GUADALUPE ALCANTARA

GUERRERO,

Claimant,

vs.

IOWA SELECT FARMS, LLP,

Employer,

and

ZURICH, N.A.,

Insurance Carrier,

Defendants.

File No. 5051321
File No. 5051322
1/1/2016

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

A R B I T R A T I O N
D E C I S I O N
Head Note Nos.: 1803, 2501, 2502, 2907

STATEMENT OF THE CASE

Claimant, Guadalupe Alcantara Guerrero, filed petitions in arbitration seeking workers' compensation benefits from Iowa Select Farms, LLP, (Iowa Select), employer, and Zurich, N.A., insurer, both as defendants. This case was heard in Des Moines, Iowa on November 17, 2015, with a final submission date of December 15, 2015.

The record in this case consists of joint exhibits AA-EE, claimant's exhibits 1-9, defendants' exhibits A-B, and the testimony of claimant and William Foley.

Prior to hearing, claimant filed a motion in limine. The motion requested that any evidence regarding claimant's Social Security number, immigration status, or alternate names be inadmissible. At hearing the parties reached a stipulation where claimant would withdraw her motion, and the parties would agree that claimant's separation from employment was deemed to be voluntary. The parties also stipulated that no evidence would be presented regarding claimant's immigration status. Given that stipulation, the motion in limine was withdrawn. (Transcript, page 4)

Serving as interpreter was Anna Pottebaum.

ISSUES

For File No. 5051321 (date of injury July 3, 2013):

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. Whether there is a causal connection between the injury and the claimed medical expenses.

3. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

4. Costs.

For File No. 5051322 (date of injury November 18, 2013):

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. Whether there is a causal connection between the injury and the claimed medical expenses.

3. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

4. Costs.

FINDINGS OF FACT

Claimant was 36 years old at the time of hearing. Claimant went up to the 9th grade in Mexico. Claimant began classes in October of 2014 to get her GED and to learn English. At the time of hearing, claimant did not have a GED.

Claimant testified she spoke some English and could understand a little bit of English when reading a newspaper. Claimant has difficulties writing in English.

Claimant has worked as a dishwasher, cook, and has cleaned houses. Claimant has also done detassling and worked at hog confinement operations.

Claimant began with Iowa Select as a technician. Iowa Select Farms is a hog confinement operation. Claimant testified she was eventually promoted to a leader position. Claimant's job duties generally required her to care and manage pigs, ensure equipment was working properly and to vaccinate pigs. Claimant was required to lift up to 40 pounds and to be able to step over 4 foot high fences between pens. (Exhibit 5, p. 1) Claimant testified her job also required her to routinely replace electrical outlets and to give injections to pigs.

On July 3, 2013 claimant was replacing an overhead electrical outlet. Claimant was standing on two livestock crates. Claimant said when she went to put the outlet back into the ceiling, she felt a pull in her back.

On July 5, 2013 claimant was evaluated by Teresa Lee, PA-C for low back pain caused when repairing an overhead electrical outlet. Claimant was treated with medication. She was limited to no overhead work and no lifting greater than 10 pounds. Claimant was assessed as having lumbago. (Ex. AA, pp. 1-5)

On July 18, 2013 claimant returned in followup and was evaluated by Charles Mooney, M.D. Claimant indicated improved back pain. Claimant was returned to work at regular duty. (Ex. AA, pp. 6-9)

Claimant testified when she returned to work she still had back pain. Claimant testified her supervisor, at the time of the July injury, was Chris Rosenboom. She said Mr. Rosenboom accommodated her work to make the job physically easier to help her with back pain.

Claimant testified that prior to November 18, 2013 she had a new supervisor, Shawn Chaplain. She said she explained her injury to Mr. Chaplain, but he did not accommodate claimant. Claimant said as a result she began to have more back pain.

Claimant said on November 18, 2013 she was again working with electrical outlets. She said her pain was so great she told her supervisor about her back pain. Her supervisor did not offer her medical treatment. Claimant said as a result she went to an emergency room.

