BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JANICE BRANDENBURG,

Claimant,

vs.

BROADLAWNS MEDICAL CENTER,

Employer,

and

SAFETY NATIONAL CASUALTY CORPORATION,

Insurance Carrier,
Defendants.

File Nos. 5042783, 5051068

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Janice Brandenburg, has filed a petition in arbitration and seeks worker's compensation benefits from Broadlawns Medical Center, employer, and Safety National Casualty Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

For File No. 5042783:

1. The extent of permanent disability, if any, from the work injury of April 26, 2012.

For File No. 5051068:

1. The extent of permanent disability, if any, from the work injury of January 26, 2012;

2. Temporary benefits;

3. Independent Medical Evaluation (IME); and

4. Alternative Medical Care.

FINDINGS OF FACT

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

The claimant was 60 years old at the time of hearing. She is a high school graduate and has post-high school certificates from Des Moines Area Community College for Life's Calling and Essentials for Health Care. Previous work history includes being a cashier, waitress, mail extractor, stocker, inspector, custodian, and materials handler. She began employment for the employer herein on July 18, 2011 as an environmental services tech (primarily housekeeping).

On January 26, 2012, the claimant suffered a stipulated injury arising out of and in the course of her employment with Broadlawns when she reported pain in her right shoulder to the employer. She received five medical treatments for the shoulder before being fully released without restrictions or impairment. (Exhibit 1, pages 12-13) The employer also provided the claimant with a backpack vacuum that was easier to use. The claimant testified that her shoulder then went pretty much back to normal.

On April 26, 2012, the claimant reported that she hurt her right shoulder while lifting a box of hand sanitizer weighing about 80 ounces off a shelf. She was first treated at the Broadlawns emergency room where x-rays showed degenerative changes to the right shoulder. (Ex. 2, pp. 1-4) On April 27, 2012, the claimant underwent an arthrogram which showed severe degenerative changes to the right acromioclavicular joint and a full thickness rotator cuff tear. (Ex. 2, p. 5) Claimant was then referred to Dr. Gehrke, an orthopaedic surgeon, who first saw claimant on May 23, 2012. (Ex. 3, p. 1) Following an MRI which showed a massive tear of the rotator cuff with significant retraction back to the acromioclavicular joint Dr. Gehrke referred the claimant to Kary Schulte, M.D., a shoulder specialist. (Ex. 3, p. 2)

The claimant first saw Dr. Schulte on July 12, 2012. Based on his examination of the claimant and claimant's medical records, Dr. Schulte diagnosed a work-related right shoulder strain and a non-work-related rotator cuff tear arthropathy. (Ex. 3, pp. 3-4) Dr. Schulte provided an injection and work restrictions, but noted that both were for the non-work-related rotator cuff tear. (Ex. 3, pp. 3-4) Temporary benefits (TTD) were stopped as of July 11, 2012 based on Dr. Schulte's opinion. On July 21, 2014, Dr. Schulte wrote a report for the defendants. (Ex. 3, pp. 8-9) In the report, Dr. Schulte explained that the significant retraction of the rotator cuff showed a chronic and long-standing problem due either to a large trauma or a chronic condition occurring over a long period of time. (Id.)

The claimant began working for Advantage Food and Marketing as a food demonstrator in November of 2012. In that job the claimant works 24-30 hours per week and was earning $11.00 per hour at the time of hearing.

On January 21, 2013, at the request of her counsel, the claimant was seen by Jacqueline Stoken, D.O., for an IME. Although Dr. Stoken reviewed the claimant's medical records, she did not have the MRI films for review. Dr. Stoken opined that the claimant had sustained a right shoulder strain, massive rotator cuff tear, and chronic right shoulder pain as a result of the January 26, 2012 work injury. (Ex. 4, pp. 1-4) Dr. Stoken opined a 8 percent body as a whole impairment. (Ex. 4, p. 5) She also opined restrictions of avoid work at or above shoulder level and avoid lifting more than 10 pounds on a frequent basis with the left arm. (Ex. 4, p. 6) Dr. Stoken also recommended rotator cuff surgical repair. (Ex. 4, p. 6) Dr. Stoken performed a second IME on the claimant at claimant's counsel's request on August 11, 2014. Dr. Stoken issued a report on August 27, 2014. (Ex. 4, pp. 16-19) Dr. Stoken increased the 8 percent rating to 9 percent and left the restrictions the same. (Ex. 4, pp. 18-19) Claimant seeks $1,600.00 for each IME for a total of $3,200.00.

The views of Dr. Schulte who treated the claimant, and is an orthopedic surgeon who is a shoulder expert, are more convincing. His opinions that the claimant's continuing right shoulder complaints are non-work-related and predate the two temporary aggravations herein are accepted.

On the date of injury based on the claimant's gross earnings, single status, and entitlement to one exemption her weekly benefit rate is $263.45. The claimant reached maximum medical improvement on July 12, 2012 for the April 26, 2012 injury. The parties stipulated to a commencement date of January 26, 2012 for the injury of that date.

REASONING AND CONCLUSIONS OF LAW

Permanent disability.

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the two injuries herein were temporary aggravations of a pre-existing non-work-related right shoulder problem, there is no permanency.

Temporary benefits.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker could not work. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33 (1).

Since the claimant reached maximum medical improvement (MMI) on July 12, 2012 there can be no award of temporary benefits for the period of July 12 through November 8, 2012 as requested. The claimant would be eligible for temporary benefits for periods of work missed from April 27 through July 11, 2012.

Alternative 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.

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.

The claimant requests additional medical care that Dr. Stoken recommends. However the shoulder expert, Dr. Schulte, does not agree that the surgery is necessary, or that it would even be beneficial. As such, the claimant has not at this time met her burden of establishing the need for alternative medical care. The request must therefore be denied.

Independent Medical Examination.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

The claimant was entitled to an IME which she chose to get from Dr. Stoken. The issue was clouded in that there were two injuries and in essence Dr. Stoken billed in two $1,600.00 pieces. Defendants are responsible for paying/reimbursing the IME fees.

ORDER

Defendants shall pay temporary total disability benefits from April 27, 2012 through July 12, 2012 at the rate of two hundred sixty three and 45/100 dollars ($263.45), to the extent not already paid.

That defendants pay/reimburse the IME fees of Dr. Stoken.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 24th day of February, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.