BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THI M. PIZANO,

Claimant,

vs.

NESTLE HOLDINGS, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5057063

A R B I T R A T I O N

D E C I S I O N

Head Notes: 1402.40, 1803, 1803.1, 2501, 2907

STATEMENT OF THE CASE

Thi Pizano, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Nestle Holdings, Inc., as the employer and Indemnity Insurance Company of North America, as the insurance carrier. Hearing occurred before the undersigned on October 10, 2017, in Davenport.

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. 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 evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 4, and Defendants' Exhibits A through F. Claimant testified on her own behalf and was the only witness called to testify.

Counsel for the parties requested an opportunity to submit post-hearing briefs. Their request was granted. The parties filed post-hearing briefs on November 20, 2017, at which time the case was considered fully submitted to the undersigned.

ISSUES

1. Whether claimant's permanent disability should be compensated as a scheduled member injury or with industrial disability as an unscheduled disability.

2. The extent of claimant's entitlement to permanent disability benefits.

3. Claimant's average gross earnings at the time of the injury.

4. The corresponding weekly rate at which benefits should be paid.

5. Whether claimant is entitled to an order requiring reimbursement, direct payment, or satisfaction of past medical expenses contained in Claimant's Exhibit 3.

6. Whether claimant is entitled to alternate medical care, including seasonal physical therapy.

7. Whether costs should be assessed against either party.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Thi Pizano, claimant, is a 50-year-old woman. Ms. Pizano was born in Vietnam, where she obtained a high school education. While living in Vietnam, claimant owned a souvenir shop. However, she left Vietnam and, after a period of time in the Philippines, she came to the United States in 1991.

Ms. Pizano soon thereafter moved to the Quad Cities area and began working at IBP. She subsequently took a job at the Sara Lee bakery as a janitor and subsequently as a machine operator until that bakery closed. In August 2012, claimant began working for Nestle Holdings, Inc.

Claimant continued working for Nestle until she was injured on February 13, 2015. On that date, claimant was performing her typical job duties when her left arm became trapped in a conveyor system. Ultimately, claimant was trapped up to the left elbow for an extended period of time. Ms. Pizano estimates that her left arm was trapped in the conveyor system for a period of approximately 30 minutes.

Fortunately, claimant is a right-hand dominant individual so her injury affects her non-dominant hand. Unfortunately, claimant's injury was quite severe and included comminuted fractures of both the radius and ulna in her left arm. Claimant was taken to

surgery on February 14, 2015. Given the severity and contamination of her injury, her wounds were cleaned but her fractures could not be repaired at that time. Claimant required three surgeries to clean her wound and ultimately surgically fixate the bones in her left forearm. Ryan P. Dunlay, M.D. was claimant's treating orthopaedic surgeon after the injury. Dr. Dunlay provided a good summary of claimant's medical treatment and course of care at Joint Exhibit 3, page 8.

Ms. Pizano experienced difficulties in her healing process. After the third surgery in which fusion was performed of the bones in claimant's left arm, she had delayed fusion, or healing, of the bones. As a result, Dr. Dunlay referred claimant to the University of Iowa Hospitals and Clinics for evaluation and care.

Matthew D. Karam, M.D., assumed claimant's care at the University of Iowa Hospitals and Clinics. Dr. Karam provided claimant care from July 2015 through June 2017. (Joint Ex. 4)

Claimant testified that she continues to have numbness and tingling in her left thumb, index and middle fingers. She also testified that she has weakness in her left arm following her injuries and treatment. Ms. Pizano also testified that the cold affects her arm and hand.

There is no doubt that Ms. Pizano sustained a significant injury to her left hand and arm as a result of the February 13, 2015 work injury. However, claimant also asserts that she sustained a left shoulder injury as a result of the work injury. Defendants challenge whether claimant sustained a left shoulder injury.

Claimant did not report left shoulder symptoms immediately after the injury. Of course, she was also suffering from a serious injury to her left arm, and her left shoulder would not have been a primary concern at the time.

