BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAQUEL VARGAS, Claimant, vs. HOLIDAY INN EXPRESS a/k/a ORCHESTRATE MANAGEMENT ASSOCIATION II & III, Employer, and SFM MUTUAL INSURANCE, Insurance Carrier, Defendants.	FILED APR 30 2018 WORKERS COMPENSATION	File No. 5058414 ARBITRATION DECISION Head Note No.: 1803

Claimant Raquel Vargas filed a petition in arbitration on March 1, 2017, alleging she sustained injuries to her right shoulder, neck, and body as a whole while working for the defendant, Holiday Inn Express, a/k/a Orchestrate Management Association II and III ("Holiday Inn"). Holiday Inn and its insurer, the defendant, SFM Mutual Insurance ("SFM"), filed an answer on March 14, 2017.

An arbitration hearing was held on February 23, 2018, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney James Byrne appeared with his client, Vargas. Attorney Lee Hook represented Holiday Inn and SFM. Nuve Alvarado Pisaro appeared and testified on behalf of Holiday Inn and SFM. Aleimarie Griffieon provided Spanish interpretation services during the hearing. Joint Exhibits ("JE") 1 through 12, Exhibits 1 through 6, excluding 15A, and Exhibits A through E, pages 17 through 26 of Exhibit D, were admitted into the record. The record was held open through March 23, 2018, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Holiday Inn and SFM waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Holiday Inn and Vargas at the time of the alleged injury.

2. Vargas sustained an injury on October 10, 2015, which arose out of and in the course of her employment with Holiday Inn.

3. Temporary benefits are no longer in dispute.

4. The alleged injury is a cause of permanent disability.

5. The disability is an industrial disability.

6. The commencement date for permanent partial disability benefits, if any are awarded, is November 28, 2016.

7. At the time of the alleged injury, Vargas's gross earnings were $354.74 per week, she was married and entitled to three exemptions, and the parties believe the weekly rate to be $255.89.

8. Holiday Inn and SFM agreed to pay the cost of the independent medical examination, if it has not already been paid.

9. Prior to the hearing Vargas was paid fifteen weeks of compensation at the rate of $246.78 per week.

10. Costs have been paid.

ISSUES

1. What is the extent of disability?

2. Should costs be assessed against either party?

FINDINGS OF FACT

Vargas lives in Des Moines with her husband, Juan Espinosa Costas. (Transcript, page 18) Vargas is the mother of five children. (Tr., p. 19) Vargas had one dependent child living at home at the time of her work injury. (Tr., p. 19)

Vargas attended primary school through the sixth grade in Mexico. (Tr., p. 19) Vargas speaks Spanish and she is unable to speak or write in English. (Tr., p. 20) Vargas does not know how to type or how to use a computer. (Tr., p. 20) At the time of the hearing Vargas was fifty-three. (Tr., p. 19)

While living in Mexico Vargas worked for Aramark, cleaning bathrooms, sweeping, and removing trash. (Ex. 2, p. 22; Tr., p. 22) Vargas stopped working in 2002. (Tr., p. 49) Vargas moved to the United States in 2006, and resumed employment. (Tr., p. 23; Tr., p. 49) Since she moved to the United States, Vargas has worked as a housekeeper for hotels, and for McDonald's cooking, cleaning, and washing dishes. (Ex. 2, pp. 22-23; Tr., pp. 23-24, 59-63) Vargas reported her prior employment required her to lift up to thirty or fifty pounds. (Tr., pp. 22-28)

In April 2013, Holiday Inn hired Vargas as a housekeeper. (Ex. 2, p. 22; Tr., p. 29) At the time of the hearing Vargas was still working for Holiday Inn. (Tr., p. 29)

Vargas cleans sixteen rooms per day. (Tr., p. 55) Vargas is responsible for vacuuming, cleaning the windows, furniture, mirrors, bathtubs, and toilets, dusting, stocking rooms with amenities, moving furniture, hanging drapes, rolling carpets, polishing floors, washing walls ceiling and woodwork, replacing light bulbs, stripping dirty linen, folding, marking, and carrying linen, making beds, cleaning the public restroom and breakfast area, taking out trash, and picking up cigarette butts. (Ex. 5, pp. 38-40; Tr., p. 30-31, 55-56) Vargas deep cleans one room per week for ninety minutes, with assistance from others. (Tr., p. 56)

Vargas testified on October 10, 2015,

> I started like any other day cleaning the room. I finished in the bathroom. I was cleaning the bathroom. I went to remove the shower curtain.
>
> At that time what I would do is I would put one foot on the edge of the tub and one foot on the toilet. The bathtub was a little wet, so my foot slipped. I fell. With my right arm, I tried to grab onto the soap holder to hold myself. I was unable to stop myself; my weight won. So I fell on the tub, and I hit my right shoulder on the edge of the tub.

