BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SUN MIRELES,

Claimant,

vs.

TITAN TIRE CORPORATION,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

FILED

MAR 15 2017

WORKERS COMPENSATION

File Nos. 5052794, 5052795

ARBITRATION DECISION

Head Note Nos.: 1402.30, 1803, 1804
2501, 2502, 2907

STATEMENT OF THE CASE

Sun Mireles, claimant, filed two petitions for arbitration against Titan Tire Corporation, as the employer, and Zurich American Insurance as the insurance carrier. An in-person hearing occurred on November 23, 2016.

The parties filed a hearing report for each contested case proceeding at the commencement of the arbitration hearing. On those hearing reports, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes claimant's Exhibits 1 through 24 and defendants' Exhibits A through P. All exhibits were admitted without objection. Claimant testified on her own behalf. No other witnesses were called to testify.

At the conclusion of the arbitration hearing, counsel for the parties requested an opportunity to file post-hearing briefs. The request was granted. This case was considered fully submitted to the undersigned upon the filing of the parties' post-hearing briefs on December 23, 2016.

ISSUES

In File No. 5052794 (October 21, 2013 date of injury), the parties submitted the following disputed issues for resolution:

1. Whether the October 21, 2013 left knee injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

2. Whether claimant is entitled to reimbursement of an independent medical evaluation fee charged by Sunil Bansal, M.D.

3. Whether costs should be assessed against either party.

In File No. 5052795 (September 3, 2014 date of injury), the parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits, including a claim for permanent total disability.

2. Whether claimant is entitled to reimbursement of past medical expenses.

3. Whether claimant is entitled to reimbursement of an independent medical evaluation fee charged by Sunil Bansal, M.D.

4. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

On October 21, 2013, Sun Mireles sustained a stipulated left knee injury while performing her work duties at Titan Tire Corporation. She received conservative care for the left knee injury through an authorized physician, Stephen Ash, M.D. On December 20, 2013, Dr. Ash noted in his clinical note that claimant, "feels ready to do her normal job." (Exhibit 1, page 7) Dr. Ash declared maximum medical improvement for claimant's left knee on that date and released Ms. Mireles to return to work without restrictions as a result of her left knee injury. (Ex. 1, p. 8)

Ms. Mireles returned to Dr. Ash for additional care on February 6, 2014. Dr. Ash administered another steroid injection into claimant's left knee. However, he reiterated that maximum medical improvement occurred on December 20, 2013 and again released claimant to return to work without restrictions. (Ex. 1, p. 10) Dr. Ash offered no opinion regarding whether claimant sustained permanent impairment relative to her left knee injury. Claimant has not sought medical treatment for the left knee since that date. (Claimant's testimony)

Claimant did obtain an independent medical evaluation performed by Sunil Bansal, M.D. on April 29, 2016. With respect to the left knee, Dr. Bansal opined, "[t]he mechanism of direct impact to the knee and her immediate clinical presentation is consistent with her right [*sic*] knee contusion." (Ex. 14, p. 166) Of course, the claimant's injury on October 21, 2013 was to the left knee. It is presumed that Dr. Bansal's report contains a typographical error in this respect. Dr. Bansal ultimately concludes that claimant has "[n]o ratable impairment" of the "left knee." (Ex. 14, p. 168)

Defendants also had Ms. Mireles evaluated by an occupational medicine physician, Charles D. Mooney, M.D. on October 18, 2016. (Ex. B) Dr. Mooney addressed the left knee injury, stating:

> Her clinical examination is nonphysiologic and does not support any internal derangement of the knee, nor any evidence or objective findings for her ongoing complaints. As such, it is my opinion that her left knee pain is related to degenerative osteoarthropathy of the knee and not related to any specific injury or incident.

