BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HELEN GULLY, Claimant, vs. LIGURIA FOODS, INC., Employer, and EMPLOYERS PREFERRED INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5063429 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 2700, 3001, 3002, 4000

FILED
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WORKERS' COMPENSATION

STATEMENT OF THE CASE

Helen Gully, claimant, filed a petition in arbitration seeking workers' compensation benefits from Liguria Foods, Inc. (Liguria) and its insurer, Employers Preferred Insurance Company as a result of an injury she sustained on November 20, 2015 that arose out of and in the course of her employment. This case was heard in Fort Dodge, Iowa and fully submitted on November 16, 2018. The evidence in this case consists of the testimony of claimant, Claimant's Exhibit 1, Defendants' Exhibits A, B, D, E, F, G and Joint Exhibits 1 through 4. Both parties submitted briefs.

ISSUES

1. Whether the alleged injury is a cause of permanent disability.
2. The extent of claimant's disability.
3. The claimant's gross earnings and the resulting workers' compensation weekly rate.
4. Whether defendants have underpaid claimant's rate for temporary and permanent benefits.

5. Whether claimant refused suitable work.
6. Whether claimant is entitled to payment for mental health treatment.
7. Whether claimant is entitled to alternate medical care.
8. Whether claimant is entitled to penalty benefits.
9. 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.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Helen Gully, claimant, was 58 years old at the time of the hearing. Claimant finished eighth grade. (Transcript page 15) Claimant was able to receive a GED in 2013. Claimant's relevant work history started in 1977. (Joint Exhibit 1, page 1) Claimant's first work was doing light assembly at Globe Union. (Tr. p. 19) Claimant's next work was as a nurse's aide in a nursing home. (Tr. p. 19) Claimant drove a tractor that packed dirt for a construction company. (Tr. p. 20) Claimant next worked in a turkey processing plant. (Tr. p. 21) Claimant worked in a pork processing plant on the line at Monfort and IBP. (Tr. p. 23) Claimant then worked in a tanning factory. (Tr. p. 24) Claimant has a past history of substance abuse and has spent time incarcerated for her criminal conduct. (Exhibit D, pp. 3 – 7; Ex. E, pp. 12, 13)

Claimant applied for and received Social Security Disability as of March 4, 2004 with an onset date of October 23, 2000. (Exhibit G, p. 27) Intellectual testing of the claimant found,

> Ms. Gully has a ninth grade education obtained in special education programming. William Morton, Psy.D., completed a psychological evaluation of the claimant in February 2004. The claimant's performance on the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III) placed her in the range of mild mental retardation. In particular, she had a Verbal IQ score of 71, Performance IQ score of 70, and Full Scale IQ score 68.

(Ex. G, p. 25) The Social Security decision found claimant's disabilities at that time as,

> 2. The claimant's impairments which are considered to be "severe" under the Social Security Act are the following: borderline intellectual functioning, dysthymic disorder, dependent personality disorder, asthma, and obesity. She is status post left knee arthroplasty and closed reduction of left ankle fracture.

(Ex. G, p. 26) The decision of the Social Security Administrative Law Judge cited medical records that claimant was limited to occasionally lifting 20 pounds. (Ex. G, p. 26)

Claimant decided to enroll in training in welding and completed training at a community college in May 2015. Claimant received good grades for these courses. (Tr. p. 78; Ex. F, p. 1) Claimant testified that while she liked welding there was "a lot of mechanical stuff" and she wanted to work in a factory or plant. (Tr. p. 30) Claimant applied for work through a temp. agency and was placed at Liguria in June 2015. (Tr. p. 50) Claimant became an employee of Liguria on July 29, 2015. (Ex. D, p. 1) Liguria makes pepperoni. (Tr. p. 32) Claimant was still on Social Security Disability at the time she began this work under the Ticket-To-Work program. (Tr. p. 31) Claimant testified that she was trying to go off Social Security Disability.

Claimant said she performed a number of jobs at Liguria. Claimant worked on an assembly line, boxing and packing and operated a machine that would seal product. Claimant said she trained other workers on this machine. (Tr. pp. 32, 33) The claimant's job description in Bulk Packaging required her to stand, walk, climb, bend, stoop, kneel, squat, crouch, reach, grasp, grip, twist, lift, push, pull, and perform overhead work. She was also required to be able to lift 50 pounds. (JE. 1, p. 2)

On November 20, 2015 claimant was at work walking to her vehicle when she fell on ice. (Tr. p. 33) Claimant said she hurt her back, shoulder and hip on the left side. (Tr. p. 34) Claimant reported to her employer the fall on November 25, 2015. Claimant reported that the parking lot she fell in had not been plowed at the time of her fall. (JEx. 1, p. 3)

Claimant went to the emergency department on November 26, 2015 and was provided restrictions of no use of the left shoulder. (JEx. 3, p. 9)

