BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SUSAN COLLINS,

Claimant,

vs.

BHJ USA, INC.,

Employer,

and

THE PHOENIX INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5047435

ARBITRATION

DECISION

Head Note Nos.: 1803; 4000

STATEMENT OF THE CASE

Susan Collins, claimant, filed a petition in arbitration seeking workers' compensation benefits against BHJ USA, Inc., employer, and The Phoenix Insurance Co., insurer, for a work injury sustained on November 9, 2013.

This case was heard on March 10, 2016 in Des Moines, Iowa. The testimony ran overlong, beyond the three hours allotted to the parties. The parties continued the testimony via deposition after the hearing and the record was left open to accept the additional testimony. During the deposition of the claimant, the defendants produced new items for impeachment such as emails and LinkeIn print-outs that had not been previously provided or itemized in the exhibits.

The defendants took advantage of the gap in time between the actual in-person hearing and the subsequent deposition. That presents an unfair advantage to the defendants and thus the line of questioning based on post in-person evidence will not be considered in the findings of facts as it would be unduly prejudicial to the parties.

Claimant objected to H-5 and then 7 through 14 as not relevant. Claimant argued that some of the documents appeared to be altered and that they had not a chance to see the originals.

Defendants presented the human resources individual to testify regarding the documents and claimant had an opportunity to cross examine on them. Exhibit H is admitted in its entirety.

The record consists of the testimony of the claimant, subject to the aforementioned limitation, Debbi Navarro, Dale Hudson, and claimant's exhibits 1-12, 14-16, and 18-19, and defendants exhibits A-O.

ISSUES

1. Whether claimant sustained a permanent impairment, and if so, the extent of that impairment;

2. Whether claimant is entitled to penalty benefits for failure to pay a permanent partial disability benefit.

STIPULATED FACTS

The parties agree claimant sustained an injury on November 9, 2013, arising out of an aborted fall at work. At the time of the injury, claimant's gross earnings were $720.00. She was single and entitled to one exemption. Based on those foregoing numbers, the weekly benefits of the claimant is $441.77.

The commencement date of maximum medical improvement (MMI) benefits would be November 10, 2013, if there is a permanent disability found.

FINDINGS OF FACTS

Claimant was a 57 year old woman at the time of the hearing. She is right hand dominant. Her educational history includes a GED. In some work applications, claimant asserts she has a high school diploma. She also has an associate's degree in human services obtained through Iowa Central Community College in 2011. Her current occupation is as a full-time aid associate at La'James International College. She earns approximately $39,000 per year. She is working without accommodations.

Claimant's skill set includes customer service, office work, office administration, fleet manager, dispatcher, safety specialist for a trucking company, and office manager where she did payroll, accounts receivable and accounts payable. Most of her work was sedentary, desk work.

Her past medical history is significant for low back, hip, and lower extremity pain in November and December 2012. She described the pain as so debilitating that it took her several hours to get out of bed and that her work was limited to a significant degree such that she could only work four hours at a time and she was unable to exercise due to pain. (Ex. A, p. 1) She was advised to lose weight. (Ex. A, p. 1) By December, she was implementing a weight loss program and weighed approximately four pounds less. She was able to return to work eight hour days. (Ex. A, p. 2)

On February 11, 2013, she was offered a position as Office Manager for defendant employer. (Ex. 9, p. 1)

On November 9, 2013, claimant sought medical treatment at Unity Point at the Emergency Department and was seen by Jennie S. Nuehring, ARNP, for back pain. Claimant pointed to an aborted fall where she wrenched her back trying not to fall at work. (Ex. 1, p. 1) She exhibited tenderness, pain and spasm on examination. (Ex. 1, p. 2) X-rays of the spine revealed no abnormalities. (Ex. 1, p. 3) Nurse Practitioner Tricia Widlund, ARNP, prescribed pain medication and returned the claimant to regular work duties. (Ex. 2, p. 3) She was referred for physical therapy. (Ex. 1, p. 14) She reported to both the therapist and Nurse Practitioner Widlund that physical therapy was helping her with pain. (Ex. 2, p. 10) On December 9, 2013, a TENS unit provided further relief. (Ex. 1, p. 17, 2, p. 11) Nurse Practitioner Widlund ordered her to continue physical therapy 2-3 times/week for 3 weeks. (Ex. 2, p. 11)

On December 16, 2013, claimant called and canceled the remainder of her therapy appointments at the recommendation of her doctor "secondary to her busy work schedule and because she has already been issued a HEP and TENS unit." (Ex. 1, p. 18) The therapist noted that goals were not met. The medical bill summary showed payments for physical therapy between December 3 and December 20, 2013. (Ex. E, p.2)

There was no medical record of Nurse Practitioner Widlund revoking PT.

