BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 26 2018
WORKERS COMPENSATION

SARAH FREDERICK, Claimant, vs. SERTA/NATIONAL BEDDING CO, LLC, Employer, and SAFETY NATIONAL CASUALTY CORPORATION, Insurance Carrier, Defendants.	File No. 5062686 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Sarah A. Frederick, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on October 31, 2016. Claimant alleged she sustained a work-related injury on May 9, 2014. (Original notice and petition.)

Serta/National Bedding Co., LLC is located in Clear Lake, Iowa. For purposes of workers' compensation, the employer is insured by Safety National Casualty Corporation. Defendants filed their answer on December 15, 2016. They admitted the occurrence of the work injury. A first report of injury was filed on May 7, 2015.

The hearing administrator scheduled the case for hearing on November 7, 2017 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building on 150 Des Moines Street. The undersigned appointed Ms. Jill Blake as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on her own behalf. Defendants elected not to call any witnesses.

The parties offered exhibits. Claimant offered exhibit marked 2. Defendants offered exhibits marked A through I. The parties jointly offered exhibit marked 1. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on or before December 1, 2017. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on May 9, 2014 which arose out of and in the course of her employment;

3. The injury is a cause of temporary disability during a period of recovery;

4. Temporary benefits are no longer at issue;

5. The injury is a cause of permanent disability;

6. Claimant's permanency is an industrial disability;

7. The commencement date for permanent partial disability benefits is January 12, 2016;

8. The weekly benefit rate is stipulated to be $375.93 per week;

9. Prior to the hearing, claimant was paid 20 weeks and 2 days of compensation at the rate of $327.43 for a total amount of permanency paid in the amount of $5,659.87; and

10. The parties are able to stipulate as to the costs that were paid by claimant prior to the date of the hearing;

ISSUES

The issues presented are:

1. What is the extent of permanent partial disability to which claimant is entitled?

2. Is claimant entitled to additional permanent partial disability benefits through April 26, 2012?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, after judging her credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 35 years old and right-hand dominant. She is the mother of two minor children. Claimant graduated from high school in 2000. In 2003, she graduated from the La James College of Cosmetology in Mason City, Iowa. She obtained a license to practice cosmetology in Iowa in 2003 and practiced her trade through 2010. Claimant still holds her cosmetology license today. She is qualified to style hair, give manicures as well as give pedicures, rub feet and clip nails. Claimant cuts hair with her right hand and holds the hair in her left hand. She does smoke tobacco products.

In March of 2008, claimant commenced employment with SERTA/National Bedding Co., LLC. Claimant was hired as a laborer in the "staging area". She was required to stack "pillow tops" on carts. Each one weighed between 10 to 15 pounds. Claimant would stack up to 300 units per shift. Claimant earned approximately $13.00 per hour. Later claimant transferred to a ruffling position at Serta.

On October 21, 2008, claimant presented to the Mason City Clinic with left shoulder pain. (Exhibit 1, page 8) Eric J. Potthoff, D.O., diagnosed claimant with:

> Left shoulder pain, secondary to rotator cuff strain, biceps tendon strain.

(Ex. 1, p. 9)

Claimant was injected with Kenalog 60 mg and plain Marcaine. Claimant was advised to continue with light duty and to participate in physical therapy. (Ex. 1, p. 9)

On July 22, 2009, MRI testing of the left shoulder occurred. (Ex. 1, p. 10) The results showed:

> [M]ild articular surface fraying of the undersurface of the supraspinatus tendon. No full thickness tear. Developing subchondral cyst formation involving the posterior aspect of the humeral head. Intact glenoid labra. Trace amount of subacromial/subdeltoid bursal fluid. Intact long head of the biceps tendon.
>
> ASSESSMENT: Left shoulder injury with chronic pain and radiologic findings as noted above.

(Ex. 1, p. 10) Claimant was referred back to Dr. Potthoff at the Mason City Clinic.

In her deposition, claimant testified, she began to experience aching in her left shoulder in 2014. (Ex. A, p. 13) She testified she could not lift up her arm and she woke up every night with pain. (Ex. A, p. 13) Claimant stated the pain was especially significant on May 9, 2014. (Ex. A, p. 13)

On July 30, 2014, claimant presented to Howard T. Kim, M.D., at Healthworks Occupational Health. Claimant reported baseline pain around 3 out of 10. (Ex. 1, p. 1) Claimant described some tingling sensation going down the arm and into the palm of the left hand. Claimant described how she had to pivot and twist her shoulders repetitively throughout the day. (Ex. 1, p. 1) Dr. Kim diagnosed claimant with "Left shoulder pain." (Ex. 1, p. 1) Dr. Kim placed claimant on work restrictions. Claimant was precluded from lifting, carrying, or pushing more than 5 pounds. (Ex. 1, p. 3) Dr. Kim also prescribed 500 mg of Naprosyn. (Ex. 1, p. 3)

