BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATILDE LUIS, Claimant, vs. HARVEY'S IOWA MGMT. CO. INC., d/b/a HARRAH'S COUNCIL BLUFFS CASINO & HOTEL, Employer, and SAFETY NATIONAL CAS. CORP., Insurance Carrier, Defendants.	File No. 5055168.02 ARBITRATION DECISION Headnote: 1803

STATEMENT OF THE CASE

Claimant, Matilde Luis, filed a petition in arbitration seeking workers' compensation benefits from Harvey's Iowa Management Company, Inc., d/b/a Harrah's Council Bluffs Casino & Hotel (Harrah's), employer, and Safety National Casualty Corporation, insurer, both as defendants. This matter was heard on December 16, 2021, with a final submission date of January 20, 2022.

The record in this case consists of Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 4, Defendants' Exhibits A through B, and the testimony of claimant and Peggy Edie-Franklin. Serving as interpreter was Alina Salvat.

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.

ISSUE

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

FINDINGS OF FACT

Claimant was 50 years old at the time of hearing. Claimant was born in Mexico. Claimant went up to elementary school in Mexico. Claimant came to the United States in 2006. She has taken ESL classes at a community college but did not receive any certification. (Hearing Transcript pp. 8-9) Claimant is able to communicate with her supervisor in English. When she has difficulty understanding her supervisor, she gets her husband to help interpret. (TR p. 32)

Claimant began at Harrah's in 2006. Claimant's job duties, when she began at Harrah's, included cleaning walls, cleaning hood fans in a kitchen, washing ovens, cleaning drains, taking garbage out, cleaning pots and pans, and doing other tasks. (TR p. 10)

On October 30, 2014, claimant was lifting a heavy pot, weighing approximately 20 pounds, when she felt a pop in her left shoulder. Records indicate that as a result of limited use of the left arm, claimant began developing pain in the right shoulder. (Joint Exhibit 2, p. 8)

On June 1, 2015, claimant was evaluated by Charles Rosipal, M.D. Claimant was assessed as having a left shoulder rotator cuff tear and right shoulder pain. Shoulder surgery was recommended and chosen as a treatment option. (JE 2, pp. 8-11)

On June 19, 2015, claimant had a left shoulder rotator cuff repair. Surgery was performed by Dr. Rosipal. (JE 3, pp. 16-18)

On March 25, 2016, claimant underwent a right rotator cuff repair and biceps tenodesis. Surgery was performed by Dr. Rosipal. (JE 3, pp. 19-21)

On November 30, 2016, claimant underwent a functional capacity evaluation (FCE) with Excel Physical Therapy. Claimant's FCE was found to be valid. (JE 2, p. 12; Defendants' Exhibit C, p. 1) The FCE found claimant was in the medium physical demand level. Claimant was restricted to lifting no more than 15 pounds to shoulder level occasionally and 10 pounds frequently. She was limited to lifting 10 pounds overhead occasionally with no prolonged overhead use of the right arm. (JE 2, p. 12)

Claimant returned to Dr. Rosipal on December 6, 2016. Claimant's FCE was discussed with her. Claimant was returned to work with restrictions as per the FCE. Dr. Rosipal found claimant at maximum medical improvement (MMI). Claimant was released from care. (JE 2, pp. 12-14)

In a February 20, 2017 letter, Dr. Rosipal opined claimant had a 7 percent permanent impairment to the body as a whole regarding her right shoulder, and a 5 percent permanent impairment to the body as a whole for the left shoulder under the AMA Guides to the Evaluation of Permanent Impairment (Fifth Edition). This resulted in a combined value of 12 percent permanent impairment to the body as a whole for both the left and right shoulder. (JE 2, p. 15)

In a March 20, 2018 report, Ted Stricklett, M.S., gave his evaluation of claimant's vocational opportunities. He opined claimant had a 45 percent loss of access to the job market in her geographic labor area. He found that claimant had an initial loss of wages in the 8 to 26 percent range. (Claimant's Exhibit 1)

On October 12, 2020, claimant was evaluated by Scott Krobot, PA-C, with MD West One for left shoulder pain. Claimant attributed her pain to repetitive work at Harrah's. Claimant was given an injection for pain. (JE 5, pp. 28-29)

Claimant returned to Dr. Rosipal on November 2, 2020. Claimant indicated a 50 percent improvement in her shoulder pain after the injection. Claimant was prescribed Mobic. She was returned to work with restrictions that limited the use of her left upper extremity with a 10-minute resting period every hour. (JE 5, pp. 31-33) This restriction was continued as of December 28, 2020. (JE 5, p. 35)

