BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRENDA ROWE,

Claimant,

vs.

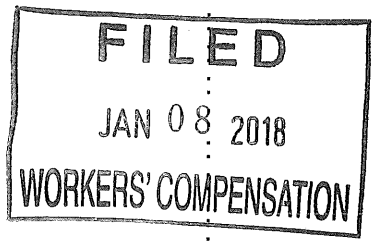
HY VEE FOOD STORE,

Employer,

and

EMC PROPERTY & CASUALTY COMPANY,

Insurance Carrier,
Defendants.



File No. 5053264

ARBITRATION

DECISION

Head Note No.: 1402.40

STATEMENT OF THE CASE

Brenda Rowe, claimant, filed a petition in arbitration seeking workers' compensation benefits from Hy-Vee Food Store, employer and EMC Property and Casualty Company, insurance carrier, as defendants. Hearing was held on July 25, 2017 in Des Moines, Iowa.

Claimant, Brenda Rowe, and Emily Johnson both testified live at trial. The evidentiary record also includes claimant's exhibits 1-6, defendants' exhibits A-G. Defendants exhibits A-E were offered at the hearing. The record was left open for defendants to submit exhibit F post-hearing. Post-hearing, defense counsel offered exhibits F and exhibit G. There was no objection to either exhibit; thus, exhibits F and G are admitted into evidence. It is noted that the parties failed to comply with the agency's Uniform Guidelines for Preparation of Hearing Exhibits by failing to submit joint exhibits and by submitting duplicate exhibits. The parties are instructed to conform their exhibits to the guidelines for future hearings before this agency.

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. The parties are bound by their stipulations.

The parties submitted post-hearing briefs on August 25, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability claimant sustained as a result of the May 27, 2014 work injury.
2. What credits defendants are entitled to claim for benefits paid prior to the hearing?
3. 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 Ms. Rowe sustained an injury arising out of and in the course of her employment on May 27, 2014, with Hy-Vee Food Store (hereinafter "Hy-Vee"). The parties have further stipulated that the injury was the cause of temporary and permanent disability. The parties have stipulated that the commencement date for permanent partial disability benefits is December 1, 2015. The central dispute in this case is the extent of industrial disability sustained by Ms. Rowe as a result of her back injury.

Ms. Rowe worked in the meat department at Hy-Vee in Cherokee from February 2014 through September 2014. She was hired as a part-time employee. She was hired for 32 hours per week but she testified she never worked that many hours. She was paid $9.00 per hour. The parties have stipulated that her gross weekly earnings were $270.00 per week; at her hourly rate this equates to an average of 30 hours per week. Her duties included customer service, preparing dishes such as meat trays, and stocking items in the self-serve meat cases. She testified that she did not have any back problems prior to working at Hy-Vee. (Testimony)

On May 27, 2014, Ms. Rowe went to the walk-in cooler to retrieve additional brats. She reached as far above her head as possible for the brats and then stepped back, hit a pallet, and twisted her back. She felt immediate pain. Ms. Rowe reported the injury to her employer. (Testimony)

She experienced pain that went down her left lower extremity; this pain continued through the time of the hearing. Hy-Vee sent her to see Dr. Rice who provided her with conservative treatment and took her off of work. Ms. Rowe was sent to see orthopedic surgeon, Michael Espiritu, M.D. on August 27, 2014. He also restricted Ms. Rowe from work. (Testimony)

Ms. Rowe returned to work with restrictions in July of 2014. She returned to work in her prior job. Ms. Rowe testified that Hy-Vee accommodated her restrictions; other employees did the heavy lifting. Her last day of work at Hy-Vee was September 25, 2014 when she was terminated. The termination will be discussed in more detail below.

