BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARY JANELLE BROTHERSEN,	:	
Claimant,	:	
vs.	:	
RIVER BEND INDUSTRIES,	:	File No. 5062450
	:	ARBITRATION DECISION
Employer,	:	
and	:	
FEDERAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	Head Note Nos.: 1108.50, 1402.40, 1803

FILED
FEB 26 2018
WORKERS COMPENSATION

STATEMENT OF THE CASE

Mary Janelle Brothersen, claimant, filed a petition in arbitration seeking workers' compensation benefits from River Bend Industries, employer, and Federal Insurance Company, insurance carrier, as defendants. Hearing was held on November 6, 2017 in Des Moines, Iowa.

Claimant, Mary Janelle Brothersen, and Jillian Brockhohn both testified live at trial. The evidentiary record also includes Joint Exhibits JE1-JE8, Claimant's Exhibits 1-2, Defendants' Exhibits A-H.

The parties stipulated that claimant was an employee of the employer on December 18, 2015 and on that date she sustained an injury that arose out of and in the course of her employment. The parties further stipulated that said injury was the cause of both temporary and permanent disability. The parties agreed that all temporary benefits had been paid to the date of the hearing. The parties also agreed that prior to the hearing defendants paid 65 weeks of permanent partial benefits for which they are entitled to a credit. The parties have stipulated that claimant should be compensated on an industrial disability basis. Additionally, the parties stipulated that the appropriate commencement date for any permanency benefits is August 9, 2016. With regard to weekly rate of compensation, the parties stipulate that the claimant's average weekly wages were $726.00, that she is single and entitled to one exemption. The parties agree this results in a weekly workers' compensation rate of $445.86. The defendants

did not assert any affirmative defenses. Finally, the parties agreed that medical benefits are not in dispute.

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 submitted post-hearing briefs on December 5, 2017.

ISSUE

The parties submitted the following issue for resolution:

1. The extent of industrial disability claimant sustained as a result of the stipulated December 18, 2015 work injury.

FINDINGS OF FACT

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

On December 18, 2015, claimant, Mary Janelle Brothersen ("Ms. Brothersen") sustained a compensable injury working for River Bend Industries ("River Bend"). Ms. Brothersen was injured when the tractor-trailer she was loading pulled away from the dock as she was backing out of the trailer. Unfortunately, Ms. Brothersen fell 4 to 5 feet to the concrete below. Ms. Brothersen was not belted into the forklift she was driving; the forklift did not fall to the ground. (Testimony)

Ms. Brothersen was taken via ambulance to the University of Iowa Hospitals and Clinics ("UIHC"). She was admitted into the hospital. On December 23, 2015, she was transferred to UnityPoint Health in Cedar Rapids for physical and occupation rehabilitation. She was treated for multiple injuries including left posterior rib fractures, left sacral alar fracture and left superior and inferior pubic rami fractures. She remained at UnityPoint until she was moved to an assisted living facility on January 6, 2016. Ms. Brothersen also received therapy from Grinnell Regional Hospital from February 25, 2016 through May 23, 2016. (Joint Exhibits 1-3 & 6; Testimony)

In February of 2016, Ms. Brothersen saw Stanley Mathew, M.D. The notes indicate that she was doing well, but did have weakness in her bilateral hips and knees. At that point, she was walking with a walker and weight bearing as tolerated. She was to continue aggressive PT and OT. (JE3)

Ms. Brothersen continued to receive care from UIHC. Towards the end of her healing, Joseph J. Chen, M.D. was primarily handling her care. By July of 2016, Ms. Brothersen was reporting that she had predominantly chronic left buttock pain. The

doctor felt it was mostly due to deconditioning of her left gluteal muscles when she was on protected weight bearing status. He encouraged her to continue with her home exercises. Ms. Brothersen expressed concern about needing to lift 25 pounds constantly as part of her job. Dr. Chen recommended a functional capacity evaluation (FCE). In the meantime, he continued her restrictions of lifting up to 25 pounds. (JE4)

