BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GLORIA LAUBENTHAL, Claimant, vs. BRAND FX, Employer, and AIG CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 5058729 ARBITRATION DECISION Head Notes: 1108.50, 1402.20, 1402.40, 1803, 2501, 2907

FILED
JUL 17 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Gloria Laubenthal, claimant, filed a petition in arbitration seeking workers' compensation benefits from Brand FX, employer and AIG Casualty Company, insurance carrier as defendants. Hearing was held on June 12, 2018 in Des Moines, Iowa.

Claimant, Gloria Laubenthal, was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE9, claimant's exhibits 1-3, and defendants' exhibits A-J.

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 submitted post-hearing briefs on May 8, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained any permanent disability as a result of the stipulated May 23, 2016 work injury? If so, the nature and extent of disability.

2. Whether claimant is entitled to payment of past medical expenses?

3. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Gloria Laubenthal, worked at Brand FX helping to build custom pick-ups for commercial use. On the date of the accident, May 23, 2016, Ms. Laubenthal stepped over a co-worker and stepped into a pothole on the floor. When she stepped into the pothole her right knee and hip popped. She knew that she was hurt but at the time she thought she could walk it off. Later that day she reported the incident to the office. The defendant employer, Brand FX, sent her for treatment that day. (Testimony)

Ms. Laubenthal went to Kossuth Regional Health Center emergency room on March 16, 2016. She reported an onset of right hip and knee pain, onset two hours ago. The diagnosis was right knee sprain and strain of the muscle of the right hip. She was restricted to work as able with crutches for one week and then return to regular duty in one week. (JE3, pp. 20-34)

Ms. Laubenthal returned to Kossuth Regional Health Center on May 31, 2016. She reported continued significant hip pain with walking and trouble sleeping at night or lying on her hip. Her knee pain was significantly better. The notes state that at the time of the injury she felt like her hip went one direction and her knee went the other direction. The assessment was greater trochanteric bursitis of the right hip. Mark G. Davis, PA-C felt that she injured the attachments to the greater trochanter. He believed that what started out as a sprain or strain had developed into a bursitis from the trauma. The recommendation was anti-inflammatory Aleve 1 pill before and after work and physical therapy treatment for the next two weeks. Ms. Laubenthal was to continue her work restrictions. The prediction was no long-term complications. (JE4, pp.36-37)

On June 15, 2016, Ms. Laubenthal returned to the clinic for her ongoing right hip pain. Her knee also still bothered her. She has been compliant with recommendations, including physical therapy. Prior to her appointment her physical therapist contacted Mark G. Davis, PA-C to advise they have little else to offer her. Ms. Laubenthal continued to have significant pain. The recommendation was for an orthopaedic consultation. Mark G. Davis, PA-C noted that the x-ray showed she had mild degenerative arthritis but felt that with the nature of the injury that would have calmed down. Ms. Laubenthal declined the recommendation for an orthopaedic consult and preferred to seek chiropractic care. There is a notation that Ms. Laubenthal later decided she would like a referral to an orthopedist rather than seeing a chiropractor. (JE4, pp. 38-39; JE5)

Ms. Laubenthal saw Christopher J. Rierson, D.O. at NW Iowa Bone Joint and Sports Surgeons on June 28, 2016. Dr. Rierson's assessment was right knee pain, possible lateral meniscus tear and bilateral hip greater trochanter bursitis. He recommended an MRI of her right knee to rule out a tear. For her hips he recommended a cortisone injection bilaterally. The injections were performed. Dr. Rierson continued her restrictions. (JE6, pp.44-45)

On July 11, 2016, Ms. Laubenthal saw Dr. Rierson. She reported that the injections they gave her for the greater trochanter bursitis did not give her significant relief. She continued to have ongoing pain in both of her hips and continued knee pain. An MRI of her right knee was obtained on July 9, 2016. The MRI of the right knee showed some minimal articular cartilage changes, but otherwise the knee looked good. The assessment was right knee pain, iliotibial band syndrome, and bilateral greater trochanteric bursitis. Dr. Rierson discussed with Ms. Laubenthal that there were not a lot of MRI findings that corresponded with her discomfort. He injected her right knee and hoped it would be both therapeutic and diagnostic. He took her completely off of work and advised her to follow-up in three weeks. (JE6, pp. 46-47)