On November 18, 2013 claimant was evaluated at Mercy Medical Center Emergency Room for back pain. Claimant indicated chronic back pain for five months. Claimant was assessed as having back pain. She was treated with medication and released. (Ex. BB, pp. 1-14)

X-rays taken on December 31, 2012 suggested a degenerative disc and facet disease at L5-S1. (Ex. BB, p. 16)

On January 14, 2014 claimant was evaluated by Aisha Choudhry, M.D. for lower back pain. An MRI was recommended. (Ex. CC, pp. 5-7)

An MRI of the lumbar spine taken on January 21, 2014 showed degenerative spondylotic changes at L4-S1. Claimant had a minimal disc bulge with an annular tear at the L4-5. (Ex. BB, p. 18)

On February 26, 2014 claimant returned to Dr. Choudhry. Claimant had improved back pain. Claimant was limited to lifting 15 to 20 pounds. (Ex. CC, pp. 9-11) These are the same restrictions claimant was also given on May 28, 2014. (Ex. CC, p. 15)

On June 9, 2014 claimant was evaluated by David Beck, M.D., a neurosurgeon, for lower back pain. Dr. Beck recommended claimant do home exercises. She was given a Medrol Dosepak. Claimant still had a 20-pound lifting restriction. (Ex. EE, pp. 1-3)

In a July 21, 2014 note, Dr. Beck reported claimant rated her pain at a level 1 on a 10-point pain scale. Claimant was working full time. Claimant indicated she was doing her regular job. Dr. Beck found claimant at maximum medical improvement (MMI) as of July 21, 2014. (Ex. EE, p. 5)

In August 2014 claimant's counsel wrote defendants' counsel. Claimant was working full time but still had significant back pain. Claimant would be contacting Dr. Beck's office for further evaluation. (Ex. 8)

In an August 13, 2014 note Dr. Beck noted claimant's work shift had decreased from seven to three workers. As a result claimant was required to vaccinate 600 pigs. Dr. Beck found claimant could return to regular work duties, but should not handle excessive duties given her back condition. (Ex. EE, p. 7)

In an August 20, 2014 note Dr. Beck returned claimant to a 15-pound lifting restriction with no overhead work and no standing or bending. (Ex. E, p. 9)

In a July 17, 2014 note Dr. Beck found claimant's condition improved. He limited her to no lifting overhead and no vaccination of pigs. (Ex. EE, p. 11)

On October 17, 2014 claimant left employment with Iowa Select. (Ex. B, p. 1)

In an October 29, 2014 note claimant indicated left side back pain. Dr. Beck recommended a functional capacity evaluation (FCE). (Ex. EE, p. 13)

In a November 4, 2014 FCE report, Rachel Squier, DPT, found claimant could perform within the medium work category. Claimant could occasionally lift up to 30 pounds, and frequently lift 20 pounds. Claimant was recommended to continue home exercises. (Ex. B)

In a November 19, 2014 note Dr. Beck found claimant was at MMI. He found the permanent restrictions detailed in the November 4, 2014 FCE report applied. (Ex. EE, p. 15)

In a November 20, 2014 note, written by defendant employer, Dr. Beck opined claimant did not require future treatment. He found she was at MMI as of November 19, 2014. He opined claimant had a 5 percent permanent impairment to the body as a whole. It appears Dr. Beck relied on Table 15-7 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition to reach that opinion. (Ex. EE, pp. 16-17)

On June 30, 2015 claimant underwent a second FCE performed by Todd Schemper, PT. The FCE found claimant could work in the light work category. Claimant was limited to lifting up to 20 pounds occasionally, and 30 pounds rarely. (Ex. 1)

In an October 6, 2015 report John Kuhnlein, D.O., gave his opinions of claimant's condition following an IME. Claimant complained of back pain radiating to her right leg. Claimant indicated the radiculopathy occurred approximately one time a week and then resolved. Prolonged walking, climbing stairs, and lifting aggravated her symptoms. Claimant was assessed as having a chronic musculoskeletal lower back pain. He found claimant had a 7 percent permanent impairment, based on a finding that claimant fit into the DRE lumbar category II of the Guides. Dr. Kuhnlein agreed with the restrictions found in the FCE performed in June of 2015. (Ex. 2)

In an October 8, 2015 report, Phil Davis, MS, gave his opinions regarding claimant's vocational opportunities. Mr. Davis opined based upon claimant's age, restrictions, limited English skills, and experience, claimant's ability to obtain or maintain gainful employment was drastically reduced, if not eliminated. (Ex. 3)

Claimant testified she has not looked for work or applied for any jobs since leaving Iowa Select. She said her husband does not want her to work due to her back pain. Claimant said, at the time of hearing, she was taking classes to improve her English skills while she learns other skills that would allow her to do lighter duty jobs.

