BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANGELA FULLER, Claimant, vs. BIMBO BAKERIES USA, INC., Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 20012896.01 ARBITRATION DECISION Head Note Nos.: 1803, 1108

STATEMENT OF THE CASE

The claimant, Angela Fuller, filed a petition for arbitration on June 8, 2021, against Bimbo Bakeries, employer, and Indemnity Insurance Company of North America, insurance carrier. The claimant was represented at hearing by Mark Sullivan. The defendants were represented by Peter Thill.

The claimant originally filed two petitions. File No. 22001389.01 was dismissed at the outset of the hearing.

The matter came on for hearing on July 15, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing. The record in the case consists of Joint Exhibits 1 through 11; Claimant's Exhibits 1 through 9; and Defense Exhibits A through E and G through J. The claimant testified at hearing and was the only witness. Jennifer Nevers was also present. Michele Proesch served as the court reporter for the proceedings. The matter was fully submitted on September 23, 2022, after helpful briefing by the parties.

ISSUES & STIPULATIONS

The parties were able to narrow the issues during the course of the hearing.[1] The following issues and stipulations were submitted. The parties stipulated that claimant worked for defendant and sustained an injury which arose out of and in the course of her employment on July 9, 2020. The parties further agree that the injury was

[1] During the course of the hearing, claimant dismissed the petition in File No. 22001389.01. At the end of the hearing, she also dismissed a claim for an alleged arm sequala injury. (Tr., p. 122)

a cause of both temporary and permanent disability. The claimant is seeking temporary disability benefits as set forth in paragraph 4 of the Hearing Report. The defendants dispute claimant has any entitlement to any further temporary benefits. Claimant is seeking permanent disability benefits as well. The defendants deny they are responsible for any further disability benefits, however, the parties stipulate that claimant's disability is "industrial." The parties do not agree upon a commencement date for permanency.

The parties stipulate to all elements comprising the rate of compensation and affirmative defenses have been waived. Claimant is seeking past medical expenses as set forth in Claimant's Exhibit 8. Claimant is seeking alternate care as well. The claimant is also seeking payment for an independent medical examination under Iowa Code section 85.39. The parties stipulate that claimant was paid weekly benefits set forth in Defendants' Exhibit A.

Under paragraph 10 of the Hearing Report, defendants listed that they dispute medical causation of claimant's current health conditions to the low back and leg to the July 9, 2020, work injury. Claimant objected to the inclusion of this as an issue since defendants had not listed causation as an issue prior to the submission of the hearing report. I overruled this objection and allowed defendants to submit this as an issue. The defendants seem to have admitted that her work injury did indeed cause some level of permanent disability, however, they do not believe that her current, ongoing symptoms at the time of hearing are entirely related to her work injury. I interpret this primarily as an apportionment issue and/or as a defense for past and future medical expenses.

FINDINGS OF FACT

Claimant Angela Fuller was 51 years old as of the date of hearing. Her demeanor was pleasant and appropriate. She testified live and under oath at the video hearing. I find Ms. Fuller to be generally credible. She was a reasonably good historian. Her testimony generally matches up with other portions of the record. There was nothing about her demeanor which led me to believe she was dishonest in her testimony.

Ms. Fuller began working for Bimbo Bakeries in March 2018 as a sanitor. The job description for this position is in the record. (Defendants' Exhibit B, page 5) The primary function of her job was to clean equipment. Ms. Fuller testified in some detail regarding her work history prior to starting at Bimbo. While her work history was varied and interesting, she primarily had earned her living as a waitress or bartender, at times with substantial earnings. (Transcript, pages 26-27) She has also performed some work through temporary staffing agencies and in manufacturing. There were periods of time in her adult life when she was not in the workforce due to personal circumstances, including family and legal challenges. Ms. Fuller testified that her job at Bimbo Bakeries was the best job she ever held. She earned over $21.00 per hour and had good benefits which were quite valuable to her.

