

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CLEOFAS ALFARO,

Claimant,

vs.

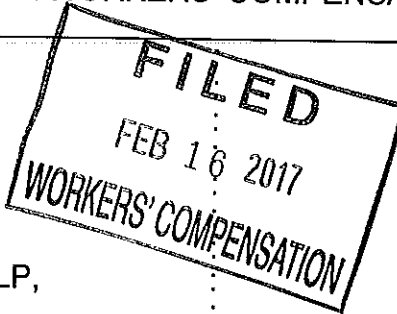
IOWA SELECT FARMS, LLP,

Employer,

and

ZURICH, N.A.,

Insurance Carrier,
Defendants.



File Nos. 5054967
5054968

ARBITRATION
DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Cleofas Alfaro, claimant, filed a petition in arbitration seeking workers' compensation benefits against Iowa Select Farms, employer, and American Zurich Insurance Co., insurer, for an alleged work injuries dated May 24, 2011 and November 17, 2014.

This case was heard on November 17, 2016, in Des Moines, Iowa. The case was considered fully submitted on December 8, 2016, upon the simultaneous filing briefs.

The record consists of claimant's exhibits 1-12, defendants exhibits A, claimant's testimony, and the testimony of Eric Wiechmann.

ISSUES

File No. 5054967

The extent of claimant's permanent disability, if any;

Costs.

File No. 5054968

The extent of claimant's permanent disability, if any;

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.

The parties agree the claimant sustained a work-related injury on May 24, 2011 and again on November 17, 2014. The parties disagree as to the extent of the claimant's permanent disability, if any has been suffered.

The parties stipulate that at all times relevant to the injury of May 24, 2011 the claimant's gross earnings were \$438.00 per week. She was married and entitled to two exemptions. Based on those foregoing numbers the weekly benefit rate is \$310.01. The parties agree that the commencement date for permanent partial disability benefits, if any are awarded would be January 10, 2012.

At all times relevant to the injury of November 17, 2014, claimant's gross earnings were \$677.96 per week she was married and entitled to two exemptions. Based on those foregoing numbers the weekly benefit rate for the injury date of November 17, 2014 is \$449.61. The parties agree that the commencement date for permanent partial disability benefits, if any are awarded, is August 2, 2016.

FINDINGS OF FACT

Claimant was a 55 year old person at the time of the hearing. Her educational history includes nine years of schooling in Mexico. She has some limited verbal English skills but has difficulty reading or writing English. Her primary language is Spanish.

Her work history includes restaurant work including cooking, cleaning, and dish washing.

She began working for defendant employer on October 25, 2010, hired to assist sows that were in labor. At times, this would necessitate pulling the piglet from the sow, moving the sows from one room to another after birthing, checking the sows conditions, and filling mistral powder containers. This position also includes caring for piglets after birth, including vaccination of the piglets. Her job description is included in Exhibit 8.

Physically, her position requires her to lift 40 pounds, step over 4-foot gates, occasionally reach with hands and arms, climb or balance, talk and hear. (Ex. 8) Eric Wiechmann testified that the job description was correct and that if someone could not perform those tasks, they should be in a different position.

The safety manager, Eric Wiechmann, testified that claimant did not have to lift anything more than 20 pounds during her job, however, both the job description and the defendants' answers to interrogatories place the lifting requirements in claimant's job at

40 pounds or greater. Mr. Wiechmann is either unfamiliar with the claimant's position or misrepresented her position. In either event, the undersigned places greater weight on the testimony of the claimant that is corroborated by the job description and the defendants' answers to interrogatories than the testimony of Mr. Wiechmann.

On May 24, 2011, claimant was assisting with a birth. She was flat on her stomach with her arm outstretched inside the sow's birth canal. The sow got to her feet quickly and before claimant could remove her arm. The pull on the arm caused immediate pain.

She began physical therapy on June 7, 2011. (Ex. 1B, p. 4)

2. Range of motion: Lumbar range of motion is limited to 55 degrees or forward flexion with reports of pain in her right lower back. Patient had within normal limits lumbar extension range of motion at 20 degrees, but did report pain upon end range. The patient had symmetrical left and right side bending, but had pain upon end range right side bending. Patient also had symmetrical right and left rotation but had pain upon left rotation. Right hip range of motion and shoulder is within normal limits.

3. Palpation: Patient had tenderness with soft tissue mobilization to right lumbar paraspinal musculature, right latissimus dorsi, and right middle and lower trapezius musculature. The patient had discomfort with posterior to anterior mobilizations throughout the thoracic and lumbar spine starting at T4 all the way down through L5 and is unable to distinguish exactly where her pain was coming from. The patient had minimal pain with rib mobilizations on the right.

