BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

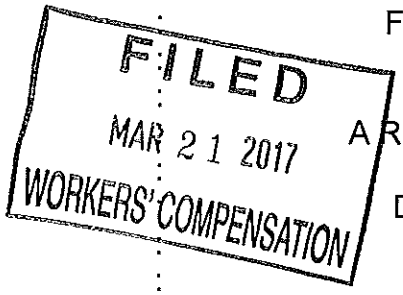
GUI FANG LIU,

Claimant,

vs.

HY-VEE, INC.,

Employer,
Self-Insured,
Defendant.



File No. 5055451

ARBITRATION

DECISION

Head Note Nos.: 1803; 4000.2

STATEMENT OF THE CASE

Claimant, Gui Fang Liu, brought the above-captioned case seeking workers' compensation benefits against Hy-Vee, Inc., a self-insured employer, for a November 3, 2014, injury. This case was heard on December 9, 2016 and considered fully submitted upon the simultaneous filing of briefs on January 6, 2017.

The record consists of claimant's exhibits one through 10, defendant's exhibits A through K, testimony of the claimant, testimony of claimant's daughter, and Roxanne Nowicki.

ISSUES

1. Extent of disability
2. Whether she is entitled to penalty benefits, and
3. Whether she is entitled to a assessment of costs

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate the claimant sustained a compensable injury to her right shoulder on November 3, 2014. There is no issue regarding temporary disability in dispute. The parties agree that the disability is industrial nature and the

commencement date for permanent partial disability benefits, if any are awarded, would be February 6, 2015. The parties dispute the extent of the claimant's disability

At the time of the injury the claimant's gross earnings were $845.00 per week. She was married and entitled to exemptions. The parties believe the weekly benefit rate to be $545.22 based on those foregoing numbers. The defendants waived all affirmative defenses and there are no medical benefits in dispute

Prior to the hearing the claimant was paid 35 weeks of compensation at the rate of $545.22.

FINDINGS OF FACT

Claimant is a 61 year old woman at the time of the hearing. She was born and educated in China before immigrating to the United States. While in China, she completed 11 years of education and worked as a human resources manager. She has limited understanding of English but is able to speak a handful of simple words.

After her immigration, she worked as a waitress in various establishments before she began her employment with defendant employer in 2005. She was promoted from server to manager of the Chinese Food Department in 2006, a position she held until 2015 when she was terminated upon failing to return to work at the appropriate time following an extended stay in China. Roxane Nowicki, the human resources and accounting manager for defendant employer, testified that she contacted claimant's daughter to inform her that the claimant's extended leave of absence had expired and wondered when claimant would return to work.

Claimant did not return to work nor contact the defendant employer. In October, claimant returned to the U.S. and asked to return to the cook/manager position. She was turned down as they had filled the position. Ms. Nowicki did tell the claimant that a similar opening was available in another store, but claimant did not apply for that position.

All parties agreed that claimant would not be able to perform the cook/manager position due to the restrictions imposed.

Despite her language issues, claimant was able to memorize the menu items and convey the orders to the kitchen while working as a waitress. As manager, she was responsible for ordering new supplies for her department and using the department computer to do so. She expressed no difficulties with these tasks.

Ms. Lana Sellner, a vocational rehabilitation consultant, described claimant's language facility as follows:

> Ms. Liu is attending ESL classes at the local church, 1 hour every week. She has been attending this class for about 7 years. Ms. Liu reported she is not able to communicate in English when she goes to the

bank or other stores. She is able to understand Basic English that is in the food industry.

Ms. Liu reported on her job at Hy-Vee she was required to enter information regarding staffing schedule, inventory and ordering inventory in to a software program. She was able to understand these words because it is in her industry and it appeared to be a drop down menu option and she so [sic] she was familiar of the information.

(Ex. C, p. 2)

Her primary duties for defendant employer was as a cook. She would fry 40 pounds of rice several times a day, along with pots of vegetables and meats. Other tasks included cleaning, ordering supplies, and serving customers. The physical requirements are described by the defendant as follows:

Physical Requirements:

- Must be physically able to exert up to 50 pounds of force occasionally; exert up to 20 pounds of force frequently; and exert 10 pounds of force constantly to move objects.
- Visual requirements include vision from 20 inches or less to more than 20 feet with or without correction, depth perception, and field of vision.
- Must be able to perform the following physical activities: Climbing, balancing, stooping, kneeling, reaching, standing, walking, pushing, pulling, lifting, grasping, feeling, talking, hearing, and repetitive motions.

(Ex. 7, p. 2)

On November 3, 2014, claimant was attempting to lift a box of chicken from a cart. The cart slipped and claimant's shoulder was injured. She informed a co-worker and then a supervisor of her injury.

