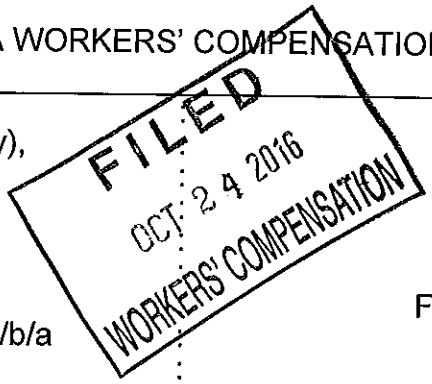
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



AURA ORDONEZ, (non-party),

Claimant,

vs.

LEISURE SERVICES, INC. d/b/a HOTEL PATTEE,

Employer,

and

VALLEY FORGE INSURANCE COMPANY,

Insurance Carrier,
Contribution Petitioner,
Defendants.

vs.

LIBERTY MUTUAL,

Contribution Defendant.

and

SECOND INJURY FUND OF IOWA,

Defendant.

File No. 5052660

ARBITRATION

DECISION

Head Note Nos.: 1402.30, 3203, 4200

STATEMENT OF THE CASE

Claimant, Aura Ordonez, filed a petition in arbitration seeking workers' compensation benefits from Leisure Services, Inc. d/b/a Hotel Pattee (Hotel), employer, Valley Forge Insurance Company (Valley Forge) and The Second Injury Fund of Iowa (Fund) all as defendants. In addition, Valley Forge filed a contribution petition against Liberty Mutual Insurance Company (Liberty) seeking a determination of liability to claimant's left knee and bilateral foot condition.

This case was heard in Des Moines, Iowa on August 5, 2016 with a final submission date of September 9, 2016.

The record in this case consists of claimant's Exhibits 1-14, defendant Hotel and Liberty's Exhibits AAAA-JJJJ, defendant Fund's Exhibits AAA-BBB; Valley's Exhibits 1A-5A, and the testimony of claimant. Serving as interpreter was Rachel Albin.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment on June 28, 2013.

2. Whether the injury is a cause of temporary disability.

3. Whether the injury is a cause of permanent disability; and if so

4. The extent of claimant's entitlement to permanent partial disability benefits.

5. Whether claimant's claim is barred by lack of timely notice under Iowa Code section 85.23.

6. Whether claimant is entitled to Second Injury Fund benefits.

7. Whether Liberty is liable for benefits paid by contribution petitioner Valley Forge.

FINDINGS OF FACT

Claimant was 54 years old at the time of hearing. Claimant emigrated from Guatemala. Claimant has a 9th grade education in Guatemala. Claimant speaks a little English, but is unable to read or write in English. Claimant has worked at a meat processing plant, done landscaping and detassling. Claimant has also packaged chocolates and eggs. (Exhibit 3, page 2)

Claimant worked in housekeeping and laundry at Hotel from 2009 until 2013. The hotel is owned by Leisure Hotel Corp./Leisure Services, Inc.

Claimant's medical history is relevant. Claimant sustained a bilateral carpal tunnel injury to her left and right upper extremities while working at Tyson. Claimant underwent a left carpal tunnel release on November 5, 1996. (Ex. 5, p. 3) She was found to have a 4 percent permanent impairment to the left upper extremity on October 9, 1997. An arbitration decision awarded claimant 7.6 weeks of benefits for the injury to the left hand. (Ex. BBB, p. 12) There is no indication claimant had any permanent restrictions regarding the left upper extremity.

Claimant also had an injury to her right upper extremity with the same date of injury. Claimant settled this injury. Claimant later brought a claim against the Fund alleging an August 5, 1996 date of injury to the right upper extremity as a first loss and a December 9, 2010 date of injury to the right knee and leg as a second loss. Claimant

settled this claim with the Fund under a compromised settlement under Iowa Code section 85.35(3) for $45,000.00. (Ex. AAA)

Claimant filed a claim against Hotel regarding a date of injury of December 9, 2010. This was for an injury to the right lower extremity. Claimant entered into an agreement for settlement with Hotel for the December 9, 2010 date of injury for a 10 percent loss to the right knee. (Ex. 2, p. 2)

Claimant filed a review-reopening petition against Hotel for the December 9, 2010 date of injury. Claimant pled a change in condition seeking additional benefits including a claim for the right knee injury resulting in a sequelae injury to the left knee and both feet.

