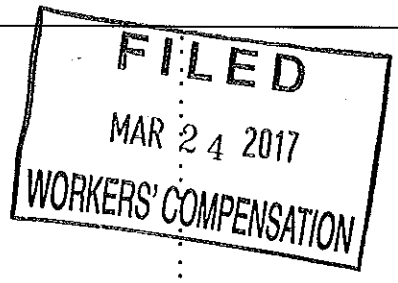
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DIYONDA AVANT, Claimant, vs. NATIONWIDE INSURANCE, Employer, and AMCO INSURANCE COMPANY Insurance Carrier, Defendants.	File No. 5054462 ARBITRATION DECISION Head Note Nos.: 1801.1, 1803, 2701

STATEMENT OF THE CASE

Claimant, Diyonda Avant, filed a petition in arbitration seeking workers' compensation benefits from Nationwide Insurance, employer, and AMCO Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on April 23, 2015. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on October 17, 2016, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 20, defendants' exhibits A through D, and the testimony of the claimant and Chris Hanson. The parties submitted post-hearing briefs, the matter being fully submitted on November 4, 2016.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant is entitled to temporary partial disability benefits from November 25, 2015 through March 20, 2016 and if so, in what amount;
2. Whether the stipulated work injury is a cause of permanent disability;
3. The extent of industrial disability;
4. The commencement date for permanent partial disability benefits;
5. Whether claimant is entitled to an award of alternate medical care pursuant to Iowa Code section 85.27; and
6. Specific taxation of costs.

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 undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was clear and consistent as compared to the evidentiary record and her deposition testimony. Her demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt claimant's veracity. The undersigned observed claimant ambulate slowly, sit with a purse positioned behind her back, alternate between sitting and standing, and place her hand upon a railing when transitioning between positions. Claimant is found credible.

Claimant was 49 years of age at the time of hearing. She graduated high school and thereafter, obtained a management information systems/computer programming degree from Iowa State University in 1994. She then worked as a computer programmer for Younkers and Hy-Vee. Claimant subsequently attended law school at Drake University from 2004 to 2006; she did not complete the program due to the birth of her daughter. While in law school and for a period after the birth of her daughter, claimant worked as a legislative clerk. Claimant returned to work at Principal Financial in July 2007 as a computer programmer. She described the work as seated, office work. Claimant worked 40 hours per week and earned $50,000.00 annually. (Claimant's testimony; Ex. 14, p. 123; Ex. 19, Depo. Tr. p. 5)

In August 2011, claimant began work as a computer programmer at defendant-employer. She held two positions during her employment: information specialist and business information specialist. (Ex. 14, p. 123) The job description for claimant's position as IT Application Development includes no specific reference to physical demands of the work. (Ex. 16, pp. 135-136) Claimant described her work as sedentary, requiring computer usage most of the day. Claimant testified she was generally able to move about as needed, but on occasion, there were meetings lasting 4 to 5 hours. She also testified that if she needed to move about, she was not as productive as if she were able to remain at her computer working. (Claimant's testimony) Claimant worked 40 hours per week and earned $74,800.00 annually. (Ex. 14, p. 123) Claimant testified she was happy in her employment at defendant-employer, even declining to pursue other job prospects. (Claimant's testimony)

On April 23, 2015, claimant suffered a stipulated work-related injury. On this date, she slipped and fell onto her left side and back while leaving the cafeteria. Claimant testified she was embarrassed, gathered herself, and returned to her work duties. Claimant testified she did not seek medical care, as she thought her pain would improve. The next morning, claimant awoke in significant pain and sought chiropractic evaluation. (Claimant's testimony)

On April 24, 2015, claimant presented to her chiropractor, Jeffery Stickel, D.O. Dr. Stickel diagnosed subluxation and performed chiropractic manipulation/adjustments. (Ex. 1, p. 5) Claimant, thereafter, continued to receive regular chiropractic adjustments with Dr. Stickel. (*See* Ex. 1, p. 6) During this period, claimant remained off work. (Ex. 1, p. 8) Although claimant initially sought care with Dr. Stickel of her own accord, defendants subsequently authorized Dr. Stickel to provide chiropractic care for a period of time. (Claimant's testimony)

Defendants also referred claimant for evaluation at Concentra Medical Centers (Concentra). On May 8, 2015, claimant presented and was examined by Judith Nayeri, D.O. Claimant complained of pain at a level 8 on a 10-point scale, with pain in the left hip and mid low back. (Ex. 2, p. 13) Dr. Nayeri assessed left hip/pelvic pain and a lumbar strain. She ordered a course of physical therapy and issued prescriptions for ibuprofen 800 mg and Skelaxin. (Ex. 2, pp. 15-16)

Claimant followed up with Dr. Nayeri on May 13, 2015. Dr. Nayeri assessed a lumbar strain and strain/sprain of the left hip/thigh. She continued conservative treatments of medications and physical therapy. (Ex. 2, pp. 17-18)

Claimant returned to Concentra on May 22, 2015 and was evaluated by Mary Shook, M.D. Claimant reported improvement, but continued symptoms. Following examination, Dr. Shook assessed lumbar strain, pelvic asymmetry, and IT band inflammation. (Ex. 2, p. 19) Dr. Shook recommended physical therapy, over-the-counter medication, and continuation of chiropractic care and massage. (Ex. 2, pp. 20-21) Claimant continued to follow up and receive conservative care through providers at Concentra throughout June 2015. (Ex. 2, pp. 22-29)

