

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHERYL FYNAARDT,

Claimant,

vs.

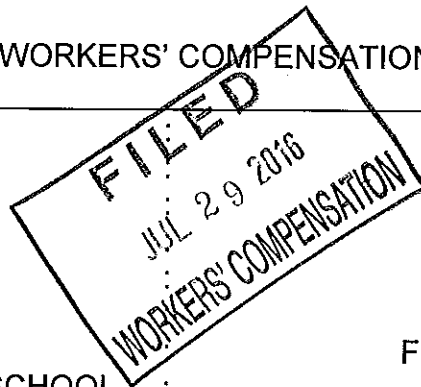
PELLA CHRISTIAN GRADE SCHOOL,

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5054005

ARBITRATION

DECISION

: Head Note Nos.: 1803, 2500, 2700, 2907

STATEMENT OF THE CASE

Cheryl Fynaardt, claimant, filed a petition in arbitration seeking workers' compensation benefits against Pella Christian Grade School, employer, and EMCASCO Insurance Company, insurer, for an accepted work injury dated May 7, 2013.

This case was heard on April 6, 2016, in Des Moines, Iowa. The case was considered fully submitted on May 4, 2016 upon the simultaneous filing briefs.

The record consists of claimant's Exhibits 1-17, defendants' Exhibits A-D, and the claimant's testimony.

ISSUES

1. The extent of claimant's industrial disability;
2. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;
3. Whether claimant is entitled to alternate care.
4. Assessment of costs.

STIPULATED FACTS

The parties stipulate claimant sustained a work-related injury on May 7, 2013. If permanent partial disability benefits are awarded, the appropriate commencement date is May 18, 2013. At the time of the injury, the claimant's gross earnings were \$243.00 per week. She was married and entitled to three exemptions. Based on the foregoing numbers, her weekly benefit rate is \$195.39.

Prior to the hearing, claimant was paid 25 weeks of compensation at the rate of \$195.39.

FINDINGS OF FACTS

Intro and Education

Claimant was a 56-year-old woman at the time of the hearing. She has a four-year degree and taught school in California. After moving to Iowa, she taught physical education at Pella Christian until she became pregnant. She stayed at home for nine years without working outside of the home. In 1996, she began driving a bus for Pella Christian.

Medical History

In the year prior to the accident, she treated with a chiropractor an average, once a month. Approximately 15-18 years ago, she slipped and fell. Three to four years ago, she had problems with her back that she attributed to the bus driving. She received massage therapy which helped.

Current Medical

She presented to the Pella Regional Health Center Emergency Department on May 7, 2013, after being involved in the motor vehicle collision. (Exhibit 1, page 1) She reported that she was having pain and stiffness in her neck and low back. CTs were negative, plain films of the lumbar back showed degenerative changes and "other than the cervical tenderness, musculoskeletal exam [was] unremarkable." (Ex. 1, p. 1) She was diagnosed with lumbar and cervical strain, and it was recommended she take Aleve as needed. (Ex. 1, p. 1) When her pain got progressively worse, she sought out additional medical care.

Initially she saw Beau Browne, D.C. at Browne Family Chiropractic on May 13, 2013. (Ex. 2, p. 5) She reported that her pain was interfering with work and home activities. On examination, she had slight to moderate restriction of her range of motion in the neck and thoracic and lumbar regions along with pain in palpation at different points in her spine. Dr. Browne characterized her prognosis as "excellent." (Ex. 2, p. 6) She continued to treat with Dr. Browne throughout May and into July with only a slight reduction in her reported pain levels. (Ex. 2, p. 18) Dr. Browne was notified that no further chiropractic care was authorized on Jul 2, 2013. "Patient will need to seek

treatment at Occupational Medicine at Pella Regional Health Center, should additional medical treatment be necessary." (Ex. D, p. 1)

In between her chiropractic appointments, she sought treatment with Bethanne Stevens, ARNP on May 17, 2013. (Ex. 3, p. 24) NP Stevens observed normal gait but tenderness along the right trapezius muscle with palpation and movement along with tightness upon range of motion. (Ex. 3, p. 26) NP Stevens prescribed rest, heat/ice, and naproxen and Skelaxin. (Ex. 3, p. 28) Claimant received physical therapy for her aches and pains beginning on May 24, 2013, coinciding with claimant's chiropractic treatment. (Ex. 4, p. 27) During her June 10, 2013, chiropractic appointment, it was noted that claimant felt that the PT and massage therapy in conjunction with the chiropractic care was beneficial. (Ex. 2, p. 15) Still her subjective symptomatology continued unabated.