(Ex. B, p. 16) Dr. Mooney analyzed the claim of permanent disability to the left knee, opining, "[n]o impairment is applicable for the left knee complaints as there are no objective findings upon which to base such impairment." (Ex. B, p. 17)

Although claimant sustained an admitted left knee injury on October 22, 2013, none of the treating or evaluating physicians have opined that claimant requires permanent work restrictions as a result of the left knee injury. Similarly, none of the physicians have offered an opinion that claimant's left knee injury caused permanent disability or permanent impairment. I find that claimant failed to prove she sustained permanent disability as a result of the October 22, 2013 left knee injury at work.

With respect to the September 2, 2014 injury date, the parties stipulate that claimant sustained a work injury and that it caused both temporary and permanent disability. (Hearing Report) Ms. Mireles alleges that she sustained neck, back, bilateral arm, and right shoulder injuries as a result of the September 2, 2014 injury date. Defendants admit that claimant sustained a right shoulder injury as a result of her work duties on September 2, 2014. However, defendants dispute whether the remaining alleged injuries are causally related to the September 2, 2014 injury date. Each alleged injury will be addressed in turn.

Ms. Mireles's initial claim is for a neck injury resulting from the September 2, 2014 work injury. Ms. Mireles obtained an orthopaedic evaluation of her neck performed by Todd J. Harbach, M.D. on April 22, 2015. (Ex. C, pp. 35-37) Dr. Harbach noted claimant's history as including the work injury in September 2014. Dr. Harbach reviewed an MRI of claimant's cervical spine and opined that there was no significant impingement. (Ex. C, p. 36) Dr. Harbach noted that claimant was "demonstrating a lot of Waddell signs today on examination." (Ex. C, p. 37) Dr. Harbach offered to address causality of the injury, but no formal report from Dr. Harbach regarding causation has been offered into evidence. (Ex. C, p. 37)

Claimant's independent medical evaluator, Dr. Bansal, does not support claimant's injury theory. Specifically, Dr. Bansal opines that there is "[i]nsufficient medical information to attribute a work-related etiology to the September 3, 2014 incident at Titan Tire." (Ex. 14, p. 167)

Defendants asked Dr. Mooney to evaluate the neck as well. Dr. Mooney provides an opinion similar to Dr. Bansal, noting:

> It is my opinion that Ms. Mireles demonstrates multiple degenerative findings as it relates to her neck and back complaints has non physiologic findings exaggerated pain behavior. Bradford Hill causality criteria of temporality, specificity, and consistency do not correlate with any specific work-related activity or injury and as such her cervical and lumbar spine complaints would not be considered work-related.

(Ex. B, p. 16) The treating occupational medicine physician, Daniel C. Miller, D.O., diagnosed claimant on August 3, 2015 with a resolved acute strain of her neck, released her to full duty, discharged her from care, and declared maximum medical improvement. (Ex. 8, p. 101) Dr. Miller appears to have assumed a causal connection to work, but did not specifically analyze the causation issue or offer a formal opinion causally connecting the neck condition to claimant's work activities at Titan Tire. No other physician has offered an opinion on the cause of claimant's neck symptoms. Therefore, I accept Dr. Bansal and Dr. Mooney's opinions and find that claimant failed to prove a causal connection between the September 3, 2014 work injury and her neck symptoms and condition.

Ms. Mireles next asserts a claim for a low back injury as a result of the September 4, 2014 work incident. Ms. Mireles has pre-existing low back injuries and symptoms. Moreover, once again, her independent medical evaluator does not support her theory or claim for a low back injury. Specifically, Dr. Bansal opined that there was "[i]nsufficient medical information to attribute a work-related etiology to the September 3, 2014 incident at Titan Tire." (Ex. 14, p. 167) Similarly, Dr. Mooney opines that the low back claim would not be considered to be work-related. (Ex. B, p. 16) Once again, no other physician has offered a contrary opinion. I accept the causation opinions of Dr. Bansal and Dr. Mooney as they pertain to claimant's low back claim and find that claimant failed to prove a causal connection between her low back injuries and her work injury of September 3, 2014.