Claimant returned to work at defendant-employer from May 27, 2015 through June 5, 2015. She was subsequently removed from work and remained off work for an extended period. (Ex. 1, p. 8; Mr. Hanson's testimony)

Claimant also continued to follow up with Dr. Stickel, who on June 18, 2015, ordered MRIs of claimant's left hip and lumbar spine. (Ex. 1, p. 7) Claimant returned to Concentra on July 9, 2015 and was examined by Joanne Harbert, ARNP. Following examination, Ms. Harbert also ordered MRI studies. (Ex. 2, pp. 30-32)

Claimant underwent the recommended MRIs of her left hip and lumbar spine on July 31, 2015. The radiologist read the left hip MRI as showing mild left gluteus minimus tendinosis. (Ex. 3, p. 38) The radiologist read the lumbar spine MRI as revealing disc degeneration at L2-L3, L3-L4 and L4-L5 with mild disc bulging and facet disease, and a "[t]iny" annular tear at L5-S1. (Ex. 4, p. 40)

On August 28, 2015, claimant returned to Concentra and was examined by Carlos Moe, D.O. Dr. Moe opined claimant's MRI revealed a bulging disc with loss of disc height at L1 through L5, an annular tear of the L5-S1 disc, moderate facet disease, and tendinosis of the gluteus minimus tendon insertion. Following examination, Dr. Moe

assessed an annular tear of a lumbar disc, bulging lumbar disc, and gluteus medius or minimus syndrome. He issued a prescription for Metaxalone and referred claimant for evaluation by a specialist. (Ex. 2, pp. 33-34)

Pursuant to Dr. Moe's recommendation, on October 26, 2015, claimant was examined at Iowa Ortho by Todd Harbach, M.D. Claimant described experiencing low back pain radiating down her left leg. (Ex. 5, p. 41) Dr. Harbach reviewed claimant's MRIs and ordered x-rays. Dr. Harbach opined claimant's lumbar spine MRI showed advanced degenerative changes at three disc levels and he observed a hint of grade 1 degenerative spondylolisthesis at L3-L4 on x-rays. He opined claimant's left hip MRI was essentially negative, with the exception of fluid around the gluteus medius tendon, consistent with the impact of a fall. (Ex. 5, pp. 42-43)

Following examination, Dr. Harbach noted diagnoses of bilateral low back pain with left-sided sciatica, radicular pain of the lower extremity, lumbar degenerative disc disease, SI joint arthritis, greater trochanteric bursitis of the left hip, spondylolisthesis of the lumbar region, and pain. He opined claimant clinically demonstrated significant left trochanteric bursitis and mild left SI joint pain. Dr. Harbach opined claimant had participated in a reasonable course of conservative treatment and encouraged her to participate in aerobic conditioning exercises. (Ex. 5, p. 43) Dr. Harbach performed a trochanteric bursa injection, which he noted provided immediate relief of 40 to 50 percent of claimant's symptoms. (Ex. 5, pp. 42-43) Dr. Harbach released claimant to light duty, with restrictions of a 15-pound maximum lift, the ability to change positions frequently, and a maximum work schedule of 8 hours per day and 40 hours per week. (Ex. 5, pp. 43, 45)

Claimant testified the 15-pound limit imposed by Dr. Harbach did not impact her work at defendant-employer. She also noted an 8-hour work day was the same as she worked prior to her injury. Claimant admitted defendant-employer offered her work within the restrictions outlined by Dr. Harbach, but she did not return to work. (Claimant's testimony)

On November 10, 2015, claimant returned to Dr. Moe at Concentra. Following examination, Dr. Moe released claimant to return to work 4 hours per day, with the need to stand and stretch for 10 minutes following every seated hour of work. (Ex. 2, pp. 36-37)

Claimant then returned to work at defendant-employer on November 11, 2015, in her preinjury position at part time hours. Claimant testified she continued to experience a great deal of back pain, pain so severe that it would cause her to limp by the time she left work. (Claimant's testimony) Defendants commenced payment of temporary partial disability benefits. (Ex. D)

Claimant returned to Dr. Harbach on November 23, 2015. Claimant reported minimal relief with the left hip injection and unchanged low back symptoms. Dr. Harbach assessed lumbar degenerative disc disease and acute low back pain. He

noted claimant was working part time as a computer programmer, performing her regular duties. (Ex. 5, pp. 46, 48-50) With respect to further treatment, Dr. Harbach opined that given the presence of three "worn-out discs," claimant's only remaining treatment option was evaluation by the pain clinic. (Ex. 5, pp. 46, 50) He also issued prescriptions for tramadol and diclofenac. (Ex. 5, pp. 46, 48-50) Dr. Harbach imposed work restrictions of a 10-pound lift and avoidance of repetitive lifting and bending. (Ex. 5, p. 52) He directed claimant to return for evaluation in 4 weeks or following treatment at the pain clinic. (Ex. 5, p. 46)