Claimant was sent to see David Ruzicka, D.O. on November 27, 2015 at the request of Liguria. (JEx. 4, p. 10) Claimant said that Dr. Ruzicka took x-rays and took a urine sample. (Tr. p. 37) Dr. Ruzicka provided a 10-pound lifting restriction for her left arm, a prescription, and returned claimant to work. (JEx. 4, p. 10) Claimant went to physical therapy for low back pain, left shoulder pain and left hip pain on November 30, 2015. (JEx. 5, p. 12)

The initial urine sample came back positive for marijuana. (JEx. 2, p.6) On December 1, 2015 Liguria sent claimant a letter informing claimant she had a right to

contest the results of the test by having a second test performed on the original sample at her expense. (JEx. 2, p. 5) The letter did not disclose the fee that was payable by the claimant for the testing. Claimant was informed that if she did not respond to the letter in five business days she would be terminated. (JEx. 2, p. 5)

Dr. Ruzicka discontinued physical therapy on December 15, 2015 and recommended a referral to orthopedics. (JEx. 4, p. 11) Claimant was referred to Benjamin Tuy, M.D. for an orthopedic evaluation of her left shoulder on January 6, 2016. (JEx. 6, p. 16) Dr. Tuy took claimant off work until he had reviewed the results of an MRI. (JEx. 6, pp. 21, 22) Dr. Tuy sent claimant for an MRI of the left shoulder. Dr. Tuy reviewed the MRI on January 28, 2016 and concluded claimant did not have a full-thickness rotator cuff tear. Dr. Tuy stated that claimant seemed to be more impaired by the pain in her lower back in the left buttock/hip/thigh. (JEx. 6, p. 23) Dr. Tuy's assessment on January 26, 2016 was,

- Left-sided low back pain without sciatica
- Contusion, hip and thigh, left, initial encounter
- Rotator cuff strain, left, subsequent encounter

(JEx. 6, p. 25) Dr. Tuy did not think claimant could return to work in the next four weeks given the amount of pain she was in and her markedly impaired gait. (JEx. 6, p. 25) On February 19, 2016 Dr. Tuy returned claimant to light work with no overhead work. (JEx. 6, p. 27)

Claimant was referred to Alexander Pruitt, M.D. for a second opinion concerning her back. (JEx. 8, p. 33) On March 2, 2016 Dr. Pruitt provided restrictions of no lifting more than 25 pounds, no repetitive bending, lifting, twisting, kneeling, squatting or climbing. He assessed her with, "Back pain, unresponsive to conservative management, physical therapy." (JEx. 8, p. 34) Dr. Pruitt reported claimant could not go back to work due to her shoulder on May 4, 2016. (JEx. 8, p. 38) Dr. Pruitt was authorized to treat claimant's shoulder on June 1, 2016 and reviewed an MRI which showed a full-thickness tear on June 29, 2016. (JEx. 8, pp. 42, 46; Tr. pp. 44, 45) Dr. Pruitt wanted to wait to do surgery on claimant's shoulder until her back pain was better under control. (JEx. 8, p. 46) On September 16, 2016 Dr. Pruitt performed surgery. Dr. Pruitt's postoperative diagnosis was:

1. Labral tear.
2. Almost complete tear of the biceps tendon.
3. Impingement degenerative joint disease of the acromioclavicular joint.

4. Full thickness rotator cuff tear.

(JEx. 8. p. 52)

On February 1, 2017 Dr. Pruitt placed claimant at maximum medical improvement (MMI) and did not provide claimant with any restrictions. Dr. Pruitt said claimant could ache for two years or longer, considering her age. (JEx. 8, p. 63) Dr. Pruitt noted claimant had finished her physical therapy. The physical therapy notes of January 17, 2017 state claimant was having difficulty with most exercises due to pain. That pain was the main reason claimant was unable to reach her goals. (JEx. 10, p. 74) The physical therapy records state that claimant met four of her nine goals. For five goals claimant made minimal or no significant progress. (JEx. 10, pp. 75, 76) On February 2, 2017 Dr. Pruitt provided a seven percent whole person impairment rating for claimant's shoulder injury. He provided a zero impairment rating for claimant's back. (JEx. 8, p. 65)

Dr. Pruitt does not comment on the lack of success in a number of areas that was shown in the physical therapy notes. Claimant told Dr. Pruitt that the therapy helped, but that does not square with the therapist's notes.

