BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AIDA AVILA,

Claimant,

vs.

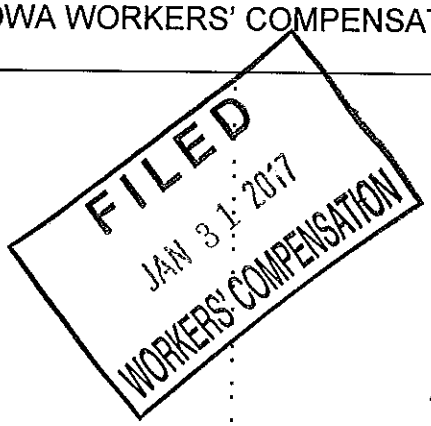
JBS USA, LLC,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5054461

ARBITRATION

DECISION

Head Notes: 1402.40, 1803, 2501, 2701

STATEMENT OF THE CASE

Aida Avila, claimant, filed a petition in arbitration seeking workers' compensation benefits from JBS USA, LLC, employer and American Zurich Insurance Company, insurance carrier, both as defendants. Hearing was held on October 5, 2016 in Des Moines, Iowa.

Claimant, Aida Avila, testified live at trial. Ms. Avila testified via a Spanish translator. The translator was Rachel Albin, a certified court interpreter. The evidentiary record also includes claimant's exhibits 1-16 and defendants' exhibits A-C, E-J. Exhibit D, a First Report of Injury, was withdrawn as an exhibit. 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 requested the opportunity for post-hearing briefs which were submitted on November 10, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability claimant is entitled to receive.
2. Whether claimant is entitled to past medical benefits?
3. Whether claimant is entitled to alternate medical care?
4. Assessment of costs.

FINDINGS OF FACT

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

The parties have stipulated that claimant, Aida Avila, sustained an injury which arose out of and in the course of her employment with JBS USA, LLC (" hereinafter JBS") on October 21, 2011. Additionally, the parties have stipulated that the injury resulted in temporary and permanent disability. The parties agree that Aida's permanent disability should be compensated as an injury to the body as a whole. The parties dispute the amount of industrial disability Aida is entitled to receive. Additionally, there is a dispute regarding Aida's entitlement to past and future medical benefits.

On October 21, 2011, Aida was working the "open leakers" job when she injured her right shoulder. This job required pulling product with a hook; in the process she injured her right arm. She felt immediate pain in her right shoulder, near the top of her shoulder and neck area. This occurred towards the end of her work day; she did not report it to anyone. However, she had the same pain the next day so she reported her injury to the nursing station. (Testimony) As a result of this injury claimant alleges injury to her right arm, right shoulder, neck, and body as a whole. (Petition)

After the injury, Aida treated with JBS Health Services and was eventually referred to Charles D. Mooney, M.D. Aida saw Dr. Mooney on November 21, 2011. She denied any history of prior neck injury or neck pain. However, Dr. Mooney reviewed the medical records of her family physician, Jerry Wille, M.D., and noted that she had been treating with Dr. Wille for right-sided shoulder and neck pain for almost two years. Dr. Mooney provided conservative treatment including medication, physical therapy, injections, and work restrictions. An EMG was conducted and revealed a normal study. By February 12, 2012, Dr. Mooney noted that Aida continued to complain of right shoulder pain that "certainly is not explained by her workup to date." (Exhibit 1, page 7) Aida underwent an MRI which revealed no evidence of rotator tear or other pathology. (Ex. 2, p. 28) On March 20, 2012, Dr. Mooney noted that Aida had essentially reached her physical therapy goals. He noted she still had some abnormal pain perception, but otherwise from a functional standpoint appeared to be doing well. She had normal range of motion in her shoulder. He released her from his care. She was released to return to full duty. She was also counseled on home exercise. She was to follow-up with Dr. Mooney as needed. Aida testified that when she performed full duty she felt the same pain again. (Ex. 1, pp. 1-9; Testimony)

At hearing Aida testified that she requested additional treatment from the defendants but was refused. The records in evidence state that she continued to have symptoms so she went to the Health Services Department at JBS approximately four times to ask for additional care, but she said she did not want to return to see Dr. Mooney so she did not seek care for a while. When the pain became intolerable she sought treatment with Dr. Wille on July 24, 2012. (Ex. 4, p. 41)

Dr. Wille's notes from July 24, 2012, state that her chief complaint was right shoulder pain since March. She thought that she hurt her shoulder at work and was given injections that did help. She went back to work but is now hurting again although this time not triggered by work. The doctor's assessment was rotator cuff tendonitis. He referred Aida to an orthopedic doctor. (Ex. 3, pp. 29-31) The note states:

> She has had this pain since march[sic] ...went to work man's [sic] comp doctor...he treated with therapy and injections and it got better...resolved...the first time it occurred while pulling on some meat above her head...now it came back two weeks and told by work not related to work this time and see primary doctor.