(Tr., p. 32) Vargas relayed she felt immediate pain in her right shoulder up to her neck. (Tr., p. 32)

Vargas reported her work injury to Holiday Inn. She received treatment at urgent care, and she was transported to Iowa Lutheran Hospital by ambulance with a right shoulder dislocation. (JE 1, p. 1; Tr., p. 33) At the hospital Vargas reported she stumbled and fell, catching herself with her right arm while cleaning at a hotel, and complaining of immediate shoulder pain. (JE 2, pp. 3, 7) Vargas received x-rays, and the reviewing radiologist listed an impression of a prominent subcoracoid dislocation of the right humeral head and "[p]robable bony Bankart and bony Hills-Sachs fracture deformity" and recommended additional imaging after the dislocation was reduced. (JE 2, pp. 6, 8) The shoulder dislocation was reduced under sedation by John Netten, D.O. (JE 2, p. 5)

On October 12, 2015, Richard Bratkiewicz, M.D., with Methodist Occupational Health and Wellness, examined Vargas. (JE 3, p. 15) Vargas was wearing a shoulder immobilizing brace and her arm was in a sling. (JE 3, p. 15) Dr. Bratkiewicz recommended range of motion exercises, told her to continue taking Norco and Naprosyn, and imposed restrictions of sedentary work only with no use of the right arm. (JE 3, pp. 15, 18)

Vargas attended a follow-up appointment with Dr. Bratkiewicz on October 19, 2015, complaining of pain in her right shoulder. (JE 3, p. 19) Dr. Bratkiewicz removed her immobilizer and examined her, noting "[a]ny movement of the rotator cuff against resistance causes grimacing behavior," imposed restrictions of sedentary work only with the left arm, and recommended she receive magnetic resonance imaging. (JE 3, pp. 19-20)

On October 27, 2015, Vargas returned to Dr. Bratkiewicz complaining of pain and an inability to move her shoulder. (JE 3, p. 21) Dr. Bratkiewicz documented "[s]he grimaces with initiation of all 4 movements of the rotator cuff. Her MRI is discussed. It is consistent with a rotator cuff tear. She has a normal labrum," he continued her restrictions, and he referred Vargas to orthopedics. (JE 3, pp. 21-22)

Vargas attended an appointment with Kyle Galles, M.D., an orthopedic surgeon, on November 5, 2015. (JE 5, p. 24) Dr. Galles examined Vargas, reviewed her imaging, and assessed her with a right shoulder injury most typical of an anterior dislocation of the glenohumeral joint with small evulsion of the greater tuberosity and a full-thickness rotator cuff tear. (JE 5, p. 24) Dr. Galles recommended rotator cuff tear repair surgery, continued her shoulder immobilizer and restriction of no use of the right upper extremity, and recommended gentle pendulum exercises. (JE 5, pp. 25-26)

Dr. Galles performed a right shoulder arthroscopic acromioplasty, limited labral debridement, biceps tenotomy, and moderate-sized rotator cuff repair on November 20, 2015. (JE 5, p. 28; JE 7, pp. 74-78) Following surgery Dr. Galles restricted Vargas from driving and working. (JE 5, p. 27)

On December 3, 2015, Vargas returned to Dr. Galles reporting her pain was much better. (JE 5, p. 28) Dr. Galles recommended pendulum exercises, imposed restrictions of no use of the right upper extremity, and prescribed Ultram. (JE 5, pp. 29-30)

During a follow-up appointment on January 6, 2016, Dr. Galles ordered Vargas to begin outpatient physical therapy, and imposed a work restriction of no use of the right arm. (JE 5, pp. 31-32)