Claimant asserts claims for bilateral carpal tunnel syndrome and asserts these are also related to her work and injury of September 3, 2014. Claimant clearly had pre-existing bilateral carpal tunnel syndrome and has filed a prior claim for these conditions against Titan Tire. In fact, Ms. Mireles previously went to an arbitration hearing and received an award of permanent disability benefits for her bilateral carpal tunnel conditions. (Ex. L)

An EMG was ordered and performed in May 2015. It demonstrated "moderate dysfunction of the left and right Median nerves at the level of the wrist . . . consistent with bilateral Carpal Tunnel Syndrome." (Ex. 9, p. 108) However, the findings on the EMG did "not fully correlate with Ms. Mireles's presenting symptoms." (Ex. 9, p. 108) None of the treating physicians offered specific causal connection opinions regarding claimant's current carpal tunnel syndrome conditions.

The prior arbitration decision found claimant sustained a five percent permanent partial disability as a result of a bilateral carpal tunnel injury. (Ex. L, p. 116) Dr. Bansal opines that claimant currently demonstrates a three percent impairment of the right upper extremity, or two percent impairment of the whole person, as a result of right carpal tunnel syndrome. Dr. Bansal assigns a two percent impairment of the left upper extremity, or one percent impairment of the whole person, as a result of claimant's current left carpal tunnel syndrome. (Ex. L, p. 116) Combined, claimant now demonstrates a three percent whole person impairment as a result of bilateral carpal tunnel syndrome according to claimant's independent medical evaluator, Dr. Bansal. This is clearly less than the five percent permanent disability previously awarded.

Moreover, Dr. Bansal's causation opinion on the bilateral carpal tunnel is less than definitive. Dr. Bansal opines that claimant's job duties at Titan Tire "clearly qualify as having a strong potential to cause carpal tunnel syndrome based on repetition, force, and awkward wrist posturing." (Ex. 14, p. 168) However, Dr. Bansal provided no discussion or analysis about claimant's prior carpal tunnel conditions, the prior award of this agency, or any explanation of whether the current conditions include a separate and discrete disability from that presented and awarded in the July 8, 2014 arbitration decision.

Dr. Mooney indicates that claimant's current conditions "would be consistent with aggravations by her work activities at Titan Tire and as such would be considered work related." (Ex. B, p. 16) Dr. Mooney further opines that claimant's current "bilateral hand/wrist symptoms would be considered work-related." (Ex. B, p. 16) Nevertheless, Dr. Mooney opines "that the previously provided impairments for her bilateral hands, wrist, i.e., carpal tunnel syndrome, are applicable and 0% is reasonable based on the findings of Dr. Gainer as there is significant nonphysiologic findings on the examination today which would not corroborate any impairment rating." (Ex. B, p. 17)

Reading and considering Dr. Bansal's opinions in conjunction with Dr. Mooney's opinions, I find that claimant has proven her bilateral carpal tunnel symptoms are causally related to and/or materially aggravated by her work activities at Titan Tire. However, I find that claimant has not proven any increase in her permanent impairment or permanent disability over that which was awarded in 2011. (Ex. L) Claimant has not proven a separate and discrete disability related to her employment activities at Titan Tire since 2011. Specifically, claimant has not proven a separate and discrete disability related to her September 3, 2014 work injury at Titan Tire.

Finally, Ms. Mireles asserts that she sustained a right shoulder injury as a result of the September 3, 2014 work injury. Defendants admit that claimant sustained a right shoulder injury and admitted that she sustained permanent disability in some amount as a result of the right shoulder injury. (Hearing Report)

Ms. Mireles clearly had some pre-existing issues with her shoulder. She filed a prior workers' compensation claim against the employer, which included a claim for a right shoulder injury. Claimant settled the prior claim on a closed file basis using a

compromise settlement. (Ex. L; Ex. M) Ms. Mireles was actually still treating for her right shoulder symptoms up until the date of the September 3, 2014 work injury.