(Ex. 3, p. 31)

Aida thinks that she did see another orthopedist who injected her right shoulder. However, she does not recall the name of that doctor. (Ex. 4, p. 41)

She continued to put up with the pain as long as she could and then asked again to go back to Dr. Mooney. At that point, defendants returned her to see Dr. Mooney. She saw Dr. Mooney on November 29, 2012, complaining of worsened right shoulder symptoms, without new injury. Dr. Mooney provided additional conservative treatment but her symptoms remained. Aida underwent another MRI. (Ex. 1, p. 10) Dr. Mooney referred her to David K. Sneller, M.D. On February 21, 2013, Dr. Sneller saw Aida. He reviewed her MRI and felt that she might have a rotator cuff tear; he recommended surgery. (Ex. 1, pp. 10-14; Testimony)

Dr. Sneller authored a March 1, 2013 missive to claims examiner, Joe Lippert. Dr. Sneller stated, "Based on my examination and history of that date, I do feel that her current diagnosis is causally related to the work injury. I do not feel it is due to a degenerative preexisting condition." (Ex. 1, p. 15)

On March 29, 2013, Dr. Sneller performed a right shoulder arthroscopy with subacromial decompression. There was no rotator cuff tear. (Ex. 1, p. 19) After surgery claimant underwent physical therapy and returned to work with restrictions. (Ex. 1, p. 21)

On June 19, 2013, Dr. Sneller released Aida to full duty work despite continued pain complaints. Aida returned to work and continued to have right shoulder pain.

Claimant testified that she requested additional medical care but the additional care was denied; defendants offered no testimony to refute this.

On October 2, 2013, Dr. Sneller saw Aida and provided a permanency rating. He noted that she still had pain and catching in her shoulder. Aida was placed at MMI. Dr. Sneller assigned 2 percent whole person functional impairment. The doctor did not assign any permanent work restrictions. Aida continued to complain of pain in her right shoulder. (Ex. 1; Testimony)

On January 30, 2014, Aida saw John D. Kuhnlein, D.O. at the request of her attorney for an independent medical evaluation. (Ex. 4) In addition to examining Aida, Dr. Kuhnlein also reviewed the medical notes provided to him. Dr. Kuhnlein diagnosed her with myofascial trapezius pain, right shoulder impingement syndrome with arthroscopic subacromial decompression, and chronic right shoulder pain. Dr. Kuhnlein noted that the conditions were directly and causally related to her work for JBS. He noted that given her reports of pain since the time of the injury, with adequately explained gaps in treatment he related this to the October 21, 2011 work injury. Dr. Kuhnlein recommended Aida seek a second opinion with Kyle Galles, M.D. He also suggested she continue to work on her range of motion and strength in her arm. He noted that Aida did not particularly care for Dr. Mooney and respectfully suggested that she not return to see him for further care. He noted that based on his exam, the problem may be more of a fear of re-injury than actual problems in her shoulder. He placed her at MMI as of September 29, 2013. However, Dr. Kuhnlein noted that if she saw Dr. Galles and he recommended further treatment then she would not be at MMI. Dr. Kuhnlein assigned 4 percent whole person as a result of her work injury. He recommended restrictions of lifting 20 pounds occasionally from floor to mid-chest height, and 10 pounds occasionally over shoulder height. (Ex. 4)

On July 1, 2016, Aida underwent a functional capacity evaluation (FCE) at E3 Work Therapy Services. The overall classification of Aida's effort was invalid due to inconsistent performance. The report states that Aida failed to give maximum voluntary effort during the FCE. The report noted that she failed 7/7 validity criteria during the XRTS hand strength assessment. There was also an absence of correlation between lifts of unmarked steel bars and the corresponding lifts on the XRTS Lever arm. (Ex. C, p. 1)

On August 22, 2016, Aida underwent a second FCE; this time the testing was performed with Athletico Physical Therapy. Physical therapist John Simonsen found that Aida provided a consistent and acceptable effort and placed her in the light physical demand work category with the ability to occasionally lift 20 pounds from floor to waist. These findings are very similar to the restrictions recommended by Dr. Kuhnlein. Aida testified she would have a difficult time lifting more than 20 pounds. (Ex. 7; testimony) I find the opinions of Dr. Kuhnlein to carry the greatest weight in this matter. His opinions are set forth in his report and are based on a detailed examination of Aida.

