

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SABRINA D. BROWN,

Claimant,

vs.

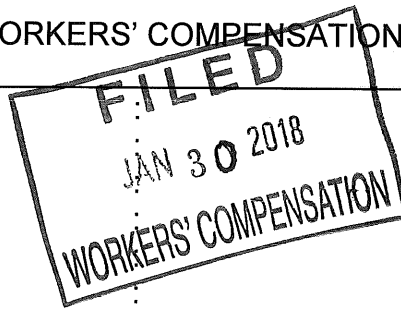
NELLIS MANAGEMENT COMPANY,

Employer,

and

SFM MUTUAL INSURANCE,

Insurance Carrier,
Defendants.



File No. 5054094

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Sabrina Brown, claimant, filed a petition in arbitration seeking workers' compensation benefits from Nellis Management Company (Nellis) and its insurer, SFM Mutual Insurance as a result of an injury she sustained on January 31, 2013 that arose out of and in the course of her employment. This case was heard in Davenport, Iowa and fully submitted on July 16, 2017. The evidence in this case consists of the testimony of claimant, Dwight Bailey, Joint Exhibits 1 – 8, Defendants' Exhibits A – F and Claimant's Exhibits 1 – 6.

ISSUES

1. Whether the alleged injury is a cause of permanent disability and, if so;
2. The extent of claimant's disability.
3. Assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Sabrina Brown, claimant, was 35 years old at the time of the hearing. Claimant graduated from high school and completed classes at a community college to earn a CNA certification. (Transcript, page 31) Claimant's complete work history is set forth in Exhibit 1, pages 1 and 2.

Claimant has worked for Nellis two different times. The most recent time she started in July 2008 and worked at a Long John Silvers and A & W restaurant. Claimant was a shift leader and was earning \$10.00 per hour at the time of her injury in January 2013. (Tr. p. 32) Claimant was fired on October 13, 2014. (Tr. p. 48)

On January 31, 2013 claimant was moving some equipment at work when she felt a strain in her left groin. Claimant noticed a bulge in her groin and went to her OB/GYN provider, as she was pregnant at the time. She initially saw a nurse practitioner on February 8, 2013 and was asked to return to see a physician. (Joint Exhibit 1, p. 1) On February 12, 2013 Eduardo Ricaurte, M.D. noted a small left inguinal hernia. (JE 1, p. 2)

Claimant was referred to Michael Phelps, M.D. at the Davenport Surgical Group and was examined on August 13, 2013. Dr. Phelps recommended surgery. (Tr. p. 39; JE2, p. 8) Claimant had surgery on December 20, 2013. (Tr. p. 39; JE 3, p. 26) On December 30, 2013 claimant returned to Dr. Phelps. The notes stated "...Pt still having discomfort-increased with lifting 15lb baby and coughing" and "The patient reports no pain." (JE 2, p. 16) On January 8, 2014 claimant reported pinching sensation with bending and a constant burning sensation in the incision site, which was improving. (JE 2, p. 17) Dr. Phelps' assessment was, "[N]umb below incision, rec NSAID may always be there, may get smaller? RTW 1-20-14 limited by pain." (JE 2, p. 18) On February 3, 2014 Dr. Phelps wrote claimant had reached the end of her healing period and did not have any permanent partial disability. (JE 2, p. 20)

Claimant testified that after the surgery she continued to have numbness and pain with lifting. (Tr. p. 40) Claimant saw Dr. Phelps on September 16, 2015 when she felt the hernia push back out again. (Tr. p. 40) Claimant had an ultrasound on December 8, 2015 which showed a normal left inguinal canal. (JE 5, p. 47) On September 17, 2015 Dr. Phelps stated that claimant did not have a reoccurrence of a hernia and he confirmed the conclusion of his February 3, 2014 report. (JE 2, p. 23)

Claimant underwent two independent medical examinations (IME). Robert Milas, M.D. performed his IME on February 7, 2015 and Robert Broghammer, M.D. performed his IME on May 2, 2016. (JEs 6 & 7) Claimant testified that Dr. Milas' IME was more thorough and took about twice as long as the IME performed by Dr. Broghammer. (Tr.

pp. 41, 42) Claimant had another examination by Dr. Milas in March 2017. Claimant said that no physician has given her permanent restriction due to her hernia. (Tr. p. 61)

The IME of Dr. Milas on February 27, 2015 found,

My impression is that of: 1) Left inguinal hernia, postop left inguinal hernia repair. 2) Ligamentous injury of the lumbar spine.

Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, this patient would fit under a Class II, of the whole person rating permanent impairment due to hernia as defined in Table 6-9, Page 136. The patient has frequent discomfort in the area of the hernia, which precludes heavy lifting, but not hampering some activities of daily living, which would have a 19% permanent partial impairment of the whole person.

