BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BROOKE REITER,

Claimant,

vs.

FLOWERS FOODS, INC., d/b/a SPECIALTY BLENDING CO., L.L.C.,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Insurance Carriers,
Defendants.

File No. 5049419

ARBITRATION DECISION

Head Note No.: 1108

STATEMENT OF THE CASE

Brooke Reiter, the claimant, seeks workers' compensation benefits from defendants, Flowers Foods, Inc. d/b/a Specialty Blending Company, LLC, the alleged employer, and its insurer, ACE American Insurance Company as a result of an alleged injury on February 1, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 2, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on March 11, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. Joint Exhibits were marked numerically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "CEx. 1-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On February 1, 2013, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking temporary total or healing period benefits as there was no work time lost as a result of the stipulated injury.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. If I award permanent partial disability benefits, they shall begin on February 2, 2013.

5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $1,318.00. Also, at that time, she was married and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $826.15 according to the workers' compensation commissioner's published rate booklet for this injury.

6. Defendants paid no weekly benefits for the stipulated injury prior to hearing.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to permanent disability benefits; and,

II. The extent of claimant's entitlement to medical benefits.

III. The extent of defendants' entitlement to a credit against any award in this case based on its right to subrogation and its asserted lien against benefits from a third party settlement.

At the hearing, there was considerable testimony offered by defendants that claimant did not report an injury from the motor vehicle accident on February 1, 2013, which is the date of injury in this case. However, a lack of notice defense under Iowa Code section 85.23 was waived in the hearing report and there was no motion at hearing to amend that report. I mentioned this problem to defense counsel at hearing and asked her to explain this inconsistency in the post-hearing brief. In the post-hearing brief, defendants continue to complain that they were not immediately informed of an injury, but defendants did not address the waiver of the notice defense in the brief.

Therefore, the waiver of the lack of notice defense shall stand. However, as will be explained below, claimant admits she did not request medical treatment by defendants for her injury until August 28, 2013.

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Brooke, and to the defendant employer as Specialty Blending.

Brooke is 30 years of age. She has a high school education. After high school, she joined the US Army and served for 6 years. After leaving the Army, she joined the Iowa National Guard and served another 4 years until her honorable discharge in March 2009. She was trained and served as an X-ray technician in the Army, but did

not state at hearing her function in the Guard. Brooke testified that from her Army training, she learned there was a risk of injury to an unborn child from x-ray radiation. Brooke states she was trained to always ask a female patient whether she was pregnant and would not proceed with an x-ray without both the doctor's and the patient's consent after being informed of the risks and then only with extra protective gear to protect the unborn child.

While she was in the National Guard, she attended Iowa State University and in 2009 received a Bachelor of Science degree in Food Service. Brooke worked for General Mills as a quality control specialist and production supervisor for three years after graduating from college. She began working for Specialty Blending on April 9, 2012 as a quality manager at its facility in Cedar Rapids, Iowa. In this position, Brooke assumed responsibility over product quality and safety functions at the facility which involves conducting tests, audits for compliance with food safety regulations, conducting customer surveys and supervising laboratory employees and procedures. No specific physical requirements are contained in the job description. (Ex. A-8:9) Brooke testified that she was required to lift and carry 50-pound sample bags which were loaded and unloaded into and out of her vehicle. Brooke states that she required assistance from co-workers in handling the sample bags after her work injury in this case.

Brooke voluntarily resigned from Specialty Blending and began working for Cargill in March 2014 doing much of the same work as she did at Specialty Blending, but at a higher salary. She was receiving an annual salary in the mid $60,000.00 at Specialty Blending. She is currently receiving $85,000.00 annually at Cargill.

Brooke injured her right shoulder in the Army and received corrective surgery. She later reinjured her right shoulder in the Guard, which required a second surgery. She currently receives a monetary benefit from the National Guard for a 15 percent body as a whole disability as a result of her shoulder injury, consisting of $258.00 per month. (Ex. E-26) Brooke states that she is not seeking benefits for a right shoulder condition in this proceeding.