She was seen by Matthew Doty, M.D. on July 10, 2013, wherein she reiterated her need for massage therapy. (Ex. 5, p. 61) Dr. Doty was amenable to this along with physical therapy and chiropractic treatment.

Joel Watters, PT, DPT, noted this in his July 29, 2013, assessment.

Cheryl continues to complain of stiffness in her low back and neck. Currently she has been seen one session per week with an extensive home exercise program. She also reports seeing a massage therapist and a chiropractor. She feels her stiffness [sic] has improved and is not as limiting as it once was but continues to bother her. Mainly, prolonged standing (>20 minutes) tends to irritate her. Objectively her measurements have plateaued somewhat, although it is not clear what her pre injury levels were. She has some muscle tension but treatment has affected that little recently. As a result, we have focused on core strength and stability. She tolerates nearly all activity very well never demonstrating painful movements but at times complaining of stiffness. It seems as if this will take time to mend and I am uncertain the maximum benefit we will be able to make. I feel confident she will be able to complete her job in the fall without issue or complaint.

(Ex. 4, p. 37)

She saw Dr. Doty again on July 31, 2013, for a follow up due to minimal progress despite three forms of regular therapy. "Cheryl feels like she is doing somewhat better, though continues to have mainly stiffness of her low back and cervical region. She is frustrated with her physical therapy and is hopeful to change to physical therapist she had previously. She notes no numbness or tingling in her hands. No paresthesias or radiation of her pain." (Ex. 5, p. 64) Dr. Doty was surprised by claimant's ongoing pain complaints.

The patient is continuing to have more significant pain and stiffness than I would expect at this time. She feels like she is not making much progress in physical therapy with her current physical therapist, and she previously had seen another physical therapist at Work Systems that she really liked. We are going to call and see if we can get her back in with her previous physical therapist. Otherwise, continue current plan. Recheck in a couple of weeks.

(Ex. 5, p. 64)

On August 14, 2013, Dr. Doty wrote "Cheryl is finally making some good progress. She has benefited from change in her physical therapist, as well as chiropractic care and would like to continue with both of those." (Ex. 5, p. 66) Dr. Doty released claimant to full duty without restrictions. (Ex. 5, p. 66)

On her September 4, 2013, follow up with Dr. Doty, claimant reported no low back tenderness. Her tightness was in the right trapezius musculature and right cervical paraspinous musculature. (Ex. 5, p. 68) Her progress was slow.

She continued treatment, approximately once per week, throughout the rest of 2013 and into 2014. Her progress was moderate. By April 22, 2014, claimant continued to complain of tightness and restrictive feelings in her neck and low back. (Ex. 4, p. 59)

On February 10, 2014, claimant underwent a cervical MRI at the order of Dr. Doty. (Ex. 5, p. 81) The MRI showed degenerative disease. (Ex. 5, p. 81) In her last visit with Dr. Doty, dated April 24, 2016, he noted as follows:

Does still reveal some tenderness when I palpate in the right paracervical musculature and right trapezius musculature. She has approximately 45 degrees of side movement of the cervical spine. The patient has a bit of tenderness all across the low lumbar region. There is no SI joint tenderness. She has negative straight leg testing.

(Ex. 5, p. 89) Dr. Doty recommended that she continue with physical therapy twice a month and her home exercise program. She also accepted a referral to a pain management specialist.

In a later note dated November 17, 2015, NP Stevens wrote that claimant should rest, ice/heat four times a day along with frequent positional changes. She also wrote "Recommend muscle remodeling therapy as set out in plan by massage therapist. (Ex. 3, p. 26-1) This note was repeated on February 3, 2016, with a change in prescriptions. "Toradol IM. Flexeril at bedtime as needed. Side effects reviewed. She is not to drive or do any activities requiring mental clarity while taking the Flexeril. Imitrex with next migraine. Side effects reviewed. May try Excedrin Migraine with next headache. Continue with massage, increase fluid intake. Follow up if no improvement."