Claimant testified her preinjury position could be performed within the restrictions imposed by Dr. Harbach on November 23, 2015. She testified defendant-employer offered work complying with the restrictions authored by Dr. Harbach. (Claimant's testimony)

Chris Hanson, IT Application Manager for defendant-employer, testified at evidentiary hearing. Claimant worked on one of Mr. Hanson's "teams" at the time of her work injury; he acted as her supervisor. Mr. Hanson confirmed defendant-employer offered claimant work that fell within Dr. Harbach's restrictions. (Mr. Hanson's testimony)

On December 5, 2015, claimant returned to Dr. Stickel for adjustment. Claimant informed Dr. Stickel she received no relief following the injection by Dr. Harbach. (Ex. 1, pp. 9-10)

Claimant returned to Dr. Stickel on December 9, 2015 and reported worsened symptoms and pain; she related the worsening to work activities. Dr. Stickel performed adjustments, advised claimant to follow up weekly, and recommended evaluation by a pain specialist. In his narrative report, Dr. Stickel also noted he "told her she should remain off work for now." (Ex. 1, p. 10) The patient status report from Dr. Stickel dated December 9, 2015, however, notes claimant was released to perform modified work on December 10, 2015 with limits of a 4-hour work day and the ability to stand and/or move each hour. (Ex. 1, p. 12)

Claimant testified she ceased working in December 2015. She explained that at the time, she continued to struggle with working, even after only 4 hours. Claimant testified she believed Dr. Stickel removed her from work entirely; she thought this would be a temporary measure. (Claimant's testimony)

Mr. Hansen testified claimant ceased presenting for work in late November or early December 2015. He testified claimant offered no explanation and simply stopped appearing and did not call or email. Mr. Hanson testified he became concerned and telephoned claimant, but her voicemail was full. (Mr. Hanson's testimony)

Claimant was scheduled to return to Dr. Harbach on December 21, 2015, but did not appear for evaluation. (Ex. A, p. 1) Claimant's attorney represented that claimant believed return evaluation by Dr. Harbach was delayed pending evaluation by a pain management physician. (Ex. 15, pp. 129-130)

Pursuant to Dr. Harbach's referral, claimant returned to Iowa Ortho on January 7, 2016 for evaluation with John W. Rayburn, M.D. Dr. Rayburn reviewed claimant's treatment history and imaging; he also performed a physical examination. (Ex. 7, pp. 55-58) Dr. Rayburn assessed lumbar spondylosis, SI joint dysfunction and ischial bursitis; he noted claimant's pain appeared facetogenic. Dr. Rayburn issued prescriptions for tramadol and diclofenac and recommended a series of diagnostic nerve blocks. (Ex. 7, pp. 58-59, 64)

The first set of injections with Dr. Rayburn took place on March 3, 2016 and consisted of bilateral SI joint injections and a left ischial bursa injection. (Ex. 7, pp. 61-62)

Defendant-employer authored a letter to claimant dated March 3, 2016. By the letter, claimant was informed that she would be subject to immediate termination in the event she did not return to work by March 9, 2016 or provide medical records substantiating a need to be off work by March 8, 2016. (Ex. 17, p. 137)

Claimant did not return to work or personally provide defendant-employer with supportive medical documentation. Claimant testified during this period, she remained off work, but in contact with defendant-insurance carrier. Defendant-insurance carrier continued to authorize medical treatment, including upcoming injections with Dr. Rayburn. (Claimant's testimony)

On March 10, 2016, Dr. Rayburn performed bilateral L2-L5 medial branch blocks. (Ex. 7, pp. 65-66)

On March 21, 2016, claimant returned to Dr. Rayburn with complaints of low back pain radiating to the left leg. Dr. Rayburn assessed lumbar spondylosis without myelopathy, SI joint dysfunction, left greater trochanteric bursa, and ischial bursitis. (Ex. 7, pp. 74, 76) Dr. Rayburn recommended continued physical therapy; claimant requested medication to allow her to "make it through" her physical therapy appointments. (Ex. 7, p. 74) Dr. Rayburn issued prescriptions for nabumetone and hydrocodone, in addition to tramadol and diclofenac. (Ex. 7, p. 76)

Claimant continued to participate in physical therapy. (Ex. 9, pp. 81-84) At an appointment on June 20, 2016, the therapist noted claimant displayed fair effort and opined claimant's subjective complaints did not correlate with objective findings. The therapist opined claimant's symptoms were "somewhat inconsistent," with demonstrated "unreproducibility between exercises." (Ex. 9, p. 84)

On July 29, 2016, at the arranging of claimant's counsel, claimant presented for an independent medical examination (IME) with board certified occupational medicine physician, Sunil Bansal, M.D. Dr. Bansal authored a report containing his findings and opinions dated August 19, 2016. As an element of the IME, Dr. Bansal performed a medical records review. (Ex. 11, pp. 109-112) Dr. Bansal also interviewed claimant, who complained of left-sided low back pain with radiation down the left leg, as well as associated numbness and tingling. She relayed difficulty with prolonged sitting and daily activities, such as bathing, washing dishes, laundry, using stairs, and lifting her grandson. Claimant reported an ability to lift 10 pounds from floor level and sit or stand up to 90 minutes. (Ex. 11, pp. 112-113)

