with her supervisor at Ryan's.

At approximately the same time, claimant also began working a part-time job with Kimco cleaning office buildings.

Claimant's prior medical history is relevant. In 2002 claimant fell while working at J.C. Penney's. Claimant complained, at that time, of low back pain and pain radiating into the leg. (Exhibit B, pages 5, 12-13)

In 2004 and 2005 claimant was treated for difficulty walking due to low back pain, foot, and knee pain. (Ex. B, pp. 7-11, 16-17, 21, 30-34) Claimant also treated on various occasions in 2005 and 2006 for chronic back pain. (Ex. B, pp. 25, 27, 29-30, 39, 40)

On June 22, 2006, claimant was evaluated as having low back pain twice a week. Claimant was assessed as having a lumbar joint dysfunction contributing to pain with daily activities. (Ex. B, p. 43)

Claimant testified that prior to August of 2006 she had low back and hip pain. She testified that prior to August 2006 she walked with a limp. She testified she had no permanent impairment or permanent restrictions prior to August of 2006.

On August 15, 2006, claimant fell at work. Claimant was assessed as having a bimalleor fracture. On August 16, 2006, Vincent Mandracchia, D.P.M., performed an open reduction and internal fixation of the left bimalleor ankle fracture. Claimant was taken off work. (Exhibit 1, pages 1-17)

Claimant was casted for approximately two months. Claimant testified she was off work, for the injury, for approximately four and one-half months before she was able to return to work. (Ex. 1, p. 18)

On October 2006 claimant followed up with Dr. Mandracchia. Claimant complained of continual ankle pain. Claimant showed evidence of a non-union of the fracture. Claimant was given a bone stimulator to aid with healing. Claimant was given a walker to help with walking. (Ex. 1, pp. 49-50) Claimant testified she required a walker up to December of 2006.

On January 9, 2007, claimant returned to work at light duty. She was restricted from heavy lifting and limited to standing up to 15 minutes. Claimant testified she was allowed to return to work at Kimco and performed most of her work in a seated position.

Claimant testified she returned in February of 2007 to Ryan's. Claimant was given a light duty job of wrapping silverware.

Claimant testified she continued to have left ankle pain when she returned to work. She testified she also began to experience pain in the left buttock and low back pain. She testified that this pain became more intense sometime in July of 2007.

In February 2007 claimant returned in follow-up with Dr. Mandracchia. Claimant testified she was doing fairly well. She was discharged from care. (Ex. 1, p. 75)

In a letter, written by defendant's counsel, dated March 11, 2007, Dr. Mandracchia found claimant was at maximum medical improvement (MMI). He found claimant had no permanent impairment, and no permanent restrictions. (Ex. 1, pp. 78-79)

On May 4, 2007, claimant was evaluated by Dr. Mandracchia for increased ankle pain. Claimant had slipped walking downstairs three days before. Claimant was assessed as having a post-bimalleolar ankle fracture with tarsal tunnel syndrome and possible hardware backing out. She was treated with medication and prescribed physical therapy. (Ex. 1, p. 85) Claimant was restricted to light duty and limited in walking. (Ex. 1, pp. 85-86)

Claimant testified sometime in late May of 2007 she was told to return to her regular job duties at the salad bar. She testified because of her limitations she could not return to her salad bar job without help. Claimant testified her employer told her the silverware wrapping job had been eliminated and that if she could not return to her regular job duties she would be terminated.

Richard Matheny testified, in deposition, he was the general manager at Ryan's where claimant worked. In that capacity, Mr. Matheny was familiar with claimant's workers' compensation injury and her job. Mr. Matheny testified claimant was offered her job with making salads with the help of a runner, to allow claimant to sit as much as possible. Mr. Matheny testified claimant initially accepted the accommodated salad bar job, and later turned the job down. (Ex. 6, pp. 241-247)

In an April 22, 2008, letter claimant was terminated from her job at Ryan's as she was off for six months or more and had limitations that could not be accommodated. (Ex. 11)

In July of 2007, claimant was evaluated at Broadlawns Hospital with exacerbation of chronic back pain. Claimant indicated she had back pain for four years. Claimant was given work restrictions and pain medication. She was recommended to have an S1 joint injection. (Ex. 1, p. 93)

In August 2007 claimant had the hardware removed from her left ankle by Nicholas Bevilacqua, DPM. (Ex. 1, pp. 113-116)

Claimant returned in follow-up in August of 2007 and was walking with a cam boot. Claimant was returned to work with no restrictions at that time. (Ex. 1, pp. 117-118)

In late August of 2007 claimant underwent a lumbar MRI. It revealed degenerative disease at the L3 through L5 levels. (Ex. 1, p. 120)

