

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMIE RAMEY,
Claimant,

vs.

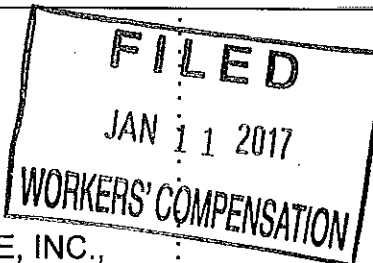
VIKING MAGAZINE SERVICE, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File No. 5055098

ARBITRATION
DECISION

Head Note Nos.: 1402.40, 1803

STATEMENT OF THE CASE

Jamie Ramey, claimant, filed a petition in arbitration seeking workers' compensation benefits from Viking Magazine Service, Inc., employer and Liberty Mutual Insurance Company, insurance carrier, both as defendants. Hearing was held on October 7, 2016 in Des Moines, Iowa.

Claimant, Jamie Ramey, and Emily Newton both testified live at trial. The evidentiary record also includes joint exhibits 1-10. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability, if any, claimant is entitled to receive as a result of the stipulated October 6, 2014 work injury.
2. Assessment of costs.

FINDINGS OF FACT

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

The parties have stipulated that claimant, Jamie Ramey, sustained an injury arising out of and in the course of her employment with Viking Magazine Service, Inc. ("Viking") on October 6, 2014. (Hearing Report) Jamie contends that she sustained permanent disability as a result of the injury. Defendants contend that she merely sustained temporary disability. (Testimony)

At the time of the October 6, 2014, work injury Jamie was working in phone sales for Viking Magazine. Her job was to read a script verbatim to the customers and to make magazine sales over the phone. Her computer was on a regular height desk and the sales people used headsets for the calls. (Testimony)

On October 6, 2014, when the sales representatives returned from their 30 minute lunch break all chairs had been removed from their cubicles. They were told that no one could have a chair until everyone got a sale. She testified that the supervisor was screaming at them about getting sales. Because Jamie is 5'11" tall she had to bend over in order to read the script verbatim from the computer screen. She also had to bend in order to type the client information into the screen for a sale. Jamie said her supervisors knew of her issues with standing. While having to stand that day Jamie was in so much pain that she had tears streaming down her face. Amber Gross, a sales manager, eventually let her have a chair. Jamie estimates that she had to stand from 12:30 until around 1:30 or 2:00. During this time she had to stand and the supervisor continued to yell about getting sales and if they did not like the environment they could get out. Jamie worked until around 4:30 and then left to go to the emergency room. (Testimony)

Jamie went to the Boone County Hospital on October 6, 2014. The notes indicate that her department was being punished that day for not having enough sales. She was forced to stand up to do her work for 90 minutes. She told the hospital that she had a history of back issues and was now having spasms. The pain radiated into her left leg and her right toes felt tingly. The diagnosis was low back pain radiating into both legs. She was prescribed valium and hydrocodone-acetaminophen. (Ex. 5, pp. 1-4)

Jamie testified that she asked her employer numerous times to see a workers' compensation doctor and she was told no. However, her pain continued so she sought treatment on her own. (Testimony)

Jamie went to the emergency room of Mary Greeley Medical Center on November 17, 2014. She reported back pain off and on since an injury in October when she was hurt at work. She took some old Tylenol #3 today and passed out. She was

brought to the emergency room via ambulance with complaints of severe back pain. She noted pain that occasionally radiated down her right leg. The diagnosis was low back pain. (Ex. 6, pp. 1-3)

On December 5, 2014, Liberty Mutual sent Jamie to see Charles D. Mooney, M.D., for a consultation for low back pain. He noted a date of injury of October 6, 2014. On that date, her employer asked her to stand and work at her desk rather than sit. This was done to motivate the employees to make more sales. Jamie noted that after 90 minutes of standing and being hunched forward she developed low back pain. Jamie told Dr. Mooney that she did have a prior history of chronic low back pain. Dr. Mooney examined Jamie and reviewed x-rays from December of 2014. His impression was that the October 6, 2014 incident had caused an exacerbation of her chronic lumbar condition including degenerative disc and degenerative facet disease of the lumbar spine and he noted that there was now evident for both SI dysfunction and myospasm. He started Jamie on Celebrex and Skelaxin. Additionally, he referred her for a course of physical therapy. He noted that she could return to work with a maximum lift of 10 pounds. No repetitive bending or lifting from the floor, and no repetitive twisting of the spine. Dr. Mooney expected her symptoms to gradually improve. (Ex. 3, pp. 1-2)

