BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CONNIE JO MALDONADO,

Claimant,

vs.

PERFORMANCE CONTRACTORS, INC.,

Employer,

and

ACE INSURANCE,

Insurance Carrier,
Defendants.

FILED

MAR 21 2017

WORKERS COMPENSATION

File No. 5056343

ARBITRATION DECISION

Head Note Nos.: 1803, 3001

Connie Jo Maldonado, the claimant, seeks workers' compensation benefits from defendants, Performance Contractors, Inc., the alleged employer, and its insurer, Arch Insurance Co., as a result of an alleged injury on September 10, 2015. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on February 20, 2017, but the matter was not fully submitted until the receipt of the parties' briefs and argument on March 6, 2017. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. There was a single exhibit offered jointly. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to exhibit 1, pages 2 through 4 will be cited as, "Ex. 1-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and at the time of the alleged injury.

2. On September 10, 2015, claimant received an injury arising out of and in the course of employment with defendant employer.

3. Claimant is not seeking additional temporary total or healing period benefits.

4. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

5. If I award permanent partial disability benefits, they shall begin on March 22, 2016.

6. At the time of the alleged injury, was married and entitled to 2 exemptions for income tax purposes.

7. Prior to hearing, defendants voluntarily paid 30 weeks of permanent disability benefits for this work injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to permanent disability benefits;

II. Claimant's gross weekly earnings at the time of the work injury;

III. The extent of claimant's entitlement to additional medical treatment; and,

IV. Claimant's entitlement to reimbursement for an independent medical evaluation (IME).

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Connie, and to the defendant employer as Performance.

From my observation of her demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Connie credible.

Connie, age 47 at the time of hearing, was employed by Performance while building an ammonia plant for CF Industries in Sargent Bluffs, Iowa, from August 27, 2016 until she was laid off on June 2, 2016. Her job title at Performance was "pipefitter B." Performance describes such a job as follows:

> Lays out, fabricates, assemblies, installs and maintains piping and piping systems, fixtures and equipment for steam, hot water, heating, cooling, lubricating, sprinkling, and industrial processing systems.

(Ex. 11-1)

This description sets forth four levels of pipefitters: mechanic A, mechanic B, mechanic C and helper. Neither the official job description, nor any other evidence in this case describes the differences in tasks or responsibilities among the various levels of pipefitters. I can only assume that the various levels represent differences in the training, experience and compensation. The Performance job was the first time Connie had been employed as a pipefitter.

There is no dispute that Connie's job at Performance was physically demanding. At hearing, she described manipulating various sizes of steel pipe from 4 inches to 20 inches in diameter either by hand or with lifting devices, Connie's testified that her work at Performance required heavy lifting over 50 pounds and working on scaffolding. (Tr-21:23) This testimony was uncontroverted. Connie was placed on light duty after her injury due to physician imposed restrictions. Although she was eventually released to full duty by the treating doctor, Connie was never returned to full duty as a pipefitter B by Performance. She was still working light duty at the time she was laid off. Performance's work on the plant ended about a month after Connie was laid off.

Connie's wage at Performance was $29.00 per hour. Connie testified that when she was offered the job at Sargent Bluffs, she was told by Performance's recruiter that she would be paid a per diem of $90.00 per day in addition to her hourly wages. However, during her initial training she was told that B level of pipefitters hired after January 15, 2015 would not receive per diem. (Ex. B) Only level A pipefitters would continue to receive per diem after that date. (Id.) Although Connie testified that she continued to complain about this change in compensation, Connie continued to work for Performance.

Prior to her work injury, Connie only received one paycheck for a full workweek. For her work during this this workweek, she was paid her regular hourly rate for 40 hours and overtime pay for 20 hours. (Ex. A-4) Sixty (60) hours of work at her normal hourly rate of $29.00 is $1,740.00.