Claimant's next visit was on January 10, 2014. (Ex. 2, p. 14) The medical chart shows "D/C Physical Therapy with goals met." (Ex. 2, p. 15) Phuong D. Nguyen, M.D., saw claimant on March 11, 2014, and he recommended further testing to aid in the diagnosis of claimant's ongoing midline mid back pain. (Ex. 2, p. 18) A March 20, 2014, MRI of the lumbar spine showed minimal posterior disc disease at L4-5 and L5-S1 without significant sequalea and mild/moderate bilateral facet joint arthropathy. (Ex. 2, p. 20) The thoracic region showed minimal degenerative disc disease throughout. (Ex. 2, p. 21)

She was discharged from Nurse Practitioner Widlund's care on March 24, 2014 as conservative treatment appeared unhelpful and surgical treatment was not indicated. (Ex. 2, p. 23)

On May 12, 2014, Dr. Nguyen wrote:

> It's been 6 months since the DOI: The mechanism of her injury is muscular in nature. She still has significant pain in the mid back on standing, bending and lifting despite complete physical therapy. She has temporary relief with the Tens unit. It is likely from the underlying DDD and DJD which is not work related. Will have orthopedic evaluation/consult for a 2nd opinion. I advise her to continue HEP with ROM, strengthening the core muscles of the back and the abdomen and

> loose weight. She may use Chiropractor if she prefers. Will d/c her if no other treatment available from the orthopedics.

(Ex. 2, p. 27)

As a result of Dr. Nguyen's referral, claimant was seen by David E. Hatfield, M.D., on June 27, 2014. Based on the objective testing, claimant's eight months of conservative treatment, Dr. Hatfield anticipated nonoperative treatment. (Ex. 3, p. 2)

Claimant then sought care at Mary Greeley Medical Center with Arnold R. Parenteau, M.D. (Ex. 4, p. 1) She complained of mid-thoracic back pain that is worse with standing, walking, bending, being on her feet, and at times rolling over in bed. (Ex. 4, p. 1) She stated that she had "approximately 16 weeks of physical therapy per her report on and off" since 2013. (Ex. 4, p. 1) Physical therapy began on December 3, 2013, and claimant self-discharged on December 16, 2013. (Ex. 1, pp. 10-118)

Dr. Parenteau determined that the only potential intervention would be thoracic facets and suspected this was only performed at the University of Iowa Hospitals and Clinics (UIHC). (Ex. 4, p. 2)

On May 5, 2015, she was seen Joseph J. Chen, M.D., at the UIHC. (Ex. 5, p. 1)

It was recommended she follow a number of home therapies including physical therapy, weight loss, and stress management. (Ex. 5, p. 1-2) She completed a two week Spine Rehabilitation course that started on June 8, 2015, and ended on June 19, 2015. (Ex. 5, p. 3) Based on her "current fitness levels", Dr. Chen recommended work and home restrictions of no lifting greater than 10 pounds repetitively and no more than four times per hour at 20 pounds. (Ex. 5, p. 4) She did not feel she had returned to baseline, but Dr. Chen advised that "there are no further supervised medical treatments that will likely improve your pain. We have discussed that despite your pain, there is no permanent structural damage to your spine that explains your ongoing pain." (Ex. 5, p.4)

Initially, Dr. Chen opined that she had no ratable impairment. (Ex. 5, p. 6) After an email discussion with the claimant, Dr. Chen revised his opinion and assigned a 5 percent impairment of the lumbar spine. (Ex. 5, p. 7) In the email to Dr. Chen, claimant itemized a number of pre-injury activities that were no longer in her repertoire of activities due to the pain such as running, cleaning sprees, lifting things more than 30 pounds for a sustained period of time, line dancing, cross fit training and long road trips. (Ex C, p. 3) There was no record that claimant ran, undertook cross fit training programs, or engaged in line dancing or lifting greater than 30 pounds for a sustained period of time before her work injury. In November 2012, she reported that she was unable to exercise due to back pain. (Ex. A, p. 1)

During her time with Dr. Chen, claimant reported no previous similar back pain. (Ex. 5, p. 11) She also reported a 100 pound weight gain in the past six months. Her weight on April 8, 2015, was measured at 336 pounds. Her weight in November 2013, was 310 pounds. (Ex. 2, p. 3) In October 20, 2014, she weighed 296 pounds. (Ex. 4, p. 1)

On July 27, 2015, claimant reported a pain rating of 1-2 on a 10 scale to Dr. Chen and 0 on a 10 scale to Valerie Keffala, a licensed psychologist. (Ex. 5, p. 59) She was encouraged to continue with her home exercise plan and returned to work full duty. (Ex. 7, p. 6)

On September 25, 2015, claimant underwent an IME with Sunil Bansal, M.D. He recorded tenderness and spasms over the mid to lower thoracic paraspinals and into the upper lumbar paraspinals. (Ex. 7, p. 9) She had some decreased range of motion of the spine. (Ex. 7, p. 9) He diagnosed her with myofascial pain syndrome and aggravation of a pre-existing degenerative condition. (Ex. 7, p. 10)

Either she did not mention her 2010 injury or Dr. Bansal failed to record it. (Ex. 7, p. 7) He recorded that claimant had worked at defendant employer for "4 years". (Ex. 7, p. 8) Claimant had worked for approximately 10 months for the defendant employer before her 2013 injury.

