BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRADLEY FOSTER, Claimant, vs. HY-VEE, INC., Employer, and CGU-HAWKEYE SECURITY, Insurance Carrier, Defendants.	:	File No. 1283691 A R B I T R A T I O N D E C I S I O N Headnote:1803; 1108

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by the claimant, Bradley Foster, against his employer, HyVee, and its insurance carrier, C G U-Hawkeye Security, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained on February 10, 2000.

This matter came on for hearing before the undersigned deputy workers' compensation commissioner in Des Moines, Iowa on September 13, 2002. The record consists of the testimony of claimant, Robert Foster, Kay Foster, Kathleen Foster, Craig Foster, and Mary Ann Munseinmay and of joint exhibits 1 through 10. Witnesses were sequestered until their testimony was given. Briefs as submitted were reviewed.

ISSUES

The stipulations of the parties contained within the hearing report filed at the time of hearing are accepted and incorporated into this decision by reference to that report. Pursuant to those stipulations, claimant had an average weekly wage of $550 on the date of injury. He was married and entitled to seven exemptions resulting in a weekly rate of compensation of $383.22.

Issues remaining to be resolved are:

1. Whether a causal relationship exists between claimant's injury and claimed disability;

2. Whether claimant is entitled to healing period or temporary total disability benefits from May 1, 2000 through June 29, 2000;

3. Whether claimant is entitled to permanent partial disability benefits and the extent of any such entitlement; and

4. Whether claimant is entitled to payment of certain medical costs under section 85.27 as costs related to reasonable and necessary care causally connected to his work injury.

FINDINGS FACT AND ANALYSIS

The undersigned deputy workers' compensation commissioner, having heard the testimony and considered the evidence, finds:

Claimant's credibility is at issue in this matter. Claimant's testimony and demeanor demonstrated that claimant was a credible witness. Additionally, other witnesses credibly corroborated claimant's testimony as to the events of February through April 2000.

Claimant is a 40 year-old high-school graduate with no further formal schooling or training. Claimant worked for HyVee from high school onward until October 7, 2000. He made the proverbial progression from stocker and sacker to departmental manager. On February 10, 2000, he was dairy and frozen foods manager at HyVee's Windsor Heights food store.

On that date, while retrieving fresh gallons of milk, claimant slipped and fell on the wet floor in the store's cooler compartment. Claimant hit his hipbone on the cement floor and felt burning pain in his low back. After mopping up the mess and restocking shelves, claimant reported the work incident to the employer's human-resources manager. Claimant continued to work throughout that day and over the next month without seeking medical attention. His low back pain did not resolve and at his employer's direction, he saw Margaret Irish, D.O., on March 10, 2000.

Dr. Irish's medical notes of that date give a service date of March 10, 2000 and an injury date of February 10, 2000. It further states:

> . . . he says for the past month or so, he has been developing left hip pain and he points to the left gluteal/piriformis area when describing the discomfort. He states occasionally he gets a pain in the left gluteal area that also is in the foot. He denies any true trauma such as falling. He

> denies any previous similar injuries. He notices increased discomfort as he does a lot of moving and bending, stocking the shelves with milk. He states he notices by the time he drives the one hour to home after work, his gluteal area is very sore...

(Joint Exhibit 1, page 7)

Dr. Irish's assessment was of left piriformis syndrome; she advised claimant to work at reduced speeds and directed claimant to physical therapy at Mercy Des Moines Sports Medicine to learn stretching exercises.

Claimant was initially seen for physical therapy on March 13, 2000. Laura G. Covill, PT. gave a treatment diagnosis of irritated sciatic nerve secondary to piriformis tightness. Claimant was instructed in exercises for the piriformis and in hamstring stretching. Claimant next presented at physical therapy on March 16, 2000. A physical therapy report of that date records claimant as stating he was feeling much better than [on the] last visit and states he had had good flexibility compared bilaterally and no complaints of pain. Claimant was released from physical therapy.

