

- 4) Whether defendant is liable for payment of certain medical costs under Iowa Code section 85.27.

FINDINGS OF FACT AND ANALYSIS

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

Claimant, Robert Eugene Middagh, (Robert) was 67 years old at the time of hearing. He graduated from high school in 1961 and enlisted in the United States Air Force. He was honorably discharged after several months because his "nerves were not right". The undersigned's impression is that, despite his having achieved a high school diploma, claimant has substantial difficulty with abstract thinking.

After leaving the military, Robert worked as a farmhand until 1964. He then began working as a plasterer's helper. He would scrape walls as part of pre-plastering preparation. Additionally, he mixed the plaster ingredients, consisting of Keene's cement, cotozoted lime, silica sand, and water, in a large drum and then carry buckets of plaster to the plaster applicator, who often was on scaffolding.

Robert had worked for Mike Hall intermittently and part time for a number of years. Robert was working with Mike on a Hall's Plastering job site in Muscatine, Iowa, at 8:00 a.m., on May 26, 2006. Claimant had mixed a drum of plaster and was proceeding to deliver a bucket of it to the scaffolding where Mike was working. Robert apparently dropped the bucket of plaster, as the bucket fell onto the concrete. The mixed plaster splashed onto Robert's face and into his right eye. Robert went outside and used a water hose to try to dislodge the debris from the eye. That did not work. Mike Hall told Robert to immediately go to the Family Eye Care Center, which was about six blocks away.

For good or ill, Robert felt he needed to clean up, change his clothes, and shave before presenting for medical care. Therefore, he drove to his home in Coalsville, Iowa and then returned to the Vision Center in Muscatine, arriving there approximately two hours after the initial injury. He was assessed with a chemical burn to the right eye and immediately directed to The University of Iowa Hospitals and Clinics. (Exhibit 4, page 1)

On May 25, 2006, on his arrival at the University of Iowa Hospitals, Robert had (right) hand motion vision at one foot, an elevated right eye pressure of 58, and the high pH near 9.0. He had a significant epithelial defect of the entire cornea as well as of the right lower and upper eyelids. He had conjunctiva on the bulbar surface and diffuse corneal haze, which obscured most iris detail and apparently, made the pupil barely visible. The concrete was manually debrided from the eye. With treatment, claimant's intraocular pressure dropped to 12 as of his hospital discharge on May 27, 2006. His right eye visual acuity then was count fingers at three feet. (Ex. 5, pp. 79-81)

University of Iowa ophthalmologists continue to treat Robert's right eye alkali burn. Robert has undergone numerous procedures related to his right eye injury.

These have included ocular reconstruction, amniotic membrane transplants, stem cell autografts, mucous membrane graft, upper and lower lid symblepharon, and a complete tarsorrhaphy and revisions. (Ex. 5, pp. 98 & 187-194) He has developed glaucoma as a complication of his injury, for which he continues to use eye drops to lower his intraocular pressure. (Ex. 5, p. 87)

As of June 30, 2008, Robert had total conjunctivalization of the right cornea. Right eye vision was light perception; left eye vision was 20/40. Visual rehabilitation with a Boston keratoprosthesis in the right eye was discussed, although claimant's prognosis was guarded. (Ex. 5, p. 88) Similar findings were made as of April 27, 2009. (Ex. 5, pp. 184-185) Apparently claimant was then scheduled for a cornea transplant procedure. Unfortunately, that surgery had to be canceled because Robert developed a "cold" that went into his right eye. The procedure is to be done this summer in an attempt to restore or improve claimant's right eye vision.

All medical professionals at the University of Iowa Hospitals and Clinics by history connect Robert's right eye condition to his alkali burn injury of May 26, 2006. Defendant has argued that Robert's delay in seeking treatment was an intervening factor that created or increased Robert's injury. Defendant has offered no medical evidence supporting that supposition.

Robert has incurred charges with the University of Iowa related to his eye injury that total \$72,946.82. His health insurance has paid some of these costs; the outstanding balance on May 20, 2009 was \$30,902.46. (Ex. 6, p. 1) Robert has a medical charge of \$121.00 with Vision Center PC for his May 25, 2006 examination. (Ex. 7, p. 1) Robert has made 33 roundtrips of 90 miles each to the University of Iowa Hospitals and Clinics for treatment; 17 in 2006, 9 in 2007, 5 in 2008 and 2 in 2009. (Ex. 8, p. 1)

Robert has not worked since his injury. He did apply for unemployment insurance benefits in summer 2006, but was not eligible for those benefits, as no wages had been reported for his social security number in the applicable quarters. (Ex. 3, pp. 1-2) Claimant had not worked for Hall's Plastering from July to September 2005 because of personal health problems.

