BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROSILIE LYNN YOUNG,

Claimant,

vs.

HUCKLEBERRY ENTERTAINMENT a/k/a FUN CITY a/k/a PZAZZ RESORT HOTEL,

Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5053858

ARBITRATION DECISION

Head Note Nos.: 1108, 1803, 2800

STATEMENT OF THE CASE

Rosilie L. Young, the claimant, seeks workers' compensation benefits from defendants, Huckleberry Entertainment a/k/a Fun City a/k/a Pzazz Resort Hotel, the alleged employer, and its insurer, Zurich American Insurance Co., as a result of an alleged injury on October 31, 2015. The caption is changed to reflect the spelling of claimant's first name.

Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 29, 2017, but the matter was not fully submitted until the receipt of the parties' briefs and argument on April 19, 2017. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to exhibit 6, pages 88 through 89 will be cited as, "Ex6-88:89." Citations to the hearing transcript of testimony such as "Tr-4:5," or to a deposition transcript such as "Ex14-4" shall be to the actual page number(s) of the original transcript, not to page numbers of a copy of the transcript containing multiple pages or to a page number of an exhibit package.

Just prior to hearing, an attempt was made to consolidate the exhibits to comply with my preferences as the parties failed to do so beforehand. What I recall was that claimant's exhibits were reduced to one, a report from the IME doctor. However, when I began deliberations, I discovered that initial treatment records were missing. Upon inquiry, the parties indicated there attempted consolidation left out the treatment records.

Treatment exhibits were then offered separately and there was considerable duplication of exhibits. I warn the parties that as of May 1, 2017, all deputies will expect the exhibits to be organized in a manner similar to my preferences and no exhibits will be received unless the exhibits are so organized.

I now receive into evidence all of the offered exhibits by claimant, marked 1-4. I note that I already received defense exhibits marked A-G and also received Exhibit H which was a report allowed into the record after hearing.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and defendant employer at the time of the alleged injury.

2. Claimant is not seeking temporary total or healing period benefits.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. At the time of the alleged injury, claimant's gross rate of weekly compensation was $483.08. Also, at that time, she was married and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $331.21 according to the workers' compensation commissioner's published rate book for this injury on the agency website.

5. The parties stipulated that the providers of the requested medical expenses attached to the hearing report would testify as to their reasonableness and defendants are not offering contrary evidence. Also, it was agreed that these medical expenses submitted by claimant at the hearing are fair and reasonable and causally connected to the medical condition(s) upon which the claim herein is based but that the issue of their causal connection to a work injury remains an issue to be decided herein.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant received an injury arising out of and in the course of employment;

II. Whether the claim is barred by Iowa Code section 85.23 for failure to provide timely notice to the employer;

III. The extent of claimant's entitlement to permanent industrial disability benefits;

IV. The extent of claimant's entitlement to medical benefits; and,

V. Claimant's entitlement to reimbursement for an independent medical evaluation (IME) pursuant to Iowa Code section 86.39.

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Rosilie, and to the defendant employer as PZAZZ.

From my observation of her demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Rosilie credible.

Rosilie, age 54 at the time of hearing, has worked for PZAZZ as a general housekeeper since 2003 and continues to do so today. PZAZZ operates a casino-hotel in Burlington, Iowa. Rosilie's duties as a housekeeper consist of clearing rooms. Such work includes, changing bedding, making beds, cleaning bathrooms, emptying trash, dusting furniture, vacuuming floors, and mopping floors. Also, a housekeeper must load and unload supplies on and off a cart that is pushed and pulled to each room. Rosilie said that pushing and pulling the cart was the most physical aspect of her job. Rosilie states that she was typically assigned to clean 14 rooms daily, but this varied according to the hotel's needs. According to PZAZZ's job description, housekeepers are required to regularly use their hands and arms, occasionally lift up to 50 pounds, and bend or stoop throughout a work shift. (ExE-1)

Rosilie testified she had no chronic health problems or physical limitations before her alleged work injury in this case. She denies any prior shoulder problems. There is nothing in the record of this case to suggest otherwise.

Rosilie's past jobs include cashier at McDonalds, cleaning rooms at a care center, telemarketing, and light assembly in an antenna plant. (ExA-5:16)

Rosilie testified that the injury to her left shoulder occurred when she was flipping a sheet, a maneuver she used to spread out a folded flat sheet over a bed. When she did so, she felt a pop in her left shoulder and began to experience pain. She finished her shift that day despite the pain. She did not report this injury at that time. Rosilie explained that she thought the pain was just a pulled muscle like the muscle soreness she typically experiences in her work and she did not believe it to be serious. Rosilie is

not sure of the exact day of this incident, but has consistently stated that it occurred at the end of October 2015.

