BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CINDY HENLE, Claimant, vs. HESKA CORP., Employer, and ATLANTIC SPECIALTY INSURANCE COMPANY., Insurance Carrier, Defendants.	File No. 5056000 ARBITRATION DECISION Head Note No.: 1803, 2500

FILED
AUG 28 2017
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Cindy Henle, claimant, filed a petition in arbitration seeking workers' compensation benefits against Heska Corp, employer, and Atlantic Specialty Ins. Co., insurer, for an accepted work injury date of April 29, 2015.

This case was heard on March 14, 2017, in Des Moines, Iowa. The case was considered fully submitted on April 21, 2017, upon the simultaneous filing of briefs.

The record consists of claimant's exhibits 1-25, defendants' exhibits A-G, the testimony of claimant and Fred Bebout.

ISSUES

1. The extent of claimant's industrial disability;

2. Entitlement to medical benefits;

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 claimant sustained an injury arising out of and in the course of her employment on April 29, 2015. They agree that if there is a permanent disability found it is industrial in nature. They further stipulate that at the time of the injury, claimant's gross earnings were $677.90 per week and that the claimant was single and entitled to five exemptions. Based on those foregoing numbers, the weekly benefit rate is $457.04.

The commencement date for permanent partial disability benefits is September 22, 2016.

Prior to hearing, claimant was paid 7 weeks of permanent partial disability at the rate of $454.18.

FINDINGS OF FACT

Claimant was a 40-year-old person at the time of the hearing. Her educational background consisted of high school and some college. Her work history includes fast food industry, mail room clerk, data entry, installer of landscape plants and materials, packager and weigh master. At the time of her injury she was a quality assurance auditor and immunotherapy auditor for the defendant employer. Claimant was terminated from her employment on September 22, 2015. Her FMLA had run out and the position needed to be filled. (Exhibit 22, page 127)

She does not believe she could return to her past employment, even the mail room clerk or data entry positions, because of her current condition.

Claimant's past medical history was significant for right shoulder and neck pain preceding the injury. On January 17, 2013, she sought treatment from her family clinic for right shoulder and neck pain which had started four to five days prior. It was diagnosed as a neck sprain. (Cl. Ex. 1, p. 1-2). She was seen in follow-up on January 25, 2013, for her neck pain which she rated a 7 on a 10 scale. She had tenderness upon palpation and right-sided muscle spasms. (Cl. Ex. 1, p. 3) Medications were prescribed and a referral for physical therapy consult was given. (Cl. Ex. 1, p. 5) She complained of right shoulder/neck pain on February 26, 2013, and during an office visit on April 5, 2013. (Def. Ex. D, p. 1, 3-4). On May 6, 2013, her family doctor informed claimant that her neck and back discomfort was driven by stress, anxiety and worrying. (Def. Ex. D, p. 8).

None of the complaints of neck and shoulder pain were attributed to work during the medical visits. Claimant testified that she did not bring up work as a cause because she was told by Fred Bebout, HR manager for defendant, that her care would not be covered by private insurance if she brought up a potential work injury. Mr. Bebout testified that he told her that if the injury was work related, then workers' compensation

would cover it, but if it was not work related, she could go to a doctor of her personal choice.

Claimant reported shoulder pain related to work on or about April 29, 2015. She was then sent to occupational physician Richard Bratkiewicz, M.D., where she reported that she had been performing repetitive tasks for approximately 4 months (Cl. Ex. 2, p. 21). Specifically, she scooped material onto a scale. She had tenderness and reduced range of motion. She was given work restrictions and sent for an MRI. The radiologist's interpretation of the MRI was "no rotator cuff tear[.] [n]o significant underlying rotator cuff tendinopathy . . . [m]ild acromioclavicular joint degenerative changes." (Cl. Ex. 6, p. 69). Dr. Bratkiewicz saw claimant on May 12, 2015, and explained the MRI results to her. He diagnosed her with strain from overuse and sent her to physical therapy. (Cl Ex 2, p. 22) After a round of physical therapy, she returned to Dr. Bratkiewicz on June 3, 2016. (Cl. Ex. 2, p. 23) During this visit, she reported an increase in range of motion and decrease in pain. She denied any neck pain. (Cl Ex. 2, p. 23) More physical therapy was ordered. During subsequent visits on July 22, 2015, August 13, 2015 and on September 4, 2016, claimant had full range of motion in her shoulder, but continued to have complaints of pain. (Cl. Ex. 2, pp. 26, 27 and 28). She continued to deny neck pain.