In October 2007, claimant was evaluated by Denise Mandi, DPM. Claimant was assessed as having post-surgical left trimalleor ankle fracture, traumatic arthritis of the left ankle, sural neuritis on the left ankle and altered ambulation due to prolonged use of the cast. (Ex. 1, p. 127) In November 2007 Dr. Mandi found claimant had a 22 percent permanent impairment to the left lower extremity. She limited claimant to limited weight bearing at no more than 2 hours at a time. She also limited claimant to no lifting or carrying more than 10 pounds. (Ex. 2, pp. 165-166)

In November and December 2007, claimant was evaluated for low back pain radiating into the buttock and into the left leg. She was diagnosed as having both paraspinal muscle irritation and low back pain with radiculopathy. Claimant was given an injection on December 26, 2007. (Ex. 1, pp. 132-135, 140)

Claimant testified she left Kimco in January 2008. She testified she requested a one to two week leave of absence to allow her back to heal. Claimant testified she attempted to return to work, but was told by Kimco she could not return to work unless she was better.

In February and March of 2008 claimant treated at Broadlawns for low back and hip pain. A March 2008 note indicates claimant's left hip and lower extremity pain showed signs of improvement. (Ex. 1, pp. 145-151)

In June of 2008 claimant underwent an independent medical evaluation (IME) with Matthew Weresh, M.D. Dr. Weresh is an orthopedic surgeon. Dr. Weresh assessed claimant as having work-related bimalleolar ankle fracture. Claimant was also diagnosed as having a long standing history of back pain that preexisted and was unrelated to claimant's August of 2006 fall. Dr. Weresh opined claimant's low back pain was not related to the August of 2006 fall. (Ex. 3, pp. 189-194)

Dr. Weresh found claimant had good strength and range of motion in the left lower extremity. Based on that, he found claimant had no permanent impairment to the left lower extremity. He also found claimant had no objective findings in which to base restrictions. (Ex. 3, p. 194)

In a November 26, 2008, report, John Kuhnlein, D.O., gave his opinions regarding claimant's conditions following an August 2008 IME. Claimant complained of pain in the buttocks and low back radiating down to the left leg. Dr. Kuhnlein found claimant had a 22 percent permanent impairment to the left lower extremity. He limited claimant to lifting 20 pounds occasionally from the floor to waist, and 30 pounds occasionally from waist to chest. He limited claimant to standing and walking up to 30 minutes at a time. He found claimant at MMI for her left lower extremity. (Ex. 4, pp. 197-208)

Dr. Kuhnlein also opined claimant's back pain was due to a piriformis syndrome that occurred from a gait change from her ankle problem. He did not feel it was appropriate to find claimant had a permanent impairment, and did not believe claimant had reached MMI. He recommended physical therapy for claimant's back pain. (Ex. 4, p. 209)

In a December 21, 2008, report, Dr. Weresh indicated he disagreed with Dr. Kuhnlein's evaluation. Dr. Weresh thought claimant might have a piriformis syndrome, but thought it was statistically unlikely. Dr. Weresh noted claimant had a history of low back pain dating back to 2002 through 2004. He felt claimant's back symptoms were consistent with what claimant's experienced prior to her fall. He did not believe claimant's ankle injury caused or aggravated claimant's back pain. (Ex. 3, pp. 195-196)

In a vocational report dated December 31, 2008, vocational specialist, Steven Yochum, CVE, gave his opinion regarding claimant's vocational opportunities. Mr. Yochum indicated it was not realistic for claimant to continue employment where she had to be on her feet. He indicated there were a few sedentary positions claimant might have available to her given her limitations and work experience. Mr. Yochum indicated her employment potentials would be limited given her physical situation and lack of English skills. (Ex. 5)

In January of 2009 Dr. Mandi indicated she believed claimant had a 22 percent permanent impairment to the left lower extremity from her workplace fall of August of 2006. She indicated claimant had a trimalleolar fracture of the ankle. She also indicated that gait changes, secondary to immobilization, like that of claimant, were a common cause for the exacerbation of symptoms of back pain. (Ex. 2, pp. 171-174)

In deposition Dr. Mandi indicated she may not have seen all of claimant's prior medical records regarding her prior back pain. (Ex. E, pp. 76-79) Dr. Mandi indicated she issued claimant restrictions based on her examination and treatment of claimant. (Ex. E, pp. 156-159) She testified she only treated claimant on two occasions. (Ex. E, p. 165)

