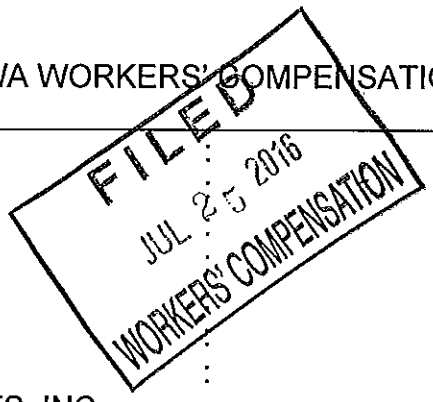
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ZIRKA PLACO,

Claimant,

vs.

MASTERBRAND CABINETS, INC. d/b/a OMEGA CABINETRY,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5041188

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Zirka Placo, has filed a petition in arbitration and seeks workers' compensation benefits from, Masterbrand Cabinets, Inc. d/b/a Omega Cabinetry, employer, and Ace American Insurance Company, insurance carrier, defendants.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Waterloo, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. The extent of permanent industrial loss from an injury arising out of and in the course of employment on or about July 19, 2011, if any;

2. Scheduled versus industrial; and

3. Medical expenses.

FINDINGS OF FACT

The undersigned having considered all of the evidence and testimony in the record finds:

The claimant was 43 years old at the time of hearing. She is of Bosnian heritage. She was a refugee from 1994 until 2001, when she came to the United States. Ms. Placo moved to Iowa in 2005 and is now a United States citizen. (Claimant's testimony)

Claimant is married and has a dependent son. She has taken English classes in the United States. Although she utilized the services of an interpreter for these legal proceedings, she is capable of speaking and reading in the English language. (Claimant's testimony)

On July 19, 2011, Ms. Placo was employed by Omega Cabinetry and was performing her typical job duties when she sustained a left foot and ankle fracture. The employer sent her to David Kirkle, D.O. for evaluation and treatment. (Exhibit 6; Ex. A) Dr. Kirkle evaluated Ms. Placo on July 21, 2011. He documented claimant's foot and ankle injury and observed a limping gait. Dr. Kirkle obtained x-rays of claimant's left foot and ankle, which he read as negative for any fracture. Dr. Kirkle imposed light duty work restrictions, gave claimant a lace up splint and asked her to return in a week.

On July 28, 2011, Dr. Kirkle diagnosed claimant's problem as a foot strain and commenced physical therapy. Conservative care continued through Dr. Kirkle until August 11, 2011. Claimant's symptoms had not resolved within those few weeks, and Dr. Kirkle referred claimant to a podiatrist, Richard Bremner, DPM, for further evaluation and treatment.

Dr. Bremner evaluated claimant on September 1, 2011. Upon reviewing her x-rays, Dr. Bremner identified a fracture of a metatarsal in her left foot. Dr. Bremner placed her in a walking boot and continued light duty work restrictions. Claimant's problems continued, despite Dr. Bremner's conservative management efforts. On January 31, 2012, Dr. Bremner referred claimant to another podiatrist, Ronald Kane, DPM, for evaluation and review of MRI results.

Dr. Kane evaluated claimant on March 8, 2012. His assessment was an internal ankle derangement, questionable osteochondral defect, and sinus tarsi syndrome in her left ankle. (Ex. C, p. 2) Dr. Kane continued light duty restrictions, but ultimately recommended surgical intervention.

On June 28, 2012, Dr. Kane performed a left ankle arthroscopy as well as a microfracture of the osteochondral defect of the talus and excised a soft tissue mass in claimant's left foot. (Ex. C, pp. 9-11) Unfortunately, this surgical procedure did not resolve all of claimant's symptoms. Dr. Kane has now recommended an ankle

replacement procedure and has referred claimant on for specialized care at the University of Iowa Hospitals and Clinics and specifically with Phinit Phisitkul, M.D.

Dr. Phisitkul evaluated claimant on January 3, 2013, recommending a repeat MRI. Claimant was scheduled to return to be evaluated by Dr. Phisitkul before the end of September 2013. As a result of her altered gait resulting directly from her left foot and ankle injury, Ms. Placo has developed low back pain and symptoms. She has experienced low back pain in the past, but her symptoms appear to have worsened since her left foot and ankle injury.

Ms. Placo self-referred to Vinko Bogdanic, M.D. for evaluation of her low back in September 2012. Dr. Bogdanic noted a causal connection between claimant's left ankle injury and her development of low back pain. He ultimately performed two hip bursa injections in an effort to treat these symptoms. These did not resolve claimant's symptoms. Ms. Placo sought an independent medical evaluation (IME), which was performed by Sunil Bansal, M.D. on May 22, 2013. Dr. Bansal noted the left ankle injury but did not offer substantive opinions pertaining to diagnosis or impairment related to the left ankle injury.