On August 13, 2014, claimant returned to Dr. Kim. Claimant had participated in physical therapy. X-rays were unremarkable. (Ex. 1, p. 4) On August 27, 2014, claimant returned to Dr. Kim. Claimant could lift, push or pull up to ten pounds. She was to continue to engage in physical therapy. (Ex. 1, p. 5)

In September of 2014, claimant had a relapse. She encountered left shoulder pain. (Ex. 1, p. 6) Dr. Kim recommended MRI testing. (Ex. 1, p. 6) The results of the MRI testing showed an extensive left labral tear. (Ex. 1, p. 7) Dr. Kim referred claimant to an orthopedic specialist. (Ex. 1, p. 7)

On November 25, 2014, claimant presented to Dr. Potthoff at the Mason City Clinic for Orthopedics. (Ex. 1, p. 11) The orthopedist conducted a thorough physical examination of claimant's left shoulder and elbow. (Ex. 1, p. 12) Dr. Potthoff diagnosed claimant with:

> 1. Left shoulder pain with superior and anterior labral tearing, mild partial thickness rotator cuff tearing (long standing).
>
> 2. Likely with some over use or tendinitis, left shoulder.

(Ex. 1, p. 13)

Dr. Potthoff made several recommendations regarding treatment. He suggested conservative care, cortisone injections, or surgery. (Ex. 1, p. 13) Claimant needed time to consider her medical options.

On December 12, 2014, claimant saw Robert Gross, D.O., for a follow-up examination of the left shoulder. (Ex. 1, p. 14) Dr. Gross explained all the medical options claimant had for treating her left shoulder. (Ex. 1, pp. 15-16) Claimant needed additional time to consider her choices.

On February 2, 2015, Dr. Potthoff performed a diagnostic and operative arthroscopy, left shoulder, with rotator interval closure (anterior capsular plication). (Ex. 1, p. 42) Claimant was placed in a sling following the surgical procedure. She tolerated the procedure well and was taken to the recovery area in stable condition. (Ex. 1, pp. 42-43)

On February 17, 2015, claimant returned to Dr. Potthoff for a post-surgical examination. (Ex. 1, p. 17) Dr. Potthoff explained to claimant that she did not have any tearing to the labrum. She did have findings consistent with multidirectional instability. As a consequence, Dr. Potthoff performed a capsular plication through the rotator interval. (Ex. 1, p. 18) Claimant was told she could return to light duty work on February 18, 2015, but she was only allowed to perform office or sedentary duties and she was required to wear a sling. (Ex. 1, p. 18)

On March 10, 2015, claimant again visited with Dr. Potthoff. The orthopedic surgeon found the left upper extremity to be neurovascularly intact. Claimant had active forward flexion to about 100 degrees. There was no appreciable swelling. (Ex. 1, p. 20) Dr. Potthoff informed claimant she no longer needed to wear a sling. Claimant was to advance her course of physical therapy. Claimant was continued on light duty work. (Ex. 1, p. 21)

Claimant returned to Dr. Potthoff on April 7, 2015. Claimant informed her physician that she had fallen at work during the first week of April. Claimant indicated she landed on her left forearm and side. Dr. Potthoff thought claimant had sustained a brief set-back. (Ex. 1, p. 23) Claimant was relegated to light duty work. She was restricted from lifting, pushing, or pulling greater than one pound. (Ex. 1, p. 23)

During her examination on May 19, 2015, claimant described having some clicking noises in her left shoulder. (Ex. 1, p. 24) Dr. Potthoff thought the postoperative fall did set claimant back in her rehabilitation. (Ex. 1, p. 25) Claimant was told she could perform home therapy. The orthopedic surgeon restricted claimant from lifting, pushing, or pulling more than five pounds with the left upper extremity. (Ex. 1, p. 25)

On June 30, 2015, claimant returned to Dr. Potthoff. The physician diagnosed claimant with:

> IMPRESSION:
>
> 1. Status post rotator interval closure secondary to multidirectional instability of the left shoulder, clinically improved.
>
> 2. Continuing anterior shoulder pain likely secondary to biceps tendinitis.