On October 3, 2014, Dr. Espiritu performed a two-level laminectomy. Ms. Rowe testified that following this surgery she underwent more physical therapy which was not helpful. She continued to have pain in her back and left lower extremity. She also experienced hip pain. (Testimony)

On December 30, 2014, Dr. Espiritu reviewed the MRI report which showed scar tissue at L5-S1 which caused a bit of foraminal narrowing. Dr. Espiritu felt that this might affect the L5 nerve root versus the S1 nerve root. However, it did not appear like there was any significant disk herniation recurrence or instability. His assessment was lumbar radiculopathy and lumbar disc herniation. Referral was made to pain management. Ms. Rowe was taken off of work. (Ex. 1, p. 5-8)

In January of 2015, at the recommendation of Dr. Espiritu, Ms. Rowe underwent L5-S1 transforaminal epidural steroid injection on her left side. (Ex. 1, p. 8)

On February 10, 2015, Ms. Rowe returned to Dr. Espiritu's office. She reported that her leg symptoms were gone, but she still had persistent severe lumbosacral back pain. It was thought that she might have discogenic back pain coming from L5-S1. Given her current symptoms, Ms. Rowe did not think she could work. The doctor noted that she should not be on any further narcotics. A discogram was ordered. The discogram was performed at Siouxland Pain Clinic on March 4, 2015. (Ex. 1, pp. 6-7 & 9; Ex. 2, pp. 1-3)

On April 20, 2015, Dr. Espiritu performed a decompression and 360-degree fusion with posterior instrumentation at L4-L5 and L5-S1. (Ex. 3)

On September 8, 2015, Ms. Rowe saw Dr. Espiritu in follow-up. She reported that the leg pain had subsided, but the back pain had increased. She also reported she still had numbness and tingling but it was now on her left side as opposed to her right side. She said the SI joint injections made her symptoms worse. She was taking tramadol every 6 to 12 hours. Dr. Espiritu examined Ms. Rowe. He noted that she had pain which was out of proportion to her pathology as well as being five months out from surgery with no issues related to her hardware. He recommended a CT myelogram and bilateral lower extremity EMG/nerve conduction velocity studies to look for an explanation for her symptoms. Dr. Espiritu noted that if the testing did not show any treatable diagnoses then he would likely place her at maximum medical improvement (MMI). He also refilled her tramadol. (Ex. A)

Ms. Rowe returned to Dr. Espiritu's office on October 6, 2015, to go over the results of the testing he ordered. The notes indicate that Ms. Rowe had been on consistent work restrictions and having persistent pain in her back and leg on the left side. The testing showed no indication for further surgical intervention. An FCE was recommended to determine her work restrictions. She was to follow-up as needed. (Ex. 1, p. 13; Ex. A, p. 3)

Ms. Rowe underwent an FCE on October 29, 2015 with Terry Nelson, P.T. However, the results were considered to be invalid because Ms. Rowe only passed 13 percent of the validity criteria. The report also stated that Ms. Rowe demonstrated indicators of significant symptom/disability exaggeration. (Ex. B)

Dr. Espiritu placed Ms. Rowe at MMI as of December 1, 2015. He noted that Ms. Rowe's FCE had been considered invalid and therefore could not be relied upon. Based on his examination and diagnosis of the patient, Dr. Espiritu placed her in the light to medium work classification. He permanently restricted her to 35 pounds on an occasional basis,15 pounds on a frequent basis, and 7 pounds on a constant basis. Utilizing table 15-3 of the AMA Guides, Dr. Espiritu assigned 20 percent functional impairment to the body as a whole. (Ex. 1, p. 16; Ex. A, p. 5) Ms. Rowe testified that she has not seen Dr. Espiritu since December of 2015 because it was her understanding defendants would not provide any more treatment. She is not aware of any other treatment he has to offer her.

On December 17, 2015, Ms. Rowe underwent a second FCE. This was performed at the request of Ms. Rowe's attorney. This FCE was performed at Physio@Work by Marion Gasner, P.T. (Ex. 4) The results of this FCE were considered to be valid. The FCE placed Ms. Rowe in the sedentary physical demand category of work. Unfortunately, there is no evidence in the record to show that this FCE or the recommendations of the FCE were ever adopted by any physician in this case. Because there is no physician who adopts or states that the restrictions set forth in this FCE are reasonable, I do not find this FCE to be persuasive or helpful.