In fact, claimant sought orthopaedic evaluation of her right shoulder on July 29, 2014, just over a month before her work injury. (Ex. 1, pp. 11-12) At that time, Dr. Ash noted that claimant was complaining of a two month history of insidious onset of right shoulder pain. He administered an injection into claimant's right shoulder on that date. (Ex. 1, pp. 11-12)

Ms. Mireles was scheduled to return to Dr. Ash for follow-up when she presented for her evaluation on September 29, 2014. Dr. Ash's notes of that date make no mention of a new work injury on September 3, 2014. Claimant described her symptoms as "unchanged" at the September 29, 2014 evaluation. However, Dr. Ash did note that claimant had "excellent relief" of her symptoms after the July 2014 injection but that the symptoms "recurred over the last couple of weeks." (Ex. 1, p. 14)

Ultimately, conservative treatment failed. On November 13, 2014, Dr. Ash noted the onset of symptoms as August 31, 2014. He recommended surgical intervention and claimant expressed a desire to have surgery on her right shoulder. (Ex. 1, pp. 16-17)

Dr. Ash took claimant to surgery on December 15, 2014. He performed a right shoulder arthroscopy, including a debridement of the undersurface of a partial rotator cuff tear and a subacromial decompression. (Ex. 4, pp. 64-65) Unfortunately, surgery did not resolve all of claimant's difficulties. She developed adhesive capsulitis and required a manipulation of the right shoulder under anesthesia to restore some motion in her right shoulder. (Ex. 1, p. 32; Ex. 5, pp. 66-67) Following the manipulation under anesthesia, claimant obtained additional conservative care. Dr. Ash declared Ms. Mireles to have achieved maximum medical improvement as of July 7, 2016. (Ex. 2, p. 60)

As noted previously, claimant obtained an independent medical evaluation performed by Dr. Bansal on April 29, 2016. (Ex. 14) Dr. Bansal concluded that claimant sustained an "acute on chronic injury to her right shoulder on September 3, 2014." (Ex. 14, p. 167) Dr. Bansal rationalized that claimant's "job duties at Titan involved repeatedly rolling heavy rolls of rubber. This forceful pushing would stress the rotator cuff over the years of performing this task. Consistent with that, she had intermittent periods of treatment for her right shoulder. However, the pain was manageable. Against this backdrop of cumulative stress that most likely weakened the rotator cuff tendons, she had an acute injury on September 3, 2014. This injury involved forceful direct impact to the shoulders." (Ex. 14, p. 167)

Dr. Bansal identified restrictions in claimant's range of motion in her right shoulder, which certainly would be consistent with her need for a manipulation under anesthesia as a result of adhesive capsulitis. Dr. Bansal opined that Ms. Mireles sustained a six percent permanent impairment of the right upper extremity, or four percent of the whole person as a result of the September 3, 2014 work injury. (Ex. 14, p. 169) He recommended claimant not lift greater than 10 pounds occasionally, or

5 pounds frequently. Dr. Bansal also recommended that claimant not perform any lifting above shoulder level with the right arm and avoid forceful pushing or pulling with the right arm. (Ex. 14, p. 170)

After Dr. Bansal rendered his opinions, defendants requested that Dr. Ash review and comment on those opinions. Dr. Ash authored a report dated November 9, 2016. Dr. Ash concurred that Dr. Bansal's impairment rating was "appropriate." Dr. Ash recommended claimant limit her lifting to 10 pounds or less on an occasional basis and 5 pounds or less on a frequent basis. (Ex. 2, p. 60)

Defendants sought their own independent medical evaluation through Dr. Mooney on October 18, 2016. Dr. Mooney opined, "no impairment rating can be provided as it relates to her right shoulder symptoms. Her range of motion measurements are completely invalid based on today's examination, and the medical records indicate that her motion is significantly better than demonstrated here; as such no impairment can be provided." (Ex. B, p. 17) With regard to permanent restrictions, Dr. Mooney recommended a functional capacity evaluation because he deemed claimant's examination to be "dominated by abnormal illness behavior, guarding and self-limited motion." (Ex. B, p. 17)