Claimant testified that because of her back injury she is limited in doing household chores, and her husband now helps a lot with household chores. She testified she has difficulty sleeping due to back pain.

Claimant testified she did not believe she could return to work at Iowa Select given her current restrictions.

William Foley testified he is the CFO for Iowa Select. In that capacity he handles all workers' compensation claims with Iowa Select and is familiar with claimant's claim for workers' compensation benefits.

Mr. Foley testified he believed claimant was put on permanent restrictions after she left Iowa Select. Mr. Foley testified he believed claimant could return to work at Iowa Select

given her current restrictions and Iowa Select could accommodate those restrictions in the farrowing unit.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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

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.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). See Also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant was 36 years old at the time of hearing. Claimant went up to the 9th grade in Mexico. Claimant's main language is Spanish. Claimant has worked as a dishwasher, cook, and has cleaned houses. She has also done detassling and worked at a hog confinement operation.

Regarding the July 3, 2013 date of injury (File No. 5051321), records indicate by July 18, 2013 claimant was returned to work at her regular duties with Iowa Select. (Ex. AA, pp. 6-9) The records indicate claimant continued to work for Iowa Select at her regular duties until

the November of 2013 incident. There is no evidence in the record claimant had any loss of hours worked between July of 2013 and November 18, 2013. There is no record claimant suffered any loss of income during that same period of time. Given this record, claimant has failed to carry her burden of proof she sustained any industrial disability, or loss of earning capacity, due to the July 3, 2013 injury.

Regarding the November 18, 2013 injury (File No. 5051322), two experts have given opinions regarding claimant's permanent restrictions following IMEs. The permanent restrictions given by physical therapist Schemper in June of 2015 are slightly different from those given by Accelerated Rehabilitation in 2014. The June of 2015 FCE indicated claimant could occasionally lift up to 20 pounds. (Ex. 1) The November 2014 FCE found claimant could occasionally lift up to 30 pounds. (Ex. B) Permanent restrictions under either FCE would preclude claimant from returning to her job at Iowa Select, which required her to lift up to 40 pounds. (Ex. 5, p. 1)

As the FCE performed in June of 2015 was done close to the time of hearing, and better reflects claimant's abilities at the time of hearing, it is found claimant's permanent restrictions are those as detailed in Exhibit 1.

Two experts have opined regarding claimant's permanent impairment. Dr. Beck treated claimant for an extended period of time. He found claimant had a 5 percent permanent impairment to the body as a whole. (Ex. EE, pp. 16-17) Dr. Kuhnlein opined claimant had a 7 percent permanent impairment to the body as a whole. (Ex. 2, p. 8) As both findings for permanent impairment are relatively close, I find it unnecessary to make a finding of fact whether Dr. Beck or Dr. Kuhnlein's finding of permanent impairment is more convincing. It is found claimant has between a 5 to 7 percent permanent impairment to the body as a whole for the November of 2013 injury.

Mr. Davis opined claimant's ability to obtain employment is drastically reduced or limited. (Ex. 3) The parties stipulated claimant voluntarily left her position at Iowa Select. (Tr. p. 4) Claimant's testimony at hearing was that she has not looked for work since leaving Iowa Select. Mr. Davis did not take either of these factors into consideration in giving his opinion regarding claimant's vocational opportunities. Mr. Davis also did not make any search of jobs available in claimant's geographic labor market. Given this record, it is found Mr. Davis' opinions regarding claimant's employment opportunities are found not convincing.