Claimant again saw Dr. Irish on March 17, 2000. Dr. Irish recorded claimant as stating he was feeling " almost 100 percent better. " The doctor reported that claimant had been doing the stretching exercises and that claimant stated that these had been very beneficial. She reported that claimant denied " any complaints." (Jt. Ex.1, p. 6) Her assessment was of status, post left piriformis syndrome-resolved. She released claimant to regular duties without restrictions or impairment and advised him to continue his home exercise program. Claimant was to follow-up as needed.

Claimant denied that he had advised Dr. Irish that he was feeling almost a hundred percent better. He stated that he understood Dr. Irish to be questioning him as to his degree of flexibility and not as to his pain level. Claimant testified that he was never pain free from the February 10, 2000 incident onward. Claimant's spouse, his parents, and his son all corroborated this statement.

On April 14, 2000, claimant returned to Dr. Irish complaining of worse pain in his lower back and a pain in the left leg hamstring area. Dr. Irish stated a history of claimant having done well until he played tag with his children a few days before this office visit. She opined that claimant's earlier symptoms had been more in the sacral/gluteal area. She advised claimant that if he had hurt his hamstrings while playing tag with his children, the condition was not work related. She released claimant to regular duty.

Claimant credibly testified that although he attempted to play tag with his children, he had only been able to run approximately 10 steps before he realized it was " not the thing to do ". Claimant’s 16 year-old son credibly testified that his father had not been able to play tag and “pretty much had had to stand and watch”. The son also

credibly corroborated claimant's testimony that while the family trampoline had been set up when warmer weather arrived, claimant had not used the trampoline.

Claimant visited Life Engineering Holistic Health Center, a chiropractic facility, on April 15, 2000. Claimant stated that he does not believe in chiropractic medical care, but then was in so much pain that he visited the center at his spouse's behest.

Claimant's discomfort continued and on April 24, 2000 he sought care with Randy D. Miller, D.O. Dr. Miller recorded a history of low back pain with left leg radiation and an onset in February 2000. His history stated that claimant's pain had increased about three or four weeks earlier when claimant had been playing tag with his kids and jumping on a trampoline. On examination, claimant had positive left straight leg raising and left lumbar parivertebral musculature tenderness. The doctor assessed claimant as having left sciatica and left lumbar radiculopathy. A lumbar MRI was ordered. The study revealed a herniated disk in L5-S1 on the left. Dr. Miller referred claimant to Cassim Igram, M.D., an orthopedic surgeon who on May 11, 2000, performed a L5-S1 discectomy. Claimant received significant relief after surgery.

Dr. Irish has opined that claimant's lumbar herniated disk and its sequelae do not relate to his February 10, 2000 work incident. Dr. Igram initially stated that based on claimant's oral history to him, he believed that claimant's disc condition was a continuation of his original work injury. After reviewing the medical reports of Dr. Irish and the physical therapy reports from Mercy Sports Medicine, Dr. Igram stated that he could not relate claimant's condition to his February 2000 work incident since the written documentation reported that claimant was doing well and had no complaints in March 2000. Dr. Igram did state that if claimant's report of ongoing and continuing leg pain between March 7, 2000 and May 3, 2000 were corroborated that corroboration would be helpful [apparently in clarifying the matter].

Keith W. Riggins, M.D. performed an independent medical evaluation of claimant on March 4, 2002. Dr. Riggins has opined that claimant has an 11 percent permanent partial impairment of the body as a whole under DRE Lumbar Category III of the AMA Guides, Fifth Edition. He recommended that claimant not lift more then 30 pounds, and lift only between the knees and shoulders. The doctor felt that while the conflict between the history in the medical records and the history claimant provided precluded a definitive statement as to causation, if the latter history was accurate, claimant's herniated disk causally related to his occupational activites.