When considering the various opinions of physicians discussing claimant's right shoulder, I find that claimant has proven she sustained a substantial aggravation of her pre-existing right shoulder condition and that she has proven she sustained permanent disability as a result of the right shoulder injury on September 3, 2014. (Hearing Report) I find that claimant achieved maximum medical improvement by July 7, 2016. (Ex. 2, p. 60)

Claimant submitted to surgical intervention. Dr. Bansal identified restricted range of motion in her right shoulder, which is consistent with Dr. Ash's diagnosis of adhesive capsulitis and claimant's need for a manipulation under anesthesia. Ultimately, Dr. Ash concurred with the range of motion findings and impairment rating offered by Dr. Bansal.

Noting that Dr. Ash evaluated claimant over an extended period of time and noting that he concurs with Dr. Bansal's impairment rating, I find that claimant proved she has restricted ranges of motion in her right shoulder and a four percent permanent impairment of the whole person as a result of her September 3, 2014 right shoulder injury.

Dr. Bansal recommends a ten pound occasional lifting limit and a five pound lifting limit. Dr. Ash concurs with those lifting restrictions. Although Dr. Mooney suggests claimant's examination was self-limited, he recommends a functional capacity evaluation, which suggests he suspects some reasonable limits are needed as a result of claimant's right shoulder injury. Defendants attempted surveillance on claimant and introduced a surveillance video depicting claimant. However, none of claimant's activities in that video belie her claims of a shoulder injury or specifically contradict the restrictions imposed by Dr. Ash and Dr. Bansal. (Ex. P) Therefore, I find the consistent

restrictions offered by Dr. Bansal and Dr. Ash of a ten pound occasional lifting and five pound frequent lifting limit are reasonable and appropriate for claimant's right shoulder injury of September 3, 2014.

Having found that claimant proved permanent disability as a result of her right shoulder injury, I must consider numerous factors and determine her loss of future earning capacity as a result of that injury. As noted, Ms. Mireles sustained a four percent permanent impairment of the whole person. She has the lifting limits discussed above, as imposed by Dr. Ash and Dr. Bansal.

Ms. Mireles is 56 years of age. She was born in Korea. She came to the United States in 1984. She speaks English, but has a thick accent that makes it difficult to understand her at times. The court reporter asked claimant several times during the hearing for clarification of her testimony to ensure she could understand claimant's English. (Claimant's testimony)

Ms. Mireles testified that she can also speak Korean, Japanese, and Spanish. However, she is only able to competently read and write in Korean. She is able to read or write minimally in English, such as to complete a job application. However, she is clearly not fluent in her reading and writing in the English language.

Claimant obtained only a middle school education in Korea. There is discrepancy in the record about whether Ms. Mireles achieved a seventh or eighth grade education. She noted she was a high school graduate on her job application. Realistically, however, I accept her testimony that she completed either a seventh or eighth grade education. (Claimant's testimony)

Ms. Mireles has worked as a waitress, at meat packing plants, in a paper plate factory, in a metal fabrication position, on a plastic manufacturing line, in housekeeping, and for the employer, Titan Tire. All of her prior employment positions required lifting more than ten pounds. Ms. Mireles is not capable of returning to any of her prior employment opportunities.

Titan Tire initially brought claimant back to work on light duty. However, they subsequently sent her home because her work would exceed restrictions. Titan Tire ultimately terminated claimant's employment. (Ex. 19, p. 188) Realistically, she was not capable of returning to her prior positions at Titan Tire.

Defendants appropriately note that Ms. Mireles has really not made any attempts to return to work since her injury and since leaving Titan Tire. Claimant concedes that she has not submitted any job applications since her last date of work in the Titan Tire plant. (Claimant's testimony) Ms. Mireles now receives Social Security Disability benefits. She has little to no incentive or motivation to return to work at this point.

