BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TINA J. KELCHNER,

Claimant,

vs.

NORDSTROM, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5048089

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Tina J. Kelchner, has filed a petition in arbitration seeking workers' compensation benefits from Nordstrom, Inc., a self-insured employer for an alleged work injury date of April 12, 2013.

The case was heard in Des Moines, Iowa, on March 18, 2015 and considered fully submitted upon the same. The evidence of this case consists of Claimant's Exhibits 1 through 7 and Defendant's Exhibit A, in addition to the testimony of the claimant as well as Leanne Joy Collins.

ISSUE

Whether the claimant sustained a permanent disability, and if so, the extent of that disability.

STIPULATIONS

The parties stipulate the claimant sustained an injury on April 12, 2013. They further agree that the disability is industrial in nature.

At the time of her injury, claimant was single and entitled to three exemptions. The parties agree that the weekly benefit rate is based off of a gross earnings calculation of $681.00 resulting in a weekly benefit rate of $449.96.

Prior to the hearing claimant was a 25 weeks of permanent partial disability benefits at the weekly rate of $449.96.

FINDINGS OF FACT

Claimant is a 31 year old person at the time of hearing. She was an average to above average student. After graduating from high school, she attended Kirkwood Community College pursuing a nursing degree. She left the program after the death of a close friend and began working in different retirement homes providing food to the residents. She then moved to Mercy where she monitored cardiac patients.

She returned to Kirkwood taking courses in nursing and dental assistant work. Because of cost, she was unable to continue.

In November 2007, she began working for the defendant employer. At that time, she was in perfect physical condition. She had no previous surgeries or hospitalizations (other than pregnancy). In 2010, she became pregnant and was put on bed rest at the 15 week marker. She had low back pain associated with that pregnancy. She received some treatment from a chiropractor during the pregnancy. After pregnancy, however, the back pain resolved.

She began working in packaging for about a year and then moved to returns and inspections. In returns and inspections, they clean and repair garments to restore them to like new condition.

On April 12, 2013, claimant injured her low back when she was lifting a box greater than 40 pounds. She was sent to tote sort and worked for an hour and her back pain increased to the point she felt that she had to report it to her supervisor. She was sent to the nurse's office and then sent home. Claimant had hoped that a chiropractor could "pop it back". (Exhibit 5, page 1)

She received treatment on site and was advised to avoid her usual fitness activities. Her lifting and carrying was limited to 20 pounds. It was recommended that she alternate walking/standing/sitting as tolerated for comfort and limit her bending/stooping to occasional. (Ex. 1, p. 1) She was also prescribed physical therapy three times a week to take place on site. (Ex. 1, p. 1) Eventually, she was referred to Work Well. (Ex. 5, p. 2)

On April 30, 2013, she was seen by Jeffrey A Westpheling, M.D., for the low back pain. He recommended continued conservative treatment with formal physical therapy and use of heat. (Ex. 1, p. 2) Dr. Westpheling saw claimant again on May 3, 2013. She had complaints of low back pain radiating into both extremities. She reported physical therapy was not helping. (Ex. 1, p. 10)

Dr. Westpheling ordered an MRI which revealed a small disc fold at L5-S1 with no evidence of foraminal or central canal stenosis. During the May 14, 2013 visit, Dr. Westpheling continued claimant's physical therapy and changed her work restrictions to no lifting or carrying greater than 30 pounds. (Ex. 1, p. 6-7)

A week later, claimant returned with complaints of radiating discomfort into the left lateral thigh area. (Ex. 1, p. 8) Dr. Westpheling continued physical therapy and claimant was given a restriction of no overtime. (Ex. 1, p. 8)

She was unhappy with Dr. Westpheling's treatment. He told her she was fine, but she disagreed. She returned to defendant employer with her complaints.

Dr. Westpheling discontinued her physical therapy due to lack of progress, suggested epidural steroid injections which she did not want to undergo at that time. (Ex. 1, p. 11) Dr. Westpheling recommended claimant see Dr. Kim for treatment.

After discussing the lack of progress with employer, claimant was sent to University of Iowa Hospitals and Clinics (UIHC). She had significant pain. She could not bend over and she had radiating pain. At hearing, claimant described herself as "quite grumpy."

Claimant was given new work restrictions at the UIHC by Eric W. Aschenbrenner, M.D., with lifting up to 15 pounds rarely and up to 10 pounds occasionally with rare bending below the knee. (Ex. 2, p. 3) He prescribed new medications and concluded that claimant's pain was musculoskeletal and myofascial rather than neurogenic. (Ex. 2, p. 7) Dr. Aschenbrenner continued to treat claimant conservatively, but claimant had ongoing pain.

The pain was significant enough that by September 2013, claimant had agreed to injections. (Ex. 2, p. 13) The day after the injection, claimant could not walk but eventually she had relief. The relief, however, lasted for only about a month. She had a second injection but after her second injection she read information that suggested the injections might not be good for her long-term health and refused to get subsequent injections.