With respect to the low back, Dr. Bansal diagnosed claimant with "Sacroiilitis [sic] from an altered gait." (Ex. 3, p. 14) Dr. Bansal offered an explanation of how this diagnosis was related to claimant's work injury, stating:

> Ms. Placo clearly has an altered gait from her altered left ankle pathology. This will place unbalanced stress to the sacroiliac joint, resulting in sacroiliiitis. The pain from sacroiliiitis often is felt as referred pain to the hip as is the case with Ms. Placo. Her symptomatology has followed a medically logical chronological order from the time of her ankle pathology, development of an altered gait, and then development of sacroiliiitis.

(Original hearing Ex. 3, p. 14)

Dr. Bansal recommended aqua therapy and cortisone injections into the left sacroiliac joint. He also recommended this care be coordinated through a pain clinic. (Ex. 1, p. 14) Dr. Bansal also opined that claimant had not yet reached maximum medical improvement. (Ex. 1, p. 14)

After Dr. Bansal's recommendations for treatment of the low back were rendered, defendants referred claimant to Dr. Kirkle. Dr. Kirkle evaluated Ms. Placo's low back on July 17, 2013. His assessment was:

> I believe it might be some exacerbation of her degenerative disk disease with her gait change, which should go away if they can get her out of this brace. But the majority, I believe, is due to her degenerative disk

> disease, and there is size [sic] of symptom exaggeration with a positive Waddell's sign.

(Original Ex. A, p. 6)

Drs. McMains and Broghammer dispute a finding of an injury to the body as a whole. Dr. McMains opined that the back symptoms are at most temporary. (Ex. H) That is a bit difficult to accept nearly five years post-injury. Also, Dr. McMains' opinions have been criticized by this agency in too many decisions to list. His opinions are entitled to little or no weight.

Dr. Broghammer relies on a video to suggest that the claimant is faking because of what he refers to as a normal gait. (Ex. J, p. 3) As the court noted in Pease, a video that is edited is not necessarily to be taken at face value. The video shows about one hour of snow shoveling over a three-hour period, a rate of work-to-rest ratio that strongly suggests physical limitations. The opinions of Dr. Broghammer are rejected.

Arnold Delbridge, M.D., performed an IME on August 13, 2015. (Ex. 1, pp. 2-7) He causally connects the original foot injury and the resulting "uneven gait materially aggravated her lumbar spine." (Ex. 1, p. 5) He opined a combined body as a whole 14 percent permanent impairment from the foot and back. (Ex. 1, pp. 5-6) He also gave restrictions of no work above shoulder level, lift limit of 20 pounds and then for only a few steps. (Ex. 1, p. 6)

The evidence does establish that the left ankle injury has caused an aggravation of claimant's low back condition. Claimant's altered gait has caused the development of symptoms in Ms. Placo's low back and the need for treatment of those symptoms. As such, I find that the claimant's current low back symptoms and need for treatment of the low back are causally related to her left ankle injury on July 19, 2011. Going beyond the decision of Deputy Commissioner Grell, based on the additional evidence and the passage of time, I find that the low back condition is permanent.

Both parties used a vocational expert. Claimant's expert opines total loss of earnings capacity. (Ex. 2) Defendants' expert opines little, if any, vocational loss. (Ex. R) Neither is particularly helpful.

The claimant is employable and retains significant industrial capacity. She has computer skills among other abilities. She is not an odd-lot employee. Her impairment is not minimal either. Considering the claimant's medical impairments, training, permanent restrictions, cognitive disorder, daily pain, as well as all other factors of industrial disability, the claimant has suffered a 30 percent loss of earnings capacity.

On the date of injury the claimant was married, entitled to three exemptions, and had average gross earnings of $586.87. As such, her weekly benefit rate is $408.36. Commencement date for permanent partial disability was stipulated as March 6, 2015.

The claimant also seeks payment of medical expenses which the parties agreed to work out if this decision causally connected the back to the work injury.

REASONING AND CONCLUSIONS OF LAW

The first issue is 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).

An employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability.

It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 654 (App. February 28, 1985).

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.

It was found above that the claimant met her burden of proof that the work injury is causally connected to permanent disability to the body as a whole and not limited to the foot. She has permanent impairment and loss of earnings capacity from the injury.

Based on the finding that the claimant has suffered a 30 percent loss of earning capacity, she has sustained a 30 percent permanent partial industrial disability entitling her to 150 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Medical.

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.

This decision causally connected the work injury to a BAW injury. The defendants are responsible for those expenses necessary to treat the injury. The defendants shall pay/reimburse those expenses as appropriate.

ORDER

Therefore it is ordered:

That the defendants pay claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing March 6, 2015 at the rate of four hundred eight and 36/100 dollars ($408.36), and continuing for all periods of disability

That the defendants shall pay/reimburse medical expenses as appropriate.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 25th day of July, 2016.

STAN MCELDERRY
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.