

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LISA ANN WESTHOFF,

Claimant,

vs.

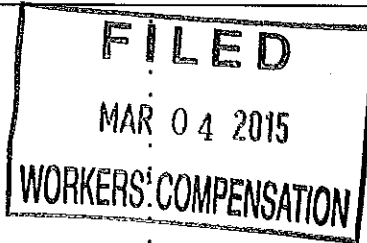
QUALICENTERS SIOUX CITY, LLC/
FRESENIUS MEDICAL CARE a/k/a
MIDWEST DIALYSIS,

Employer,

and

AMERICAN CASUALTY COMPANY
OF READING, PA,

Insurance Carrier,
Defendants.



File No. 5055010

ARBITRATION

DECISION

Head Note Nos. 1802, 1803

STATEMENT OF THE CASE

The claimant, Lisa Ann Westhoff, filed a petition for arbitration and seeks workers' compensation benefits from Qualicenters Sioux City, LLC/Fresenius Medical Care a/k/a Midwest Dialysis, employer, and American Casualty Company of Reading PA, insurance carrier. The claimant was represented by Al Sturgeon. The defendants were represented by Craig Finch.

The matter came on for hearing on July 7, 2014, before deputy workers' compensation commissioner Joe Walsh in Sioux City, Iowa. The record in the case consists of claimant's exhibits 1 through 11 and defense exhibits A and B. The claimant testified at hearing, in addition to Deborah Kleitsch, Joslyn Benstead and Aleksandra Richardson. Stephanie Cousins was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on July 28, 2014 after helpful briefing by the parties. The undersigned Deputy initiated a status conference with the parties on February 24, 2015 to discuss whether a brief supplemental hearing would be helpful based upon the amount of time which had passed. It was determined that such a supplemental hearing was unnecessary and the parties agreed that any unresolved issues could be bifurcated or by exercising their rights to review-reopening.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant is entitled to healing period benefits for her injury commencing on June 25, 2014.
2. The nature and extent of claimant's permanent partial disability.
3. Whether the claimant is entitled to medical expenses.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.
2. Claimant sustained an injury which arose out of and in the course of employment on August 23, 2012.
3. The parties have agreed the claimant is single with three exemptions and gross wages of \$669.66. The parties believe the weekly rate is \$449.92
4. Defendants have paid and are entitled to a credit of 25 weeks of compensation (permanent partial disability) or \$11,248.00.
5. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant, Lisa Westhoff, was 42 years old as of the date of hearing. Lisa is the single mother of three, who were 19, 21 and 22 as of the date of hearing. The children still reside with Lisa in Sioux City. She graduated from Floyd Valley in Alton, Iowa in 1990. She has certifications as a nurses' aide and medication aide through Western Iowa Tech. She is also certified as a patient care technologist.

Lisa began her career with Fresenius Medical Care also known as Midwest Dialysis, in December 2001. She was a patient care technologist, or more specifically, a dialysis technician. (Transcript, pages 12-13) Her primary job responsibility is to provide appropriate medical treatment for the dialysis process, including preparation of materials for the procedure and administration of the process. Her job description is in the record at claimant's exhibit 8.

It is stipulated that on August 23, 2012, claimant was injured in the course of her employment. The injury occurred in the process of transferring a patient from a wheelchair to a dialysis chair. Emergency personnel were summoned. (Tr., pp. 14-15) During the interim, Lisa sustained the patient's weight by holding her up until the crew

arrived. Lisa described "burning" in her lower back following the incident. (Tr., p. 16)

Lisa was initially treated at Mercy Business Health Services a few days later. (Claimant's Exhibit 1) The initial report documented her complaints. "She does state that the pain sometimes radiates down into her right buttocks and upper right leg." (Cl. Ex. 1, p. 1) She was placed on restrictions and provided medications. Lisa returned a few days later and, since the symptoms were not getting better, an MRI was ordered. On September 4, 2012, the following was documented.

Female who I saw initially on 08/27/2012 for an acute lumbar strain that occurred after herself and other employees were trying to lift a very obese patient. The injury was sustained on 08/23/2012. There was no immediate medical attention sought on that day and as the pain got worse, she came in for evaluation. I saw her on 08/27/2012, treated her conservatively and then rechecked her again on 08/30/2012. At that time, the pain had become worse and she was very uncomfortable. I took her off work and we had her scheduled for an MRI. She is back in the office today for a recheck of her back and to review the MRI. While here, she is still complaining of pain in her lower back. She had quite a bit of muscle spasms evidently in the MRI when they laid her on the table for the first time.