Dr. Bansal performed a physical examination. He noted tenderness to palpation over claimant's lower lumbar paraspinals and into the left SI joint, as well as of the left greater trochanter area with swelling. Dr. Bansal also noted accentuated pain with rotation of claimant's left hip and loss of sensory discrimination over the left lateral thigh. (Ex. 11, pp. 113-114)

Following records review, interview and examination, Dr. Bansal assessed aggravation of lumbar spondylosis and facet arthropathy, and trochanteric bursitis. Dr. Bansal opined the work injury aggravated and lighted up claimant's preexisting lumbar spondylosis, aggravated underlying lumbar facet arthropathy, and directly caused an L5-S1 annular tear. Dr. Bansal also opined the work injury was consistent with development of left hip acute trochanteric bursitis, most likely from acute inflammation. (Ex. 11, pp. 115-117)

Dr. Bansal opined claimant sustained permanent impairment and recommended permanent restrictions as a result of the conditions. Dr. Bansal opined claimant fell within DRE Lumbar Category II, warranting a permanent impairment rating of 5 percent whole person, due to radicular complaints, guarding and decreased range of motion. He found no ratable impairment to claimant's hip. Dr. Bansal recommended permanent restrictions due to the back and hip conditions: no lifting over 15 pounds occasionally and no lifting over 10 pounds frequently; no frequent bending, climbing or twisting; and avoidance of sitting or standing longer than 90 minutes at a time. (Ex. 11, p. 117) By a subsequent opinion, Dr. Bansal opined claimant achieved maximum medical improvement (MMI) on March 21, 2016. (Ex. 12, p. 119)

Claimant testified the lifting, bending, climbing and twisting restrictions recommended by Dr. Bansal would not impede performance of her preinjury job at defendant-employer or computer programming positions generally. She testified the 90-minute positional limitation would impact her productivity, as she could be forced to interrupt a project in order to move. She also questioned if it would be feasible to change positions during long project meetings which could stretch to 4 or 5 hours in length. Ultimately, claimant admitted she would be able to return to work under these recommended restrictions; however, she questioned her productivity level. (Claimant's testimony)

Mr. Hanson similarly testified a weight restriction of 10 or 15 pounds would not impact claimant's ability to perform her preinjury job. He also expressed belief that limitations on changing positions, bending, climbing and twisting would have no effect. He indicated that employees in claimant's preinjury position possess the freedom to move about as needed, may sit and stand at will, and are not forced to sit or stand for prolonged periods. Mr. Hanson denied knowledge of 4 to 5 hour meetings referenced by claimant, but noted longer meetings typically have formal breaks every 1 to 1 ½ hours. (Mr. Hanson's testimony)

Mr. Hanson's telephonic testimony was consistent with the evidentiary record, as well as claimant's testimony. The undersigned was presented with no reason to doubt Mr. Hanson's veracity. Mr. Hanson is found credible.

On August 26, 2016, the physical therapist noted claimant had not "progressed as expected." The therapist described claimant as demonstrating poor to fair effort and noted she self-terminated exercises due to subjective pain reports, without objective findings or change in mechanics. Additional therapy was thought to be beneficial, if claimant put forth "greater effort." (Ex. 9, p. 87) At an appointment on August 29, 2016, the therapist noted claimant was demonstrating improved effort. (Ex. 9, p. 92) Claimant continued participation in physical therapy sessions until early October 2016. (Ex. 9, pp. 93-99)

On September 23, 2016, Dr. Harbach authored responses to questions posed by defendants' counsel. Dr. Harbach indicated he evaluated claimant on two occasions in 2015 and on examination, claimant appeared to have significant left trochanteric bursitis and mild SI joint arthrosis. He opined claimant's MRI revealed three "worn out disks, which undoubtedly predated" claimant's injury. Dr. Harbach opined claimant's fall on April 23, 2015 aggravated this preexisting condition. He described the aggravation as "predominantly temporary in nature," yet recognized the duration of pain complaints was "somewhat extended." Dr. Harbach opined claimant had returned to baseline and opined claimant had achieved MMI. He opined claimant fell within DRE Lumbar Category I, with no ratable impairment. (Ex. 6, p. 53; Ex. B, p. 1) Dr. Harbach imposed no permanent restrictions. Defendants' counsel inquired what treatment was needed in order to help claimant achieve MMI, to which Dr. Harbach opined claimant had achieved MMI and thus, the question was not applicable. (Ex. 6, p. 54; Ex. B, p. 2)

Claimant returned to Dr. Rayburn on October 5, 2016 with complaints of continued low back and hip pain. (Ex. 7, p. 78a; Ex. A, p. 2) Following examination, Dr. Rayburn assessed lumbar spondylosis without myelopathy, SI joint dysfunction, left greater trochanteric bursa, and ischial bursitis. With respect to treatment, Dr. Rayburn opined he possessed "no other options... to offer at this point." Dr. Rayburn indicated he planned to refer claimant to Dr. Harbach for reevaluation and no follow up appointments were scheduled. He issued prescriptions for tramadol, diclofenac, hydrocodone, and nabumetone. Dr. Rayburn opined claimant could continue use of anti-inflammatories, but opioids were not recommended. He also noted the two "[d]iscussed using chiropractic care and massage therapy." (Ex. 7, 78c; Ex. A, p. 4)

