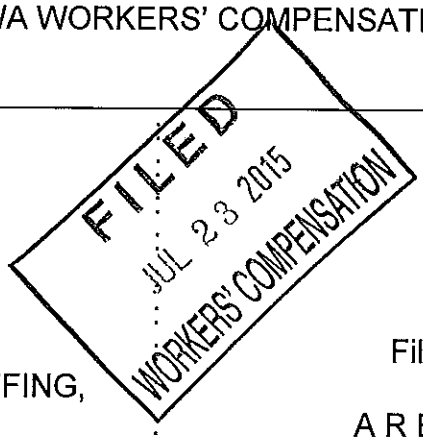
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



KATHERINE M. MORGAN,

Claimant,

vs.

REMEDY INTELLIGENT STAFFING,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5048674

ARBITRATION

DECISION

Head Note: 1803

STATEMENT OF THE CASE

The claimant, Katherine Morgan, filed a petition for arbitration and seeks workers' compensation benefits from Remedy Intelligent Staffing, employer, and ACE American Insurance Company, insurance carrier. The claimant was represented by David A. O'Brien. The defendants were represented by Peter Thill.

The matter came on for hearing on December 1, 2014, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 8 and defendants' exhibits A through L (except G). The claimant testified under oath at hearing as did witness, Todd Pike on her behalf. For the employer, J.T. Breslin provided sworn testimony. Tammy Guenther was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on December 24, 2014 after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The nature and extent of the disability, including whether the claimant qualifies as an odd-lot employee.

2. The correct gross earnings for rate calculation purposes. The claimant alleges gross wages of $418.00 per week, while the defendants contend the appropriate gross earnings are $354.12 per week.

STIPULATIONS

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

1. The parties had an employer-employee relationship at the time of her injury.
2. Claimant sustained an injury which arose out of and in the course of employment on August 25, 2013.
3. The injury is a cause of both temporary and permanent disability. The permanent disability is industrial.
4. Temporary disability/healing period and medical benefits are no longer in dispute.
5. The claimant is married with two exemptions for rate calculation purposes.
6. Affirmative defenses have been waived.
7. Medical care is not in dispute.
8. The defendants are entitled to a credit of ten weeks of permanent partial disability.

FINDINGS OF FACT

Claimant, Katherine Morgan, was 48 years old at the time of hearing. She is legally married, although she is separated. She received her G.E.D. from Kirkwood Community College in 1983. She later attained a Certified Nursing Assistant (CNA) certificate in 1990. Later still, she earned an Occupational Medicine Technician (OMT) certification in 2006, also from Kirkwood. In 2006, she began, but did not complete, coursework for a Medical Transcription Technician certificate through Hamilton Business College. She testified she is not particularly good with computers. She has not been diagnosed with any learning disabilities. (Transcript, page 62) Ms. Morgan does not drive. She gave up her driver's license after suffering a work-related injury in approximately 2009. (Tr., pp. 41-42)

From 1983 to 1990, Ms. Morgan worked as a bartender at Kitty's Long Branch. Since 1990, Ms. Morgan's work history is almost exclusively in the field of healthcare (CNA/OMT). She worked in healthcare from approximately 1990 through 2009. This mostly involved direct patient care in nursing homes, which could be fairly heavy at times. Job duties included dressing residents, lifting residents, and assisting with

cleaning (showers) and meals. She had suffered a torn left rotator cuff in 2001. She went through physical therapy for that injury and went back to work full-duty.

In 2009, Ms. Morgan suffered a work injury to her right shoulder performing this type of work, which ultimately led her to leave the field of healthcare. (Def. Ex A, pp. 7, 10) She underwent surgery for this and was released to work in December 2009. (Def. Ex. A, p. 23)

Ms. Morgan began working for Remedy Intelligent Staffing, Inc., (hereinafter Remedy) in approximately early 2010, after being released from her right shoulder surgery. Remedy is a staffing company which provides temporary staff to local businesses. Remedy did not guarantee workers 40 hours per week, and the hourly wage depended upon the position. According to Remedy's Operations Manager, John T. Breslin, it was not uncommon at all for employees to work less than 40 hours per week.

