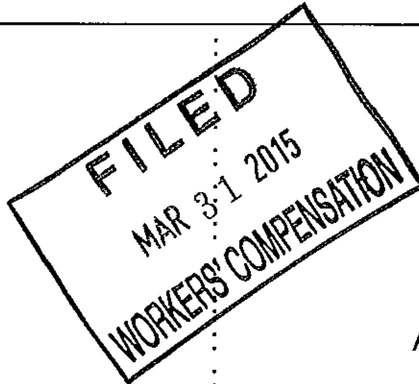
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



CINDY RICHARDSON, Claimant, vs. KWIK TRIP, INC., Employer, and ZURICH AMERICAN INS. CO., Insurance Carrier, Defendants.	File No. 5046182 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Cindy Richardson, has filed a petition in arbitration and seeks workers' compensation benefits from Kwik Trip, Incorporated, employer, and Zurich American Insurance Company, insurance carrier defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman on December 1, 2014 at Des Moines, Iowa. The record in the case consists of claimant's exhibits 1-17; defendants' exhibits A through I as well as the testimony of the claimant and Karen Swenson.

ISSUES

The parties submitted the following issues:

1. The extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u);
2. The claimant's weekly rate. Specifically, whether the claimant is entitled to inclusion of profit sharing bonuses in the calculation of her rate and whether she is entitled to two or four exemptions;
3. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27 and alternate medical care.

FINDINGS OF FACT

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

The claimant at the time of the hearing was 42 years old. She is married and has two children, which she claimed as dependents on her income taxes in 2011. See Exhibit 14, page 126. She is a high school graduate and has three diplomas from Hamilton Business College in Cedar Rapids, Iowa in administrative accounting, business administration and sales and marketing. It should be noted that the diplomas are not accredited. The claimant worked for Meskwaki Casino from 1995 to 1996 as a full-time waitress. She served drinks and bussed tables. She earned $7.50 per hour. The claimant began working at Kwik Trip as a clerk on April 1, 1996. At the time of the injury in this case she was a full-time shift leader earning $12.25 per hour. The work of clerk and shift leader require the claimant to perform physical job tasks such as making coffee, cleaning the floor, cleaning restrooms, sweeping the drive, filling the cooler, waiting on customers, cleaning counters and tables, fixing gas pumps and doing book work when the manager or assistant manager was gone. She performed managerial tasks such as opening and closing cash registers, filling out sales sheets and helping with ordering and inventory. The job required the claimant to be able to lift up to 50 pounds. In addition to working at Kwik Trip the claimant helped her husband and son with their farm. The farm consisted of 600 acres, and they had been operating the farm since 1993 although the acreage amount had fluctuated over the years. The claimant was not paid for her work specifically as an employee, but rather the income from the farm supported the family. On the farm the claimant operates a combine and tractors and does bookkeeping for the farm but does not do the taxes. She also sells produce at the Toledo Farmers' Market, which she has been doing since 1997. The claimant estimated that her gross wages per year from the farmers' market was $4,000.00.

On September 16, 2011 the claimant injured her back when she was lifting a 40-pound block of ice. The claimant experienced pain around the right side of her back from her underwear line across the middle of the back. The claimant attempted to continue working, but the pain became severe enough that she had to be taken by ambulance from the store to the hospital. At the hospital she was diagnosed with recurrent low back pain and a history of chronic low back pain.

Subsequently, the claimant was treated conservatively for her injury with physical therapy, chiropractic treatment, and injections in her hip and back. Eventually, the claimant underwent an MRI of her lumbar spine on February 15, 2013, which indicated no disc herniation and degenerative changes.

Douglas Sedlacek, M.D. was the claimant's authorized and treating physician. The claimant's visits with her chiropractor were not authorized by the defendants. Dr. Sedlacek treated the claimant with injections.

On June 18, 2013 the claimant saw Daniel Miller, D.O. with the employer's authorization for low back pain management. Dr. Miller opined on July 29 2013:

> As you know I saw Ms. Richardson on 6-18 and 7-16-13. You have or will be receiving my Encounter Notes. I will answer the questions you have asked of me in a letter dated 6-6-13.
>
> 1. The diagnosis is lumbar spondylosis and bilateral SI joint degeneration.
> 2. I believe that her work related injury has caused an exacerbation of this preexisting condition.
> 3. I believe she has received excellent treatment and that there are no further treatment recommendations.
> 4. At this time we will continue with her current work restrictions until an FCE is obtained. After the FCE I will address any permanent restrictions.
> 5. She is at MMI effective 7-16-13.

On July 31, 2013 the claimant underwent a functional capacity evaluation, which was considered valid. The functional capacity evaluation placed the claimant in the medium demand category with restrictions of waist to floor lifting 40 pounds; waist to crown lifting 30 pounds; bilateral carry 30 pounds; and squatting and kneeling to be completed with the use of mechanical support for transitional movements. See Exhibit 6, page 51. The claimant had previously obtained restrictions from her chiropractor of lifting 20 pounds or less.

On October 31, 2014 Dr. Miller indicated that the restrictions from the functional capacity evaluation of July 31, 2013 were necessitated by the work injury, and the claimant had sustained an aggravation of her preexisting chronic back pain as a result of her work injury of September 16, 2011. Finally, Dr. Miller opined that the claimant would require long-term use of non-steroidal anti-inflammatory medications to treat her injury.

On October 22, 2014 the claimant had another functional capacity evaluation performed by a different therapist. This test was again found to be valid and indicated that the claimant would be able to perform work in the light physical demand category.

