BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLIE ANNE MCNITT, Claimant, vs. NORDSTROM, INC., Employer, Self-Insured, Defendant.	File No. 5065697 A P P E A L D E C I S I O N Head Notes: 1402.40; 1804; 2502; 2907

Defendant, Nordstrom, Inc., self-insured employer, appeals from an arbitration decision filed on July 19, 2019, and from a rehearing decision re: demeanor filed on July 20, 2020. Claimant Charlie Anne McNitt cross-appeals.

This case was initially heard by Deputy Workers' Compensation Commissioner Erica Fitch on June 1, 2018, and it was considered fully submitted in front of Deputy Fitch upon the filing of post-hearing briefs on July 16, 2018. Deputy Fitch subsequently was taken off regular deputy work, including hearings, to focus her efforts full-time on the development and implementation of the Workers' Compensation Electronic System (WCES). Therefore, due to Deputy Fitch's unavailability for hearings and decisions, this case was delegated to Deputy Commissioner Stephanie Copley on July 2, 2019, pursuant to Iowa Code section 17A.15(2). Deputy Copley issued the arbitration decision on July 19, 2019.

Defendant asserts on appeal it was error to delegate this case to a deputy commissioner other than Deputy Fitch because claimant asserts Deputy Fitch remained available to the agency at the time of the delegation. I disagree. Deputy Fitch's job duties at the time this case was delegated had been reassigned and reallocated such that she did not have time available to hear or decide cases. Therefore, I find and conclude that Deputy Commissioner Fitch was unavailable, as the term is intended in Iowa Code section 17A.15(2). I, therefore, reject defendant's initial basis for appeal.

Defendant also asserted on appeal that it was error for Deputy Copley to issue an arbitration decision without rehearing this case. While Deputy Copley did not communicate with the parties or offer to rehear any portion of this case before writing the arbitration decision, review of the decision demonstrates that Deputy Copley considered the requirements of Iowa Code section 17A.15(2). Deputy Copley specifically noted she reviewed the post-hearing briefs and neither party argued in their briefs that claimant's demeanor was a substantial factor bearing on the issues in this

case. Therefore, Deputy Copley concluded rehearing was not required pursuant to Iowa Code section 17A.15(2) and she filed the arbitration decision on July 19, 2019.

Deputy Copley found claimant is permanently and totally disabled. Defendant asserted Deputy Copley erred in failing to rehear the case before issuing the arbitration decision and in finding claimant is permanently and totally disabled. Defendant asserted claimant's demeanor was a substantial factor in determining whether claimant is permanently and totally disabled. Defendant asserted claimant is a reliable, hard-working, and personable individual who future employers will appreciate and desire to employ. At a minimum, defendant asserted a deputy commissioner cannot assess claimant's demeanor and determine whether she is permanently and totally disabled without observing claimant at hearing.

In an order for rehearing filed in this matter on May 12, 2020, I found Deputy Commissioner Copley did not commit error in not rehearing this case before filing the arbitration decision on July 19, 2019. However, I also ordered that a rehearing be scheduled to take place within 90 days of May 12, 2020. The rehearing was held on July 16, 2020.

In the arbitration decision, in addition to finding claimant is permanently and totally disabled as a result of the work injury, the deputy commissioner also found claimant failed to prove by a preponderance of the evidence that she sustained a neck injury related to the work injury. On cross-appeal in this case, claimant asserts the deputy commissioner erred in rejecting claimant's neck injury claim.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties, and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on July 19, 2019, and the proposed rehearing decision re: demeanor filed on July 20, 2020, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

In the rehearing decision, Deputy Copley stated:

> The rehearing was conducted on July 16, 2020, by the undersigned. The only evidence introduced at rehearing was claimant's testimony in response to questions from defendant's counsel. The evidentiary record closed and the rehearing was considered fully submitted upon the conclusion of claimant's testimony on July 16, 2020.

. . .

At the outset of her testimony on rehearing, claimant agreed with defendant's counsel that she tends to be an even-keeled, positive, and upbeat person. She likewise agreed she does not consider herself to be an "Eeyore."

In terms of her motivation and employability, claimant agreed that she has always been a motivated, hard worker who generally met or exceeded the expectations of defendant. Claimant's testimony in this regard was consistent with my finding in the arbitration decision that she is motivated to work.

Claimant also answered questions regarding her participation in defendant's re-employability program known as "REA." She explained that she provided clerical services for the local science center and greeting services for Mercy Hospital. The greeter position required her to interact regularly with the general public, and claimant testified she enjoyed helping people in this role.

Considering all of claimant's testimony on rehearing, I find - borrowing defendant's terminology - that claimant's "outward manner" or "bearing" is very pleasant, likeable, and approachable. I find her demeanor is a positive factor in terms of her employability, meaning it makes her a more desirable candidate for rehire.