While employed by Remedy, Ms. Morgan was assigned to General Mills in Cedar Rapids and Oral B in Iowa City. She performed various duties at General Mills including pushing and pulling pallets, setting up and tearing down lines and feeding hoppers. At Oral B, she packaged toothbrushes, moved pallets, and trained other workers. After several months with Oral B, she requested to return to General Mills. She returned to General Mills in 2013. She eventually worked as a supervisor in the cereal department at General Mills until she suffered a work injury in August 2013.

On August 25, 2013, Ms. Morgan turned and hit her right shoulder on the corner of a metal hopper while loading the hopper. This injury is admitted, and the employer concedes the injury was a cause of both temporary and permanent disability.

Ms. Morgan sought treatment for her shoulder in September 2013, a full month after the incident of injury. (Cl. Ex. 3, p. 1) After seeking treatment, she was required to take a drug test pursuant to the employer's policy. (Breslin Testimony; Cl. Ex. 1, p. 3) Based upon the record before me, I have very serious doubts as to whether this drug test was legal under Iowa Code section 730.5 (2013). The employer's drug testing policy is not in evidence. Post-accident testing can be performed under section 730.5 under the following limited circumstances. "Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, ..." Iowa Code section 730.5(8)(a)(3) (2013). Thus, there are three elements for a legal post-accident test: (1) an accident, (2) which causes and injury, and (3) an investigation of the accident.

The test was allegedly positive for "marijuana", although there are no specific test results in the record of evidence. It is noted that ordinarily this type of test detects the presence of THC. There is a hand-written note from Mercy Care North where the test is listed as positive and "marijuana" is handwritten in. Under special instructions are the words, "confirm instant non-negative test." (Cl. Ex. 3, p. 14) No testing levels are

provided, nor any of the documentation that would ordinarily accompany such a test result. The date on the form is October 7, 2013, which is when Mr. Breslin testified the positive results were confirmed.

Of course, the legality of the drug test was not a fighting issue in this case. Even so, the evidence which is in the record strongly suggests that the employer did not conduct post-accident testing; it conducted post-treatment testing. The injury occurred on August 25, 2013. No test was performed until Ms. Morgan sought treatment on September 26, 2013. The test clearly had nothing at all to do with the accident investigation since a positive test 32 days after the accident is useless for accident investigation purposes. In fact, there is really no evidence that there was any investigation of the accident itself. It is unclear in this record why the testing policy was applied to Ms. Morgan under these circumstances, but based upon the record before the agency, the use of the drug test as a basis for termination is a cause of significant concern.

Ms. Morgan received treatment through Mercy Occupational Medicine with Sudha Anand, M.D. The initial x-rays were negative. (Cl. Ex. 3, p. 5) She described a burning sensation in her right armpit that tingled down her right arm. (Cl. Ex. 3, p. 6) She was provided various Tramadol for the pain and given restrictions against reaching and overhead work. (Cl. Ex. 3, pp. 1, 5) She returned to Dr. Anand a couple of times in October. The restrictions stayed the same, and Ms. Morgan confirmed the medications were helpful. She was also given Skelaxin. Dr. Anand continued to diagnose shoulder sprain. (Cl. Ex. 3, p. 24)

On November 22, 2013, Ms. Morgan was examined and evaluated by Ignatius Brady, M.D. Ms. Morgan reported that her shoulder had done fairly well for long periods of time after her surgery in 2009; however, her current pain was much worse. (Cl. Ex. 4) Dr. Brady noted the following symptoms:

> Aching and burning in the right shoulder and into the axilla which shoots down arm. Activities of daily living are unaffected, but she does many things in pain. It does interrupt her sleep. The main effect the pain has had on her is she is unable to resume the physically demanding work she had done at General Mills for the last three years.