Ms. Laubenthal returned to Dr. Rierson on August 1, 2016. Unfortunately, she did not respond well to the injections in her knee and hips. She did not respond like a normal greater trochanter bursitis or a right knee pain with injections. He recommended an MRI for the hip and kept her off of work. (JE6, pp. 48-49)

On August 23, 2016, Ms. Laubenthal returned to Dr. Rierson. She was discouraged because she had bilateral hip pain for the last three months. She had the hip MRI on August 16, which demonstrated some evidence of greater trochanteric bursitis bilaterally with some edema noted about the lateral side of the hip. The assessment was bilateral hip greater trochanteric bursitis. Based on the rather normal-appearing MRIs, Dr. Rierson was not certain where the main discomfort was coming from. He recommended a second opinion at the Mayo Clinic and would try to get the referral approved through worker's compensation. Ms. Laubenthal was released to return to sedentary work. (JE6, pp. 50-51; JE7)

Rather than following the recommendation of the authorized treating physician and sending Ms. Laubenthal to the Mayo Clinic, defendants sent her to the Mason City Clinic. On September 14, 2016, Ms. Laubenthal saw Michael B. Scherb, M.D. at the Mason City Clinic. His impression was hip bursitis. Dr. Scherb stated he would not have done anything different than what had been done so far. He did not recommend arthroscopy for her knees because she did not have any evidence of meniscal tear. Because prior injections did not help her, he thought additional injections would not help her. She did have some evidence of bursitis, which in most instances resolved with time and physical therapy. Dr. Scherb discussed seeing someone in pain management to help find a medication regimen to control her pain. He also agreed with the suggestion of Dr. Rierson to go to a tertiary care center such as Mayo Clinic or Iowa City. He kept her on the current work restrictions and told her to follow-up as needed. (JE9)

Ms. Laubenthal testified that when she was on sedentary duty at Brand FX she worked in the office. She said she did not do a whole lot. She checked in freight and took pictures of completed trucks and downloaded them onto the computer. She could not sit very long because of her knee and hips, so working in the office did not go well for her. Ms. Laubenthal voluntarily resigned her employment from Brand FX on October 27, 2016. The stated reason for her resignation was for a new job. (Def. Ex. B, p. 3; Testimony)

Defendants scheduled an IME for Ms. Laubenthal to see Dr. Chen at the University of Iowa on November 3, 2017. Claimant testified she was unable to attend due to poor weather conditions. Another appointment was scheduled; however, pursuant to another Deputy's ruling on a motion to compel an independent medical examination (IME), Ms. Laubenthal did not attend the appointment. (Testimony)

David R. Archer, M.D. performed an IME on February 20, 2018 at the request of the defendants. Dr. Archer diagnosed Ms. Laubenthal with lateral pelvic pain in the area of the gluteus medius muscles bilaterally without functional deficit, and lateral right knee pain in the area of the lateral collateral ligament without functional impairment. He felt that the lateral pelvic pain in the area of the gluteus medius muscles bilaterally without functional deficit was related to the May 23, 2016 work injury. He placed her at maximum medical improvement (MMI) as of May 2017. With regard to further treatment, Dr. Archer stated, "I do not have further recommendations for treatment as, in her own words, 'nothing works' although a consultation at a pain clinic might be rewarding as recommended by Dr. Rierson and Dr. Scherb." (Def. Ex. A, p. 1) He opined that Ms. Laubenthal had no ratable deficit under the Fifth edition of The Guides. He stated that "[f]unctional impairment by her report is substantial but not consistent with the findings." He noted that Ms. Laubenthal was fully employed at the time of the examination and did not require work restrictions so a formal FCE was not indicated. (Def. Ex. A)