Aida testified that she has continued to have right shoulder pain after she was released by Dr. Sneller. She sought ongoing treatment with Margaret Fehrle, M.D. (Ex. 6) Dr. Fehrle provided right shoulder injections. The injections have provided some relief and have helped Aida continue working at JBS. (Testimony; Ex. 6, pp. 58-65)

After Aida was released to full-duty by Dr. Sneller, she did not return to the position of "open leakers". Instead, she used her seniority to bid on a different JBS position, packing intestine into boxes. This job involved cutting large intestine, placing it into a box at table height, and pushing the box down the table. She performed this work full-duty for several months. Then she bid into her current position of "feed bung washer". In this position Aida utilized scissors to clean intestine. This job did not involve any overhead work or any lifting. She continues to work ten hours per day, up to six days per week. She testified that she has not missed significant time from work since she returned from her surgery. At the time of hearing she was earning the highest wage in the history of her employment. Aida enjoys her work and plans to continue in her current position. (Testimony)

Aida was born in Mexico where she attended school through the third grade. She quit school to help her family sell bread and take care of her younger siblings. She never returned to school. She cannot speak, read, or write English. She moved to the United States around the age of 23 to look for work opportunities.

Once in the United States Aida worked for several years as a housekeeper and nanny in the Chicago area. She testified that these jobs did not require any overhead work, nor did it involve any lifting over 20 pounds. (Testimony)

Aida also cleaned hog heads at a meatpacking plant in Columbus Junction, Iowa. This work involved work at table height with an electric knife. This job did not involve any overhead work or any lifting, overhead or otherwise. (Testimony)

Aida began working for JBS on October 26, 1994. Throughout the years she has worked various positions. She was still working for JBS at the time of the arbitration hearing. Since returning to JBS after her surgery she has performed jobs that require repetitive arm movement, but do not require lifting more than 20 pounds. She testified that the repetitive use of her arms causes her pain in her right shoulder. She has modified the way she performs some of her job tasks by using her left arm only.

Aida was in her early 50's at the time of hearing. Although Aida has not sustained any loss of actual earnings, I find that she has sustained a loss of earning capacity as a result of the work injury. Considering her age, limited educational background, employment history, ability to retrain, motivation to continue working, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 25 percent loss of future earning capacity as a result of her work injury with JBS.

The next issue that must be addressed is whether Aida is entitled to payment of past medical expenses. After Dr. Sneller released her from care on June 19, 2013, Aida requested additional medical treatment from her employer. (Testimony) In response to that request, claims examiner Joe Lippert indicated that no additional care would be offered. He stated, "I just got off the phone with Dr. Sneller's office. He will no longer see Ms. Avila for her injury. Per his nurse, Kathy, he has addressed everything with Ms. Avila and has nothing further to offer her." (Ex. 15, p. 130) No additional care or treatment from any other provider was offered at that time. Nor did the defendant inform Aida that there was any type of authorized treating physician still in place for her. I find that up until this point defendants did provide reasonable care. However, Aida continued to experience symptoms. Defendants failed to offer Aida any treatment. I further find that offering no care to the claimant is the same as offering no care reasonably suited to treat the injury. Aida testified that because no additional care was offered she sought treatment on her own with Dr. Wille and Dr. Fehrle. Aida testified that the treatment did provide her with some relief. She also testified that the treatment helped her to be able to perform her job. I find that the treatment she received was beneficial and superior to no care. As a result of the treatment she incurred the medical expenses as set forth in Exhibits 12, 13, and 16. I find the defendants are responsible for these past medical expenses.

Claimant is also seeking reimbursement for Exhibit 14, which is for the FCE performed at Athletico. The record is void of any evidence that this was for treatment or care. Rather the physical therapist conducted a functional capacity evaluation. I find that the expenses set forth in Exhibit 14 were for an evaluation, not for care or treatment. Thus, I conclude that those expenses were not incurred pursuant to Iowa Code section 85.27 and therefore are not the responsibility of the defendants.

