BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 1 5 2016
WORKERS' COMPENSATION

ARMINDA CRUICKSHANK, Claimant, vs. PRIME NURSING AND REHABILITATION, Employer, and DIAMOND INSURANCE, Insurance Carrier, Defendants.	File Nos. 5042829, 5042830 APPEAL DECISION Head Note Nos.: 1801.1, 1803, 2904

Upon written delegation of authority by the workers' compensation commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on behalf of the Iowa workers' compensation commissioner.

Defendants, Prime Nursing and Rehabilitation (Prime), employer, and Diamond Insurance, insurer, both as defendants, filed a notice of appeal on November 3, 2014.

This case was heard on January 14, 2014, by Deputy Workers' Compensation Commissioner Ron Pohlman. An arbitration decision was filed on October 17, 2014. That decision found claimant sustained no permanent disability regarding a September 14, 2012, date of injury (File No. 5042829). Regarding the November 8, 2012, injury (File No. 5042830), the decision found claimant was due temporary partial disability benefits, healing period benefits, and that claimant sustained a 20 percent loss of earning capacity regarding the November 8, 2012, date of injury.

Defendants contend on appeal the deputy erred in finding claimant was due temporary partial disability benefits and permanent partial disability benefits.

The detailed arguments of the parties have been considered, and the record of the evidence has been reviewed de novo.

ISSUES ON APPEAL

1. Whether claimant's low back condition was caused or materially aggravated by the work injury.

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

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

Claimant raised the issue of penalty in her brief. (Claimant's post-hearing brief, page 13) The arbitration decision did not award penalty benefits to claimant. (Arbitration Decision, pp. 9-10) Defendants did not raise the issue of penalty in their appeal. Claimant did not file a cross-appeal raising the issue of penalty. Given this record, claimant is precluded from raising the issue of penalty on appeal, as they failed to preserve the issue. Rule 876 IAC 4.28(7); Becker v. Central States Health and Life, 431 N.W.2d 354, 356 (Iowa 1988) ("Failure to cross-appeal on an issue decided adversely. . . forecloses. . . raising the issue on appeal").

As noted above, the arbitration decision in this matter found claimant sustained no permanent disability for the September 14, 2012, injury. (File No. 5042829) (Arbitration Decision, p. 6) Claimant did not seek any temporary benefits for the September 14, 2012, date of injury. Given this record, all discussion regarding the issues in this case will pertain only to the November 8, 2012, date of injury (File No. 5042830).

FINDINGS OF FACT

At the time of the hearing, claimant was 31 years old. She graduated from high school and attended some college. Most of claimant's work life has been as a certified nursing assistant (CNA). (Transcript page 10; Exhibit 10, Deposition pp. 8-12; Ex. 11, pp. 210-211)

Claimant began employment with Prime on May 1, 2012. Claimant was employed as a CNA. Claimant's job duties included lifting patients, showering patients and toileting patients. As a CNA with Prime, claimant was required to lift up to 50 pounds. Claimant was also required to transfer non-ambulatory patients weighing between 100 to 150 pounds. (Tr. pp. 13-17; Ex. 12, p. 234)

On November 8, 2012, claimant reported an injury to Prime concerning her right shoulder and upper back. (Ex. 7, p. 168) On November 8, 2012, claimant was evaluated at Broadlawns Medical Center for shoulder pain. Claimant was assessed as having right shoulder pain and treated with medications. (Ex. F, pp. 29-31)

Claimant testified that after her November 8, 2012, injury, she was returned to work with a five-pound lifting restriction and no lifting above her head. She said Prime was able to accommodate that restriction. She testified that from November 8, 2012,

until her last day of work with Prime, February 8, 2013, Prime offered her less than 40 hours of work per week. Claimant testified she received 36 hours per week or less. Claimant said she did not receive any temporary partial disability benefits during that period. (Tr. pp. 27-29; Ex. 8, pp. 172-177; Ex. 14)

Joyce Jones testified at hearing she was the business office manager at Prime. She said between November 8, 2012, and February 12, 2013, claimant was offered 40 hours of work per week. She said claimant requested not to be scheduled on Mondays, as her daughters needed to be taken to counseling appointments. Ms. Jones testified claimant never indicated she had a back problem from her work injury of November of 2012. Ms. Jones testified there are no records evidencing claimant requested to take Mondays off from November 8, 2012, through February 12, 2013. (Tr. pp. 95-98)

On November 18, 2012, claimant was evaluated at Concentra by Terrence Kurtz, M.D. Claimant indicated she had injured her right shoulder after hitting a bedframe. Claimant was assessed as having a right shoulder impingement/abrasion and recommended to have an MRI. (Ex. 1, p. 26-31)

