BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MONICA TOLEDO,

Claimant,

vs.

AIMBRIDGE HOSPITALITY HOLDINGS, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5065720

ARBITRATION DECISION

Head Note Nos.: 1402, 1802, 1803

STATEMENT OF THE CASE

Claimant Monica Toledo filed a petition in arbitration seeking workers' compensation benefits from defendants Aimbridge Hospitality Holdings, LLC, employer, and Zurich American Insurance Company. This matter was heard in Des Moines, Iowa on May 31, 2018, by Deputy Workers' Compensation Commissioner Erica J. Fitch.

On July 2, 2019, pursuant to Iowa Code section 17A.15(2), the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a proposed decision in this matter due to the unavailability of Deputy Commissioner Fitch.

Pursuant to the requirements of Iowa Code section 17A.15(2), I have read the entirety of the record created before Deputy Commissioner Fitch as well as the parties' post-hearing briefs.

Although there are several factual disputes between the parties, neither party argues demeanor is the operative decision making factor in this case. Thus, I conclude I can proceed to issue a proposed decision pursuant to Iowa Code section 17A.15(2).

The parties submitted a hearing report prior to the commencement of the evidentiary hearing. On that hearing report, the parties entered into certain stipulations. Deputy Commissioner Fitch accepted that hearing report and entered an order at the time of hearing noting her approval of the stipulations and disputes noted on the hearing

report. I therefore accept the stipulations noted on the hearing report, and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are bound by their stipulations.

The record presented to and accepted by Deputy Commissioner Fitch at hearing consists of Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 13, Defendants' Exhibits A through C, and the testimony of claimant. The evidentiary record closed on May 31, 2018. The case was considered fully submitted upon receipt of the parties' briefs on June 18, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's August 6, 2016 work injury was limited to her left arm or also affected her left shoulder.
2. Whether claimant sustained any permanent disability, and if so, the extent of that disability.
3. Whether claimant is entitled to temporary benefits from March 31, 2017 through July 12, 2017.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant sustained an injury on August 6, 2016, while attempting to clean a bathtub. Per defendant-employer's instructions, claimant was not to step inside the tub to clean; instead, she was standing on the outside of the tub and leaning across with her right arm to clean when she slipped and fell forward. (Hearing Transcript, pages 25-27) Claimant's left shoulder hit the wall before she braced herself with her left hand in the base of the tub. (Hrg. Tr., pp. 26-28) Claimant testified she felt pain right away in her left shoulder and left wrist. (Hrg. Tr., p. 28)

Despite reporting the injury immediately, claimant was not sent for medical treatment until August 12, 2016, when she was evaluated at Methodist Occupational Health and Wellness. (Hrg. Tr., p. 29: Joint Exhibit 1, p. 1) Claimant, who was born in Colombia and only speaks basic English, was not provided with an interpreter for her first two appointments at Methodist Occupational Health; instead, claimant's daughter who is also "not fluent in English" attempted to interpret. (Hrg. Tr., pp. 15, 30; JE 1, p. 1)

Despite the lack of an official interpreter, the notes from claimant's initial appointment at Methodist Occupational Health contain a description of claimant's injury that is consistent with that provided at hearing: "[S]he was cleaning a bathtub when she slipped and fell supporting her body weight with her outstretched left hand." (JE 1, p. 1) However, only claimant's wrist symptoms are mentioned in the notes from claimant's first two non-interpreted appointments. (See JE 1, pp. 1-7) Claimant testified she

attempted to communicate her shoulder symptoms through her daughter but was concerned her daughter did not explain them well to the doctor because "[h]er English was not good." (Hrg. Tr., p. 31) Claimant was diagnosed with a wrist sprain but was referred for an MRI. (JE 1, p. 4)

Claimant returned to Methodist Occupational Health on September 16, 2016 after her left wrist MRI. An interpreter was provided for this visit. (JE 1, p. 8; Hrg. Tr., p. 33) Notably, in addition to left wrist symptoms, the notes from this interpreted visit mention a left shoulder injury "that happened the same time as her left wrist injury." (JE 1, p. 9) Claimant's left wrist MRI showed no acute abnormalities, but it did reveal a large symptomatic ganglion cyst and subluxation of the ulna for which claimant was referred to an orthopedic surgeon, Teri Formanek, M.D. (JE 1, pp. 8-9) Claimant was also instructed to perform left shoulder exercises. (JE 1, p. 9)