Claimant asserts average weekly earnings of \$285.00 based on first quarter earnings of 2006 of \$2,611.00. (Ex. 3, p. 1) Defendant asserts average weekly earnings of \$158.85 based on claimant's earnings in the 13 weeks immediately preceding May 25, 2006. (Weeks 4 through 13 on Exhibit A are designated as weeks in 2005. The week dates otherwise are consistent with the 2006 dates of weeks one through three. For that reason, the use of "05" is considered a scrivener's error) Claimant worked no hours and received no wages during the weeks of April 21, April 28, and May 15. Therefore, total amount of wages or spendable weekly earnings properly must be divided by 10 rather than 13. (Ex. A) When that is done, the average spendable weekly earnings amount is \$161.60; the average weekly wage is \$206.50.

The record evidence in its entirety supports a finding that that claimant earned less than the usual weekly earnings of a regular full-time plasterer's assistant in southeast Iowa. The best evidence of claimant's total earnings during the 12 calendar months immediately preceding his injury are his reported wages of \$2,289.00 during the third quarter of 2005, his reported wages of \$1,869.00 during the fourth quarter of 2005, his reported wages of \$2,611.00 during the first quarter of 2006, and his wages of \$2,065.00 earned from the week of March 3, 2006 through the week of May 22, 2006. Added together, total wages are \$8,834.00. That sum divided by 50 is \$176.68. Under the applicable benefit schedule, the resulting weekly rate of compensation for a single individual entitled to one exemption is \$147.27.

CONCLUSIONS OF LAW

The above findings of fact and analysis lead to the following conclusions of law:

First considered is to question whether a causal connection exists between claimant's May 26, 2006 injury and his 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's treating physicians by history attribute his continuing right eye problems back to the right eye alkali burn he sustained in the May 25, 2006 work injury. Defendant offered no contrary medical evidence. Under that circumstance, whether

claimant might have had a more favorable outcome had he received immediate medical treatment for his eye on May 25, 2006 is a moot point.

Wherefore, it is concluded that claimant has established a causal relationship between his May 25, 2006 work injury and his current disabling right eye condition.

The nature of claimant's right eye disability is now considered.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant has not returned to work with Hall's Plastering. The record evidence suggests that he would not be capable of returning to substantially similar work at this time giving the almost total loss of vision in his right eye. The record evidence also reflects that claimant remains under medical care. His treating physicians intend to perform a cornea transplant surgery. Although the prognosis may be guarded relative to this procedure, a reasonable expectation of improvement in claimant's disabling eye condition remains. Claimant is not at maximum medical improvement. He remains temporarily totally disabled while healing from his right eye injury.

Wherefore, claimant has established that he remains temporarily totally disabled from his right eye injury. He, therefore, is entitled to an award of temporary total or healing period benefits from the date of injury and continuing until he fully recuperates from his injury or he becomes eligible for permanent disability benefits.

Claimant seeks payment of his medical expenses for the right eye care received from the University of Iowa Hospitals and Clinics and from Vision Center PC. He also seeks reimbursement of medical mileage costs incurred in traveling 90 miles round-trip to Iowa City for care on 33 occasions.

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 16, 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 No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

The medical care claimant received clearly relates to his right eye work injury as does the mileage traveled to receive the care. In other words, these are medical costs for which defendant is liable.

Wherefore, it is concluded that claimant is entitled to payment of medical charges in the total amount of \$72,946.82 with the University of Iowa Hospitals and Clinics and in the total amount of \$121.00 with Vision Center PC. Claimant also is entitled to reimbursement of medical mileage expenses at the reimbursement rate applicable on the date on which the mileage was traveled. Claimant shall supply those dates to defendant within 30 days of the filing of this decision.

Claimant's weekly rate of compensation is disputed.

Because claimant was an intermittent, part-time worker in the 12 calendar months preceding his injury, Iowa Code section 85.36(9) governs computation of his weekly rate of compensation. As analyzed in the above findings of fact, the result is a compensation rate of \$147.20 per week. The only evidence from which claimant's spendable weekly earnings can be estimated is Exhibit A. A spendable weekly earnings amount of \$161.60 is greater than the weekly rate. The weekly rate is controlling for temporary disability purposes.

ORDER

THEREFORE, IT IS ORDERED THAT:

Defendant pay claimant temporary total or healing period benefits at the applicable rate of one hundred forty-seven and 20/100 dollars (\$147.20) from the date of injury and continuing until he fully recuperates from his injury or becomes eligible for permanent disability benefits.

Defendant pay accrued amounts in a lump sum and pay interest as Iowa Code section 85.30 provides.

Defendant pay medical charges in the total amount of seventy-two thousand nine hundred forty-six and 82/100 dollars (\$72,946.82) with the University of Iowa Hospitals and Clinics and in the total amount of one hundred twenty-one and 00/100 dollars (\$121.00) with Vision Center PC.

Defendant reimburse claimant medical mileage expenses for thirty-three (33) ninety (90) mile round-trips to the University of Iowa Hospitals and Clinics. Reimbursement shall be made at the reimbursement rate applicable on the date on which the mileage was traveled. Claimant shall supply those dates to defendant within thirty (30) days of the filing of this decision.

Defendant file subsequent reports of injury as this division requires.

Defendant pay costs of these proceedings pursuant to rule 876 IAC 4.33.

Signed and filed this 14th day of July, 2009.

HELENJEAN M. WALLESER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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