

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LACIE LERCH,
Claimant,

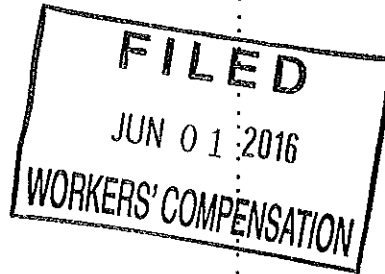
vs.

PETER JOSEPH, INC.,
Employer,

and

ACCIDENT FUND INSURANCE
COMPANY OF AMERICA,

Insurance Carrier,
Defendants.



File No. 5052086

ARBITRATION
DECISION

Head Note Nos. 1803; 1108

STATEMENT OF THE CASE

Lacie Lerch filed a petition for arbitration seeking workers' compensation benefits from Peter Joseph, Inc., and Accident Fund Insurance Company of America.

The matter came on for hearing on April 13, 2016, before deputy workers' compensation commissioner Joseph L. Walsh in Davenport, Iowa. The record in the case consists of joint exhibits 1 through 17; as well the sworn testimony of claimant, Lacie Lerch, Korena Paschal and Ranissa Wyatt.

Amy Pedersen was appointed the official reporter for this hearing. The parties briefed this case and the matter was fully submitted on May 6, 2016.

ISSUES AND STIPULATIONS

The primary fighting issue in this case is whether the claimant has proven that her stipulated work injury is a substantial cause of any temporary or permanent disability in her right arm. Claimant alleges she is entitled to temporary disability benefits from March 13, 2013, through March 20, 2013 and that she suffered a permanent loss of use of her right hand/arm. The defendants contend there is no permanency. The parties dispute the appropriate commencement date for any benefits owed. Claimant seeks medical expenses outlined in the attachment to the hearing report, as well as an IME and alternate medical care.

The parties have stipulated that claimant sustained an injury which arose out of and in the course of employment on March 13, 2013. The parties stipulate that the claimant was single with one exemption and gross weekly earnings of \$174.00 per week at the time of injury. Affirmative defenses have been waived. There is no credit issue in this case.

FINDINGS OF FACT

Lacie Lerch was born in 1995 and was 20 years old as of the date of hearing. She testified live at hearing and I find her to be credible. Her testimony was consistent with the medical records. There was nothing about her demeanor which caused the undersigned any concern about her truthfulness.

Lacie is a hard worker. She is right handed. She has routinely worked two or three jobs at a time, even during high school. In high school she was active in softball. Her mother, Korena Paschal, testified that Lacie was an excellent softball player and hoped to play in college and possibly get a scholarship.

In November 2012, Lacie began working for Peter Joseph, Inc., a McDonald's franchise in Davenport, Iowa. On March 13, 2013, Lacie suffered a stipulated work injury. She injured herself closing the cash drawer. She reported the injury right away to her supervisor and general manager, Danny Edwards. (Joint Exhibit 11) She went to the doctor immediately with permission. She saw Ann Patterson, ARNP at Genesis. "The patient presents with right, hand pain, wrist pain, wrist swelling, finger pain." (Jt. Ex. 3, p. 5) She diagnosed a wrist sprain and took Lacie off work for a week or until her follow up visit. (Jt. Ex. 3, p. 7) She had x-rays taken.

Lacie did not work for about a week after the injury while she was recuperating. She followed up the following day with Geeta Mahadevia, M.D., who noted Lacie was complaining of significant pain. Lacie was provided a splint and Dr. Mahadevia diagnosed a wrist contusion. (Jt. Ex. 4, p. 12) On March 20, 2013, she followed up with Genesis again, this time seeing Cheryl Benson, PA. Ms. Benson provided a new splint because the one provided at the hospital was too small. She recommended physical therapy. (Jt. Ex. 4, p. 15) On April 3, 2013, Ms. Benson saw her again, changed her medications, ordered a fabricated splint and more occupational therapy. (Jt. Ex. 4, p. 17)

At her follow-up appointment on April 19, 2013, Ms. Benson diagnosed right wrist sprain suspected "triangular fibrocartilage complex tear." (Jt. Ex. 4, p. 20) She ordered an MR arthrogram of the right wrist at that time. Physical therapy was placed on hold although she was instructed to continue her strengthening exercises.

Lacie quit her job with the employer around the beginning of May 2013. (Jt. Ex. 11)

She followed up again with PA Benson in June 2013. The MRI did not "show any obvious tear or ligamentous injury." (Jt. Ex. 4, p. 22) PA Benson did note an audible and palpable click with circumduction of the right wrist. She "does have some mild persistent weakness, as well as pain, but at this time both due to time constraints and based on her plateauing in response to occupational therapy, I am going to recommend a period of watchful waiting." (Jt. Ex. 4, p. 22) She provided naproxen and restricted heavy lifting.