Claimant initially presented to Dr. Formanek on October 3, 2016, with an interpreter, complaining of left wrist and shoulder pain after falling and "land[ing] palm down on her wrist." (JE 4, p. 17; see Hrg. Tr., p. 62) The description of falling and landing on the left wrist is consistent with claimant's testimony at hearing and the description provided to Methodist Occupational Health. Dr. Formanek noted claimant likely had a pre-existing volar ganglion cyst that was "aggravated" by her fall. (JE 4, p. 20) He recommended surgical removal of the cyst, which was performed on October 31, 2016. (JE 4, pp. 20, 28) In the interim, claimant was prescribed medication and physical therapy for her left shoulder. (JE 4, p. 20)

Claimant continued physical therapy for her shoulder and her wrist after the cyst was removed. By December 6, 2016, claimant was back to work in a modified capacity. Her wrist had improved, but she continued to have difficulty with her shoulder. (JE 4, p. 35) Dr. Formanek administered a left shoulder injection and maintained claimant's work restrictions. (JE 4, pp. 35, 37)

Claimant returned to Dr. Formanek on January 10, 2017, after completing a left shoulder MRI. Dr. Formanek indicated claimant had arthritis in the shoulder that was "exacerbated by her fall," and he recommended another injection. (JE 4, p. 43) Regarding claimant's wrist, Dr. Formanek remained optimistic and noted he thought claimant would be "able to use her wrist normally." (JE 4, p. 43) Claimant's work restrictions were extended through claimant's next appointment in four weeks. (JE 4, p. 45)

At claimant's follow-up appointment on February 7, 2017, claimant reported continued improvement in her wrist. (JE 4, p. 48) As a result, Dr. Formanek placed claimant at maximum medical improvement (MMI) for the wrist with no permanent restrictions. (JE 4, p. 48) Claimant acknowledged at the hearing that her wrist had significantly improved by this time. (Hrg. Tr., p. 40) Claimant's left shoulder remained symptomatic, however, so claimant was referred to a shoulder specialist, Steven Aviles, M.D. (JE 4, pp. 48-49)

Claimant reported to Dr. Aviles that she developed shoulder pain after falling on an "outstretched" left arm at work. (JE 7, p. 149) Again, this description of the incident is consistent with claimant's testimony at hearing and reports to her previous providers. Dr. Aviles reviewed the MRI ordered by Dr. Formanek and interpreted it to show a partial biceps tear for which he recommended surgery. (JE 7, p. 151) That surgery, consisting of a biceps tenotomy and subacromial decompression, was performed on March 31, 2017. (JE 9) Dr. Aviles restricted claimant from working until April 6, 2017, at which time she could return to work with no use of the left upper extremity. (JE 7, p. 157)

Before claimant was scheduled to return to Dr. Aviles for her first post-operative visit, claimant presented to her primary care provider, Elizabeth Jauron, M.D., with pain and nausea. (JE 10, p. 186A) Claimant told Dr. Jauron that she placed a call into Dr. Aviles' office and was prescribed a new pain medication, but was unable to see Dr. Aviles until the following Monday. (JE 10, p. 186A) Dr. Jauron excused claimant from work from April 6 through April 8, 2017. (JE 10, p. 186)

When claimant returned to Dr. Aviles on April 10, 2017, she reported "nausea and vomiting" as a result of the medication she was being prescribed, which was consistent with her complaints to Dr. Jauron. (JE 7, p. 159; see Hrg. Tr., p. 44) While claimant was concerned defendant-employer was not honoring Dr. Aviles' restrictions, Dr. Aviles indicated based on claimant's description that defendant-employer was "accommodating her restrictions nicely." (JE 7, p. 159) Dr. Aviles then modified claimant's restrictions to allow her to use her left arm to lift up to two pounds. (JE 7, p. 159)

Claimant, however, was terminated on April 13, 2017, based on "a series of attendance infractions." (Claimant's Ex. 9, p. 82)

Dr. Aviles continued to lessen claimant's restrictions through her appointment on July 12, 2017. The notes from that visit indicate claimant reported only "mild" symptoms. (JE 7, p. 175) Claimant, however, disputes this account.