Dr. Dunlay opines that claimant "has severe and significant deficits to her left arm including her shoulder, wrist, and hand due to this traumatic work related injury." (Joint Ex. 3, p. 8) Specifically, Dr. Dunlay opines that Ms. Pizano sustained slight loss of range of motion in her left shoulder. He assigns a three percent permanent impairment of the left upper extremity to claimant's left shoulder injuries. Dr. Dunlay converts this to a whole person impairment and opines that Ms. Pizano sustained a two percent permanent impairment of the whole person as a result of injuries to her left shoulder. (Joint Ex. 3, pp. 8-9)

In addition, Dr. Dunlay opines that Ms. Pizano sustained a 22 percent permanent impairment of the left arm as a result of her left wrist injuries. Dr. Dunlay also identifies a 61 percent permanent impairment of the left arm as a result of claimant's left hand injuries and residual functional losses. Combining the left shoulder, left wrist, and left hand impairment, Dr. Dunlay concludes that claimant sustained a 47 percent whole person impairment as a result of the February 13, 2015 work injury. (Joint Ex. 3, p. 9)

No other physician offers an opinion about the level of claimant's permanent impairment. However, Dr. Karam does offer an opinion in which he agrees that "Ms. Pizano's injury was basically limited to the left arm." (Joint Ex. 4, pp. 46, 48) Dr. Karam explains, "Ms. Pizano had some mild shoulder discomfort and stiffness, which was resolved with physical therapy." (Joint Ex. 4, pp. 46, 48)

Yet, after authoring the above opinion, Dr. Karam referred claimant for further evaluation of the left shoulder by James V. Nepola, M.D. (Joint Ex. 4, p. 50) Dr. Nepola's records are not in evidence, and there is no clear opinion from Dr. Nepola pertaining to whether claimant sustained permanent disability of the left shoulder as a result of the work injury. Dr. Nepola opined that claimant had good relief of her left shoulder pain after he performed an injection in May 2017. However, he also suggested that claimant may require future treatment, or injections, of the left shoulder. (Joint Ex. 4, p. 52) Dr. Nepola also opined that claimant requires permanent restrictions limiting her lifting to five pounds with the left hand. (Joint Ex. 4, p. 53) Given that he only treated claimant's left shoulder, Dr. Nepola's restrictions are presumably for the left shoulder condition.

The left shoulder is a close factual issue. However, given that no one has refuted the permanent impairment rating offered by Dr. Dunlay pertaining to the left shoulder, I find that claimant sustained a two percent permanent impairment of the whole person as a result of the left shoulder injury. Additionally, given that Dr. Karam opined that claimant's left shoulder condition was "resolved," but later required additional referral and treatment through Dr. Nepola, I find that claimant's condition was not entirely "resolved" in May 2016. Considering the ongoing care, potential for future shoulder treatment, and the impairment rating from Dr. Dunlay, I find that claimant has proven she sustained a permanent injury to the left shoulder, which resulted in permanent functional loss equivalent to two percent of the whole person and imposition of a five pound lifting restriction with the left arm.

I accept the unrebutted impairment ratings offered by Dr. Dunlay. Considering claimant's left shoulder, left wrist, and left hand injuries, I find that claimant sustained permanent functional loss equivalent to 47 percent of the whole person. Again, I find that claimant requires a five pound lifting restriction on her left arm as a result of the work injury on February 13, 2015. I find that claimant may require ongoing, periodic treatment for her injuries, including her left shoulder, but that she achieved maximum medical improvement on August 31, 2016. (Joint Ex. 4, p. 45)

Having reached the above factual findings, I must consider claimant's loss of future earning capacity caused by her February 13, 2015 work injuries. The parties each obtained and introduced a vocational opinion. Claimant's vocational expert opines that claimant does not have transferrable work skills and that there are no jobs available to claimant within the stable labor market. In essence, claimant's vocational expert opines that claimant is not employable after the February 13, 2015 work injury. (Claimant's Ex. 1, pp. 10-11)

Defendants introduce a competing vocational opinion, which concludes that Ms. Pizano remains capable of full-time employment. Defendants' vocational expert opines that claimant sustained a loss of access to the labor market in the range of 47 to 85 percent and only an approximate 40 percent loss of future earning capacity as a result of the February 13, 2015 work injury. (Defendants' Ex. A, p. 6)

Each vocational expert critiques the other expert's opinion. Each raises legitimate critiques of the other expert. For example, claimant's vocational expert challenges the fact that defendants' expert used a statewide labor market to conduct his analysis, while claimant's expert used only the Quad Cities area to conduct his analysis.