In an October 29, 2021 report, Scott Meyer, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Meyer opined that the work claimant performed with Harrah's was aggravating her shoulders and that claimant had recurrent shoulder pain as a result of this aggravation. He recommended another FCE for claimant. He opined claimant's degenerative changes in her right shoulder were probably 50 percent work related. He found that the previous rating by Dr. Rosipal was still appropriate. He opined claimant had not incurred any additional permanent impairment to her left shoulder. Dr. Meyer reiterated that claimant needed to have a new FCE to help determine current work restrictions. (JE 4)

At the time of hearing claimant was still working at Harrah's. Claimant was cleaning bathrooms, mopping, cleaning ashtrays and picking up empty bottles. Claimant was also doing dusting. Claimant testified that when she is unable to do a job task, she is able to get help from a co-worker. (TR pp. 10-11, 21-22, 37)

Claimant testified that she does have a restriction that requires her to take a 10-minute break regarding her left arm every hour. She testified that because of the workload, she cannot comply with this restriction. (TR p. 13)

Claimant testified that when she began at Harrah's she earned $8.50 per hour. At the time of injury, claimant earned between $10.00 and $11.00 per hour. At the time of hearing, claimant earned $12.36 per hour. (TR p. 25)

Peggy Edie-Franklin testified she is claimant's supervisor at Harrah's. In that capacity she is familiar with the claimant, her job at Harrah's, and her work restrictions. She testified claimant's current job is among the least physical jobs available at Harrah's. (TR p. 37)

CONCLUSION OF LAW

The only 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. 6.904(3).

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 Ry. Co. of Iowa, 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 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.

Claimant was 50 years old at the time of hearing. Claimant went up to elementary school in Mexico. She did not graduate from high school. Claimant does not have a GED. Claimant speaks sufficient English to do her job at Harrah's, but sometimes requires her husband to interpret. Claimant had an interpreter at hearing.

Claimant had surgery to both shoulders. Both Drs. Rosipal and Meyer agree that claimant has a 12 percent permanent impairment to the body as a whole as a result of her work injuries and subsequent surgeries. (JE 2, p. 15; JE 4) Claimant has permanent restrictions that limit her to lifting no more than 15 pounds occasionally and 10 pounds frequently to the shoulder level. (JE 2, p. 12) The record indicates that because of her limitations, claimant was moved to a lighter duty job at Harrah's after her return to work. Even on her lighter duty job, claimant still occasionally requires the help of a co-worker.

Claimant's condition has worsened since her return to work and her shoulders ache at the end of the shift. (TR p. 16; JE 5, p. 31; Ex. 1, p. 3) The employer's expert, Dr. Meyer, indicates work claimant performs at Harrah's has aggravated her shoulder condition. Dr. Meyer has recommended a second FCE to better assess claimant's limitations. (JE 4) At the time of hearing, the FCE had not been performed. Given her condition, Dr. Rosipal recommended claimant not use the left upper extremity for 10 minutes every hour. (JE 5, p. 35) That restriction has not been applied at work. Claimant was given an injection for pain and takes prescription medication for pain.

At the time of hearing, claimant was still working at Harrah's. As noted, her current job is one of the least physical positions at Harrah's. At the time of injury

claimant earned $10.00 to $11.00 per hour. At the time of hearing claimant earned $12.36 per hour. In brief, in the seven years since claimant was injured, claimant's hourly earnings have increased approximately $1.50 to $12.36 per hour.

Given the record as detailed above, it is found that claimant has a 30 percent loss of earning capacity or industrial disability. Claimant is due 150 weeks of permanent partial disability benefits (500 weeks x 30 percent). Dr. Rosipal found claimant at MMI on December 6, 2016. The benefits should commence as of that date.

ORDER

Therefore it is ordered:

That defendants shall pay claimant 150 weeks of permanent partial disability benefits at the rate of two hundred eighty and 56/100 dollars ($280.56) per week commencing on December 6, 2016.

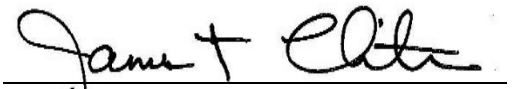
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

That defendants shall be given credit for benefits previously paid.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.12(2)

Signed and filed this 16th day of March, 2022.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Steven Howard (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.