BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHIRLEY RENDA,

Claimant,

vs.

J.C. PENNEY,

Employer,

and

NATIONAL UNION FIRE INS. CO.

Insurance Carrier,
Defendants.

File No. 5060402

A R B I T R A T I O N

D E C I S I O N

Headnotes: 1100, 1802, 1803, 2800, 3000

STATEMENT OF THE CASE

Shirley Renda, claimant, filed a petition in arbitration seeking workers' compensation benefits from her employer, J.C. Penney and their workers' compensation insurance carrier, National Union Fire Insurance Company. The matter proceeded to hearing on October 9, 2018. The record was held open post-hearing to allow claimant to obtain an additional opinion from Todd Harbach, M.D. The parties submitted post-hearing briefs and the matter was considered fully submitted on November 30, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE6; Claimant's Exhibits 7 through 15; and, Defendants' Exhibits A through E. Claimant provided testimony at hearing.

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

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on December 22, 2016, that arose out of and in the course of her employment with the defendant employer.

2. Whether the alleged injury is the cause of temporary disability. Claimant alleges temporary benefits for the periods of December 23, 2016 through June 16, 2017.

3. Whether the alleged injury is the cause of permanent disability and the extent thereof.

4. Rate, gross earnings.

5. Costs.

6. Defendants assert the affirmative defense of lack of timely notice under Iowa Code section 85.23.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Background

Shirley Renda, claimant, was 80 years old at the time of the hearing. She obtained her high school diploma in 1956 and has had no additional formal education.

Claimant's work history includes working as a secretary for a mortgage company and at Equitable Life Insurance Company. She left the workforce to care for her four children and later returned to work after her divorce in 1977. She did office work for a number of different companies, including over-the-phone sales.

On October 3, 2000, claimant was hired by the defendant employer, J.C. Penney. She worked for the defendant until May, 2017. (Exhibit B) She primarily worked in the men's clothing department as a sales associate. She testified that she worked 37 ½ hours per week, stocking clothes, cleaning the fitting rooms, operating the cash register, and helping customers. She earned $12.00 per hour and was required to lift up to 20 pounds and engage in standing, stooping, squatting and reaching. (Ex. C-3)

She also stocked plastic bags at the register, which came in boxes weighing up to 25 or 30 pounds. She had to stock the bags a couple times per week and more often in December when the store was busier.

Claimant testified that over the years, J.C. Penney employed fewer and fewer people as their business volume decreased, but the Christmas season remained busy. During the month of December, she and other employees were not allowed time off.

Pre-injury Medical Condition

In 2005, claimant fell and sustained a head injury with bleeding in the brain. As a result, she developed a seizure condition, for which she continues to take medication. After the fall, claimant was told by doctors to avoid heavy lifting because of the potential for another bleed in her brain. (Ex. D-4, Depo. p. 16) She was also told to avoid escalators and stairs because she understood another fall could be potentially fatal. (Ex. D-4, Depo. p. 15) Claimant understood these restrictions to be in effect while she was working for the defendant, including in December, 2016. (Ex. D-4, Depo. p. 16) However, claimant stated that she did do some lifting at work, "but not a lot." (Ex. D-5, Depo. p. 17)

The Alleged Injury and Subsequent Medical Treatment

Claimant noticed back pain on Thanksgiving Day, 2016. She was not at work and was carrying a grocery bag with two 2-liter soda bottles and felt a pull in her back. (Ex. D-8, Depo. p. 30) She testified that she "just went on, and [the pain] went away." (Ex. D-7, Depo. p. 26) She testified at hearing that the incident did not keep her from enjoying the remainder of her day.

However, at hearing, claimant also testified that she went to work the following day, which was Black Friday, and she still had pain from the prior day, although she stated that she did not feel it too much, until the end of her shift. (Testimony) In her deposition, claimant stated that at the end of the work day, she had a back ache that she attributed to prolonged standing. (Ex. D-7, Depo. p. 26)

Claimant continued working her regular shifts from Black Friday, 2016 through December 22, 2016. She stated in her deposition that her back hurt off and on during this time from prolonged standing at work. (Ex. D-8, p. 30) She testified at hearing that her back kept getting worse and worse during this time. (Testimony) But, she kept working because the employer needed people during the busy season. Claimant also testified at hearing that she did not mention her back pain to anyone at work during this time. It is significant that claimant had increasing back pain in December 2016 that she attributed to her work and specifically to long periods of standing at work.