The FCE was performed with E3 Work Therapy Services on August 2, 2016. The testing was found to be valid due to Ms. Brothersen performing consistently during the testing. The report indicated that she met the material handling demands for a heavy demand vocation. It was determined that Ms. Brothersen can sit, stand, bend, and squat on a constant basis. According to the FCE, she may lift up to 68 pounds from 20 inches to waist, occasionally; carry 68 pounds for 25 feet, occasionally; and lift 35 pounds from waist to crown, occasionally. (JE7)

Dr. Chen placed Ms. Brothersen at maximum medical improvement (MMI) on August 8, 2016. He assigned her 2 percent impairment of the whole person due to left hip range of motion limitation, 5 percent of the whole person for her healed pubic symphysis fracture, 5 percent whole person impairment for the healed sacral fracture. Thus, Dr. Chen assigned a total of 12 percent whole person impairment as a result of the work injury. Dr. Chen stated that Ms. Brothersen required no permanent work restrictions and could resume her full work duties. (JE4) I find the impairment rating of Dr. Chen to be persuasive. Based on the opinion of Dr. Chen, I find that Ms. Brothersen has sustained 12 percent permanent functional impairment to her body as a whole as a result of the work injury.

Ms. Brothersen returned to see Dr. Chen on February 20, 2017. At that time, she was working as a cook in a care center. She was having increased pain with prolonged sitting and standing. She was only working about 30 hours per week and felt exhausted afterwards. Ms. Brothersen reported continued pain in the left groin, low back, and buttock pain. She rated her pain as 7/10. She also reported some numbness and tingling in her left foot. Dr. Chen recommended 1000 mg of Tylenol twice daily, as well as naproxen. He also encouraged her to resume walking or swimming. He recommended that she should try to manage her stress and keep a positive outlook regarding her chronic back pain. Dr. Chen confirmed his prior impairment rating of 12 percent to the whole person. (JE4)

At the request of her own attorney, Ms. Brothersen underwent an independent medical evaluation (IME) with Sunil Bansal, M.D. on July 21, 2017. Ms. Brothersen reported having difficulty with her memory and trouble with comprehension. She also reported consistent ringing of her ears and dizziness if she stood up too quickly. She was experiencing frequent headaches. She had pain in her left-sided ribs when she coughed. She also reported constant, sharp, and shooting low back pain no matter what her activity. She also experiences pain in her left hip. She reported she now had a limp when she walked for the first five or six steps which then resolves.
Ms. Brothersen reported that she had been working for a nursing home, but was required to push a very heavy cart, which caused her more pain. At the time of the IME,

she was working at a retail store which only required her to lift lightweight objects; nothing more than 30 pounds.

Dr. Bansal stated that at the time of the work injury, Ms. Brothersen sustained multiple injuries including her back, pelvis, left hip, head, and spleen, as well as left-sided rib fractures. With regard to her head, chest, ribs, and abdomen, Dr. Bansal placed Ms. Brothersen at MMI as of February 17, 2016. With regard to her back, right hip, left hip, and pelvis, the doctor agreed with Dr. Chen that she had reached MMI on August 8, 2016. Dr. Bansal felt that Ms. Brothersen had not sustained any ratable impairment for her chest, ribs, and abdomen injuries. He assigned six percent whole person impairment for her back, four percent whole person impairment for her left hip, and ten percent whole person impairment for her pelvis.