Claimant testified she informed Dr. Rayburn she had pursued chiropractic and massage treatment for her complaints and received some relief. (Claimant's testimony)

On October 11, 2016, Dr. Rayburn authored responses to questions posed by defendants' counsel. Dr. Rayburn opined claimant's back and hip pain were causally related to the work injury of April 23, 2015. He opined claimant had achieved MMI from a pain management standpoint; he noted claimant could continue use of anti-inflammatory medications and home exercises to assist with chronic pain. (Ex. 8, p. 79; Ex. C, p. 1) In response to inquiry as to what additional treatment was needed to assist claimant in achieving MMI, Dr. Rayburn replied he believed claimant had met MMI. (Ex. 8, p. 80; Ex. C, p. 2) Dr. Rayburn indicated he did not provide impairment ratings or permanent restrictions. (Ex. 8, p. 79; Ex. C, p. 1)

On October 12, 2016, Mitchell Thole, PT, discharged claimant from physical therapy. Mr. Thole noted claimant had attended 30 sessions, with minimal improvement. Mr. Thole opined claimant demonstrated poor to fair effort in sessions and self-terminated exercises due to subjective pain complaints, without objective findings or change of mechanics. He opined claimant did not progress as had been anticipated and following physician evaluation, therapy was discontinued. With respect to claimant's level of functioning, Mr. Thole noted claimant was unable to: lift 25 pounds floor-to-waist; occasionally climb stairs; or frequently sit, stand, lift, bend, stoop, or perform daily tasks. (Ex. 9, pp. 100-103)

Claimant testified she has not returned to her baseline, preinjury condition. Claimant desires to participate in further chiropractic and massage treatment. She testified both forms of care provided some relief of her symptoms. In terms of ongoing treatment, claimant requested authorization of any recommendations made by Dr. Rayburn. (Claimant's testimony)

Following her termination by defendant-employer, claimant testified she began a work search. The evidentiary record contains a listing of 50 employers/positions to which claimant applied. (Claimant's testimony; Ex. 18, pp. 138-139) All the listed positions appear to be in claimant's professional field: computer programming/IT.

Claimant testified she applied for more positions than those listed in Exhibit 18. As a result of her job search, claimant has secured a "few" interviews and identified two employers who interviewed her for positions. Both employers ultimately informed her that another candidate had been selected. At the time of hearing, she had no other interviews scheduled. Claimant testified she would like to return to work in her field; however, she noted she continued to suffer with difficulty when she performed such work on a part-time basis for defendant-employer. (Claimant's testimony)

Claimant testified her symptoms impact her ability to perform daily activities. She described difficulty cooking, cleaning, and doing dishes and laundry. She explained she experiences problems with prolonged standing, lifting, and carrying. Claimant also experiences increased symptoms with prolonged sitting, which can interfere with her

concentration. Claimant testified she is also unable to garden, which she enjoyed in the past, and has a decreased tolerance for attendance of her minor daughter's academic and recreational activities. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant is entitled to temporary partial disability benefits from November 25, 2015 through March 20, 2016 and if so, in what amount.

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).

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).

Iowa Code section 85.33(3) states:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

Claimant claims entitlement to temporary partial disability benefits from November 25, 2015 through March 20, 2016, based upon a restriction limiting claimant to part time hours. Specifically, claimant argues she was limited during this period to 4-hour work days. She acknowledges defendant-employer offered work within the other restrictions in effect and argues it could reasonably assumed that if defendant-employer offered work for 8 hours, it would have similarly offered work for 4 hours. On this basis, claimant requests temporary partial disability benefits based upon one-half of her stipulated gross average weekly wage, as this figure was computed based on 8-hour

days and claimant was limited to one-half of those hours. Claimant's request for benefits is, of course, complicated by the fact she declined to present to work in any fashion beginning at some point in December 2015.

In order for claimant to prevail, she must first establish that she was not medically capable of returning to substantially similar employment. Claimant admits that the work offered, i.e. her preinjury job, was compliant with Dr. Harbach's restrictions of November 23, 2015. Therefore, the fighting issue is whether or not claimant labored under an additional hour restriction during the claimed period.

Claimant notes Dr. Moe released claimant to 4-hour shifts on November 10, 2015. However, Dr. Harbach subsequently imposed no limitation upon her work hours. Therefore, I find Dr. Harbach's opinion superseded the opinion of Dr. Moe. It is not uncommon for an employee to be subjected to lessening work restrictions over time; without further conflicting evidence, I am unconvinced Dr. Harbach intended to leave Dr. Moe's hourly restriction in place. Dr. Harbach did comment that claimant had been performing part-time work; however, I am unable to infer an intention to limit claimant's hours based simply upon an acknowledgement that claimant, at the time of examination, was working limited hours. Therefore, as of November 23, 2015, Dr. Harbach released claimant to perform work consistent with her preinjury position and at regular hours.