Finally, on February 21, 2014 the claimant saw Sunil Bansal, M.D. for an independent medical evaluation at her attorney's request. Dr. Bansal diagnosed bilateral sacroiliitis greater on the right, which he causally connected to the work injury. He opined that claimant had a five percent permanent impairment to the body as a whole and agreed with the restrictions outlined in the October 22, 2014 functional capacity evaluation.

The claimant resigned from her employment because of pain in her back, hip, and leg, which was not improving even though she had restrictions. She felt she could no longer function at the level at which she had functioned prior to her injury. The claimant's supervisor, Karen Swenson, testified that she could have continued employing the claimant even with the restrictions from the functional capacity evaluation and that doing so would not require a job to be created for the claimant.

The claimant continues to participate in the operation of the family farm with her husband and son. She does still drive a combine and a tractor and has an active CDL for operation of farm equipment. She acknowledged that she performs raking and mowing work with her farm equipment. She also participates in bookkeeping for the farm and manages the GPS systems for the sprayers on the farm.

The employer had a vocational evaluation performed by Susan McBroom on October 28, 2014. Ms. McBroom indicated that there were jobs that paid the same or more than the claimant earned for the employer available in the claimant's labor market area. See Exhibit I, page 11. The claimant had a vocational evaluation done that indicated a loss of access to the labor market.

The claimant also has a history of neck pain and headaches that were present both before and after the injury. The claimant had received chiropractic care for these problems.

On March 15, 2012 the claimant was seen with complaints of neck pain that had lasted for three to four weeks with no known injury. See Exhibit E, page 8. On June 10, 2014 the claimant was seen for problems with her neck and upper back while picking up groceries. Further, she indicated that she had an old injury to her neck or back that had happened three or four months prior when she had a fall. See Exhibit H, page 3.

The claimant received profit sharing bonuses at the end of each year. The bonus was not consistent from year to year, and the claimant did not get a bonus in every year that she worked. This bonus is found to be irregular.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is whether the work injury was the cause of any 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).

The greater weight of evidence indicates that the claimant sustained a permanent aggravation of a low back condition, which has resulted in permanent restrictions and permanent impairment such as evidence of permanent disability.

The next issue is the extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

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.

The claimant's permanent impairment is slight. She does have work restrictions, but the evidence indicates that she could have remained as an employee for the defendant in the same position. Further, the record indicates that the claimant is capable of performing work in other occupations, as demonstrated by her participation in farming activity and in the farmers' market. The claimant possesses skills that might

qualify her for work in sedentary occupations, as evidenced by her activities with the farm and her past education. It is concluded that the claimant has sustained a ten percent loss of earning capacity entitling her to 50 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

The next issue is the claimant's weekly rate. The claimant argues that the bonuses that she received should be included.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

The evidence in the record demonstrates that the bonuses the claimant received were irregular in nature. These bonuses were not received in every year and were not consistent in their amount. There was no guaranty that the claimant would receive a bonus. As such, the bonus should not be included in the claimant's rate calculation. There was also the dispute as to the number of exemptions the claimant is entitled. The claimant has established that at the time of the injury she was married with two children that were claimed as dependents on her tax return, which is prima facie evidence of dependency. The claimant is entitled to have her rate calculated as a married person with four exemptions. The claimant's average weekly wage without the bonus is $466.35. Therefore, her weekly rate is $338.30.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27 and alternate medical care.

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).

The claimant was not authorized to receive care with her chiropractor. The claimant has not shown that that care was particularly beneficial. The defendant was providing the claimant with care with an authorized physician at the time that the claimant sought this care on her own. She is not entitled to reimbursement of medical expenses with Joel Beane, D.C. The claimant also seeks payment as set out in Exhibit 16 for mileage for visits to authorized providers and for an outstanding balance for an MRI on June 26, 2013, which was ordered by the authorized treating physician,

Dr. Miller. The claimant is entitled to reimbursement of these causally related expenses pursuant to Iowa Code section 85.27 and for reimbursement for those portions that she has personally paid.

The claim for alternate care consists of a request for the defendants to pay for prescriptions from Dr. Miller consisting of nabumetone and a topical cream as well as gabapentin and baclofen. As these have been prescribed by the authorized and treating physician, the defendants are obligated to pay for and provide these prescriptions pursuant to Iowa Code section 85.27.

The claimant seeks reimbursement of costs in this case including the functional capacity evaluation of Tim Vanderwilt, PT of October 22, 2014 in the amount of $960.00. The second functional capacity evaluation for which the claimant seeks reimbursement was not ordered by a physician and not pursuant to an examination. This examination was sought at the request of claimant's counsel. Under these circumstances the undersigned cannot conclude that the cost of the functional capacity evaluation is properly taxable pursuant to rule 876 IAC 4.33.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing July 16, 2013 at the weekly rate of three-hundred thirty-eight and 30/100 dollars ($338.30).

Defendants shall receive credit for benefits previously paid.

Defendants shall pay claimant's medical expenses directly and reimburse her for those expenses she has personally paid pursuant to Iowa Code section 85.27.

Defendants shall provide and pay for prescriptions from Dr. Miller for the claimant's injury pursuant to Iowa Code section 85.27.

Costs of this action in the amount of five-hundred seventeen and 40/100 dollars ($517.40) are taxed to the defendants pursuant to rule 876 IAC 4.33.

Signed and filed this 31st day of March, 2015.

RON POHLMAN
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.