Dr. Bansal stated that Ms. Brothersen should follow permanent restrictions. He noted that Ms. Brothersen was sore for one week after the FCE. Dr. Bansal felt her restrictions should be a restriction of no lifting over 30 pounds occasionally and no lifting over 20 pounds frequently. He also stated no prolonged standing or walking greater than 60 minutes at a time. (Claimant's Exhibit 1)

It is noted that Ms. Brothersen's medical history includes, but is not limited to, COPD, pneumonia, two pacemakers, chiropractic care for her back, ribs, and shoulders and PTSD from her military service. Through the Department of Veteran Affairs, Ms. Brothersen was awarded 70 percent disability with an effective date of December 14, 2015. (Defendants' Ex. G)

Ms. Brothersen's last date of employment with River Bend was the date of the injury. She was terminated for her positive drug test on the date of the injury and for violating the drug free workplace policy. Jillian Brockhohn, a human resource generalist for River Bend, testified at the hearing. Ms. Brockhohn had worked at River Bend for one year and four months prior to the date of the arbitration hearing. At the time of Ms. Brothersen's injury, Ms. Brockhohn had not yet been hired by River Bend. Ms. Brockhohn has never performed either of the jobs that Ms. Brothersen performed at River Bend. She testified that only approximately 25 percent of the lifting had to be done manually. Ms. Brockhohn testified that the job would be within the guidelines noted in the FCE. The undersigned did not find Ms. Brockhohn's testimony to be compelling because during cross-examination, it became evident that her knowledge of the jobs performed by Ms. Brothersen and of the FCE itself was very limited.

Ms. Brothersen testified that she gave it all she had during the FCE. She testified that she does not believe that she could perform the physical lifting as set forth in the FCE on Joint Exhibit 7, page 124 on a full-time basis. (Testimony)

In September of 2016, Ms. Brothersen began working at Grinnell Health Care; she worked approximately 30 hours per week. In this job she cooked, cleaned the kitchen, served residents, washed dishes, and set up the dining room. (Cl. Ex. 2, p. 22) However, Ms. Brothersen testified she did not enjoy this work because she does not like

to cook. Ms. Brothersen also testified she left because she could not physically perform the job. She had difficulty pushing a heavy steam table down the halls and turning the table around the corners. Initially, she thought she could get her body used to the physical demands but she simply could not. She held this job for approximately 8 months. She testified that she took a 6-8 week break during that time due to her pain levels. (Testimony) To Ms. Brothersen's credit, she continued to perform this job until she found other employment.

Ms. Brothersen left her employment at Grinnell Health Care to take a job at Van Heusen's at the outlet mall. Initially, she worked as a shipment processor where she received and unloaded boxes. She then moved to the floor supervisor/key holder. In this position, she ran the cash register, prepared deposits for the bank, closed the store, vacuumed, folded clothes, and used ladders. She voluntarily left this job due to a lack of hours; she was only working 10-20 hours per week. She believes she could still physically perform this job.

Next, Ms. Brothersen went to work at Subway in the Pilot Flying J; she continued to work there full-time as of the time of the arbitration hearing. Her job includes making sandwiches, cleaning, doing dishes, making bread, stocking items, taking out trash, and running the cash register. She is on her feet her entire shift. She currently earns $10.25 per hour. She testified that she does not perform all of the duties. For example, she does not throw heavy cases of frozen food. Her employer is willing to work around her physical limitations. (Testimony)

This is a difficult case with regard to the issue of Ms. Brothersen's permanent restrictions. She underwent a valid FCE in August of 2016 which placed her in the heavy demand category. (JE7) Dr. Chen reviewed the FCE and released her to return to work without restrictions in August of 2016. At that time, Ms. Brothersen was not employed. In September of 2016, she began working at the care center. In February of 2017, she returned to Dr. Chen and reported an increase in symptoms with prolonged sitting and standing. She reported she was exhausted after work. Dr. Chen again released her without restrictions. In July of 2017, Ms. Brothersen underwent an IME with Dr. Bansal who placed restrictions on her that are more in line with the medium work category. Dr. Bansal's restrictions include no prolonged standing or walking greater than 60 minutes at a time. (Cl. Ex. 1, p. 17)

Ms. Brothersen is currently working in a full-time job that requires her to be on her feet all day. Dr. Bansal's restrictions are not consistent with Ms. Brothersen's demonstrated capabilities. I do not find the restrictions set forth by Dr. Bansal to be persuasive. The only other physician to render in an opinion in this case regarding restrictions is Dr. Chen. I find Dr. Chen's opinions with regard to permanent restrictions to be more persuasive. Thus, I conclude that Ms. Brothersen has no permanent restrictions as a result of the work injury.

