

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASMINKA AVDIC,

Claimant,

vs.

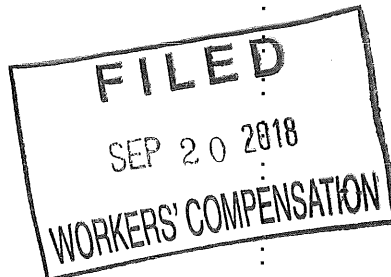
WELLS FARGO,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5065576

ARBITRATION

DECISION

Headnotes: 1402.40, 1803,
2502, 2701, 2907

STATEMENT OF THE CASE

Jasminka Avdic, claimant, filed a petition for arbitration against Wells Fargo, as the employer and Old Republic Insurance Company as the insurance carrier. An in-person hearing occurred in Des Moines on May 7, 2018.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 2, and Defendants' Exhibits A through F. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record closed at the end of the arbitration hearing.

However, counsel requested the opportunity to submit post-hearing briefs. The parties' request was granted. The case was deemed fully submitted upon the simultaneous filing of the post-hearing briefs on June 4, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's alleged neck injury is causally related to or sequela of the August 5, 2015 work injury?
2. The extent of claimant's entitlement to permanent disability benefits.
3. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.
4. Whether claimant is entitled to alternate medical care for future treatment of her alleged neck injury and future maintenance care of the right shoulder.
5. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Jasminka Avdic is a 49-year-old, right-hand dominant woman, who was born in Bosnia. (Claimant's testimony) She obtained a high school education in Bosnia, and immigrated to the United States in 1999. (Claimant's testimony; Defendants' Exhibit F, page 15) She has subsequently become a citizen of the United States. (Defendants' Ex. F, p. 15)

Claimant did not speak any English when she arrived in the United States. (Claimant's testimony) Nevertheless, within a couple of weeks of entering the United States, Ms. Avdic obtained employment at TJ Maxx. She took English classes, improved her ability to speak and understand English and was promoted by TJ Maxx to a cashier position. (Claimant's testimony)

She subsequently obtained employment at Walmart. She held both positions at TJ Maxx and Walmart for a period of time. At Walmart, Ms. Avdic worked as a cashier and was later promoted to a front manager, then to customer service, and into a position with the money center at Walmart. She earned \$15.00 per hour when she last worked for Walmart in the winter of 2014-2015.

Ms. Avdic obtained employment with Wells Fargo in 2006 and simultaneously worked part-time for Walmart for a period of time. Ms. Avdic has worked as a teller, lead teller, and was promoted to a personal banker position most recently. (Claimant's testimony) At the time of the injury underlying this claim, Ms. Avdic was earning \$17.26 per hour (Defendants' Ex. E) After her promotion to a personal banker position, claimant earned \$20.21 per hour. (Defendants' Ex. D) At the time of hearing, Ms. Avdic

was earning \$20.61 per hour. (Defendants' Ex. F, p. 11) Claimant worked full-time at the time of this injury and continues to work full-time for Wells Fargo. (Defendants' Ex. F, p. 12)

On August 5, 2015, claimant was working at Wells Fargo. She lifted a bag of quarters that weighed approximately 45 pounds and experienced pain in her right shoulder. She reported the injury and was later provided medical care when her symptoms did not resolve. (Claimant's testimony)

Claimant first obtained treatment for her right shoulder approximately one month after the injury occurred. She went to a walk-in clinic due to her ongoing symptoms. She was not treated. Instead, the walk-in clinic advised her that she must obtain treatment through her employer since it was a work injury. (Claimant's testimony) Wells Fargo sent claimant to Concentra Medical Centers for initial treatment on September 9, 2015.

At her initial evaluation, claimant filled out a history form. She reported only an injury to her right shoulder. (Joint Ex. 1, p. 1) Carlos Moe, D.O. evaluated claimant. He recommended work restrictions and subsequently ordered an MRI arthrogram of claimant's right shoulder. (Joint Ex. 1)

Unfortunately, the MRI disclosed a significant, if not complete, tear of claimant's rotator cuff in her right shoulder. (Joint Ex. 2) Dr. Moe referred claimant for surgical consultation with an orthopaedic surgeon, William Jacobson, M.D. (Joint Ex. 2)

Dr. Jacobson diagnosed claimant with a full-thickness tear of the supraspinatus tendon in the right shoulder. He recommended and subsequently performed surgical repair of claimant's torn right rotator cuff. (Joint Ex. 3; Joint Ex. 4)

After an appropriate period of therapy and recovery, Dr. Jacobson opined that claimant was capable of returning to work without restrictions as of April 19, 2016. (Joint Ex. 3, pp. 10, 20) Dr. Jacobson confirmed this full-duty release on May 18, 2016 and again in September 2016. (Joint Ex. 3, pp. 11, 22, 38)