In July 2013, Lacie returned to Genesis where her ongoing complaints were, once again, well-documented. She described pain, which at times was still quite severe. On examination, PA Benson noted modest swelling, as well as the continued popping sound. An orthopedic referral was recommended at that time. (Jt. Ex. 4, p. 24)

On August 1, 2013, she visited James Lyles, M.D., at ORA Orthopedics. He reviewed her history and performed a thorough examination. He diagnosed ulnar abutment syndrome and TFCC sprain. (Jt. Ex. 7, p. 33) She was provided a right wrist short arm fiberglass cast and an injection for the pain. Dr. Lyles then started her on therapy on August 27, 2013, and instructed her to continue wearing the brace. (Jt. Ex. 7, p. 35; see also Jt. Ex. 8, p. 46) He last saw her on September 24, 2013 and noted that she continued to have minimal discomfort on full flexion and extension. He found, however, that she had full range of motion. (Jt. Ex. 7, p. 38) On that date, he noted that she had a new injury to her right elbow which was non-work related.

Lacie suffered a non-work related injury to her forearm or elbow at school in September 2013. Based upon the evidence in the record, this injury had no impact one way or the other on her work injury.

In February 2014, Dr. Lyles wrote an opinion letter that Lacie suffered no permanent impairment from her work injury. (Jt. Ex. 7, p. 39) She saw Robert Milas, M.D., on March 3, 2014, for an independent medical evaluation. He diagnosed "ligamentous injury of the right wrist" and estimated a 30 percent loss of function as reflected in Table 16-34, Page 509, of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 1, p. 2)

Dr. Lyles saw Lacie a final time on March 24, 2014, wherein he noted persistent right wrist pain after sprain. He recommended further care.

The defendants performed surveillance on Lacie in August 2015. The report was reviewed in its entirety. (Jt. Ex. 16) The surveillance report added no value to the resolution of any dispute in this case.

Lacie does not take medication for her hand and wrist. She testified she still has tingling in her fingers and pain and swelling in her wrist that comes and goes. She testified the more she uses her hands, the more symptoms she has. (Jt. Ex. 17, Lerch Depo, pp. 37-39) She testified she has difficulty lifting heavy objects.

CONCLUSIONS OF LAW

The first question is whether the admitted March 13, 2013, work injury is a cause of temporary and/or permanent disability, and if so, the extent of such disability. By a preponderance of evidence, I find that the March 13, 2013, work injury is a proximate cause of temporary and permanent disability in the claimant's right wrist and arm.

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).

The defendants have conceded and stipulated that Lacie was injured on March 13, 2013. The expert opinions as to the medical impairment in this case are conflicted as to whether this injury caused any permanency. All of the physicians agree that the injury caused some temporary symptoms (although the defendants dispute the claimant's right to receive a week of temporary disability benefits). I find that the stipulated injury caused both temporary and permanent disability in Lacie's right arm.

Dr. Lyles provided treatment for Lacie. In February 2014, he wrote a statement that she had no ratable impairment based upon her range of motion and her lack of neurosensory deficit. (Jt. Ex. 7, p. 39) He had not seen Lacie since September 2013, when he wrote that report and at his last visit with her, he mainly documented an unrelated, inconsequential (for purposes of this decision), non-work injury. At no time did he document that she had fully recovered from the work injury or that she was symptom free. (Jt. Ex. 7, p. 38) When he saw her in March 2014, he recommended further testing, which, for reasons not entirely clear at this time, was never obtained. He did, however, document her ongoing complaints and symptoms. (Jt. Ex. 7, p. 40)

In March 2014, Dr. Milas diagnosed a ligamentous injury of the right wrist, and assessed that the injury should be deemed permanent. He opined this condition was directly related to her stipulated work injury. (Jt. Ex. 1, p. 2) I find this assessment to be the most accurate diagnosis of Lacie's condition at this time. This assessment is consistent with Lacie's testimony of her symptoms and ongoing complaints of pain. It is consistent with Lacie's significant history of treatment from March 2013, through September 2013, including substantial physical therapy and testing. As stated above, Lacie is found to be credible. Her ongoing complaints and symptoms have stayed generally consistent throughout her treatment. I can find no reason in this file to disbelieve any portion of her testimony.

For these reasons, I find the claimant has met her burden that her injury is a proximate cause of disability.

The next issue is whether Lacie is entitled to a week of healing period benefits.

