BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CARRIE A. TAYLOR,

Claimant,

vs.

WALGREENS,

Employer,
Self-Insured,
Defendant.

File No. 5024858

REVIEW-REOPENING

DECISION

CARRIE A. TAYLOR,

Claimant,

vs.

WALGREENS,

Employer,

and

ZURICH,

Insurance Carrier,
Defendants.

File No. 5053902

ARBITRATION DECISION

STATEMENT OF THE CASE

Carrie Taylor filed a petition in review-reopening from a settlement dated January 27 2011, which awarded a 28 percent permanent partial disability. Claimant also filed a petition in arbitration alleging a new injury of November 9, 2015.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa. All objected to exhibits are admitted into the record.

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.

ISSUES

For File No. 5024858:

1. Whether the claimant has established a change in condition such as to merit an additional award of disability;

2. Medical expenses;

3. Alternate medical care; and

4. Penalty

For File No. 5053902:

1. Whether the claimant suffered an injury arising out of and in the course of employment on November 9, 2015;

2. Whether the alleged injury is the cause of any permanent disability, and if so, the extent;

3. Temporary benefits;

4. Medical benefits;

5. Alternate medical care; and

6. Penalty.

FINDINGS OF FACT

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

The claimant was 42 years old at the time of hearing. She is not a high school graduate, but does have a GED.

On November 12, 2007, the claimant suffered an injury to her back arising out of and in the course of her employment with Walgreens. After extensive treatment she was provided a 15 pound lifting restriction and to avoid repetitive lifting. (Exhibit B) On January 19, 2010, Donna Bahls, M.D. placed the claimant at maximum medical

improvement (MMI) and opined an eight (8) percent body as a whole (BAW) impairment from the work injury. The claimant entered into an agreement for settlement with the employer on January 27, 2011 for a payment of 28 percent BAW. At that time she was working full time at Walgreens and they were accommodating her 15 pound lifting restriction.

The claimant continued to see Dr. Bahls for maintenance treatment and medications. On May 6, 2013, the claimant reported that she was now being asked to unload trucks with boxes weighing over 75 pounds in violation of her restrictions. (Ex. 2A, pages 7-9) Dr. Bahls contacted the employer's adjuster in January of 2014 about these continued violations of the claimant's restrictions. A new MRI was ordered and showed a clearly identifiable annular tear at L4-5. (Ex. 2B) Restrictions were increased on August 4, 2014 to include occasional sitting as needed. (Ex. 2A, pp. 12-14) The claimant had to go to the emergency room (ER) on December 24, 2014 due to pain from the work injury. (Ex. 2C)

Dr. Bahls wrote on January 22, 2015, that the claimant's symptoms had gotten worse because her employer was forcing her to work outside of her restrictions. (Ex. 2A, p. 18) On March 26, 2015, the claimant again had to go to the ER. (Ex. 2B, pp. 5-7) Dr. Bahls took claimant off work for 2 days additional.

In May of 2015 the claimant got a new manager. The new manager demoted the claimant because of her work restrictions. The new cashier position required the claimant to stand in one place, a violation of the August 4, 2014 restriction of Dr. Bahls. It also violated the October 8, 2015 restrictions of Dr. Bahls of no prolonged standing in one position and no prolonged standing or frequent sit stand activity. (Ex. 2A, p. 26) The claimant was taken from work by ambulance on November 9, 2015 due to work in the cashier position. (Ex. 2C, pp. 10-15) The employer continued to count these absences toward discharge and discharged the claimant for excessive absenteeism. The claimant has been off work since December 2, 2015.

Claimant was referred to Dr. Boarini for a consult on May 9, 2015. (Ex. C) He did not recommend surgery and recommended a referral to the University of Iowa pain clinic. He reviewed an MRI from the summer before, an MRI taken before the November 9, 2015 ER visit. (Ex. 3, p. 11)

The claimant was referred to Daniel Miller, D.O., when Dr. Bahls stopped seeing patients. At Dr. Bahls' last encounter with the claimant, Dr. Bahls noted that the claimant's chronic pain had gotten worse over the last year. (Ex. 2A, p. 37) Dr. Miller placed the claimant at MMI effective September 14 or 22, 2016. (Ex. 2F, pp. 6-8) Although Dr. Miller released the claimant to work status she has been unable to find work.

The claimant saw Robin L. Sassman, M.D., for an independent medical evaluation on July 21, 2016. The report was dated September 8, 2016. (Ex. 3)

Dr. Sassman believed that the amount of weight the claimant should lift should be lowered to 10 pounds rarely. (Ex. 3, p. 15) Dr. Sassman also opined a 21 percent of the BAW impairment rating. (Ex. 3, p. 15) The claimant's condition was getting worse before November 9, 2015, and progressively so. It is found that the November 9, 2015 incident is not a new injury entitling the claimant to additional compensation, but a continuation of the decline from the 2007 work injury.