On December 22, 2016, claimant was handling a large package. She described lifting the heavy package with both hands onto the counter for a customer. (Ex. C-5) After this, she noticed her back was hurting worse than it had been before. She began to feel lightheaded and nauseous. Claimant told her supervisor, Frikreta, she needed to leave early because she was feeling nauseous, lightheaded and her back was hurting. (Ex. D-8, Depo. pp. 32, 33) She did not tell Frikreta that she believed her back was hurting because of her work. (Ex. D-9, Depo. p. 33) Claimant testified at hearing that

she went home and iced her back and went to bed. The following day, she called the store and spoke to the Store Manager, Amanda, and explained that she had done something to her back and could not get out of bed and would not be able to come to work. (Ex. D-9, Depo. pp. 34-35) Claimant did not tell Amanda that she felt her back condition was related to her work. She stated that it "was just hurting in general. I didn't know what was wrong." (Ex. D-9, Depo. p. 36) Despite this statement claimant testified that her back had been hurting due to long periods of standing at work and her pain increased on December 22, 2016 after lifting a heavy package.

Claimant did not return to work after December 22, 2016 for the defendant employer or anywhere else. Prior to this incident, claimant had received high marks on her performance reviews with her employer and many positive comments from customers. (Ex. 13)

On December 23, 2016, claimant went to her regular family doctor. (Ex. JE5) She reported straining her back on Thanksgiving Day, lifting a bag with two 2-liter bottles of soda, which resolved in a few days and she "strained her back again last week at work lifting a heavy bag [and] has continued to have pain in the lower back ever since." (Ex. JE5-1) She was prescribed muscle relaxers.

Claimant testified at hearing that the following week, the pain did not improve and she called back asking to be referred to a specialist. She was sent to physical therapy, but had significant pain with the exercises. She received the results of her x-rays and learned that she had two compression fractures of her lumbar vertebrae at L1 and L3. (Ex. JE5-4,7) She testified that she was told to discontinue therapy and she was referred to Dr. Harbach, at Mercy Orthopedics. Claimant treated with Dr. Harbach from January, 2017 through June, 2017.

On January 12, 2017 claimant saw Dr. Harbach for the first time and reported that her pain was worsening, persistent and radiated into the right thigh. (Ex. JE4-5) The intake form asks whether the injury was work related, due to an accident, or other. The form is marked "other." (Ex. JE4-4) Claimant testified that she believed workers' compensation was only available to factory workers, not retail positions like hers.

On February 1, 2017, claimant had an MRI recommended by Dr. Harbach that resulted in a diagnosis of osteoporosis, low back pain and L1 and L3 fractures. (Ex. JE4-23)

On February 3, 2017, Dr. Harbach discussed with claimant treatment options of a back brace versus surgery. (Ex. JE4-25) Claimant testified that she understood she was at a greater risk during surgery because of her age and her anti-seizure medication related to the 2005 head injury. Claimant chose the conservative treatment of using the back brace. (Ex. JE4-25)

Claimant was placed in the back brace, which she found to be helpful, and she had a decrease in pain. (Ex. JE4-34, 40) She stated she wore it consistently until May,

2017. Claimant was instructed to wean out of the brace and did so by June, 2017. Dr. Harbach suggested walking to promote healing, which claimant did on an increasing basis, working up to walking 20 minutes at a time, three times per day.