On March 19, 2018, at the request of her attorney, claimant underwent an IME with Sunil Bansal, M.D. Dr. Bansal diagnosed Ms. Laubenthal with right knee strain and left and right greater trochanteric bursitis. He placed her at MMI as of August 23, 2016, which was her last appointment with Dr. Rierson. Dr. Bansal causally connected her conditions to the work injury. He noted that prior to the injury she was not experiencing problems in her right knee or hips and had been able to perform all of her duties. Thus, he believed from both temporal and mechanistic standpoints, her right knee and bilateral hip pathology was related to her May 23, 2016 injury. Dr. Bansal felt that she had no ratable impairment to her right knee or right hip. With regard to the left hip, Dr. Bansal assigned 3 percent whole person impairment for her trochanteric bursitis. As a result of the work injury, he restricted her to no frequent kneeling, squatting, climbing, or twisting. No prolonged standing or walking greater than 30 minutes at a time. Dr. Bansal felt that she may need intermittent steroid injections for her right knee, and intermittent cortisone injections, NSAIDs, and a home exercise program for her hips. (Cl. Ex. 1)

The first issue to be addressed is permanency. Prior to the May 23, 2016 injury Ms. Laubenthal did not have any problems with her hips or right knee. Dr. Rierson, an authorized orthopaedic specialist, assessed Ms. Laubenthal with bilateral hip greater trochanter bursitis. He recommended that workers' compensation allow her to be seen at the Mayo Clinic. Dr. Scherb, another authorized orthopaedic specialist, felt workers' compensation should have Ms. Luabenthal seen at a tertiary care center such as the Mayo Clinic for bilateral hip pain and right knee pain. Both orthopaedic specialists restricted her activities. Those restrictions have not been lifted. Even defendants' IME doctor, Dr. Archer felt that Ms. Laubenthal's conditions were related to the work injury. Dr. Archer also stated that a consultation at a pain clinic, as recommended by Dr. Rierson and Dr. Scherb, might be rewarding. The injury occurred over three years ago and Ms. Laubenthal continues to experience problems. The pain in her hips and right knee has persisted. Because of the pain she needs to change positions frequently. Following the injury, Ms. Laubenthal reported hip and knee pain. There is no evidence of a prior right knee problem, no prior diagnosis of bursitis in her hips or any pelvic pain. Prior to the work injury, no doctor had recommended that she be seen at a tertiary pain center for ongoing pain.

The treating physicians limited her to sedentary duties only. Dr. Bansal saw her more recently and restricted her to no frequent kneeling, squatting, climbing, or twisting. No prolonged standing or walking greater than 30 minutes at a time. I find that the restrictions set forth by Dr. Bansal are Ms. Laubenthal's permanent restrictions as a result of the work injury. Furthermore, I find that Ms. Laubenthal has sustained a 3 percent whole person impairment as assigned by Dr. Bansal. I find that his impairment rating is more persuasive than that of Dr. Archer's because it is more consistent with the record as a whole. I find Ms. Laubenthal has demonstrated by a preponderance of the evidence that she has sustained permanent damage as a result of the work injury.

Ms. Laubenthal's work history demonstrates she is an individual with a strong work ethic who is motivated to be employed. There is no evidence in the record that she is exaggerating or malingering. I find her testimony to be straight-forward and credible.

She has requested additional treatment from the defendants in an attempt to improve her condition. Unfortunately, the treatment has not been authorized. In her post-hearing brief claimant requests alternate medical care. However, alternate medical care was not identified as an issue at the time of hearing. Therefore, it will not be considered in this decision.