The next issue to be addressed is whether claimant is entitled to alternate medical care. Under Iowa law, if a claimant is dissatisfied with the care offered the claimant shall communicate the basis of such dissatisfaction to the employer. In this case, the record is void of any such communication. Additionally, it is not entirely clear from the record what additional care is being sought. For these reasons, I find that alternate medical care is not appropriate in this matter. Claimant's request for alternate medical care is denied.

Although the alternate medical care request is denied it should be noted by the parties that the undersigned did find Dr. Kuhnlein's opinions to be persuasive. I further find that her ongoing shoulder symptoms are related to the work injury. As such, the defendants are obliged to furnish reasonable and prompt medical care. The treatment must be reasonably suited to treat the injury without undue inconvenience to the employee.

The final issue to be addressed is costs. Claimant seeks the filing fee of $100.00, which is appropriate cost under 4.33. Defendants are ordered to reimburse claimant for this cost.

Claimant is seeking reimbursement of the FCE as a cost. The relevant inquiry with regard to taxation of an FCE as a cost is whether the FCE was required by a doctor or practitioner, as necessary for completion of a medical report. If not, taxation of the cost of the FCE is inappropriate. There is no evidence in the record that any doctor required the FCE. Therefore, the cost of the FCE is not taxed to defendants.

Thus, defendants are taxed costs in the amount of one-hundred and 00/100 dollars ($100.00).

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 R. App. P. 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's

Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in 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.

Based on the above findings of fact, I conclude that claimant sustained a 25 percent industrial disability. Therefore, claimant is entitled to one-hundred twenty-five (125) weeks of permanent partial disability benefits. Those benefits shall be paid at the stipulated weekly rate of three-hundred ninety-seven and 68/100 dollars ($397.68). The permanent partial disability benefits shall commence on the stipulated commencement date of April 15, 2013.

Claimant is also seeking payment for past medical expenses. 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).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the

employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care." Claimant testified that she continued to have ongoing problems with her shoulder even after defendant refused to provide any additional treatment. The care claimant sought was reasonable and necessary because of the work injury. I concluded that the care the claimant sought was more beneficial, superior, and more extensive than the no care that was offered by the defendant. Therefore, defendant is responsible for the medical expenses set forth in Exhibits 12, 13, and 16.

As noted above, I concluded that the expenses set forth in Exhibit 14 were not incurred for medical care or treatment. Rather, the expenses in Exhibit 14 were for an evaluation. As such, defendants are not responsible for these expenses pursuant to Iowa Code section 85.27.

Claimant is also seeking alternate medical care. Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the 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.

In the present case, I concluded that the claimant failed to communicate the basis of such dissatisfaction to the employer. Additionally, it is not clear what alternate care claimant is seeking. Therefore, claimant's request for alternate medical care is denied.

However, based on the above findings of fact, I conclude that claimant's symptoms are directly and causally related to the work injury. As such, defendants are obliged to furnish prompt, reasonable treatment to the employee.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. 876 IAC 4.33. I find that the claimant was generally successful in her claim and an assessment of costs is therefore appropriate.

First, claimant seeks the filing fee of $100.00, which is appropriate cost under 4.33. Defendants are ordered to reimburse claimant for this cost.

Claimant is seeking reimbursement of the FCE under 4.33. Rule 4.33 allows for the taxation of reasonable costs associated with obtaining two reports of doctors or practitioners. Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009). The relevant inquiry with regard to taxation of the FCE cost is therefore whether the FCE was required by a doctor or practitioner, as necessary for completion of a medical report. If not, taxation of the cost of the FCE is inappropriate. There is no evidence in the record that any doctor required the FCE. Therefore, the cost of the FCE is not taxed to defendants.

Thus, defendants are assessed costs in the amount of one-hundred and 00/100 dollars ($100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of three-hundred ninety-seven and 68/100 dollars ($397.68).

Defendants shall pay claimant one-hundred twenty-five (125) weeks of permanent partial disability benefits.

Defendants shall be entitled to credit for all weekly benefits paid to date.

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

Defendants shall be responsible for the medical expenses as set forth above.

Defendants shall be entitled to a credit under Iowa Code section 85.38(2) as stipulated in the hearing report.

Defendants shall reimburse claimant's costs in the amount of one-hundred and 00/100 dollars ($100.00).

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 31st day of January, 2017.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/sam

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.