(Cl. Ex. 4, p. 1) In the physical examination, he noted a loss of 20 degrees of active range of motion. (Cl. Ex. 4, p. 4) Dr. Brady ordered an MRI, which was performed in January 2014. In his March 7, 2014 report, he described the findings as "supraspinatus tendinopathy with superimposed, less than 50% articular sided interstitial type tear of the supraspinatus." He diagnosed right-sided partial rotator cuff tear. (Cl. Ex. 4, p. 4) He recommended no further surgery and provided an impairment rating of an additional two percent due to new muscle tearing. (Cl. Ex. 4, p. 4)

In September 2014, David Tearse, M.D., performed a medical evaluation. He was provided a lengthy history of the facts and circumstances of Ms. Morgan's medical

problems with her right shoulder. (Cl. Ex. 5, pp. 1-5) Dr. Tearse performed a thorough medical record review, obtained the history, performed a physical examination and ordered new x-rays. (Cl. Ex. 5, pp. 5-6) He diagnosed right shoulder impingement with mild limitation of motion and weakness, with MRI finding of partial thickness rotator cuff tear. (Cl. Ex. 5, p. 8) He did not recommend surgery, opined she was at maximum medical improvement and assigned an 8 percent body as a whole rating. (Cl. Ex. 5, p. 9) He indicated that this rating was in addition to her prior rating of 5 percent she received after her 2009 surgery. He assigned the following permanent restrictions related to the condition:

- 20 pounds lifting from floor to waist bilaterally – occasional;
- 5 lbs. lifting on the right unilaterally – occasional;
- Avoid extended overhead reaching and lifting;
- 20 lbs. push/pull – occasional;
- Limit repetitive reaching in front of her and to her side.

(Cl. Ex. 5, pp. 9-10) Prior to hearing, Dr. Brady signed on that he agreed with these restrictions. (Cl. Ex. 4, p. 6)

On October 29, 2014, William Boulden, M.D. evaluated Ms. Morgan for a second defense medical evaluation. He diagnosed "a soft tissue irritation problem." (Def. Ex. B, p. 3) Dr. Boulden opined that there was no new pathology since her 2009 surgery. "I do not see any new pathology, based on the current MRI, that would be related to her injury." (Def. Ex. B, p. 3) He essentially went on to opine that she should have had medical restrictions against doing overhead work after her first injury. "I do not feel she has sustained any type of material aggravation due to the injury of August 25, 2013. My definition of material aggravation is something that has been changed structurally." (Def. Ex. B, p. 4) Structurally, according to Dr. Boulden, her shoulder is better now than it was in 2009. He also discounted Ms. Morgan's symptoms, finding she had a positive Waddell sign from light touching around the shoulder and that her active range of motion was significantly worse than her passive range of motion.

Both parties also retained vocational experts. Ms. Morgan met with Barbara Laughlin, M.A., in October 2014. Ms. Laughlin reviewed numerous medical records and other documents. Ms. Laughlin analyzed Ms. Morgan's restrictions as well as the limitations on her activities of daily living. (Cl. Ex. 6, p. 6) She used something called Skilltran computerized transferrable analysis program to analyze Ms. Morgan's employability. "It is my opinion Ms. Morgan will have significant difficulty finding work she can perform within her restrictions. A limitation on reaching is severe." (Cl. Ex. 6, p. 10) She then opined that she is able to perform sedentary and light work which requires occasional reaching or less. (Cl. Ex. 6, p. 10)

The defendants retained Michelle Barns, B.S., CSHE, CEAS III, for an expert vocational report. Ms. Barns did not meet with Ms. Morgan. Ms. Barns reviewed the medical restrictions and work history and determined Ms. Morgan is capable of working in the following positions: customer service representative, receptionist, information clerk and telemarketer. (Def. Ex. D, p. 1) Frankly, these are all realistic fields of employment for Ms. Morgan to at least attempt. Ms. Barns provided several pages of documentation and analysis showing jobs available in the community in these fields. (Def. Ex. D)

For her part, Ms. Morgan has not done a substantial search for work since being terminated by her employer. She does not believe she is capable of gainful employment. She has filed for disability.