By the end of April, 2017, x-rays showed some healing taking place of the compression fractures and claimant reported "feeling better with regards to her pain." (Ex. JE4-40) Her pain was described as improving, intermittent, and without any radiation. (Ex. JE4-40)

Claimant testified that she went to her employer wearing the back brace and told them she did not know how long she would be off work. She was placed on short-term disability and received 12 weeks of benefits from mid-January through mid-April, 2017. (Ex. E)

Claimant testified that she received a letter from her employer about voluntary early retirement, which included a reduced amount of pension benefits and the end of her employment. She understood that if she did not take early retirement, her employment was going to end at some point. The letter suggested contacting an attorney, which she did. Claimant accepted the voluntary retirement and her last date of employment was early May, 2017. (Testimony; Ex. B-1)

Claimant could not state during her deposition when, if ever, she personally reported to her employer that her back condition was work related. (Ex. D-12, depo. p. 45)

On March 20, 2017, claimant's counsel wrote a letter to Dr. Harbach asking for his opinion whether claimant's work for the defendant employer caused or aggravated claimant's back condition. (Ex. 8)

On April 20, 2017, Dr. Harbach drafted a letter and stated that claimant reported heavy lifting at work over the holiday season. Dr. Harbach opined, "I do believe that the lifting caused the compression fractures in this patient's back." (Ex. 9-1) He further stated that "even if she did not fracture her back at work the repetitive bending and lifting made her symptoms worse, which caused her to seek my care. It is important to note that the patient denied any other specific lifting injury or fall, relating all of this to lifting while at work at J.C. Penney." (Ex. 9-1)

On April 26, 2017, claimant's counsel wrote a letter to the employer asking the same be accepted "as Shirley's report of work injury" concerning her back condition and inability to work beginning on December 23, 2016. (Ex. 14)

I find that April 26, 2017 is the first time that claimant reported to her employer that she believed her back injury was work related, 125 days after the alleged date of injury of December 22, 2016.

On September 20, 2017, claimant's counsel wrote a letter to Dr. Harbach inquiring about her status concerning MMI and impairment according to the American

Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition. (AMA Guides).

On October 13, 2017, Dr. Harbach opined in a letter that claimant reached MMI on June 16, 2017 and assigned 23 percent permanent impairment of the whole person based on the "DRE lumbar category #4, which is in table 15-3, on page 384," of the AMA Guides, "because she had greater than 50% of 2 levels," referring to the compression fractures. (Ex. 11-1) He also assigned a permanent restriction of lifting no more than 50 pounds and he encouraged claimant to seek employment "that does not require lots of bending and lifting, if possible." (Ex. 11-2) It is significant that this impairment rating is based on the compression fractures alone and not any loss of motion or residual symptoms.

On February 19, 2018, defense counsel wrote to Dr. Harbach following a telephone conversation. (Ex. A, pp. 1-3) Dr. Harbach signed and dated the letter indicating his agreement that claimant did not report the injury to him as work related. Also, claimant reported that her back injury began when she lifted a grocery sack with two 2-liter bottles and her pain continued after that incident through her appointment with Dr. Harbach on January 12, 2017. (Ex. A-2) Dr. Harbach agreed that it was lifting the grocery bag that was more likely than not the cause of her low back pain and compression fractures. (Ex. A-3) He further stated that he is unable to opine that claimant's employment at J.C. Penney in December 2016, "forms a material cause and/or aggravation/worsening/acceleration of her low back condition, including compression fractures, on a permanent basis." (Ex. A-3)

On August 16, 2018, claimant's counsel took Dr. Harbach's deposition to inquire about causation. (Ex. 12) Dr. Harbach was aware at that time that claimant's initial complaint occurred when "she lifted a heavy bag of groceries at Thanksgiving time," and "the pain became substantially worse when she was at work doing repetitive bending, [and] lifting." (Ex. 12-3, Depo. p. 9) Dr. Harbach stated that the work at J.C. Penney was not the actual "causal event of the fracture." (Ex. 12-3, Depo. pp. 9-10) Rather, he stated that "I think her lifting of the grocery sack [on Thanksgiving Day] caused the fracture," and "[r]epetitive lifting and bending at work could certainly aggravate that problem." (Ex. 12-3, Depo. p. 10) Dr. Harbach then confirmed his opinion expressed on April 20, 2017, that "even if she did not fracture her back at work the repetitive bending and lifting made her symptoms worse, which caused her to seek my care." (Ex. 9-1) Under cross examination, Dr. Harbach also agreed that his opinions expressed in the February 19, 2018 letter remained unchanged and that such opinions were within a reasonable degree of medical certainty. (Ex. 12-5, Depo. pp. 19-20) In the February 19, 2018 letter, Dr. Harbach stated he is unable to opine that claimant's employment at J.C. Penney in December 2016, "forms a material cause and/or aggravation/worsening/acceleration of her low back condition, including compression fractures, on a permanent basis." (Ex. A-3)