Claimant underwent an MRI on the right shoulder on November 19, 2012. It suggested bursitis. (Ex. 1, p. 32)

Claimant returned to Dr. Kurtz on November 20, 2012. He opined claimant had a right shoulder impingement/strain. (Ex. 1, p. 33)

Claimant continued to treat conservatively with Dr. Kurtz in November and December of 2012. (Ex. 1, pp. 39-41) When conservative treatment failed to help with symptoms, claimant was referred to an orthopedic surgeon. (Ex. 1, p. 41)

On December 12, 2012, claimant went to Broadlawns complaining of back pain. Claimant had fallen backwards down stairs. Claimant indicated pain in her lower back and hip. (Ex. F, pp. 35-39)

Claimant returned to Broadlawns on December 20, 2012, complaining of continued low back pain after falling down stairs. Claimant was treated with medication. (Ex. F, pp. 40-42)

On January 3, 2013, claimant was evaluated by Timothy Vinyard, M.D. Claimant complained of right shoulder pain. She was assessed as having a rotator cuff tendonitis. She was given a cortisone injection in the right shoulder. Claimant was put on a five-pound lifting restriction. (Ex. 3, pp. 50-54)

Claimant's last day of work at Prime was on February 8, 2013. (Ex. 8, p. 179)

When conservative treatment failed to resolve symptoms, claimant underwent surgery. On February 12, 2013, Dr. Vinyard performed a right shoulder rotator cuff repair and biceps tenodesis. (Ex. 3, p. 62)

On April 16, 2013, claimant underwent a physical for her new employer, HCR Manor Care. Claimant denied any back injury. Claimant had limitations to the right shoulder. (Ex. 5, pp. 151-153)

On April 26, 2013, claimant began working for HCR Manor Care as a staffing and scheduling coordinator. (Ex. K, p. 80)

In a May 10, 2013, response and discovery, claimant indicated the parts of her body that were affected by the November 8, 2012, injury were her right shoulder and elbow. (Ex. I, p. 69)

On May 28, 2013, the softball team claimant managed played a double header. Claimant testified she was not playing on the team at that time, but only played as a substitute. (Ex. N, p. 155; Tr. p. 82)

In June of 2013, the softball team managed by claimant played six games. (Ex. N, p. 155) Claimant testified she was unsure if she played softball at that time. (Tr. p. 83)

On July 1, 2013, claimant was put under surveillance. Surveillance showed claimant playing catch with a softball, swinging a bat, batting, playing first base, and falling to the ground. (Ex. M, pp. 97a, 100-113)

Notes from a July 8, 2013, physical therapy session indicated claimant was hoping she could eventually return to playing softball. (Ex. 4, p. 138)

On July 31, 2013, and August 1, 2013, claimant was again put under surveillance. Surveillance footage showed claimant batting, throwing a softball, playing catcher, and playing outfield during a softball game. (Ex. M, p. 97a, 123-134, 139) Claimant was also surveilled on August 26, 2013, and August 28, 2013, batting, playing catcher, playing first base, and connecting on hits in a softball game. (Ex. M, pp. 97a, 140-153, 154)

Claimant testified she began playing softball regularly in July of 2013. She said she had limitations lifting her arm over shoulder level, limitations in swinging a bat, and limitations in playing certain positions. (Tr. pp. 64-67)

Claimant was evaluated by Dr. Vinyard on August 29, 2013. Claimant was found to be at maximum medical improvement. Claimant indicated she was pain free. Claimant was released from care with no permanent restrictions. Dr. Vinyard indicated he had reviewed surveillance footage of claimant playing softball. (Ex. 3, pp. 95-97)

In a September 6, 2013, letter, Dr. Vinyard reiterated he reviewed surveillance footage of claimant lifting and playing softball. Footage suggested claimant was doing well with her shoulder and was using her shoulder for a wide range of activities without evidence of limitations. Dr. Vinyard opined claimant had zero percent permanent impairment and no permanent restrictions. (Ex. 3, p. 99)

In a December 4, 2013, report, Robin Sassman, M.D., gave her opinions of claimant's condition following an independent medical evaluation (IME). Claimant said she had back pain following her injury. Dr. Sassman said she saw surveillance footage of claimant lifting and mowing. Claimant indicated she returned to play softball and she sat on the bench a lot. Claimant indicated she had not played shortstop due to her right shoulder, but now only played first base and catcher. (Ex. 6, pp. 154-163)

Dr. Sassman did not find claimant at MMI. She found claimant had a 14 percent permanent impairment to the upper extremity due to loss of range of motion, converting to an 8 percent permanent impairment to the body as a whole. She also found claimant fit into the DRE category II under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, for her back and found claimant had a 5 percent permanent impairment to the body as a whole for her back injury. The combined values for both injuries resulted in a 13 percent permanent impairment to the body as a whole. (Ex. 6, pp. 163-165)

Dr. Sassman restricted claimant to no lifting, pushing, pulling, or carrying more than 20 pounds. She also recommended no work above shoulder height. (Ex. 6, pp. 163-165)

On December 5, 2013, claimant was laid off from HCR Manor Care due to overstaffing. (Ex. 9, p. 197; Tr. p. 62-63)

In a December 23, 2013, letter, written by defendants' counsel, Dr. Vinyard indicated he had reviewed Dr. Sassman's IME report. He indicated claimant never reported a lower back condition to him. He reiterated claimant had a zero percent permanent impairment under the Guides.

