BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOROTHY WRIGHT,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5046428

ARBITRATION

DECISION

Head Note Nos.: 1802; 1803

STATEMENT OF THE CASE

Dorothy Wright, claimant, filed a petition in arbitration seeking workers' compensation benefits from Quaker Oats Company, employer, and Indemnity Insurance Company of North America, insurance carrier. Hearing was held on February 17, 2014.

Claimant was the only witness testifying live at trial. The evidentiary record also includes Claimant's Exhibits 1-12 and Defendant's Exhibits A-K. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties request the opportunity for post-hearing briefs which were submitted on March 19, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. The commencement date for permanent partial disability benefits.
2. Whether claimant is entitled to healing period benefits from March 1, 2012 through September 19, 2013.

3. The extent of entitlement to industrial disability.
4. Assessment of costs.

FINDINGS OF FACT

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

Dorothy Wright sustained 60 percent industrial disability as a result of the August 30, 2011, work injury at Quaker Oats Company ("Quaker").

Ms. Wright began working at Quaker as a seasonal employee in 1998. As a seasonal employee she performed various types of work depending on Quaker's needs. While she was employed with Quaker she worked in numerous departments including oat mill, ready-to-eat, instant oats, sanitation, packaging, elevators, and shipping. On August 30, 2011, as she walked into an elevator at Quaker, the gate closed striking her on the head. She fell onto the ground injuring her right hip. (Testimony)

Claimant is alleging that she injured her right hip and body as a whole as a result of the August 30, 2011, injury at Quaker. I note that claimant is not claiming that her head pain, cognitive (memory) difficulties, dizziness, hearing loss, heart problem, and stomach pain are related to the work injury. It is also noted that Ms. Wright underwent extensive treatment; the undersigned will not endeavor to summarize all of her treatment in this decision merely the more pertinent medical evidence.

Immediately after the August 30, 2011, injury Ms. Wright was taken via ambulance to St. Luke's hospital in Cedar Rapids. (Ex. 5) At the hospital she was assessed with right hip fracture, osteoporosis, and a forehead abrasion. (Ex. 6, p. 3) She was admitted into the hospital and was seen by Daniel C. Fabiano, M.D. Dr. Fabiano recommended hip hemiarthroplasty. (Ex. 6, p. 5) Dr. Fabiano performed this operation on August 31, 2011. (Ex. 6, pp. 13-14) Ms. Wright was discharged from the hospital to a rehab facility on September 2, 2011, and subsequently underwent physical therapy. (Ex. 5, p. 6; Ex. 7 & 8)

On October 10, 2011, Ms. Wright saw Stanley J. Mathew, M.D. She reported continued right hip pain. She was using a walker for mobility and occasionally indoors she was using a cane. He recommended she continue her home exercise program. She was not fond of oral medications so he prescribed a compounding cream to control the pain. She was instructed to follow-up with her orthopaedic surgeon. (Ex. G, pp. 3-11)

Ms. Wright followed-up with Dr. Fabiano on October 13, 2011. According to the clinical note Ms. Wright was feeling fine. Dr. Fabiano felt that her prosthesis was intact and that orthopedic physical therapy was appropriate. She was told to call if she would like to be seen again. She was released to return to work without any restrictions. (Ex. D, pp. 1-3) On October 28, 2011, a representative from the third party administrator

wrote to Dr. Fabiano to verify that she was released without restrictions. There was some question because she was walking with a walker and/or a cane and she was still taking pain medication. Dr. Fabiano again indicated she did not require any restrictions. He felt she would reach maximum medical improvement in approximately six months. (Ex. D, p. 4)

Ms. Wright received additional conservative treatment from Dr. Mathew. By May 30, 2012, Dr. Mathew noted she was able to walk functional distances independently though she did have pain. He felt she was unable to return to work at that time. He recommended she return to the clinic in eight weeks. (Ex. G)

On November 10, 2012, Ms. Wright called Dr. Fabiano's office to advise him that she could not return to work and she was still using a walker. She also informed the doctor's office that she was done with work until June of 2012. (Ex. D, p. 5) Dr. Fabiano signed a note dated November 10, 2011, which indicated she could return to work on June 1, 2012. (Ex. D, p. 6) On December 12, 2011, Quaker contacted Dr. Fabiano's office to advise that they did in fact have light duty work available to Ms. Wright and could accommodate her cane or walker. Dr. Fabiano's office issued a note indicating Ms. Wright could return to work on December 19, 2011, light duty work and she should be allowed to use her walker or cane until June 1, 2012. (Ex. D, pp. 7-8) On January 11, 2012, claimant's counsel wrote to Dr. Fabiano to clarify work restrictions. Dr. Fabiano clearly stated that there were no restrictions for Ms. Wright for sitting, walking, or standing. (Ex. D, p. 9)

Dr. Fabiano saw Ms. Wright again on May 28, 2013. At that time she reported she was feeling fine. She did have posterior right thigh pain but no lower back or right hip joint pain. He again stated she could return to work without any restrictions. (Ex. D, pp. 10-12)