On September 10, 2018, Defense counsel wrote to Dr. Harbach again following a telephone conversation and Dr. Harbach signed and dated the letter indicating his

agreement that claimant's action of picking up the grocery bag in November 2016 "more likely than not caused her compression fractures at L1 and L3." (Ex. A-5) He also agreed that claimant's work at J.C. Penney in November and December, 2016 "probably flared-up or exacerbated her low back pain on a transient or temporary basis." (Ex. A-5) Dr. Harbach again agreed that claimant's employment at J.C. Penney does not likely "form a 'material' cause and/or aggravation/worsening/acceleration of her low back condition, including compression fractures, on a *permanent* basis." (Ex. A-5) Finally, he agreed that his previously assigned "23% whole body permanent impairment rating and recommended permanent work restrictions attributable to Ms. Renda's lumbar compression fractures are not likely causally related to her employment at J.C. Penney." (Ex. A-5)

On November 9, 2018, claimant's counsel wrote a letter to Dr. Harbach which included the following quote from the September 10, 2018 letter from defense counsel:

> While it may be possible, you cannot opine it is probable that Ms. Renda's employment at J.C. Penney in December, 2016 forms a material cause and/or aggravation/worsening/acceleration of her low back condition, including compression fractures, on a permanent basis.

(Ex. A-4; Ex. 15-1) Concerning the above, Dr. Harbach agreed that claimant's work at J.C. Penney did not cause the compression fractures in her lumbar spine. However, the "work during [the] busy season of 2016 was indeed an aggravation of her condition." (Ex. 15-1)

It is significant that this last statement concerning aggravation of the condition does not address whether the aggravation was temporary or permanent and therefore, does not contradict Dr. Harbach's opinion of September 10, 2018, in which he agreed that the work at J.C. Penney "probably flared-up or exacerbated her low back pain," but did so "on a transient or temporary basis." (Ex. A-5)

The November 9, 2018 letter also states that claimant did not have permanent impairment or restrictions "prior to developing the condition she presented to [Dr. Harbach] with." (Ex. 15-1) However, this statement merely states the existence of an impairment rating and restrictions related to claimant's condition without identifying the cause of the condition as work related or not. Finally, Dr. Harbach opines that claimant's vertebrae structurally worsened due to exertion after the compression fracture, which is supported by the delay in healing of the fracture. However, a mere delay in healing without more, tends to support the temporary nature of the exacerbation.

I find that the most persuasive evidence concerning Dr. Harbach's opinion is his own words spoken during his deposition. In his deposition, he reaffirmed his opinion that it was lifting the grocery bag at home, unrelated to work, that caused the compression fractures of L1 and L3. (Ex. 12-5, Depo. p. 18) He also confirmed that he is unable to opine that claimant's employment at J.C. Penney in December 2016, "forms

a material cause and/or aggravation/worsening/acceleration of her low back condition, including compression fractures, on a permanent basis." (Ex. A-3; Ex. 12-5, depo. pp. 19-20) I find that the written opinion of September 10, 2018, is most consistent with Dr. Harbach's deposition testimony and that claimant's work at J.C. Penney in November and December, 2016 "probably flared-up or exacerbated her low back pain on a transient or temporary basis." (Ex. A-5) Also, I accept Dr. Harbach's opinion that the "23% whole body permanent impairment rating and recommended permanent work restrictions attributable to Ms. Renda's lumbar compression fractures are not likely causally related to her employment at J.C. Penney." (Ex. A-5)

Current Condition

Currently, claimant walks daily between 1 and 1 ½ hours per day, walking up to 30 minutes at a time. She does not take any prescription medication, but does use Advil as needed. She stated in her deposition in July 2018, that she takes Advil "maybe once a month." (Ex. D-11)

Claimant lives by herself and takes care of her own housecleaning, although her family will take care of mowing the grass and shoveling snow. She stated in her deposition that she "can only go so long," and knows that overdoing it will cause her to need to rest. (Ex. D-11)

Since accepting early retirement, claimant testified that she has "seen" some jobs, which required prolonged standing or walking and she did not think she would be able to physically perform the work.

