BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARDELL MAYBERRY, Claimant, vs. SISTER OF CHARITY BVM, Employer, and ZURICH NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5011856 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402; 1700 1800; 1803

STATEMENT OF THE CASE

This is a proceeding in arbitration that was initiated when Mardell Mayberry, claimant, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on March 8, 2004. Claimant alleged she sustained a work related injury on January 16, 2004 when she slipped and fell on ice on the sidewalk. (Original Notice and Petition)

The Sister of Charity BVM is a religious order of Catholic nuns. The order operates Mount Carmel Complex in Dubuque, Iowa. The complex community "consists of those who choose Mount Carmel for their retirement home, those who serve our retired, sick and frail BVMs and those who serve in administration for the Congregation." (Exhibit A-1) The mission of the community is "To join with others in supporting and furthering the life and mission of the BVM Congregation." (Ex. A-1) For purposes of workers' compensation, The Sister of Charity BVM is insured by Zurich North America.

Defendants filed their answer on May 27, 2004. They admitted the occurrence of the work injury on the date alleged.

The parties indicated they would be ready to try the case on or after January 1, 2005. The hearing administrator scheduled the case for a primary hearing on September 29, 2005 in Dubuque, Iowa at the office of the Iowa Department of Workforce Development.

Claimant testified on her own behalf. Ms. Luan Scott, daughter of claimant, testified on behalf of her mother. Ms. Cathy Cushman, Dining Service Assistant, testified for defendants.

The following exhibits were offered at the commencement of the hearing: Claimant's exhibits 1-6 and Defendants' exhibits A-G. All proffered exhibits were admitted as evidence in the case.

The parties submitted post-hearing briefs. Defendants filed their brief on October 14, 2005. Claimant filed her brief on October 17, 2005.

STIPULATIONS

The parties engaged in the following stipulations:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on January 16, 2004 that arose out of and in the course of her employment;

3. The injury is a cause of both temporary and permanent disability,

4. Temporary benefits are no longer at issue;

5. Claimant's permanent disability is an industrial disability and the commencement date for the payment of benefits is May 17, 2004;

6. Claimant's weekly benefit rate is $153.37 per week;

7. Defendants have withdrawn any affirmative defenses they may have had available to them;

8. Prior to the hearing, claimant was paid 17.143 weeks of compensation at the rate of $294.02 per week, for January 17, 2004 through May 16, 2004, and $1,488.32 for period May 17, 2004 through August 8, 2004, and permanent partial disability of 43 weeks at $153.37 per week from November 29, 2004 through September 25, 2005; and

9. The parties are able to stipulate to the allowable costs to litigate the claim.

ISSUES

The issues for determination are:

1. The extent of permanent partial disability benefits to which claimant is entitled; and

2. Whether claimant is entitled to mileage pursuant to section 85.27 of the Iowa Code, as amended.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after hearing the testimony, after reading the evidence and after reviewing the post-hearing briefs, makes the following findings of fact and conclusions of law:

Claimant is presently 72 years old. She is a widow with ten adult children. Claimant graduated from high school in 1951. She obtained her certification as a certified nursing assistant, (CNA) in 1977 or 1978.

To say the least, claimant has always been an industrious individual. Claimant retired from Carlon in 1996. For three years, claimant worked part-time as a cook at St. Raphael's Villa. She tended to the dietary needs of retired priests.

After a long work life, she commenced her employment with the present employer on October 13, 1999. She was almost 66 when she started working at the Mount Carmel Complex as a part-time afternoon host in the Dining Services Department. Claimant testified she worked from 25 to 30 hours per week. Her hourly wage was set at $9.68 per hour. The mission of the dietary department was "To provide nutritious and attractive meals and nourishment to all Mount Carmel residents, guest and staff." (Ex. A-1) Claimant thoroughly enjoyed her job as a host.

There is no dispute claimant slipped and fell on the icy pavement outside of the complex on January 16, 2004. Following her fall, she was taken to the Mercy Medical Center. X-rays were ordered of her left leg. The results revealed "Lateral posterior tibial plateau fracture minimally displaced." (Ex. 2-2) Mark Singsank, M.D., diagnosed claimant with "Internal derangement of left knee with posterior tibial plateau fracture." (Ex. 2-2) Dr. Singsank placed claimant in a knee brace at 30 degrees, provided her with crutches and referred claimant to Scott Schemmel, M.D.

