BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARCIA A. HOGLE, Claimant, vs. MENARDS, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	File No. 5060951 ARBITRATION DECISION Head Note Nos.: 1803, 2502

STATEMENT OF THE CASE

Claimant, Marcia Hogle, has filed a petition for arbitration seeking workers' compensation benefits against Menards, Inc. employer, and XL Insurance America, Inc., insurer, both as defendants, for a disputed work injury.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on May 20, 2020, via CourtCall. The case was considered fully submitted on June 10, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-5; Claimant's Exhibit 1; Defendant's Exhibits A-K.

At the time of the hearing, claimant had not obtained an independent medical evaluation (IME) due to the cost of advancing that fee. Defendants did not volunteer to pay the IME despite the fact that this was an accepted work injury.

Rather than filing for continuance or an independent medical evaluation petition, claimant proceeded to hearing with the request that the record be kept open for an undetermined period of time during which the claimant would attempt to obtain an independent medical examination. There was no guarantee by the claimant that the IME would be obtained, only that an attempt would be made.

Claimant presented no good cause as to what circumstances would change in the future that would enable her to obtain the IME. Claimant also posited that an order

could be issued requiring defendants to prepay a reasonable sum consistent with the guidelines of Iowa Code section 85.39. However, the code provision specifically states that the employer's obligation is to reimburse the claimant for the examination. Iowa Code section 85.39 (2019). The legislature has not required defendants pre-pay IME expenses which does place the injured worker at a disadvantage; however, this is an issue to address with the legislature as we are charged with applying the existing law when there are no substantive terms uniquely within the interpretive expertise of the workers' compensation commissioner. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759 (Iowa 2016); Burton v. Hilltop Care Centers, 813 N.W.2d 250 (Iowa 2012); Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 (Iowa 2004).

The plain language of the statute uses the word "reimbursement" which is to repay a charge already satisfied. Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223, 235 (Iowa 2010). Defendants are also entitled to object to payment of an IME based upon reasonableness. Iowa Code section 85.39. Should the employer be required to pay in advance and the charges be deemed unreasonable, defendant employer would have to bring an action to determine reasonableness rather than the claimant. This burden shifting does not have support in the statute. Absent contrary direction, ordering a pre-payment or an advance payment of an IME is not within the guidelines of the statute and therefore, even if the claimant had requested a continuance or raised the issue earlier, the agency would not have the power to give the relief requested.

Given that claimant's claim has been accepted, should she have a change of circumstances not previously contemplated, the option of a review-reopening exists.

ISSUES

Whether claimant has sustained a permanent disability, and if so, the extent of said disability;

Whether claimant is entitled to an IME;

The assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree the claimant sustained an injury which arose out of and in the course of her employment with defendant employer on or about November 21, 2016. They further agree that the injury was the cause of some temporary disability during a period of recovery entitlement to which is no longer in dispute.

While the parties disagree as to the extent of any permanent partial disability, they do agree that the claimant's disability, if one is found to be caused by claimant's work injury, would be industrial in nature and that the commencement benefit date is December 24, 2016.

At the time of the injury, the claimant's gross earnings were $158.84 per week. She was single and entitled to one exemption. Based on those foregoing numbers, the weekly benefit rate would be $138.91 which is below the weekly benefit rate of the statewide minimum and therefore permanent partial disability benefits, if any are awarded, would be payable at $197.92 per week.

Defendants waive all affirmative defenses.

Prior to the hearing the client was paid 1.29 weeks of compensation at the rate of $164.43 per week.

FINDINGS OF FACT

At the time of the hearing, claimant was a 59-year-old person. At all times relevant hereto, claimant was single and entitled to one exemption. She is 5'3" and her current weight is around 123 pounds. Since the time of her injury, her weight has vacillated between the 120-123 pound range.

Her educational background consists of graduation from high school followed by training at a cosmetology school. She went on to become an instructor of cosmetology.