Claimant notified Liguria that she did not intend to terminate her employment on December 11, 2015. (JEx. 2, p. 7) Claimant was terminated from Liguria on January 13, 2016 when she did not attend an employer approved drug treatment program. (JEx. 2, p. 8) Claimant testified that she did not think she should attend, as she did not smoke marijuana and did not want to pay for the program. (Tr. p. 65) Claimant returned to a community college in January 2016 for a culinary arts program. She was able to complete one semester with mixed grade results. (Ex, F, p. 2) Claimant withdrew from a second semester. (Tr. p. 56)

Claimant had 45 physical therapy sessions from September 19, 2016 through February 13, 2017. (JEx. 10, p. 76) Claimant still has pain in her left shoulder. Claimant said that she will drop items if she uses her left hand to pick up items. (Tr. p. 56) Claimant also has pain in her lower back and left hip which limits her walking and standing. (Tr. p. 57)

On June 12, 2018 claimant went to the Berryhill Center due to depression. Claimant reported that she was upset about not being able to work. (JEx. 11, p. 77) Dean Guerdet, ARNP, assessed claimant with "Moderate episode of recurrent major depressive disorder" and prescribed medication and therapy. (JEx. 11, p. 83) Claimant said the mental health treatment was helpful and she was continuing to treat at the Berryhill Center at the time of the hearing. (Tr. p. 59)

Claimant applied for a couple of jobs after she was terminated by Liguria. Claimant applied at Silgan, a food container company, a meat packing plant that she had an interview scheduled but could not attend, a pet food company, and a company that makes bird food. (JEx. 13, p. 107; Tr. pp. 71, 72)

Claimant was receiving Social Security Disability (SSD) and Supplemental Income Insurance (SSI) at the time of the hearing as well as the time she was working for Liguria. (Tr. pp. 60, 74)

On July 28, 2018 Tom Hansen, M.D. performed an independent medical examination (IME). (JEx 12, pp. 93 – 97) Dr. Hansen provided a 13 percent whole person impairment for claimant's left shoulder and 5 percent for her spine. Dr. Hansen gave claimant a 15 percent to the body as a whole rating. (JEx.12, p. 96) Dr. Hansen noted that Dr. Pruitt had placed 25-pound lifting restrictions, working at waist level and no overhead work, which Dr. Hansen thought was appropriate. Dr. Hansen did not mention that Dr. Pruitt had lifted his restrictions on February 1, 2017. (JEx. 12, p. 96) Dr. Hansen noted claimant was severely depressed, as she has not been able to work after her injury. He noted that there was not a rating he could assign based upon the AMA Guides, 5th Edition for her depression. (JEx. 12, pp. 96, 87)

I find that Dr. Hansen's restrictions are the claimant's restrictions. Given the poor progress in physical therapy, significant shoulder surgery, continuing back pain and Social Security records, I find Dr. Hansen's restrictions most convincing.

On August 10, 2018 Kunal Patra, M.D., a board-certified psychiatrist, performed an independent psychiatric evaluation of the claimant. (JEx. 13, pp. 100 – 132) Dr. Patra reviewed a number of medical records along with his own evaluation. (JEx. 13, p. 101) It did not appear that he received information concerning the IQ testing that was performed for claimant's SSD claim. When asked by Dr. Patra about why she was receiving SSDI, claimant did not mention her intellectual functioning. (JEx. 13, p. 107) Dr. Patra's assessment was:

> [I]t is my opinion within a reasonable degree of medical and psychiatric certainty that Ms. Gully is currently struggling with:
>
> 1) Somatic Symptom Disorder, with predominant pain, Persistent, Moderate Severity.
>
> 2) Adjustment Disorder, with depressed mood.

(JEx. 13, p. 113)

Dr. Patra wrote,

> Based on review of Ms. Gully's medical and psychiatric records and following my evaluation of Ms. Gully on August 10, 2018, it is my opinion within a reasonable degree of medical and psychiatric certainty that Ms. Gully is not struggling with major depressive episode. Furthermore, it is my opinion within a reasonable degree of medical and psychiatric certainty that at the present time, Ms. Gully is struggling with <u>Adjustment Disorder, With depressed mood.</u>

> Discussion: The presence of emotional or behavioral symptoms in response to an identifiable stressor (such as a persistent painful illness with increasing disability) is the essential feature of adjustment disorders. If the stressor or its consequence persists (for example, persistent painful illness), the adjustment disorder may also continue to be present and become the persistent form. Adjustment disorders are common accompaniments of medical illness and may be the major psychological response as stated in: Adjustment Disorders. In: *Diagnostic and Statistical Manual of Mental Disorders,* Fifth Edition, Washington, DC: American Psychiatric Publishing; 2013: 286-289.

(JEx. 13, p. 125) Dr. Patra stated that claimant's psychiatric condition is not based upon her inability to work. (JEx. 13, p. 128) Dr. Patra opined that claimant does not have any permanent impairment pursuant to the AMA Guides 5th Edition.

