BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

OLIVIA MIKAROVSKI,

Claimant,

vs.

MERCY MEDICAL CENTER,

Employer,
Self-Insured,
Defendant.

File No. 5048507

ARBITRATION

DECISION

Head Note Nos.: 1803, 2501, 2907

STATEMENT OF THE CASE

Olivia Mikarovski, claimant, filed a petition for arbitration against Mercy Medical Center as the self-insured employer. An in-person arbitration hearing occurred on April 12, 2016 in Des Moines, Iowa.

The evidentiary record includes claimant's exhibits 1 through 15 and defendant's exhibits A through E. All exhibits were received without objection. Claimant was the only witness called to testify live at the arbitration hearing.

The parties filed a hearing report in which the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.
2. Whether claimant is entitled to an award of medical expenses contained in exhibit 13.
3. Whether claimant's costs should be assessed against defendant.

FINDINGS OF FACTS

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

Olivia Mikarovski is a 49 year old woman. Ms. Mikarovski is a high school graduate. She obtained a cosmetology license and worked in the cosmetology industry until she sustained a rotator cuff injury in approximately 1999. Following the rotator cuff injury, claimant was unable to continue employment in the cosmetology industry. After sustaining the rotator cuff injury, Ms. Mikarovski obtained additional training and became a surgical technician. (Claimant's testimony)

She began employment with Mercy Medical Center in Cedar Rapids, Iowa in approximately 2003 as a surgical tech. In this position, she was required to assist with surgical procedures, including preparing the necessary surgical instruments and cleaning the surgical suite before the operation. She was also required to lift trays of surgical instruments and assist with lifting and positioning adult patients in the operative suite. She achieved the highest level surgical tech position within Mercy Medical Center during her employment. (Claimant's testimony)

On March 25, 2013, Ms. Mikarovski was performing her normal job duties at Mercy Medical Center when she twisted while lifting a surgical tray and experienced a sharp pain and burning in her low back. Claimant sought medical attention the next day. (Exhibit 3, page 1) Despite conservative care, claimant's condition continued to worsen and she submitted to a lumbar MRI in April 2013. That MRI demonstrated a disc herniation at the L5-S1 level. (Ex. 6, p. 30)

Claimant was referred to a neurosurgeon, Chad D. Abernathey for surgical consideration. Dr. Abernathey evaluated claimant on April 2, 2013. He recommended an epidural steroid injection in claimant's lumbar spine. (Ex. 4, p. 3) However, Dr. Abernathey recommended against any surgical intervention. (Ex. 4, pp. 3-4)

A repeat MRI in August 2013 demonstrated no significant change despite ongoing symptoms. (Ex. 6, p. 32) The treating occupational medicine physician, Ignatius (Nate) Brady, M.D., declared claimant to have achieved maximum medical improvement on November 21, 2013 and recommended against any permanent work restrictions. Instead, Dr. Brady opined that claimant needed to remain active to maintain as much function as possible. (Ex. 5, pp. 35-36) Dr. Brady also opined that claimant had no permanent impairment as a result of the work injury. (Ex. 5, p. 35)

Unfortunately, claimant's symptoms persisted. She obtained a second opinion from another neurosurgeon, David H. Segal, M.D. Dr. Segal diagnosed claimant with a central disc herniation and recommended a repeat MRI. (Ex. 8, pp. 2-3)

The repeat MRI occurred in April 2014 and demonstrated a slightly larger herniated disc than was previously noted in April and August 2013. (Ex. 6, p. 34) Another MRI was performed in December 2014, which demonstrated no change since April 2014. (Ex. 6, p. 35)

Ms. Mikarovski sought a return evaluation with Dr. Abernathey in December 2014. Dr. Abernathey noted that claimant was "not interested in any aggressive surgical management such as a fusion." Dr. Abernathey was extremely hesitant about any such surgical intervention. (Ex. 4, p. 5)

Claimant then returned for evaluation with Dr. Segal in April 2015. Dr. Segal recommended surgical intervention and a fusion at the L5-S1 level. (Ex. 8, pp. 5-6)

Claimant obtained a third neurosurgical opinion from Matthew A. Howard, M.D., a neurosurgeon, professor and chair of the Department of Neurosurgery at the University of Iowa Hospitals and Clinics. Dr. Howard evaluated claimant and reviewed an October 2015 MRI on November 9, 2014. Dr. Howard concluded that "there is no clear evidence of nerve root entrapment, malalignment or subluxation. In this setting, I would not recommend invasive surgical intervention." (Ex. 15, p. 7)

A functional capacity evaluation (FCE) was obtained in February 2015. It demonstrated that claimant was capable of occasional floor to waist lifting up to 40 pounds, sitting constantly, standing constantly, stooping, kneeling, and squatting occasionally. The FCE was considered valid and recommended work in the medium demand work category. (Ex. 10)