The resulting question is, regardless of her motivation or lack of effort to return to work, whether Ms. Mireles is wholly disabled from performing work that her experience, training, education, intelligence, and physical capabilities would otherwise permit her to

perform. Both parties offer vocational expert opinions in an effort to assist the undersigned in making this factual determination.

Claimant offers the vocational opinion of Phil Davis. (Ex. 17) Mr. Davis has worked as a vocational counselor or in similar positions since 1996. (Ex. 18) He interviewed Ms. Mireles on September 6, 2016. Mr. Davis opines that claimant cannot return to her prior employment at Titan Tire. Similarly, Mr. Davis opines that Ms. Mireles cannot return to any of her prior employment positions as a result of her right shoulder injury and resulting restrictions. (Ex. 17, pp. 182-183)

Mr. Davis opines that, Ms. Mireles "lacks prior training, education, or experience (transferable skills) that would assist her to any degree in the pursuit of competitive employment. Ms. Mireles's limited English language skills and lack of basic computer skills also limits her options for employment." (Ex. 17, p. 183) As a result, Mr. Davis opines, "that as a result of her injuries and resulting physical restrictions Mrs. Mireles's [*sic*] has lost access to all of her prior employment activities, which currently precluded her from a gainful, competitive employment." (Ex. 17, p. 183) Specifically, Mr. Davis opines, "Mrs. Mireles's ability to obtain gainful, competitive employment has been drastically reduced if not eliminated." (Ex. 17, p. 184)

Defendants offer the vocational opinion of Tom Karrow. (Ex. I) Mr. Karrow also personally interviewed Ms. Mireles. Mr. Karrow noted that claimant has not registered with Iowa Workforce Development or otherwise attempted a job search. Mr. Karrow opines:

> Ms. Mireles would be able to take English as a Second Language classes. If she attended those classes for approximately six to eight weeks, she would be able to read and write basic English. Once Ms. Mireles can read and write the English language, this will open up another employment opportunity for her as an interpreter. . . . Average interpreter salaries for the Des Moines area, according to the Iowa Department of Labor, are approximately $37,000 a year.

(Ex. I, p. 77)

Mr. Karrow performed a labor market survey and opined that claimant could perform several job openings that he identified. Among those job openings were food service type positions such as an assistant manager position at Panera Bread or Applebee's. Mr. Karrow identified a department sales type position at Hobby Lobby, Target, Kohl's, Sears, Von Maur, or Gordman's as possible jobs. He also identified other opportunities such as customer service representatives or assistant manager positions at those businesses. (Ex. I, p. 80) He opines that claimant could anticipate non-managerial positions to pay approximately $10.50 per hour and management positions to pay an average annual salary in the $26,000.00 range. (Ex. I, p. 81)

I find that the jobs identified by Mr. Karrow are not terribly realistic for claimant. She has a thick English accent that would make it difficult to work in customer service or as an assistant manager at a retail facility. Perhaps even more relevant, Ms. Mireles

is not capable of reading and writing in English at this time. It seems like a large stretch to believe she is going to obtain management level work or customer service work without the ability to read or write in English. Receipts at department stores are written in English. Menus and receipts at Applebee's and Panera Bread are written in English. Management level employees would be expected to complete paperwork, including employee reviews, reprimands, incident reports, workers' compensation documentation, among numerous other written documents. Claimant is not capable of performing these tasks.

Ultimately, I find that Mr. Davis provided an accurate recitation of claimant's limitations, abilities, experience, and educational background. Mr. Davis opines that claimant cannot return to any of her prior employment. I agree with his opinions in this respect.

Mr. Davis hints that he believes claimant may be permanently and totally disabled. However, his ultimate conclusion is that claimant's ability "to obtain gainful, competitive employment has been drastically reduced if not eliminated." (Ex. 17, p. 184) I find this conclusion to be convincing.