Ms. Morgan testified that her shoulder pain and limitations interfere with her daily activities, including leisure activities such as golfing, walking her dog and riding a bike, as well as activities such as mowing the lawn and personal care, like washing her hair. Any activities which involve reaching are difficult. She has night pain which adversely affects her ability to sleep.

Ms. Morgan is found to be credible, as is her significant other, Todd Priske. Ms. Morgan's testimony has been consistent between her sworn deposition testimony and her testimony at hearing, as well as her hearsay statements in medical records. In particular, I believe that she had essentially healed following the 2009 surgery, and her symptoms became much worse and more disabling following her August 25, 2013, work injury. Having said this, I believe the claimant is not particularly motivated to seek work. She believes she is too disabled to work, and this belief has led her to not even make a legitimate attempt to seek employment.

CONCLUSIONS OF LAW

The primary question submitted is the nature and extent of Ms. Morgan's work-related disability. The situs of her condition is in her right shoulder, and, as such, her disability is evaluated industrially.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

The defendants have conceded that Ms. Morgan has some level of disability causally related to her stipulated work injury. Defendants contend the extent of disability is minimal, having paid 2 percent of the body as a whole prior to hearing. Ms. Morgan has alleged entitlement to benefits as an odd-lot worker, or alternatively argues for a finding of a very high industrial 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.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Ms. Morgan's diagnosis is partial rotator cuff tear of the right shoulder. Her

impairment ratings range from 2 to 8 percent of the body as a whole, which according to the physicians, is in addition to her previous rating following the 2009 right shoulder surgery. I find that Dr. Tearse's rating is a more reliable and accurate assessment of Ms. Morgan's loss of function as a result of her right shoulder injury. This disability does appear to be, primarily, an aggravation of her 2009 injury and surgery. She had healed up from that surgery and returned to unrestricted work. Dr. Boulden may very well be correct that she should have had restrictions following that surgery to prevent this type of aggravation from occurring. The undisputed facts of the case are that her shoulder symptoms were under control and she had no restrictions. The aggravation occurred and the defendants are responsible.

Dr. Boulden's expert opinion is squarely rejected in this decision. He opined that since he could find no new structural damage on the films, there was no new impairment as defined by him. Again, regardless of what should have happened, the facts are that after the 2009 surgery, Ms. Morgan's shoulder felt pretty good. She returned to work with no restrictions from 2010 through August 25, 2013, when she had her injury at work. In fact, the fact that Dr. Boulden opined Ms. Morgan should have had restrictions following the 2009 surgery weighs in her favor in this sense. He essentially opined that her condition back then was susceptible to re-injury based upon doing aggressive overhead work and reaching.

Ms. Morgan had a very limited course of treatment. She saw some occupational physicians a few times in September and October before her evaluation with Dr. Brady. Her treatment essentially ended unceremoniously. There was no surgery or even physical therapy. She had a couple months of conservative care involving medical restrictions and medication management.

The strongest evidence for a high industrial disability assessment in this case is the medical restrictions. The most accurate restrictions are agreed upon by the parties' experts. They are:

- 20 pounds lifting from floor to waist bilaterally – occasional;
- 5 lbs. lifting on the right unilaterally – occasional;
- Avoid extended overhead reaching and lifting;
- 20 lbs. push/pull – occasional;
- Limit repetitive reaching in front of her and to her side.

These are severely limiting restrictions for a 48 year old whose work history has almost exclusively involved providing direct care to patients as a CNA and manufacturing.

Ms. Morgan is 48 years old. She has a GED and some certificates in the field of healthcare. She is a good communicator and a good worker. She has been promoted

to lead worker and even an acting supervisor during her relationship with the employer in this case.

The defendants' strongest evidence in this record is Ms. Morgan's failure to conduct a meaningful work search. (Def. Ex. F, Morgan Depo., p. 19) Ms. Morgan simply believes that since she cannot do the same jobs she has done in the past, she is not capable of working at all.