It is abundantly clear that the claimant's condition has changed for the worse since the settlement and arbitration decision. Her restrictions have increased. The large employer herein decided that it could no longer use the services of such a disabled worker. The claimant has been unable to find other work. So her economic circumstances have changed.

Considering the claimant's medical impairments, training, education, total loss of earnings, permanent restrictions, as well as all other factors of industrial disability as detailed above, it is found that the claimant has suffered a 100 percent loss of earning capacity from the 2007 injury. Therefore, it is found based upon this record and after considering all the factors of industrial disability that the shifting burdens of an odd-lot analysis is not necessary.

The claimant's weekly benefit rate was previously established at $280.31 per week for the 2007 injury. The claimant seeks payment of medical bills detailed in Exhibit 4. Those bills were reasonable and necessary for the treatment of the work injury. She also seeks alternate care. The basis asserted is that the defendants' ongoing failure to provide reasonable care or even at times pay for care authorized constitutes an abandonment of care. It is so found.

REASONING AND CONCLUSIONS OF LAW

The claimant was not found to have suffered a new injury on November 9, 2015. That finding, and now conclusion, is contingent on the review-reopening being granted, however. So the next issue is whether claimant is entitled to additional permanent disability benefits via a claim for review-reopening on the 2007 injury.

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 Rule of Appellate Procedure 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).

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2).

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

The claimant has had a substantial change of condition as evidenced by diminished physical capacity, a change in economic condition, and no return to work.

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 and inability to engage in employment for which the employee is fitted. 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).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential

for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions, 654 (App. February 28, 1985).

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.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)). "Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

A worker is totally disabled under the odd-lot doctrine if the services the worker can perform "are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985) (quoting Lee v. Minneapolis Street Railway Co., 230 Minn. 315, 320, 41 N.W.2d 433, 436 (1950)). This flows from the principle that a worker who has no reasonable prospect of securing employment has no material earning capacity. Id. The trier of fact considers whether there are jobs in the community the worker can realistically compete for. Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 198 (Iowa 2014) In establishing total disability, "an employee need not look for a position outside the employee's competitive labor market." Id.

Under the odd-lot doctrine, a worker must present a prima facie case of total disability "by producing substantial evidence that the worker is not employable in the competitive labor market." Guyton at 106. If the worker establishes a prima facie case, then the burden switches to the employer to present evidence of suitable employment. Id. If the employer fails to produce evidence of suitable employment, and the deputy commissioner concludes the worker falls within the odd-lot category, the worker is entitled to a finding of total disability. Id.

Based on the finding that the claimant has suffered a 100 percent loss of earning capacity she has sustained a 100 percent permanent total industrial disability using a traditional as opposed to odd-lot analysis.

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 16, 1975).

The claimant seeks payment of medical bills detailed in Exhibit 4. Those bills were reasonable and necessary for the treatment of the work injury. They are the responsibility of the defendants.

Alternate care.

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

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

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

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

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

A second opinion as to a course of treatment is most certainly a part of treatment. The agency commonly orders evaluations for a second opinion in alternate care proceedings. Burr v. Bridgstone/Firestone Inc., File No. 1049010 (Alt Care, September 1999); Tansel v. Umthun Trucking, 1179887 (Alt Care, June 1998); Morris v. Lortex, Inc, File No. 1009285 (Alt Care, April 1998); Dorothy v. Rockwell International, File No. 1045450 (Alt Care, August 1993). Second opinions are a common practice in health care matters outside the workers' compensation setting. The decision on whether or not to pursue a second opinion for surgery is a matter of medical judgment. Doctors, lawyers and for that matter, car mechanics, can reasonably, professionally disagree on a course of action.

Defendants have the right to choose the medical care, but only if that care is offered promptly, reasonably suited to treat the injury and offered without undue inconvenience to the injured worker. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999).

The consequence of failing to promptly provide care is the loss of the right to choose the care. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999).

The defendants' ongoing failure to provide reasonable care, or even at times pay for care authorized, constitutes an abandonment of care. Claimant may, through her physician, direct her care for the work injury, and the employer will need to pay for this care in a prompt manner.

ORDER

THEREFORE IT IS ORDERED:

That the defendants pay claimant permanent total disability commencing April 10, 2007, at the rate of two hundred eighty and 31/100 dollars ($280.31), and continuing through all periods of disability.

Defendants shall pay/reimburse as appropriate the medical bills as detailed above.

Claimant's request for alternate care is granted as detailed above.

Defendants shall pay the costs of this action pursuant to rule 876 IAC 4.33.

Defendants shall receive credit for benefits previously paid.

Defendants shall file subsequent reports of injury as required by the agency.

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

STAN MCELDERRY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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SRM/srs

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.