

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BETTY COLE,

Claimant,

vs.

STOOKEY TRUCKING,

Employer,

and

PROTECTIVE INSURANCE,

Insurance Carrier,
Defendants.

File No. 1657750.01

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Betty Cole has filed a petition for arbitration seeking workers' compensation benefits against Stookey Trucking, employer, and Protective Insurance, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on July 19, 2021, via Court Call. The case was considered fully submitted on August 16, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-7, Claimant's Exhibits 1-8, Defendants' Exhibits A-K, along with the testimony of claimant and Beverly Jackson.

ISSUES

The nature and extent of claimant's permanent disability.

STIPULATIONS

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.

The parties agree claimant sustained an injury which arose out of and in the course of her employment on December 3, 2018. This injury was the cause of temporary disability.

The parties agree if there is a permanent disability found, that it is industrial in nature and that the commencement date for permanent partial disability benefits, if any are awarded, is June 12, 2019.

At the time of the injury, the claimant's gross earnings were \$1,169.12 a week. The claimant was single and entitled to one exemption. The parties agree that the weekly benefit rate based on the foregoing numbers is \$656.50.

Defendants waive all affirmative defenses. Prior to the hearing, claimant was paid 35 weeks of compensation at the rate of \$625.55 per week for a total of \$21,894.26. Defendants have paid medical or hospitalization expenses in the amount of \$8,168.10, but are not seeking a credit of this amount against an award.

Defendants have paid \$2,788.00 as reimbursement for the IME of Dr. Bansal.

FINDINGS OF FACT

Claimant is a 60 year old person. She is single with an adult child and no dependents. Her educational background includes completion of the 8th grade. She does not have a GED.

Her relevant work experience includes nurse's aide work, over-the-road trucking and bartending/bar management. She also worked as a scale person, truck operator, and a scoop operator at a gravel business. She assisted her brother in the management and running of his bar while he fell ill. In the more distant past, she worked for a gravel/rock quarry and sewed clothes. Her truck driving experience includes transporting feed locally and then as an over-the-road truck driver for approximately 16 years. She assisted in unloading but no loading. Other physical requirements included vehicle checks which involve opening the hood of the truck, at times without the assist of hydraulics.

In June 2018, claimant began driving a truck for defendant employer. Her work entailed driving from Grimes to Kansas City and then returning home. She did not miss any work prior to her injury.

On or about December 3, 2018, claimant slipped and fell on the ice at a Fed Ex terminal in Grimes. She testified she was carrying a backpack filled with soda and other items. She attempted to counteract the fall but twisted her body and she landed on her left knee and right hand.

She reported the injury and took herself to a chiropractor for treatment but did not improve. Prior to her fall, she had treated with a chiropractor for neck and back issues. She relayed her ongoing pain to defendant employer who sent her to Unity Point where

she was seen by Christine M. Schmitt, ARNP. (Joint Exhibit 1:1) In the pain diagram filled out on December 13, 2018, she identified pain in the upper shoulder, between her shoulder blades and in her low back. (JE 1:2) After the examination which revealed recurrent spasms, ARNP Schmitt prescribed meloxicam and cyclobenzaprine and recommended follow up with a work comp doctor. (JE 1:3)

On January 14, 2019, claimant was seen at Concentra by Richard Bratkiewicz, M.D. (JE 2:7) Palpation produced left-sided and right-sided muscle spasms. (JE 2:6) She was diagnosed with strain of the lumbar paraspinal muscles and thoracic myofascial strain and referred to physical therapy. (JE 2:6) Dr. Bratkiewicz also prescribed Naproxen. Id. She was returned to work with modified duty lifting only up to 10 pounds. (JE 2:7)

On January 24, 2019, claimant established care with Carrie J. Kenkel PA-C. (Defendants' Exhibit A:1) She had complaints of hypertension, hyperlipidemia, hypothyroidism, urge incontinence, and tobacco dependence. (DE A2-3) There were no complaints of any musculoskeletal pains. (DE A:2)

On January 29, 2019, claimant underwent a physical therapy evaluation. (JE 2:13) She walked with a short stride and was hesitant to turn her head independently over her shoulders. Id. On palpation, she was tender in the trapezius and cervical paraspinal musculature, greater on the right than the left. Id. She was also tender along the lumbar and thoracic paraspinals. Id. She had reduced extension of her cervical spine and reduced bilateral side bending and bilateral rotation. (JE 2:13) Overall, the physical therapy assessment was that claimant had increased pain, decreased range of motion, difficulty with normal functional activities secondary to neck and back pain post her fall on December 3, 2018. Id. She continued to undergo therapy through March 2019 with minimal improvement. (JE 2:38)