4. Strength: Patient had decreased right quadriceps strength with a manual muscle testing grade of 4-/5.

5. Flexibility testing: The patient lacks supine straight leg raise on the right to 60 degrees while left was 90 degrees. Right hip internal rotation was limited to 7 degrees while the left was 25 degrees. External rotation on the right was limited to 15 degrees while the left was 35 degrees.

6. Biomechanical evaluation: Patient had pain with bed transitions with going from supine to prone and prone to supine.

(Ex. 1B, p. 4)

She was noted to have exerted maximum effort but still showed weakness in her core musculature. (Ex. 1B, p. 3)

In a visit on June 21, 2011, with Charles Mooney, M.D., she reported ongoing pain down her right side, radiating into her hip. (Ex. 1B, p. 4) Physical therapy was beneficial, decreasing her symptomatology by 80 percent. (Ex. 1B, p. 4) She was

tender but exhibited fairly normal range of motion. (Ex. 1B, p. 4) Dr. Mooney recommended continued physical therapy and modified work restrictions of no lifting greater than 10 pounds and no repetitive bending or lifting from floor to waist. (Ex. 1B, p. 5)

On August 10, 2011, Dr. Mooney reviewed MRIs which he felt were "consistent with S1 radicular pain based on her Lf-S1 disc and osteophyte findings." (Ex. B, p. 12) He recommended she be evaluated by the pain clinic for further treatment.

A September 1, 2011, visit with Cassim Ingram, M.D., ruled out surgery. (Ex. 1c, p. 2)

On September 27, 2011, claimant was seen by Arnold R. Parenteau, M.D., for possible injection therapy. (Ex. 1D, p. 2) He agreed her pain was myofascial in nature and that she was a good candidate for the trigger point injections. (Ex. 1D, p. 2)

Dr. Mooney saw claimant on October 18, 2011, and returned claimant to regular duties despite her thoracolumbar range of motion essentially unchanged.

OBJECTIVE: Examination today reveals thoracolumbar range of motion to be essentially unchanged. She has significant abdominal protuberance and this limits her forward motion. She is mildly tight in the right paralumbar erectors without overt triggering or spasm. She is able to squat, recover, heel and toe walk without evidence of weakness. Deep tendon reflexes remain somewhat flattened but preserved. She demonstrates very mildly positive neural tension findings in the right leg at the seated position of 80 degrees causing pain in the back only.

(Ex. 1B, p. 14). She has a second injection on October 30, 2011. (Ex. 1D, p. 4)

Dr. Mooney ordered an EMG study and the results were normal. (Ex. 1B, p. 20) On January 10, 2012, he ordered her back to full duty work and placed her at MMI. He further concluded she suffered some permanent impairment. (Ex. 1B, p. 25)

Pursuant to your questions, it is my opinion based on 'The Guides to Evaluation of Permanent Impairment,' published by the AMA 5th edition, that Ms. Alfaro does demonstrate evidence of partial permanent impairment as it relates to her injury of 05/24/12. This is found on page 384 of the aforementioned guide, under DRE lumbar category 2. It is my opinion that the 1st paragraph applies, and a 5% impairment of the whole person is applicable.

It is my opinion that the injury of 05/24/11 does represent an aggravation of underlying degenerative disc and degenerative facet disease of the lumbar spine. However, as she was asymptomatic prior to this injury, it is my opinion that the entire 5% impairment of the whole person is applicable to the injury of 05/24/11, and apportionment is not indicated.

(Ex. 1B, p. 25)

Claimant testified that her pain from the May 2011 injury never fully abated, but that she did return to work without restrictions and continued to work her full-duty job until another work injury of November 17, 2014. On that day, she was pushing a cart of piglets, slipped on ice and fell.

She was sent to the physician but told she was suffering only muscular pain. (Ex. 1A, p. 3) On her own, she sought treatment with David Beck, M.D., who gave her injections.

