

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BONNETTA SMITH,

Claimant,

vs.

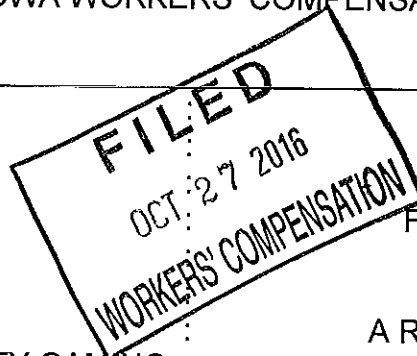
LAKESIDE CASINO AFFINITY GAMING,

Employer,

and

ZURICH AMERICAN INSURANCE,

Insurance Carrier,  
Defendants.



File No. 5049705

ARBITRATION

DECISION

Head Note No. 1803

STATEMENT OF THE CASE

Bonnetta Smith filed a petition for arbitration seeking workers' compensation benefits from Lakeside Casino Affinity Gaming (hereafter, Lakeside) and Zurich American Insurance.

The matter came on for hearing on December 10, 2015, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Cedar Rapids, Iowa. The record in the case consists of claimant's Exhibits 1 through 15; defense Exhibits A through L; as well the sworn testimony of claimant, Bonnetta Smith and the employer's representative, Sondra Romeo. Janice Doud was appointed the official reporter for this hearing. The parties briefed this case and the matter was fully submitted on January 8, 2016.

ISSUES AND STIPULATIONS

The only issue in this case is the nature and extent of the claimant's disability. Claimant also seeks an IME expense and costs.

The remainder of issues are undisputed and stipulated. The parties have stipulated the claimant suffered an injury which arose out of and in the course of employment on February 9, 2014, and said injury is a cause of both temporary and permanent partial disability. Prior to hearing, defendants paid 15 weeks (3 percent) for permanent partial disability. The parties agree that her disability is industrial and the

commencement date for any benefits is May 14, 2015. The elements comprising the weekly rate of compensation are stipulated and the parties contend the appropriate rate is \$259.74. Affirmative defenses have been waived and medical expenses are not in dispute. These stipulations are accepted and are binding upon the parties.

### FINDINGS OF FACT

Bonnetta Smith is a 52-year-old woman who worked as a valet driver for Lakeside Casino. She has a GED. She began her employment with Lakeside in March 2013. She was a full-time parking valet. She earned \$8.14 per hour. Her prior work history includes employment as a supervisor at Wal-Mart and Dollar General and as a bookkeeper for an automotive shop. These previous positions paid in the \$11.00 per hour range. (Claimant's Exhibit 10, pages 95-96) As a valet for Lakeside, customer service was a significant part of her job. Ms. Smith has excellent customer service skills, as demonstrated by the "excellent service pins" she received from Lakeside. Overall, claimant has attractive employment skills in the competitive job market.

The parties have stipulated on February 9, 2014, Ms. Smith suffered an injury which arose out of and in the course of her employment. On that date, she attempted to get in a tall pickup truck. She slipped backward. "I grabbed the steering wheel with my right hand, brought my left leg up; and the next thing I know, I'm flat on my back." (Transcript, page 17) She fell hard, hitting her head and her back. She testified that the fall knocked her "silly" and she may have lost consciousness. (Tr., pp. 17-18) The incident itself is undisputed and it is well-documented. (Cl. Ex. 1)

Ms. Smith saw Daniel Miller, D.O., at Occupational Medicine on February 24, 2014. (Def. Ex. D, pp. 1-2) At that visit, she reported severe headaches, neck stiffness and mild neck pain which began shortly after her fall. Dr. Miller ordered CT scans of her neck and back and prescribed Tylenol. (Def. Ex. D, pp. 2 and 4) She was referred to Steven Adelman, D.O., a neurologist, for her head trauma. Dr. Adelman documented that Ms. Smith "has been experiencing intractable headaches and dizziness, along with neck stiffness. I suspect she suffered a cerebral concussion with post traumatic headaches, cervical strain and dizziness." (Cl. Ex. 8, p. 74)

Ms. Smith continued to treat with Dr. Miller through 2014. (Def. Ex. D, pp. 5-52) The working diagnosis for this period of time was cervicgia and headaches. She underwent fairly extensive physical therapy and used medications to control her pain. Her primary symptoms were headaches, neck stiffness and pain. Medications included Ibuprofen, Methocarbamol, Ultram, Tylenol and Prednisone. (Def. Ex. D, pp. 6, 11, 19) Dr. Miller attempted injections on a couple of occasions. In September, she was referred to Kurt Smith, D.O., at Iowa Orthopaedic Center.

Dr. Smith diagnosed cervical and lumbar strains and suggested she aggravated her cervical facet arthropathy. (Def. Ex. C, p. 4) He ordered a lumbar MRI and prescribed some new medications. In October, he ordered a cervical epidural steroid injection (ESI). This was performed by James Sykes, D.O. She had a lumbar injection

in November 2014. She had another cervical ESI in January 2015. (Cl. Ex. 5) The injections provided temporary relief, however, overall her symptoms continued.