On February 11, 2019, claimant was seen at Iowa Ortho for severe neck pain, moderate to severe thoracic spine pain, and moderate low back pain which she attributed to falling on ice on December 3, 2018. (DE B:10) On examination, she had normal alignment, functional range of motion, and no obvious muscle wasting, no palpable spasms or subluxation of the neck, back, bilateral upper and lower extremities. (DE B: 12) She did have tenderness to palpation over the bilateral trochanteric bursa. (DE B:12)

Trevor Schmitz, M.D., noted the claimant had some findings on examination consistent with a non-anatomic source for the pain. He ordered an MRI of the C-spine and lumbar spine. (DE B: 12)

The MRI of her cervical and lumbar spine were consistent with primarily degenerative changes with no significant findings of acute injury. (JE 4:31) Specifically at L4- L5, she had a disc bulge with endplate spur formation and disc degeneration in facet arthritis. Id. Throughout her cervical spine, with the worst levels being C5 and C6, she demonstrated disc degeneration as well as arthritis. Id. The moderate internal disc

derangement particularly on the right side at L4-L5 was described as “definitely capable of causing pain.” (JE 4:32)

On April 10, 2019, claimant was seen by Dr. Schmitz for follow up, complaining of low back and right anterior hip pain. (CE 1:3-4) She had recently had a cervical steroid injection on April 2, 2019, which did not alleviate her pain. (CE 1:3)

On April 27, 2019, claimant was seen at the GRU Emergency Department for right thoracic pain radiating to the front of her chest along with shortness of breath. (JE 5:34) The Emergency Department physician felt that the pain was musculoskeletal but concerned that there was a cardiopulmonary source and transferred the claimant to Allen Hospital. (JE 5:38)

On May 10 2019, claimant was seen at Cedar Valley Medical Specialists in follow up for her cardiology appointment. (DE C:22) It was noted that she had been recently hospitalized for pain in her upper back which is radiating to her upper extremities. Id. Tests revealed severe left atrial enlargement with moderate to severe mitral stenosis and pulmonary hypertension. Id. She was started on medication and returned for follow up to the clinic.

She stated that the Gabapentin had completely resolved in her back pain. (DE C:22)

On June 12, 2019, she returned to Dr. Schmitz with continued pain in the neck and back. (DE B:14) The examination was largely normal. He indicated that from a spine perspective he would be okay with her doing anything and everything she wanted in life even an aggressive work hardening regiment with heavy lifting. (DE B:16) He noted that she could not do that due to her cardiac limitations. Overall he concluded that at this point her need for work restrictions was related to cardiac status rather than low back status. (DE B:16)

On June 27, 2019, claimant underwent mitral valve replacement. (DE E:33)

On July 10, 2019, the defendants informed the claimant that they were terminating Worker's Compensation benefits based upon the report of Dr. Schmitz of June 12, 2019. (DE J:45)

On August 1, 2019, Dr. Schmitz authored an opinion letter opining that claimant had not sustained any specific injury, suffered no significant loss of motion, had no documentable neurological impairment. As a result he assigned zero percent impairment of the whole person for the low back and cervical spine. (JE B: 17)

On September 20, 2019, she returned to Unity Point with complaints of back pain. (JE 7:73) She was seen by PA-C Carrie J. Kenkel. Id. Claimant reported being seen at orthopaedics but had to stop as a result of a mitral valve replacement. (JE 7:74) Because of her back pain, she was unable to complete cardiac rehab. (JE 7:74) Ms.

Kenkel increased claimant's prescription for Gabapentin to 300 mg three times daily. (JE 7:78)

She then returned to Unity Point for treatment of depression. (JE 7:88) The notes indicate claimant was not compliant with her medication regime, missing days and taking too much on others. (JE 7:84) Claimant reported that she could not do anything due to the pain in her back and neck. (JE 7:89) The pain was affecting all areas of her life. (JE 7:89) She was diagnosed with severe depression and prescribed Zoloft 50 mg per day. (JE 7:92) For her cervical and lumbar degenerative disc disease, she was encouraged to continue to take gabapentin 300 mg per day along with heat. (JE 7:92) Claimant was referred to MercyOne for a second opinion regarding her back/back pain.