Defendant obtained an independent medical evaluation performed by John D. Kuhnlein, D.O., on February 25, 2015. Dr. Kuhnlein opined that claimant was not a surgical candidate and declared her to be at maximum medical improvement. Dr. Kuhnlein recommended permanent restrictions that included a 30-pound occasional lift and no lifting greater than 10 pounds over shoulder. (Ex. 11, p. 6)

Claimant has elected to forego surgery. Dr. Segal has opined that she has a 13 percent permanent impairment rating as a result of the work injury. He also recommends against any lifting or bending and opines that claimant cannot sit for greater than 30 minutes at a time. (Ex. 8, p. 9) Dr. Segal suggested that claimant was unable to work in any capacity. (Ex. 8, p. 5)

When reviewing the various medical opinions in this case, I find Dr. Segal's opinions to be inconsistent with all of the other physicians, including claimant's independent medical evaluator. Claimant has also obtained and held employment for three months prior to the hearing, which appears to be inconsistent with Dr. Segal's opinions. (Claimant's testimony) I do not give Dr. Segal's opinions any significant weight in this case.

Dr. Kuhnlein appears to offer opinions that are consistent with the surgical opinions of Dr. Abernathey and Dr. Howard. Dr. Kuhnlein's permanent impairment rating is consistent with the AMA Guides to the Evaluation of Permanent Impairment, for someone that is not a surgical candidate. See AMA Guides, Fifth Edition, Table 15-3, p. 384. Dr. Kuhnlein's permanent restrictions are slightly more restrictive than the FCE

findings, but reasonable. I accept Dr. Kuhnlein's medical opinions pertaining to maximum medical improvement, permanent impairment, and permanent work restrictions to be the most convincing in this record.

Ms. Mikarovski presented as a well-spoken, well-dressed woman at the hearing. She appeared professional and had a likeable disposition. She is capable of interacting with members of the public and serving in customer service industry type positions. She has past work experience in the restaurant business, including as a waitress and cook.

Following her work injury, the employer determined that claimant was not physically capable of performing her job as a surgical tech. Mercy Medical Center terminated claimant's employment in March 2015. Claimant was upset about being terminated but agrees that she was not physically capable of performing the necessary job duties as a surgical tech at Mercy Medical Center. (Claimant's testimony)

Following her termination, claimant did not make an extensive job search. She was offered a job after her first application was submitted. She rejected that job offer because she was going to be out of town and because she was looking into the possibility of doing child care. (Claimant's testimony)

Claimant was able to obtain employment in January 2016 after submitting her second job application. From January 2016 through the date of the hearing, claimant worked as an assistant store manager at a women's clothing store. Claimant testified that she was not doing well with the physical activities required in her new job and testified she was not sure she could continue to work in that capacity. She also testified that she declined an offer to become the store manager because she did not believe she could physically handle the position. (Claimant's testimony)

Claimant was emotional during the hearing and her testimony about her ongoing symptoms, ability to continue to work, and her current situation seemed a bit exaggerated. For instance, claimant challenges the FCE findings asserting that she cannot stand on her feet for extended periods of time. Yet, she continues to work in retail where she stands. Dr. Kuhnlein did not impose any specific time limits on claimant's standing, though he suggested she should sit, stand and walk as needed. (Ex. 11, p. 6)

Claimant is also limiting her work to part-time employment. Dr. Kuhnlein, who I found to be most credible on restrictions, has not limited claimant's ability to work to something less than full-time. The FCE findings do not suggest a need for employment at less than full-time status.

Nevertheless, I do not doubt that claimant continues to have symptoms and that those symptoms make it difficult for her to perform physical activity. Claimant was rocking and fidgeting in her chair during her testimony and it appeared that she was uncomfortable.

Claimant likely remains capable of performing some of the duties as a cosmetologist. She is clearly continuing employment with the women's clothing store. The restrictions offered by Dr. Kuhnlein suggest claimant remains capable of gainful employment. However, it appears that both parties concur claimant is not capable of returning to employment as a surgical tech.

In her capacity as a surgical tech, claimant worked full-time. She earned $18.94 per hour as a surgical tech and worked at least 40 hours per week. In her current position, Ms. Mikarovski works 35 hours per week and earns only $8.50 per hour. She has clearly sustained a significant actual loss of earnings and a reduction in her future earning capacity as a result of the March 25, 2013 work injury.

Considering claimant's age, educational background, employment history, ability to return to work in a new position, permanent impairment, permanent work restrictions, motivation, as well as all other relevant industrial disability factors, I find that Ms. Mikarovski has proven she sustained a 50 percent loss of future earning capacity as a result of the March 25, 2013 work injury.

Claimant also seeks payment or satisfaction of past medical expenses, which are contained in exhibit 13. Exhibit 13 reflects that claimant paid $250.00 in deductibles toward medical expenses incurred with Mercy Medical Center, Mercy Care, and Mercy Occupational Health. A private health insurance carrier also appears to have paid charges. Defendant asserts no challenge to those medical expenses, stipulate that the medical providers would testify the charges were reasonable, necessary and causally related to claimant's injury. (Hearing Report) Claimant is entitled to reimbursement of the $250.00 she paid and is entitled to be held harmless against any lien reimbursement claims asserted by a private health insurance carrier.