I find that the claimant has failed to meet her burden to show a prima facie case that she is not employable in the competitive job market. Her own expert placed her in the sedentary to light classification, and her failure to perform a legitimate work search, tips the scales against such a finding. Her own expert's report does not meet her burden. Moreover, even if the claimant had met her burden, the defendants have shown jobs the claimant could likely do in the competitive job market. In particular, I find the report of Ms. Barns credible insofar as Ms. Morgan could likely perform work in the competitive labor market such as customer service representative, receptionist, information clerk and telemarketer. Ms. Morgan's lack of computer skills are certainly a disadvantage, however, she has demonstrated solid leadership skills and strong communication skills.

It undoubtedly would be easier to assess Ms. Morgan's true level of disability had the employer continued to employ her. There would certainly be more certainty about her work capacity. On October 7, 2013, the employer terminated Ms. Morgan based upon an alleged positive drug test. As set forth in the findings of fact, the employer suggested this test was for purposes of a post-accident investigation, but there is absolutely no evidence in this record to support that allegation. The test was performed more than 30 days after the accident, on September 26, 2013, when Ms. Morgan finally received treatment. The final results were then, for some reason, not learned until October 7, 2013. Ms. Morgan was let go at that time. There is no competent evidence in this record which would allow me to conclude that Ms. Morgan was terminated due to her own misconduct. Eaton v. Employment Appeal Board, 602 N.W.2d 553, 557-58 (Iowa 1999). The defendants' argument that per "the uncontested testimony of Mr. Breslin, had the claimant not failed the post-accident drug test she would still be employed" by the employer today, is entirely unconvincing.

I find that Ms. Morgan's best opportunity for continued employment would have been to continue to receive work assignments through Remedy. The fact that Remedy terminated her following a claim for a work injury treatment makes it far more difficult to ascertain her actual loss of earning capacity. Had she stayed employed, we would know with far greater certainty what her work capacity is and whether she could have easily transitioned into other jobs, as Mr. Breslin suggested. What is clear is that with the restrictions and limitations she has, Ms. Morgan is no longer suited to continue to perform the demanding work she was doing at the time of injury. (Cl. Ex. 1) The work she was specifically assigned through the General Mills contract is undoubtedly outside of her restrictions. This, combined with restrictions that prevent her from a great deal of her past employment, is strong evidence that her loss of earning capacity is severe.

When considering these, and all of the other factors of industrial disability, I find that the greater weight of evidence demonstrates that Ms. Morgan has suffered a 60 percent loss of earning capacity. Sixty percent of 500 weeks is 300 weeks of benefits owed commencing on the stipulated date of November 22, 2013.

The only other issue is Ms. Morgan's gross wages. The claimant contends the gross wages are $418.00 per week. (Cl. Ex. 8) The defendants contend the correct gross wages average out to $354.00 per week. (Def. Ex. H)

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 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 actual difference in the parties' calculation of gross wages seems to be that the claimant included her overtime pay at the time and a half rate. This is not allowed. Iowa Code section 85.61(3) (2013); *see also* rule 876 IAC 8.2. The claimant also includes the week the injury occurred, which is also disallowed.

I find that the defendants have correctly calculated the gross wages. Ms. Morgan averaged $354.00 per week in the 13 weeks which led up to the date of injury. Consequently, the correct rate of compensation (married with two exemptions) is $251.28.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of two hundred fifty-one and 28/100 dollars ($251.28) per week commencing November 22, 2013.

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 weeks previously paid.

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.

Signed and filed this 23rd day of July, 2015.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

David A. O'Brien
Attorney at Law
1500 Center St. NE
Cedar Rapids, IA 52402
dave@daveobrienlaw.com

Peter J. Thill
Attorney at Law
111 E. Third St., Ste. 600
Davenport, IA 52801-1596
pjt@bettylawfirm.com

JLW/sam

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.