Dr. Jacobson declared maximum medical improvement on May 17, 2016. (Joint Ex. 3, pp. 11, 38) He assigned a permanent impairment rating to claimant's right shoulder injury equivalent to two percent of the right upper extremity, or one percent of the whole person. (Joint Ex. 3, p. 38)

Ms. Avdic requested a second opinion from a different orthopaedic surgeon. Defendants consented and scheduled claimant to be evaluated by Steven A. Aviles, M.D., on July 25, 2016. (Joint Ex. 5) Dr. Aviles found only a "subtle finding" of a "slight internal rotation defect of 70 degrees, which is slightly different from normal." (Joint Ex. 5, p. 4) Dr. Aviles opined that claimant sustained only a one percent permanent impairment of the right upper extremity as a result of the August 5, 2015 work injury.

Nevertheless, claimant continued to complain of ongoing symptoms, including symptoms involving her neck and upper back. Dr. Jacobson noted that claimant did not report scapular pain, neck pain, and headaches until March 2016. He opined that those alleged injuries and symptoms are not directly related to the August 5, 2015 work injury. (Joint Ex. 3, pp. 39-40)

However, claimant sought additional treatment and was referred to a pain specialist, Dan Moyse, M.D. for ongoing treatment of her scapular pain, neck pain, and headaches. Defendants did not authorize treatment through Dr. Moyse and denied liability for any alleged neck injury. (Claimant's testimony) Dr. Moyse provided some injections into claimant's neck and diagnosed claimant with a C5-6 disc herniation. (Joint Ex. 6, p. 5) However, Dr. Moyse opined, "I do NOT think this is related to her original injury or is a sequelae of her right rotator cuff surgery." (Joint Ex. 6, p. 5) (emphasis in original)

Dr. Moyse was not able to resolve all of claimant's neck symptoms so he referred claimant to the University of Iowa Hospitals and Clinics for evaluation in their pain center by Justin G. Wickle, M.D. on January 8, 2018. Dr. Wickle diagnosed claimant with mild degenerative changes in her cervical spine. However, he could not identify an etiology for her pain complaints. He referred claimant back to Dr. Moyse and recommended no changes in her work restrictions. (Joint Ex. 9)

Ms. Avdic subsequently obtained an independent medical evaluation performed by Sunil Bansal, M.D., on March 15, 2018. (Claimant's Ex. 1) Dr. Bansal noted a history, stating, "on August 5, 2015, she sustained injuries to her right shoulder, back, and neck." (Claimant's Ex. 1, p. 9) Ultimately, Dr. Bansal diagnosed claimant with a right shoulder cuff and labrum tear as well as a C5-6 right-sided disc herniation. (Claimant's Ex. 1, pp. 13-14) Dr. Bansal opined that the right shoulder as well as the neck conditions are causally related to claimant's work injury on August 5, 2015.

Dr. Bansal concurred with Dr. Jacobson's assessment that claimant's right shoulder achieved maximum medical improvement on May 17, 2016. However, Dr. Bansal opined that claimant did not achieve maximum medical improvement for her neck until February 1, 2018. Dr. Bansal opined that claimant sustained permanent impairment equivalent to five percent of the whole person as a result of the neck injury and four percent of the right upper extremity as a result of the right shoulder injury. (Claimant's Ex. 1, pp. 16-17)

Ms. Avdic testified that she did not have right shoulder or neck injuries or symptoms prior to the August 5, 2015 work injury. Yet, I have difficulty finding that the neck injury is causally related to the August 5, 2015 work injury.

Dr. Jacobson is a qualified orthopaedic surgeon. He evaluated claimant for an extended period of time. He performed surgery on claimant's right shoulder. He explained that claimant did not begin complaining of neck symptoms, scapular

symptoms, or headaches until March 2016. He opined that the neck injury is not related to the August 5, 2015 work injury.

Certainly, claimant can make a reasonable argument that Dr. Jacobson was selected and authorized by defendants. Perhaps the credibility of his opinion could be challenged, arguing that he was paid by the defendants. However, Dr. Jacobson is a physician well-known to this agency. He provides good orthopaedic care to his patients. His opinions carry significant weight.

I note that Dr. Moyse was not authorized or paid by defendants. Instead, claimant sought unauthorized treatment with Dr. Moyse under her personal health insurance. Dr. Moyse concurs with Dr. Jacobson and opined that the neck condition is not related to the August 5, 2015 work injury. This is very convincing evidence. Dr. Moyse has no incentive to support the defendants' position and every incentive to support his patient. Yet, he opines that the neck condition is not related.