On December 26, 2013, claimant underwent an IME with William Boulden, M.D. Claimant complained of lower back pain and upper right back pain. Dr. Boulden opined claimant had no objective findings supporting a finding of permanent impairment to the lower back. Dr. Boulden indicated he also reviewed surveillance footage of claimant and saw nothing in the footage supporting that claimant had a lower back problem. (Ex. H)

In a January 13, 2014, letter, written by claimant's counsel, Dr. Vinyard indicated that in his August 29, 2013, exam of claimant, he found claimant had some deficits in the range of motion of the right shoulder. He noted he reviewed Dr. Sassman's report. He indicated Dr. Sassman's finding of permanent impairment, under the Guides, was appropriate, given Dr. Sassman's range of motion tests. (Ex. 3, pp. 100a-100d)

Claimant testified at hearing her shoulder has improved since surgery. She said she still has pain and limitations in strength and range of motion. Claimant testified she is unable to lift heavy objects, and is unable to pick up her 5-year-old son. Claimant testified she has some limitations with sleep due to her right shoulder. She testified that

given her limitations, she does not believe she could return to work as a CNA. Claimant testified she uses ice to treat her shoulder for pain. (Tr. 16-18, 30, 68-69)

CONCLUSIONS OF LAW

The first issue to be determined on appeal is if claimant's alleged lower back condition was caused or materially aggravated by her November 8, 2012, injury.

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant alleged she injured her lower back on November 8, 2012. Defendants contend claimant failed to carry her burden of proof she sustained a lower back injury on November 8, 2012.

It appears from the administrative file in this case defendants did contend, at the arbitration level, claimant failed to carry her burden of proof she sustained a lower back injury. The arbitration decision, in this case, did not provide any findings or conclusions of law regarding the issue if claimant carried her burden of proof she sustained a lower back injury at work.

As detailed in the finding of facts above, claimant reported a right shoulder injury to her employer occurring on November 8, 2012. There is no mention in the November 8, 2012, accident report of a back injury. (Ex. 7, p. 168) On November 8,

2012, claimant was treated at Broadlawns and Concentra for a right shoulder injury. There is no mention in the records from either provider of a November 8, 2012, back injury. (Ex. F, pp. 29-31; Ex. 1, pp. 26-31) Claimant had follow-up care with Dr. Kurtz at Concentra for a right shoulder injury in November and December of 2012. There is no mention in any of these visits of a lower back injury occurring in November of 2012 at work. (Ex. 1, pp. 32-42)

On December 12, 2012, claimant treated at Broadlawns for a back and hip injury occurring after falling down stairs. (Ex. F, pp. 35-42)

Claimant treated with Dr. Vinyard from January 2013 through August of 2013. There is no mention in any of the records with Dr. Vinyard claimant had a lower back injury occurring at work on November 8, 2012. (Ex. 3, pp. 50-54, 61, 95-97)

In initial discovery responses, dated May of 2013, claimant made no mention of a low back injury occurring in November of 2012 with her work at Prime. (Ex. I, p. 69)

The employer's injury report for the November 8, 2012, injury makes no mention of a lower back injury. Treatment records from Dr. Kurtz with Concentra from November through December of 2012 make no reference to a November of 2012 low back injury at work. None of Dr. Vinyard's records make any reference to a lower back problem caused or aggravated by the November 8, 2012, injury. Claimant initially responded to discovery and only referred to a right shoulder problem caused by the November 8, 2012, work injury. Given this record, claimant has failed to carry her burden of proof the November 8, 2012, work-related injury caused or materially aggravated a lower back condition.