(Ex. 1, p. 27)

Dr. Potthoff opined claimant's symptoms were the result of tendinitis. (Ex. 1, p. 27) The orthopedic surgeon found no evidence of instability. (Ex. 1, p. 27) Claimant received an injection of Kenalog 60 mg and plain Lidocaine 2 cc in the subacromial space of the left shoulder. (Ex. 1, p. 27)

The next physical examination occurred on July 28, 2015. (Ex. 1, p. 28) Claimant had no findings consistent with any remaining instability. (Ex. 1, p. 29)

On September 22, 2015, claimant had MRI testing of the left shoulder. (Ex. 1, p. 41) According to Robert E. Berg, M.D., the results showed:

> IMPRESSION:
>
> 1. Mild articular surface tendinopathy involving supraspinatus tendon, unchanged.
>
> 2. Early greater tuberosity subchondral cyst formation, unchanged.
>
> 3. Trace subacromial/subdeltoid bursitis.
>
> 4. Mildly degenerative acromioclavicular joint with adjacent subchondral marrow edema within clavicle and acromion. This can be a pain generator.

(Ex. 1, p. 41)

Dr. Potthoff reviewed the results of the MRI test. He opined there was some low grade fraying at the undersurface of the supraspinatus tendon, and some mild tendinopathy as well. (Ex. 1, p. 30)

Dr. Potthoff had certain recommendations for claimant. They included:

> 1. I did talk to the patient about the findings on the magnetic resonance image (MRI) findings. I believe that when she tripped over the forklift, she may have sustained a low grade partial tear of the rotator cuff, as seen on the MRI scan. However, there does not appear to be any indication for any repair of the rotator cuff based on the MRI findings. It was explained the most we would do would be to debride that and as she has had continuing pain in the shoulder, even after her previous capsular plication, I doubt that that would give her any significant pain relief. She has had Cortisone injections and therapy, again with minimal relief.
>
> 2. She will occasionally take anti-inflammatories but they do bother her stomach so I did recommend trying some Celebrex. She was agreeable with that and given a prescription for Celebrex 200 mg. #60, to take one every 12 hours p.r.n. pain, with one refill.

> 3. Following discussion, she believes she can advance her activity level and I did give her a note that she is to continue with light duties but she is not to do any lifting, pushing or pulling greater than 10 pounds with the left upper extremity.
>
> 4. We will have her follow up in 4 weeks for repeat examination to see how she is doing. We may need to get a Functional Capacity Evaluation performed for determination of permanent restrictions.

(Ex. 1, p. 31)

On the same date, Dr. Potthoff explained to claimant the structure of the shoulder looked good. Claimant could perform work as tolerated but Dr. Potthoff cautioned claimant she would be at a high risk for continued pain if she engaged in repetitive type manual labor. (Ex. 1, p. 33)

On November 16, 2015, claimant underwent a functional capacity evaluation, (FCE). (Ex. 1, p. 50) Claimant demonstrated the ability to perform duties in the medium physical demand level. (Ex. 1, p. 50)

Claimant had a second opinion regarding her left shoulder. She saw Timothy A. Gibbons, M.D., another orthopedic surgeon at the Mason City Clinic. Claimant visited with Dr. Gibbons on January 12, 2016. (Ex. 1, p. 34) Dr. Gibbons noted after he conducted a physical examination of claimant's left shoulder:

> **Extremities:**
>
> Physical examination today shows that she does meet the criteria of hyperlaxity and has full functional range of motion of her shoulder. She has some parascapular splinting.

(Ex. 1, p. 35)

Apparently, claimant explained she had resorted to some alternative modes of treatment. Dr. Gibbons told her "this alternative medicine that she has been receiving is close to voodoo and she should avoid it." (Ex. 1, p. 35) The alternative treatments were never discussed at hearing but the curiosity of the undersigned deputy was definitely piqued by the comments Dr. Gibbons made to claimant.

Dr. Gibbons recommended claimant find employment outside of the Serta plant. (Ex. 1, p. 35) The orthopedist did not recommend claimant continue to engage in overhead type activities. (Ex. 1, p. 35)

Dr. Gibbons opined claimant had reached maximum medical improvement on January 12, 2016. (Ex. 1, p. 37) The orthopedist opined claimant had no permanent

restrictions and no permanent impairment according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

After Dr. Gibbons provided his opinion regarding a permanent impairment rating, claimant exercised her right to an independent medical examination pursuant to Iowa Code section 85.39. Sunil Bansal, M.D., M.P.H., examined claimant on July 7, 2016. Dr. Bansal found:

> **LEFT SHOULDER:**
>
> There is tenderness to palpation, greatest anteriorly.
>
> Surgical scarring is noted.
>
> Positive sulcus sign.
>
> Positive loading posterior/anterior drawer test.
>
> Translation of the humeral head over the glenoid with axial loading, but this reduces.