The claimant alleges that she was off work as a result of a work injury for one week following March 13, 2013. The employer alleges that it could have accommodated the claimant had she brought in restrictions. In essence, the employer contends the claimant chose to remain off work, and therefore, is ineligible for temporary benefits.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

There is a medical note in the file advising Lacie to stay off work for one week following the accident. (Jt. Ex. 3, p. 7) There is a conflicting record, however, which appears to release Lacie to work on March 16, 2014. (Jt. Ex. 3, p. 10) The burden is on Lacie to prove her entitlement to healing period benefits. By a preponderance of evidence, I find that Lacie is entitled to healing period from March 13, 2013, through March 16, 2013. The employer's argument that it could have accommodated Lacie during this period is unconvincing. She was off work under medical care by an authorized provider.

The next issue is the extent of permanent disability benefits to which Lacie is entitled.

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and

compensation payable for those injuries. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

In this case, the parties have stipulated that the injury and disability are to Lacie's right arm. As such, her disability is evaluated under Iowa Code section 85.34(2)(m). The disability is evaluated based upon the loss of function and is capped at 250 weeks.

The AMA Guides, Fifth Edition, has been adopted as a guide for determining an injured worker's extent of functional disability. 876 IAC section 2.4. In making an assessment of the loss of use of a scheduled member, however, the evaluation is not limited to the use of the AMA Guides. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Notwithstanding suggestions to the contrary in the AMA Guides, this agency has a long history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App. March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corporation, File No. 979887 (Arb. February 8, 1994); Ryland v. Rose's Wood Products, File No. 937842 (Arb. January 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

I have adopted the diagnosis of Dr. Milas, however, I find that his rating is too high based upon Lacie's credible description of her ongoing symptoms and disability. The fact that Lacie never fully recovered from her work injury is well-documented in the medical records. Dr. Milas found a 30 percent impairment rating. He documented some strength loss.

Based upon the record before me, I simply cannot find that the claimant has suffered a 30 percent loss of use of her right arm. I find that Lacie has a ligamentous injury which causes her intermittent problems, including pain, some weakness and difficulty lifting very heavy objects. It causes her difficulty doing the dishes and doing her hair. In part, it prevented her from finishing her high school softball career. When

considering all of the evidence in the record, I find that Lacie has a 15 percent loss of function of her right arm resulting from her March 13, 2013, work injury. Fifteen percent of 250 weeks is 37.5 weeks of benefits. This is the amount of benefits to which the claimant is entitled.

The final issues in this case revolve around claimant's medical treatment. She seeks payment for medical expenses for her visit with ORA Orthopedics on September 24, 2013, as attached to the hearing report.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

For all claimed medical expenses, the claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Dr. Lyles was claimant's treating physician for her work injury. He evaluated her on September 24, 2013. (Jt. Ex. 7, p. 38) At that visit, he primarily focused upon a non-work-related injury which has no real relevance in this claim. By a preponderance of evidence, I find that this bill is unrelated to claimant's work injury and is not payable under section 85.27.

The claimant also seeks IME expense. The only IME bill in the record is the Addendum of Dr. Milas, attached to the hearing report. (See Hearing Report attachment)

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).

The Addendum from Dr. Milas is for a second IME related to the claimant's knee for the purpose of pursuing a Second Injury Fund claim which was settled. The defendants are not liable for the second evaluation as an 85.39 IME, particularly since it is unrelated to any injury for the claimant's right arm. See Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 861-62 (Iowa 2009).

The claimant also seeks alternate medical care. She would like to see a new physician to treat her ongoing complaints of pain in her right arm.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

I find that the employer's chosen physician has provided reasonable care. The claimant has failed to meet her burden to prove entitlement to alternate medical care. She has proven a permanent disability and she is entitled to lifetime medical care for her right arm injury. She may return to Dr. Lyles for follow up care as needed.

The final issue is taxation of costs. "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code section 86.40 (2013); see also, 876 IAC section 4.33.

Using the discretion set forth by statute, I award the claimant costs in the amount of \$460.57.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant healing period benefits from the date of injury through March 16, 2013, at the stipulated rate of one hundred and seventy-four and

00/100 (\$174.00) per week.

Defendants shall pay the claimant thirty-seven and one-half (37.5) weeks of permanent partial disability benefits at the rate of one hundred and seventy-four and 00/100 (\$174.00) per week commencing March 17, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.


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

Defendants are responsible for lifetime medical care for the claimant's right arm disability and its sequela. Dr. Lyles of ORA Orthopedics is the authorized treating physician.

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

Costs are taxed to defendants in the amount of four hundred sixty and 57/100 dollars (\$460.57).

Signed and filed this 1st day of June, 2016.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/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.