Claimant was 36 years old at the time of hearing. Her main language is Spanish. Most of claimant's work activity has involved manual labor. Claimant has not had any surgery. Claimant has permanent restrictions that limit her to lifting up to 20 pounds occasionally. This restriction would not allow claimant to work at Iowa Select based on her job description. (Ex. 5, p. 1) Claimant has between a 5 to 7 percent permanent impairment to the body as a whole. Claimant voluntarily left her position at Iowa Select. She has not applied for or looked for work since leaving Iowa Select. When all factors are considered, it is found claimant has a 30 percent loss of earning capacity or industrial disability.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and reasonably suited to treat the injury without undue inconvenience to the employee. The employer is not responsible for the costs of medical care not authorized by section 85.27. A claimant may seek payment of unauthorized medical care by a preponderance of the evidence if the care was reasonable and beneficial. Bell Bros Heating and Cooling v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would have likely been achieved by the care authorized by the employer. Id at 206. The claimant has a significant burden to prove that care was reasonable and beneficial. Id at 206.

The record indicates that after the July of 2013 injury claimant treated with physicians authorized by defendants.

Claimant testified that after her injury of November of 2013 she reported the injury to her supervisors and then sought medical care on her own, as she was not referred, by her employer, to any medical treatment. (Tr. pp. 38-39, 53-54) Claimant testified the care she received from the provider she chose, was beneficial to her health. (Tr. pp. 39-40)

Claimant sought medical care for her November of 2013 injury with her employer. The employer initially did not provide claimant with medical care. The care claimant sought on her own was beneficial to claimant. Given this record, defendants are liable for the medical expenses detailed in Exhibit 6, pages 1 through 8.

The medical record indicates Dr. Beck was an authorized treater. Defendants are liable for medical expenses detailed in Exhibit 6, pages 9 through 10. Defendants are also ordered to pay claimant’s medical mileage.

The next issue to be determined is if claimant is entitled to reimbursement for an IME performed by Dr. Kuhnlein.

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).

Dr. Beck, the employer-retained physician, gave his opinion regarding permanent impairment in a note dated November 20, 2014. Dr. Kuhnlein gave his opinions and report dated October 6, 2015. Given this chronology, claimant is due reimbursement for the Dr. Kuhnlein IME.

The final issue to be determined is costs. Claimant's costs are detailed in Exhibit 9.

Rule 876 IAC 4.33 provides:

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The record does not indicate that any physician, authorized or not authorized, ordered the FCE at issue in this case. Under 876 IAC 4.33, an FCE does not appear to be a recoverable cost. Given this record, claimant has failed to prove she is entitled to reimbursement for the FCE.

The term "practitioner" is not proceeded by the qualifier "medical", and as a result, the agency's position has been that the reasonable cost of a vocational report falls under 876 IAC 4.33 and can be assessed as a practitioner report costs. Rodriguez v. JBS Swift, File No. 5029197 (Appeal May 8, 2012).

As defendants are found to be liable for the reimbursement of Dr. Kuhnlein's IME, translator costs that assisted with an IME are also recoverable costs. Translation costs for the FCE are not recoverable costs. The costs associated with the vocational report are a recoverable cost.

Therefore, defendants are liable for all costs found at Exhibit 9, except for those costs associated with the FCE, and the translation services for the FCE.

ORDER

THEREFORE IT IS ORDERED:

Regarding File No. 5051321 (date of injury July 3, 2013):

Claimant shall take nothing from this file in the way of permanent partial disability benefits.

Regarding File No. 5051322 (date of injury November 18, 2013):

That defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of four hundred seventy-seven and 53/100 dollars ($477.53) per week commencing on November 19, 2014.

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

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

Regarding both File No. 5051321 (date of injury July 3, 2013) and File No. 5051322 (date of injury November 18, 2013):

That defendants shall pay the medical bills as detailed above.

That defendants shall reimburse claimant for the costs of Dr. Kuhnlein's IME.

That defendants shall pay claimant's costs except those associated with the FCE, as detailed above.

That defendants shall receive a credit for benefits previously paid.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this _____24th_____ day of February, 2016.

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JAMES F. CHRISTENSON
DEPUTY WORKERS'
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