On November 19, 2014, Dr. Smith placed Ms. Smith on light-duty for the first time. He recommended sedentary work inside. (Def. Ex. C, p. 22) The restrictions lasted for a short period and she was back to full-duty before the end of the year. (Def. Ex. C, p. 26)

On January 26, 2015, Charles Mooney, M.D., performed an independent medical examination. Dr. Mooney opined that her neck symptoms were related to the work injury, but the low back issues were not. (Def. Ex. B, p. 10) He opined she was not at maximum medical improvement at that time. Approximately one week later, Dr. Miller opined that Ms. Smith plateaued in her condition on February 2, 2015. (Def. Ex. C, p. 32) She was released without any permanent restrictions, although he specifically stated she would "continue to require medication for symptom management." (Def. Ex. C, p. 32)

Ms. Smith returned to Dr. Miller in March 2015. She was still complaining of headaches, neck pain and low back pain. She had a recent flare-up which had landed her in the emergency room. Dr. Miller prescribed Butrans Transdermal patches and a TENS unit. (Def. Ex. D, p. 53) Ms. Smith testified she has used the patch consistently from March 2015, through the date of hearing. The patch had some side effects. It made her lightheaded and dizzy at times. She testified she was somewhat concerned about driving while using it. She took the Butrans medication guide to the H.R. Director, Sondra Romeo. (Cl. Ex. 15) Ms. Smith testified that the employer's insurance carrier would not accept her because the patch was a narcotic. (Tr., pp. 38-39) Ms. Smith was taken off work from March 19, 2015, through May 13, 2015. Dr. Miller attempted to reduce the dosage to 5 mg, however, Ms. Smith suffered withdrawal symptoms including shakiness and passing out. (Tr., p. 37) The lower dosage did not deliver pain relief.

In April 2015, Dr. Miller provided an expert opinion that claimant suffered from a 3 percent whole body impairment resulting from her February 2014, work injury. (Def. Ex. D, p. 56) He opined that she could return to work as a valet driver.

In June, Ms. Smith underwent a driving evaluation at Younker Rehabilitation Center to determine whether she was safe to drive. Based upon her performance it was determined she could. (Def. Ex. F) Following this, she returned to work and resumed her position as a valet driver.

Ms. Smith testified she requested Saturdays and Sundays off to acclimate to fresh patches (when the highest amounts of medication were being delivered). Her personal physician had written a note for her to this effect. (Cl. Ex. 6, p. 51) The employer refused and began assessing her unexcused absences for calling in at such times. (Tr., p. 40; see also Def. Ex. I, p. 20) Lakeside's H.R. manager testified that, due to the demands of the employer, Ms. Smith was needed on Saturdays and

Sundays. (Tr., pp. 113-114) The employer sought clarification from Ms. Smith's personal physician. Dr. Miller authored a report suggesting claimant could change the days that she changed her patch. (Def. Ex. D, p. 62)

On July 30, 2015, Ms. Smith was terminated for excessive absenteeism for missing work, the final instances being July 25 and 26. She applied for and received unemployment insurance benefits. She continues to look for work as of the date of hearing.

On October 26, 2015, Ms. Smith was evaluated by Todd Harbach, M.D., who opined that she was not a surgical candidate. (Def. Ex. C, p. 34)

Ms. Smith continues to see Dr. Miller up to the time of hearing and had follow ups scheduled. She testified that she still has significant symptoms in her low back and neck and head, including headaches.

Sunil Bansal, M.D., performed an independent medical evaluation for the claimant and a report was issued on November 4, 2015. After reviewing all of the pertinent records, taking a history and performing a thorough examination, Dr. Bansal diagnosed post-concussive syndrome, traumatic brain injury, aggravation of cervical spondylosis and facet arthropathy, C5-C6 disc bulge, and various bulges and tears in the lower back discs. (Cl. Ex. 8, p. 83) He related all of these conditions to the work injury and provided a 5 percent whole body rating for the head injury, a 5 percent whole body rating for the neck and 5 percent whole person for the lower back. (Cl. Ex. 8, pp. 83-87) He recommended permanent restrictions.

### CONCLUSIONS OF LAW

The primary question is the extent of claimant's industrial disability.

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.

The claimant has sustained permanent impairment to her head, neck and low back as a result of her February 9, 2014, work injury. Her disability is industrial and is therefore assessed by determining her loss of earning capacity resulting from a condition caused by the work injury.

Having considered all of the evidence in the record, and utilizing all of the factors set forth above, I find that the claimant has sustained a 25 percent loss of earning capacity. This entitles her to 125 weeks of compensation at the stipulated rate.

The claimant was 52 years old at the time of hearing. She is a bright person with numerous employment skills in both management and customer service. At the time of hearing, she was not employed but was seeking suitable employment. She has impairments which cause chronic pain in her neck and lower back. The pain can be quite disabling and interferes with her activities of daily living. Managing her medications caused her significant difficulty in maintaining her employment as a valet driver. While she was safe to perform that job, it was probably not the best-suited job for her with the condition and her use of opioid medications. Having stated this, the employer likely could have communicated better with the claimant and taken further steps to engage in an interactive process to determine whether accommodations could be made to keep her employed.

Industrial disability, however, is evaluated without respect to accommodations which are (or are not) made by an employer. The Iowa Supreme Court views "loss of earning capacity in terms of the injured worker's present ability to earn in the competitive job market **without regard to the accommodation** furnished by one's present employer." Thilges v. Snap-On Tools, 528 N.W.2d 614, 617 (Iowa 1995).

Ms. Smith has undoubtedly suffered a fairly significant loss of earning capacity in terms of her present ability to earn wages in the competitive job market. Having considered all of the relevant factors, I find her loss of earning capacity is 25 percent.

#### ORDER

#### THEREFORE IT IS ORDERED:

Defendants shall pay the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of two hundred fifty-nine and 74/100 dollars (\$259.74) per week from May 15, 2015.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.


Defendants shall be given credit for the permanent partial disability previously paid.

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

Defendants shall pay the IME expense of Dr. Bansal as set forth in Claimant's Exhibit 14, including mileage.

Defendants shall pay reasonable costs of this action.

Signed and filed this 27<sup>th</sup> day of October, 2016.

  
JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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JLW/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.