CONCLUSIONS OF LAW

1) Whether claimant sustained an injury on December 22, 2016, that arose out of and in the course of her employment with the defendant employer.

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, the only expert weighing in on the issue of causation is Dr. Harbach. I have found above that he opined that the non-work related event of lifting the grocery bag at home caused the compression fractures of L1 and L3. (Ex. 12-5, depo. p. 18) Dr. Harbach could not say that the employment was "a material cause and/or aggravation/worsening/acceleration of her low back condition, including compression fractures, on a permanent basis." (Ex. A-3) However, he did state that her work in November and December, 2016 "probably flared-up or exacerbated her low back pain on a transient or temporary basis." (Ex. A-5)

Based upon Dr. Harbachs's opinion, I conclude that claimant did sustain a temporary exacerbation of her underlying condition as a result of her employment, which manifested on December 22, 2016.

2) Affirmative Defense - claimant failed to provide timely notice under Iowa Code section 85.23:

Having determined above that claimant did sustain a temporary exacerbation injury arising out of and in the course of her employment with the defendant employer, I now must determine whether claimant provided timely notice of that injury to defendants.

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

Iowa Code section 85.23.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

In this case, claimant has alleged a cumulative injury with a manifestation date of December 22, 2016. (Hearing Report, p. 1)

Claimant argues that the discovery rule should toll the 90-day notice requirement until Dr. Harbach issued his April 20, 2017 letter stating that "even if she did not fracture her back at work the repetitive bending and lifting made her symptoms worse, which caused her to seek my care." (Ex. 9-1; Claimant's Post-Hearing Brief, p. 5) Or, in the alternative, that the discovery date would be no earlier than "early February, 2017," when she consulted counsel on another matter and the issue of her back condition possibly being related to work was discussed. (Claimant's Post-Hearing Brief, p. 5) If either of these dates are accepted, the letter from claimant's counsel to the employer of April 26, 2017, would fit within the 90-day notice requirement. (Ex. 14)

I have found above that the April 26, 2017 letter was claimant's first notice to the employer that she believed she had a work-related back injury,

The time period both for giving notice and filing a claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

In the case it is clear that claimant never reported a back injury to her employer until the April 26, 2017 letter from claimant's counsel.

Claimant testified that she did not know workers' compensation benefits existed for non-factory workers. With this understanding, it is more understandable why claimant may mark a doctor's intake form as "other" rather than "work related." (Ex. JE4-4) Although the undersigned is sympathetic to claimant's misunderstanding, ignorance of the law is not an excuse, and it does not provide a basis under the law to toll the 90-day notice requirement.

December 22, 2016 was claimant's last day of work for the defendant. Through claimant's testimony, and supported by her reports to medical providers, she attributed her back pain to her employment. She testified that her back condition worsened from the prolonged standing, bending and lifting at work. Despite marking a doctor's intake form as "other" and any testimony of her uncertainty, I cannot overlook her clear attribution of her back pain to her work activities up to and including lifting a heavy package on December 22, 2016. Claimant's testimony on the whole and her reports to her medical providers establish that claimant believed her back condition was related to her work at J.C. Penney. She clearly attributed her worsening condition to her work activities. There was no evidence of any intervening cause for her worsening condition between Black Friday and December 22, 2016. I conclude that claimant was aware that

her condition was work related. Further, when she became physically unable to continue working after December 22, 2016, she would have also been aware of the serious nature of her condition and the adverse impact on her employment.

I conclude that the manifestation date of December 22, 2016 and the discovery date are the same, and I therefore conclude that claimant failed to provide notice to her employer within 90 days

Having found that claimant did not provide notice to the employer of her back condition within 90 days, I find that claimant's claim is barred by Iowa Code section 85.23.

The remaining issues are moot. Each party shall pay their own costs.

ORDER

IT IS THEREFORE ORDERED:

Claimant shall take nothing.

Each party shall pay their own costs.

Signed and filed this 21st day of February, 2019.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/sam

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.