On September 10, 2015, Connie was working with another employee when she had to climb down from a scaffold on a ladder. The ladder was not fastened correctly and Connie fell. Connie was attached to the scaffold by a harness and a 6 foot lanyard. Connie fell the length of the lanyard and then was pulled from the right, and Connie's body jerked to the left. The lanyard did not prevent Connie from striking the ground on her left side. (Tr-36:37) Following her fall, Connie was transported to Mercy Medical ER. Imaging at the hospital revealed a T12 level compression fracture. (Ex. 1-5)

After the ER visit Connie was authorized to see Rodney Cassens, M.D., an occupational medicine doctor. Upon a diagnosis of a T12 compression fracture, Dr. Cassens prescribed a back brace, recommended over-the-counter pain medications, ordered physical therapy, and placed Connie on restricted duty. Dr. Cassens continued these treatment modalities from September 11, 2015 to December 15, 2015. When Connie failed to improve, the doctor referred Connie to an orthopedic specialist, Wade Jensen. M.D. (Tr-43; Ex. 2)

An MRI was performed on January 13, 2016 revealing a T12 compression deformity with left greater than right loss of height of 20 percent on the left and 7 percent on the right.

Connie first saw Dr. Jensen on February 10, 2016. The doctor's initial assessment was T12 compression fracture with radicular complaints. Connie was returned to physical therapy. There was no change in restrictions. (Ex. 3-2:4)

Dr. Jensen referred Connie to Brent Felix, M.D. a back specialist for consult. In his letter to Dr. Jensen dated March 9, 2016, Dr. Felix stated that Connie's symptoms are consistent with a T12 compression fracture as shown on MRI along with loss of vertebrae height. The doctor recommended only further non-operative treatment. Due to the amount of her pain, Dr. Felix recommended a functional capacity evaluation (FCE) to determine restrictions. The doctor also recommended pain management.

At the next appointment on March 21, 2016, Dr. Jensen's assessment changed to healed T12 compression fracture with continued myofascial pain. At this time, Dr. Jensen placed Connie at maximum medical improvement (MMI) and referred her for an FCE. The doctor stated that if the FCE results were valid, he will use them as restrictions, but if the FCE results were invalid, she will be on "restricted duty." (Ex. 3-5:6) I assume the doctor meant unrestricted duty if the FCE was invalid. Otherwise, the statement would make little sense.

On April 28, 2016, Connie underwent an FCE by Timothy Saulsbury, PT. In his written report to Dr. Jensen, Saulsbury placed claimant at the medium physical demand level. However, he sates as follows:

> Ms. Maldonado exhibited overt symptom/disability exaggeration behavior by our criteria and she scored 3/5 by Waddell's and 4/21 by Modified Korbon's protocols indicating that a few non organic signs are present. She passed only 24/36 validity criteria during her FCE, 67% which suggests poor effort and invalid FCE results.

(JEx. 1-1)

Based on the invalid FCE, Dr. Jensen's physician assistant on May 23, 2016 returned Connie to full duty work and stated that Dr. Jensen would provide an impairment rating. (Ex. 3-8:9) Dr. Jensen co-signed the office note indicating this release without restrictions. (Id.)

At the request of her attorney, Connie was evaluated on June 10, 2016 by Sunil Bansal, M.D., an occupational medicine physician. In his report dated July 29, 2016, Dr. Bansal provided a permanent impairment rating of 7 percent to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, placing Connie into category II on Table 15-4 for compression fractures of less than 25 percent of a thoracic vertebral body. (Ex. 6-11) Dr. Bansal severely criticized the physical therapist who performed the FCE for his use in part of Waddell's signs to conclude that

Connie was exaggerating on the FCE rendering the results to be invalid. (Id.) He explains that the author of the Waddell's signs, Dr. Waddell, has rejected the use of his criterion to identify patients as malingerers or exaggerators, citing the following medical article:

> Main, Chris, Waddell, Gordon. Behavioral responses to examination. A reappraisal of the interpretation of "nonorganic signs". Spine (Phila Pa 1976). 1998 Nov 1;23(21):2367-71.