On January 15, 2020, claimant was seen at MercyOne for back and neck pain. (JE 6:44) Claimant reported ongoing and constant neck and back pain ranging from 4 to 10 on a 10 scale. Id. In her history, she said that her discomfort had been exacerbated in terms of frequency, intensity, and duration for the last six months. (JE 6:48) Further, she noticed left shoulder weakness when lifting and lowering her arm. Id. Claimant was referred for an MRI of the cervical spine and an EMG. (JE 6:48)

While the MRI image quality was hampered by patient motion, mild central spinal stenosis was seen at C5-6 and C6-7 levels. This was unchanged from the previous MRI (JE 6:49) There was also prominent neural foraminal narrowing at C5-6 and C6-7 levels. (JE 6:49) The EMG showed no evidence of radiculopathy, mononeuropathy, or plexopathy. (JE 6:53)

Marietta Walsh, D.O., advised claimant to either continue with conservative management or undergo an anterior cervical discectomy. (JE 6:65) Claimant did not feel that physical therapy was helpful and she did not want to see pain management since she believed that the last course of treatment resulted in heart valve surgery. (JE 6:65) Claimant was not interested in surgery. Id. Dr. Walsh stated that claimant was at increased risk of paralysis or spinal cord injury should she fall or suffer an accident. Id.

On February 24, 2020, claimant was seen by Dr. Bansal for an independent medical examination. (Claimant Exhibit 1:1). Dr. Bansal recorded that claimant's current condition included constant pain in the neck radiating into the left shoulder and down her arm into her hand involving her second, third, and fourth fingers. (CE 1:7) She also continued to have constant low back pain, radiating down her right leg to her knee with numbness and tingling. She was able to sit or stand for 30 minutes but has difficulty bending forward. She had difficulty walking up and down flights of stairs.

Claimant also asserted that she developed depression based upon not receiving any income. She was taking sertraline 50 mg having difficulty eating and sleeping. (JE 1:7)

During the physical examination, she exhibited tenderness to palpation over the cervical paraspinal musculature and reduced range of motion in the neck. There was tenderness to palpation over the lumbar back with guarding noted into the mid and lower lumbar paraspinal's. (CE 1:8) Straight leg test bilaterally were negative. She had negative Fabre's test. (CE 1:8)

There was a loss of sensory discrimination over the index and right fingers on the left and a loss of sense or discrimination of the anterolateral lower leg. (JE 1:8)

Dr. Bansal's diagnosis included aggravation of the cervical spondylosis in the neck and aggravation of the lumbar spondylosis. (JE 1:9) He agreed with Dr. Schmitz she achieved maximum medical improvement on June 12, 2019. (JE 1:9)

Dr. Bansal opined that the mechanism of falling, coupled with her immediate clinical presentation, was consistent with the aggravation of her cervical and lumbar spondylosis with disc bulging.(CE 1:10) For the neck, he assessed a 5 percent whole person impairment due to radicular complaints, guarding, and loss of range of motion. (Join Exhibit 1:10)

Dr. Bansal assessed 5 percent whole person impairment as well based upon radicular complaints, guarding, and loss of range of motion. (JE 1:10) He recommended permanent restrictions of no lifting greater than 20 pounds, no frequent bending or twisting, no prolonged sitting or standing for greater than 30 minutes. (JE 1:11)

On May 26, 2021, Dr. Schmitz authored a second letter in response to inquiry from the defendants counsel. Upon review of additional medical records, Dr. Schmitz had an unchanged opinion. He continued to believe that she had a stable spine and could do anything and everything she wishes to do in life. (DE B: 18)

Dr. Bansal wrote a follow up letter on July 8, 2021 in response to additional medical records from the Covenant Clinic Neurosurgery unit. Claimant had declined to undergo surgery and Dr. Bansal agreed that it was reasonable for her to decline surgery based upon the risks, including the recent heart surgery. (CE 1:13)

He charged \$591.00 for the physical examination and \$2,197.00 for the report (CE 1:14)

On June 8, 2021, Dr. Ajay Kaja, M.D., signed a letter authored by the claimant's counsel agreeing that he had not limited claimant's activities due to the cardiac condition. (CE 2:20) Dr. Kaja is claimant's cardiac specialist.

On June 21, 2021, claimant was seen by PA-C Kenkel, for INR and headaches. It was noted the claimant had a history of chronic cervicalgia and degenerative disc disease of the cervical spine and she believed that her headaches were caused by the chronic neck pain. (CE 3:22) PA-C Kenkel started claimant on a half dose of Zanaflex 4 mg nightly for muscle spasm and pain. (JE 3:24) Claimant continues to treat with Dr. Kenkel.

