BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELIZABETH WILLUHN f/k/a ELIZABETH MILLER, Claimant, vs. ROMECH, Employer, and ZURICH INSURANCE, Insurance Carrier, Defendants.	File No. 5023729 IOWA CODE SECTION 85.27 DECISION

FILED
JUN 04 2019
WORKERS COMPENSATION

STATEMENT OF THE CASE

Elizabeth Willuhn, claimant, filed the current petition for medical benefits against Romech, as the employer, and Zurich Insurance, as the insurance carrier. Claimant filed and prevailed in a prior arbitration proceeding, which affirmatively established that she sustained a permanent injury to her right shoulder while working for Romech on February 27, 2006. In an arbitration decision filed on December 10, 2008, a former deputy workers' compensation commissioner found that Ms. Willuhn established a permanent injury to her right shoulder and awarded ten percent industrial disability. The December 10, 2008 arbitration decision became final agency action and is now binding upon the parties and the undersigned.

Ms. Willuhn filed this medical petition on November 8, 2018. The undersigned heard this case on May 22, 2019, in Des Moines. Pursuant to 876 IAC 4.49, claimant and her counsel sought permission to appear for this hearing via CourtCall. Their request was granted. Defendants sought to have a witness appear via telephone conference call at this hearing. Their request was also granted.

Therefore, a live hearing was conducted at the agency office in Des Moines, Iowa. Defense counsel and the court reporter presented at the agency office for the hearing. Unfortunately, the video feed did not function properly and the entire hearing was conducted via telephone conference call. Claimant and her counsel appeared telephonically from Council Bluffs. Defendants' witness, Catherine Sams, appeared telephonically through CourtCall from Davenport, Iowa.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 2 and Defendants' Exhibits A through F. All exhibits were received without objection. Claimant testified on her own behalf. Defendants called Catherine Sams to testify. The evidentiary record closed at the conclusion of the arbitration hearing.

Defense counsel requested the opportunity to file post-hearing briefs. Claimant's counsel waived any right to file a post-hearing brief. Defense counsel's request was granted and defendants were permitted to file a brief until May 31, 2019. Defendants filed their post-hearing brief on May 30, 2019, and the case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's current right shoulder condition is causally related to the February 27, 2006 work injury.

2. Whether claimant is entitled to alternate medical care for treatment of her right shoulder.

FINDINGS OF FACT

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

Elizabeth Willuhn sustained a right shoulder injury on February 27, 2006 working for Romech. (Arb., December 10, 2008, page 4) Specifically, claimant proved in the underlying arbitration proceeding that she sustained an injury "to the right shoulder in the trapezius area and the claimant has some right carpal tunnel syndrome which is not surgical." (Arb., December 10, 2008, p. 8) Ms. Willuhn did not achieve maximum medical improvement for the work injury until April 19, 2007. (Arb., December 10, 2008, p. 5)

Subsequent to issuance of the December 10, 2008 arbitration decision, Ms. Willuhn required additional medical care. The defendants referred her back to her authorized treating surgeon, James Devney, D.O. Dr. Devney provided ongoing conservative care for claimant over the next several years. (Joint Exhibits 1, 3)

In February 2009, Dr. Devney diagnosed claimant with ongoing right shoulder symptoms attributable to the 2006 work injury. He recommended a repeat botox injection into the right shoulder, or trapezius, with a course of physical therapy. (Joint Ex. 1, pp. 1-5) Claimant obtained significant, though temporary, relief of her symptoms as a result of the botox injection. (Claimant's testimony; Joint Ex. 1, pp, 6, 8)

In June 2010, Dr. Devney repeated the botox injection into claimant's right shoulder. (Joint Ex. 1, p. 8) Dr. Devney opined in June 2010 that the ongoing symptoms were causally related to the 2006 work injury. (Joint Ex. 1, p. 8) Again, the botox injection provided significant symptomatic relief for claimant. (Joint Ex. 1, p. 9)

Dr. Devney repeated Botox injections in October 2011 and in November 2012. (Joint Ex. 3, pp. 14-17) Defendants contacted Dr. Devney inquiring about whether the ongoing symptoms six years after the work injury were still related to the work injury. Dr. Devney opined in his October 25, 2012 medical note that claimant's "recurrent symptoms are causally related to her February 2006 work injury. The fact that her cervical and right shoulder MRI scans were unremarkable in 2009 further substantiates the above-noted diagnoses. Additionally, her present symptom complex is identical to past complaints." (Joint Ex. 3, p. 16)

