BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JULIA COLBY, Claimant, vs. BROTHERS OF THE CHRISTIAN SCHOOLS, Employer, and ATLANTIC MUTUAL COMPANIES, Insurance Carrier, Defendants.	:	File No. 5015874 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803

STATEMENT OF THE CASE

Julia Colby filed a petition in arbitration seeking workers' compensation benefits from Brothers of the Christian Schools, defendant employer, and Atlantic Mutual Companies, defendant insurance carrier, on account of an injury which arose out of and in the course of the claimant's employment on September 16, 2003. This matter was heard by deputy workers' compensation commissioner, Vicki L. Seeck, commencing on February 28, 2006, in Dubuque, Iowa. The record was left open in order to permit the parties to further investigate the issue of the claimant's gross earnings. The parties initially wanted to stipulate to the claimant's rate. However, the agency does not permit the parties to simply stipulate to rate, but rather requires the parties to submit information on the claimant's gross earnings; marital status; and number of exemptions. Based on this information, the agency then determines the correct rate of compensation. On March 8, 2006, the parties filed a stipulation that the claimant's gross weekly wage was $489.00 per week and that the claimant was married with two exemptions.

The record, therefore, consists of Claimant's Exhibits 1-8; Defendants' Exhibits A-B; the stipulation concerning rate filed on March 8, 2006; and the testimony of Julia Colby. The claimant also requested that judicial notice be taken of certain portions of the American Medical Association Guides to the Evaluation of Permanent Impairment,

Fifth Edition. As this is an administrative proceeding, not a judicial proceeding, administrative notice will be taken.

ISSUE

The sole issue for determination in this case is the extent of the claimant's permanent partial disability as a result of her injury on September 16, 2003.

The parties stipulated that the commencement date for the payment of permanent partial disability benefits is January 3, 2004. At the time of the hearing, the defendants had paid the claimant 80 weeks of permanent partial disability benefits at a rate of $328.60 per week. The claimant's gross weekly wage is $489.00 per week and claimant is married with 2 exemptions. The claimant's rate is $328.87.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony of the witness, and having read all the evidence in the record, makes the following findings of fact:

The claimant, Julia Colby, was 60 years old at the time of the hearing and was born on March 24, 1945. She presently resides in Hazel Green, Wisconsin. She graduated from high school in Oregon, Wisconsin, and received her registered nurse degree in 1966 from Mercy Hospital in Dubuque, Iowa.

After graduating from nurse's training, she worked at hospitals in both Wisconsin and Dubuque. In 1997, she went to work for the Mount Loretto Sisters of Presentation in Dubuque. In 2000, she was hired by the Mount Carmel Sisters of Charity of the Blessed Virgin Mary, which is where she is currently employed. These sisters are affectionately known as BVMs. She presently cares for nuns who are residents of a retirement home maintained by the BVMs. The name of the retirement home is the Mount Carmel Continuing Care Retirement Community. Her job title is RN Supervisor. The claimant is in charge of either one or two floors of the four-floor residence. She usually works with three nurse's aides. The claimant passes out medication and does treatments as ordered by the physicians. She routinely checks patients who are diabetics and gives them insulin shots and performs tests to determine blood sugar. Before her injury, which will be discussed in detail later, she would often help lift sisters who might have fallen or who needed assistance to use a bathroom. She no longer does any lifting of patients.

The claimant's injury occurred on September 16, 2003. At that time, there was extensive renovation work being done on the facility and at night, all lights would be shut off except at the nurses' station. There were also some night lights, but these lights did not effectively light the hallways in the facility. There were also bats present. On September 16, 2003, a nurse's aide came screaming and yelling down a hall, saying she was being chased by a bat. The aide collided with the claimant, who in turn fell into

a steel door frame. The aide kept running. The claimant said that the collision was very painful and it left her with tears in her eyes. She stayed the rest of the night in the med room.

The claimant had the next two days off and she stayed in bed. She worked on Friday and while she was still hurting, she did not think her pain was quite as bad as it had been. The claimant told her supervisor about the accident and filled out an incident report. She then had several more days off. She returned to work on the following Wednesday and was able to complete her shift. On Thursday, however, she started to fall down and could not even walk. She had pain in her low back that she described as "electrifying." She would try to take a step and it would feel like she was being hit with a cattle prod.

The claimant was referred to Mike Steinberg, M.D., for evaluation. According to the claimant, she was given a lot of pills and told to rest and keep her leg up. After approximately two weeks, an MRI was ordered and the claimant was told that she had a ruptured disc. Shortly thereafter the claimant lost control of her bowels and her bladder and she then called Dr. Steinberg's office and reported her symptoms to a nurse. She was told to take an ambulance to Mercy Hospital, but her husband drove her there because it would be faster. David Field, M.D., was on call and he did immediate surgery on her back. The surgery occurred on Friday afternoon, October 10, 2003. The claimant said she was put in a wheel chair and shoved out of the door on the following Sunday morning.