A referral to an orthopaedic specialist was made and claimant was examined by Mark Kirkland, D.O., an orthopedic surgeon, on August 24, 2015. (Cl. Ex. 3) She complained of some neck pain but believed it was associated with her right shoulder. He did find objective findings of shoulder impingement.

> She does have positive objective findings on physical examination today. She has pain to palpation specifically over the anterior half of the AC joint. She has a positive crossarm test. I am able to palpate popping coming from her active motion of her right shoulder today. The MRI shows hypertrophy and edema at the acromioclavicular joint.

(Cl. Ex. 3, p. 32) Dr. Kirkland further clarified that claimant sustained a right shoulder acromioclavicular joint internal derangement with no significant preexisting condition. (Cl. Ex. 3, p. 31). He attributed the cause of this injury to "mechanics of her job." (Cl. Ex. 3, p. 31)

Her care was transferred to orthopedic surgeon Timothy Vinyard, M.D. (Cl. Ex. 4) While she had right shoulder pain and limited range of motion, she expressed no pain in the neck and had "active pain free range of motion" in the cervical spine. (Cl. Ex. 4, p. 36)

After consultation with the claimant, Dr. Vinyard initially treated claimant conservatively with injections. (Cl. Ex. 4, p. 37) When she experienced only temporary relief after two injections, it was decided claimant would undergo surgical repair of her shoulder. (Cl. Ex. 4, p. 42) Dr. Vinyard performed surgery on claimant's right shoulder,

where he repaired a tear in the upper border of her subscapularis and decompressed her shoulder. (Cl. Ex. 8).

Post-surgery recovery was slow, but claimant expressed a reduction in pain and showed an increase in range of motion. (See generally Cl. Ex. 4, pp. 44-53) On June 13, 2016, she returned with complaints of swelling in her right upper arm which Dr. Vinyard suggested should be seen by her family physician as he did not believe it was related to her shoulder injury or surgery. (Cl. Ex. 4, p. 54) The swelling resolved on July 12, 2016. (Cl. Ex. 4, p. 56) However, her post-surgery recovery was still slow. During the August 4, 2016, checkup with Dr. Vinyard, claimant felt that her pain symptoms were worsening, particularly over the anterior aspect of her shoulder radiating into the biceps. (Cl. Ex. 4, p. 59) A corticosteroid injection was administered which provided temporary relief. (Cl. Ex. 4, p. 63)

A second MRI was ordered but did not show any active shoulder pathology, rotator cuff tear, significant tendinosis or labral pathology. (Cl. Ex. 6) Claimant returned to Dr. Vinyard's office on September 22, 2016, and reported "sharp, moderate pain over the anterior and anterolateral aspect of her shoulder radiating into her proximal upper arm." (Cl. Ex. 4, p. 63) She discontinued physical therapy as she did not believe it was helpful and did not believe anti-inflammatory medications aided her either. Her last physical therapy appointment documented pain while sleeping, pain upon lifting objects away from her body, and swelling along the right anterior shoulder and chest compared to the left. (Ex. 9, p. 77) The postoperative injection provided only short term relief. (Cl. Ex. 4, p. 63) Dr. Vinyard concluded:

> I had a thorough discussion with the patient. We reviewed her magnetic resonance imaging. I do not see any structural damage on her magnetic resonance imaging. She is concerned that the magnetic resonance imaging did not fully cover the area where she is having pain. We discussed that could be some referred pain. I really think if she has any structural damage to explain her symptoms, that would be coming from her shoulder. I do not think another magnetic resonance imaging of her humerus region is likely to reveal any significant pathology. At this point, I do not feel like further injections, medications or physical therapy are likely to help. We discussed either going off restrictions and attempting to work through any symptoms or considering a functional capacity evaluation to be placed on permanent restrictions. She considered her options carefully and elected to proceed with being placed at MMI and coming off any restrictions. I told the patient I would be happy to see her back on an as-needed basis.

(Cl. Ex. 4, p. 64-65)

Dr. Vinyard wrote an opinion letter assessing a 1% impairment rating.

