BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VANESSA BLANCO,

Claimant,

vs.

HY-VEE, INC.,

Employer,

and

EMC PROPERTY & CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 5063313

ARBITRATION

DECISION

Head Notes: 1803, 1108

STATEMENT OF THE CASE

Claimant, Vanessa Blanco, filed a petition for arbitration seeking workers' compensation benefits from Hy-Vee, Inc., the employer and EMC Property & Casualty Company, the insurance carrier.

The matter came on for hearing on March 20, 2018, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Sioux City, Iowa. The record in the case consists of Claimant's Exhibits 1 through 2; Defense Exhibit A; Joint Exhibits 1 through 4; as well the sworn testimony of claimant, Vanessa Blanco as well as witness, Yesenia Blanco, and defense witnesses, Amy Kramer. Marcia Mahon was appointed as the court reporter for the proceedings. The parties briefed this case and the matter was fully submitted on March 27, 2018.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted.

The parties have stipulated to most matters in this case and have done a good job of narrowing the issues for determination. The stipulations presented in the hearing report are accepted and are binding upon the parties.

It is stipulated that claimant suffered an injury which arose out of and in the course of employment on December 27, 2014. The primary issue is whether this injury resulted in any permanent disability. It is stipulated that if the claimant is entitled to permanent disability benefits, her disability is industrial. The defendants dispute that claimant has suffered any permanent disability. The parties stipulate that the appropriate commencement date for permanent disability benefits is February 28, 2017.

The parties stipulate to the elements which comprise the rate of compensation. The parties contend the correct rate of compensation is $185.49 per week. Affirmative defenses have been waived.

The claimant is not seeking medical expenses. The claimant seeks reimbursement for her independent medical evaluation (IME) as set forth in Claimant's Exhibit 2. Alternatively, claimant seeks the IME expense as a report cost. The defendants dispute this bill on the basis that it is unreasonable. The parties agree that no permanency has been paid to date.

FINDINGS OF FACT

Vanessa Blanco is a bright, pleasant, 19-year-old student at Indian Hills Community College. She testified live and under oath at hearing. I find her testimony to be highly credible. Her testimony was consistent with the medical documentation in the file. While she appeared nervous at hearing, there was nothing about her demeanor which caused me any concern about her truthfulness. She presented well at hearing and appears to be bright and employable.

Ms. Blanco graduated from high school in 2017 in Estherville, Iowa. She was an "A" student. She worked in high school both at Hy-Vee as a cashier and at a local movie theatre. At the time of hearing, she attends Indian Hills Community College, studying office management and international business. In addition to being bright and industrious, claimant is athletic. She is a track and cross country star who qualified for state competition and now competes at a high level at Indian Hills.

It is stipulated that Ms. Blanco suffered an injury which arose out of and in the course of her employment for Hy-Vee on December 27, 2014. She was a minor at the time. On that date, she was lifting packages or cases of bottled water and developed right shoulder pain. That evening, her right shoulder was sore and painful. The following morning, she could barely move it. She sought treatment in early January 2015, at Estherville Medical Clinic where the injury is documented. (Joint Exhibit 1, page 1) The diagnosis at that time was "[m]ild brachial plexopathy." She was provided with medications and provided a 5-pound lifting restriction with her right arm. (Jt. Ex. 1, p. 2) She followed up at the clinic in February and an MRI was recommended. (Jt. Ex. 1, p. 6) The MRI was performed on February 27, 2015. It was determined there was a possible labral tear, but it was not definitive. (Jt. Ex. 2, p. 1) Her care was referred to John Leupold, M.D., at NWIA Bone Joint & Sports Surgeons. Ms. Blanco first saw Dr. Leupold on March 13, 2015.