By way of contrast, defendants' expert notes that claimant's expert has arbitrarily changed the designated skill levels of claimant's prior employment and concluded that it was all "unskilled" work despite contrary designations in the Dictionary of Occupational Titles. Defendants' expert also points out that the claimant's expert assumes claimant is capable of working at something less than the sedentary work level, even though she has no physical limitations other than on her left hand and arm.

Again, I believe the critiques offered by each of the vocational experts have some merit and damage the credibility of the other expert. However, when I consider the competing opinions, I have difficulty with the claimant's expert arbitrarily changing the skill level assumptions about claimant's prior jobs. It appears that these assumptions and changes unnecessarily limit claimant's abilities and future job prospects.

Additionally, claimant has continued to pursue English as a second language classes since the injury. She intends to pursue a GED and is making plans for future employment. Claimant appears to believe that she is capable of some future employment, though her work search has been less than exhaustive prior to the date of hearing.

Ultimately, I find the opinions of defendants' vocational expert to be more convincing than those offered by claimant's expert. Nevertheless, the defense vocational opinion also contains flaws and appears somewhat overly optimistic in the undersigned's estimation. Given claimant's language barriers, age, limited educational background, limited employment history, and the significance of her injuries and physical restrictions, finding alternate employment is going to be difficult for claimant, and she is likely to experience significant loss of earning capacity as a result of this injury.

Considering claimant's age, the situs and severity of her physical and mental injuries, her educational background, her current language barriers, her level of motivation to return to work, her permanent functional restrictions, her permanent impairment, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Ms. Pizano has proven she sustained a 75 percent loss of future earning capacity as a result of the work injuries she sustained on February 13, 2015.

The parties have disputes about claimant's applicable weekly rate. Specifically, there is a factual dispute about claimant's gross earnings. With respect to the dispute about claimant's gross earnings, claimant asserts that her average gross weekly earnings prior to the injury date were $1,737.00. Defendants contend that the applicable gross weekly earnings were $1,498.00. (Hearing Report)

Claimant does not produce any evidentiary support for her gross weekly earnings contention. Nor does claimant brief the issue to explain how she arrived at gross weekly earnings of $1,737.00. It appears that defendants paid at a weekly rate that was higher than they now contend applies. However, other than pointing out that defendants paid at a higher rate, claimant has no other evidentiary or legal support for her calculations.

Defendants, by contrast, demonstrate their calculations at Defendants' Exhibit C, page 2. Defendants' calculations appear to be representative and customary of claimant's weekly earnings prior to the date of injury. Therefore, I find claimant's gross weekly earnings to be $1,497.99 prior to the February 13, 2015 work injury. The parties stipulated that claimant was married and entitled to three exemptions on the date of injury. (Hearing Report)

Claimant asserts a claim for past medical expenses and includes charges for physical therapy performed on January 12, 2017 and January 18, 2017. (Claimant's Ex. 3) Defendants challenge whether the treatment or charges are reasonable, necessary, or causally related to the work injury. However, defendants stipulate that the charges contained in Claimant's Exhibit 3 are causally related to the disputed shoulder condition. (Hearing Report) Having found that the shoulder condition is causally related to the February 13, 2015 work injury, I find that the expenses contained in Claimant's Exhibit 3 are also causally related.

As far as the reasonableness and necessity of the physical therapy contained in Claimant's Exhibit 3, I note that the therapy was recommended by the treating orthopaedic surgeon, Dr. Dunlay. (Joint Ex. 3, p. 10) I find the physical therapy is reasonable and necessary care for claimant's left shoulder injury. Similarly, I find that both Dr. Dunlay and Dr. Nepola suggested that future treatment of the left shoulder may be necessary.