During physical therapy, Melissa Sheehy, OT, on March 31, 2014, claimant was at 90 percent of her previous activity. (Ex. 6, p. 6) The therapist recommended she limit her lifting to 30 pounds occasionally and forward bend only occasionally. (Ex. 6, p. 7) Claimant told Ms. Sheehy on March 10, 2014, that she did not have to sit at work anymore and that she felt much stronger. (Ex. 6, p. 3) However, she maintained a pain level of two-three on a ten scale even during her last visit. (Ex. 6, p. 6)

Claimant was sent to Meals on Wheels for light-duty work and paid by Nordstrom's to work at Meals on Wheels. She helped prepare food and package it for delivery.

Dr. Aschenbrenner opined that claimant's current back pain was not related to her previous pregnancy back pain.

"Despite appropriate treatment she does continue to have some back pain and, therefore, I anticipate that she will have some ongoing symptoms/impairment." (Ex. 2, p. 23)

"Finally, regarding whether the condition is a 'temporary aggravation of the pre-existing condition' as I mentioned above, it appears that the prior back pain was separated, related to pregnancy, and resolved prior to the current symptom." (Ex. 2, p. 24)

Dr. Aschenbrenner found claimant to be at maximum medical improvement as of April 21, 2014. During that visit she admitted to having some continual back pain and left lower extremity symptoms and that certain activities aggravated her symptoms including prolonged driving or playing on the ground with the children. (Ex. A, p. 8) He did not give her any work restrictions except that she be allowed to sit and stand on a rare basis throughout the day. (Ex. A, p. 9) During the physical examination, Dr. Aschenbrenner noted that she continued to have some intermittent musculoskeletal pain but also had ongoing intermittent radicular symptoms that was suggestive of L5 impingement. (Ex. A, p. 9)

At the request of the defendant, Dr. Aschenbrenner issued an impairment rating of 5 percent. This rating was due to non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings and no alteration of the structural integrity. (Ex. A, p. 10)

Richard F. Neiman, M.D., conducted an IME on January 7, 2015. (Ex. 4, p. 2) When she presented to Dr. Neiman, claimant reported back pain, neck soreness which she attributes to stress, some anxiety and depression.

Her forward flexion was 50 degrees, extension at 20 degrees, right and left lateral flexion at 30 degrees. Her straight leg test was negative bilaterally. Her neurological examination revealed station and gait normality. She had good strength and reflexes. In the last visit with Ms. Sheehy, claimant's musculoskeletal examination had approximately the same results. (Ex. 6, p. 6) Her forward flexion was 50 degrees, extension was 35 degrees, and side bend was 36 degrees on right and 37 degrees on the left. (Ex. 6, p. 6)

Based on her MRI, however, Dr. Neiman assigned claimant 11 percent whole person impairment and recommended that claimant avoid excessive flexion, extension, and lateral flexion and lifting repetitively in the range of 15 to 20 pounds, maximum up to 40 pounds.

She went part-time at the end of February, beginning of March. When she was full time and had to take time off due to pain and discomfort, her performance pay reduced dramatically. She was worried that she would lose her job. She asked to go part-time because she would reduce her time off and increase her pay. She reduced her hours by eight hours per week. She works four, eight hour days instead of five eight hour days.

Her fiancé is a massage therapist and as her back pain increases, she receives more treatment from her fiancé.

Her non work activity has changed. She used to go horseback riding, ride four wheelers, take her kids on long walks but the uneven ground causes back pain. She was unable to take her children trick-or-treating because she was saving herself for work.

She has a twin sister who works in the same department, doing the same job and the claimant makes approximately $10,000 less than her twin.

Claim has not looked for additional employment. She has no computer skills nor any skills suited for sedentary work at this time.

Her current medical regimen includes taking ibuprofen, essential oils, and receiving therapeutic massages on a regular basis.

Ms. Collins testified that she is the department manager for returns and inspections where the claimant currently works. Ms. Collins manages approximately 170 people. She testified that part-time employment was designed to retain older staff who no longer wanted to work as many hours.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

There is no dispute that the claimant sustained an injury to her back. Prior to her injury she had only one back complaint and that was during her pregnancy. Dr. Aschenbrenner ruled out that her current symptomology was related to her pregnancy.

Since the work injury, claimant has had significant and ongoing back pain that has caused her to limit her work hours and reduced her leisure activities. Even on the day of claimant's release from Dr. Aschenbrenner's care she was still exhibiting low back pain and radicular symptoms.

The defendant argues that Dr. Aschenbrenner's impairment rating should be given greater deference because he used the appropriate method according to the AMA Guides to the Evaluation of Permanent Impairment.

The guides are just that—guides. It is a useful tool in evaluating loss of impairment but it is not binding on this agency. See 876 IAC 2.4. The impairment ratings are useful along with the functional measurements performed by both Dr. Neiman and occupational therapist Sheehy.

Both Neiman and Sheehy found claimant to have some limitation in range of motion, ongoing pain, and both recommended some sort of lifting restrictions.

Based on the testimony of the claimant who is found to be credible, as well as the reduction in range of motion, the consistent ongoing complaints of pain and discomfort, the need for lifting restrictions in the 20 to 30 pound range, claimant industrial losses determined to be 20 percent.

ORDER

THEREFORE, it is ordered:

That defendant is to pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred forty-nine and 96/100 dollars ($449.96) per week from April 13, 2013.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant is to be given credit for benefits previously paid.

That defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 7th day of April, 2015.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/kjw

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.