An EMG study performed on January 3, 2017, due to "burning into the Rt. neck and Rt. upper arm and N/T into the arm since April, 2015" had negative results. (Ex. 10) Mark Puricelli, D.O., saw claimant on February 9, 2017, for "limb pain." (Ex. 11, p. 82) She complained of pain in the right shoulder and bicep going down into her fingers with occasional coldness in her right hand. (Ex. 11, p. 82) Dr. Puricelli suggested that she should see a pain specialist given the unremarkable MRI. (Ex. 11, p. 85)

Claimant underwent an IME with Sunil Bansal, M.D., on November 18, 2016. (Cl. Ex. 12) During the examination, he noted tenderness to palpation of the right trapezius but no muscle spasm along with full range of motion. (Cl. Ex. 12, p. 94) She had tenderness to palpation, greatest over the deltoid into the proximal biceps and some reduced range of motion. (Cl. Ex. 12, p. 95) He assigned an eight-percent (8%) whole person rating and restrictions of "no lifting greater than 20 pounds occasionally, or 10 pounds frequently with the right arm, along with no lifting more than 5 pounds above shoulder level or away from the body with the right arm occasionally[.] [n]o frequent overhead lifting with the right arm." (Cl. Ex. 12, p. 99) He did not find that her neck pain was attributable to any work related injury. He opined that claimant had sustained an overuse injury, much as Dr. Vinyard had initially diagnosed. (Cl. Ex. 12, p. 96)

He also agreed that the preoperative visit and lab testing done by her primary care physician was reasonable and necessary. (Ex. 12, p. 99)

At hearing, Claimant also sought payment for unauthorized care with her family physician for conditions that she felt were due to her cervical spine, from December 20, 2016 through January 18, 2017. (Cl. Ex. 1, pp. 10-20). It should be noted that she informed her personal physician at this time that her occupational medicine doctor and her orthopedic surgeon "did nothing" to ameliorate her complaints. (Cl. Ex. 1, p. 10). However, claimant admitted at hearing that Dr. Vinyard's surgery did help her condition. (Claimant's Hearing Testimony). Further, Claimant reported to her physical therapist multiple instances of her condition improving. (Def. Ex. E, pp. 5, 9 and 14) Claimant also sought payment for unauthorized care with Capital Orthopaedics & Sports Medicine, concerning EMG/NCV testing dated January 3, 2017. (Cl. Ex. 10) She sought payment for unauthorized treatment with Mercy Ruan Neurology (Dr. Mark Puricelli), dated February 9, 2017. (Cl. Ex. 11) Last, claimant sought payment for an unauthorized MRI of her cervical spine dated January 13, 2017. (Cl. Ex. 7) All of this unauthorized treatment involved claimant's cervical spine, where the result of this testing and treatment failed to demonstrate a cervical disc condition. Thus, there can be no argument this testing and treatment improved Claimant's condition.

Further, claimant's own IME physician, Dr. Bansal, opined that there was "insufficient medical evidence to attribute a work-related cervical neck condition." (Cl. Ex. 12, p. 96) Additionally, Dr. Vinyard opined that the contested treatment was neither reasonable, nor necessary, in relation to claimant's injury dated April 29, 2015, and was not causally related to her work injury dated April 29, 2015. (Def. Ex. G) At hearing,

Claimant testified that she pursued this unauthorized treatment because she felt Dr. Vinyard misread her original MRI, where he found a tear upon surgery, and therefore did not continue with treatment by him even though such was offered. (Claimant's Hearing Testimony).

Dr. Vinyard did not agree that claimant's treatment with her personal physician was reasonable or necessary nor causally related to her work injury. (Ex. G, p. 2)

Claimant maintains she sustained a right shoulder injury caused by repetitive work tasks which required her to work at or above shoulder level. The human resources supervisor, Mr. Bebout, testified that claimant rarely worked with her arms at shoulder height and never above. The scales were no more than 39.5 inches off the ground. During the IME with Dr. Bansil, claimant explained that 75% of her day is spent lifting and 50% of her duties are at or above shoulder level. This discrepancy, suggests the defendants, is evidence of claimant's lack of credibility. Regardless, the parties agree that the claimant did sustain a right shoulder injury as a result of her work.