It must then be considered whether Dr. Stickel's subsequent opinion and recommendation of restrictions is persuasive and properly considered binding in this matter. The evidentiary record is unclear as to whether or not claimant returned to work and if so, at what hours, following Dr. Harbach's November 23, 2015 opinion. Both claimant and Mr. Hanson credibly testified claimant ceased working in late November or December 2015, thus indicating claimant worked in some capacity following issuance of Dr. Harbach's restrictions. Claimant then sought chiropractic care with Dr. Stickel on December 5, 2015 and December 9, 2015. Dr. Stickel's notes of the December 9, 2015 appointment indicate he informed claimant to remain off work. His accompanying patient status report notes a 4-hour work day restriction.

I find these contradictory notes troublesome, particularly so when I am called upon to rely upon Dr. Stickel's opinions on proper restrictions over the opinion of Dr. Harbach. I further note that claimant was subsequently examined by Dr. Rayburn, who did not impose any restriction on claimant's work hours. Furthermore, claimant failed to provide defendant-employer with a copy of Dr. Stickel's restrictions and request accommodation, even following an explicit request for any medical documentation to support her absences.

I find the opinion of Dr. Harbach more persuasive as to claimant's work restrictions. Dr. Harbach is an orthopedic specialist, authorized by defendants to provide treatment and that treatment was ongoing at the time of issuance of the restrictions in question. I am unable to infer any ongoing restrictions from Dr. Moe, nor

do I find that the restrictions recommended by chiropractor, Dr. Stickel, are accurate or compelling enough to warrant disregarding the opinions of Dr. Harbach.

As I find the restrictions of Dr. Harbach are more persuasive and claimant admits the work offered by defendant-employer was within those restrictions, I find claimant refused an offer of suitable work and is thus not entitled to temporary partial disability benefits pursuant to Iowa Code section 85.33(3).

The next issue for determination is whether the stipulated work injury is a cause of 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).

At the time Dr. Harbach last evaluated claimant, November 23, 2015, he served as an authorized physician, rendering treatment and issuing referrals to address claimant's ongoing symptoms. On that date, Dr. Harbach referred claimant to Dr. Rayburn, issued prescriptions for tramadol and diclofenac, and imposed restrictions of a 10-pound maximum lift and avoidance of repetitive lifting and bending. Dr. Harbach did not personally examine claimant again prior to evidentiary hearing. He offered written responses to inquiries on September 23, 2016; it is unclear what medical records, if any, he reviewed prior to issuing these opinions. He confirmed that at the time of his last evaluation of claimant, claimant showed significant left trochanteric bursitis and mild SI joint arthrosis. Dr. Harbach opined the work injury aggravated preexisting conditions of claimant's back. He described the aggravation as predominantly temporary in nature, yet commented the duration of claimant's pain symptoms was extended. He ultimately

opined claimant had returned to baseline, without ratable impairment or need for permanent restrictions.

Dr. Rayburn provided a course of treatment which was contemporaneous with evidentiary hearing. Evidentiary hearing in this matter took place on October 17, 2016; Dr. Rayburn examined claimant less than two weeks prior, on October 5, 2016. At that appointment, Dr. Rayburn assessed lumbar spondylosis, SI joint dysfunction, left greater trochanteric bursa, and ischial bursitis. He indicated he currently lacked treatment options to offer claimant. However, he referred claimant for repeat evaluation by Dr. Harbach and issued prescriptions for tramadol, diclofenac, hydrocodone and nabumetone. Dr. Rayburn also noted he and claimant had discussed chiropractic and massage treatment. He subsequently issued responses to inquiries, thereby opining claimant had achieved MMI from a pain management standpoint and noted claimant could continue use of anti-inflammatories and an exercise program to assist with chronic pain. He further noted he did not offer opinions on permanent impairment or need for permanent restrictions.

In addition to ongoing care with Dr. Rayburn, claimant also participated in physical therapy through early October 2016. Following Dr. Rayburn's examination, the therapist discharged claimant from care on October 12, 2016. The therapist noted claimant was unable to: lift 25 pounds floor-to-waist; occasionally climb stairs; or frequently sit, stand, lift, bend, stoop or engage in some daily activities.

In addition to the treating providers, claimant also underwent an IME with Dr. Bansal on July 29, 2016. As elements of the IME, Dr. Bansal reviewed claimant's medical records and performed a physical examination. Dr. Bansal assessed aggravation of lumbar spondylosis and facet arthropathy, and trochanteric bursitis; he opined claimant had achieved MMI. Dr. Bansal opined claimant sustained no ratable impairment to her hip, but sustained a 5 percent whole person impairment as a result of her back condition, due to radicular complaints, guarding and decreased range of motion. Dr. Bansal also recommended permanent restrictions with respect to claimant's back and hip: no lifting over 15 pounds occasionally or 10 pounds frequently; no frequent bending, climbing or twisting; and avoidance of sitting or standing greater than 90 minutes.

Claimant credibly testified to ongoing pain and limitations attributable to the stipulated work injury. Multiple medical records, most notably from physical therapy, note some degree of self-limiting behavior and subjective complaints unsupported by objective findings. However, no medical provider has testified claimant displays malingering or indicates belief that claimant is disingenuous in her expression of symptoms. I will not disregard claimant's credible testimony of ongoing pain and limitations on the sole basis the reports are subjective in nature.

