BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GABRIELLE MCDONALD f/k/a GABRIELLE STUDHAM,	:	
Claimant,	:	File No. 5067559.01
vs.	:	
ST. LUKE'S LIVING CENTER WEST,	:	ARBITRATION DECISION
Employer,	:	
and	:	
IOWA LONG TERM CARE RISK MANAGEMENT ASSOCIATION,	:	
Insurance Carrier, Defendants.	:	Head Note: 1801.1

STATEMENT OF THE CASE

Gabrielle McDonald (f/k/a Studham) filed a petition for arbitration and seeks workers' compensation benefits from St. Luke's Living Center West, employer, and Iowa Long Term Care Risk Management Association, insurance carrier. The claimant was represented by Nate Willems. The defendants were represented by John Cutler.

The matter came on for hearing on December 14, 2020, before Deputy Workers' Compensation Commissioner Joe Walsh. The hearing was conducted through video via CourtCall. The record in the case consists of Joint Exhibits 1 through 2, Claimant's Exhibits 1 through 8, and Defense Exhibits A through F.[1] The claimant testified at hearing, in addition to Director of Nursing, Alexis Benion. Gale Sweeney Christensen served as court reporter for the proceeding. The matter was fully submitted on January 11, 2021, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

[1] Claimant's Exhibit 1, page 1, was accepted into evidence erroneously. This is the First Report of Injury, which cannot be accepted as evidence in a contested case. See Iowa Code Section 86.11 (2019). While this document was admitted into evidence, it was not reviewed or considered by the undersigned in this decision.

1. Whether claimant is entitled to temporary partial disability benefits. Claimant alleges entitlement to temporary partial disability (TPD) for several specific dates, including a running award of TPD commencing on August 1, 2020.

2. The correct rate of compensation. Gross wages and marital status are in dispute.

3. Costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on April 7, 2018. This injury is a cause of some temporary disability. The parties agree that the issue of permanency is not ripe as of the date of hearing.

3. Affirmative defenses have been waived.

4. There is no claim for 85.27 expenses.

FINDINGS OF FACT

Claimant Gabrielle ("Gabby") McDonald (f/k/a Studham) was 29 years old as of the date of hearing. She testified live (via CourtCall) and under oath. I find her testimony to be highly credible. Her testimony was straightforward and simple. She was a relatively good historian. Her testimony is generally consistent with other portions of the record of evidence. There was nothing about her demeanor which caused the undersigned any concern for her truthfulness. In fact, the opposite is true. She appeared credible and honest in all relevant respects.

Ms. McDonald worked third shift (overnight) for St. Luke's Living Center West as a resident care technician. She was hired in 2016 and began working in January 2017. She sustained an injury to her right shoulder area which arose out of and in the course of her employment on April 7, 2018. Ms. McDonald described the injury at hearing. Her description was consistent with the medical notes. (Joint Exhibit 1, page 29) It was a pulling injury which resulted in a right posterior labral tear and biceps tendon tear. (Jt. Ex. 1, p. 25) Later, Ms. McDonald contended that her work injury aggravated her preexisting depression and anxiety as a sequela. The defendants have subsequently provided medical care for her needed mental health treatment. The parties have stipulated that Ms. McDonald is not at maximum medical improvement for the mental health injury and was still receiving treatment at the time of the hearing.

At the time of her injury, Ms. McDonald was legally married, however, she was separated and going through divorce. (Tr., p. 31) She was not legally divorced until

sometime in 2019. Her gross earnings are disputed. The claimant contends she earned $560.57 per week, while defendants contend she earned $543.86 per week. (Compare Cl. Ex. 5 with Def. Ex. A) Ms. McDonald was paid bi-weekly and earned $13.60 per hour plus shift differential. The employer's calculation includes a two-week period ending March 31, 2018, where Ms. McDonald worked fewer hours, resulting in a smaller paycheck. (Def. Ex. B, p. 8) There is no testimony in the record as to whether this was a customary fluctuation. While it is slightly lower than the other two-week periods, I do not find it is per se inconsistent with her other earnings. I find that the employer's calculation set forth in Defendants' Exhibit A is the best reflection of her average weekly earnings at the time of injury. Therefore, I find her gross weekly earnings were $543.86.

Ms. McDonald testified that she was off work for less than a week and then returned to work with physical restrictions. (Transcript, page 15) When Ms. McDonald presented the restrictions, she had a meeting with her employer and was assigned to work first shift (daytime hours). Ms. McDonald testified that daytime hours were far less convenient for her as she was raising a child on her own. (Tr., pp. 15-16) Ms. McDonald did not request to stay on the third shift and the employer did not offer. There is no question, however, that she was assigned this shift for her light-duty work, and she performed the work. On light-duty, Ms. McDonald helped in the kitchen, provided patients oral care, bathed clients and answered phones. (Tr., p. 34) This is undoubtedly work which is more suited for daytime hours.