The first issue that must be addressed is when Ms. Wright reached maximum medical improvement (MMI). Defendants contend Ms. Wright reached MMI on March 1, 2012. In support of their position they rely on the October 28, 2011, opinion of Dr. Fabiano. At that time, Dr. Fabiano stated that claimant was released without restrictions and would reach MMI at six months. (Ex. D, p. 4) However, Dr. Fabiano later stated Ms. Wright had reached MMI at her September 20, 2013, appointment with him. (Ex. 2, p. 5) Thomas Gorsche, M.D., also opined that Ms. Wright reached MMI six months post-operation which would be March 1, 2012. (Ex. 9, pp. 4-5) Defendants urge that Ms. Wright's condition did not significantly improve after March 1, 2012. Specifically, defendants argue that although claimant underwent physical therapy from March 2012 to July 2012, her medical condition did not change and therefore she was not in a state of healing period. Claimant contends she reached MMI on September 20, 2013. In support of her contention she relies on her treating physician's September 20, 2013, opinion. In October of 2013, Dr. Fabiano reiterated his opinion that she reached MMI on September 20, 2013 in correspondence with defense counsel. (Ex. 2, p. 6)

Dr. Fabiano is the treating surgeon in this matter. Dr. Fabiano observed and treated Ms. Wright over a long period of time. He was able to see her on numerous occasions. Dr. Gorsche was only able to see Ms. Wright on one occasion. Dr. Gorsche's opinion regarding MMI is based on what he would expect someone with her injury. It is not based on any treatment he provided for Ms. Wright. I find that Dr. Fabiano's opinion carries greater weight regarding the date of MMI. Therefore, I find Ms. Wright reached MMI on September 20, 2013. Because Ms. Wright reached MMI on September 20, 2013, this is the date her healing period ended and the date any permanent partial disability benefits should commence.

The next issue to address is permanent impairment. Dr. Fabiano and Dr. Gorsche agree that she sustained 15 percent impairment to her body as a whole due to the August 30, 2011 work injury. Therefore, I find the preponderance of the evidence demonstrates she sustained 15 percent functional impairment to her body as a whole due to the August 30, 2011 work injury.

Next we turn to the issue of permanent restrictions. Initially, Dr. Fabiano released Ms. Wright to return to work without restrictions on October 28, 2011. (Ex. D, p. 3) Dr. Fabiano later authored a work note stating she could return to work without restrictions on June 1, 2012. (Ex. D, p. 6) On January 11, 2012, Dr. Fabiano clarified for her attorney that there were no restrictions on claimant's ability to sit, walk, or stand. (Ex. D, p. 9) On May 28, 2013, Dr. Fabiano again stated Ms. Wright had no restrictions. (Ex. D, p. 13) On August 9, 2013, Dr. Fabiano responded to a letter from claimant's counsel and stated she "may" follow the FCE recommendations. (Ex. 2, p. 1) Finally, on October 15, 2013, Dr. Fabiano recommended permanent restrictions of lifting no more than 50 pounds, no running, and no squatting. (Ex. 2, p. 6) A review of the records demonstrates that Dr. Fabiano never indicated that the FCE restrictions were necessary. In fact, after he stated that she "may" follow those restrictions he then issued a final opinion stating what he felt her permanent restrictions should be. I find that Dr. Fabiano's October 15, 2013, final opinion regarding restrictions represents his opinion on the final permanent restrictions for Ms. Wright.

Dr. Mathew did provide some temporary restrictions for Ms. Wright. However, on July 19, 2012, he released her to full duty work. Dr. Mathew did restrict her activities at a later date but those restrictions were due to conditions Ms. Wright is not claiming as part of this injury. (Ex. G, p. 16; Ex. 8, p.2)

Dr. Gorsche felt that Ms. Wright had a good surgical result. He recommended permanent work restrictions of no squatting, no flexion of the hip past 100 degrees, and no lifting more than 40 pounds repetitively. (Ex. 9, p. 5) Dr. Gorsche did not restrict her ability to walk or stand.

Ms. Wright did undergo an FCE at her home with Mr. Blankenspoor; however, no physician has adopted these restrictions. Therefore, the results of the FCE are not given much weight. (Ex. 4)

Once again I find the opinion of Dr. Fabiano to be the most persuasive. Dr. Fabiano treated Ms. Wright over a period of time, performed surgery on her hip, and was not hired to simply provide an opinion for litigation. Therefore, I find that Ms. Wright's permanent restrictions as a result of the August 30, 2011, injury are lifting no more than 50 pounds, no running, and no squatting.