It is undisputed that claimant received authorized medical care continuing to the date of hearing, with a referral pending from Dr. Rayburn to Dr. Harbach. Dr. Rayburn issued diagnoses regarding claimant's ongoing complaints and as recently as two

weeks prior to hearing, issued prescriptions for four medications. He also specifically indicated additional treatment of anti-inflammatories and exercises could be beneficial in treating claimant's chronic pain. Based on Dr. Rayburn's contemporaneous record of ongoing care, treatment recommendations, and a pending referral to Dr. Harbach, I find claimant suffered with ongoing symptoms at the time of evidentiary hearing.

It must therefore be determined whether the work injury and ongoing symptoms were a cause of permanent disability; I conclude permanent disability does exist with respect to claimant's low back and left hip. Claimant credibly testified to ongoing symptoms and limitations. Dr. Rayburn recommended ongoing care to address chronic pain.

With this background, I find unconvincing Dr. Harbach's opinion that claimant sustained no permanent impairment and required no permanent restrictions. I am troubled that Dr. Harbach opined claimant had returned to baseline, despite no abatement of her symptoms and ongoing authorized treatment extending to the date of evidentiary hearing. Additionally, at the time Dr. Harbach issued his opinions, he had not examined claimant in 10 months and it is unclear what, if any, intervening records were reviewed.

Given these reservations regarding the basis of Dr. Harbach's opinions, I find the opinions of Dr. Bansal are entitled to greater weight. Dr. Bansal is the only physician, aside from Dr. Harbach, who opined as to the extent of claimant's permanent impairment and need for work restrictions. Dr. Bansal examined claimant approximately three months prior to evidentiary hearing and performed a detailed medical records review. Dr. Bansal opined claimant sustained a permanent functional impairment of 5 percent whole person relative to her back condition. I find no obvious defect in Dr. Bansal's methodology, nor does the rating appear inherently flawed or unreasonable. Dr. Bansal also recommended permanent restrictions with respect to claimant's back and hip: no lifting over 15 pounds occasionally or 10 pounds frequently; no frequent bending, climbing or twisting; and avoidance of sitting or standing greater than 90 minutes. These restrictions are consistent with the physical limitations subsequently noted by the physical therapist in October 2016 and are in line with the restrictions imposed by Dr. Harbach in November 2015. As I find Dr. Bansal's opinions entitled to greater weight, I adopt his opinions with respect to the extent of claimant's permanent functional impairment and need for permanent restrictions.

As claimant continues to suffer with ongoing symptoms which warrant continued care and I have adopted the opinions of Dr. Bansal with respect to functional impairment and permanent restrictions, it is determined claimant has proven she sustained permanent disability as a result of the work injury on April 23, 2015.

The next issue for determination is the extent of industrial disability. The next issue for determination is the commencement date for permanent partial disability benefits. These issues will be considered together.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

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 was 49 years of age on the date of evidentiary hearing. She is highly educated, with high school and undergraduate degrees, as well as completion of two years of law school. She earned her undergraduate degree in management information systems/computer programming from Iowa State University. She thereafter worked as a computer programmer until electing to attend law school. While in law school, claimant worked as a legislative clerk. Although claimant did not complete law school due to the birth of her daughter, she subsequently returned to work as a computer programmer. Due to claimant's educational background, I find claimant would likely be capable of learning and applying new skills, if need be.

The entirety of claimant's reported work history falls within an office-type setting, involving largely professional nature duties. The vast majority of claimant's work history has occurred within the computer programming/IT field. This type of work garnered claimant an annual salary of $74,800.00 at defendant-employer. This field is clearly that which best suits claimant's aptitudes and abilities, as well as maximizes her earning potential. Therefore, any detrimental impact on claimant's ability to successfully participate in this field negatively impacts her earning capacity.

Claimant suffered a stipulated work-related injury to her low back and left hip on April 23, 2015. Although her injury was non-surgical, claimant received extensive conservative care which continued until the date of evidentiary hearing. As set forth

supra, the undersigned adopts the opinions of Dr. Bansal and finds claimant sustained a permanent impairment of 5 percent whole person and requires work restrictions of no lifting over 15 pounds occasionally or 10 pounds frequently; no frequent bending, climbing or twisting; and avoidance of sitting or standing greater than 90 minutes.

These restrictions are significant and could prove exceptionally difficult to overcome for a physical laborer. Claimant, however, is well-educated and trained in a professional field. Claimant herself admits she would be capable of performing her preinjury job within these restrictions. No evidence was submitted which indicates claimant's preinjury job at defendant-employer was somehow less strenuous than other programming positions. I am therefore left to conclude that claimant's work for defendant-employer was similar to work within the broader computer programming/IT field and accordingly, she would be physically capable of performing such work for other employers within her restrictions.

Claimant raised legitimate concerns with respect to the impact of her restrictions upon potential employment. First, claimant expressed concern with respect to her ability to participate in prolonged meetings; however, I am unconvinced such meetings were frequent occurrences or that claimant would be unable to change positions within those meetings. Second, claimant raises concern with respect to her productivity, given a need to change positions. Claimant's concern may be well-founded; however, at this juncture, the concern is also speculative in nature as claimant has not returned to work in any capacity following achievement of MMI. Also speculative is concern of the impact of claimant's pain upon her productivity and functioning in a work environment, as claimant has not returned to work.