> [I]n relation to the above-mentioned psychiatric conditions namely, somatic symptom disorder, with predominant pain, persistent, moderate intensity and adjustment disorder, with depressed mood. Neither of these underlying psychiatric conditions incapacitate Ms. Gully from managing her a) activities of daily living (ADLs) as she is able to take cook [sic], go shopping, bath [sic] and self-groom, and drive herself; b) her social functioning as she is able to go out and spend time with her older sister and daughter several times a week and she specifically states that she 'jumps' into her car and drives down when her older sister calls her; c) in areas of concentration, persistence and pace as she is able to relax with watching television shows/movies and read newspaper and has no difficulty with paying attention when engaged in such activities and even showed an interest as early as this year to enroll in business management/day-care course at Iowa Central University. One would not anticipate Ms. Gully to be attempting to enroll in the course if she was having issues with her concentration, persistence, and pace; and d) adaptation to competitive and dynamic work environment as Ms. Gully herself expresses desire to find factory jobs which she professes to enjoy and in which she is good at, but has some hesitation owing to her pain perception. Please note that Ms. Gully does not verbalize difficulty in return to work in such a position because of any depression/anxiety/concentration issues.

(JEx. 13, p. 131, 132)

Defendants calculate that claimant's weekly rate was $341.54 using the following table.

DOI: 11/20/15: Single, One exempt.

Pay Date	Period End	Hours	Rate	Wages
1) 11/18/15	11/15/15	40	$12.95	$518.00
2) 11/10/15	11/8/15	31.90	$12.95	$413.11
3) 11/4/15	11/1/15	39.4	$12.95	$510.24
4) 10/28/15	10/25/15	26.8	$11.45	$306.86
5) 10/21/15	10/18/15	41.80	$11.45	$478.61
6) 10/14/15	10/11/15	43.8	$11.45	$501.51
7) 10/7/15	10/4/15	60.6	$11.45	$693.87
8) 9/30/15	9/27/15	60.2	$11.45	$689.29
9) 9/23/15	9/20/15	53.9	$11.45	$617.16
10) 9/16/15	9/13/15	52.3	$11.45	$598.84
11) 9/7/15	9/6/15	55.9	$11.45	$640.01
12) 9/2/15	8/30/15	55.6	$11.45	$636.62
13) 8/26/15	8/23/15	40.6	$11.45	$464.87
$7068.99/13 = $543.77				
$341.54 rate				

(Attached to Hearing Report)

Claimant calculated the claimant's weekly rate was $357.64 using the following table.

	Week Ending	Week Not Used	#Hours Worked	Hourly Rate	Gross Wages
1	11/22/15		48.2	$12.95	$624.19
2	11/15/15	X (funeral)	40.00	$12.95	$518.00

3	11/08/15		31.9	$12.95	$413.11
4	11/01/15		39.4	$12.95	$510.23
5	10/25/15	X	26.9	$11.45	$308.01
6	10/18/15		41.8	$11.45	$478.61
7	10/11/15		43.8	$11.45	$501.51
8	10/04/15		60.6	$11.45	$693.87
9	9/27/15		60.2	$11.45	$689.29
10	9/20/15		53.9	$11.45	$617.16
11	9/13/15		52.3	$11.45	$598.84
12	9/06/15		55.9	$11.45	$640.05
13	8/30/15		55.6	$11.45	$636.62
14	8/23/15		40.6	$11.45	$464.87
				Total Wages	$6,868.35

$6,868.35 ÷ 12 weeks = $572.36 AWW

Marital status: S,1

Rate: $357.64

(JEx. 14, p. 133) The claimant used twelve weeks and included the pay period claimant was injured Claimant excluded the weeks ending November 15 and October 25, 2015 as being unrepresented. Defendants included these weeks. The claimant's wage records are found at Joint Exhibit 14, pages 137 - 138. For the pay periods between August 2, 2015 and November 22, 2015 claimant worked more than thirty hours per week, all but one week. (JEx. 14, pp 137 – 137) I find that any week of less than 30 hours is not representative of claimant's usual earnings.

Defendants informed claimant on March 28, 2017, they would be paying the rating of Dr. Pruitt. (Ex. B, p. 2) Defendants informed claimant on September 21, 2017 that they had paid claimant the seven percent rating issued by Dr. Pruitt and would not be paying any additional benefits. (Ex. A, p. 1) Defendants paid claimant at a rate of $332.92 for healing period and permanent benefits. (Ex. C, pp. 1 – 3) Defendants

acknowledged in the hearing report the claimant's rate was at least $341.54, if any benefits were payable. (Hearing Report; Tr. p. 8)

Claimant has mild mental retardation/borderline intellectual functioning and her insight to her vocational options, her functional and physical conditions is somewhat limited. That being said, claimant's testimony was generally consistent as compared to the evidentiary record and her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible as to the facts she continues to have pain in her left shoulder and lower back and that repetitive activities are difficult for her.

Given the limitations recommended by Dr. Hansen and claimant's intellectual function I find that claimant has a 65 percent loss of earning capacity.

CONCLUSIONS OF LAW

The defendants admit claimant had a temporary injury due to her fall at work on November 20, 2015, but deny she is entitled to any permanent partial benefits.