Claimant testified that her current prescriptions of Zoloft and Gabapentin were helping but that she continues to have pain in her back and neck along with trouble sleeping. Activity worsens her pain. Driving is a strong aggravator to the pain in her neck. On a daily basis, her pain ranges from 4 to 8 on a 10 scale. She does have some depressive episodes but Zoloft “really helps.” (Transcript p. 49) Since her fall on December 3, 2018, she has not ridden her Harley. This testimony is corroborated by her sister, Beverly Jackson. Ms. Beverly Jackson also shared that in November 2020 the sister’s Harley was sold due to her own shoulder problem.

Claimant has attempted to look for work but her town is very small and she has not been successful in finding work within her geographic location and within her restrictions. She testified that she uploaded her resume on an internet site and that she submitted an application to two retail outlets close to her residence. Defendants point out that the claimant did not present completed job applications nor any evidence vocational training had been sought.

Claimant receives Social Security Disability benefits.

CONCLUSIONS OF LAW

Claimant alleges she has sustained permanent disability arising out of a work injury on December 3, 2018. Defendants concede that claimant sustained injury which arose out of and in the course of her employment but that all the benefits owed to claimant have been satisfied.

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. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words “arising out of” referred to the cause or source of the injury. The words “in the course of” refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs “in the course of” employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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 support of their argument that claimant's neck and back pain have resolved and thus she is not entitled to additional permanent partial disability benefits, defendants rely on the expert testimony and opinions of board certified orthopedic surgeon, Dr. Trevor Schmitz. Dr. Schmitz opined that claimant's back issue resolved on or around June 12, 2019, when he found that from a spine perspective she could do anything and everything she wanted including heavy lifting. Any restrictions she needed for work was related to her cardiac issues and not a back problem.

However, relying on Dr. Schmitz's opinions would require dismissal of claimant's post June 12, 2019, medical complaints and the treatment opinions of her cardiac surgeon and Dr. Bansal, claimant's expert. Dr. Kaja affirmed that claimant was not limited in activities due to a cardiac condition. Dr. Bansal opined that claimant's current physical limitations are related to her work injury. These opinions are more closely aligned with claimant's course of treatment following her June 12, 2019, release by Dr. Schmitz.

Claimant continued to seek out treatment on a regular basis from Carrie Kenkel, P.A. for both neck and back pain. Ms. Kenkel increased claimant's prescription for gabapentin to 300 mg, three times daily in September 20, 2019. A neurosurgeon, Dr. Walsh, advised claimant to undergo an ACDF procedure and that if claimant did not, she was at risk for paralysis or spinal cord injury if claimant would suffer a fall or an accident.

Ms. Kenkel prescribed Zanaflex for muscle spasm and pain in the neck in June 2021.

The course of treatment and claimant's consistent, and persistent, pain complaints support the opinions of Dr. Kaja and Dr. Bansal and thus, their opinions are adopted in this case.

It is found claimant has sustained, and continues to sustain, pain and disability in her neck and low back as a result of her work injury of December 3, 2018.

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 Ry. Co. of Iowa, 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 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. Iowa Code section 85.34.

The question is then the extent of claimant's disability. Claimant is an older worker with limited education whose past work history has been heavy labor and driving a truck. Per Dr. Bansal, her work restrictions are limited lifting over 20 pounds and no sitting or standing for over 30 minutes at a time.

Claimant testified there are no touch driving jobs available but that those jobs did require some manual labor such as opening a hood to check oil, coolants and belts. There was no evidence that these tasks were outside of the work limitations that Dr. Bansal recommended. There is limited evidence of her job search or the work that is available to her. She has experience managing a bar and serving. She has extensive driving experience.

Claimant's disability assessment is complicated by the lack of evidence regarding the pool of jobs available to her and what appeared to be a low motivation to return to work.

Based on the foregoing, it is found that claimant's industrial disability is 60 percent.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant three (300) weeks of permanent partial disability benefits at the rate of six hundred fifty-six and 50/100 dollars (\$656.50) per week from June 12, 2019.


That defendants shall be credited two thousand seven hundred eighty-eight and no/100 dollars (\$2,788.00) against the award of permanent partial disability benefits.

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

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

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

Signed and filed this 4th day of February, 2022.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Willis Hamilton (via WCES)

Steve Hamilton (via WCES)

Mark Carter (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.