Ms. Willuhn submitted to repeat botox injections in December 2012. (Joint Ex. 3, p. 18) Once again, the injections provided significant symptomatic relief. (Joint Ex. 3, p. 19) As with the prior pattern, claimant's right shoulder symptoms returned approximately one year later and she again sought treatment with Dr. Devney. (Joint Ex. 3, pp. 20-22) Dr. Devney performed further diagnostic work-up, including repeat MRI's and a repeat EMG, with evidence of new injury. (Joint Ex. 3, pp. 20-25) Dr. Devney performed repeat botox injections in July 2014. (Joint Ex. 3, p. 29)

In October 2018, claimant sought further care with a family physician, Karen J. Krogstad, M.D., who recommended referral back to Dr. Devney for further care. Dr. Krogstad opined, "I do not feel any further imaging would be warranted at this time since these are the symptoms that she has previously found relief from Botox injections and would recommend that she be seen again by Dr. Devney as this injury was previously found to be related to her work-related injury." (Joint Ex. 5, p. 31)

Instead of authorizing a return evaluation and treatment with Dr. Devney, defendants scheduled an independent medical evaluation with Robert L. Broghammer, M.D., on May 25, 2019. (Joint Exhibit 6) Dr. Broghammer diagnosed claimant with "chronic recurrent right upper back/periscapular pain." (Joint Ex. 6, p. 49) However, Dr. Broghammer opined:

> [T]his diagnosis is unrelated to the alleged injury of February 27, 2006. The reasons for stating so are multiple. First and foremost, Ms. Willuhn's prior workup, including MRIs as well as EMG and nerve conduction studies, did not disclose any evidence of a frank surgical lesion or acute

> injury. Ms. Willuhn's symptom complex was consistent with an upper back muscular strain, which was appropriately treated through worker's compensation and which appeared to have resolution when the worker was evaluated by Dr. Devney on July 10, 2006.
>
> The recurrent symptom complex cannot be reasonably related to the remote injury in my medical opinion. In this regard, I would specifically disagree with the opinions of Dr. Devney.

(Joint Ex. 6, p. 49) Instead, Dr. Broghammer opines, "myofascial strains typically resolve within a few days to a few weeks to perhaps a few months of an injury. There is no way in my medical opinion to connect the recurrent symptom complex to the remote injury." (Joint Ex. 6, p. 49)

Defendants contend that Dr. Broghammer's opinions should be accepted because he is the "only medical specialists known to have performed a current, comprehensive review of medical records, and to have performed a current medical evaluation of the Claimant." (Defendants' Post-Hearing Brief, p. 7) Of course, this is not entirely correct. Ms. Willuhn's personal physician, Dr. Krogstad, evaluated claimant in October 2018, and recommended referral back to Dr. Devney for further botox injections. Dr. Krogstad noted that the injury was work-related and that the botox injections had previously provided symptomatic relief. (Joint Ex. 5, p. 31)

Although Dr. Devney did not re-evaluate claimant after his 2014 treatment, his records clearly demonstrate that claimant had ongoing symptoms, that the botox injections were anticipated to provide only temporary relief, and in fact, only provided temporary relief of symptoms. Dr. Devney's long-time treatment records demonstrate that claimant's symptoms are chronic since the date of injury and that the botox injections likely needed to be repeated.

Perhaps most importantly, I find Dr. Broghammer's opinions to be inconsistent with the prior arbitration decision. In his December 10, 2008 arbitration decision, the previous deputy commissioner concluded that claimant achieved maximum medical improvement on April 19, 2007. The deputy commissioner's conclusion was not appealed and became final agency action by operation of law.

Now, eleven years later, Dr. Broghammer provides a medical opinion that is contrary to the arbitration decision's findings and conclusion. Rather than acknowledging that claimant did not achieve maximum medical improvement until April 19, 2007, Dr. Broghammer opines that claimant's injury "appeared to have resolution when the worker was evaluated by Dr. Devney on July 10, 2006." (Joint Ex. 6, p. 49)

Dr. Broghammer's opinion also suggests that claimant's injury was temporary in nature and fully resolved. However, that issue was specifically tried in the prior arbitration hearing. The deputy commissioner found a permanent disability as a result

of the work injury. Dr. Broghammer's opinions are again contrary to the final agency findings and conclusions.