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).

When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

Defendants assert claimant is not credible. I found claimant's testimony to be generally credible. Her complaints of pain and impairment were consistent with the medical evidence. While I did not find claimant was limited to five pounds for lifting, as claimant testified, the medical record shows claimant had significant injury to her left shoulder. Dr. Pruitt said it was likely claimant would take more than two years before she might recover from surgery and that claimant still has back pain that has remained since her work injury.

The claimant fell at work on November 20, 2015 and continues to have shoulder and back symptoms related to that fall. The physical therapy notes, the restrictions of Dr. Hansen and rating provided by Dr. Pruitt and Dr. Hansen provide convincing evidence claimant has a permanent injury.

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 assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

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 Comm. Sch. Dist., 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).

Defendants make the assertion in their brief that claimant's industrial disability is "less than zero." (Def. Brief, pp. 12, 13) It appears that one reason for such a novel assertion by the defendants is that claimant was receiving SSDI at the time she was working for Liguria. Defendants have a misunderstanding of SSDI/SSI benefits. An award of SSDI/SSI is based upon inability to perform substantial gainful activity for 12 months or more as a result of a medical condition. There is no limitation of persons returning to the workforce. The Social Security Administration has many programs to encourage persons receiving SSDI or SSI to work. The *Red Book* published by the Social Security Administration provides a summary of most of the programs. https://www.ssa.gov/redbook/documents/TheRedBook2018.pdf Claimant was participating in such a program when she was injured at Liguria, the Ticket-To-Work program.

Defendants asserted that since Dr. Pruitt did not provide claimant any restriction claimant does not have an industrial disability. 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, page 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 worker's 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.

Dr. Hansen found that claimant had been given a 25-pound lifting limitation throughout her treatment. Claimant was also provided restrictions on bending, twisting, squatting, climbing and kneeling. While Dr. Pruitt did lift the restrictions, I previously found Dr. Hansen's restrictions to be more consistent and credible with the overall medical record.

Claimant has looked for factory work since her termination. Claimant unsuccessfully attempted to go back to a community college after her termination by Liguria. Claimant has not utilized any vocational services and defendants have not offered any such services. Claimant does not have the vocational experience or the intellectual ability to perform many jobs within her restrictions. Claimant would like to be engaged in the labor market, but is significantly limited by her physical and mental challenges.

Claimant's lifting limitations and pain precludes much of her previous work. Considering the claimant's medical impairments, training, education, her current lack of

success in finding employment, actual loss of earnings, current and permanent restrictions, as well as all other factors of industrial disability, it is found that the claimant has suffered a 65 percent loss in earning capacity. Claimant is entitled to 325 weeks of permanent partial disability. Defendants are entitled to a credit for the 35 weeks they paid in permanent partial benefits.

Defendants have asserted that claimant's act of not agreeing to attend an approved drug program was tantamount to a voluntary quit and that the claimant is not entitled to healing period benefits.

Defendants' assertion that claimant is not entitled to weekly temporary total disability or healing period benefits due to a refusal to accept suitable work pursuant to Iowa Code section 85.33(3) is an affirmative defense. The employer must show by the preponderance of the evidence that the work was offered; that the work was suitable, that is, having a physical or mental demand level that does not exceed claimant's capacities; and, that the refusal was an intentional act. Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004); Woods v. Siemens-Furnas Controls, File Nos. 1303082, 1273249 (Arb. July 22, 2002). Disciplinary action such as a suspension or termination based upon misconduct or a violation of an employer's work rules is not a refusal to perform suitable work. In Franco v. IBP, File No. 5004766 (App. February 28, 2005) Commissioner Trier held:

> The concept that a termination for misconduct constitutes an intentional refusal to perform work was adopted by this agency in Himes v. MSP Resources, Inc., No's. 1055997 & 1055996 (App. April 10, 1996). . . . [T]hat policy has been expressly reversed to the extent that an employer's personnel policies will not govern entitlement to indemnity benefits. The employer must prove that the employee refused work that was both offered and suitable. The act of refusal must be an intentional act. Woods v. Seimens-Furnas Controls, No's. 1303082 & 1273249 (App. July 22, 2003). For misconduct to disqualify a person from compensation, the misconduct must be tantamount to refusal to perform the offered work. The misconduct must be serious and the type of conduct that would cause any employer to terminate any employee. The misconduct must have a serious adverse impact on the employer. Brodigan v. Nutri-Ject Systems, Inc., No. 5001106 (App. April 13, 2004). An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action.

Franco v. IBP, File No. 5004766, p. 6 (App. February 28, 2005).