In a December 2, 2015 review-reopening decision, Deputy Workers' Compensation Commissioner Walshire found claimant sustained an additional injury to the left leg caused by the original injury to the right leg. The decision found claimant sustained a 2 percent permanent impairment to the left leg as a result of the December 9, 2010 injury to the right leg. The decision also found Iowa Code section 85.34(2)(s) was not applicable to the review-reopening decision (Ordonez v. Leisure Services, File No. 5037670 Review-Reopening (December 2, 2015)). That decision is currently under appeal before the agency. This agency has entered an order staying the appeal pending the final outcome of this case.

Claimant worked as a housekeeper at Hotel. Claimant's job duties included, but were not limited to, loading cleaning carts with towels, soaps and sheets; cleaning bathrooms; making beds; dusting; and removal of dirty laundry.

Medical records indicate claimant complained of left knee pain in 2010 and 2011. (Ex. AAAA, pp. 5-6) Claimant was assessed as having plantar fasciitis in the left foot in 2008. (Ex. AAAA, pp. 3-4) In February of 2011 claimant was evaluated and treated for left knee pain. Claimant indicated left knee pain was probably caused by favoring her right knee. (Ex. AAAA, p. 6) Claimant also testified in deposition and at hearing she had pain in her left knee prior to her right knee surgery. (Ex. CCCC, Deposition pp. 5, 7-8, 14-15, 21-22; Transcription pp. 18-19, 37, 52)

On March 16, 2011 claimant underwent surgery to her right knee to repair a meniscus tear. (Ex. EEEE, p. 1) Claimant testified at hearing the pain in the left knee worsened. She said pushing laundry bins at work caused worsening of her left knee pain.

In a December 13, 2011 letter, Craig Mahoney, M.D. opined claimant had a work-related injury to her right knee resulting in a meniscus tear. Dr. Mahoney opined claimant's gait was altered by the right knee injury. (Ex. EEEE, p. 4)

On May 20, 2013 claimant was evaluated by Todd Miller, DPM. He opined claimant's left foot and knee injuries were due to compensating for her right knee problems. (Ex. FFFF, pp. 1, 3)

On June 28, 2013 claimant was evaluated by Dr. Mahoney. Claimant complained of left knee pain. She said her left and right knee pain was due to her right knee injury due to overcompensating for the right. Claimant also indicated pain in the left knee from pushing laundry carts at work. (Ex. 7, pp. 1-3)

In a July 15, 2013 note, written by defense counsel for Hotel, Dr. Mahoney indicated claimant's left foot pain was not caused by her right knee injury. (Ex. 7, p. 4)

On July 31, 2013 claimant was terminated from Hotel when the hotel closed down. (Ex. GGGG, p. 6; Ex. 13) Claimant testified she applied for work when the hotel reopened, but she was not hired for a job. (Tr. p. 25)

In a November 25, 2013 note, Dr. Mahoney opined claimant's left knee problem was causally related to her December 9, 2010 right knee injury. (Ex. EEEE, p. 11)

On February 24, 2014 claimant underwent surgery on her left knee consisting of a partial medial menisectomy. Surgery was performed by Dr. Mahoney. (Ex. 8, pp. 1-2)

Claimant applied for Social Security Disability in 2005 but was denied. Claimant applied for Social Security Disability a second time following her right knee surgery and the claim was again denied. (Tr. p. 24) On April 21, 2014 claimant was found to qualify for Social Security Disability benefits following her left knee surgery. (Ex. 4)

On August 13, 2014 claimant underwent a functional capacity evaluation (FCE) with John Kruzich, MS, OTR/L. Claimant was found to have given invalid effort in the FCE. Given the finding of invalid effort, functional limitations were not given. (Ex. DDDD)

On October 9, 2014 claimant underwent a second FCE performed by Todd Schemper, PT, DPT. Claimant was found to have performed the FCE with consistent effort. Claimant was found to be able to work in the light physical demand level and was limited to occasionally lifting up to 25 pounds. (Ex. 10)

In a November 24, 2014 note Dr. Mahoney opined claimant's foot problems were not related to her December of 2010 injury. (Ex. AAAA)

In a December 11, 2014 letter Dr. Mahoney opined claimant's bilateral foot problems were not related to a work-related injury. (Ex. AAAA, p. 14)