The next day, claimant was sent to Mercy Occupational Medicine Clinic. (Ex. 1, p. 3) She was given Motrin and a work release. On November 11, 2014, she was referred for an ortho consult due to a suspected rotator cuff injury. (Ex. 2, p. 9) She was released to "computer work only." (Ex. 1, p. 2)

On November 19, 2014, she was seen by Lisa M. Coester, M.D., an orthopaedic specialist. Dr. Coester diagnosed claimant with right shoulder impingement with a possible rotator cuff tear. (Ex. 3, p. 3) A corticosteroid injection was administered. Dr. Coester was hopeful claimant could return to work with no use of her right arm on November 24, 2014. (Ex. 3, p. 6)

Claimant returned to Dr. Coester on December 10, 2014, and reported no improvement. An MRI was ordered along with physical therapy. (Ex. 3, p. 7) Claimant's work restrictions of no use of the right arm were continued.

She began physical therapy at Balanced Physical Therapy with Sue Bell, P.T. Ms. Bell had previously worked with claimant for the left shoulder pain. Claimant had several visits with Ms. Bell but did not improve. She entered physical therapy with a pain rating of four and left with a pain rating of five. (Ex. 2, p. 4) Physical therapy was halted momentarily after an MRI ordered by Dr. Coester revealed a full thickness tear of the distal anterior supraspinatus tendon. (Ex. 4, p. 1) Dr. Coester strongly recommended surgical repair, but the claimant refused. (Ex. 3, p. 16)

On the physical therapy discharge note, it read, "Patient has declined surgery for full thickness tear. Apparently released from physician. PT discontinued." (Ex. 2, p. 4)

At the time of her discharge from physical therapy, claimant complained of pain of 5 on a 10 scale, radiculopathy, and decreased range of motion. (Ex. 2, p. 13)

Dr. Coester deemed claimant at MMI as of February 16, 2015, and assigned work restrictions of no work above the shoulder with the right arm, no repetitive movement, and a 10-pound limit on the right arm for lifting, pushing and pulling. (Ex. 3, p. 17)

She stated regarding the range of motion deficits and impairment rating as follows:

> I last evaluated GuiFang (Linda) on 02/06/2015 and determined she has reached MMI and was released from my care since she is declining surgical treatment for her RC tear. Clinical measurements were completed at that visit – her forward active flexion is limited to 150. Her strength in flexion and abduction is 5-/5 each and 4+/5 strength for ER. Figure 16-40 on page 476 was used to determine ROM impairment, and Table 16-35 on page 510 was used to determine strength impairment.
>
> Using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, and based upon clinical measurements, she has an upper extremity impairment of 11%. This would translate into a 7% whole person impairment.

(Ex. A, p. 1)

Claimant then went to China to see if treatment there could resolve her problem. She described it as follows:

> Q. What sort of care did you get in China? What did you do?

> A. Physical therapy. I take some Chinese medicine. Then Chinese medicine is put on the shoulder and get the electronical and the warm-up and to get the blood circulation for the shoulder.

The treatment in China was not successful. Claimant return to the U.S. in September and sought re-employment with defendant employer. Her position was filled.

She testified that she did speak with a manager at a different store run by defendant employer but they would not hire her because of the work injury. With her daughter's help, she sought employment from other restaurants in town, but none had work available for her, either because of her physical restrictions or her language restrictions. (See e.g., Ex. 8)

Claimant had previous left shoulder pain and was ordered to undergo physical therapy in September 2013. (Ex. 1, p. 1) She had a few physical therapy visits in September of 2013 which seemed to resolve by the end of the month. She was discharged on September 30, 2013, with nearly normal range of motion and only a little pain. (Ex. 2, p. 3) During the IME with Dr. Milani in 2016, claimant had full range of motion on the left with no pain.

On September 20, 2016, Ms. Sellner issued a report at the request of the defendants. Due to the restrictions of Dr. Coester, claimant would be placed in the sedentary to light duty category of work whereas before claimant was in the medium duty work category. (Ex. C, p. 5) Ms. Sellner recommended claimant utilize vocational services.

Ms. Sellner identified three positions for the claimant and sent those to claimant. (Ex. G) With her daughter's assistance, claimant applied for those positions but was not hired. (Ex. 8)

Claimant underwent an IME with James Milani, D.O., on September 13, 2016. (Ex. 5) At that meeting, claimant described constant pain in the lateral aspect of her right shoulder that will, at times, extend down into the elbow. She has difficulty reaching behind her back, up, or out in front of her. Repetitive motions worsen her pain. She cannot sleep on the right side and cannot fasten her bra.

She had limited range of motion on the right with tenderness to palpation, mostly at the lateral humeral head.

> Color, temperature, and capillary refill are all normal throughout the hand/digits. Tinel's and Phalen's are negative. The sensation in the hand and digits to her feels a little less compared to when I touch the left, but there is no dormatomal pattern.

(Ex. 5, p. 5) He confirmed Dr. Coester's diagnosis, and noted that because claimant turned down surgery, she was at MMI. He assigned the same impairment rating of 7%.