Iowa Code section 85.33 (2015) provided that a refusal of suitable work results in a suspension of benefits during the periods of refusal. The Edwards v. Weitz Corp. File

No. 5032285 (Arb. 6/22/2011) (Affirmed on appeal 8/22/12) decision is relevant in this case. The Edwards decision held:

> If an employee who is temporarily, partially disabled refuses to accept suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of refusal. Iowa Code section 85.33(3). An employer's personnel actions cannot control an employee's right to benefits. The employer must show that the employee refused to perform the work that was both offered and suitable. The refusal must be an intentional act to cause denial of benefits under Iowa Code section 85.33(3). Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (Appeal April 13, 2004); Woods v. Siemens Furnas Control, File No. 1273249, 1303082 (Appeal July 22, 2003).
>
> An employee is precluded from receiving benefits under Iowa Code section 85.33(3) if the employee was offered suitable work, and the employee refused the work. Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010).
>
> Claimant contends he is due a running award of total temporary disability benefits from July 21, 2009 to the present. Defendants contend that because claimant failed a drug screen, under company policy claimant voluntarily terminated his employment and therefore Iowa Code section 85.33(3) applies.
>
> The record indicates claimant was terminated from his employment with Weitz on July 20, 2009. This was due to claimant's failure to pass a drug screen. Agency case law indicates that failure of a drug screen and subsequent termination is not considered a voluntary quitting of work.
>
> Under Schutjer, the employer must first offer suitable work, before the employee is precluded from benefits under Iowa Code section 85.33(3). That did not occur in this case. Claimant testified he would have continued to work at Weitz if given the opportunity.

Edwards v. Weitz Corp. File No. 5032285 (Arb. 6/22/2011) (Affirmed on appeal 8/22/12).

Like the Edwards case, there was no offer of suitable work by Liguria, as claimant was terminated and did not refuse suitable work. Claimant did not commit misconduct such that it was an intentional act that is tantamount to a voluntary quit.

I find defendants failed to substantially comply with Iowa's private sector drug-free workplaces law, Iowa Code Chapter 730.5. This law requires that before drug

testing can occur certain conditions must be met. The relevant section for this case is Iowa Code section 730.5(8)(f).

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:
>
> ...
>
> f. 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, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

Iowa Code section 730.5 (West).

In this case claimant was injured on November 20, 2015. Claimant went to the emergency room on November 26, 2015. Claimant was not admitted to the hospital. Claimant was seen by Dr. Ruzicka on November 27, 2015. Claimant was sent to Dr. Ruzicka by her employer. This is when the drug testing occurred. This was seven days after claimant slipped in an icy parking lot and had her injury. This testing could not provide defendants with any reliable information about whether claimant was under the influence of drugs for an accident that happened seven days ago. The week delay in testing is not valid testing under Iowa Code section 730.5. See Skipton v. S & J Tube Inc. 822 N.W. 2d 122 (Table) (Iowa Ct. Appeal, 2012) (Noting that there was no new injury at the time of the employer's drug testing).

Section 730.5(9)(*a*)(1) mandates:

> Drug or alcohol testing or retesting *by an employer* shall be carried out within the terms of a written policy which has been provided to every employee subject to testing, and is available for review by employees and prospective employees.

There was no evidence presented that the employer adopted a written policy and that the policy was provided to the claimant.

Section 730.5(7)(i)(1) provides:

> If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample ... and the fee payable by the employee to the employer for reimbursement of expenses concerning the test. (Emphasis supplied)

The Iowa Supreme Court in Harrison v. Employment Appeal Bd., 659 N.W.2d 581, 587 (Iowa 2003) stated in the notice to the employee about a first positive drug test, the employer must provide notice of the cost of a second test that the employee would pay if the employee wishes to request a second test.

> As noted at the outset of our opinion, section 730.5(7)(*i*)(1) requires that the employer give an employee written notice of a positive test result. Such notice must be by certified mail, return receipt requested. The notice must inform the employee of his right to have a second confirmatory test done at a laboratory of his choice and it must tell the employee what the cost of that test will be. Any fee charged by the employer must be consistent with the cost to the employer of the initial confirmatory test. An employee has seven days to request a second test.

Harrison, p. 587

The employer did not provide evidence that claimant was provided written notice of the costs for the second test. An employer must substantially comply with these notice requirements. Sims v. NCI Holding Corp., 759 N.W.2d 333, 338 (Iowa 2009).