When over-the-counter medications and time did not alleviate her symptoms, she sought medical treatment from her family doctor on November 3, 2015 using her husband's medical insurance to find out what is going on. When imaging revealed a possible torn rotator cuff in the left shoulder, she was referred to an orthopedic clinic and was first seen by Andrew Rendoff, P.A. on November 13, 2015. Rendoff reports that claimant had left shoulder pain that started one month ago while placing sheets on a bed in her housekeeper job. (Ex2-14) She complained of limited range of motion and weakness of the shoulder and denied any prior problems with the shoulder. (Id.)

Rosilie testified that Rendoff told her this could be work related. Rendoff suspected a rotator cuff tear and ordered an MRI. Following the MRI, Rosilie was seen by Atiba Jackson, M.D, an orthopedic surgeon, on January 11, 2016. (Ex1-2) Dr. Jackson reports that claimant complained of shoulder pain with "no specific injury." (Ex2-9) This doctor apparently did not see Rendoff's initial office notes. Dr. Jackson reviewed the MRI and diagnosed a left shoulder full thickness tear of the distal anterior supraspinatus tendon with additional abnormal signal suggesting tendinopathy or undersurface/intrasubstance tear, but no definite labral tear. (Ex1-10) (Id.) A second MRI was done December 1, 2015 and reviewed by John Palva, M.D. who reports the same diagnosis as Dr. Jackson. (Ex2-13) Rosilie then reported her injury to PZAZZ on January 14, 2016. (ExF)

On March 4, 2017, Rosilie was seen by Suleman Hussain, M.D., another orthopedic surgeon, at the request of defendants for a second opinion. Dr. Hussain's diagnosis was a degenerative rotator cuff tear with symptoms since October 31, 2015. The doctor reports that given her age and activity level, surgical intervention was likely. (ExC-2) He also opined that it was unlikely that Rosilie's work event caused her shoulder condition. He based this opinion on a delay in reporting the injury and seeking medical treatment as one would expect that a person who exhibited such symptoms would have sought treatment within a week or two. (ExC-2:3) He states that the only records he had was the MRI and some correspondence by defendant insurer. (Id.) However, the doctor does state that Rosilie will require surgical repair of the tear. (Id.) Apparently based on this opinion, defendant did not authorize any medical treatment for the left shoulder.

At the request of her attorney, Rosilie was evaluated by Sunil Bansal, M.D., an occupational medicine physician, on February 17, 2017. After his examination of Rosilie and reviewing the records from Dr. Jackson and Dr. Hussain, Dr. Bansal opines that the left rotator cuff tear is related to overuse syndrome from her repetitive physical stress at work and she suffered a cumulative trauma injury. (Ex4-62:63) He further opines that Rosilie is only able to lift ten pounds occasionally with her left arm and avoid overhead lifting. (Ex4-61) He reports that Rosilie states she could perhaps lift two to three pounds just a bit above her shoulder, but it would be painful. (Id.) She currently keeps her left elbow close to her body when lifting or carrying. (Id.) He provides a

permanent impairment rating of five percent to the body as a whole based on lost range of motion of the shoulder. (Ex4-63)

In a reply report dated April 11, 2017, Dr. Hussain states that after a review of claimant's deposition and Dr. Bansal's report, he continues to opine that the rotator cuff tear is not related to her work activities. (ExH-1) He also states that from his review of the job description for housekeeper at PZAZZ, her job did not involve "repetitive and physically demanding" work as stated by Dr. Bansal. (Id.) The doctor also takes issue with Dr. Bansal's impairment rating stating that rotator cuff impairments are more applied based on loss of strength, not loss of range of motion.

Rosilie testified that she did not lose any time from work as a result of her left shoulder injury. She continues to perform her job on a full time basis. She states, however, that she modifies the way she does her work relying more on her right arm. She no longer flips sheets as she did before. She has trouble pulling and pushing her cart with her left arm. She has trouble getting supplies on top of the cart and reaching up to shelves in cabinets. She is unable to reach above her shoulder without pain. She only washes the walls of a shower stall with her right arm. However, she is not in constant pain. Rosilie testified that she has problems with activities of daily living such as using her right arm to dress or play with her grandchildren. She does housework and cooking, but gets assistance from her husband and a grandchild who is living in her household.

Rosilie testified she would have trouble returning to her past laborer type of employment as she can only fully use her right arm. She could return to cashiering, but not stocking shelves. She could return to telemarketing. However, all of those jobs she stated were minimum wage employment.