Dr. Bansal evaluated claimant one time. His history seems to assume that the August 5, 2015 work injury caused an injury to the right shoulder as well as the neck. He provides no explanation or analysis of why claimant reported only right shoulder symptoms at her first appointment with Concentra, despite listing the September 9, 2015 medical record as a record he reviewed.

Dr. Bansal provides a medical explanation how lifting could cause claimant's neck injury. He provides an explanation of how a neck injury could cause symptoms in the neck and into the scapula and shoulder regions. Yet, he provides no analysis of the fact that claimant did not have or report symptoms in the neck at the time of the injury or even a month later when evaluated by Concentra.

According to Dr. Jacobson, claimant did not report neck symptoms until March 2016, or approximately seven months after the work injury. Dr. Jacobson evaluated claimant several times over an extended period of time. Some explanation of his observations and the delayed onset of neck symptoms is necessary to credibly connect the work injury and the neck symptoms and condition. Considering the credentials of the experts, their opportunities to evaluate claimant over a period of time or only on a single occasion, as well as their causation opinions and explanations, I find the causation opinions expressed by Dr. Jacobson and Dr. Moyse to be most convincing in this evidentiary record. Therefore, I find that claimant failed to prove her neck symptoms and condition are causally related to the August 5, 2015 work injury at Wells Fargo.

The parties stipulate that claimant sustained permanent disability related to the right shoulder injury. (Hearing Report) Three physicians have offered opinions about claimant's permanent impairment related to the right shoulder. Dr. Jacobson had the best opportunity to evaluate claimant intra-operatively and over a period of time on a number of occasions. He is an orthopaedic surgeon and is well qualified.

Dr. Aviles is also a respected orthopaedic surgeon. He appears to have performed a thorough evaluation of claimant's right shoulder. His opinions are entitled to significant weight as well.

Finally, Dr. Bansal is an occupational medicine physician, who is well acquainted with the AMA Guides to the Evaluation of Permanent Impairment and performs numerous permanent impairment ratings. Dr. Bansal clearly is also qualified to render a permanent impairment rating.

Dr. Jacobson opined that Ms. Avdic sustained a permanent impairment equivalent to two percent of the whole person as a result of the right shoulder injury. Dr. Aviles found only a slight reduction of range of motion in the claimant's right shoulder. He assigned a permanent impairment rating that is equivalent to one percent of the right upper extremity, or one percent of the whole person. Dr. Bansal assigned an impairment equivalent to four percent of the whole person for the right shoulder injury.

Again, each of these physicians is capable and qualified to render an impairment rating. Dr. Jacobson evaluated claimant more frequently than the other two physicians. He also had the opportunity to evaluate claimant's right shoulder intra-operatively. I find his opinion to be most convincing under the circumstances of this case. Therefore, I find that claimant sustained a permanent impairment equivalent to two percent of the whole person as a result of the August 5, 2015 right shoulder injury.

Dr. Jacobson released claimant to return to work without formal medical restrictions on April 19, 2016. (Joint Ex. 3, pp. 10, 20) He evaluated claimant again more than once after that date and reiterated and confirmed the full-duty work release on May 17, 2016 and again on September 9, 2016. (Joint Ex. 3, pp. 11, 22, 38)

Neither Dr. Aviles nor Dr. Bansal specifically offered permanent work restrictions for the right shoulder. Dr. Wikle opined in January 2018 that no changes to claimant's work status were required as a result of his evaluation. (Joint Ex. 9, p. 6) I accept Dr. Jacobson's opinion and find that claimant has no permanent work restrictions as a result of the August 5, 2015 right shoulder injury at work.

Claimant has been able to return to work. She has been promoted since the date of injury. Her actual earnings are significantly increased since the date of injury. She continues to work full-time for Wells Fargo and appears to be a valued employee. Ms. Avdic likes her job and testified that she intends to stay working at Wells Fargo until she retires. From a practical standpoint, claimant's injury has had very minimal effect on her future earnings.

Claimant is now 49 years of age. She is a motivated worker. However, if she were to lose her job with Wells Fargo, she would carry a permanent impairment and may have to disclose to a future employer that she had a right shoulder injury that required surgical repair. However, she has obtained a good result following Dr. Jacobson's care. I find that Ms. Avdic sustained permanent disability as a result of her

August 5, 2015 right shoulder injury at Well Fargo. However, I find that the work injury has had minimal impact on her future earning capacity.