At the time of the hearing Ms. Laubenthal was 56 years old. She graduated from high school in 1980. She does not have any formal post-high school education. She worked at a grocery store for approximately one year before she was married. She then took time out of the workforce to start a family. (Testimony)

When Ms. Laubenthal rejoined the workforce she worked at a couple of farms helping with livestock and field work. She lifted 50-60 pound bags of seed, drove a

combine, worked up ground, and picked up rock. She helped to bale, cut, and stack hay. She had to get on and off equipment multiple times per day. The last time she performed farm work she was paid $15.00 per hour. She grew up on a farm and enjoys working on a farm. She does not believe that she is physically capable of returning to farm work. The farm work is now too physically demanding for her because the work injury. (Testimony)

Ms. Laubenthal also performed housekeeping work at Kossuth Hospital. This required her to stand all night, clean, take out the trash, mop, sweep, vacuum, and lift pails of liquid. Prior to this work injury she had no problems performing this type of work. However, now she does not believe she would be physically capable of performing the duties of this job due to the work injury. (Testimony)

When Ms. Laubenthal worked at Brand FX her job required installing trays behind seats, changing fuses, wiring set up, placing decals, and installing license plates. She was not required to lift much weight, but she was on her feet the vast majority of the day. There were times when she would lay down in awkward positions to work in the fuse box. However, prior to the injury she did not have any problems performing her duties. (Testimony)

Ms. Laubenthal voluntarily resigned her position in October of 2016 because she was not able to perform the work she did prior to the injury, and there really was not enough work for her to do in the office. It is noted that the written resignation form states she resigned due to a new job. However, I found Ms. Laubenthal's testimony that she could not physically perform her pre-injury job to be convincing and credible. (Testimony)

At the time of hearing Ms. Laubenthal was working for Algona Floor Design in Algona, Iowa. To her credit, she went out and found a new job that she was physically capable of performing. She was performing office work such as accounts payable and receivable, payroll, answering the telephone, placing orders and selling flooring and paint products. She averages 40 hours per week. She is paid $12.25 per hour. At the time of the injury she was paid $13.95 per hour. (Cl. Ex. 2; hearing report)

Considering Ms. Laubenthal's age, educational background, employment history, ability to retrain, motivation to obtain a job, length of healing period, permanent impairment, permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 35 percent loss of future earning capacity as a result of her work injury with the defendant employer.

Claimant is also seeking payment of past medical expenses. Claimant is seeking payment of a November 3, 2016 bill from Fairmont Orthopaedics & Sports Medicine in the amount of three thousand and no/100 dollars ($3,000.00). It appears that this bill stems from an MRI ordered by Paul Chiropractic, an unauthorized provider in this case. Ms. Laubenthal also had an MRI on August 8, 2016 of her bilateral hips. I find that

there is no evidence as to why the second MRI was reasonable and necessary in these circumstances. Therefore, claimant's request for payment of the bill is denied.

Additionally, claimant is seeking an assessment of costs. I find that claimant was generally successful in her claim and therefore, exercise my discretion and assess costs against the defendants. I find that the filing fee in the amount of $100.00 and the cost of service in the amount of $13.12 are appropriate costs. Thus, defendants are assessed costs in the amount of one hundred thirteen and 12/100 dollars ($113.12).

CONCLUSIONS OF LAW

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

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.

Based on the above findings of fact, I conclude that claimant sustained permanent disability to her body as a whole as a result of her work injury. I further conclude that she sustained 35 percent industrial disability as a result of the work injury. As such, Ms. Laubenthal is entitled to 175 weeks or permanent partial disability benefits commencing on the stipulated date of August 12, 2016.

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 1975).

Because the claimant failed to show that the November 3, 2016 MRI ordered by the unauthorized chiropractor was reasonable and necessary I conclude that defendants are not responsible for that medical expense.

In her post-hearing brief claimant requests alternate medical care. However, this issue was not raised on the hearing report and therefore, will not be addressed in this decision. However, defendants have an ongoing obligation under Iowa Code section 85.27 to provide all reasonable and necessary medical treatment related to the work injury.

Claimant is seeking an assessment of costs. I conclude that the costs sought by claimant are appropriate under 876 IAC 4.33(3) & (7). Thus, defendants are assessed costs in the amount of one hundred thirteen and 12/100 dollars ($113.12).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of three hundred seventy-seven and 11/100 dollars ($377.11).

Defendants shall pay one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on the stipulated commencement date of August 12, 2016.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) 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 (2) percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall reimburse claimant costs as set forth above.

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 17th day of July, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.