> Question #4: Regardless of causation, within a reasonable degree of medical certainty, do you believe claimant has sustained any permanent impairment as a result of the alleged work injury of November 3, 2014, under the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition? If so, what rating of permanent impairment under the AMA Guides, 5th Edition will you assign to each individual injury and as a whole? Answer: Since I believe she is at MMI for this injury, I believe it is okay to assess for a permanent impairment according to "The Guides." A permanent impairment according to the Guides would be rated on her range of motion or the lack of range of motion. I therefore turn to chapter 16.41, shoulder motion impairment. Using Figure 16-40, forward flexion of 130 degrees equals 3% upper extremity impairment, extension of 30 degrees equals 1% upper extremity impairment. Figure 16-43 shows abduction 128 degrees equals 2% upper extremity impairment and adduction 45 degrees equals 0% upper extremity impairment. Figure 16-46 shows internal motion of 30 degrees equals 4% upper extremity impairment and external range of motion of 40 degrees equals 1% upper extremity impairment and external range of motion of 40 degrees equals 1% upper extremity impairment. These impairments are then added together, according to the Guides, to equal 11% upper extremity impairment. The whole person impairment, Table 16-3, takes 11% upper extremity impairment to a 7% whole person impairment. I do not believe there are any other ratings pertaining to this injury.

(Ex. 5, p. 6)

Because of her injury, claimant limits her activity around the home. She is currently unemployed and it did not appear that she was actively looking for employment or motivated to return to work.

Her tax returns show a fairly steady wage from 2010 through 2014. (Ex. 6)

CONCLUSIONS OF LAW

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.

There is very little factually in dispute. Claimant sustained a work-related injury which resulted in a torn rotator cuff. She was advised to have surgery to repair her condition, but refused.

Claimant has continued pain, as well as limited range of motion. Drs. Milani and Coester both opined claimant had a 7 percent whole person impairment. Dr. Milani's work restrictions are slightly more detailed than that of Dr. Coester, but generally, both recommend limited use of the right arm above shoulder height with a 10-pound lift, push and pull.

As a result, this moves claimant from the medium duty work category to the sedentary and light duty work category. Claimant has limited understanding of the English language, although, based on the relative ease of her direct testimony, perhaps more than she admitted to. Nonetheless, there is no evidence that claimant is fluent in English, either reading, writing or speaking it and the lack of this fluency affects her overall access to the labor market.

The sticking point in this case is the claimant's refusal to undergo surgical repair of her torn rotator cuff. The restrictions imposed by Dr. Coester and Dr. Milani are largely due to the claimant's existing injury. Dr. Milani states that the work restrictions are, in part, to prevent any further injury to the injured rotator cuff.

This agency has adopted the approach that where the risk of treatment is insubstantial and the probability of cure or improvement is high, then refusal of medical treatment will result in a termination of benefits. But if there is a real risk involved and a considerable chance that the procedure will result in no improvement or perhaps a worsening of the condition, then claimant cannot be forced to run the risk at the peril of losing his or her statutory compensation rights. OTC Holdings v. Prucha, 758 N.W.2d 839 (Iowa Ct. App. 2008) (noting that the commissioner's "findings could have specifically expanded on whether the surgery was inherently risky or without potential recovery"); Palmer v. Iowa Power, Inc., File No. 941807 (App., May 25, 1993); Hardy v. Abell-Howell Company, File No. 814126 (App. December 21, 1990).

The record does not have evidence that claimant was terrified of surgery as was the case in Walker v. Worley Warehousing, Inc., File No. 5035129, January 25, 2011 (WL 71110505). She did not want to have surgery and was willing to try alternative methods in China. Those were not successful.

Both Dr. Milani and Dr. Coester agree that surgery is recommended. Dr. Coester used the words "strongly recommended." There are no percentages of success in the record, but the untreated rotator cuff tear is susceptible to further injury, as evidenced by Dr. Milani's recommended work restrictions.

In balancing the risk of harm versus the probability of cure or improvement, it is determined that claimant's permanent disability benefits are reduced because of her refusal to have surgery. While the surgery may not have improved claimant's condition, the evidence in the record makes it more likely than not that the continued pain and reduced range of motion is due to the untreated rotator cuff tear and that the shoulder is more vulnerable to further injury.

Because of the foregoing, weighing the claimant's past work history, her age, her education, her current skill set, and her low motivation to return to work, it is determined claimant has suffered a 25 percent industrial loss.

Turning to the issue of penalty, claimant was paid only 7 percent and no more.

Iowa Code section 86.13(4) allows an award of additional benefits if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse. Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

1. The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

2. The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

3. The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

Defendant has the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty.

Claimant asserts that defendants' refusal to pay more was unreasonable. However, defendants did communicate their intent to pay the 7 percent impairment on

February 20, 2015, shortly after the determination of Dr. Coester. (Ex. F, p. 1) Dr. Milani performed an additional assessment a year later after claimant returned from China and reach substantially the same conclusion as Dr. Coester. Further, claimant refused to undergo surgery.

Defendants neither refused to pay benefits nor paid their benefits late. That they could have paid more, but did not, is excused by their reasonably debatable conclusion that claimant's refusal to have surgery reduced her entitlement to any further permanency benefits.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of five hundred forty-five and 22/100 dollars ($545.22) per week from February 6, 2015.

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 defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 21st day of March, 2017.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.