(Ex. 6-12)

Dr. Bansal goes on to recommend permanent activity restrictions of no lifting over 20 pounds occasionally; no lifting over 10 pounds frequently; no frequent bending, climbing or twisting; and, no prolonged sitting or standing for greater than one hour. (Ex. 6-12) He recommends future maintenance treatment. (Id.) Dr. Bansal's fee for this IME is $2,545.00. (Ex. 6-14)

In a letter to defendant's adjusting firm dated September 12, 2016, Dr. Jensen provided a permanent impairment rating of 6 percent to the body as a whole under the AMA Guides, Fifth Edition. He placed Connie into category II on Table 15-3 for compression fractures of less than 25 percent of a thoracic vertebral body. (Ex. 3-10) Looking at the Guides, Table 15-3 is for ratings of the lumbar spine. Table 15-4, the one used by Dr. Bansal, is to be used for rating the thoracic spine. At any rate, the descriptions of the various categories in these two tables are the same.

I find that Connie has suffered 6-7 percent permanent partial impairment to the body as a whole due to her work injury of September 10, 2015. This is based on the uncontroverted opinions of Drs. Jensen and Bansal.

I also find that the work injury of September 10, 2015 is a cause of the permanent restrictions outlined by Dr. Bansal. In doing so, I reject the views of Dr. Jensen and the FCE evaluator. First, they are inconsistent with testimony of Connie's description of her limitations, which I found credible at hearing based on my observation of her demeanor at hearing. Second, Connie has a consistent record of employment prior to the work injury and she obtained employment at Performance based on her good work performances for prior employers. I do not find that such a worker would suddenly end a fairly lucrative occupation and lose her financial security without a real physical disability. But for the work injury in this case and significant physical limitations caused by that injury, I find it likely that Connie would have completed her employment as a pipefitter at Performance and would likely be working in such a capacity today at another construction site in this country. Finally, I found convincing Dr. Bansal's criticism of the FCE evaluator. Using a set of criteria, even only partially, to conclude someone is exaggerating their disability when the author of that criteria has rejected such use is unreasonable and taints the rest of the FCE evaluator's findings.

Extent of Industrial Loss:

When Connie was released to full duty, she returned to her light duty work at Performance until she was laid off by Performance on June 2, 2016. She returned to her family in Utah. (Tr-48) She subsequently filed for unemployment and her claim for such benefits was uncontested. (Tr-59) Connie has not been employed in any capacity since leaving Performance.

Connie applied for work as required by unemployment rules. She continues to do so at the present time, but has not received a job offer. She has submitted an extensive list of employers she has contacted in her job searches. My problem with her job search is that she is limiting her applications to construction contractors, and specifically to safety type of jobs, in an effort to remain in higher paid construction work. This severely limits her job opportunities. She appears to be an intelligent person with experience and training in many other occupations, albeit less financially rewarding than construction work.

She is a high school graduate and a graduate of a community college with a degree in health science. (Ex. 14-2) She was a certified pharmacy tech and worked as such for a year. (Ex. 14-4) She also was a restaurant cook, package handler, bartender, and sales clerk. (Ex. 14-4:5) Connie states that she cannot do such work because of the bending and lifting required. I would be more convinced if she had tried such jobs before arriving at that conclusion.

On the other hand, Connie is clearly prohibited from performing the construction jobs for which she was best suited given, her age, education, and experience. The jobs that are available to her are paid much less than those she held in the construction industry.

From examination of all of the factors of industrial disability, it is found that the work injury of September 10, 2015 is a cause of a 60 percent loss of earning capacity.

Claimant remains in considerable pain from her work injury and requires pain management care for the foreseeable future.

CONCLUSIONS OF LAW

I. 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 treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

In this case, I found the work injury to be a cause of permanent disability. The parties agreed in the hearing report if I found the injury to be a cause of permanent disability, the disability is to be compensated industrially. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

A showing that claimant had no loss of his job does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995).

However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve viewing a loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

In the case sub judice, I found that claimant suffered a 60 percent loss of her earning capacity as a result of the work injury. Such a finding entitles claimant to 300 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 60 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. Claimant has only been paid 30 weeks of permanent disability benefits.