The stipulated work injury involves the neck. While driving to a retail store to purchase totes for the laboratory, Brooke was struck in the rear by another automobile. Brooke does not know the speed of the vehicle that struck her, but described the collision as "strong hit." The damage repair estimate to Brooke's vehicle was $1,007.34. Although the police were contacted, a police officer was not dispatched to the scene. Brooke and the other driver were able to drive their vehicles to a nearby parking lot to exchange information. Brooke stated that she then reported the accident to the plant manager at Specialty Blending using her cell phone and told him that she was going to a local hospital emergency room to check on the status of her unborn child as she was pregnant at the time. This is confirmed at hearing by the plant manager, Carmen Keifer. After a few hours of monitoring, the baby was found to be uninjured. Brooke states that she told emergency room staff that she had a stiff neck, but no treatment was prescribed. Emergency room physicians, however, did diagnose a neck sprain from the accident. These doctors also state that the other driver was injured. (JEx. 2-1)

Brooke testified that until her child was born in April 2014, she refused x-ray requests by physicians, fearing injury to her child based on her training in the Army. Defendants' medical expert in this case, Robert L. Broghammer, an occupational medicine physician, disagrees. This is a moot issue as no doctor has stated that the lack of an x-ray delayed or worsened her injury. (JEx. 6-8:9) As noted by Dr. Broghammer, a doctor could have taken an MRI, which does not produce harmful radiation. (Id.)

Brooke admits that she was asked if she needed treatment by Specialty Blending management, but refused initially. When her neck began to worsen, she obtained extensive chiropractic care on her own from Logan Jenkins, D.C., beginning on February 4, 2013. Initial payments for this treatment came from State Farm Insurance on behalf of Cargill, her current employer. (JEx. 8-17) Treatments after March 15, 2013 and extending until August 27, 2013 remain unpaid. (JEx. 8) Apparently, Dr. Jenkins is not currently billing claimant for his unpaid treatment. Brooke testified that she did not want invasive treatment and chose chiropractic care as the safest care for her unborn child.

Brooke was treated by her family doctor, Paul Thomas, D.O., on March 5, 2013 for complaints related to her pregnancy. Neck pain was not discussed or treated by Dr. Thomas at this time. (JEx. 3-4:6)

Brooke states that she did not significantly improve from Dr. Jenkins' chiropractic care. Apparently, on August 28, 2013, Brooke finally requested treatment from defendants according to her manager, Keifer. Keifer stated that she was told that defendants are not liable for treatment she obtained on her own. Brooke testified that she was not directed to treat anywhere by defendants at this time. There is no evidence to the contrary in the record. She was eventually directed to see Dr. Broghammer, an occupational medicine specialist, who first examined her on November 19, 2013. However, as the second paragraph of his letter report of that visit clearly states, the examination was for an independent medical examination, not for treatment and no doctor-patient relationship was to exist after this visit. (JEx. 6-7) She was seen again in January 2016, but again only for a second independent examination, not for treatment. (JEx. 6-12) In fact, a request by claimant for payment of past medical bills and current treatment by Sunny Kim, M.D., was denied by defendants on October 15, 2014 on the basis of the delay in reporting residual complaints to defendants and the views of Dr. Broghammer in his first examination of claimant. (CEx. 2-1:2) There was no direction to any other treatment provider in his denial.

Brooke again, on her own, sought treatment of her neck problems with her family doctor, Dr. Thomas, on August 29, 2013. Upon a history of neck pain from a whiplash injury on February 1, 2013, Dr. Thomas treated Brooke with a prescription dosage of ibuprofen and referred her to Sunny Kim, M.D., a specialist in physical medicine and rehabilitation. (JEx. 3-5:9) Dr. Kim treated Brooke beginning on September 12, 2013 and this treatment continues today. (Ex. 4) Dr. Kim initially tried "dry needle" procedures a few times, but that did not help and on March 12, 2015, the doctor notes that overall there was an increase in her pain levels since his first treatment.