However, despite her favorable demeanor, claimant only received one offer - which was later retracted - from the 15 job applications she submitted with the assistance of defendant's vocational counselor, Lana Sellner. (Arbitration Hearing Transcript, pages 38, 40)

Ms. Sellner indicated claimant is "employable in customer service type positions" considering her physical capacity and restrictions. (Exhibit A, p. 54) After hearing claimant's testimony on rehearing, I find claimant's demeanor would make her well-suited for such positions as well. However, as I found in the arbitration decision, claimant lacks the computer literacy required in many of these roles. (See Arb. Hrg. Tr., p. 58)

Perhaps most importantly, claimant's favorable demeanor changes nothing about my finding in the arbitration decision that claimant is now precluded from returning to the warehouse work for which she is fitted and to which she is accustomed. Claimant's physical capabilities essentially limit her to customer service or receptionist positions. Though her demeanor would make her a favorable candidate for these positions, many require computer skills she lacks. Further, while her demeanor is

> well-suited for the greeter positions she performed through REA, these positions are volunteer in nature and, based on claimant's inability to find work even with Ms. Sellner's assistance, they do not appear to be widely available in the competitive labor market.
>
> For these reasons, claimant's testimony on rehearing regarding demeanor does not impact or change my finding in the arbitration decision that claimant is wholly disabled from performing work that her experience, training, education, intelligence, and physical capabilities would otherwise allow her to perform, nor does it change my finding in the arbitration decision that claimant is permanently and totally disabled as a result of her work injuries.
>
> Thus, with additional findings of fact set forth above, the findings of fact in the arbitration decision are adopted in their entirety.

(Rehearing Decision RE: Demeanor, pages 2-3)

I affirm the deputy commissioner's finding that claimant sustained permanent total disability as result of the October 2, 2007, work injury.

I also affirm the deputy commissioner's analysis regarding claimant's alleged neck injury. I affirm the deputy commissioner's finding that the opinions of Dr. Sassman are not sufficient in this case to establish a causally related neck injury.

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 her report dated January 9, 2018, Dr. Sassman opines:

> . . . Given that the trauma to the shoulder was significant enough to cause the tear, some of this force would also have been transmitted to the neck and likely caused at least an aggravation of underlying degenerative changes and/or a disc issue. This is based on the information I have at this point and will become clearer once the MRI of the cervical spine is obtained.

(Ex. 6, p. 34)

Dr. Sassman further noted:

> . . . I would recommend that an MRI of the cervical spine be obtained to assess for cervical root nerve irritation. Ms. McNitt has symptoms on examination that are consistent with cervical radiculopathy that has not yet been evaluated. Given the trauma that occurred to the right shoulder, concomitant injury to the cervical spine can occur as well. Therefore, this should be assessed.

(Ex. 6, p. 35)

I recognize and acknowledge that Dr. Sassman is the only physician who specifically addressed the neck injury claim. However, like the deputy commissioner, I also note that neither of the treating orthopedic surgeons diagnosed a neck injury, recommended treatment for claimant's neck, or recommended any further diagnostic work-up of the neck to determine if there was an injury of the neck related to the work injury. Similarly, the opinions of Dr. Sassman demonstrate the need for further diagnostic work-up before she can provide a definitive diagnosis of claimant's neck. Dr. Sassman's opinion that a concomitant injury "can" occur is not sufficient to prove claimant sustained a neck injury as a result of the initial work injury or during work hardening.

Dr. Sassman also stated any diagnosis of the neck would be "clearer" if an MRI was performed. However, claimant did not obtain an MRI or a definitive diagnosis of her neck condition prior to hearing. Claimant bore the burden of proof to establish a causal connection between the work injury and her claim of a neck injury. I affirm the deputy commissioner's finding that claimant failed to prove a definitive diagnosis of her neck and she failed to prove a causal connection or material aggravation of the undefined neck condition related to the work injury.

I affirm the deputy commissioner's findings, conclusions and analysis regarding the above issues.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on July 19, 2019, and the rehearing decision re: demeanor filed on July 20, 2020, are affirmed in their entirety with the above-stated analysis.

Defendant shall pay claimant permanent total disability benefits, commencing on May 23, 2016, and payable through the present and continuing during claimant's ongoing period of total disability.

Defendants shall pay benefits at the stipulated weekly rate of four hundred twelve and 14/100 dollars ($412.14).

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

Per the parties' stipulations, defendants shall receive credit for all weekly benefits paid after May 26, 2016.

Defendants shall reimburse claimant in the amount of two thousand seven hundred seventy-two and 50/100 dollars ($2,772.50) for the remainder of Dr. Sassman's independent medical evaluation charge.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed this 7th day of August, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Dirk Hamel (via WCES)

James M. Peters (via WCES)