Jamie did attend some physical therapy appointments. However, she could not attend them all because by this point she had been terminated from Viking and did not have any transportation to get to Ames where the therapy was. She eventually was able to have the physical therapy in Boone. She never missed a single appointment in Boone. (Testimony)

Jamie continued to follow-up with Dr. Mooney's office. Dr. Mooney noted some evidence of radicular findings and recommended a lumbar MRI. (Ex. 3, p. 1) The lumbar MRI was performed on February 9, 2015. The MRI revealed multilevel spondylosis most prominent at the L3-L4 and L5-S1 levels. There was a moderate narrowing of the right intervertebral foramen at the L3-L4 and effacement of the left lateral recess at L5-S1. (Ex. 2) In early February she was referred to the pain clinic and her restrictions were continued. (Ex. 3, p. 4-5)

On April 10, 2015, Jamie saw Bradely W. Wargo, D.O. He provided her with lower back stretching exercise. Additionally, he performed a lumbar epidural steroid injection. She was to follow-up with Dr. Mooney. (Ex. 4, pp. 1-4)

By April 22, 2015, Jamie reported that her leg pain had markedly improved. At that time she was two weeks out from an epidural provided by Dr. Wargo. She continued to experience low back pain and some hip difficulty. She continued to have restrictions placed on her activities. (Ex. 3, p. 6)

Jamie saw Dr. Wargo again in mid-May. She reported that she continued to feel like she was having weakness in her right leg due to the pain. The doctor noted that the first epidural provided temporary relief of some of her symptoms. Dr. Wargo performed

another lumbar epidural steroid injection on May 13, 2015. She was instructed to follow-up with Dr. Mooney. (Ex. 4, pp. 5-8)

By May 20, 2015, she had undergone two epidurals and felt 85-90 percent better. Dr. Mooney released her from his care and noted that he expected her to reach MMI in three months. She was to continue using Celebrex for the next three months. She was released to return to work without any restrictions. (Ex. 3, p. 7)

Jamie testified that the first epidural helped for a few days. However, the second epidural helped a great deal for approximately three months. She did not receive 100 percent relief but the second epidural was very helpful. However, after three months the symptoms returned. The last time she saw Dr. Mooney was one week after the injection when she was feeling much better. (Testimony)

On August 24, 2015, Dr. Mooney completed a form indicating that his current diagnosis for Jamie was degenerative disc disease of the lumbar spine. He noted she had reached MMI as of August 13, 2015. He felt she had reached her pre-injury baseline and did not have any permanent partial impairment as a result of the work injury. Additionally, he opined that she did not have any permanent restrictions. No rationale was provided for his opinions. (Ex. 3, p. 8)

In October of 2015, Jamie was seen by Sunil Bansal, M.D., for an IME. Dr. Bansal reviewed medical records provided to him and also examined Jamie. Dr. Bansal noted Jamie's prior back injuries. He diagnosed Jamie with an aggravation of L5-S1 spondylosis. The doctor opined that the prolonged bending that Jamie had to perform on October 6, 2014 aggravated her underlying lumbar spondylosis at L5-S1 and caused her symptomatic radicular back pain. He noted that she had prior L5-S1 symptomatology but that was accompanied by left leg radicular symptoms, not the right leg radicular symptoms that she had experienced since the October 6, 2014 injury. He also noted that Jamie was not experiencing radicular back pain just prior to the October 6, 2014 incident. Dr. Bansal assigned 5 percent whole person impairment. As a result of the work injury he restricted her to no lifting over 25 pounds occasionally and no lifting over 10 pounds frequently. No frequent pushing or pulling, and no pushing or pulling greater than 10 pounds. He also recommended no frequent bending or performing tasks that require prolonged bending. He said she should sit, stand, and walk as tolerated. However, she should avoid sitting for more than 45 minutes, no standing more than 30 minutes and no walking more than 30 minutes at a time. (Ex. 1)