(JE 6, p. 49) On March 30, 2017 Dr. Milas issued another report which, in terms of claimant's hernia injury, was not different than the February 27, 2015 report. (JE 6, pp. 50 - 52)

On May 4, 2016 Dr. Broghammer issued an IME. In his examination he noted that there was subjective numbness around the scar and incision site. He found there was no evidence of a recurrent hernia. (JE 7, p. 63; Ex. B, p. 11) Dr. Broghammer agreed with Dr. Phelps that claimant had no permanent impairment due to the hernia. Dr. Broghammer disagrees with Dr. Milas' assessment, as he did not find a palpable defect in the supporting structure of the abdominal wall to assign an impairment rating under the AMA Guides 5th Edition. (JE 7, p. 64) On April 17, 2017 Dr. Broghammer issued a letter reiterating what he said in his May 4, 2017 IME report and still disagreeing with Dr. Milas about a rating of claimant's hernia injury. (JE 7, pp. 66, 67)

Claimant testified she currently has a constant numbness at the site of her hernia. (Tr. p. 43) Claimant feels pain in the hernia site when she lifts heavy objects. She also feels pain while running. (Tr. p. 44) She feels pain in the hernia area when engaged in strenuous activities. (JE 8, p. 84) Claimant does not feel pain doing regular daily activities. (Tr. p. 5)

Claimant injured her lower back in September 2014 while working for Nellis. (Tr. p. 47; JE 3, p. 28) After claimant was discharged by Nellis she worked as a CNA for about a month. Claimant said that she could not lift people, as she had lower back pain. (Tr. pp. 51, 78) Claimant then worked in a day care and did not have any physical problems performing that job. (Tr. p. 51) Claimant said that she worked in housekeeping for a casino and quit that job due to heavy lifting required lifting stage pieces that bothered her back and hernia. (Tr. p. 54) At the time of the hearing claimant was working for a company that provided cleaning services. It did not require heavy lifting and claimant can perform this work. (Tr. p. 55) At the cleaning service she is earning a similar amount as she earned at Nellis. (Tr. p. 81)

I find the claimant to be credible. Her demeanor at the hearing was straightforward and was not evasive.

Dwight Bailey was called by the claimant to testify. Mr. Bailey was married to claimant for two years and divorced in 2015. Mr. Bailey sees the claimant most days. (Tr. p. 8) Mr. Bailey testified the he and the claimant were committed to a wellness and fitness lifestyle. Before the work injury he and claimant would engage in vigorous exercise several times a week at a local YMCA. Mr. Bailey said that after claimant's hernia surgery claimant does not engage in exercising as vigorously as before the injury. (Tr. p. 19) Mr. Bailey testified that claimant still works out at the YMCA, but does less of a work out now. (Tr. p. 26)

I find that claimant's hernia has caused a permanent impairment. It has reduced the claimant's industrial base. She is limited in performing strenuous lifting due to her hernia injury.

Claimant may have additional lifting limitations due to a lower back injury. I do not consider any lifting limitation for any back condition in assessing her disability caused by her hernia.

Claimant is intelligent and is motivated to work. She has some college education, but no degree. I find that claimant has a five percent loss of earning capacity.

I find claimant's gross earnings were \$273.00 per week and she was single and entitled to take three exemptions. Claimant's weekly workers' compensation rate is \$202.33.

CONCLUSIONS OF LAW

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)

Defendants stipulated claimant had an injury that arose out of and in the course of her employment at Nellis Management Company. The defendants dispute there is any permanency.

Dr. Phelps and Dr. Broghammer opine that claimant has no permanent impairment due to her hernia. Dr. Phelps wrote on January 8, 2014 that claimant may have permanent numbness. Dr. Broghammer noted subjective numbness. The claimant has consistently complained of this symptom after her surgery. Claimant also has pain caused by her hernia and surgery when she is engaged in strenuous activity.

While that may not be measured in the AMA Guides, it is a limitation caused by her work injury that precludes claimant from some types of employment. Dr. Milas provided a rating of the upper end of a category II hernia injury based upon the AMA Guides.

Upon review of the medical evidence and credible testimony of the claimant and witness, I find that claimant has proven by a preponderance of the evidence that she has a permanent impairment due to her January 31, 2013 work injury.

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009)

Claimant is a younger individual with some college education. Claimant is motivated to work. Claimant's industrial base is only slightly impacted by the hernia. Certain types of strenuous work are precluded due to pain she experiences. I find that claimant is entitled to a five percent industrial award. This entitles claimant to 25 weeks of permanent partial disability benefits.

Claimant has requested \$965.75 in costs (attached to Hearing Report). All of the costs are allowable under Iowa Code sections 85.39, 86.40 and 876 IAC 4.33 except two \$20.00 reports. I award claimant costs in the amount of \$925.75.

ORDER

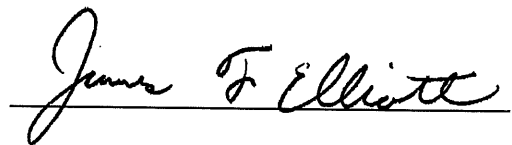
Defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the weekly rate of two hundred two and 33/100 dollars (\$202.33) commencing on April 5, 2016.

Defendants shall pay claimant costs of nine hundred twenty-five and 75/100 dollars (\$925.75).

Defendants shall pay all past due amounts in a lump sum with interest as provided by law.

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 30th day of January, 2018.



JAMES F. ELLIOTT
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.