Claimant testified Dr. Aviles did not examine her on July 12, 2017, and spent less than five minutes in the room with her: "He arrived. He told me I was fine, that he was going to lift - - that he was going to lift the restrictions and that I was going to go back to my normal life. He shook my hand and left." (Hrg. Tr., p. 50) Claimant also denied ever telling Dr. Aviles that her symptoms were mild and occasional or that she had improved leading up to this visit. (Hrg. Tr., pp. 49, 51) Claimant's testimony is generally corroborated by the transcript of the audio recording she took during her exchange with Dr. Aviles on July 12, 2017, though it is not clear at what point during the appointment when the recording began or whether claimant was examined by a nurse or assistant prior to seeing Dr. Aviles. (Cl. Ex. 6)

Regardless, Dr. Aviles placed claimant at MMI as of July 12, 2017, and released her to return to work without restrictions. (JE 7, p. 176) He eventually authored a letter

in which he opined claimant sustained a two percent whole body impairment. (JE 7, p. 180A) It does not appear claimant has ever returned to Dr. Aviles for treatment.

Claimant, however, continued to complain of shoulder symptoms. As of April 5, 2018, claimant returned to Dr. Jauron with decreased range of motion and worsening pain. (JE 10, p. 186C) Dr. Jauron recommended physical therapy and a follow up with an orthopedic surgeon, though she recognized these referrals would likely not be possible given claimant's lack of insurance. (JE 10, p. 186D) Claimant was also given a prescription for meloxicam for pain. (JE 10, p. 186D)

Claimant was eventually evaluated for purposes of an independent medical examination (IME) by Sunil Bansal, M.D. In Dr. Bansal's report, signed September 28, 2017, the description of claimant's August 6, 2016 fall is consistent with claimant's testimony at hearing and the history given to her other providers. (Cl. Ex. 1, p. 6) Claimant reported to Dr. Bansal that she could lift 5 pounds frequently with her left hand below shoulder level but could not lift more than 10 pounds. (Cl. Ex. 1, p. 8)

Dr. Bansal opined claimant's fall on August 6, 2016 aggravated the ganglion cyst on her left wrist and resulted in surgery. (Cl. Ex. 1, p. 11) He assigned a 4 percent upper extremity impairment rating (or a 2 percent whole body rating) for range of motion deficits in the wrist. (Cl. Ex. 1, p. 12) Dr. Bansal likewise opined that claimant aggravated her left shoulder impingement syndrome when she fell on her outstretched hand, which necessitated the subacromial decompression surgery. (Cl. Ex. 1, p. 11) He assigned a 4 percent whole body impairment rating for range of motion deficits in the shoulder. (Cl. Ex. 1, p. 12) With respect to permanent restrictions, Dr. Bansal recommended no lifting greater than 10 pounds occasionally or 5 pounds frequently with the left arm, no lifting above shoulder level with the left arm, and no frequent reaching with the left arm. (Cl. Ex. 1, p. 12)

Defendants denied liability for claimant's shoulder injury in part because claimant's shoulder complaints do not appear in the medical records until September 16, 2016, despite her testimony that she experienced immediate pain in the shoulder after the fall. As noted, however, claimant was not provided an interpreter until this September 16, 2016 appointment. Once the interpreter was provided, claimant's left shoulder complaints appeared in the notes. I find that the absence of left shoulder complaints in the medical records prior to September 16, 2016 was due to miscommunication and the lack of an interpreter—not to the absence of symptoms.

I acknowledge the notes from September 16, 2016 indicate claimant's left shoulder pain started "a few days after her original injury," as opposed to immediately after the fall. However, the same note also provides that claimant described "an injury to her left shoulder today that happened the same time as her left wrist injury." (JE 1, pp. 8-9) (emphasis added)

Defendants also overlook the fact that claimant provided a consistent description of the fall to each of her providers, including Methodist Occupational Health,

Dr. Formanek, Dr. Aviles, and Dr. Bansal. The description of the fall in the medical records was also consistent with claimant's testimony regarding the incident at hearing.

The relatively minor discrepancy on which defendants rely for their denial is overshadowed by the causation opinion of Dr. Bansal, which is supported by the opinions of Dr. Aviles and Dr. Formanek. I find these causation opinions, which are unrebutted by another physician's opinion, to be persuasive. I therefore find claimant's August 6, 2016 work injury aggravated her underlying shoulder condition and caused the need for the surgery performed by Dr. Aviles.