Immediately prior to her position with the defendant employer, claimant had worked as a housekeeper at St. Ambrose University for approximately three years. As a housekeeper, she would be responsible for cleaning the offices, restrooms, dorms, and townhomes. She also worked as a waitress and a bartender in the relevant past.

Her past medical history was significant for two instances of right lower back pain necessitating medical treatment. On May 22, 2006, claimant was seen for decreased range of motion in the sacroiliac joint on the left, the lumbar spine, and the thoracic spine at Eldridge Spine and Wellness. Darren C. Campbell, D.C., was able to palpate a misalignment in the sacroiliac joint of the left L5 and L4. (Joint Exhibit 1:2) Claimant returned for a few more visits and received treatment for the sacral region pain. (JE 1:4)

Claimant was seen for abdominal pain on July 8, 2009, at Genesis Medical Center. (JE 2:6) At the time, she was working as a housekeeper for St. Ambrose University. In a July 13, 2009, visit with Rick Garrels, M.D., she reported pain radiating down her right lower extremity that was aggravated by standing or sitting for longer than 10 minutes as well as ascending and descending stairs. (JE 2:6) She ambulated with an antalgic gait pattern and straight leg raise test on the right was positive. (JE 2:6) X-rays revealed early lower facet degenerative changes. (JE 2:9) Dr. Garrels diagnosed claimant with right lumbar strain and right lumbar radiculopathy. She underwent a

course of physical therapy. (JE 2:8) She also took time off of work in July 2014 due to back pain.

In her teen years, she began suffering seizures which abated in her forties. In the last six months to a year, the seizures have returned and she is currently taking Dilantin to control those.

Around March 2016, she began as a stock person for the defendant employer. It was a part-time job and she worked approximately 20 hours per week from five in the morning until nine. Claimant also worked at a bar part-time.

On the morning of November 21, 2016, she was lifting a bag of cat litter which weighed approximately 45 to 50 pounds. She dropped the bag and had a hard time straightening up. She reported this pain to her manager on duty at the time and was sent to Richard G. Fried, D.C. of Fried Chiropractic. (JE 4:12) The account recorded in the chiropractic records is not accurate. (JE 4:12) The date of service is noted to be November 21, 2016, and the date of injury was the same. However, in the detail section of the chiropractic record, it was recorded that claimant lost time from work from October 21, 2016, through October 22, 2016. (JE 4:6) Under social history, it was recorded that claimant was pregnant and using alcohol. (JE 4:13) Claimant was 56 at the time and not pregnant.

Nonetheless, Dr. Fried recorded tenderness to palpation and muscle tension bilaterally at the cervical spine, thoracic spine and lumbar spine. Subluxations were noted at T4 and L4 with pain radiating down the left posterior leg to the calf. (JE 4:14) range of motion was limited at all ranges. (JE 4:14) Straight leg tests were negative, but she had positive Kemp's Test, Braggard's dorsiflexion on the left, and Patrick's FABERE. (JE 4:15) X-rays showed degeneration and osteoporosis. (JE 4:15) Adjustments were made and claimant was instructed to return for twelve visits at three visits a week. (JE 4:16) Dr. Fried also imposed work restrictions of no lifting over ten pounds until December 3, 2016. (JE 4:18) By December 16, 2016, Dr. Fried returned claimant to work with no restrictions. (JE 4:21) Dr. Fried performed what is labeled a file evaluation on December 29, 2016. (JE 4:24) He recorded claimant had made a full recovery without any residuals. (JE 4:24) He did note tenderness to palpation, muscle tension on the left side of the lumbar spine but all ranges of motion were within normal limits. (JE 4:25) Adjustments were made and Dr. Fried concluded that claimant was fully recovered from the work injury with no residuals. (JE 4:27)

Claimant returned to Dr. Fried's office on September 25, 2017 following an incident with her brother where she was shoved into a counter. (JE 4:27) This was a nonwork exacerbation of her symptoms. (JE 4:29) On June 7 2019, she fell disembarking her boyfriend's truck. She missed the running board and landed face first on the driveway. She was seen by Jeffrey S. Walczyk, M.D. a few days later after the dizziness and headaches did not abate. (JE 5:31) She was diagnosed with concussion, acute post-traumatic headache, and contusion on her face. (JE 5:32)

Through the end of 2017 and into 2018, claimant continued to work at the bar as well as for defendant employer. She has not worked at the bar for at least a year and a half. She continues to work for defendant employer as a morning stocker. She does no heavy lifting.