(Cl. Ex. 1, p. 3) Mike Bobier, PA-C, went on to diagnose moderate "L4 lateral right foraminal bulging annulus with minimal right L4 nerve contact. (Cl. Ex. 1, p. 3) She was placed on significant restrictions and medications and referred to Matthew Johnson, M.D., an orthopedic surgeon at the Center for Neurosciences, Orthopedic and Spine (CNOS).

Dr. Johnson diagnosed lumbar strain. (Cl. Ex. 4, p. 3) He did not find the MRI findings to be clinically significant. He initially tried physical therapy for Lisa, which did not help. He kept her on light-duty. On October 23, 2012, Dr. Johnson noted her continued occasional right leg pain. He continued her medications and referred her for pain management treatment, facet blocks in particular. (Cl. Ex. 4, p. 9) Lisa visited Wade Lukken, M.D., of Siouxland Surgery Center Pain Clinic on November 28, 2012. She treated with CNOS and the pain clinic simultaneously for a period.

Dr. Lukken diagnosed lumbar facet syndrome and lumbar spondylosis. (Cl. Ex. 3, p. 2) "Patient has significant pain related to facet arthrosis, lumbar spondylosis, and lumbar facet syndrome. Pain is affecting daily life and has failed conservative treatment options, including tincture of time. Patient wishes to move forward with intraarticular facet injections today." (Cl. Ex. 3, p. 3) The injections were not particularly helpful. Later in the month, a medial branch block was attempted. (Cl. Ex. 3, p. 8) Again, it was not particularly successful.

On January 2, 2013, Lisa visited Dr. Johnson again. He noted the following. "Lisa is still having a lot of pain. She states that she cannot work her normal job with the amount of pain that she has. I do not see any structural abnormalities in her spine or any indications for surgery at this time." (Cl. Ex. 4, p. 12) He recommended she return to Mercy Business Health, Rodney Cassens, M.D., for ongoing care. Dr. Lukken saw her again at the end of January and adjusted her medications. She remained on hydrocodone.

On March 13, 2013, Lisa returned to Mercy Business Health and again saw Mike Bobier, PA-C. "She is able to maintain her work, however, she states by the middle of the day, her back feels like it is on fire and she has pain radiating into her hip and leg." (Cl. Ex. 1, p. 4) He diagnosed chronic low back pain with right leg, hip radiculopathy and then noted, "Dr. Johnson placed the patient on a permanent 15-pound weight limitation, so we will continue that today." (Cl. Ex. 1, p. 4) He issued a correction a week later, noting that the restriction was not intended to be permanent. (Cl. Ex. 1, p. 5)

Thereafter Lisa's treatment apparently stalled and she underwent two separate medical evaluations. She first saw Michael T. O'Neil, M.D., at NebOrtho in June 2013. (Cl. Ex. 5, p. 4) He issued a supplemental report on September 5, 2013, responding to specific questions from defense counsel. (Cl. Ex. 5) She also saw Sunil Bansal, M.D., at the Iowa Injury Institute. He issued a report on October 24, 2013. (Cl. Ex. 6)

Dr. O'Neil performed a thorough review of the records and performed an evaluation on Lisa. He diagnosed, "[S]ubjective complaints of chronic right low back and right buttock/thigh pain with no objective abnormal physical findings on examination." (Cl. Ex. 5, p. 12) He related that condition to the stipulated work injury. (Cl. Ex. 5, p. 12) He then utilized The AMA Guides to the Evaluation of Permanent Impairment, 6th Edition to provide a 1 percent whole person impairment rating. (Cl. Ex. 5, p. 13) He affirmed the 15-pound lifting restriction with no repetitive bending, squatting or twisting. (Cl. Ex. 5, p. 13) In his supplemental report, Dr. O'Neil clarified some of his medical opinions. (Cl. Ex. 5, pp. 1-2)

Dr. Bansal also performed a thorough review of the medical records and evaluated Lisa. He documented her current condition (as of October 2013) and specifically went through her job duties which seem to substantially worsen her symptoms. (Cl. Ex. 6, pp. 8-9) Dr. Bansal diagnosed lumbar spondylosis including L4-L5 disc bulge with right L4 nerve contact and lumbar myofascial pain syndrome. Using the AMA Guides, Fifth Edition, he rated claimant's whole body impairment at 5 percent and confirmed the light-duty restrictions.