On the other hand, claimant has made no attempt to seek employment since her injury. Mr. Davis does not definitely opine that claimant has lost all ability to be gainfully employed. Mr. Davis's equivocation on this issue, coupled with claimant's lack of any job search and lack of motivation, leave me unable to find her to be permanently and totally disabled. Therefore, I accept Mr. Davis's opinion and find that claimant's September 3, 2014 right shoulder injury at Titan Tire has drastically reduced claimant's ability to obtain gainful, competitive employment. However, I find that claimant has not proven by a preponderance of the evidence that her ability to obtain gainful, competitive employment has been eliminated.

Considering claimant's age, educational background, employment history, language limitations, the situs and severity of her right shoulder injury, as well as her permanent restrictions, permanent impairment, lack of motivation to seek alternate employment, as well as all other industrial disability factors identified by the Iowa Supreme Court, I find that Ms. Mireles proved she sustained an 80 percent loss of future earning capacity as a result of the September 3, 2014 right shoulder injury at Titan Tire.

Ms. Mireles also seeks reimbursement for the cost of her independent medical evaluation with Dr. Bansal. This issue is listed in both files as a dispute. Dr. Bansal performed his independent medical evaluation on April 29, 2016. Dr. Bansal addressed the neck, back, bilateral carpal tunnel, as well as claimant's right shoulder in his evaluation and report.

Defendants did not obtain a competing impairment rating for the right shoulder until July 7, 2016, when they asked the treating surgeon, Dr. Ash, to offer an impairment rating. Similarly, defendants did not obtain an impairment rating for the bilateral carpal

tunnel syndrome until Dr. Mooney performed an independent medical evaluation in October 2016.

CONCLUSIONS OF LAW

In file number 5052794, the parties stipulated that claimant sustained a left knee injury. The parties sought a determination from the undersigned about whether claimant sustained permanent disability as a result of the left knee injury and, if so, the extent of permanent disability to which claimant is entitled.

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).

Having found that Ms. Mireles failed to prove she sustained any permanent disability as a result of the left knee injury, I conclude that claimant failed to prove entitlement to permanent disability benefits in file number 5052794.

In file number 5052795, the parties stipulated that claimant sustained a work related right shoulder injury on September 3, 2014. The parties further stipulate that the injury caused permanent disability and should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report) However, the parties disputed the extent of claimant's entitlement to permanent disability benefits.

Defendants also disputed various other alleged injuries were causally related to claimant's work activities at Titan Tire. Having found that claimant failed to prove her neck or low back claims are causally related to her work activities at Titan Tire, I do not consider those conditions in evaluating claimant's industrial disability.

Defendants also disputed that claimant's bilateral carpal tunnel syndrome was compensable. Ultimately, I found that claimant proved her work activities at Titan Tire were a cause or materially aggravating factor of her bilateral carpal tunnel syndrome. However, to be compensable as a new injury, claimant's bilateral carpal tunnel condition must cause some current disability that is separate and discrete from the prior award already provided for her bilateral carpal tunnel syndrome in 2011. (Ex. L) See Excel Corp. v. Smithart, 654 N.W.2d 891, 898 (Iowa 2002) (superceded on other grounds by statutory modification of Iowa Code section 85.34(7)(b)).

In this case, I found that claimant did not prove by a preponderance of the evidence that her bilateral carpal tunnel syndrome at present represented or caused a separate and discrete disability. Therefore, I conclude that claimant failed to prove she sustained any permanent disability resulting from the bilateral carpal tunnel syndrome, other than was previously awarded in the 2011 arbitration decision. Id.

As noted, claimant has proven her right shoulder injury is causally related to her work injury. The parties stipulated that the injury caused permanent disability. The remaining fighting issue with respect to the right shoulder injury is the extent of claimant's entitlement to permanent disability.

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.