The next issue to be determined on appeal is the extent of claimant's entitlement, if any, to temporary partial disability benefits.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

The record indicates claimant worked 40 hours per week prior to her November 8, 2012, injury. Claimant contends after her injury and before her surgery, she was only offered 36 hours a week, or less, of work. (Tr. pp. 27-29; Ex. 8, pp. 172-177; Ex. 14)

Defendants contend, through the testimony of Ms. Jones, claimant requested all Mondays off, following her November 8, 2012, injury, to take her daughter to counseling. (Tr. 96)

Claimant's testimony is that her hours were cut to 36 hours or less after her injury. There is no record claimant's working hours were cut because of claimant's work restrictions or because of claimant's partial disability. Ms. Jones testified claimant asked for that time off so she could take her daughter to counseling. Claimant was not called back on rebuttal to dispute Ms. Jones' testimony. Given this record, claimant has failed to carry her burden of proof she is entitled to any temporary partial disability benefits for the period of time between November 8, 2012, to February 12, 2013.

The final issue to be determined on appeal is the extent, if any, of claimant's entitlement to permanent partial disability benefits.

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.

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Claimant had an accepted work injury to her right shoulder. After conservative treatment failed, claimant underwent right shoulder surgery performed by Dr. Vinyard. That surgery consisted of, in lay person's terms, removing damaged tendon from the shoulder, shaving bone where the tendon attached, and reattachment of the bicep tendon. (Ex. 3, p. 100d)

Two experts opined whether claimant sustained any permanent disability to her right shoulder. Dr. Vinyard treated claimant for an extended period of time and performed claimant's surgery. He opined claimant has zero percent permanent disability following her right shoulder injury and surgery. This opinion is based, at least in part, on watching claimant play softball. (Ex. 3, pp. 99)

Dr. Vinyard did indicate his range of motion studies of claimant showed she had some range of motion deficits. He also indicated Dr. Sassman's findings of permanent impairment, under the Guides, were appropriate given Dr. Sassman's range of motion tests. (Ex. 3, pp. 100a – 100d)

Dr. Sassman evaluated claimant in October of 2013. She found claimant had an 8 percent permanent impairment to the body as a whole for the right shoulder injury. This was based upon range of motion testing performed pursuant to the Guides. (Ex. 6, pp. 163-164)

Dr. Sassman's evaluation was performed closer to the date of hearing than was the evaluation done by Dr. Vinyard. As such, it is a more accurate snapshot of claimant's strength and range of motion of her right shoulder at the time of hearing. Dr. Vinyard acknowledged that even with his range of motion of testing, claimant had some deficits in range of motion. He also indicated given the measurements from Dr. Sassman's range of motion assessment, her finding of 8 percent permanent impairment to the body as a whole is appropriate under the Guides. Given this record, it is found claimant has an 8 percent permanent impairment to the body as a whole for her shoulder injury.

Claimant was 31 years old at the time of hearing. She graduated from high school. Most of claimant's work has been as a CNA. She had surgery to the right shoulder. It has been found claimant has an 8 percent permanent impairment to the body as a whole due to the right shoulder injury.

The most problematic evidence in the record is footage of claimant playing softball. Footage from July and August of 2012 shows claimant playing in softball games, repeatedly throwing a softball, swinging a softball bat, and connecting on several hits. The footage does not indicate claimant has any pain after doing any of these activities. The record also suggests claimant was less than honest about her softball activities with her physical therapist and Dr. Vinyard, until after she was aware that defendants had footage of her playing softball. (Ex. 3, pp. 86-89; Ex. 4, pp. 122, 124, 135, 138; Ex. G, pp. 54-55; Ex. L, p. 97a; Ex. M, pp. 100-112, 113; Ex. N, p. 155)

In short, the footage suggests claimant has no limitations throwing a softball and hitting a softball.

However, claimant did have shoulder surgery where damaged tendon was removed, bone was cut, and the bicep tendon was reattached. Claimant's job as a CNA

required her to lift up to 50 pounds and to transfer non-ambulatory patients weighing between 100 to 150 pounds. (Ex. 12, p. 234; Tr. pp. 13-17)

The footage of claimant playing softball suggests claimant has no loss of strength or range or motion. At the same time, claimant had surgery as detailed above. Her job as a CNA required her to lift and assist non-ambulatory people. Given this record, when all factors are considered, it is found claimant has a 5 percent loss of earning capacity or industrial disability.

ORDER

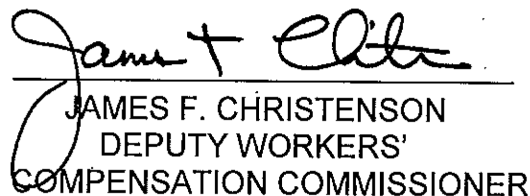
THEREFORE IT IS ORDERED:

That defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits commencing on April 29, 2013, at the rate of four hundred nineteen and 86/100 dollars ($419.86) per week.

Benefits shall be paid in a lump sum with interest under Iowa Code section 85.30 with subsequent reports of injury filed as directed by this agency.

Defendants shall pay the costs of this matter and the appeal, including the preparation of the hearing transcript.

Signed and filed this 15th day of January, 2016.



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