On February 11, 2016, Vargas returned to Dr. Galles. (JE 5, p. 33) Dr. Galles documented Vargas was progressing, recommended additional physical therapy, and imposed a one to two pound lifting restriction with no repetitive pushing, pulling, or work over shoulder height with the right upper extremity. (JE 5, pp. 33, 35)

During an appointment on March 16, 2016, Dr. Galles recommended another month of physical therapy and imposed a three to four pound lifting restriction with no work over shoulder height with the right upper extremity. (JE 5, pp. 36, 38)

On April 21, 2016, Vargas attended a follow-up appointment with Dr. Galles. (JE 5, p. 39) Dr. Galles opined Vargas had reached maximum medical improvement, he recommended Vargas undergo a functional capacity evaluation, and he recommended a five to ten pound lifting restriction and no work over shoulder height with the right upper extremity until the functional capacity evaluation could be completed. (JE 5, pp. 39, 41)

Vargas attended a follow-up appointment with Dr. Galles on June 2, 2016. (JE 5, p. 42) Dr. Galles noted the functional capacity evaluation was invalid. (JE 5, p. 42) Vargas continued to complain of moderate shoulder pain while performing light duty

work. (JE 5, p. 42) Dr. Galles recommended a magnetic resonance imaging arthrogram to determine if the rotator cuff repair had healed, noting "[t]here certainly is a large area of calcific tendinitis that is new since surgery and that may need to be addressed in the future as well pending" the imaging results. (JE 5, p. 42) Dr. Galles continued Vargas's restrictions and prescribed tramadol. (JE 5, pp. 42, 44)

On August 2, 2016, Vargas underwent a right shoulder magnetic resonance imaging arthrogram. (JE 5, p. 46) During an appointment on August 8, 2016, Dr. Galles documented the imaging demonstrated "an area of heterotopic ossification and also what appears to be [a] re-tear of [the] supraspinatus" and recommended "a RIGHT shoulder scope, debridement of the heterotopic ossification, and attempted rotator cuff re-repair," and he continued her restrictions. (JE 5, pp. 48, 52)

Dr. Galles performed a right shoulder arthroscopic extensive debridement of calcification on August 30, 2016. (JE 5, p. 55; JE 7, pp. 79-83) Following surgery Dr. Galles imposed a restriction of no use of the right arm. (JE 5, p. 54)

On September 14, 2016, Vargas attended a follow-up appointment with Dr. Galles. (JE 5, p. 55) Dr. Galles ordered physical therapy, prescribed oxycodone, and imposed a one pound lifting restriction with no pushing, pulling, or work over shoulder height with the right upper extremity. (JE 5, pp. 55, 57)

Vargas attended an appointment with Dr. Galles on October 19, 2016. (JE 5, p. 59) Dr. Galles noted Vargas's range of motion had improved and she was doing much better. (JE 5, p. 59) Dr. Galles ordered additional therapy, prescribed tramadol, and imposed a five pound lifting restriction with no work over shoulder height with the right upper extremity. (JE 5, pp. 59, 61)

Vargas returned to the emergency room on November 5, 2016, reporting after receiving physical therapy for her right shoulder, she began having right thoracic back pain acutely three days ago, and reporting the pain was worse when leaning forward. (JE 2, pp. 10-11) Vargas relayed she had experienced intermittent back pain for the last several months, but it became acutely worse after physical therapy, and that she had difficult performing her job duties at work. (JE 2, p. 11) Vargas received x-rays, and the reviewing radiologist listed an impression of an intact thoracic spine, multilevel mild endplate primary osteoarthritic degenerative changes of the thoracic spine, and mild apex rightward spinal curvature perhaps due to positioning, scoliosis or muscle spasm. (JE 2, p. 14)

During a follow-up appointment on November 28, 2016, Dr. Galles found Vargas was at maximum medical improvement, and he encouraged her to perform exercises on her own. (JE 5, p. 62) Dr. Galles recommended Vargas "try to minimize repetitive work over shoulder height with her RIGHT upper extremity because of her history of previous moderate rotator cuff tear." (JE 5, pp. 62, 64)

On December 12, 2016, Dr. Galles sent a letter to SFM, reporting on November 28, 2016, he found Vargas was at maximum medical improvement and he "released her

to essentially full activities" with a "suggestion" to try to minimize repetitive work over shoulder height to minimize stress on her previous rotator cuff injury. (JE 5, p. 64A) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Galles opined:

> [P]age 476, Figure 16-40, she would have a 1% upper extremity impairment for flexion to 160 degrees. Page 477, Figure 16-43, 1% upper extremity impairment for abduction 150 degrees. Page 479, Figure 16-46, 0% upper extremity impairment for 70 degrees for external rotation and 1% upper extremity impairment for internal rotation of 70 degrees. Total upper extremity impairment, therefore, would equate to 3%.