In a May 22, 2015 letter Dr. Mahoney indicated claimant had a 10 percent permanent impairment to the right knee for the partial menisectomy and a 2 percent permanent impairment for the left knee meniscectomy. He found no further treatment

was necessary and that claimant had reached maximum medical improvement (MMI). (Ex. 7, p. 17)

In an August 31, 2015 report Jacqueline Stoken, D.O. gave her opinion of claimant's condition following an independent medical evaluation (IME). Dr. Stoken opined claimant had a cumulative trauma to her left knee due to an overuse syndrome. She opined claimant's left and right knee injury, and left and right foot injuries, were sequelae injuries to the original right knee injury of December 9, 2010. She found claimant had a 10 percent permanent impairment to both the left and right knees. She also found claimant had a permanent impairment to both feet due to pain and loss of range of motion. Dr. Stoken found the combined values for all of claimant's injuries resulted in an 18 percent permanent impairment to the body as a whole. (Ex. 9, pp. 1-11)

In a September 13, 2015 report, Philip Davis, MS gave his opinion of claimant's vocational opportunities. He opined given claimant's experience, education, and physical limitations, claimant's ability to obtain employment for a full-time occupation was eliminated. (Ex. 11)

In an October 7, 2015 letter written by Valley Forge's attorney, Dr. Mahoney opined claimant's left knee condition was brought to his attention on June 28, 2013. He opined claimant's left knee condition was aggravated by her work duties at Hotel. He opined it was more likely claimant's work duties, after the right knee surgery, increased the stress on claimant's left knee. (Ex. 7, pp. 19-20)

In an October 12, 2015 report Ted Stricklett, MS, gave his opinions regarding claimant's employment opportunities. He found claimant had a 75 percent loss of access to jobs in the Des Moines and West Des Moines area, given claimant's limitations, and limitations in English skills. (Ex. 12)

Claimant testified that after she left Hotel, she tried to work at Pioneer doing field work. Claimant said she worked for Pioneer for two days but says she was unable to do the work and quit. Claimant has not looked for other work since. (Tr. p. 25)

In a February 1, 2016 note, Dr. Stoken indicated she reviewed Dr. Mahoney's October 7, 2015 opinion. She agreed with Dr. Mahoney claimant's ongoing work activities caused claimant's left knee pain. She also agreed claimant's work activities aggravated claimant's left knee condition after the right knee surgery. The duties led to claimant's need for further left knee treatment. (Ex. 9, p. 13)

Claimant testified her left knee swells and is painful. She said her left knee locks up and limits her ability to walk.

CONCLUSIONS OF LAW

The first issue to be determined is did claimant sustain an injury to her left lower extremities on June 28, 2013 that arose out of and in the course of employment.

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 alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

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).

Claimant contends she sustained a cumulative work injury to her left knee on or about June 28, 2013.

In File No. 5037670 claimant pled her left knee injury was a sequelae injury to her December 9, 2010 right knee injury.

Dr. Miller opined claimant's left knee problems are due to compensating for the right knee. (Ex. FFFF, pp. 1, 3)

In a June 28, 2013 evaluation claimant complained of left knee pain due to overcompensating for the right knee. (Ex. 7, pp. 1-3)

In a November 25, 2013 note Dr. Mahoney indicated claimant's left knee problems were causally related to her December 9, 2010 right knee injury. (Ex. EEEE, p. 11)

In an August 3, 2015 IME report, Dr. Stoken opined claimant's left knee injury was a sequelae injury to her original right knee injury of December 9, 2010. (Ex. 9, p. 11)

Just prior to her review-reopening hearing, in a letter written by Valley Forge's counsel, Dr. Mahoney indicated claimant's left knee condition was aggravated by her work duties at a hotel. (Ex. 7, pp. 19-20) No rationale is given for this slight change in a causation opinion, when compared with Dr. Mahoney's November 25, 2013 note. As Dr. Mahoney gives no rationale for this change in causation, the opinions expressed in Exhibit 7, pages 19-20 are given little weight in this case.

In the review-reopening decision, concerning the date of injury of December 9, 2010, claimant was found to have carried her burden of proof she sustained an additional injury to her left leg caused by the original injury to the right leg. As a result, claimant was awarded additional benefits for her left leg injury, for File No. 5037670 for a date of injury of December 9, 2010. The decision also found claimant was not due additional benefits by application of Iowa Code section 85.34(2)(s), but was due benefits for the 2 percent permanent impairment.