I am bound by the prior findings and conclusions in the arbitration decision. It would result in contradictory results for me to now find that claimant reached maximum medical improvement and "resolution" on July 10, 2006, given the contrary findings in the arbitration decision. Dr. Broghammer's opinions contradict the agency's findings and conclusions and invite the undersigned to provide contrary findings and conclusions to those set forth in the prior arbitration decision. Dr. Broghammer's opinions are rejected.

However, even if I were to disregard the arbitration decision's findings and conclusions, I would reject Dr. Broghammer's opinions. Claimant clearly required botox injections. Those injections were expected to provide temporary relief of symptoms. As a practical matter, the botox injections worked as expected and symptoms continually returned in claimant's shoulder and trapezius. Over an extended period of time, the botox injections were successful in providing temporary symptomatic relief. Claimant has now experienced a recurrence of symptoms similar to those previously predicted and experienced. Dr. Broghammer's opinions are contrary to the actual experience in this case.

Defendants also point to some intervening activities and events as potential new injuries or causes of claimants' symptoms. Claimant denied during her testimony experiencing any new injuries to her right shoulder or trapezius subsequent to the prior arbitration hearing and decision. Neither Dr. Broghammer nor any other physician has opined that there was an intervening injury. Defendants' argument about intervening events or activities are not supported by medical causation opinions and are not found to be credible. Claimant's testimony is found credible and accepted. I specifically find that claimant has not experienced any new injuries to her right shoulder or right trapezius since the arbitration hearing and/or arbitration decision.

I further accept the credible testimony of claimant as to her symptoms, the efficacy of botox injections in the past, and the temporary nature of the relief experienced by those injections. I find that the current need for treatment of the right shoulder and trapezius remain causally related to the work injury. I find it reasonable and appropriate that claimant should return to Dr. Devney for further medical care, given his credentials and his long-standing care of claimant. To the extent that Dr. Devney will accept claimant as a return patient, I find that claimant has demonstrated a need for such care and that the refusal of care by defendants is unreasonable. Therefore, I find that it is reasonable, necessary and appropriate for care to be authorized with Dr. Devney for claimant's shoulder and trapezius.

CONCLUSIONS OF LAW

The parties submit two disputed issues for resolution. The initial fighting issue is whether claimant's current right shoulder condition and need for treatment is causally related to the February 27, 2006 work injury.

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.

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 this case, claimant bears the burden to establish the ongoing causal connection between the February 27, 2006 work injury and her current right shoulder symptoms and need for treatment. Iowa R. App. P. 6.14(6)(e). Having found that

claimant carried this burden of proof and established by a preponderance of the evidence that her ongoing right shoulder and right trapezius symptoms are causally related to the February 27, 2006 work injury at Romech, I conclude that claimant has established entitlement to ongoing medical care at defendants' expense.

Ms. Willuhn requests an award of alternate medical care. 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 1975).

Defendants have denied liability for claimant's ongoing right shoulder symptoms and treatment. They are currently offering no treatment based upon this denial of liability.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. 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." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

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."

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Having found that Ms. Willuhn needs further medical care for her right shoulder and having found that the employer is not offering any medical care for claimant's right shoulder at the present time, I conclude that claimant has established entitlement to alternate medical care and ongoing medical care of her right shoulder and right trapezius.

Ms. Willuhn requests an order authorizing Dr. Devney as the treating physician and requiring defendants to pay for the reasonable medical charges incurred in obtaining treatment through Dr. Devney. I conclude that claimant has established entitlement to the alternate medical care sought.

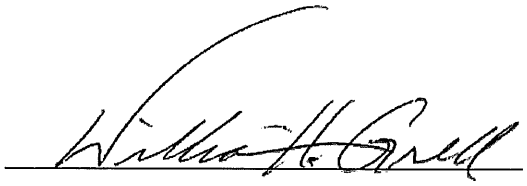
ORDER

THEFORE, IT IS ORDERED:

Defendants shall authorize medical treatment and pay for all reasonable and causally related medical charges incurred for treatment of claimant's right shoulder and right trapezius through James Devney, D.O.

The employer and insurance carrier 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 ___4th___ day of June, 2019.



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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.