In January of 2009 Scott Mailey issued his report regarding claimant's vocational opportunities. Based on Dr. Weresh's opinion, that claimant had no permanent impairment or permanent restrictions, claimant would have job opportunities in areas including, but not limited to, banquet server, line cook, and housekeeper. Based on Dr. Kuhnlein's restrictions Mr. Mailey opined claimant would have little or no loss of earning capacity, and should be able to find jobs in the $7.50 to $9.00 an hour range. (Ex. D)

Mr. Mailey found fault with the opinions of Mr. Yochum's vocational report in that it was based only on the opinions of Dr. Kuhnlein. Mr. Mailey based his opinions, in part, on the records showing claimant continued to work at Kimco throughout 2007, and that her hours increased somewhat in November of 2007. (Ex. D)

Claimant testified she spent approximately 7 hours with Mr. Yochum. She testified she has never met Mr. Mailey.

In a subsequent letter, Mr. Mailey opined claimant should have been able to secure employment if she made a good faith effort to do so. (Ex. D, p. 69)

In a January 2009 letter Dr. Weresh indicated he reviewed Dr. Mandi's report regarding claimant from January 2009. Dr. Weresh indicated the correct assessment of claimant's fracture was a bimalleolar fracture. He based this opinion on the review of Broadlawns medical records and claimant's diagnostic records. (Ex. A, pp. 2-3)

Dr. Weresh also indicated he understood claimant's gait changed temporarily due to her ankle fracture. However, he noted claimant had a well documented history of back problems. He believed that this history, and not claimant's temporary need to protect the leg while the fracture healed, was the cause of claimant's back problems. (Ex. A, pp. 3-4)

Claimant testified that if she did not fall in August of 2006, she would still be working at Ryan's and Kimco. She testified she is now limited to jobs where she can sit for extended periods. She testified her left ankle is still very sore. She testified she

does not have full range of motion in her ankle. She testified that walking or standing for an extended period of time aggravates her ankle pain.

Claimant testified that prior to her August 2006 injury she had low back and hip pain. She testified the severity of low back and hip pain was more severe now than then.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant injury resulted in a permanent disability.

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 fractured her ankle in August 2006. She underwent surgery that required the implant of hardware in her ankle. She was off work for approximately 4 ½ months because of her injury. Claimant had a second surgery to remove her hardware approximately a year after the injury. In a letter, written by defense counsel, Dr. Mandracchio, opined claimant had no permanent impairment or permanent restrictions. Dr. Mandracchio offered no rationale for this opinion. (Ex. 1, p. 78)

Dr. Mandi found claimant had a 22 percent permanent impairment to the left lower extremity. She also indicated claimant had restrictions regarding walking, lifting, and carrying. (Ex. 2, pp. 165-166)

Dr. Mandi's opinions were corroborated by the opinions of Dr. Kuhnlein. (Ex. 4)

Dr. Weresh evaluated claimant on one occasion for an IME. He opined claimant had no permanent impairment or permanent restrictions from her ankle injury. This was based on the finding that claimant had a full range of motion and good strength in her left lower extremity.

Claimant testified that approximately two and one-half years after her injury, she has a loss of strength and range of motion in her ankle. She also testified she continues to have significant pain in her left ankle.

Claimant had an ankle fracture in August of 2006. Claimant credibly testified that she continues to have significant pain, limitation in range of motion, and strength in her left ankle, two and one-half years after her accident. Claimant had two surgeries on her ankle. She was off work four and one-half months following her first surgery. Two physicians opine claimant has no permanent impairment to her left lower extremity. Dr. Mandracchio gives no rationale of why he believes claimant had no permanent impairment or permanent restrictions. Dr. Weresh bases his opinions, that claimant has no permanent impairment or permanent restrictions, on an understanding that claimant has no loss of strength or range of motion. This is contrary to the credible testimony of claimant. Two other physicians, Dr. Mandi and Dr. Kuhnlein, opine claimant has permanent impairment. Based on the above facts, claimant has proven that her left ankle fracture resulted in a permanent impairment.

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

The case law regarding causation, detailed above, applies to this issue, but will not be repeated.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

If 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.2d 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 contends her altered gait, from her left ankle fracture, materially aggravated or caused her low back pain. Defendants contend that if claimant has any permanent impairment, it is limited to her left lower extremity.