Dr. Bansal opined that her lumbar spondylosis was pre-existing but symptomatically quiescent prior to November 9, 2013. (Ex. 7, p. 10) Dr. Bansal does not give any mention in his "causation" section of the complaints a year prior to claimant's work injury that her low back pain was so debilitating claimant could only work four hours a day. Her past medical history is not consistent with his statement that she was symptomatically quiescent. Instead, he either ignores, forgets, or glosses over the past and concludes that the current symptoms are related to the November 9, 2013, injury and that she should have restrictions of no lifting over 10 pounds occasionally and no lifting over five pounds frequently. In her email to Dr. Chen, claimant acknowledged that she could lift moderate amounts of weight and not trigger her mid-spine pain. (Ex. C, p. 3)

Dr. Bansal further recommends no frequent bending, climbing, or twisting and that sitting, standing and walking as tolerated. According to Dr. Bansal, claimant would need to avoid sitting for more than 60 minutes, standing for more than 15 minutes, and walking for more than 30 minutes continuously.

He assigned an 8 percent impairment rating. (Ex. 7, p. 12)

As office manager, she was required to lift and carry 11-25 pounds frequently along with simple grasping. It was designated as a light duty job. (Ex. 8) Her September 2013, performance evaluation identified her as an average employee. (Ex. 9) In the 2015 evaluation, she had improved and was exceeding many categories. (Ex. 12)

On July 28, 2015, claimant was sent a letter informing her that due to Dr. Chen's non rating, she would not be paid any further industrial benefits. (Ex. D)

Claimant has had a few issues pertaining to the handling of money. She was charged with a felony in 2004 that was ultimately pled down to a misdemeanor. Claimant filed tax returns for a friend and had the money deposited in claimant's account. When she was confronted by the friend, the claimant maintained that the tax return had not been deposited in her account. The police confiscated the claimant's computer and upon an investigation charged claimant. She testified that it was a mistake. She believed she had changed the designated account, but when she realized it was not, she "immediately wanted to give her [friend] her money back." (Tr. p. 46) The attempt to pay her back, if there was an attempt, was after she had been arrested.

She testified that her employers knew of her conviction yet on her application to Lederman's Bail Bond, she wrote that she had never been convicted and that her charges were dismissed.

Claimant worked at Lederman's Bail Bond as a bail agent between June 2012 and 2013. She claimed that they parted mutually. She then went on to assert that the owner could not find all the deposits or account for all the sums she handled, and that she agreed to pay $100.00 per month on her credit card until a debt of $6,504.00 was paid off. (Ex. M, p. 3) The explanation she gave at hearing regarding misfiled premiums was a jumbled mess of words that did not begin to match up with the promissory note. Claimant's explanation was not credible, nor did it make sense.

Claimant was terminated from defendant employer on the grounds she had mishandled company cash as well as accepting credit card payments from truck drivers using a Square credit card swipe. Claimant testified she did no such thing even though there are exhibits which show handwritten receipts for the credit cards.

She later testified that one of her supervisors authorized her to accept payments via credit card on her personal phone and that those payments would be deposited in her account. She would then transfer the money to the defendant employer. Claimant provided no proof that she transferred sums of money to her employer. Mr. Hudson, a co-worker, testified that claimant informed him that she had set up the credit card transaction through Ms. Navarro.

Exhibit H, page 5 showed that a driver had damaged a door at the defendant employer. Ms. Navarro testified as follows:

> A. This was a receipt that I did not create, but it looks like it came from Susan for a damage to – repair to an overhead door that one of the drivers at A & K Express had damaged our door, and Susan wrote him up for a receipt for $767.20, and then she left his phone number, which I called and asked if he'd paid for these damages, and he stated yes, he paid with a credit card.

(Tr. p. 198)

She represented that she was a small business owner who "managed all aspects of driver recruiting for various national transportation companies and driving schools, from ad placement to application review and matching potential candidates with a company for permanency." (Tr. p. 127) When, in fact, the claimant did none of those things. Instead she worked with a man who placed ads in Craigslist. (Tr. p. 128)

The testimony of both Ms. Navarro and Mr. Hudson was clear and straightforward whereas the testimony of claimant was convoluted and confusing, internally contradictory and vague.