(Ex. 3, p. 26-2) NP Stevens wrote a separate letter for the claimant on January 16, 2016, wherein she reaffirmed the recommendation to see Sharon Van See, a licensed massage therapist. (Ex. 3, p. 26-3)

Despite claimant's extensive physical therapy, chiropractic treatments, and massage therapy, she reported ongoing daily pain. (See e.g. Ex. 6, p. 1)

On July 15, 2014, claimant consulted with Todd C. Troll M.D., a pain specialist with The Iowa Clinic. (Ex. 7, p. 97)

Pt is seen at the request of work comp. She drives a school bus and was struck by a vehicle on the right front side of the bus on 5/7/13. She developed neck and low back pain as a result of this which has persisted to this date. She had evaluation of her pain with xrays of lumbar spine, ct of neck and mri of neck. These studies revealed spondylosis but no fx and no nerve root impingement. She feels overall better and credits PT with that. Still has pain in neck mainly on right side and pain across the low back. Rates pain as a 3. No bowel or bladder sx. No radicular sx although has occ. Tingling in the fingers of both hands. Standing for long periods increases low back pain. Turning head to left increases neck pain.

(Ex. 7, p. 97)

Her physical examination was largely normal:

Cervical Spine (Motion):

General/bilateral: Cervical spine rotation to the left was abnormal. Cervical spine flexion was normal. Cervical spine extension was normal. Cervical spine rotation to the right was normal. Cervical spine motion on lateral flexion to the left was normal. Cervical spine motion on lateral flexion to the right was normal.

Lumbar/Lumbosacral Spine:

General/bilateral: Lumbosacral spine exhibited no asymmetry. Active flexion of the lumbosacral spine was normal tight hamstrings noted. Active extension of the lumbosacral spine was normal. A straight-leg raising test was negative.

(Ex. 7, p. 98)

Dr. Troll recommended she continue physical therapy to work on strength, endurance and overall conditioning. (Ex. 7, p. 98)

On September 19, 2014, she appeared to have a pain break-thru with aquatic therapy. She told Dr. Troll that she had been pain free temporarily when in the pool. (Ex. 7, p. 102) Again, her physical exam was largely normal but for tenderness upon palpation in the posterior neck. (Ex. 7, p. 102) Dr. Troll wrote a recommendation that she continue aquatic therapy but that she could return to work without restrictions. (Ex. 7, p. 107) Dr. Troll discharged her on March 30, 2015. She reported same pain levels but that the aquatic therapy three times per week was helpful. He encouraged her to continue with that. (Ex. 7, p. 108)

FCE/Restrictions/Impairment

Dr. Troll released claimant without restrictions but assigned a 5 percent impairment rating based solely on claimant's persistent claims of pain. (Ex. 7, p. 110) He indicated that she should be provided a long-term membership to a pool to continue her aquatic exercise. (Ex. 7, p. 111) Defendants agreed to pay for this, and the nurse case manager informed claimant that she was to continue with her aquatic therapy even after she had been placed on maximum medical improvement. (Ex. 6, p. 96)

She then saw Robin L. Sassman, M.D. on October 9, 2015. (Ex. 9)
Dr. Sassman provided an itemization of her time:

Ms. Fynaardt was cooperative, and provided the history. Five hours were spent by an assistant abstracting the file. I spent 45 minutes reviewing the abstract and the file in preparation for the examination prior to seeing Ms. Fynaardt. One hour and 15 minutes was spent with Ms. Fynaardt in obtaining the history and performing the examination. One hour and 15 minutes was spent dictating the report and calculating impairment. Thirty minutes were spent reviewing the dictation.

(Ex. 9, p. 111)

According to claimant, she continued to have pain on the right side of her neck, middle of her scapula and in the low back. (Ex. 9, p. 114) She also reported radiation down her legs despite there being scant record of that during her regular treatment with NP Stevens and her physical therapy sessions. On examination, she had no loss of range of motion but did report tenderness upon palpation over the trapezius on the right and over the L1, L2, L3 and S1 region. (Ex. 7, p. 116) Dr. Sassman recommended an MRI to rule out disc herniation or nerve root irritation and then a follow up evaluation by a pain management specialist. (Ex. 7, p. 117)

The impairment ratings Dr. Sassman assigned were for guarding during examination and no verifiable radiculopathy: 5 percent for the lumbar region, 5 percent for the thoracic region, and 5 percent for the cervical spine. Dr. Sassman's impairments are excessive. There were repeated notes in the treatment records that claimant did not have radicular symptoms. (See e.g. 1, p. 1, Ex. 3, p. 24, Ex. 5, p. 61, Ex. 5, p. 70) Dr. Sassman's reliance on claimant's report of radiculopathy has almost no support in the medical records and therefore is rejected outright.