(JEx. 1-63) Brooke did not return to Dr. Kim until November 2014, reporting a gradual onset of pain over the last two years. (JEx. 1-65) In December 2015, Dr. Kim began periodic Myoblock (Botox) injections to deaden the nerves, which he believes is the course of her future treatment. (JEx. 1-67) Initially, the doctor diagnosed simply chronic neck pain from the February 1, 2013 injury, but now has diagnosed cervical dystonia. (Ex. 1-66)

On January 4, 2015, Dr. Kim opined at the request of Brooke's attorney, that Brooke's continued symptoms of chronic pain, muscle guarding, spasm and lost range of neck motion from her injury on February 1, 2013 is permanent and she suffered a five percent permanent partial impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He also opines she should have permanent restrictions of no frequent lifting, pushing or pulling greater than 40 pounds. (JEx. 4-18) In his deposition, Dr. Kim stated that her current neck condition could have occurred without injury. (JEx. 1-42) Until his deposition on January 28, 2016, he was unaware of Brooke's chiropractic care with Dr. Jenkins after the injury. There was no discussion by Dr. Kim in this deposition about chiropractic care before the February 1, 2013 motor vehicle accident.

When she was hired by Specialty Blending, Brooke completed a medical history form, which indicated that her past right shoulder problems have caused her to have a stiff neck. However, a physician who performed the pre-employment screening identified no medical issues. (Ex. A-6) The plant manager, Kiefer, testified that when Brooke was hired, Brooke stated that she could not lift 50 pounds and she was told that the job did not require such lifting and if necessary, she would receive help from co-workers. Brooke denies this, stating that the only time she asked for help in lifting was during her first pregnancy, which began before her work injury in this case. She clearly was not pregnant at the time of her hiring as her first child was not born until April 2013. There is no indication of this accommodation by Specialty Blending in Brooke's personnel records submitted into evidence.

Brooke admits to a previous motor vehicle accident in 2007 or 2008 and treatment for a month by a chiropractor at that time for neck strain. She said that she improved after this treatment.

However, there is no dispute that Brooke had periodic chiropractic care prior to the stipulated work injury. Brooke testified that this was primarily for her back and she is not claiming injury to the back in this proceeding, but since chiropractic adjustments address the entire spine, her neck was involved in the treatment. However, Brooke testified she would seek treatment when her neck occasionally "kinked."

On January 12, 2012, Brooke was treated by Rod Shipley, D.C., for neck pain and right shoulder pain following a recent ski trip to Colorado. She reported a previous whiplash injury and chiropractic care for that injury. She was treated with spinal manipulation. (JEx. 9)

On February 9, 2012, Brooke began treating with Kelly Bonar, D.C., for primarily neck pain. (JEx. 7-1) He again treated Brooke for the same condition on February 16, 2012. The next treatment for neck pain was on November 13, 2012 and again on January 25, 2014, only a few days before the injury in this case. After her injury, Dr. Bonar adjusted Brooke for neck pain 8 times from March 25, 2014 through September 1, 2015. These manipulations by Dr. Bonar were in addition to the adjustments by Dr. Jenkins between February and August 2014. It is unknown whether these chiropractors were aware of the other's treatment, but there is no mention of the other chiropractors in their records in evidence.

In his November 2013 report, Dr. Broghammer opined that further treatment was not necessary as it would not improve her condition and he would expect her to recover. He recommended that the initial hospital treatment should be paid by defendants, but not the ongoing care that she sought on her own. (JEx. 6-8:9)

After becoming aware of her prior chiropractic care, Dr. Broghammer, in his second report in January 2016, opines that Brooke's ongoing neck complaints at that time were not casually related to the motor vehicle accident on February 1, 2013. He states they were the result of her prior chronic neck condition resulting from a prior whiplash injury.

Ultimate Findings:

I find that Brooke suffered an aggravation of a prior neck condition on February 1, 2013 as a result of a whiplash injury in a motor vehicle accident on that date. The initial hospital diagnosis was neck strain.

At the time, for reasons personal to her, Brooke did not seek treatment from defendants for care after her hospital visit and chose to go to two chiropractors, one of whom treated her neck problems before the February 1, 2013 accident. It is clear that claimant suffered a significant increase in her neck pain condition from the accident because the frequency of the chiropractic care dramatically increased. Given Brooke's comments about the success of these chiropractic adjustments, chiropractic treatment did not improve her condition and was not beneficial to claimant or the employer.