Having considered claimant's age, educational background, employment history, the situs of her injury, the severity of her injury, the length of her healing period, her permanent impairment, her motivation to return to and continue working, her increased earnings since the date of injury, as well as all other factors of industrial disability enumerated by the Iowa Supreme Court, I find that Ms. Avdic has proven a minimal loss of earning capacity. Specifically, I find that claimant has proven she sustained a 15 percent loss of future earning capacity as a result of the August 5, 2015 work injury.

CONCLUSIONS OF LAW

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).

In this case, I found that claimant has not proven her work injury caused her neck injury or symptoms. Therefore, I conclude that claimant has not proven entitlement to either treatment or permanent disability benefits for her alleged neck injury.

Nevertheless, claimant sustained an admitted right shoulder injury. The parties also stipulate that claimant sustained permanent disability as a result of the right shoulder injury and that it should be compensated with industrial disability benefits. (Hearing Report)

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.

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that Ms. Avdic proved she sustained a 15 percent loss of future earning capacity as a result of her right shoulder injury. Therefore, I conclude that claimant has proven she sustained a 15 percent industrial disability. Ms. Avdic is entitled to an award of 75 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). Pursuant to the parties' stipulation, the permanent partial disability benefits shall commence on May 17, 2016. (Hearing Report)

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

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, defendants authorized treatment through Dr. Jacobson. He offered a permanent impairment rating relative to claimant's right shoulder on May 18, 2016. Claimant did not obtain an evaluation with Dr. Bansal until March 2018. I conclude that

claimant has proven entitlement to reimbursement for an evaluation pursuant to Iowa Code section 85.39. The charges submitted by Dr. Bansal are significant. Neither the report nor the invoice provides detail as to the amount of time Dr. Bansal spent with claimant, reviewing records, or drafting a report. Nevertheless, the charges are similar to independent medical evaluation fees routinely seen by this agency in recent times. Therefore, I conclude that claimant is entitled to reimbursement of Dr. Bansal's charges totaling \$2,973.00. Iowa Code section 85.39; Des Moines Area Regional Transit v. Young, 867 N.W.2d 839 (Iowa 2015).

The third disputed issue submitted by the parties is whether claimant is entitled to alternate medical care. Claimant seeks maintenance care for her right shoulder but makes no specific requests or complaints as to care that is being offered. Given that the right shoulder injury is an admitted injury, defendants are clearly under an obligation to provide future medical benefits for all causally related treatment. Iowa Code section 85.27. There are no specific pending disputes as to care that is or should be provided so no specific order will be entered. Defendants retain the right to select and authorize qualified medical providers of their choosing should future treatment of claimant's right shoulder be necessary.

With respect to claimant's neck injury and symptoms, claimant failed to prove a causal connection between the neck condition and claimant's August 5, 2015 work injury. Therefore, defendants are not obligated to provide medical treatment for the neck. Claimant's request for an alternate medical care order pertaining to the neck is denied.

The only other disputed issue is assessment of costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has received an award of permanent disability in this case, I conclude that it is appropriate to assess claimant's costs.

Claimant seeks assessment of her filing fee totaling \$100.00. This is an appropriate and reasonable cost and is assessed pursuant to 876 IAC 4.33(7). Claimant's independent medical evaluation charges have already been awarded pursuant to Iowa Code section 85.39 and need not be considered or awarded as a cost. No other costs are sought by claimant.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on May 17, 2016.

All weekly benefits shall be paid at the stipulated rate of four hundred twenty-one and 99/100 dollars (\$421.99).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Pursuant to the stipulation contained in the hearing report, defendants are entitled to a credit for all weekly benefits paid to date against this award.

Defendants shall reimburse claimant's independent medical evaluation charges totaling two thousand nine hundred seventy-three and 00/100 dollars (\$2,973.00).

Defendants shall provide claimant reasonable, appropriate, and timely medical care for any causally related condition related to claimant's right shoulder.

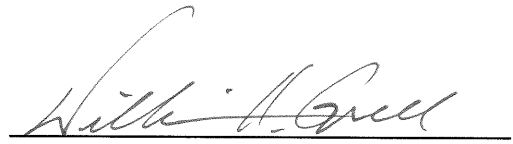
Defendants retain the right to select and authorize future causally related medical care for the right shoulder.

Claimant's request for an alternate medical care order pertaining to future treatment of her neck condition is denied.

Defendants shall reimburse claimant's costs totaling one hundred and 00/100 dollars (\$100.00).

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 20th day of September, 2018.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Gary G. Mattson
Attorney at Law
1820 N.W. 118th St., Ste. 200
Clive, IA 50325-8259
gary@iamarcalawgroup.com

Tiernan T. Siems
Attorney at Law
10330 Regency Pkwy. Dr., Ste. 100
Omaha, NE 68114
siems@eslaw.com

WHG/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.