A written witness report dated October 15, 2014 from Kelley Ferneau is in evidence. Kelley was a co-worker of the claimant. She stated that when they arrived back from their 12:00 lunch break all the chairs had been removed from the cubicles. At that time, she was the floor manager. Kelley stated that around 1:00 a male worker approached her about his inability to stand any longer due to a metal plate in his leg. Kelley was also aware of a couple other workers who had back injuries. Kelley went to Emily Newton, the human resources manager, and told her that this male employee could no longer stand. Emily told Kelley to speak to Amber about the situation.

However, Kelley said the situation was ignored. At that point, the male worker sat on the floor. Then Kelley went to the call floor and saw that Jamie was in tears and said that her back was in pain. Kelley did not know what to do because she had been directed not to give anyone chairs. Kelley stated that Amber Gross did finally give a chair to Jamie around 1:30. Kelley was told to give everyone chairs around 1:50 or 2:00. (Ex. 8, pp. 1-2)

Another co-worker, Della Scaggs, also provided a witness report dated October 15, 2014. She noted that upon returning from their 30 minute lunch break all the chairs had been taken away. The workers were told to stand as a way to help motivate them to make sales. Della knew that Jamie's back was hurting from standing too long and Jamie said that she might have to go home. (Ex. 8, p. 3)

Josh Beach another co-worker also provided a witness report dated October 15, 2014. He worked near Jamie who said that her back was hurting. He noted it was possible that the pain was from a preexisting non-job related injury. (Ex. 8, p. 4)

Emily Newton provided a typed incident statement dated October 15, 2014. She stated that Amber Gross did remove all chairs from the sales representatives' cubicles. Amber announced that she did not have any documentation from any sales representatives restricting his or her ability to stand and she instructed the group that if any employee felt they could not stand they needed to speak with her before they logged on. No one reported any inability to stand. Approximately 30 minutes later Amber overheard Jamie complaining to Ella about back pain due to her standing. Amber told Jamie she could get a chair to sit but Jamie said no one else had a chair so she was not going to do that. Around 1:30, Amber again overhead Jamie complaining to Della about back pain. So Amber had Jamie come talk to her at her desk on the perch. Jamie was again offered a chair to sit but she declined the chair. Amber again told her to get a chair and sit; Jamie did. Around 2:00 all employees were allowed to have a chair. Around 4:30 Jamie told Amber that she had to leave work and go to the emergency room because her back was hurting and she just did not feel good. Amber allowed Jamie to leave and told her to bring a doctor's slip back with her. (Ex. 8, pp. 5-6) Emily also testified at the hearing. She said on the date of the injury the employer had created a "chair-free environment" to help open the diaphragm and generate energy. (Testimony)

Amber Gross, sales manager, also provided a typed incident statement which she authored on October 14, 2014. Her statement is remarkably similar to that of Emily Newton's which was prepared the following day. (Ex. 8, pp. 7-8)

The first issue that must be addressed is whether Jamie sustained permanent disability as a result of the stipulated work injury. There is no dispute that the employer took Jamie's chair away from her for a period of time on the date of the injury. There is no dispute that Jamie was forced to stand during this time, bend over to read her script from her monitor, and also bend over to enter any information into the computer. Neither party disputes that Jamie had prior back problems. There are two expert

opinions in this matter. Defendants rely on the opinion of Dr. Mooney who last saw Jamie within weeks of her last epidural. Jamie testified that this was before the very effective epidural had worn off. Because Dr. Mooney has not been given the opportunity to examine Jamie since the epidural has worn off I do not find his opinions to carry as much weight as the opinions of Dr. Bansal. Dr. Bansal was given the opportunity to examine Jamie after the last epidural had worn off. Dr. Bansal's report indicates that he was aware of Jamie's prior back problems, her treatment following this work injury, and her condition at the time of his examination. For these reasons, I find the opinions of Dr. Bansal carry the greatest weight in this case. I find that Jamie has sustained permanent disability as a result of the work injury.