The evidence shows that the type of accident claimant had was not the type that allows drug testing under 750.5(8)(f) which incorporates by reference Iowa Code Chapter 88. Iowa Code section 88.6(3)(b) provides:

> *b.* The commissioner shall prescribe regulations requiring an employer to maintain accurate records of, and to make periodic reports on, work related deaths, injuries, and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.
>
> The Iowa Division of Labor has adopted rules concerning reporting injuries.
>
> **875—4.3(88) Recording and reporting regulations.** Except as noted in this rule, the Federal Occupational Safety and Health Administration regulations at 29 CFR 1904.0 through 1904.46 as published at 66 Fed. Reg. 6122 to 6135 (January 19, 2001) are adopted.
>
> **4.3(1)** The following amendments to 29 CFR 1904.0 through 1904.46 are adopted:
>
> *a.* 66 Fed. Reg. 52031-52034 (October 12, 2001)
>
> *b.* 67 Fed. Reg. 44047 (July 1, 2002)
>
> *c.* 67 Fed. Reg. 77170 (December 17, 2002)
>
> *d.* 68 Fed. Reg. 38606 (June 30, 2003)

e. 79 Fed. Reg. 56186 (September 18, 2014)

f. 81 Fed. Reg. 29691 (May 12, 2016)

g. 81 Fed. Reg. 31854 (May 20, 2016)

4.3(2) In addition to the reporting methods set forth in 29 CFR 1904.39(a), employers may make reports required by 29 CFR 1904.39 using at least one of the following methods:

a. Completing the incident report form available at www.iowaosha.gov and faxing the completed form to (515)242-5076 or sending the completed form to osha@iwd.iowa.gov;

b. Calling (877)242-6742; or

c. Visiting 1000 E. Grand Avenue, Des Moines, Iowa.

The relevant U.S. Department of Labor regulation is 29 CFR §1904.39 which provides in part:

> Reporting fatalities, hospitalizations, amputations, and losses of an eye as a result of work-related incidents to OSHA.
>
> ...
>
> (2) Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.
>
> ...
>
> (9) How does OSHA define "in-patient hospitalization"? OSHA defines in-patient hospitalization as a formal admission to the in-patient service of a hospital or clinic for care or treatment.
>
> (10) Do I have to report an in-patient hospitalization that involves only observation or diagnostic testing? No, you do not have to report an in-patient hospitalization that involves only observation or diagnostic testing. You must only report to OSHA each in-patient hospitalization that involves care or treatment.

There is no evidence that claimant was admitted to a hospital as defined by the OSHA regulations. There is no evidence there was $1,000.00 damage to property. The evidence does not show that the defendants complied with Chapter 730.5. Drug testing would have been improper even if it had occurred on the day of the accident.

The Iowa Supreme Court has ruled that employers who fail to substantially comply with Chapter 730.5 may not use the test results to contest unemployment benefits. In the Harrison case the court held:

> *Consequences of noncompliance.* In Eaton, we stated "[i]t would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." 602 N.W.2d at 558. As a result, we held that the Employment Appeal Board erred in that case by relying on such a test to support a finding of misconduct. *Id.* Victor Plastics argues the same result is not warranted here because, unlike the test in *Eaton,* the test in this case was authorized by law and the employer merely failed to strictly follow the "technical notice requirements" of the statute. We disagree.
>
> Although the legislature now allows random workplace drug testing, it does so under severely circumscribed conditions designed to ensure accurate testing and to protect employees from unfair and unwarranted discipline. The importance of these protections, including the procedural safeguards contained in section 730.5(7), is highlighted by the statutory provision making an employer "who violates this section ... liable to an aggrieved employee ... for affirmative relief including reinstatement ... or any other equitable relief as the court deems appropriate." Iowa Code § 730.5(15). Although an employer is entitled to have a drug free workplace, it would be contrary to the spirit of Iowa's drug testing law if we were to allow employers to ignore the protections afforded by this statute, yet gain the advantage of using a test that did not comport with the law to support a denial of unemployment compensation.

Harrison v. Employment Appeal Bd., 659 N.W.2d 581, 588 (Iowa 2003).

The Iowa Supreme Court held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 557-58 (Iowa 1999). I find that an employer may not benefit in a workers' compensation case if it fails to substantially comply with Iowa drug testing law. As the employer failed to substantially comply with Chapter 730.5 I find that the claimant did not refuse suitable work and is entitled to healing period benefits.

Defendants argue that Reynolds v. Hy Vee, Inc., No. 5046203 (App. October 31, 2017) supports the assertion that claimant should be denied healing period benefits. In Reynolds the claimant stole from the employer and was terminated. In this case it is the employer who has failed to follow Iowa Code Chapter 730.5. Reynolds does not support defendants' argument.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The claimant received treatment at the Berryhill Clinic for depression, and the mental health counselors there have indicated that her depression is related to her inability to work.

Dr. Patra is the only psychiatrist who has provided an opinion in this case. He states that claimant does not have any impairment due to her inability to work. However, Dr. Patra has assessed claimant with an adjustment disorder, with depressed mood, caused by a persistent painful illness. Claimant's work injury is the cause of persistent painful illness. It is work related. I find Dr. Patra's opinion to be the most convincing, as he clearly is the most qualified physician in this record to issue an opinion about claimant's mental health. I find his report the most convincing.

I note that there is no mention of claimant's diagnosis of mild mental retardation in Dr. Patra's report, which is somewhat troubling.