Ms. McDonald testified that her assignment to first shift light-duty resulted in lower pay. She prepared a summary of her wages from her date of injury (pay period ending April 14, 2018) through the pay period ending August 31, 2019. (Cl. Ex. 6) I find she did, in fact, earn less wages, sometimes significantly so. Ms. McDonald testified that she worked fewer hours while she was working light-duty because she was attending physical therapy and other medical appointments. She testified that she was not paid for attending physical therapy or other medical appointments.[2] (Tr., pp. 17-18) She also did not receive her shift differential pay when working first shift. (Tr., pp. 37-38)

Ms. McDonald worked her regular hours on the first shift light-duty from approximately one week after her work injury through September 1, 2019. (Tr., p. 16) During this period of time, she had two surgeries on her injured shoulder, the first on May 24, 2018, and the second on December 6, 2018. (Jt. Ex. 1, pp. 25-26; 60-61) In May 2019, she was placed at maximum medical improvement by her surgeon for the shoulder condition, however, she continued to treat for the aggravation of her mental condition. As it relates to her shoulder area conditions, she was released without any medical restrictions on May 20, 2019. (Jt. Ex. 1, p. 64) It appears that since this time, she has been working mostly unrestricted with the exception of a brief period of

[2] Iowa Code Section 85.27(7) requires an employer to pay wages to an employee for time taken off for treatment following a work injury in these circumstances. The unrebutted evidence before the agency is that the employer did not comply with this provision.

temporary restrictions re-imposed as set forth below. In September 2019, Ms. McDonald chose to go back to school and take care of her father. Her father was suffering from kidney and liver failure. At that point in time, she voluntarily reduced her hours to first shift every other weekend. (Tr., p. 20) From April 2018, through September 2019, Ms. McDonald worked all of the hours assigned to her by the employer on first shift.

After September 1, 2019, Ms. McDonald only worked two weekends per month while she was going to school and taking care of her father. She continued to treat for her mental health condition and returned to her surgeon a couple of times for her shoulder condition. It is somewhat unclear in this record whether Ms. McDonald continued to work on the first shift after she was released from her physical shoulder area restrictions, although it appears she may have returned to third shift. (Cl. Ex. 8, pp. 48-50) In any event, I find that since Ms. McDonald's shoulder area restrictions ended on May 20, 2019, any claim for temporary benefits would end as of that date as well.

On October 31, 2019, Nate Brady, M.D., placed Ms. McDonald on restrictions for her right shoulder area condition. (Jt. Ex. 1, p. 70) She returned to her treating surgeon in November and December 2019, who ultimately released her back to full duty on December 31, 2019. (Jt. Ex. 1, p. 67) It appears from the record that she was only placed on the temporary restrictions during a period of time from October 2019 through December 2019, when she was voluntarily working reduced hours.

In April 2020, Ms. McDonald was terminated from her employment with St. Luke's Living Center. She testified that after the COVID-19 global pandemic began, she heard from an acquaintance that there was an outbreak at the facility. (Tr., p. 21) Ms. McDonald was concerned about the pandemic in part because she was taking care of her father who suffered from kidney and liver failure. She called her supervisors and requested a leave of absence or to use her sick leave. This was denied. On April 24, 2020, she texted her superior, stating the following:

> I'm following up with the phone conversation with Carrie today. Due to the Covid-19 outbreak at LCW. I'm concerned coming into work in the near future may jeopardize my safety and health for me and my family… I don't intend on quitting this job, in hopeful to return as soon as it is safe to do so.

(Cl. Ex. 4, p. 16) She received the following response. "Ill take this as your resignation, Effective immediately. Unless a doctor says you can't work due to medical reasons." (Cl. Ex. 4, p. 15) Ms. McDonald applied for and was awarded unemployment benefits. (Cl. Ex. 3)

The employer seeks to characterize this employment separation as a voluntary quit. It was not. Ms. McDonald clearly expressed her intent not to quit in the final message she sent to the employer. She was seeking a leave of

absence. The evidence firmly establishes that the employer initiated the separation from employment.

At hearing, the Director of Nursing, Alexis Benion, testified on behalf of the employer. Her testimony was generally credible. It is noted that she chose her words carefully. She testified that Ms. McDonald did not request third shift hours for her light-duty and that such work would have been offered upon request. (Tr., pp. 62-64) She conceded that the employer did assign her first shift hours. She also testified that the employer is a 24/7 care facility, and the employer simply could not allow employees a leave of absence for fear of Covid-19. (Tr., p. 64) She testified that Ms. McDonald "self-terminated" when she requested the leave of absence. (Tr., p. 68) She conceded that the employer's Covid-19 "policy" was not written or formal in April 2020. There is no question, even from Ms. Benion's testimony, that the employer, not the claimant, initiated the separation from employment.