Claimant was a credible, straightforward witness. His history of continuing low back and leg pain from February 10, 2000 onward was corroborated by the credible testimony of his spouse, parents, and son. It is significant that claimant reported occasional left foot pain when he first saw Dr. Irish on March 10, 2000. Physical therapist Covill diagnosed left sciatic nerve irritation on March 13, 2000. She also instructed claimant in hamstring stretching exercises on that date. These facts suggest that claimant's report of hamstring discomfort in April 2000 was consistent with

claimant's own earlier experience of his injury even if it did not comport with Dr. Irish's understanding of his condition.

It is expressly found that claimant's work injury of February 10, 2000 was a substantial factor in producing his L5-S1 herniated disk and in his need for the discectomy Dr. Igram performed to ameliorate that condition. Likewise, claimant's care for the disc, including the discectomy and subsequent physical therapy, was reasonable and necessary care required because of the February 10, 2000 work injury.

Claimant voluntarily ended his employment with HyVee in October 2000. He did not wish to continue the 70 mile drive from his home to the Windsor Heights store. He had continued to work as the frozen food and dairy department manager from his work release in June 2000 to his October 2000 voluntary termination, however. At hearing, claimant testified that the lifting involved in his food store job had been difficult subsequent to his back injury and surgery. The store's assistant manager testified that he had not heard claimant complain of back pain or observed claimant having difficulties on account of his back between July and October 2000. Nevertheless, Dr. Riggins' restriction of no more than 30 pounds lifting is not atypical of restrictions to be expected after back surgery. Claimant did need to manipulate weights greater than 30 lbs. as dairy and frozen food manager. While he may have continued this work after his back injury, it does not follow that he was then as well suited for it as he had been prior to his injury. Claimant has secured other employment. He works in factory maintenance and earns $11.70 per hour on a 40 hour per week basis with some seasonal overtime. Claimant is bright and well spoken. He is certainly capable of further schooling or retraining. These factors give him greater opportunities than might be available to a less bright individual of his age and having his back condition. When all factors are considered, claimant is found to have a loss of earnings capacity of 20 percent.

CONCLUSIONS OF LAW

The causation question first is considered.

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. 14 (f).

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. Frye v. Smith Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel and Co. v. Jordan, 559 N.W.2d 148 (Iowa 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 Hospital 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 vs. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, 516 N.W.2d 910 (Iowa App. 1994).

It is concluded that claimant has established a causal relationship between his February 10, 2000 work injury and his claimed temporary and permanent disability. It is further concluded that, pursuant to section 85.34 (1), claimant is entitled to payment of healing period benefits at the weekly rate of $383.22 from May 1, 2000 through June 29, 2000.

The extent of claimant's permanent partial disability must be resolved.

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 and inability to engage in employment for which the employee is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole made by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the 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 is concluded that claimant has established permanent partial disability to the body as a whole of 20 percent entitling him to 100 weeks of benefits at the weekly rate of $383.22.

Medical benefits are disputed.

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-reopen 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 16, 2002); Kleinman v. BMS Contract Services, Ltd., No. 1019099 (App. September 8, 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 31, 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

It is concluded that claimant is entitled to payment of medical expenses set forth in the listing of medical expenses attached to the hearing report which listing covers the dates from April 24, 2000 through June 19, 2000. Pursuant to the stipulation of the parties, defendants' actual liability to claimant is for those expenses claimant actually paid only. These total $1,134.42.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay claimant healing period benefits from May 1, 2000 through June 29, 2000 at the weekly rate of three hundred eighty-three and 22/100 dollars ($383.22).

That defendants pay claimant permanent partial disability benefits for one hundred (100) weeks at the weekly rate of three hundred eighty-three and 22/100 dollars ($383.22) with those benefits to commence on June 30, 2000.

That defendants pay accrued amounts in a lump sum and pay interest pursuant to section 85.30.

That defendants pay claimant his out-of-pocket medical expenses in the amount of one thousand one hundred thirty-four and 42/100 dollars ($1,134.42).

The defendants pay costs of this action pursuant to rule 876 IAC 4.33.

That defendants comply with the subsequent report of activity requirements of this division.

Signed and filed this _30th_ day of September, 2002

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HELENJEAN M. WALLESER
DEPUTY WORKERS'
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