In February of 2016 the Social Security Administration determined that Ms. Rowe was disabled as of May 27, 2014. Ms. Rowe testified that the award was based primarily on her low back condition. (Ex. 6)

I find the opinions of Dr. Espiritu, the orthopaedic surgeon, carry greater weight than those of physical therapist Gasner. I find that as a result of the work injury Ms. Rowe has permanent restrictions as set forth by Dr. Espiritu. Thus, her permanent restrictions are 35 pounds on an occasional basis,15 pounds on a frequent basis, and 7 pounds on a constant basis. Dr. Espiritu placed Ms. Rowe in the light to medium work classification. Furthermore, I find Ms. Rowe has sustained 20 percent functional impairment to the body as a whole as a result of the work injury. (Ex. 1, p. 16; Ex. A, p. 5)

At the time of hearing, Ms. Rowe was not employed. The last time she was employed was with Hy-Vee. As noted above, Ms. Rowe was terminated from Hy-Vee on September 25, 2014. Ms. Rowe testified that she had an argument with a co-worker which led to the co-worker either slapping or scratching her. As a result of this incident, Hy-Vee had a meeting with Ms. Rowe to investigate the situation. Tim Haupert, the store director, and Taylor Ward, the human resource manager, at the Cherokee store were involved in the meeting which took place on September 25, 2014. The evidence demonstrates that Ms. Rowe refused to meet prior to this date. During the meeting, Tim asked Ms. Rowe for clarification about the incident with the co-worker. The email states that before the meeting was over:

> Brenda stood up, grabbed her purse and said, 'I'm done.' Tim attempted to explain to her that if she did not respond or stay, if she walked out of his office and did not finish the meeting that he would have no choice but to terminate her. Brenda's reply was, 'Do what you got to do.' 'You do what you got to do.' Brenda left the meeting at approximately 1:25 p.m.

(Ex. E, p. 7)

Emily Johnson testified for the defendants. She has worked at the Hy-Vee store in Cherokee for five years. She had worked as product management, produce manager, assistant manager, and cashier. The assistant manager position helps determine what employee restrictions can be accommodated. Ms. Johnson testified that she reviewed both FCEs and Hy-Vee could accommodate the restrictions set forth in both those FCEs. (Testimony)

At hearing, Ms. Rowe testified that she continues to experience constant pain in her low back which shoots to her right hip and some days down her right lower extremity. At times she has pain in her left hip and down her left lower extremity; she also experiences cramping in her left lower extremity. Ms. Rowe takes Lyrica for the nerve pain in her leg. She feels she can comfortably sit or stand for approximately 1 hour, but then she needs to switch positions. She testified that she can only walk about 1 block at a time. At times she will also sit with her hands under her buttocks to reduce her pain. She also performs in-home exercises she learned from physical therapy; she does these a couple of times per week in an attempt to reduce her pain. (Testimony)

Defendants question the validity of Ms. Rowe's self-described limitations and the severity of her symptoms. In support of their position they point to the records of her primary care provider, Dr. Wesley Parker; Ms. Rowe has treated with Dr. Parker since being released by Dr. Espiritu on December 1, 2015. Specifically, defendants point to the lack of Ms. Rowe's use of pain medications over the subsequent 12 months. Ms. Rowe testified that she could not afford to seek medical treatment. (Exs. C & D)

In between the time of the first and second surgery, Ms. Rowe called a few places to try to obtain a job. However, since that time she has not looked for or made any effort to obtain any type of employment, either part-time or full-time. (Testimony)

At the time of the hearing Ms. Rowe was in her early 60's. She attended high school until midway through her senior year when she left school to get married. She does not have a GED. At one point she did have a CNA but her certification is no longer current. Her work history includes work as: a waitress/cashier in the fast food industry, a CNA, an assistant manager of a dry cleaning establishment, assembly worker constructing window frames, daycare provider, cleaner of kennels at a humane society, an employee for a mail-order pharmacy company filling bottles, an employee for a medical supply company completing mail orders, and as a food preparer for residential and educational facilities. Ms. Rowe feels she cannot return to her prior jobs because they require her to be on her feet all day. Ms. Rowe testified that she can no longer stand all day. She also feels she also cannot bend, squat, or lift as required by her prior jobs. She does not own a computer and testified that she does not have any computer skills. She does have a cell phone, but it is not a smart phone. She cannot afford to return to school. She only drives approximately 10 to 12 miles at a time due to her back pain. She has moved out of her home and into an apartment due to difficulty climbing stairs. (Testimony)