Medical records indicate claimant has a long history of back problems dating back to approximately 2002. Claimant was diagnosed with having back pain on a number of occasions. (Ex. B, pp. 5, 11, 17-19, 25, 27-43) Medical records indicate that on a number of occasions, prior to August of 2006, claimant indicated she had difficulty with walking due to low back pain. (Ex. B, pp. 5, 7-11, 16-17, 30-32, 42)

Approximately two months prior to her August of 2006 injury claimant received physical therapy for low back pain. (Ex. B, p. 47)

In July of 2007, approximately one year after her ankle fracture, claimant treated for back pain that had been occurring for approximately four years. (Ex. 1, p. 93)

Dr. Kuhnlein opined claimant's back pain was due to a piriformis syndrome due to her gait changes caused by the ankle problem. (Ex. 4, p. 209) Dr. Kuhnlein gave no explanation as to why claimant's long standing history of low back pain was not a factor in determining the causation of claimant's back pain.

Dr. Mandi initially indicated it was possible that claimant's August of 2006 fall may have resulted in back pain, but that she could not render a determination without seeing claimant's records before August 2006. (Ex. 2, p. 167)

Dr. Mandi later, in deposition indicated that she was unsure if she had seen all of claimant's prior medical records. Dr. Mandi did indicate that gait changes could exacerbate a preexisting low back problem. However, Dr. Mandi's opinions, in this area, are generalizations, and not specific to claimant's individual injury. (Ex. 2, pp. 171-172)

Dr. Weresh opined, on several occasions, claimant's back pain was not caused or materially aggravated by claimant's August 2006 fall. This was because claimant's symptoms after the August of 2006 fall for low back pain, were similar to symptoms claimant experienced prior to the fall.

Claimant had a long history of low back pain prior to the August 2006 injury. Dr. Weresh opined that given this history, claimant's low back pain was not due to her August 2006 injury. Dr. Mandi's opinions, are generalizations, and not specific to claimant's specific case. Dr. Kuhnlein's opinions regarding claimant's low back pain do not take into consideration claimant's long history of low back pain. Based on the above, claimant has failed to prove her low back pain is caused by her ankle injury of August 2006.

It is found the opinions of Dr. Weresh, regarding the causation of claimant's back pain, are more convincing than those of Dr. Kuhnlein. However, as noted above, it is also found that the opinions of Dr. Mandi and Dr. Kuhnlein are more convincing than Dr. Weresh regarding the extent of claimant's disability for her left ankle. This finding is not contradictory. It is a finding that Dr. Weresh's opinions regarding claimant's back pain are more convincing given the preexisting history of claimant's back pain. It is a finding that Dr. Kuhnlein's and Dr. Mandi's opinions regarding the extent of claimant's lower left extremity disability, are more convincing, given the history and current condition of claimant's left lower extremity.

Both Dr. Mandi and Dr. Kuhnlein found claimant had a 22 percent permanent impairment to the left lower extremity. This finding entitles claimant to 48.4 weeks of permanent partial disability benefits (22 percent times 220 weeks).

The next issue to be determined is if claimant is due reimbursement for an IME examination pursuant to Iowa Code section 85.39.

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.

Iowa Code section 85.39 limits an injured worker to one IME, regardless of the number of ratings obtained by the employer or its insurance carrier. Larson Manufacturing v. Thorson, 763 N.W.2d 842 (Iowa 2009); Crawford v. Maytag Company, File No. 5022533 (App. Dec. April 14, 2009)

Claimant obtained Dr. Mandi's IME report on November 24, 2007. She obtained Dr. Kuhnlein's report November 26, 2008. Claimant is not entitled to reimbursement for Dr. Kuhnlein's report.

The next issue to be determined is if apportionment pursuant to Iowa Code section 85.34(7) is appropriate.

Based on defendants brief and argument at hearing, defendants seek apportionment for claimant's back injury only. As detailed above, it is found that claimant's back injury was not caused by the August 2006 ankle fracture. For this reason, the issue of apportionment is moot.

The final issue to be determined is costs. Claimant seeks costs including, but not limited to $1,000.00 for the May 2, 2008, report from Dr. Mandi. Claimant also seeks reimbursement for the $800.00 for the January 6, 2009, report from Mr. Yochum. The costs of report from a physician is recoverable under rule 876 IAC 4.33(6). The reimbursement amount is limited. The costs for reports from a doctor has been limited to the costs allowed under rule 876 IAC 4.33(5) for deposition testimony. That limit is $150.00.

Based on the above, claimant is entitled to $150.00 per report from Dr. Mandi and Mr. Yochum. Defendants shall pay other costs as requested in claimant's itemization of costs.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant forty-eight point four (48.4) weeks of permanent partial disability benefits at the rate of two hundred eleven and 10/100 dollars ($211.10) per week commencing on November 24, 2007.

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

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

That defendants shall receive credit for benefits previously paid.

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

That defendants shall pay the costs of this matter as detailed above, and pursuant to rule 876 IAC 4.33.

Signed and filed this ____29th____ day of July, 2009.

_____
JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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