Claimant testified at hearing that she continued to have pain. She cannot bend over and lift things. At best, claimant believes she can lift twenty pounds. Dr. Fried's adjustments provided temporary relief. When she gets off work, she has to get off her feet and ice her lower back. She is careful what home activities she undertakes and does no lifting around her house.

Dr. Garrels provided an IME for defendant employer on March 28, 2019. (Ex. B:2) Dr. Garrels concluded that claimant sustained a temporary aggravation of a pre-existing lumbar degenerative condition and that she reached maximum medical improvement on March 1, 2017. (Ex. B:2) He further opined that claimant sustained no permanent impairment and no work restrictions were necessary. (Ex. P:3)

On April 23, 2019, Dr. Fried reaffirmed his previous treatment note that claimant had not sustained any permanent disability. (Ex C:11)

Claimant's current job with defendant employer does require her to exert up to 50 pounds of force occasionally and up to 25 pounds of force frequently. (Ex G:22) Claimant maintains she has ongoing pain that has not resolved and continues to affect the manner in which she conducts her daily activities including how she executes the essential tasks of her job.

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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 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 unrebutted expert opinions in this case come from Dr. Garrels and Dr. Fields. Dr. Garrels is a well-known medical examiner within the workers' compensation litigation field. His competency and impartiality has been the subject of other agency decisions such as Shariff v. Kraft Foods, Inc., File No. 5037146 (April 30, 2014).

However, the commissioner explicitly limited the credibility finding of Dr. Garrels to the case the commissioner was examining.

> Finally, following a review of the entire record in this contested case, it is found that in this particular case, Dr. Garrels' views lack objectivity.

Kraft Foods, Inc. v. Shariff, 882 N.W.2d 873 (Iowa Ct. App. 2016) (quoting the commissioner's decision) In Sharif, the findings of fact included observations that Dr. Garrels "lobbied a medical specialist to change his opinion in a manner favorable to an employer and thus directly interfere with the specialist's recommended and authorized treatment of the work injury, which had been voluntarily accepted by the employer and insurer . . . ." Kraft Foods, Inc. v. Shariff, 882 N.W.2d at *8.

The same set of facts are not in this particular record and thus, the credibility determination made by the Commissioner in Sharif cannot be extended here.

In this case, claimant's personal account of ongoing pain and discomfort associated with her accepted work injury are not consistent with the reports recorded by Dr. Fields at the time of treatment or Dr. Garrels. They are not consistent with the claimant's return to work at the same job with defendant employer engaging in similar tasks. Claimant also worked at a bar and/or restaurant for several months to a year after her accepted work injury.

Based on the foregoing, it is determined that claimant did not carry her burden to prove that she has sustained a permanent disability arising out of and in the course of her employment.

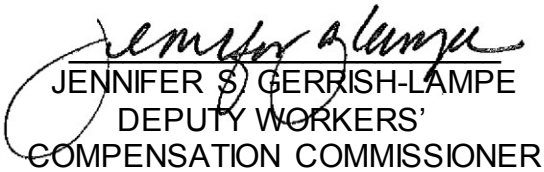
As for the IME demand, this was addressed earlier. The law as it currently is interpreted does not allow for the pre-payment of an IME but claimant is entitled to one. Should she obtain one, defendants are obligated to reimburse it subject to reasonableness of the examination fee.

ORDER

THEREFORE, IT IS ORDERED, claimant shall take nothing.

That each party shall pay their own costs.

Signed and filed this 27th day of July, 2020.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Earl A. Payson (via WCES)

Charles A. Blades (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.