With respect to whether claimant sustained any permanent disability to her left upper extremity and shoulder, I find the opinions of Dr. Bansal to be most persuasive. Claimant credibly testified Dr. Aviles lifted her restrictions and dismissed her from care on July 12, 2016 with little to no discussion about the true extent of her ongoing symptoms. Further, leading up to the July 12, 2016 appointment, claimant was following a 10-pound lifting restriction that had just been renewed as of claimant's June 21, 2016 appointment. (JE 7, p. 173) Claimant credibly testified that she had not improved prior to the July 12, 2016 appointment to justify a full-duty release to work. Claimant's testimony is consistent with her IME with Dr. Bansal, during which she reported not being able to lift more than 10 pounds. For these reasons, I find Dr. Bansal's impairment ratings and permanent restrictions to be more consistent with claimant's ongoing symptoms and complaints.

Regarding the extent of her permanent disability, claimant credibly testified she could not return to her job with defendant-employer due to her work-related injuries and resulting restrictions. (See Hrg. Tr., p. 25) Per defendant-employer's job description, claimant was required to lift and/or carry as much as 75 pounds, but Dr. Bansal's restrictions limit her to lifting no more than 10 pounds. (Cl. Ex. 4, p. 42) Claimant's permanent restrictions likely preclude her from returning to most housekeeping jobs.

While claimant could physically return to many of the secretarial and administrative jobs she held in Colombia prior to coming to the United States, she would be unable to perform most of these jobs in the United States due to her inability to speak fluent English. (See Hrg. Tr., pp. 17-21) She acknowledged she performed receptionist duties for Spanish-speaking clients upon her arrival in the United States in 2015, but she also explained she only earned $100.00 per week to do so. (Hrg. Tr., p. 22)

Claimant was 52 years old at the time of the hearing. (Hrg. Tr., p. 14) She has the equivalent of a high school diploma and two years of additional training to be a secretary in Colombia, but again, the utility of her education is limited by the fact that she can speak, read, and write only basic English. (Hrg. Tr., pp. 58-59) Based on her age and her language barrier, she is not a good candidate for retraining.

Despite these hurdles, claimant was able to find part-time work in November of 2017 prepping food for the West Des Moines School District. (Hrg. Tr., p. 53) Claimant was earning $13.30 per hour at the time of the hearing (more than what she was

earning per hour with defendant-employer) and was working 20 hours per week. (Hrg. Tr., p. 68) Claimant testified she has asked whether additional hours are available and has been told no. (Hrg. Tr., p. 68) This inquiry suggests she believes she is physically capable of working more than part-time hours in this job.

Even so, with permanent restrictions of no overhead reaching and no lifting more than 10 pounds with the left arm and a language barrier, claimant's employment opportunities are now quite limited. I find claimant sustained a 70 percent loss of earning capacity due to her August 6, 2016 work injury.

Claimant also seeks healing period benefits from March 31, 2017, the date of her shoulder surgery, through July 12, 2017, the date on which Dr. Aviles placed her at (and the parties agree she reached) MMI.

Dr. Aviles restricted claimant from returning to work after her surgery on March 31, 2017 until April 6, 2017. Thus, I find that from March 31, 2017 through April 5, 2017, claimant had not returned to work, was not capable of returning to substantially similar work, and had not yet reached MMI.

I also find that from April 6 through April 8, 2017, claimant missed work due to pain and a reaction to the medication prescribed to her after her shoulder surgery. Claimant called Dr. Aviles' office but was unable to see him until April 10, 2017. In the interim, claimant was seen by her primary care provider, Dr. Jauron, who excused her from work. Thus, I find that from April 6 through April 8, 2017, claimant was unable to return to substantially similar work due to a condition related to her work injury. In other words, from April 6 through April 8, 2017, claimant had not returned to work, was not capable of returning to substantially similar work, and had not yet reached MMI.

From April 9, 2017 through her termination on April 13, 2017, defendant-employer offered claimant work within her restrictions, yet claimant did not show up to work and had no doctor-imposed excuse for her absence. I therefore find that from April 9 through April 13, 2017, claimant refused an offer of suitable work.