Claimant seeks charges from Christianson Chiropractic. Again, defendant stipulates the medical provider would testify those charges were reasonable, necessary and causally related to the work injury. Claimant did not establish that these charges were authorized medical care or that the chiropractic care provided a more beneficial result than could have otherwise been obtained through treatment offered and authorized by defendant.

Claimant seeks charges incurred for treatment with Dr. Segal on March 11, 2014. Claimant selected Dr. Segal for evaluation and treatment. Dr. Segal recommended alternate medical treatment but did not render any treatment different than that offered by defendant because claimant declined surgical intervention. I find that claimant failed to prove the care offered by Dr. Segal was authorized. I find that claimant failed to prove the treatment offered by Dr. Segal resulted in a more beneficial outcome than treatment otherwise offered and authorized by defendant.

Finally, claimant seeks to be held harmless against any Medicaid liens asserted for treatment and payments made to the University of Iowa Hospitals and Clinics. Claimant selected Dr. Howard at the University of Iowa Hospitals and Clinics. Neither

Dr. Howard nor any other care rendered at the University of Iowa Hospitals and Clinics was authorized by defendant. Claimant failed to prove that the care rendered at the University of Iowa Hospitals and Clinics was more beneficial than care otherwise offered and authorized by defendant. In fact, Dr. Howard concurred with the opinions of Dr. Abernathey and recommended against surgical intervention.

CONCLUSIONS OF LAW

The parties have stipulated that claimant sustained a work-related low back injury on March 25, 2013 and that the injury caused permanent disability. The parties appropriately stipulate that the injuries should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Reports) However, the parties dispute the extent of claimant's entitlement to permanent partial disability benefits.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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.

Upon consideration of all of the relevant factors of industrial disability, I found that claimant proved she sustained a 50 percent loss of future earning capacity. This is the equivalent of a 50 percent industrial disability. Therefore, I conclude claimant has proven entitlement to 250 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant seeks payment, reimbursement or an order requiring defendant to hold claimant harmless against any medical lien assertions for medical bills contained and summarized in exhibit 13. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendant stipulated that the medical providers would testify that the medical charges were reasonable, necessary and causally related to the work injury at issue. However, defendant disputed the medical expenses as being unauthorized.

Review of exhibit 13 discloses that claimant paid $250.00 out of pocket for medical expenses incurred at Mercy Medical Center. Defendant authorized this care. Defendant is responsible for payment of these charges. Iowa Code section 85.27. Claimant is entitled to an order for reimbursement of the $250.00 she paid. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860 (Iowa 2008). Claimant also documents that an additional $2,278.95 was paid by a private health insurance carrier toward the charges incurred at Mercy Medical Center. Claimant is entitled to an order requiring defendant to hold her harmless against any lien assertions for these payments. Id.

Claimant asserts a claim for payment of charges incurred at Christianson Chiropractic, University of Iowa Hospitals and Clinics, and with Dr. Segal. Having found that claimant failed to prove these charges were authorized and having found that claimant failed to prove the treatment with these providers provided a more beneficial outcome than could have been achieved through treatment with the medical providers authorized by defendant, I conclude that claimant failed to prove entitlement to any reimbursement or other payments toward those medical charges. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

Finally, claimant submitted a statement of costs and seeks assessment of those costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40.

Claimant seeks assessment of her filing fee as a cost. I conclude that claimant's filing fee totaling $100.00 is a permissible cost and shall be assessed against defendant. See 876 IAC 4.33(7).

Claimant also seeks assessment of a $300.00 fee charged by Dr. Segal for issuance of a formal written report. Such a medical report can be taxed as a cost. See 876 IAC 4.33(6); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). However, I did not find Dr. Segal's opinions to be convincing in this case. I did not give those opinions significant weight. Therefore, I conclude that Dr. Segal's charges should not be taxed as a cost in this case.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on October 9, 2014 at the stipulated weekly rate of five hundred forty-one and 09/100 dollars ($541.09).

Defendant shall pay any accrued weekly benefits in lump sum with interest pursuant to Iowa Code section 85.30.

Defendant shall be entitled to a credit for all permanent disability benefits paid to date.

Defendant shall reimburse claimant two hundred fifty dollars ($250.00) for payments claimant made toward medical charges at Mercy Medical Center.

Defendant shall pay any charges to providers, satisfy any medical lien asserted, reimburse any third-party payer, or otherwise satisfy any and all medical expenses paid to Mercy Medical Center, Mercy Care, and/or Mercy Occupational Health, as attached and summarized in claimant's exhibit 13.

Defendant shall reimburse claimant's costs totaling one hundred dollars ($100.00).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 24th day of June, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
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WHG/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.