Dr. Leupold suspected "an occult superior labrum anterior and posterior lesion." (Jt. Ex. 3, p. 1) He continued her on anti-inflammatory medications and recommended physical therapy. She performed physical therapy for a couple of months at Avera Holy Family Hospital in Estherville. (Jt. Ex. 2, pp. 3-11)

In May 2015, Dr. Leupold documented that she made substantial progress in therapy but she was still having difficulty performing her exercises. He increased her lifting restriction to 15 pounds (although he limited her forceful gripping, pushing and pulling). (Jt. Ex. 3, p. 2) Dr. Leupold continued to follow up with Ms. Blanco throughout 2015, and eventually performed an injection for pain in October 2015. (Jt. Ex. 3, p. 6) There was some waxing and waning of symptoms throughout this time. She had some immediate increase of pain right after the injection and then it felt much better. (Jt. Ex. 3, p. 8) In December 2015, she was increased to a 25-pound lift restriction.

Throughout 2015, Ms. Blanco remained on restrictions. Her mother, Yesenia Blanco, testified that she missed some school and athletic activities due to pain throughout this time. In January 2016, she continued follow up treatment with Dr. Leupold. He continued very conservative care until March 2016, when he opined that she was not going to get better without surgical intervention. (Jt. Ex. 3, p. 12) Surgery was performed on June 14, 2016 described as "right shoulder arthroscopy and bursoscopy." (Jt. Ex. 2, p. 12) Normal, post-surgical follow-up examinations were performed thereafter. She continued to have right shoulder pain in any event. (Jt. Ex. 3, p. 24) She had an EMG, which was normal. She received some physical therapy throughout this period of time. In December 2016, Dr. Leupold declared that she had a "wonderful" clinical result from the surgery and she would be released to full-duty in about a month. (Jt. Ex. 3, p. 26) She last saw Dr. Leupold in February 2017. She reported that she occasionally gets low-level discomfort along her left scapular region. (Jt. Ex. 3, p. 28) She was allowed to begin track at that time. She was released without restrictions and instructed to follow up as needed.

Ms. Blanco testified that her symptoms did not fully resolve. Specifically, she testified that since being released by Dr. Leupold she is still unable to reach behind her back. Her shoulder gets fatigued from overuse, such as driving long distances, and she has some difficulty or discomfort performing activities of daily living such as sweeping or vacuuming. Sometimes her workouts for track cause discomfort as well. She has had to alter her weight program at Indian Hills due to her shoulder discomfort. She has difficulty writing for extended periods. She still participates in athletic activities at Indian Hills. At some point, she switched from working as a cashier to working in customer service, which is less physically demanding. I find her credible, as her testimony is consistent with Dr. Leupold's final report, that she continued to have some pain at times. While he documented Ms. Blanco's range of motion at that time, his report is not entirely clear as to whether her internal range of motion was actually full. He stated her shoulder "internally rotates 80 degrees. This is an improvement even from her last exam." (Jt. Ex. 3, p. 28) In March 2017, however, Dr. Leupold prepared a report for the insurance carrier that claimant had no permanent impairment from the injury pursuant to The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Def. Ex. A)

Sunil Bansal, M.D., evaluated Ms. Blanco in June 2017. He reviewed records, examined the claimant and prepared a classic 85.39 IME report. His report is thorough and credible. At that time, Ms. Blanco reported she had constant right shoulder pain, as well as intermittent sharp pains. He opined that claimant suffered a 3 percent body as a whole impairment based upon range of motion. He made specific range of motion measurements and rated them properly pursuant to The AMA Guides, Fifth Edition. (Cl. Ex. 1, p. 10) He recommended rather severe permanent restrictions of no lifting greater than 15 pounds occasionally, 10 pounds frequently, and 5 pounds occasionally over the right shoulder.

Dr. Leupold reviewed Dr. Bansal's report shortly thereafter and opined the rating given was reasonable; however, it was based upon different examination results than he used.

I find that the impairment rating assigned by Dr. Bansal is the best indication of claimant's impairment in the record. It is a minimal rating which accounts for range of motion issues. Based upon the record before me, I find the claimant's range of motion has been impacted by her injury and resulting surgery. In addition, she continues to have documented pain and fatigue in her shoulder, which apparently is not assessed in either rating. The greater weight of evidence supports a finding that Ms. Blanco does have some degree of functional disability in her right shoulder and arm as a result of her December 2014 work injury.