I find that this mental injury arose out of and in the course of her work for Liguria. The symptoms cause more than a minimal impact on claimant's ability to work. Claimant's treatment at Berryhill is causally related to her work injury; whether it is described as depression or as an adjustment disorder it relates to her work injury. Defendants shall pay for the costs claimant incurred for her mental health treatment and shall pay and provide for additional mental health treatment that is causally related to her work injury.

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).

There was little testimony concerning what hours claimant customarily worked at Liguria. The best evidence in the record are the pay records provided by the parties that show that claimant generally worked at least 40 hours a week. There is only one week that claimant worked or was paid for less than 30 hours before her injury; the week ending October 25, 2015.

In calculating claimant's worker's compensation rate I used the defendant's calculation with the exception of not using the week with the pay period ending October

28, 2015, with 26.80 hours. I include the week ending August 19, 2015 with 58.70 hours.

Pay Date	Period End	Hours	Rate	Wages
1) 11/18/15	11/15/15	40	$12.95	$518.00
2) 11/10/15	11/8/15	31.90	$12.95	$413.11
3) 11/4/15	11/1/15	39.4	$12.95	$510.24
4) 10/21/15	10/18/15	41.80	$11.45	$478.61
5) 10/14/15	10/11/15	43.8	$11.45	$501.51
6) 10/7/15	10/4/15	60.6	$11.45	$693.87
7) 9/30/15	9/27/15	60.2	$11.45	$689.29
8) 9/23/15	9/20/15	53.9	$11.45	$617.16
9) 9/16/15	9/13/15	52.3	$11.45	$598.84
10) 9/7/15	9/6/15	55.9	$11.45	$640.01
11) 9/2/15	8/30/15	55.6	$11.45	$636.62
12) 8/26/15	8/23/15	40.6	$11.45	$464.87
13) 8/19/15	8/10/15	58.70	$11.45	$672.11
			Total	$7,434.24 ÷ 13 = $571.86
			Rate	$357.64

I find that claimant's average wage for the relevant time before her injury is $571.86. Claimant's weekly worker's compensation rate, with one exemption and single, is $357.64.

Defendants paid healing period and permanent partial disability benefits at the rate of $332.93. The defendants underpaid claimant $24.71 each week they made payments. Defendants shall correct the underpayments and pay claimant at the correct rate for all benefits.

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or

excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Claimant has requested penalty for underpayment of rate and for not paying claimant permanent benefit beyond the rating claimant received.

Defendants acknowledged at the hearing and in the hearing report that claimant's weekly rate is at least $341.54 and that the rate they paid claimant is $332.93. Defendants have argued that no additional payments were due based on a refusal of work by claimant and that claimant's impairment is "less than zero."

Claimant was not offered suitable work. Additionally, claimant did not refuse work. Defendants' drug testing was not permitted under the law and the testing performed did not provide adequate notice to the claimant. I award a penalty of

approximately 50 percent for the 61 weeks that claimant was underpaid healing period benefits. The penalty is $131.00 [61 x $4.31 = $262.91 ÷ 2 = $131.45].

Defendants have not shown reasonable grounds for the underpayment of permanent partial benefits. I also award an approximately 50 percent penalty for underpayment of permanent partial benefits. Defendants shall pay claimant $75.00 for underpayment of permanent partial benefits [35 x $4.31 = $150.85 ÷ 2 = $75.42].

Total payment due to claimant for penalty is $206.00. I find that this amount of penalty should be awarded in this case in order to ensure compliance with workers' compensation laws in the future.

While this is a close case, I decline to award penalty benefits for the decision of the defendants not to pay any more than the rating given by Dr. Pruitt. While I found that claimant was entitled to substantially more permanent partial disability than the defendants paid, the defendants' decision to pay the rating was not unreasonable at the time.

Claimant requested an award of cost. I award claimant the filing fee of $100.00.

ORDER

Defendants shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the weekly rate of three hundred fifty-seven and 64/100 dollars ($357.64) per week commencing on February 2, 2017.

Defendants shall have a credit for healing period and permanent partial benefits already paid in this case.

Defendants shall pay claimant the underpayment of healing period and permanent partial benefits as set forth in this decision.

Defendants shall pay claimant two hundred six dollars ($206.00) in penalty benefits.

Defendants shall provide for treatment and pay the medical expenses related to claimant's mental health as set forth in this decision.

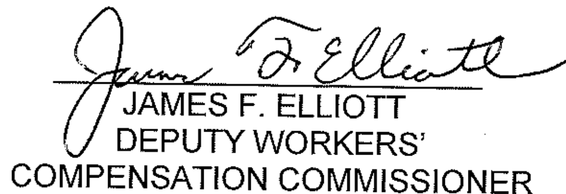
Defendants shall pay claimant costs in the amount of one hundred dollars ($100.00).

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).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 5th day of April, 2019.



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JFE/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.