(JE 5, p. 64A)

Sunil Bansal, M.D., an occupational medicine physician, performed an independent medical examination for Vargas on January 20, 2017. (Ex. 1) Dr. Bansal reviewed Vargas's medical records and examined her. (Ex. 1) Dr. Bansal agreed with Dr. Galles that Vargas reached maximum medical improvement on November 28, 2016. (Ex. 1, p. 10) Dr. Bansal opined the mechanism of falling and impacting the axilla is consistent with an acute right rotator cuff tear and humerus fracture. (Ex. 1, p. 11) Using Figures 16-40 through 16-46 of the AMA Guides, Dr. Bansal assigned Vargas the following impairments:

	Range of Motion	% UE Impairment
Flexion:	162, 160, and 161 degrees	1
Abduction:	155, 155, and 156 degrees	1
Adduction:	31, 34, and 33 degrees	1
External Rotation:	78, 81 and 77 degrees	0
Extension:	38, 40, and 36 degrees	1
Internal Rotation:	62, 63, and 63 degrees	2

> This equals a 6% upper extremity impairment, which is equal to a 4% impairment of the body as a whole.

(Ex. 1, p. 11) Dr. Bansal recommended permanent restrictions of no lifting greater than ten pounds or lifting above shoulder level or frequent reaching with the right arm. (Ex. 1, p. 12)

In March 2017, Vargas received a raise of $.32 per hour. (Ex. B, p. 1)

Holiday Inn and SFM sent a letter to Dr. Galles, enclosing Dr. Bansal's report, and requesting his opinions. (JE 5, pp. 64C-64D) Dr. Galles responded on November 16, 2017, as follows:

> With regard to Raquel Vargas and your letter dated November 13, 2017, as you are well aware I last saw Ms. Vargas for followup of her right shoulder problems on November 28, 2016. On that date, it appeared as though she was much improved from her 2 previous surgeries; one being a rotator cuff repair and the other being resection of an area of calcification. She demonstrated very good shoulder mobility and excellent strength. It was my opinion on that date which again was November 28, 2016, she was at maximum medical improvement. The only restriction suggesting that she avoid repetitive lifting overhead so as to minimize [the] risk of reinjury to her rotator cuff tear repair. I have not seen her in followup since then. In reviewing your information, specifically regarding Dr. Bansal's report, her range of motion of her right shoulder is similar to the range of motion that I had documented at our last visit. There was, however, a new finding of diminished sensation over her right thumb. Comments made that she was only able to raise her arm to shoulder level were not consistent with my last examination. The comment that she fears another dislocation was also not consistent with my last examination nor was it consistent with her examination done under anesthesia at our last surgery where her shoulder was quite stable. My only explanation as to her having an unstable shoulder at this point in time would have to be explained by another injury. Again, as documented in my last examination, she had good shoulder mobility, good strength, there was no sense of instability, and to my opinion most definitively at the time of her 2nd surgery there was no evidence of shoulder instability. Finally the only explanation I would have to this significant change in physical examination would be the occurrence of a new injury since I last evaluated her.

(JE 5, p. 65)

After Dr. Galles released her from care, Vargas returned to her normal job duties without assistance, with the exception of moving furniture or beds. (Tr., pp. 46-47, 59-60) Vargas continues to change shower curtains, but she now has a step stool to stand on. (Tr., p. 68) Vargas testified she believes she can continue to perform her job duties with the assistance she receives moving furniture. (Tr., pp. 49, 58-59) Vargas also assists her coworkers with cleaning, but does not assist with moving furniture. (Tr., pp. 59-60)

Alvarado Pisaro is Vargas's supervisor. Alvarado Pisaro testified Vargas's other coworkers also receive assistance with moving furniture from coworkers. (Tr., p. 76) Vargas testified that before her work injury she did not receive assistance moving furniture and beds, but she now receives assistance. (Tr., pp. 85-86)