Mr. Bebout did not do claimant's position day in and day out. Claimant's testimony was supported by her medical records as well as the doctors' opinions. Dr. Vinyard believed that the claimant's symptoms related back to her work and Dr. Kirkland did not find evidence of a pre-existing condition. Therefore, it is found that claimant was credible in her testimony that she was required to do repetitive work at or above shoulder level.

Currently claimant has pain and numbness extending into her right arm and fingers. She has a loss of strength when holding items away from her body with her right arm. Since her discharge, she has not engaged in serious pursuit of a new position.

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 R. App. P. 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).

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).

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 primary issue to be resolved is the extent of claimant's disability. The medical experts in this case largely agree claimant sustained an overuse injury to her right shoulder. This was repaired surgically by Dr. Vinyard. Post-surgery, claimant continued to have pain, weakness, and reduced function although the surgery had resolved some of her issues.

Dr. Vinyard assigned a 1% impairment rating with the explanation that he was unable to pinpoint the cause of her continued symptoms. The objective testing provided no insight. Dr. Bansil, the claimant's IM examiner, assigned an 8% impairment rating and imposed lifting restrictions for the right arm. Claimant testified she had no restrictions on the left side.

In the past, claimant has held clerical type positions as an administrative assistant doing bookkeeping and inventory, a mail room clerk, lab work polishing and

creating eye glasses, and data entry. These are all positions claimant should be able to do within even the restrictions Dr. Bansal assigned.

While there was some discussion as to claimant's neck, there are no medical opinions that support a finding that claimant sustained a neck related injury arising out of her work. Even Dr. Bansal concluded that the medical evidence was not sufficient for him to provide a causal link between the neck and claimant's work injury.

Therefore, based on all the preceding, it is determined claimant has sustained a 15% industrial disability.

The next issue is whether claimant is entitled to reimbursement and/or direct payment of unauthorized medical bills. The Supreme Court laid out the circumstances under which unauthorized medical expenses should be paid for by the defendants in Bell Bros. Heating v. Gwinn, 779 NW 2d 193 (Iowa 2010). This is not a case where the defendants denied liability. They accepted liability for the shoulder and had been providing care.

It was claimant who decided that physical therapy wasn't useful and discontinued it. She made the decision to seek out care on her own with Dr. Puricelli.

There was no indication from the defendants that claimant could not return to any of her previous authorized care providers including Dr. Vinyard or Dr. Kirkland. There was no evidence claimant's care had been abandoned by the defendants. Therefore, it is the burden of the claimant to show that the care from Dr. Puricelli and the EMG testing was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 NW 2d at 207. The opinion of Dr. Bansal was only that the preoperative visit and lab testing done by her primary care physician was reasonable and necessary, but not that the 2017 unauthorized medical visits were reasonable and necessary.

As claimant's brief points out, the EMG and cervical MRI revealed no neck problems that could be contributing to claimant's right upper extremity pains. Dr. Puricelli offered no care either, suggesting that a pain specialist would be better suited for her condition and complaints. Therefore, there's no evidence that the unauthorized care was beneficial either. Claimant did not carry her burden to show that the care was reasonable and beneficial or that going to her own medical providers resulted in a more favorable outcome. Bell Bros. Heating v. Gwinn, 779 NW 2d at 208.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant seventy- five (75) weeks of permanent partial disability benefits at the rate of four hundred fifty-eight and 04/100 dollars ($458.04) per week from September 22, 2016.

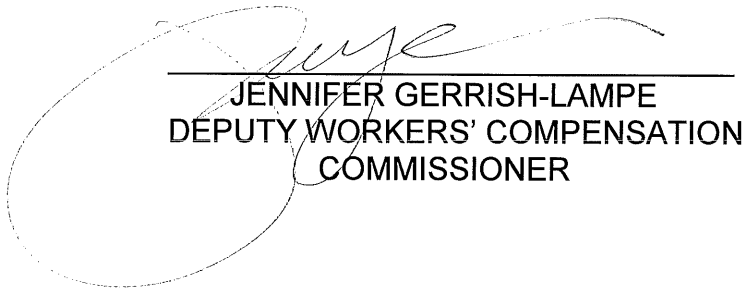
That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 28th day of August, 2017.



JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
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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.