Claimant's applications for employment often had inaccuracies. She stated she had graduated when instead she had a GED. She claimed she had never been discharged or asked to resign from a job, when she had been terminated at least twice previously. She indicated her salary at KSR, her small business, was $775.00 per week on the application for employment with defendant employer. At hearing, she admitted that she never made any money but instead lost money.

These were small lies, but along with the others such as overstating the weight she had lost (100 pounds when it was less than forty) or informing her therapist that her doctor had terminated the physical therapy sessions or later telling Dr. Chen she had attended over sixteen when it was only a handful in December, in the aggregate these untruths give rise to the conclusion that claimant had low credibility.

Her testimony regarding the car travel, cake decorating, the posts on Facebook, are all given little weight because of the aforementioned credibility, or lack thereof, finding.

Her pain level vacillates between 4 and 10 increasing upon activity. She currently uses her TENS unit, does water therapy, and takes over-the-counter pain medication. Her hobbies including her grandchildren, taking care of animals, and cake decorating. Those activities are constrained by her ongoing and constant pain in the mid-center of her back.

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).

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.

This is a case involving a myofascial injury that claimant asserts has resulted in debilitating pain. Her subject complaints comprise the bulk of claimant's evidence regarding her lasting industrial disability.

Defendants make a specific credibility challenge and in the findings of facts, claimant's testimony was afforded low credibility. The smaller inconsistencies such as claimant's résumés which gloss over past terminations or her fabrications about her educational background are easier to dismiss than the pattern of issues claimant has had with money. One of the more compelling pieces of evidence regarding claimant's

credibility was her calling the physical therapist and informing them that the rest of the therapy sessions were cancelled at the recommendation of her physician and then going on to proclaim she had completed her physical therapy sessions in later treatment consultations. Claimant was willing to bend or twist the truth to make herself look better in a medical circumstance.

The best evidence of claimant's condition post injury is that of her two-week intensive participation in the Spine Rehabilitation Program with Dr. Chen. Dr. Chen's program does not accept all applicants, but he felt claimant could benefit. Based on his post program letters, claimant did benefit. Her pain intensity going into the program was between 4 and 10 on a 10 scale. At the end of the two week program, her pain was at 0 or 1 on a 10 scale. Dr. Chen discharged claimant with no ratable impairment. At the prompting and request of the claimant, Dr. Chen revised his impairment rating to 5 percent. Part of the email claimant sent included dubious facts such as that claimant was no longer to participate in cross-fit training, line dancing, running, and sustained weight lifting. There was no credible evidence she had done any of those activities prior to her injury.

Dr. Bansal's opinions are less helpful because he discounts her intense complaints of pain less than 12 months prior to the claimant's injury. Further, his opinions are largely based on claimant's suspect subjective complaints of pain and discomfort.

Claimant's lifting restrictions from Dr. Chen place claimant in the light duty category of work. Her prior work history is almost exclusively light duty to sedentary work. She's able to physically perform the tasks of her previous jobs per Dr. Chen's restrictions.

Given the claimant's low credibility and the improvement she gained through Dr. Chen's spine rehabilitation, it is determined claimant has sustained an 8 percent industrial loss.

The next issue is penalty. Claimant maintains that she is entitled to penalty benefits for defendants' nonpayment of permanent partial disability.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to fifty percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Dr. Chen released claimant to full duty work without restrictions and no impairment on July 27, 2015. On the following day, defendants informed claimant via letter than they would not be paying any permanent disability. They timely communicated with claimant the reason for the denial and included Dr. Chen's report. While Dr. Chen later revised his impairment rating to 5 percent, the claim for permanency remained fairly debatable. Later discoveries revealed claimant's past history of fabrications. Claimant did not show an untimely denial or lack of payment and even if she had, the employer engaged in a reasonable and timely investigation followed by timely notice to claimant of the reason for their denial of benefits. No penalty is appropriate.

ORDER

THEREFORE IT IS ORDERED:

That defendants are to pay unto claimant forty (40) weeks of permanent partial disability benefits at the rate of four hundred forty-one and 77/100 dollars ($441.77) per week from November 10, 2013.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

That each party shall pay their own costs with the cost of the transcript to be split evenly.

Signed and filed this 21st day of June, 2016.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jerry L. Schnurr, III
Attorney at Law
822 Central Ave., Ste. 405
Fort Dodge, IA 50501
jschnurr@frontier.com

Lara Plaisance
Attorney at Law
1089 Jordan Creek Parkway, Ste. 360
West Des Moines, IA 50266
lplaisan@travelers.com

JGL/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.