Since leaving employment, Ms. McDonald has worked without restrictions as a part-time bartender, earning cash and tips. (Tr., p. 26) There is no formal record of these earnings. She testified she stopped receiving unemployment benefits when she started bartending. She is also helping her boyfriend with a business venture. She has not earned any pay in this venture and assists with scheduling and other phone work. At the time of hearing, Ms. McDonald has continued to treat for her mental condition, for which she has not been placed at maximum medical improvement. (Jt. Ex. 1, pp. 84-92)

CONCLUSIONS OF LAW

The first question submitted is claimant's average gross weekly wages at the time of the injury. I find that, she was, in fact, married at the time of her injury. I find the fact she was separated at the time has no impact on the rate of compensation.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

The burden of proof is on the claimant to prove her gross earnings. By a preponderance of evidence, I find that the employer has set forth the most convincing calculation of claimant's gross weekly earnings prior to her injury. (*See* Def. Ex. A) Therefore, I conclude that her gross earnings were $543.86 per week and her weekly rate of compensation (applying married with two exemptions) is $353.50.

The next issue is whether claimant is entitled to temporary partial disability benefits (TPD), and, if so, for what period of time.

An injured worker is entitled to temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2)

If an employee is entitled to temporary partial benefits under subsection 3 of this section, the employer for whom the employee was working at the time of injury shall pay to the employee weekly compensation benefits, as provided in section 85.32, for and during the period of temporary partial disability. The temporary partial benefit shall be sixty-six and two-thirds percent of the difference between the employee's weekly earnings at the time of injury, computed in compliance with section 85.36, and the employee's actual gross weekly income from employment during the period of temporary partial disability. If at the time of injury an employee is paid on the basis of the output of the employee, with a minimum guarantee pursuant to a written employment agreement, the minimum guarantee shall be used as the employee's weekly earnings at the time of injury. However, the weekly compensation benefits shall not exceed the payments to which the employee would be entitled under section 85.36 or section 85.37, or under subsection 1 of this section. Section 85.33(4)

From the time Ms. McDonald returned to work from her injury in April 2018, through May 20, 2019, she worked on first shift light-duty. This resulted in a regular reduction of her pay because she was no longer paid shift differential and her hours were reduced during periods when she received medical treatment. As a consequence, the employer is responsible for paying temporary partial disability during this period of time. The employer therefore shall pay two-thirds of the difference between her average weekly earnings of $543.86 and her actual earnings for each week during the specified period with interest as set forth in Iowa Code Section 85.30 (2019). The employer may take a credit for any TPD benefits paid during this period.

The claimant seeks further TPD payments, including a running award, however, has failed to meet her burden for such. She was released to full-duty on May 20, 2019, by the treating surgeon. While the record is somewhat unclear as to whether she returned to third shift or continued to work light-duty first shift, I find that the release of restrictions prevents any further temporary benefits after May 20, 2019. Her treating surgeon saw her on a couple more occasions since releasing her, however, he never placed her on restrictions. While Dr. Brady did place her on restrictions on October 31, 2019, he referred her back to her treating surgeon who released the restrictions on December 31, 2019. This entire eight-week time period was during a period of time when Ms. McDonald had voluntarily reduced her work hours to return to school and care for her father. Her chosen IME physician did recommend restrictions in April 2020, however, it does not appear that she has really utilized these restrictions in her employment setting at this time.[3] (Jt. Ex. 1, p. 81)

The claimant has asked the agency to reach conclusions regarding the nature of the disability. Specifically, claimant seeks a finding that the claimant's disability is industrial because she has a mental condition and was terminated from employment. The parties, however, have stipulated that the nature of the permanency is not ripe for adjudication. I have found, as a matter of fact, that the employer terminated the claimant, however, no factual findings or legal conclusions relating to the nature of the permanent disability shall be made beyond this.

The next and final issue is costs. Claimant seeks the costs in the amount of $4,400.68 outlined in Claimant's Exhibit 7. The parties have stipulated that these costs have been paid on claimant's behalf.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876-4.33(86) states:

> **Costs.** 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

[3] Charles Wenzel, D.O., placed temporary shoulder restrictions on claimant, opining she was not at maximum medical improvement for her shoulder condition. By a preponderance of evidence, I find that she has reached MMI for her shoulder area condition as of May 17, 2019 based upon the opinion of her treating physician.

> practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876-4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

I find that the claimant is entitled to all of the costs set forth in Claimant's Exhibit 7. Neither party specifically briefed the issue of costs. While expenses to obtain medical reports are not specifically delineated in Rule 4.33, these expenses can be awarded generally under Section 85.40, and I find such expenses are appropriate in this case.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant temporary partial disability benefits (TPD) from the time she returned to work in April 2018 through May 20, 2019, when she was released to full duty. The TPD shall be two-thirds the difference between her AWW of five hundred forty-three and 86/100 dollars ($543.86) and her actual wages as set forth in Claimant's Exhibit 6 during the specified period of time from the return to work in April 2018 through May 20, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the TPD previously paid during the specified period of time.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants in the amount of four thousand four hundred and 68/100 dollars ($4,400.68).

Signed and filed this ___19th_____ day of August, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

John Cutler (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.