CONCLUSIONS OF LAW

The initial dispute between the parties is whether claimant's left shoulder sustained a permanent injury and permanent disability.

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).

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Comm'r. Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Having found that claimant proved she sustained a permanent left shoulder injury as a result of the February 13, 2015, work injury, I conclude that claimant has established she sustained an unscheduled injury that is compensable with industrial disability benefits. Iowa Code section 85.34(2)(u).

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.

Having considered claimant's age, the situs and severity of her injuries, her permanent impairment, permanent restrictions, ability to return to gainful employment, her motivation level, educational background, employment history, language barriers, and all other industrial disability factors identified by the Iowa Supreme Court, I found that claimant sustained a 75 percent loss of future earning capacity. This entitles claimant to a 75 percent industrial disability award, or 375 weeks of permanent disability benefits. Iowa Code section 85.34(2)(u). Pursuant to the parties' stipulations, permanent partial disability benefits shall commence on August 27, 2016. (Hearing Report)

The next issue to be determined is the proper weekly rate at which all benefits in this case should be paid. Specifically, the parties dispute claimant's gross weekly earnings at the time of the injury. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

In this case, I found that the gross weekly wage calculated by defendants at Defendants' Exhibit C, page 2 was reasonable and fairly reflected claimant's customary earnings immediately prior to the date of injury. Ultimately, I calculated that claimant's gross weekly wage prior to the injury date was $1,497.99.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $1,497.99 and relying upon the parties' stipulations that she is entitled to claim married, plus three exemption status, and using the Iowa Workers' Compensation Manual (p. 99) with effective dates of July 1, 2014 through June 30, 2015, I determine that the applicable weekly rate for benefits in this case is $922.30.

The next disputed issue for resolution is claimant's entitlement to payment, reimbursement, or satisfaction of past medical expenses included in Claimant's

Exhibit 3. Defendants dispute whether the requested medical treatment was reasonable and necessary and whether the disputed expenses are causally related to the work injury. However, defendants stipulated that the disputed expenses are causally related to the disputed left shoulder condition.

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).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Having found that claimant proved she sustained a permanent injury to the left shoulder, I similarly found that the disputed treatment expenses contained in Claimant's Exhibit 3 are reasonable, necessary and causally related to the February 13, 2015 date of injury. Defendants will similarly be obligated to provide claimant future, causally-related treatment for claimant's left shoulder, including potential injections recommended by Dr. Nepola and potential physical therapy recommended by Dr. Dunlay. Iowa Code section 85.27.

Finally, claimant also seeks assessment of her costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant has prevailed on the majority of the disputed issued. Therefore, I conclude that it is appropriate to assess her costs in some amount.

Claimant seeks assessment of her filing fee ($100.00). This is a reasonable request and is assessed pursuant to 876 IAC 4.33(7).

Claimant seeks assessment for the cost of service of her original notice and petition. Again, this is a reasonable request. Claimant's service cost ($12.90) is assessed pursuant to 876 IAC 4.33(3).

Finally, claimant seeks the cost ($20.00) of a medical record from ORA Orthopaedics. This request is permissible and assessed pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing on August 27, 2016.

All weekly benefits shall be paid at the rate of nine hundred twenty-two and 30/100 dollars ($922.30) per week.

Defendants shall pay all accrued benefits in lump sum with interest pursuant to Iowa Code section 85.30.

Defendants shall be entitled to credit for all benefits paid to date.

Defendants shall reimburse claimant for any out-of-pocket medical expenses she paid, satisfy any outstanding medical expenses directly with the medical providers, and hold claimant harmless for all medical expenses contained in Claimant's Exhibit 3.

Defendants shall provide claimant future medical care for all treatment causally related to her left hand, wrist, and shoulder injuries.

Defendants shall reimburse claimant's costs totaling one hundred thirty-two and 90/100 dollars ($132.90).

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 2nd day of February, 2018.

WILLIAM H. GRELL
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.