On January 20, 2004, Dr. Schemmel examined claimant's left knee for the first time. The physician found "trace knee effusion to be present." (Ex. 3-2) Claimant not only complained of her left leg, she also voiced complaints of pain in the lumbar spine. Dr. Schemmel ordered x-rays of the lumbar spine. The x-rays demonstrated compression fractures. Consequently, Dr. Schemmel placed claimant into a Jewett brace. Also, Dr. Schemmel referred claimant to Michael P. Chapman, M.D., for treatment of the spine.

Dr. Chapman examined claimant on February 11, 2004. He concurred with the opinion held by Dr. Schemmel; claimant had sustained compression fractures to the lumbar spine. (Ex. 3-7) Dr. Chapman opined the Jewett brace was appropriate for claimant's condition and the orthopedic surgeon also prescribed a sitting doughnut for

claimant's sacrococcygeal pain. Claimant was told to wear her brace unless she was showering.

On February 17, 2004, claimant returned to Dr. Schemmel for treatment of the left knee. Only a trace effusion was present. (Ex. 3-8) Conservative treatment for the knee was prescribed. The conservative treatment included physical therapy and a home exercise program. But for the lumbar spinal condition, claimant could have returned to work on March 17, 2004. (Ex. 3-15) Dr. Schemmel discussed a gradual return to work plan for claimant. The physician released claimant to return to work because of her knee effective April 13, 2004. However, claimant did not return to work. She was still experiencing difficulties stemming from her lumbar spine condition.

Because of her difficulties with her lumbar spine, claimant continued to treat with Dr. Chapman. The physician ordered a "sitting doughnut" for claimant. Dr. Chapman wanted to wean claimant from the Jewett brace. On April 7, 2004, Dr. Chapman ordered aggressive therapy for claimant. (Ex. 3-15)

On May 3, 2004, claimant participated in a functional capacity evaluation. Mr. Dan Focht, MA, OTR conducted the FCE. Mr. Focht opined claimant was capable of performing work in the sedentary to light level of work as defined by the Department of Labor Dictionary of Occupational Titles. Claimant's level of endurance was observed to be low. (Ex. 5-5)

Personnel records established claimant returned to work on May 17, 2004. The return to work was gradual in nature. Claimant initially worked two hours per day. By July 8, 2004, claimant was able to work six hours per day and claimant felt well. (Ex. 4-34) Gradually, she returned to work for five to seven hours per day. By August 2, 2004, claimant worked eight hours per day.

On or about August 15, 2004, claimant was home on a Sunday. She was walking inside of her home when she experienced excruciating pain. The doctors discovered claimant had sustained another compression fracture. The fracture occurred at T-12 and the medical personnel deemed the cause as nontraumatic. (Ex. 3-41) The fracture was unrelated to claimant's employment. But for the new fracture, claimant would have been at maximum medical improvement on September 1, 2004. (Ex. 3-43)

On September 22, 2004, Dr. Schemmel provided a permanent impairment rating for claimant's left leg. The physician rated claimant as having a15 percent impairment rating to the left lower extremity which converted to a 6 percent impairment rating to the body as a whole.

Peggy Mulderig, M.D., M.P.H., a specialist in occupational medicine, provided a permanent impairment rating for claimant's spinal condition. Dr. Mulderig rated claimant as having a 10 permanent impairment rating for the compression fractures at L-1 and L-2.

Dr. Mulderig opined the following with respect to permanent restrictions for claimant:

> Ms. Mayberry can return to employment with a 13-pound weight limit. She can bend and reach 10 to 33% of any shift. It would be further recommended that the patient be started back to work on 4-hour shifts, gradually increasing to 6 and then to 8-hour shifts. In this examiner's opinion, the patient would be unable to mop or vacuum. Otherwise, the patient should be able to return to her prior position as p.m. host.