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven an 80 percent loss of future earning capacity. This is equivalent to an 80 percent industrial disability and entitles claimant to an award of 400 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

The hearing report submitted in File No. 5052795 indicates that there is a dispute about payment of past medical expenses. Review of the evidentiary record does not

disclose that any medical expenses were introduced into the evidentiary record. An itemization of the claimed expenses was not attached to the hearing report. Without any medical benefits being submitted, the undersigned has not entered any findings of fact relative to past medical expenses. It is concluded that claimant has failed to prove entitlement to payment or reimbursement of any past medical expenses.

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).

Ms. Mireles was only entitled to reimbursement for an evaluation after defendants' obtained an impairment rating. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015). In this instance, claimant obtained the impairment ratings and evaluation with Dr. Bansal prior to defendants' obtaining impairment ratings for either file. Therefore, I conclude that claimant has not established entitlement to reimbursement for the cost of Dr. Bansal's evaluation pursuant to Iowa Code section 85.39.

Finally, claimant seeks assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and having concluded that claimant failed to establish entitlement to any substantive benefits in File No. 5052794, I conclude that claimant's costs should not be assessed in that file.

Claimant did prevail to some extent in File No. 5052795. It is appropriate to assess costs in some amount in that file. Claimant seeks assessment of her $100.00 filing fee. (Statement of Costs) Claimant's filing fee of $100.00 is assessed pursuant to 876 IAC 4.33(7).

Ms. Mireles seeks assessment of the costs ($13.48) of service of her petition upon the employer and insurance carrier. Claimant could only pursue her rights and claim via the filing of a petition and service on defendants. It is appropriate to assess claimant's service fees pursuant to 876 IAC 4.33(3).

Claimant seeks the assessment of the cost of her deposition ($174.15). Claimant's deposition transcript was introduced as Exhibit 23. I conclude it is

appropriate to assess the cost of claimant's deposition transcript pursuant to 876 IAC 4.33(2).

Ms. Mireles seeks the assessment of the costs of Dr. Bansal's evaluation and report as a cost, as well as the expense of Mr. Davis's vocational report as an expense. Agency rule 4.33(6) permits the assessment "of the reasonable costs of obtaining no more than two doctors' or practitioners' reports." I relied upon the opinions of Mr. Davis to conclude that claimant sustained a substantial industrial disability as a result of her right shoulder injury. I conclude it is appropriate to assess Mr. Davis' charges totaling $1,485.60 as costs pursuant to 876 IAC 4.33(6).

I relied upon Dr. Bansal's reports in File No. 5052795 to award benefits for the right shoulder injury. However, claimant did not prove entitlement to benefits on many of the issues addressed in Dr. Bansal's report. Claimant is not entitled to the expense of Dr. Bansal's evaluation as a cost. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844-845 (Iowa 2015).

Dr. Bansal broke down his charges to include $468.00 for his examination and $2,888.00 for his record review and report. It is not clear to me that claimant can obtain reimbursement for the time Dr. Bansal spent performing a record review. Nor is it reasonable to assess defendants for time spent preparing a report that addressed various conditions that were found not related to the alleged work injuries or that did not establish any entitlement to additional permanent disability. I conclude that it is reasonable to assess $1,250.00 toward Dr. Bansal's preparation of his report as it pertains to File No. 5052795 and specifically his report as it addresses claimant's right shoulder injury, impairment, and resulting restrictions. Therefore, I conclude claimant is entitled to reimbursement of $1,250.00 of Dr. Bansal's charges as a cost pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5052794:

Claimant shall take nothing further.

The parties shall bear their own costs.

In File No. 5052795:

Defendants shall pay claimant four hundred (400) weeks of permanent partial disability benefits commencing on July 7, 2016 at the stipulated weekly rate of eight hundred sixty-eight and 22/100 dollars ($868.22).

Defendants shall pay all accrued weekly benefits in lump sum, along with applicable interest calculated pursuant to Iowa Code section 85.30.

Defendants shall be entitled to the credit stipulated to by the parties on the hearing report.

Defendants shall reimburse claimant's costs, as outlined in the body of this decision, totaling three thousand twenty-three and 23/100 dollars ($3,023.23).

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 15th day of March, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/srs

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.