The parties have stipulated that Ms. Fuller sustained an injury which arose out of and in the course of her employment on July 9, 2020. Ms. Fuller testified in detail at hearing about the injury. The injury itself is well-documented. (Def. Ex. C) Ms. Fuller was pushing a heavy cart filled with dough when the accident occurred. She injured her low back. She did not immediately receive treatment as she initially did not think the accident severe.

After attempting some chiropractic care at first, she presented to the emergency room at Finley Hospital on October 14, 2020. (Jt. Ex. 2, p. 9) Ms. Fuller then started treatment as directed by her employer, with Tri-State Occupational Health and was quickly referred for neurosurgical consultation with Chad Abernathey, M.D. After a full medical workup he diagnosed right S1 radiculopathy, right L5-S1 disk extrusion. He confirmed her condition was causally connected to her work injury. (Jt. Ex. 5, p. 49) On January 28, 2021, Dr. Abernathey performed a lumbar microdiskectomy. (Jt. Ex. 6, p. 55) The surgery was generally successful. Ms. Fuller continued with follow ups with Dr. Abernathey and underwent a fairly significant amount of physical therapy beginning in February 2021. (Jt. Ex. 7) While the surgery was generally successful, the therapy notes documented fairly significant ongoing symptoms in her low back, right gluteus and down her right lower extremity into her foot which caused difficulty sleeping.

On July 21, 2021, Dr. Abernathey assigned a permanent impairment rating of 7 percent of the whole body. (Jt. Ex. 5, p. 52) In total, Ms. Fuller was paid healing period benefits from October 20, 2020, through July 21, 2021. At the time this rating was given, Dr. Abernathey had not actually seen her since March 2021. Ms. Fuller was under the impression that she was supposed to have work hardening before being released, which never happened. In any event, she was released to work and Dr. Abernathey did not provide any formal work restrictions at that time. Her employer, however, did not return her to work, although she remained on the payroll up through the date of hearing.[2] (Tr., pp. 69-71)

Ms. Fuller returned to Dr. Abernathey in October 2021, with reports of increased low back pain and instances of her back "locking up." (Jt. Ex. 5, p. 53) A repeat MRI was performed. (Jt. Ex. 8, pp. 80-81) Dr. Abernathey had no additional treatment recommendations.

Two other physicians provided medical opinions in this case. Robin Sassman, M.D., provided opinions following the claimant's independent medical examination (IME) and Jonathan Fields, M.D., provided opinions following a defense IME. Both of these physicians reviewed numerous appropriate records and examined Ms. Fuller.

On June 15, 2022, Dr. Sassman diagnosed lumbar spine radiculopathy and

[2] Claimant testified that she has not returned to work (or received a paycheck) at Bimbo since she went off work in October 2020. She testified that she has stayed in touch with Bimbo in hopes of returning to work at some point. She testified that she was eventually told to stop contacting Bimbo about returning to work and that, after her evaluation, with Dr. Fields, she was told by her attorney that her employment was going to end at some point in time. (Tr., pp. 69-70)

opined that she was not at maximum medical improvement for this condition. (Cl. Ex. 2, p. 19) She opined that further pain management treatment should be pursued. She did directly causally connect this condition to Ms. Fuller's July 9, 2020, work injury. She opined that, in the absence of further treatment, the date of maximum medical improvement would be one year after the surgery, January 28, 2022. (Cl. Ex. 2, p. 19) In the absence of further treatment, Dr. Sassman assigned a 24 percent whole body impairment rating. (Cl. Ex. 2, p. 20) Dr. Sassman also recommended permanent restrictions of no lifting, pushing or pulling more than 20 pounds and alternate sitting and standing. (Cl. Ex. 2, p. 22)

Dr. Fields diagnosed "L5-S1 right paracentral disc herniation with severe right lateral recess stenosis." (Def. Ex. H, p. 36) He also opined that this condition and "her current low back and leg symptoms are consistent with this reported injury." (Def. Ex. H, p. 36) He opined that she was unable to meet the job requirements for Bimbo Bakeries and assigned restrictions of, "Avoid forward bending and twisting. No climbing ladders." (Def. Ex. H, p. 36) He did not recommend additional medical treatment. (Def. Ex. H, p. 37)