I find that Rosilie suffered an injury to her left shoulder on or about October 31, 2015 which arose out of and in the course of her employment with PZAZZ. This injury consisted of a left rotator cuff tear and biceps tendon tear. This is based on the causation opinions of Dr. Bansal and the undisputed fact that Rosilie had no prior left shoulder problems. In doing so I did not find the views of Dr. Hussain convincing. He first rejected the role of the alleged sheet flipping event as a cause of the shoulder condition based upon a lack of understanding of the facts. Rosilie did seek treatment within a week of the onset of her problems and only delayed reporting the injury until she discovered that the injury was serious after the MRI and Dr. Jackson's diagnosis. Also, when informed of the real facts in Rosilie's deposition, he continued to reject causation, but does not explain why. I am unconvinced that it was only mere coincidence and her shoulder problems began with the work event.

In finding the date of injury to be October 31, 2015, I did not give much weight to the report of PA Rendoff on November 13 that claimant was injured one month earlier. Claimant has consistently and credibly testified that it occurred at the end of October. Also, Rendoff's report is simply hearsay evidence and a generalized statement that could be interpreted to be only a reference to the previous month. Also, Dr. Jackson's

note reporting no specific injury occurred after she gave Rendoff a specific account of how the injury occurred and that story has been consistent throughout these proceedings. Given this finding, claimant clearly gave defendants notice of the injury within 90 days.

I find the work injury of October 31 is a cause of a five percent permanent impairment to the body as a whole as opined by Dr. Bansal. I know of nothing in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to limit the assessment of impairment for rotator cuff injuries to only loss of strength. In any event, Rosilie's credible testimony demonstrates a loss of both strength and range of motion. I find that due to her work injury, Rosilie is unable to lift more than ten pounds occasionally using only her left arm and is unable to reach above her shoulder with her left arm without pain. She also has difficulty with pushing and pulling her housekeeper cart.

Rosilie's medical condition before the work injury was excellent and she had no functional impairments or ascertainable disabilities. Due to her physical limitations from her left shoulder injury, she is prevented from returning to manual labor work that she performed in the past, which has been the higher paid employment compared to cashiering or telemarketing.

Admittedly, Rosilie has no physician imposed restrictions, but this is largely at her request to maintain her employment. To date, she has been is able to maintain her employment with PZAZZ without loss of wages. However, she is clearly at risk of further difficulties in performing her job if her shoulder condition worsens.

From examination of all of the factors of industrial disability, it is found that the work injury of October 31, 2015 was a cause of a 15 percent loss of earning capacity.

Dr. Bansal's IME examination and report were performed after the evaluation of Dr. Hussain, a doctor retained by defendants.

I find that the requested medical expenses which involve her treatment following the work injury until she reported the injury to defendants to constitute reasonable and necessary treatment of the work injury.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational

consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

In the case sub judice, I found that claimant carried the burden of proof and demonstrated by the greater weight of the evidence that she suffered an injury on or about October 31, 2015 arising out of and in the course of employment.

II. Pursuant to Iowa Code section 85.23, injured workers are to notify their employers within 90 days of the occurrence of a work injury unless the employer has actual knowledge of the injury. In this case, defendants were notified within 90 days of the date of the October 31, 2015 injury. This defense fails.

III. The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an

expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

The parties agreed in this case that if the work injury is a cause of permanent disability, it is an industrial disability to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity.

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

In the case sub judice, I found that claimant suffered a 15 percent loss of her earning capacity as a result of the work injury. Such a finding entitles claimant to 75 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

IV. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, I found that the requested expenses constituted reasonable and necessary treatment of the work injury. Although they were not authorized, defendants have denied liability for the left shoulder condition and do not have an authorization defense. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119 (Iowa 2003); West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999); Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002). In any event, the treatment was helpful as it identified the nature of the injury. (Id.)

IV. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. In this case, the employer retained Dr. Hussain who denied the causation of the shoulder condition to claimant's work event. This is sufficient to generate entitlement to a responsive IME at defendants' expense. Reimbursement for the fee of Dr. Bansal will be awarded.

ORDER

1. Defendants shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated rate of three hundred thirty-one and 21/100 dollars ($331.21) per week from the date of injury, October 31, 2015.

2. Defendants shall pay the medical expenses listed in the hearing report. Defendants shall reimburse claimant for her out-of-pocket medical expenses and shall hold claimant harmless from the remainder of those expenses.

3. Defendants shall reimburse claimant the sum of one thousand four hundred seventy and 00/100 dollars ($1,470.00) for the fees of Dr. Bansal.

4. Defendants shall pay accrued weekly benefits in a lump sum.

5. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

6. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

7. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 18th day of May, 2017.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

James P. Hoffman
Attorney at Law
PO Box 1087
Keokuk, IA 52632-1087
jamesphoffman@aol.com

Michael J. Lunn
Attorney at Law
1225 Jordan Creek Pkwy., Ste. 108
West Des Moines, IA 50266
mlunn@scheldruplaw.com

LPW/srs

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.