Although Ms. Brothersen does not have any restrictions placed on her activities, I find that she does continue to have ongoing pain and symptoms as a result of the work

injury. Despite these ongoing symptoms Ms. Brothersen has demonstrated that she is motivated to remain in the workforce.

At the time of hearing, Ms. Brothersen was in her mid-fifties and resided in Guernsey, Iowa. She graduated from high school and described herself as an average student. She attended community college and received a dental assistant diploma. However, she has never worked as a dental assistant because she was unable to obtain employment in that field. She also has a business and accounting certificate which she received while in Colorado. However, she also has never worked as an accountant or bookkeeper. (Testimony)

Ms. Brothersen was in the Army for approximately one and a half years. While in the Army she received forklift driver training. While in the Army she also had to manually be able to lift up to 100 pounds. (Testimony)

Ms. Brothersen has a varied work history which demonstrates her motivation to continue working and her willingness to work in a variety of positions. The details of her work history are set forth in Claimant's Exhibit 2. Her jobs have included detassling, working in warehouses and concession stands, forklift operator, repairing steam cleaners, supervising employees, picking, packing, and shipping orders, and working in a retail liquor store. She has also been a buyer for liquor stores. She has performed part-time office work for a chiropractor. She has been the store manager of a Subway restaurant. She has worked at Goodwill where she helped to sort and price donations, operate a forklift, and unload trucks. She has worked as a day laborer building displays. Ms. Brothersen testified that she does know how to operate a computer. Her typing skills are limited to the hunt and peck method. (Testimony)

Ms. Brothersen testified that she would love to return to work operating a forklift but feels that she cannot. She believes that she could not handle the constant bouncing, climbing on and off the forklift, and stacking materials onto pallets for the forklift to move. Ms. Brothersen has not yet attempted to return to forklift work. While it is noted that many of her prior jobs require her to lift more than the weight limits set forth in the FCE, those limits were not adopted by Dr. Chen. (Testimony)

Ms. Brothersen also testified that she could not return to many of her other prior jobs due to the work injury. These jobs include waitressing, warehouse concession stand jobs, working for Hartz Pet Supply, Book Company warehouse work, the wine and spirit jobs she previously had, and her prior job at Goodwill. She also testified that she could not return to the position she was performing on the date of the injury at River Bend. She testified that more than 50 percent of her time was spent lifting and she does not believe she could physically handle that any longer. (Testimony) However, I find that she has no formal restrictions placed on her activities that would preclude her from this type of employment. I also conclude that she does continue to have ongoing pain and symptoms as a result of the work injury.

Ms. Brothersen's work history has provided her with various experiences and qualifications. She has experience performing inventory work. She has experience working with bills of lading, FedEx, and UPS for a variety of employers. She has experience working as a supervisor. She has been responsible for hiring, firing, training, and disciplining employees. She also has experience preparing bank deposits, handling accounts payable/receivable and payroll hours.

Considering her age, educational background, employment history, ability to retrain, motivation to continue working, length of healing period, permanent impairment, and lack of permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 20 percent loss of future earning capacity as a result of her work injury with the defendant employer. As such, claimant is entitled to 100 weeks of permanent partial disability benefits commencing on the stipulated date of August 9, 2016.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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).

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).

Based on the above findings of fact, I conclude that Ms. Brothersen has sustained 20 percent industrial disability as a result of the work injury. As such, Ms. Brothersen is entitled to 100 weeks of permanent partial disability benefits commencing on August 9, 2016.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of four hundred forty-five and 86/100 dollars ($445.86).

Defendants shall pay one hundred (100) weeks of permanent partial disability benefits commencing on the stipulated date of August 9, 2016.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 26th day of February, 2018.

ERIN Q. PALS
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.