III. The basis of compensation is the weekly earnings of the injured employee at the time of the injury. Iowa Code section 85.36. Weekly earnings is defined as gross salary, wages or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed. Section 85.36 provides various methods of computing weekly earnings depending upon the type of earnings and employment. If an employee is paid on a daily or hourly basis the gross weekly earnings are computed by dividing by 13 the earnings over the 13 week period before the work injury. Iowa Code section 85.36(6).

If the worker has worked less than 13 weeks before the injury, as in this case, Iowa Code section 85.36(7) states the rate shall be computed as if he or she had worked the full 13 weeks before the injury and had worked, when work was available to other employers in a similar occupation. That Code section goes on to state if the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

The party's dispute over gross earnings in this case first involves the inclusion or exclusion of the asserted per diem pay. Claimant seeks to include this amount into gross earnings, less her actual expenses. While claimant may have had a contract of employment that includes per diem pay when she arrived for work on August 27, 2015, that contract ended when she was told the next day that she would not be paid per diem. She then had the right to leave and seek unemployment at that time. However, she chose to stay and that act modified the employment contract to exclude per diem pay. Therefore, per diem pay will not be included in the calculation of gross weekly earnings.

The remaining dispute over gross weekly earnings involves the use of the actual work hours of other workers at the plant to calculate the 13 week average for gross earnings under Iowa Code section 85.36(7). Both sides then chose different co-workers to arrive at their gross weekly average. I do not believe that cherry picking co-workers by each side to achieve a higher or lower average gross income was the intent of statutory language referencing to use work available to co-workers in similar occupations. I am unable to use any other available hours for the two co-workers chosen by the parties as there is no evidence that they were the same level of pipefitter or had the same duties or tasks as claimant. One task by a co-worker may be needed more than other tasks when offering overtime to workers. Also, overtime may also be given based on seniority or skill level and this was not addressed by the parties. Therefore, there is no showing that either co-worker was comparable to claimant's work availability as a B level pipefitter.

Using then the last alternative in Iowa Code section 85.36(7), we have only one representative work week. During that week, claimant worked a total of 60 hours. At hourly wage, she earned $1,740.00. Using that amount along with the stipulated single status and entitlement to 2 exemptions, claimant's weekly compensation rate is $969.46 using the Workers' Compensation Commissioner's published rate booklet on the agency's website.

III. Claimant is entitled to reasonable medical treatment for a work injury pursuant to Iowa Code section 85.27. I found in this case, that claimant requires continued pain management for her work injury. This will be awarded.

IV. Iowa Code 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.

Defendants assert that claimant is not entitled to reimbursement for the fees of Dr. Bansal's independent medical examination because it occurred before their doctor, Dr. Jensen, issued his impairment rating. However, disability evaluations can occur before an impairment rating. Dr. Jensen's release of claimant to full duty based upon the FCE on May 23, 2016 constitutes an evaluation of permanent disability. An employer retained physician's release to return to work without restrictions is an assessment of disability qualifying claimant for an IME under Iowa Code section 85.39. Pella Corporation v. Marshall, CA Opinion, Case No. 14-2121, Filed April 6, 2016.

Dr. Bansal's evaluation did not occur until June 10, 2016. Claimant is entitled to reimbursement for Dr. Bansal's fees.

ORDER

1. Defendants shall pay to claimant three hundred (300) weeks of permanent partial disability benefits at a rate of nine hundred sixty-nine and 46/100 dollars ($969.46) per week from the stipulated commencement date of March 22, 2016. Defendants shall pay accrued weekly benefits in a lump sum and receive credit for the thirty (30) weeks already paid.

2. Defendants shall immediately authorize a board certified pain management specialist of their choosing to provide at no cost to claimant continued pain management care for so long as that specialist deems it necessary.

3. Defendants shall pay claimant the sum of two thousand five hundred forty-five and 00/100 dollars ($2,545.00) as reimbursement for the fees of Dr. Bansal.

4. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

5. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

6. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 21st day of March, 2017.

LARRY WALSHIRE
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.