She began physical therapy on May 4, 2015. (Ex. 1E, p. 2) Claimant demonstrated muscle tenderness in B superior gluteals, tenderness to palpation at the sacrum, and decreased right hip flexion due to muscle tightness and pain. (Ex. 1E, p. 2) She had large trigger points that responded to manual therapy. (Ex. 1E, p. 8) The long walking, kneeling, and bending at work exacerbated her pain and tightness. (Ex. 1E, p. 2-4)

She was discharged from PT on July 30, 2015, after sixteen visits. Her symptoms waxed and waned over the course of treatment. (Ex. 1E, p. 10) It was noted that part of her difficulty in achieving lasting relief was her work requirements. (Ex. 1E, p. 10)

However, the patient's work positioning stations and duties were not easily modifiable and seem to be the largest limiting factor in her progress as she continued to lean forward with poor mechanics to separate the piglets from the sows and each day would report that working and walking across the facility returned her symptoms to previous levels. The patient was given home exercise program which she performed well when reviewed in therapy and state compliance with.

(Ex. 1E, p. 10)

Dr. Beck saw claimant on July 20, 2015, noting that the MRI scan showed stenosis at L2-3. (Ex. 1E, p. 12) The two discussed surgery but claimant did not want to skip work.

DIAGNOSIS AND MANAGEMENT: I explained to Cleofas what the problem is. Basically she really doesn't want to have surgery as she doesn't want to skip any work. I told her any operation she would be off work at least 6 weeks. I recommend we try an epidural steroid injection and I have set her up for that.

(Ex. 1F, p. 1) The epidural helped some, but given the mild to moderate stenosis at 5 levels in her back, Dr. Beck recommended another injection. (Ex. 1F, p. 3) By October 10, 2016, Dr. Beck felt that claimant did not need surgery or scheduled

treatment due to her return to full time work. "She is...coping with this nicely." (Ex. 1F, p. 4)

In response to an inquiry from claimant's counsel, Dr. Beck agreed that claimant may need surgery but that she is working with pain and that the back and hip condition of the claimant was aggravated by her work incident on November 17, 2014. (Ex. 1F, p. 5)

Claimant underwent an FCE on August 2, 2016. She gave consistent effort and the test was deemed valid. As a result, the therapist recommended the following restrictions:

Slight/No Limitations:

1. Elevated work weighted up to 2 lbs.
2. Sitting
3. Standing
4. Walking
5. Lifting waist to/from floor up to 5 lbs.
6. Lifting waist to/from crown up to 5 lbs.
7. Front carry up to 15 lbs.

Some Limitations:

1. Forward bent standing
2. Kneeling/Half-Kneeling
3. Stairs
4. Lifting waist to/from floor up to 15 lbs.
5. Lifting waist to/from crown up to 10 lbs.
6. Front carry up to 20 lbs.

Significant Limitations:

1. Lifting waist to/from floor up to 25 lbs.
2. Lifting waist to/from crown up to 15 lbs.
3. Front carry up to 25 lbs.

Unable to perform:

1. Crouching.

(Ex. 3)

Farid Manshadi, M.D., performed an IME on August 23, 2016. (Ex. 2)

He concluded:

DISCUSSION: After reviewing the provided medical records and evaluation and examination of Mr. Cleofas Alfaro, I believe she has evidence of right-sided SI joint dysfunction. Obviously, I believe this is a new injury since 11/17/14. She did have another work injury on 05/24/11 while working at Iowa Select Farms and she was at MMI at that time in regard to her back injury. I cannot make a connection between the two injuries at this point as they appear to be two separate injuries. This was at least a material aggravation of the prior injury of 11/17/14.

(Ex. 2, p. 3) He also believed she had a permanent disability and one that required permanent restrictions.

IN [sic] regard to any permanent restrictions associated with Ms. Alfaro's work-related injuries, as a result of the 11/17/14 work injury I recommend to follow the recommendations provided by the Functional Capacity Evaluation. This includes capabilities in the light category with up to 20 pounds on an occasional basis with front carry of physical demand.

In regard to the impairment rating, I used the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition, [sic] Chapter 15, Page 384 and she falls under DRE Lumbar Category 2 and I assign another five (5) percent impairment of the whole person.

In regard to the date of maximum medical improvement for Ms. Alfaro's work-related injuries, for the second injury of 11/17/14 I set the date as of 08/02/16. For the first injury I set the date as of 01/10/12.

(Ex. 2, p. 4)

Claimant testified that it is not possible to do her job within the restrictions set forth by Dr. Manshadi and Work Well, but that she has not informed her employer of the restrictions because she is concerned she would lose her job. She maintains that she has constant pain that does not abate and that her work activities such as walking, kneeling, bending and lifting exacerbate her symptoms.

At home, she testified she needs assistance doing everyday tasks such as carrying her grocery bags, sweeping, mopping or carrying her laundry basket. She has to use a cushion under her leg when she sleeps.