On August 28, 2013, Brooke finally requested care from defendants for the injury. This was denied and she was compelled to seek care on her own from her personal physician, Dr. Thomas, and subsequently, a pain management physician, Dr. Kim. Dr. Kim commenced treatment on September 12, 2013 and this continues today. However, his initial treatment ended on October 31, 2013. Treatment ended then for about 15 months until Brooke returned to Dr. Kim in February 2015 seeking treatment for continued neck pain. (JEx. 4-6) Dr. Broghammer's first report, opining continued treatment was not necessary, came in November 2013. I find that claimant plateaued and returned to her baseline after October 31, 2013. Consequently, I find the treatment fee by Dr. Thomas in August 28, 2013 ($150.00), and treatment by Dr. Kim until October 31, 2013 ($485.00) to be reasonable charges for the reasonable and necessary treatment of the temporary work injury. (CEx. 4 & 5) This includes the physical therapy

fees at Rec Center Physical Therapy in the amount of $1,089.00. (Ex. 6) I also find the initial hospital visit charges in the amount of $786.00 after the accident constituted reasonable and necessary treatment of the work injury. (CEx. 3)

I am unable to find that the work injury of February 1, 2013 is a cause of permanent impairment or permanent disability. Claimant argues that I should reject the views of Dr. Broghammer because his past medical opinions are biased for employers. That may well be, but Dr. Broghammer was the only doctor who states that he was aware of Brooke's medical history before February 1, 2013. I cannot give much weight to the views of Dr. Kim, who has not been shown to have been aware of Brooke's past whiplash injury and her past chiropractic care for chronic neck pain.

At no time was Brooke taken off work due to her work injury of February 1, 2013. She left her job at Specialty Blending only to seek a higher paying job opportunity.

CONCLUSIONS OF LAW

I. 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 treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

In this case, claimant failed to show by a preponderance of the evidence that the work injury was a cause of permanent disability. Also, she was not absent from work

due to this work injury. Consequently, claimant is not entitled to weekly compensation benefits.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, the initial emergency room care at St. Luke's hospital on February 1, 2013 was reasonable emergency care for the work injury of February 1, 2013.

The chiropractic care from Drs. Bonar and Jenkins was not authorized. This was obtained by claimant on her own and no request for care was made prior to obtaining this treatment. I did not find the care beneficial. Therefore, defendants are not liable for such treatment. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

However, I found that after a request for treatment was made, no treatment was authorized. An authorization defense is not available to defendants after denial of liability for a condition sought to be treated. Whether or not the care was beneficial is irrelevant in this situation. Id.; R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119 (Iowa 2003); West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999); Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, Vol. I, No. 3, Industrial Commissioner Decisions, 611 (March 27, 1985); Barnhart v. MAQ Incorporated, I Iowa Industrial Comm'r Report 16 (App. March 9, 1981).

I found that the treatment after October 31, 2013 is not related to the work injury.

Therefore, defendants are liable for the following:

St. Luke's Hospital, $786.00;

Dr. Thomas, $150.00;

Rec Center Physical Therapy, $1,059.00

Dr. Kim, $485.00

Some of these bills were paid by Specialty Blending's group medical insurance carrier, Blue Cross/Blue Shield of Alabama. (Ex. G)

It is unknown whether claimant paid any co-insurance or deductible potions of the medical bills. If there are some, defendant must reimburse her.

III. Defendants seek a credit against their liability in this case under their right to subrogation and lien pursuant to Iowa Code section 85.22. At hearing, defense counsel

explained that the employer is self-insured and that Blue Cross/Blue Shield of Alabama is only a claims administrator. It appears that their lien was established according to Exhibit B. In her post-hearing brief, claimant recognizes the lien and intends to honor it.

However, this agency has no subject matter jurisdiction to enforce any right of subrogation or lien rights under Iowa Code section 85.22. This is left to the district court. There is no case law that suggests that this agency must provide a credit to enforce the lien.

ORDER

1. Defendants are liable for the medical bills set forth in this decision and shall hold claimant harmless against any lien by a group insurance carrier. Defendants shall reimburse claimant for her out-of-pocket medical expenses.

2. As claimant for the most part lost in this proceeding, claimant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33.

Signed and filed this 7th day of April, 2016.

LARRY WALSHIRE
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.