Lisa subsequently underwent a valid functional capacity evaluation (FCE) on April 11, 2014, which placed her in the light to medium work category. (Cl. Ex. 7, p. 1) The restrictions limit her bending, kneeling and crawling to occasional. She can lift 15 pounds frequently and 35 pounds occasionally according to these restrictions. (Cl. Ex. 7, p. 5) She sought treatment at the emergency room on April 15, 2014 complaining of

acute low back pain. (Cl. Ex. 2, p. 1) Thomas Benzoni, D.O., recommended ice and prescribed additional medications. (Cl. Ex. 2, pp. 2-3)

Lisa experienced an increase in her symptoms just prior to hearing. On June 25, 2014, Lisa returned to Dr. Lukken at the pain clinic. She reported a recurrence of her pain. (Def. Ex. B, p. 3) Dr. Lukken performed another epidural injection and recommended a surgical consultation. (Def. Ex. B, p. 4)

CONCLUSIONS OF LAW

The primary issue in this case revolves around the nature and extent of Lisa's disability. This first issue in this regard is whether Lisa began a new healing period on June 25, 2014, and if so, what the consequences are. The evidence established that Lisa achieved maximum medical improvement on March 13, 2013. (Cl. Ex. 1, p. 10) At that point permanent disability benefits are owed. On June 25, 2014, Lisa returned to her authorized pain physician, Dr. Lukken, who took her off work up through the date of injury.

It has long been held that a healing period may be intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Healing period may terminate and then begin again. Willis v. Lehigh Portland Cement Co., Vol. I No. 2, Iowa Industrial Commissioner Decisions, 485 (Review-Reopening 1984); Clemens v. Iowa Veterans Home, Vol. I No. 1, Iowa Industrial Commissioner Decisions, 35 (Review-Reopening 1984); Riesselman v. Carroll Health Center, III Iowa Industrial Commissioner Report, 209 (App. December 28, 1982); Junge v. Century Engineering Corp., II Iowa Industrial Commissioner Report, 219 (App. August 18, 1981). See also, 15 Higgs, Workers' Compensation Law and Practice, Section 13-3 (2007-2008).

However, this agency recognized long ago that there can be multiple temporary total or healing periods. A temporary return of work following a work injury does not preclude the reinstatement of temporary total disability or healing period benefits when an employee is compelled to leave work a second time as a result of the same injury. See Junge v. Century Engineering Corp., II Iowa Industrial Comm'r Report 219 (App. 1981).

In multiple healing period scenarios, permanent partial disability is due and payable after the end of the first healing period and this is the time interest on unpaid benefits begins. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Credit against the eventual permanent disability award should be given for voluntary weekly payments between the two healing periods as they are permanent disability payments, not healing period. Flug v. Meisner Electric, File No. 5007007 (App. August 17, 2005).

I find that greater weight of evidence supports a finding that Lisa reached maximum medical improvement initially on March 13, 2013. The greater weight of evidence reflects Lisa has continued to attempt to work in her regular job which is too strenuous for her. She works long days. She is on her feet a great deal assisting with patients. The medical records and other portions of the record are replete with

references to the long days and her back condition deteriorating throughout the day. (Cl. Ex. 6, p. 9; Cl. Ex. 5, p. 6; Cl. Ex. 4, p. 12) On March 13, 2013, the following medical history is noted: "She is able to maintain her work, however, she states by the middle of the day, her back feels like it is on fire and she has pain radiating into her hip and leg." (Cl. Ex. 1, p. 4) It is noted that this note reflects her condition on the very date the parties stipulated she reached maximum medical improvement. Lisa has attempted to maintain her job in spite of her deteriorated condition. Unfortunately, workers often stay in jobs which are too difficult and no longer within their physical abilities for financial reasons.

The record in this case reflects that Dr. Lukken did take her off work for low back pain on June 25, 2014. (Def. Ex. B, p. 3) Based upon the record before me, however, I cannot conclude that this was the beginning of a new healing period. On June 25, Dr. Lukken stated the following. "The pain is in the exact same pattern that it was previously. Right sided low back into the right leg." (Def. Ex. B, p. 3) Lisa had an injection two weeks prior. On May 6, 2014, Dr. Lukken had stated that Lisa "has significant increase in her pain after a 12 hour shift of working. Usually by the next day she continued to have significant pain and states she is 'wiped out.'" (Cl. Ex. 3, p. 11)

There is simply not enough evidence in the record to conclude this was the start of a new healing period. Rather, based upon the record before me, it appears that the inevitable occurred. Lisa was finally simply unable to continue doing her job, in particular the 12 hour days. To be sure, I would have a clearer picture of the entire circumstance, if I had a record that went past the date of hearing. For example, if Lisa did proceed to a surgical consultation and received a surgical intervention, she is likely in a new healing period. Or conversely, if Lisa returned to work and continued working in pain following the hearing, a different conclusion could be drawn. Of course, I do not have such a record. What I have is snapshot of Lisa's condition as of July 7, 2014. Based upon that snapshot, Lisa was at maximum medical improvement as of March 13, 2013, and while her condition has waxed and waned since then, I am unconvinced that she truly had a new healing period commencing in June 25, 2014.