Claimant has received regular raises while employed for defendant employer. She began at \$22,000, and received a raise in December 12, 2011. (Ex. A, p. 5) The following year, she was given a rating of 3 on her annual performance evaluation. (Ex. A, p. 6-7) The same rating was assigned in February 2014, (Ex. A, p. 8-11) and then again on November 26, 2014. (Ex. A, p. 16-19) From the stipulated average weekly

wage calculations claimant's income rose from \$438.00 per week in 2011 to \$677.96 at the end of November 2014.

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).

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).

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 suffered two injuries while working for defendant employer. The first injury occurred on May 24, 2011. She had treatment including medication, therapy and injections. On January 10, 2012, Dr. Mooney determined claimant was at MMI and assigned a 5 percent impairment rating for the whole body. She continued to have pain in her back and hip but returned to full duty employment without restrictions. Defendants argue that claimant has lost no time, wages or employability as a result of the work-related injury and has suffered no loss of earning capacity.

However, there appears no dispute that claimant did have an injury and an impairment that leaves her with pain and discomfort. Claimant is a 55 year old person whose background consists of limited formal education, limited English abilities, and mostly unskilled working experience. Her back injury resulted in ongoing pain and discomfort. She is a hard worker, as evidenced by her continuing to work without complaint through her pain.

Her work requires 40 pounds of lifting as well as bending, twisting, and kneeling—all provocative actions which can and do trigger her pain symptoms.

Therefore, it is determined that her industrial disability, arising out of the May 24, 2011, work injury is 10 percent.

Claimant seeks the assessment of costs which are awarded herein.

Claimant suffered a second work-related injury to her back and hip on November 17, 2014. She was again treated conservatively with physical therapy, injections, and medication. However, her pain is worse, affecting her daily activities and limiting her ability to do chores around her home. Dr. Beck indicated that surgery might be an option for the claimant in the future when she can no longer tolerate the pain.

A valid FCE places claimant in the light duty work level. It was recommended she carry up to 20 pounds on an occasional basis, eliminate crouching, and limit lifting overhead to 2 pounds.

Dr. Manshadi agreed that these restrictions arose out of her November 17, 2014, injury. He set her MMI date at August 2, 2016, and added an additional 5 percent impairment.

Claimant is reluctant to present her work restrictions to her employer, fearing she would be terminated from her job. She continues to do her work, but has significant pain while undertaking her tasks. The written job description describes tasks that are beyond claimant's work restrictions. She has not been offered accommodation.

While claimant is currently employed and has received good evaluations and regular pay increases, her physical abilities are impaired by pain. Dr. Beck agrees that if the pain becomes intolerable, surgery is an option.

Dr. Manshadi assessed an additional 5 percent impairment over and above the rating assigned by Dr. Mooney in 2012.

Claimant's pain and deteriorating physical condition combined with the elements described above about her past work history, educational background, motivation to return to work, and other factors, it is determined that claimant's permanent partial disability arising out of the November 17, 2014, is 25 percent. This may increase or decrease due to future treatment and/or increasing symptomatology, however, that would be the subject of a review re-opening.

Claimant also requests payment of costs and medical expenses. Exhibit 11 contains bills and charges associated with interpretation fees, medical record procurement, and filing fees. Pursuant to IAC rule 876 4.33 wherein the claimant can request that costs be taxed by the deputy to a prevailing party, the costs identified in Exhibit 11 are taxed to the defendants.

Any medical expenses that are associated with Dr. Beck, treatment ordered by Dr. Beck, or care associated with claimant's back and hip injury arising out of the November 17, 2014, injury or the May 24, 2011, injury are to be reimbursed and/or paid for by the defendants as they have a statutory obligation to furnish reasonable services and supplies to treat an injured employee. Iowa Code section 85.27(4).

ORDER

THEREFORE, it is ordered:

File No. 5054967:

That defendants are to pay unto claimant fifty (50) weeks of permanent partial disability benefits at the rate of three hundred ten and 01/100 dollars (\$310.01) per week from January 10, 2012.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

File No. 5054968

That defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of four hundred forty-nine and 61/100 dollars (\$449.61) per week from August 2, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

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

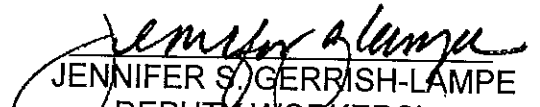
That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

That defendants shall pay reasonable medical services and supplies to treat claimant including, but not limited to, the reimbursement for past medical services and supplies identified in Exhibit 10.

Signed and filed this 16th day of February, 2017.


JENNIFER S. GERRISH-LAMPE
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.