Vargas relayed that she continues to have pain in her shoulder up through her neck, especially when changing window curtains in rooms. (Tr., p. 48) Vargas reported she takes Tylenol for the pain twice per day. (Tr., pp. 48-49)

CONCLUSIONS OF LAW

I. Extent of Disability

The parties have stipulated Vargas sustained an injury arising out of the course of her employment on October 10, 2015, the alleged injury is a cause of permanent disability, and any disability she has sustained is an industrial disability. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

Dr. Galles, a treating orthopedic surgeon, and Dr. Bansal, an occupational medicine physician retained by Vargas to conduct an independent medical examination, have provided impairment ratings in this case. Dr. Galles opined Vargas has sustained a three percent upper extremity impairment, which equals a two percent whole person impairment under Table 16-3 of the AMA Guides at page 439. Dr. Galles recommended Vargas minimize repetitive work over shoulder height to minimize stress on her previous rotator cuff injury. (JE 5, p. 64A) Dr. Bansal assigned a six percent upper extremity impairment, which equals a four percent impairment to the body as a whole under the AMA Guides. (Ex. 1, p. 11) Dr. Bansal recommended permanent restrictions of no lifting greater than ten pounds or lifting above shoulder level or frequent reaching with the right arm. (Ex. 1, p. 12)

Dr. Galles examined Vargas on November 28, 2016, and issued his impairment rating on December 12, 2016. (JE 5, pp. 62, 64, 64A) Dr. Bansal examined Vargas on January 20, 2017, and issued his impairment rating on February 23, 2017. (Ex. 1) I find the opinion of Dr. Galles more persuasive than the opinion of Dr. Bansal.

Dr. Galles possesses superior training to Dr. Bansal. He treated Vargas over the course of many months, and he performed two surgeries on her right shoulder. Dr. Bansal examined Vargas on one occasion, for purposes of providing an independent medical examination.

Dr. Bansal documented he observed Vargas could not raise her right arm above shoulder level, due to pain, and he also noted she had occasional numbness and tingling in her right upper extremity into her hand and fingers. (Ex. 1, pp. 7-8) These findings are inconsistent with the findings of Dr. Galles two months before. (JE 5, p. 64A) Vargas has not sought treatment with Dr. Galles or any other medical provider for right shoulder complaints since November 2016. This is not the first time I have questioned Dr. Bansal's findings. See Perez-Avina v. Brenneman Pork, Inc., File Nos. 5050212, 5050213 (Apr. 10, 2018) (concluding Dr. Bansal's "objective findings" were inconsistent with the findings of multiple treating providers and determining his opinion was not credible in decision awarding permanent total disability benefits).

At the time of hearing Vargas was fifty-three. (Tr., p. 19) Vargas attended school in Mexico through the sixth grade. (Tr., p. 19) She has a limited work history of working in housekeeping, and in fast food cooking, cleaning, and washing dishes. (Ex. 2, pp. 22-23; Tr., pp. 22-24, 49, 59-63) Vargas sustained a moderate injury to her right shoulder, requiring two surgeries, and an extended period of rehabilitation. Vargas has continued to work for Holiday Inn and she has received a wage increase since Dr. Galles released her from care. She continues to perform her normal job and she receives assistance with lifting or moving furniture and beds. Considering all of the factors of industrial disability, I conclude Vargas has sustained a fifteen percent industrial disability.

II. Costs

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides,

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

At hearing Holiday Inn and SFM agreed to pay the cost of the independent medical examination, if had not already been paid. Vargas seeks to recover the $100.00 filing fee, and service fees totaling $13.42. (Ex. 6) Rule 876 IAC 4.33 expressly allows for the recovery of the filing fee and service cost.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant seventy-five (75) weeks of permanent partial disability benefits, at the rate of two hundred fifty-five and 89/100 dollars ($255.89) per week, commencing on November 28, 2016.

Defendants shall receive a credit for all weekly benefits paid to date.

Defendants shall pay accrued benefits in a lump sum with interest on all weekly benefits provided by law.

Defendants are assessed one hundred and 00/100 dollars ($100.00) for the filing fee, and thirteen and 42/100 dollars ($13.42) for service costs.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 30th day of April, 2018.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.