The next issue is Lisa's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure

to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Lisa is a bright, professional person with high demand work skills in the medical field. She is 42 years old as of the date of hearing. Her condition is best described by Dr. Bansal as lumbar spondylosis including L4-L5 disc bulge with right L4 nerve contact and lumbar myofascial pain syndrome. (Cl. Ex. 6, p. 10) There is some debate between the expert physicians about whether she only has myofascial pain or whether the pain is also caused by the disc conditions as shown on the scans. While it is not particularly probative to the extent of disability, the greater weight of evidence based upon the snapshot at this time is that there is some disc involvement. Regardless of the exact diagnosis, all of the medical providers seem to agree on the restrictions: no lifting greater than 15 pounds with no repetitive or frequent bending, squatting or twisting. The April 2014 functional capacity evaluation lessened the restrictions slightly, placing her in the light to medium classification. She can lift 35 pounds on occasion and 15 pounds frequently. (Cl. Ex. 7, p. 1) These accurately reflect her abilities. They are, nevertheless, quite limiting restrictions.

Lisa's healing period was relatively short. There has been no surgery, nor has any surgery been recommended at this point. She has a five percent impairment rating. At the time of hearing, Lisa has a non-surgical chronic low back with highly limiting restrictions. Her treatment has been mostly medication management, restrictions and injections of various sorts. She has continued on narcotic pain medications to deal with the symptoms. The restrictions, unfortunately limit her from the vast majority of patient care positions. She is therefore limited from using her most relevant past work history and skills.

Lisa has attempted valiantly to stay in a position which is not well-suited for her condition. While no physician has limited Lisa's hours, I find Lisa credible about the toll that working long hours repetitively bending and twisting has on her symptoms as it is reflected in the medical reports. Lisa's job description is in evidence. (Cl. Ex. 8) Lisa clearly does not meet the minimum requirements of her job, in terms of being able to assist with moving patients or other required tasks. (Cl. Ex. 8, p. 3) Lisa testified in some detail about her ongoing struggle at work in her deposition on May 12, 2014.

Q. What things do you think you can't do?

A. The job itself is killing me. It's killing my back.

Q. How so? . . .

- A. It's a constant repetitive job, and part of my work restrictions this whole time has been basically no repetitive motion, and that has not ever been followed.
- Q. Okay.
- A. If you've never seen the job being done setupwise and what you do for the patient, that's really something that as an attorney I feel needs to be done for, because it is constantly repetitive motion with it.

Because you're constant from up to midway to down. The patient chairs are probably even with this (indicating). I'm in a bending forward position to hook them all. It's just all repetitive motion.

(Cl. Ex. 10, Dep. pp. 54-55) The job duties Lisa described are verified in her job description and further confirmed by co-worker, Deborah Kleitsch. (Tr., pp. 67-69)

The employer has accommodated Lisa by allowing her to perform her job without performing these essential lifting functions. Both sides have acted reasonably in attempting to keep Lisa employed. She has been with this employer since 2002 and it is a good job. (Def. Ex. A) Lisa has been a good employee and the employer has been a good employer. The reality is, Lisa is no longer a good fit for the job and the relationship between the parties has become strained as a result.

Lisa is a good candidate for retraining. She has numerous transferable skills in the medical field, many of which may not require formal retraining. Upon reviewing all of the factors of industrial disability, I find that Lisa has suffered a 40 percent loss of earning capacity. Under Iowa law, this entitles her to 200 weeks of benefits commencing as of the date she reached maximum medical improvement.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay the claimant two hundred (200) weeks of permanent partial disability benefits at the rate of six hundred and sixty-nine and 66/100 (\$669.66) per week commencing March 13, 2013.

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.


As of the date of hearing, the claimant has failed to prove entitlement to any additional healing period benefits.

Defendants shall be given credit for the weeks previously paid as stipulated.

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.

Signed and filed this 4th day of March, 2015.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/kjw

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.