While I recognize defendant-employer was likely acting within the parameters of its attendance policy when claimant was terminated, I find that for purposes of claimant's healing period, defendant-employer failed to offer suitable work after her termination on April 13, 2017. In claimant's termination letter, defendant-employer noted claimant missed work from April 6 through April 8, and April 11 through April 14. (Cl. Ex. 9, p. 82) Defendant-employer's attendance policy provides that "[u]nscheduled absences, tardiness or leaving early three (3) days within a 90-day period is considered excessive absenteeism and will result in disciplinary action up to and including termination." (Cl. Ex. 9, p. 82)

While claimant was terminated for excessive absenteeism, the written notice claimant received for her absenteeism months earlier, on January 11, 2017, indicates defendant-employer tolerated significantly more than 3 unscheduled absences within 90-day periods. (See Def. Ex. A, p. 2) Specifically, claimant had 18 unscheduled

absences in a 90-day period before receiving a written notice. Thus, I find claimant's termination was based on inconsequential conduct that employers typically overlook and tolerate—and that this employer tolerated with claimant just months prior. While I find defendant-employer appeared to have acted in accordance with its attendance policy, the conduct that led to claimant's termination was not serious or the type of conduct that would cause any employer to terminate any employee. Thus, I find that defendant-employer failed to offer suitable work after April 13, 2017.

As of April 13, 2017, claimant had a 2-pound lifting restriction. (See JE 7, p. 159) Dr. Aviles assigned a 10-pound lifting restriction at her next appointment on May 8, 2017, and the 10-pound restriction remained in place until Dr. Aviles released claimant with no restrictions on July 12, 2017. (JE 7, p. 166) As discussed above, however, I do not find Dr. Aviles' full-duty release to be persuasive. Instead, I found Dr. Bansal's 10-pound lifting restriction to be more consistent with claimant's abilities. Per defendant-employer's job description, claimant was required to lift and/or carry as much as 75 pounds. (Cl. Ex. 4, p. 42) Thus, as of and after April 13, 2017, I find claimant was not capable of performing work substantially similar to that of her job with defendant-employer.

CONCLUSIONS OF LAW

The first issue to be decided is whether claimant's August 6, 2016 work injury was limited to her left arm or if it also affected her left shoulder.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Relying on the opinions of Dr. Bansal, which were supported by the opinions of Dr. Formanek and Dr. Aviles, I found claimant's left shoulder condition was aggravated by her fall on August 6, 2016. I also found this fall necessitated the left shoulder surgery performed by Dr. Aviles. As such, I conclude claimant satisfied her burden to prove she sustained an injury to the body as a whole.

Based on the opinions of Dr. Bansal, I also determined claimant's left shoulder injury was permanent in nature. Thus, I conclude claimant proved she sustained an industrial disability for which she is entitled to permanent partial disability (PPD) benefits.

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).

In this instance, having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found claimant proved she sustained a 70 percent loss of future earning capacity. Pursuant to Iowa Code section 85.34(2)(u), industrial disability is paid in relation to 500 weeks as the disability bears to the body as a whole. A 70 percent loss of earning capacity entitles claimant to an award of 350 weeks of permanent partial disability benefits. Iowa Code § 85.34(2)(u).

The next issue to be decided is claimant's entitlement to temporary benefits from the date of her shoulder surgery on March 31, 2017 through being placed at MMI for her shoulder on July 12, 2017.

Iowa Code section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has

returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Iowa Code § 85.34(1) (2016).

Dr. Aviles restricted claimant from returning to work after her shoulder surgery, which I found to be work-related, until April 6, 2017. Thus, from March 31, 2017 through April 5, 2017, claimant had not returned to work, was not capable of returning to substantially similar work, and had not yet reached MMI. Claimant is therefore entitled to healing period benefits during this time.

I also found that claimant was restricted from working from April 6 through April 8, 2017, due to a condition related to her shoulder surgery. In other words, from April 6 through April 8, 2017, claimant had not returned to work, was not capable of returning to substantially similar work, and had not yet reached MMI. I therefore conclude claimant is entitled to healing period benefits during this time.

However, I found that claimant refused suitable work from April 8, 2017 through her termination on April 13, 2017. Iowa Code section 85.33(3) provides that when an "employer offers an employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal." Iowa Code § 85.33(3).

Refusal of suitable work by an employee results in forfeiture of any temporary disability or healing period benefits pursuant to Iowa Code section 85.33(3). Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). Iowa Code section 85.33(3) only applies, however, if the employer offers suitable work to the employee. Id.