At the time of the injury, Ms. Rowe was paid $9.00 per hour and worked approximately 30 hours per week. Although Ms. Rowe cannot return to many of her prior jobs, no medical provider has opined that she cannot work. Dr. Espiritu has not placed any restrictions on her ability to walk, sit, or stand. However, as noted above, Dr. Espiritu did permanently restrict her ability to lift. Dr. Espiritu placed Ms. Rowe in the light to medium work classification. I find Ms. Rowe's restrictions preclude her from returning to many of the jobs that she previously held. However, I find that the preponderance of the evidence does not show that she is permanently and totally disabled. I find Ms. Rowe has a work history with varied employment. Ms. Rowe has obtained a variety of skills that would enable her to pursue alternate employment if she were so motivated. Unfortunately, Ms. Rowe has demonstrated little to no motivation to find any alternate work.

I also find that Ms. Rowe has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, she has now been out of the labor market since September of 2014 and she does have restrictions placed on her activities. She has lost access to a significant portion of her pre-injury employment opportunities. However, Ms. Rowe has demonstrated little to no motivation to reenter the workforce. Considering Ms. Rowe's age, educational background, employment history, ability to retrain, lack of motivation, length of healing period, permanent impairment and permanent restrictions and the other industrial disability factors identified by the Iowa Supreme Court, I find that Ms. Rowe has proven that she sustained a 55 percent loss of future earning capacity as a result of her work injury with Hy-Vee. As such, Ms. Rowe is entitled to 275 weeks of permanent partial disability benefits commencing on the stipulated commencement date of December 1, 2015.

The parties are seeking a determination with regard to how the weekly benefits that were paid prior to the hearing should be classified. Prior to the hearing, the defendants paid 101 weeks of weekly workers' compensation benefits. The dispute

between the parties is which benefits should be classified as healing period (HP) benefits and which benefits should be classified as permanent partial disability (PPD) benefits. Hy-Vee contends that the payments for December 12, 2014 through February 19, 2015 and benefits paid from May 19, 2015 through February 13, 2017 should all be classified as PPD benefits. However, on the Hearing Report the parties stipulated that the commencement date for permanent partial disability benefits is December 1, 2015. The parties are bound by the stipulations they enter into on the Hearing Report. Thus, the defendants may only take credit towards permanency benefits for any weekly benefits paid on or after December 1, 2015.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. I find that claimant was generally successful in her case and therefore find that an assessment of costs would be appropriate in this matter. Claimant is seeking payment for the second FCE. This FCE was not requested by a physician. The FCE in question was conducted by a physical therapist, and the results were never reviewed or adopted by a physician. I did not find this FCE to be beneficial in this case. I exercise my discretion and do not award the expense of the second FCE as a cost. Therefore, defendants are not assessed any costs in this matter.

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).

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 concluded that Ms. Rowe sustained fifty-five (55) percent industrial disability as a result of the May 27, 2014 work injury with Hy-Vee. As such, Ms. Rowe is entitled to payment of 275 weeks of permanent partial disability benefits commencing on the stipulated commencement date of December 1, 2015. Defendants shall receive a credit towards permanency for any benefits paid on or after December 1, 2015.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of one hundred eighty-two and 23/100 dollars ($182.23).

Defendants shall pay two hundred seventy-five (275) weeks of permanent partial disability benefits commencing on the stipulated commencement date of December 1, 2015.

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

Defendants shall be entitled to credit towards permanency for any benefits paid on or after December 1, 2015.

Each party shall bear their own costs.

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 8th day of January, 2018.

ERIN Q. PALS
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.