Dr. Sassman went on to state:

Of note, this may change with further treatment. Ms. Fynaardt should limit lifting, pushing, pulling and carrying to 30 pounds rarely from floor to waist, 30 pounds occasionally from waist to shoulder and 30 pounds rarely above shoulder height. She should limit bending, twisting and stooping to a rare basis. She should not use vibratory or power tools.

(Ex. 7, p. 118)

Current status

Claimant would like for her pool pass to be paid for along with the ability to visit the chiropractor for necessary adjustments in addition to massage therapy. She has returned to work without restrictions. Claimant testified she was provided an air ride seat which helps.

During her testimony, she became teary while describing how she is unable to stand at church during the prayer circles and that she is often looking for the closest seat. She does not believe she could perform full-time employment due to her inability to stand for long periods of time. Not even Dr. Sassman imposed a standing restriction.

Claimant continues to treat with a chiropractor and massage therapy but she pays for it herself.

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

Claimant asserts that the motor vehicle accident resulted in dramatic changes in her employability. However, the medical records along with the medical opinions do not support this. While it is accurate that claimant's pain complaints have been consistent, the objective testing does not support claimant's subjective complaints. She has had extensive therapy including regular physical therapy as often as three times a week in conjunction with chiropractic treatment and massage therapy. Dr. Sassman's impairment ratings were awarded solely on claimant's guarding and supposed radicular symptoms. Even Dr. Troll's impairment was based on claimant's subjective ongoing complaints.

Her examinations in 2014 revealed normal range of motion and only some tenderness to palpation.

Claimant urges that her inability to stand for any significant period of time be taken into consideration. However, Dr. Sassman did not provide a restriction of no standing. Claimant's standing restriction is self-imposed and has no expert witness support.

Lay testimony can be used to buttress expert opinion but cannot provide the causation bridge in and of itself.

Dr. Troll's assessment of claimant's abilities is more in line with the claimant's physical examinations and her long course of treatment. Dr. Sassman's opinions using the DRE II method relies on a finding of radicular pain that is not supported by the extensive medical treatment claimant had in the two years following her motor vehicle collision.

Dr. Troll discharged claimant with no restrictions. Claimant has been working with no restrictions since the fall of 2013.

Claimant has a four-year degree. She has taught physical education at her current employer, and she has driven a bus for the last 20 years. Prior to her injury, claimant admitted to visiting the chiropractor at least once a month for adjustments.

Based on all of the foregoing, claimant's loss of access to the market that existed for her prior to her work injury is 5 percent. Dr. Troll's impairment rating, based solely on claimant's subjective reports of pain, was generous.

The next question is whether claimant is entitled to chiropractic treatment and massage therapy. One of the criteria for awarding alternate care is a showing by the claimant that the care offered by the defendants is not reasonable.

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).

Claimant is allowed to return to her primary care physician. Dr. Troll recommended the payment of a pool pass, which defendants continue to provide when asked.

The massage therapy appears to only serve to temporarily ameliorate any symptoms. The same can be said for the chiropractic care. Given the claimant's assertions that she has had ongoing pain and discomfort from the original accident, the current type of treatment that claimant wants seems to be at odds with the results of the treatment.

The claimant did not carry her burden to show that the current care is not reasonably suited to treat her injury.

Similarly, to be entitled to reimbursement for unauthorized medical care, the claimant must prove that the unauthorized care was reasonable and beneficial under all the surrounding circumstances, including the reasonableness of the employer-provided care, and the reasonableness of the decision to abandon the care furnished by the employer in the absence of an order from the commissioner authorizing alternative care. In *Bell Brothers*, the Iowa Supreme Court stated "the question of whether the unauthorized care was beneficial focuses on whether the care provided a more favorable medical outcome than would likely have been achieved by the care authorized by the employer."

Claimant has presented no evidence that the massage therapy or chiropractic therapy was more beneficial and resulted in a more favorable medical outcome than the aquatic therapy.

However, Dr. Troll did not expressly discontinue the massage therapy until April 2, 2015. Given the medical orders of Nurse Practitioner Stevens, the massage therapy bills should be paid up to April 2, 2015.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of one hundred ninety-five and 39/100 dollars (\$195.39) per week from May 18, 2013.

That claimant is entitled to payment of her pool pass.

That claimant is entitled to repayment of massage therapy visits up to April 2, 2015.

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 are to be given credit for benefits previously paid.

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

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

Signed and filed this 29th day of July, 2016.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.