Claimant has, to her credit, applied for a significant number of positions. Each position applied to appears to fall within claimant's professional experience and education; she is not applying for work in positions which would exceed her restrictions or be otherwise inappropriate given claimant's skills. In this targeted work search, claimant has been successful in obtaining two interviews; however, she has not been offered any positions. It is not clear that the unsuccessful work search is attributable to the work injury and resulting restrictions, as the positions applied for appear consistent with claimant's physical abilities. I would also be remiss in failing to consider the fact claimant ceased presenting to work at defendant-employer in December 2015, despite an offer to return to her preinjury position. Claimant admits the work offered fell within Dr. Harbach's contemporaneous restrictions and also with the permanent restrictions ultimately imposed by Dr. Bansal. I am left with some question as to whether claimant's actions have demonstrated significant motivation on claimant's part to return to the workforce.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 20 percent industrial disability as a result of the stipulated work-related injury of April 23, 2015. Such an award entitles claimant to 100 weeks of permanent partial disability benefits (20 percent x 500 weeks = 100 weeks). The parties stipulated at the time of the work injury, claimant's gross weekly

earnings were $1,427.47, and claimant was married and entitled to 2 exemptions. The proper rate of compensation is therefore, $873.78.

Permanent partial disability benefits commence at the termination of claimant's healing period. In this matter, claimant's healing period terminated upon her return to work on November 11, 2015. *See* Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). The proper date for commencement of permanent partial disability benefits is therefore, November 11, 2015.

The next issue for determination is whether claimant is entitled to an award of alternate medical care pursuant to Iowa Code section 85.27.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

By this decision, the undersigned determined claimant sustained permanent impairment and suffers with ongoing symptoms as a result of the stipulated work injury of April 23, 2015. Hearing in this matter took place on October 17, 2016; claimant received physical therapy until early October 2016 and was examined by Dr. Rayburn on October 5, 2016. At that time, Dr. Rayburn opined he lacked other treatment options, issued prescriptions for four medications and referred claimant back to Dr. Harbach for evaluation. Dr. Rayburn also noted he and claimant discussed chiropractic and massage treatment. Claimant admits Dr. Rayburn did not prescribe or refer her for such care, but argues these treatments were identified as options.

By the hearing report, claimant requested an award of alternate medical care. Specifically, claimant seeks an order for chiropractic care, massage therapy and ongoing medications per Dr. Rayburn. Defendants argue they lacked prior notice of any dissatisfaction by claimant with the care that had been authorized.

Claimant continues to suffer with symptoms causally related to the work injury and is entitled to treatment for those complaints. After reviewing the entirety of the record, I find no indication that defendants have failed to authorize reasonable ongoing treatment. Defendants continued to authorize evaluation with Dr. Rayburn as recent as two weeks prior to hearing, there is no evidence the authored prescriptions were not honored, and a referral from Dr. Rayburn to Dr. Harbach was pending at the time of hearing. The undersigned was presented with no evidence that defendants would not follow through with the referral, nor any indication that claimant would not participate in such ongoing evaluation and treatment. While claimant is entitled to continued medical care for her injuries, defendants' offer of ongoing care to date has been reasonable.

With respect to claimant's request for chiropractic and massage treatment, I find such a request reasonable given claimant credibly testified such care provided her some relief of symptoms. However, an award of alternate care on this issue is premature by this decision, as it is unclear whether claimant expressed dissatisfaction with the care offered and made a request to defendants for authorization of such treatments. Defendants are entitled to the opportunity to investigate and consider a request for such care prior to a deputy commissioner removing the right to direct care. Under these circumstances and with knowledge of claimant's extensive chiropractic care to date, I am unwilling to award claimant a "blank check" for chiropractic and massage treatments. Such care could form an important element of claimant's ongoing maintenance care; however, the care should be undertaken as part of a larger plan for palliative treatment and should be subject to periodic review for efficacy.

Therefore, it is determined that claimant's request for alternate is granted in part and denied in part. Claimant remains entitled to additional medical treatment to address her ongoing complaints, even if such care is only palliative or maintenance in nature. Defendants are therefore ordered to authorize a physician to treat claimant's ongoing complaints; defendants may also entrust such care to a currently authorized physician. In either case, defendants are bound by the treatment plan issued by that authorized physician, including any recommendation for chiropractic or massage treatment. Claimant's current request for an order for chiropractic and massage treatment is denied at this time as premature.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: filing fee ($100.00) and service fees ($13.48). (Ex. 20, pp. 141-143). These are allowable costs and are taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits commencing November 11, 2015 at the weekly rate of eight hundred seventy-three and 78/100 dollars ($873.78).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

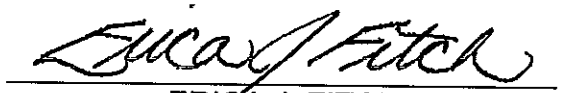
Defendants shall receive credit for benefits paid.

Defendants shall designate a physician to treat claimant's ongoing complaints.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 in the amount of one hundred thirteen and 48/100 dollars ($113.48) as set forth in the decision.

Signed and filed this 24th day of March, 2017.



ERICA J. FITCH
DEPUTY WORKERS'
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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.