At the time of hearing, Ms. Fuller had obtained employment with Joann's Fabric and Crafts. She works as a cashier and also cuts fabric and stocks merchandise. The work is part-time and pays $10.00 per hour without benefits. I find Ms. Fuller is highly motivated. After she was released by Dr. Abernathey, she regularly checked with Bimbo Bakeries to see about returning to work. Until the time of hearing – after her fitness for duty evaluation with Dr. Fields – she had not been told that her employment with Bimbo would be terminated.

Ms. Fuller has continued to be symptomatic which causes her numerous deficits in her activities of daily living, including sleep difficulties. Her testimony on this topic was consistent with her reports to the evaluating physicians. (Cl. Ex. 2, p. 14)

Having reviewed the evidence in the case, I find that Ms. Fuller did sustain an injury which arose out of and in the course of her employment. The injury to her low back resulted in both temporary and permanent disability and caused the need for her surgery, as well as the treatment set forth in Claimant's Exhibit 1. I find that she reached maximum medical improvement on July 21, 2021. She is unable to return to work for the employer in this case and she is not well-suited to return to hospitality work.

CONCLUSIONS OF LAW

The primary question submitted is the extent of claimant's industrial disability. The parties stipulated that the disability is industrial.

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 Ry. 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 refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

I find that claimant has sustained a substantial loss of earning capacity as a result of her work injury. Ms. Fuller was 51 years old as of the date of hearing. Her job for Bimbo Bakeries is the best job she has ever held, earning over $21.00 per hour with valuable fringe benefits. She now has a permanent impairment in her lower back which is still highly symptomatic. Her impairment rating is between 7 and 24 percent. She described disabling symptoms of pain, loss of range of motion down her right leg which causes difficulty bending, twisting, climbing and walking. It also interferes with her sleep.

Her employer arranged a fitness for duty examination for her with Dr. Fields and she was deemed unable to return to her employer, at least in her previous position. At the time of hearing, the employer had not offered any position to her. Her restrictions are no bending, twisting or climbing ladders. In spite of her employment being in limbo since the time Dr. Abernathey released her in July 2021, Ms. Fuller obtained appropriate employment. The best she could find was part-time work at $10.00 per

hour at a fabric store. I find it is likely that she will secure more hours and better pay in the future, her actual loss of earnings at the time of hearing exceeds 60 percent.

Because of her symptoms and formal medical restrictions, Ms. Fuller is no longer well-suited for manufacturing work or her primary past employment in hospitality, particularly as a waitress in a busy location. Having considered all of the appropriate factors of industrial disability, I find that claimant has sustained a 65 percent loss of earning capacity. I conclude that this entitles her to 325 weeks of compensation pursuant to Iowa Code section 85.34(2)(v) (2021).

The next issue is the commencement date for benefits. The claimant argues that the defendants have used an incorrect commencement date for payment of benefits. The issue is whether the claimant reached MMI on July 21, 2021. Claimant argues her MMI date is January 27, 2022, based upon Dr. Sassman's report.

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, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

I find that both the opinion of Dr. Abernathey and Dr. Sassman are flawed. Dr. Abernathey did not appear to have any basis for assigning MMI other than it was approximately six months after the surgery. In my experience reviewing these cases, this does appear to be somewhat standard for this type of surgery. The problem is that when Dr. Abernathey placed her at MMI, he had not even seen her since March 2021. Dr. Sassman's opinion, however, is, at least equally flawed. Dr. Sassman's actual opinion is that claimant was still not at MMI as of the date of her evaluation in June 2022. (Cl. Ex. 2, p. 19) She then opined that in the absence of further treatment, she would place MMI at the arbitrary date of one year after the surgery. For reasons which will be detailed below, I agree with Dr. Sassman that the evidence supports a finding that claimant may benefit from some additional treatment and it may actually improve her condition. In this record, however, the greater weight of evidence supports the finding that Ms. Fuller's condition actually plateaued around the July 2021, date.