Because Jamie has sustained permanent injury to her back her injury shall be compensated on an industrial disability basis. I find that she has sustained 5 percent whole person functional impairment. Additionally, I find that Jamie has the following restrictions as a result of the work injury: no lifting over 25 pounds occasionally; no lifting over 10 pounds frequently. No frequent pushing or pulling, and no pushing or pulling greater than 10 pounds; no frequent bending or performing tasks that require prolonged bending, sit, stand, and walk as tolerated; avoid sitting for more than 45 minutes, no standing more than 30 minutes and no walking more than 30 minutes at a time.

Jamie testified that she continues to have constant pain. She is better than she was before she had any epidurals but she is worse than when she last saw Dr. Mooney. She has pain every day, some days worse than others. On bad days her pain shoots down into her leg and her foot is numb. She has to log roll to get out of bed each day. She prefers not to sit more than 30 minutes at a time and has to shift her weight from side to side while she is sitting. This testimony is consistent with how Jamie sat during the hearing. She testified that prior to her work injury at Viking she did not struggle with sitting for long periods of time. In fact, she spent most of her days at Viking sitting for long periods. Her pain interferes with her ability to get a good night's rest. She estimates she wakes around five times per night. She also has difficulty walking for long periods of time. (Testimony)

Jamie was terminated from Viking. They told her the termination was due to her not making sales. Jamie testified that prior to the injury she did not have difficulty making sales. According to Jamie, at one point Viking paid her \$12.00 per hour; this included incentive pay. (Testimony)

She is currently working at a Baymont hotel. She started working there on December 11, 2014, as a front desk clerk. She is now the hotel manager. She is paid \$11.75 per hour. She works 40 hours per week with some overtime. She oversees housekeeping, maintenance, and basically the day-to-day operations of the hotel. She walks the halls and checks the mail. Her duties include inspecting rooms after they have been cleaned. She is able to sit as needed to rest and sitting on a bed also allows her to view the room as a guest would. This is not a very physically challenging job. She also has an ergonomically correct desk. (Testimony)

At the time of hearing Jamie was in her late 60's and lived in Boone, Iowa. She was home schooled as a child. She obtained her GED around 1997. She did attend Marshalltown Community College for one year and then went to the University of Northern Iowa. She obtained her BA from UNI in 2006. Her work history includes working as a house manager at a Mosaic home. She supervised staff and helped schedule appointments for families and social workers. Also, when the home was short-staffed she would fill-in for her staff. She has also worked teaching safety classes such as CPR. She has experience working at group shelters as a house manager at night. This involved performing bed checks and making sure the residents followed the rules and took their medications. She has also worked as a case manager for children. In this role she encouraged five year olds and preschoolers to have good behavior; she also completed paperwork for funding and case reports. She has also owned her own business as a wedding singer and karaoke DJ. However, she has not done this for several years due to the travel and late nights. Her work experience also includes welding, changing motors, working on conveyor belt. She has performed factory work including sewing. (Testimony; Ex. 10)

Considering Jamie's age, educational background, diverse employment history, ability to retrain, motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 35 percent loss of future earning capacity as a result of /her work injury with Viking.

Claimant is also seeking an assessment of costs. Because claimant was successful in her claim I find that an award of costs is appropriate. Specifically, claimant is seeking the filing fee in the amount of \$100.00. I find that this is an appropriate cost. Defendants are assessed costs in the amount of \$100.00.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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.

Based on the above findings of fact, I conclude that Jamie has sustained permanent disability as a result of the work injury. Based on the above findings of fact, I conclude that Jamie sustained 35 percent loss of industrial disability. Therefore, defendants shall pay her 175 weeks of permanent partial disability benefits commencing on the stipulated date of May 20, 2015.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was generally successful in her claim. Costs taxed by a deputy may include filing fees. I conclude it is appropriate to assess the cost of the filing fee to the defendants. Thus, defendants shall pay claimant costs in the amount of one hundred and no/100 dollars (\$100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of one hundred ninety-two and 25/100 dollars (\$192.25).


Defendants shall pay one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on the stipulated date of May 20, 2015.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant's costs in the amount of one hundred and no/100 dollars (\$100.00).

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

Signed and filed this 11th day of January, 2017.


ERIN Q. PALS
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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.