(Ex. 5-6)

Claimant's last day of work at the Mount Carmel complex was August 24, 2004. (Ex. C-6) Claimant testified she was unable to perform the duties of a PM Host as depicted in exhibit A. Specifically, claimant was unable to tolerate physical exertion and she had lifting restrictions. Additionally, claimant was specifically instructed to avoid mopping and to refrain from pushing a vacuum cleaner. (Ex. A)

Despite claimant's inability to push a vacuum cleaner, she was told to do so. Claimant experienced guilt because she was unable to perform all of the duties of a PM Host. She enjoyed her job and missed talking with the nuns who resided at the complex.

Ms. Cathy Cushman, Dining Service Assistant, testified claimant was unable to mop and vacuum the dining room floor. Ms. Cushman testified a PM Host must be free from weight restrictions and the host must be capable of standing for long periods of time. Ms. Cushman indicated there was no burden on the dining room staff to follow the work restrictions that were imposed for claimant.

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. of 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.2d 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 Serv. 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.

Since her retirement in 1996, claimant has only worked in a part-time capacity. At the Mount Carmel Complex, claimant was employed part-time. The facility had written work duties for claimant as a PM Host. She worked between 20 to 30 hours per week. The parties stipulated that at the time of her work injury, claimant was earning $225.52 per week. Claimant was an employee in good standing who received satisfactory performance reviews for her work. She enjoyed her hosting job.

After her injury at work, claimant sustained permanent injuries to her left leg and to her lumbar spine. There are permanent impairment ratings for both the left leg and for the spine. Claimant has an impairment rating for the left leg in the amount of 15 percent to the lower extremity or 6 percent to the body as a whole. The rating for the work related spinal condition is 10 percent to the body as a whole. Claimant is able to return to sedentary or light work but she is required to work within the restrictions imposed by her medical providers. Those medical restrictions preclude claimant from performing all of the duties of a PM Host. Defendant-employer indicated the complex was willing to accommodate claimant. However, certain staff members were pressuring claimant to work outside of her work restrictions.

There are numerous part-time positions available for which claimant is qualified. However, most of the positions are at the bottom of the wage scale. Claimant has not looked for suitable work. Because of her age, vocational training is dubious. Claimant has always worked in unskilled or semi-skilled positions. Currently, claimant receives approximately $900.00 per month in Social Security retirement benefits and $124.00 per month as pension benefits from Carlon, a former employer. Claimant qualifies for Medicare benefits too. Claimant has sustained an actual loss of earnings since the date of her work injury. She has earned no wages since she last worked on August 24, 2004.

It is the determination of the undersigned; claimant has sustained a permanent partial disability in the amount of 35 percent. Claimant is entitled to 175 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $153.37 per week and commencing from the stipulated date of May 17, 2004. Defendants shall take credit for all benefits previously paid to claimant, including any overpayments made.

The next issue to address is the issue of mileage for driving to medical providers. See: Iowa Code section 85.27(1), as amended and rule 876 IAC 8.1. Claimant attached to the hearing report, a detailed summary of the mileage requested. The summary is hereby incorporated by reference herein. Claimant is requesting 300 miles at the rate of $.29 per mile. She is claiming $87.00. Both the Iowa Code and the Iowa

Administrative Code provide for transportation expenses. Claimant is entitled to the $87.00 for her transportation expenses.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of one hundred fifty three and 37/100 dollars ($153.37) per week and commencing from May 17, 2004.

Defendants shall also pay unto claimant eighty seven ($87.00) in medical mileage, as provided by Iowa Code section 85.27 and rule 876 IAC 8.1.

Defendants shall take credit for all benefits previously paid, including any overpayment.

Accrued benefits shall be paid in a lump sum, together with interest as allowed by law.

Allowable costs to litigate the claim are assessed to defendants.

Within a timely manner, defendants shall file all reports that are required by the Iowa Division of Workers' Compensation.

Signed and filed this _____31st_____ day of March, 2006.

_____
MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Mr. Mark J. Sullivan
Attorney at Law
PO Box 239
Dubuque, IA 52004-0239

Ms. Stephanie Glenn Techau
Attorney at Law
700 Walnut St., Ste. 1600
Des Moines, IA 50309-3800

MAM/kjf