Next, we turn to the issue of industrial disability. Following the August 30, 2011, injury Ms. Wright returned to Quaker and performed light duty work for a short period of time in 2012. However, she did not return to work at Quaker after that short stent and was eventually terminated on October 31, 2013. (Ex. 10, p. 2) Although Ms. Wright enjoyed working for Quaker she has not applied for any positions with Quaker or any other employer since the time of her injury. (Testimony)

In July of 2013, Quaker attempted to contact Ms. Wright on several occasions to advise her that they could accommodate the restrictions set forth by Dr. Gorsche. Those restrictions were no squatting, no flexing the right hip past 100 degrees, and no lifting more than 40 pounds on a repetitive basis. (Ex. J, p. 2) However, claimant did not even attempt to return to work. Based on claimant's testimony at hearing it seems claimant believed she could only return to work consistent with the FCE restrictions. Despite the fact that no physician had adopted the FCE restrictions claimant refused to attempt any work that was not within the FCE restrictions. Because Ms. Wright declined Quaker's offer to work with the restrictions set forth by the treating physician she was terminated. (Ex. 10, p. 2)

At the time of hearing Ms. Wright was 67 years of age. Ms. Wright testified that she has difficulty walking and bending. She also testified that her right foot just seems like it wants to drag sometimes. (Testimony) She did not have a cane with her at the hearing.

Ms. Wright graduated from high school in 1965. While in high school Ms. Wright waitressed at several different restaurants. Her work history includes childcare, warehouse work, hotel housekeeping, working for the City of Cedar Rapids Sewer Department, manufacturing, and janitorial work. (Ex. 1, p. 3-4) Ms. Wright testified that she could not return to many of her prior jobs. However, her testimony is not consistent with the medical evidence. For example, Ms. Wright testified that she could not return to some of these positions because she can only walk a couple of blocks without the use of a cane. However, even the test results from the FCE performed at her attorney's request states she only has a "slight or no limitation" on walking. (Ex. 4, p. 3) Furthermore, Ms. Wright's surgeon has placed no limitation on her walking. There are some prior jobs that Ms. Wright believes she is still capable of performing. She believes she could return to childcare for the neighborhood kids, and to some of her prior work at Quaker. (Testimony)

In the present case, the treating surgeon has stated that Ms. Wright is capable of returning to work with restrictions of no lifting over 50 pounds, no squatting, and no running. However, Ms. Wright has not applied for any positions with Quaker or any

other employer. Ms. Wright admitted that she did not contact Quaker to see if they could accommodate the restrictions from the FCE.

I find that Ms. Wright has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, she has now been out of the labor market for quite some time and she has restrictions on her activities which she did not have prior to the injury. Considering Ms. Wright's age, educational background, employment history, ability to retrain, lack of motivation, length of healing period, permanent impairment and permanent restrictions and the other industrial disability factors identified by the Iowa Supreme Court, I find that Ms. Wright has proven that she sustained a 60 percent loss of future earning capacity as a result of his work injury with Quaker.

CONCLUSIONS OF LAW

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).

Claimant asserts she is permanently and totally disabled under the traditional industrial disability analysis. The parties stipulate that this injury involves an injury to the body as a whole and should be compensated with industrial disability pursuant to Iowa Code section 85.34(u).

Because claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning

capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. An injured workers' healing period ends when they return to work or when "it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury." Iowa Code section 85.34(1). In the present case, Ms. Wright reached MMI on September 20, 2013. Therefore, her healing period ended when it was medically indicated that significant improvement from the injury was not anticipated. I found Ms. Wright's healing period ended on September 20, 2013, when she was placed at maximum medical improvement (MMI) by Dr. Fabiano.

Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34. The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270; 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525 (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, sections 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

In considering all of the evidence within this record, I found the most relevant industrial disability factors in this case to be the length of claimant's healing period, the permanent impairment ratings, the permanent work restrictions, claimant's lack of motivation to find alternate employment and claimant's age as the most relevant factors affecting the industrial disability award. Claimant's educational background, employment history, inability to return to some of her prior employment and ability to retrain were also relevant considerations, though all industrial disability factors identified by the Iowa Supreme Court were weighed and considered. Having considered all of the relevant industrial disability factors, I found that claimant did not prove by a preponderance of the evidence that she is permanently and totally disabled at the present time. Nevertheless, I did find that Ms. Wright has proven a significant loss of future earning capacity. I specifically found that she has shown by a preponderance of the evidence a 60 percent loss of future earning capacity.

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. Having found claimant sustained a 60 percent loss of earning capacity, claimant is entitled to 300 weeks of industrial disability, or permanent partial disability, benefits. Iowa Code section 85.34(2)(u). Pursuant to my above findings, all weekly benefits shall be paid at the rate of $462.93, and the permanent partial disability benefits shall commence on September 20, 2013.

Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions . . . (3) costs of service of the original notice and subpoenas, . . . (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, . . . (7) filing fees when appropriate, . . .

The claimant is awarded the filing fee ($100.00). I find that this is a reasonable cost allowed by the rule.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of four hundred sixty-two and 93/100 dollars ($462.93) per week commencing on September 20, 2013.

Defendants shall be entitled to a credit against the above award for any benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall pay costs as detailed above.

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 23rd day of April, 2015.

ERIN Q. PALS
DEPUTY WORKERS'
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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.