The employer bears the burden to establish the prerequisites of Iowa Code section 85.33(3). Koehler v. American Color Graphics, File No. 1248489 (App. Feb. 25, 2005). Specifically, the employer must establish by a preponderance of the evidence that work was offered to the claimant, that the work was suitable, and that claimant intentionally refused the offered work. Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012); Raymie v. JB Schott Family Farms, File No. 5041943 (App. Oct. 7, 2016); Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004); Woods v. Siemens Furnas Control, File Nos. 1303082, 1273249 (Arb. July 2002) (Final agency action by Commissioner Trier).

Thus, based on her refusal of suitable work, I conclude claimant is not entitled to healing period benefits from April 9, 2017 through her termination on April 13, 2017.

Defendants contend claimant is not entitled to healing period benefits after her termination. Termination by itself is not sufficient grounds to disqualify an employee from temporary benefits under Iowa Code section 85.33(3), however. Raymie, File No. 5041943 (App. Oct. 7, 2016); Terhark v. Hope Haven, File No. 5031853 (App. Feb. 26, 2013); Alonzo v. IBP, Inc., File No. 5009878 (App. Oct. 31, 2006); Franco v. IBP, Inc., File No. 5004766 (App. Feb. 28, 2005). Instead, for misconduct to be

tantamount to a refusal to perform suitable work, it must be "serious and the type of conduct that would cause any employer to terminate any employee" and "have a serious adverse impact on the employer." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. Oct. 31, 2017). The misconduct needs to be more egregious "than the type of inconsequential misconduct that employers typically overlook or tolerate." Id. While an employee "is not entitled to act with impunity toward the employer," the Commissioner has held that "not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action." Id. (citation omitted).

In this case, suitable work was offered to claimant through her termination. However, I found the conduct that led to claimant's termination was inconsequential and the type of misconduct that employers typically overlook or tolerate. In fact, defendant-employer in this case had previously overlooked this same conduct from claimant. I therefore conclude claimant's misconduct was not tantamount to a refusal to perform suitable work. Thus, claimant's termination, though potentially justified per defendant-employer's attendance policy, was not sufficient grounds to disqualify claimant from healing period benefits. As a result, I found defendants failed to offer suitable work after claimant's termination on April 13, 2017.

I also found claimant was unable to return to substantially similar work after her termination based on the temporary restrictions given initially by Dr. Aviles and the eventual permanent restrictions assigned by Dr. Bansal. Thus, I conclude claimant is entitled to an additional period of healing period benefits from April 14, 2017 through July 12, 2017, the date on which the parties agree claimant reached MMI.

I echo the sentiments of the deputy commissioner in Ibrahim v. ABM Industries, File No. 5059441, who in his arbitration decision noted that this outcome seems odd and somewhat unjust when a claimant's termination is justified by defendant-employer's personnel policies:

> Realistically, an employer will typically follow its attendance policy and personnel policies. . . . When an employee fails to appear for work repeatedly, it is not realistic to expect an employer to maintain that employee indefinitely. Yet, when this employer actually takes action, acts in a responsible business manner, and complies with its own established personnel policies, it forfeits a defense in this worker's [*sic*] compensation case. That seems like an odd and perhaps unjust result to the undersigned. . . .

Ibrahim v. ABM Industries, File No. 5059441 (Arb. Jan. 30, 2019). Regardless, I am bound by the case law that has developed on this issue, and based on that case law conclude claimant is entitled to healing period benefits after her termination.

In sum, claimant is entitled to healing period benefits from March 31, 2017 through April 8, 2017, and again from April 14, 2017 through July 12, 2017.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from March 31, 2017 through April 8, 2017, and from April 14, 2017 through July 12, 2017.

Defendants shall pay claimant three hundred fifty (350) weeks of permanent partial disability benefits commencing on July 13, 2017.

All weekly benefits shall be paid at the stipulated rate of two hundred thirty-two and 36/100 dollars ($232.36).

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).

The employer and insurance carrier shall be entitled to a credit for all weekly benefits paid to date.

Per defendants' counsel's statement on the record at hearing, defendants shall reimburse claimant plus interest for any underpayment in temporary benefits paid prior to the arbitration hearing.

Per defendants' counsel's statement on the record at hearing, defendants will reimburse claimant for Dr. Bansal's IME expenses.

Per defendants' counsel's statement on the record at hearing, defendants will reimburse claimant for asserted costs.

The employer and insurance carrier shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 18th day of July, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SJC/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.