CONCLUSIONS OF LAW

The first question is whether the admitted December 27, 2014, work injury is a cause of permanent disability, and if so, the extent of such disability. By a preponderance of evidence, I find that the December 27, 2014, work injury is a proximate cause of disability in the claimant's right shoulder.

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).

The expert opinions as to the medical impairment in this case are conflicted. Dr. Leupold opined that she had no shoulder impairment, although he documented her ongoing difficulty with pain when he released her. He also documented her range of motions as follows. "She externally rotates 95 degrees and internally rotates 80 degrees. This is an improvement even from her last exam." (Jt. Ex. 3, p. 28) His exam did not provide a chart of each of the ratable impairments possible for range of motion, nor document her precise measurements in each of these categories. Dr. Bansal's report did. (Cl. Ex. 1, p. 10) Reading the entire medical record as a whole, combined with Ms. Blanco's credible testimony, I find that she does suffer from some functional range of motion deficit as a result of the stipulated work injury.

Separate and apart from the range of motion deficits, Ms. Blanco suffers from pain and fatigue in her right shoulder, which I find credible. Ms. Blanco experienced the original injury in December 2014. She was treated conservatively with significant medical restrictions and medications for a year and a half before surgery was performed. While the surgery was a success overall, I find it likely that she has some permanent damage from the injury. That is to say, her shoulder is clearly not the same as it was before she had the accident.

For these reasons, I find the claimant has met her burden that her injury is a proximate cause of disability.

The next issue is the nature and extent of her permanent partial disability.

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 Comm'r. Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Since the disability is to the claimant's right shoulder, her entitlement to disability benefits is calculated industrially.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

The claimant is young, industrious and bright. She competes in high level athletics. She appears to have a great future ahead of her. At the time of hearing she was 19 years old and attending community college for business (office management and international business).

Her disability is located in her right shoulder. She had a very good outcome from shoulder surgery; however, she does have some ongoing symptoms and a minor permanent partial impairment. Her condition has a minor impact on her range of motion and she still experiences pain and fatigue in her shoulder. This does impact her activities of daily living. Her employer is still Hy-Vee. They appear to approve of her work performance and she is able to perform customer service work, which is generally higher level work than that of cashier. I find claimant is likely to advance out of service sector work into professional work of some type. She has no restrictions from her treating surgeon. Dr. Bansal recommended severe restrictions which I find are over-the-top and unlikely to be followed in any event. While the claimant may have to watch what she is doing in terms of overhead work in the future, the greater weight of evidence suggests that she does not need any formal permanent restrictions in place. I find that her industrial disability is minimal. This disability, however, has had, and is likely to have a minor negative impact on her employability. Having reviewed all of the appropriate factors I find she has proven a 10 percent industrial disability. This entitles claimant to 50 weeks of benefits at the stipulated rate.

The final issue is reimbursement of the IME expenses set forth in Claimant's Exhibit 1.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Claimant seeks reimbursement of $2,542.00 for Dr. Bansal's IME. The defendants contend these expenses are unreasonable. Unfortunately, I have no basis of comparison in this record of evidence. This amount does seem high considering the fact there are very few records. I have no basis to find this amount to be per se unreasonable. The fee is within a range of reasonableness which has been awarded by this agency in the past. The defendants are responsible for the IME expenses.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant fifty (50) weeks of permanent partial disability benefits at the rate of one hundred eighty-five and 19/100 dollars ($185.19) per week from February 28, 2017.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall pay claimant's IME expenses as set forth in Claimant's Exhibit 1, page 11, in the amount of two thousand five hundred forty-two and 00/100 dollars ($2,542.00).

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 13th day of February, 2019.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Mary C. Hamilton
Attorney at Law
PO Box 188
Storm Lake, IA 50588
mary@hamiltonlawfirm.com

Dennis R. Riekenberg
Attorney at Law
9290 West Dodge Rd., Ste. 302
Omaha, NE 68114-3320
driekenberg@ctagd.com

JLW/sam

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.