	RANGE OF MOTION
Flexion:	172, 175, and 175 degrees
Abduction:	161, 160 and 161 degrees
Adduction:	40, 40, and 40 degrees
External Rotation:	87, 89, and 86 degrees
Extension:	41, 40, and 43 degrees
Internal Rotation:	45, 45, and 46 degrees

(Ex. 1, p. 71)

Dr. Bansal diagnosed claimant with "Left shoulder multi-directional instability." (Ex. 1, p. 72) The evaluating physician opined claimant would be more susceptible to shoulder subluxation and dislocation in the future. (Ex. 1, p. 72)

Dr. Bansal opined claimant had a functional impairment to the body as a whole. (Ex. 1, p. 73) The evaluating physician explained his permanency rating as follows:

> As it relates to her multi-directional instability, with reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 16-26 (rating shoulder instability), we find that she meets the criteria

> for a **6% upper extremity impairment, or a 4% whole person impairment.** Specifically, she has increased symptomatology with range of motion, a positive sulcus sign, and loading posterior/anterior drawer sign with translation of a class 2. (Emphasis in original.)

(Ex. 1, p. 73)

Dr. Bansal also imposed some work restrictions due to the left shoulder multi-directional instability. The evaluator recommended limited loaded over the shoulder work and to reduce frequent over shoulder work with the left arm. Specifically, Dr. Bansal opined:

> Therefore, I would place a restriction of no lifting greater than 15 pounds occasionally, or 10 pounds frequently with the left arm, along with no lifting more than 5 pounds above shoulder level occasionally. No frequent over shoulder lifting with the left arm.

(Ex. 1, p. 73)

At the time of the arbitration hearing, claimant was working as a full time employee in the border measure area. She testified she plans to stay employed at the Serta plant. Claimant testified in her deposition she earns $16.19 per hour. (Ex. A, p. 7) During her deposition, claimant testified she did not earn overtime hours because she was pregnant with her second child. Claimant still possessed an active Iowa Cosmetology license.

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522; 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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 has established her left shoulder condition resulted in a permanent disability. She underwent a functional capacity evaluation. She is capable of working in the medium category of work according to the FCE. Dr. Bansal concluded claimant had an impairment rating of four percent to the body as a whole. He examined claimant for approximately one and one-half hours. Dr. Potthoff declined to provide an impairment rating at all. He sent claimant to his partner, Dr. Gibbons. Claimant testified Dr. Gibbons spent approximately ten minutes examining and talking with claimant on one occasion only. Dr. Gibbons rated claimant as having a zero percent impairment rating.

Dr. Gibbons advised claimant to sever her employment arrangement with Serta. The job was not a good fit for claimant, given her shoulder problems. Dr. Potthoff advised claimant to avoid repetitive manual labor with her left arm and shoulder. Claimant is precluded from performing certain jobs within the Serta plant. She may no longer work as a "ruffler". The staging position is out of the question as well. Claimant is no longer capable of stacking pillow-tops on carts over her shoulder level and then pushing the carts from one location to another. Claimant is now accommodated in a much lighter duty job than she had previously. She plans to stay in the position.

After considering all of the factors in determining industrial disability; it is the determination of this deputy; claimant has a permanent partial disability in the amount of 15 percent. Defendants shall pay unto claimant 75 weeks of permanent partial disability benefits commencing from January 12, 2016. Said benefits shall be paid at the stipulated weekly rate of $375.93. Defendants shall take credit for 20 weeks and 2 days of benefits previously paid to claimant in the aggregate amount of $5,659.87 and, as stipulated in the hearing report.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The final issue is the matter of the costs to litigate the claim. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports

may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant is requesting costs as detailed in Exhibit 11. Assessment of costs is a discretionary function of this agency. The following costs are assessed to defendants:

Filing fee	$100.00
Service Fee	$6.47
*Cost of IME	(Defendants stipulated they will pay $2,594.00 if not paid prior to the hearing)
Total	$106.47

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant, seventy-five (75) weeks of permanent partial disability benefits at the weekly benefit rate of three hundred seventy-five and 93/100 dollars ($375.93) per week.

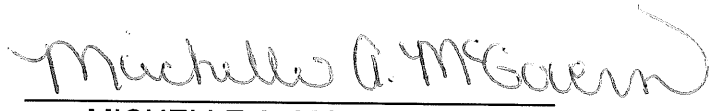
Defendants shall take credit for all benefits previously paid to date, and as characterized in the body of this decision.

Defendants shall pay costs as detailed in the body of the decision.

Defendants shall pay all past due benefits in a lump sum with interest, as allowed by law.

Defendants shall file all requisite reports in a timely manner.

Signed and filed this 26th day of January, 2017.



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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.