The next issue is whether the claimant is entitled to payment of past medical expenses set forth in Claimant's Exhibit 1.

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).

Claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

I find that all of the medical expenses set forth in Claimant's Exhibit 1 are causally related to her work injury. The only available defense is whether the treatment was authorized. The defendants have never formally denied this claim and have a statutory obligation to direct her medical care.

I find that Ms. Fuller reported her injury immediately to her immediate supervisor in July 2020. When claimant initially filled out paperwork related to her work injury, she declined medical treatment. (Def. Ex. C, p. 13) When her condition did not improve, and in fact worsened, she quite reasonably changed her mind. Prior to asking the employer to authorize care, however, she had sought chiropractic care on her own. Again, this is understandable and otherwise reasonable, the fact remains that all of her medical visits to the chiropractor were unauthorized. It appears in this record that once Ms. Fuller requested treatment for the condition, an appointment at Tri-State Occupational Health was quickly authorized. (Def. Ex. J, p. 53) Therefore, all of the unauthorized treatment with the chiropractor, as well as the visit to Grand River Medical Care, is deemed unauthorized and is not compensable.

The claimant, however, also sought emergency treatment at Finley on a couple of separate occasions prior to seeking treatment. I find that this care is reimbursable under the emergency care provisions under Iowa Code section 85.27.

Therefore, I find that all of the medical expenses set forth in Claimant's Exhibit 1 are reimbursable with the exception of the chiropractic visits set forth therein.

The next issue is whether claimant is entitled to alternate medical care.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if

> requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

The defendants are not currently offering the claimant any medical treatment on the basis of the opinion of Dr. Fields. "In my medical opinion, no further medical care is needed at this time with regard to her low back condition." (Def. Ex. H, p. 37) I interpret Dr. Fields opinion to primarily address her condition from a surgical perspective.

The claimant has testified that her symptoms have worsened since she was released by Dr. Abernathey. While I have no basis to dispute the opinions of Dr. Abernathey and Dr. Fields that further surgery is not an option, I find that Dr. Sassman's treatment recommendation for a referral to pain management to be compelling. "Ms. Fuller may benefit from an evaluation by a pain management specialist to determine if an epidural steroid injection or a specific medication regimen would be beneficial." (Cl. Ex. 2, p. 19)

Defendants shall authorize evaluation and treatment with a pain management specialist.

It is noted that defendants argue that Ms. Fuller has developed left-sided symptoms in her low back and the defendants are not responsible for this. The defendants, however, have never denied any portion of this claim up until they filed the Hearing Report in this matter. There is still no denial in the agency's compliance filings. There is no basis in this record for finding any type of intervening or superseding cause of this condition at this time.

The next issue is payment of the IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

The claimant had a number of other body parts examined and evaluated as part of her examination with Dr. Sassman. I find that all of this was reasonable at the time the evaluation was performed. There is no meaningful way in this case to apportion out the expenses related to the claims dismissed by the claimant. Furthermore, it is apparent from the records submitted that the vast majority of Dr. Sassman's time was spent reviewing and examining the claimant's low back. She has prevailed on this claim. The defendants are responsible for the IME costs set forth in Claimant's Exhibit 3.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant three hundred and twenty-five (325) weeks of permanent partial disability benefits at the rate of five hundred and fifty-three and 08/100 ($553.08) per week commencing July 21, 2021.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the thirty-five (35) weeks previously paid.

Defendants are responsible for the medical expenses set forth in Claimant's Exhibit 1, with the exception of chiropractic bills and Grand River Medical Group in a

manner consistent with this decision.

Defendants shall authorize an evaluation and treatment with a pain management specialist.

Defendants shall reimburse the IME expenses set forth in Claimant's Exhibit 3.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants in the amount of one hundred and no/100 dollars ($100.00).

Signed and filed this 26th day of January, 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Sullivan (via WCES)

Peter Thill (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.