After the review-reopening decision was filed, Dr. Stoken indicated claimant's work duties at Hotel caused her left knee pain and aggravated her left knee condition. (Ex. 9, p. 13) There is no rationale given for this change of opinion. It is also contrary to the records in this case, which indicate claimant was complaining of left knee pain dating back to 2010 and 2011. As a result, Exhibit 9, page 13 is found not convincing.

Claimant argued, in a review-reopening petition, she was due additional benefits for a left knee injury that was a sequelae injury to her December 9, 2010 injury to her right knee. The review-reopening found claimant sustained additional permanent disability to the left leg as a sequelae injury caused by the December 9, 2010 injury to the right knee. Claimant was awarded additional benefits for the left leg injury as a sequelae injury to the December 9, 2010 injury to the right knee. Dr. Miller opined claimant's left knee injury was caused by compensating for the right knee. Dr. Stoken, initially opined claimant's left knee injury was a sequelae to the December 9, 2010 right knee injury. Dr. Mahoney also initially opined claimant's left knee injury was aggravated by her overuse injury to her right leg. Dr. Mahoney and Dr. Stoken's subsequent opinions on causation regarding the left knee injury are found unconvincing. Given this record, claimant has failed to carry her burden of proof she sustained a left knee injury on June 28, 2013 that arose out of and in the course of employment.

Claimant did not plead a June 28, 2013 injury to her feet. Claimant also did not argue in her brief she sustained a June 28, 2013 injury to her feet. (Claimant's post-hearing brief, p. 4) However, there is some evidence in the record claimant may have had an injury to her bilateral feet. Based on the opinions of Dr. Miller and Dr. Stoken, Exhibit FFFF, pages 1, 3 and Exhibit 9, claimant has also failed to carry her burden of proof she sustained a June 28, 2013 injury to her bilateral feet.

As claimant has failed to carry her burden of proof she sustained an injury to her left lower extremity on June 28, 2013, all other issues regarding temporary disability, permanent disability, and entitlement to permanent partial disability benefits are considered moot.

The next issue to be determined is whether claimant is entitled to Fund benefits.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

As noted above, claimant failed to carry her burden of proof she sustained an injury to her left lower extremity that arose out of and in the course of employment on June 28, 2013. As claimant failed to carry her burden of proof she sustained a second qualifying injury, claimant has also failed to carry her burden of proof she is entitled to Fund benefits.

The final issue for determination is whether Valley Forge is entitled to an order of reimbursement as against Liberty pursuant to Iowa Code section 85.21. Valley contends claimant's left knee and bilateral foot condition is a result of a June 28, 2013 injury, during Liberty's coverage period. As a result, Valley Forge contends it should be reimbursed for benefits paid to claimant.

Iowa Code section 85.21 states:

> The workers' compensation commissioner may order any number or combination of alleged workers' compensation insurance carriers and alleged employers, which are parties to a contested case or to a dispute which could culminate in a contested case, to pay all or part of the benefits due to an employee or an employee's dependent or legal representative if any of the carriers or employers agree, or the commissioner determines after an evidentiary hearing, that one or more of the carriers or employers is liable to the employee or to the employee's dependent or legal representative for benefits under this chapter or under chapter 85A or 85B, but the carriers or employers cannot agree, or the commissioner has not determined which carriers or employers are liable.

Contribution petitioner Valley Forge contends claimant sustained a June 28, 2013 injury to her left knee and bilateral feet. This was during the coverage period for Liberty Mutual, as detailed above. It is found claimant failed to carry her burden of proof she sustained an injury to her left knee and bilateral feet that arose out of and in the course of employment on June 28, 2013. As claimant has failed to carry her burden of proof she sustained an injury to her left knee and bilateral feet on June 28, 2013 that arose out of and in the course of employment, contribution petitioner Valley Forge has failed to carry their burden of proof that Liberty Mutual is the insurance carrier liable for the left leg and bilateral foot injuries.

ORDER

THEREFORE IT IS ORDERED:

That claimant take nothing in the way of benefits from these proceedings.

That contribution petitioner Valley Forge has failed to carry its burden of proof Liberty is the insurer liable for claimant's left knee and bilateral knee injuries.

That all parties shall pay their own costs.

Signed and filed this 24th day of October, 2016.

JAMES F. CHRISTENSON
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.