For the next month, the claimant was on bed rest. She was still having bowel and bladder problems, however. In November 2003, she started physical therapy at Dr. Fields' clinic. Her employer then informed her that she had to return to work before Christmas as she could not be off any longer and still keep her job. She did return to work half days and then on January 3, 2004, she returned to full-time work. She continued on prescription medication. She also had physical therapy for a period of time in early 2004, although she cannot recall exactly how long that therapy lasted.

The claimant continues to have problems with her back, bowel and bladder. Her legs seem to go numb after a hard day of work. She says that there is no pattern to her bowel and bladder problems and that she is fortunate to have a lot of bathrooms in the facility where she works. She had problems with lifting any weight and testified that even handling a gallon of milk is a strain for her. She has difficulty sitting at a desk. She no longer lifts patients. She plans on working as long as she is able, as she enjoys her job.

Scott Cairns, who performed an independent medical examination on behalf of the claimant, advised her to seek out a urologist for her continuing bladder problems. She has no present plans to do so. She knows that the surgery for this problem can often create worse problems and she is able to deal with her situation as it is. She is afraid that if she has surgery, she will lose what function she presently has.

On cross-examination, the claimant reiterated that she loved her job and that she especially enjoyed working with the sisters. She said that the sisters are very intelligent and that they are always grateful for the services provided to them. The claimant admitted that she has assistance of co-workers, such as nurse's aides, to do the lifting that may be required. She said that she can push the cart that contains the various medications taken by the sisters. She keeps the bookwork up to date and orders supplies, such as eye drops, when needed. She is able to handle the medications and treatments and will sometimes be in charge of two floors. She has an elevator for her use and is able to sit for about 20 to 30 minutes.

The claimant is presently earning an hourly wage of $19.87 per hour.

The record contains few medical records, particularly medical records that document the claimant's original symptoms and treatment. The claimant's treating surgeon was David S. Field, M.D., a board certified orthopaedic surgeon. (Claimant's Exhibit 2, page 1) In a report dated July 28, 2004, he stated that the claimant had lumbar disk syndrome at L5-S1 on the left side, with associated cauda equina syndrome. (Cl. Ex. 2, p. 1) He deemed her postoperative course as satisfactory. (Cl. Ex. 2, p. 1) He indicated that she was using Darvocet for pain in the daytime; Lortab at night and Vioxx daily. (Cl. Ex. 2, p. 1) He then added that "[m]odification of her job has allowed her to return to work." (Cl. Ex. 2, p. 1)

Dr. Field opined that the claimant had reached maximum medical improvement and her lifting was restricted to no greater than 40 pounds. (Cl. Ex. 2, p. 1) He was also of the opinion that this weight lifting limit was not an issue in her current job. (Cl. Ex. 2, p. 1) Finally he indicated that while the claimant had had previous surgery at L4-L5, the new disk problem at L5-S1 "would be a separate rating" and that her impairment rating was 12 percent of the body based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. Ex. 2, p. 1) In a follow-up letter dated November 9, 2004, Dr. Field declined to change his impairment rating and indicated that the 12 percent impairment included "her bowel and bladder issues." (Cl. Ex. 1, p. 1)

The claimant had an independent medical evaluation with Scott Cairns, whose specialty is not identified on his report dated February 17, 2005. In her testimony, the claimant referred to him as Scott Cairns and he calls himself Dr. Cairns on his report. The report is not signed. He recounts the claimant's medical history briefly and as there are no corroborating records, it cannot be determined if Dr. Cairns has accurately summarized the medical records or indeed if he even looked at them. His history is, however, generally in keeping with the claimant's testimony. In particular, Dr. Cairns noted that the claimant has continuing bowel and bladder incontinence. (Cl. Ex. 3, p. 1) He also finds loss of range of motion in the claimant's back and positive straight leg raising. (Cl. Ex. 3, p. 1)

He determined that the claimant's total impairment was 34 percent of the whole person. He explained his reasoning as follows:

> A surgically treated disk lesion with residual is rated at 10º [sic] of the whole man. Utilizing table 1319, a patient who has limited urinary capacity, but intermittent emptying without voluntary control is rated at between 10-24%. So, I would arbitrarily rate that as 15% of whole man. Table 1307 with anorectal neurological impairments where the patient has individual reflex regulation, but only limited voluntary control would again be rated between 1-19% of the whole man, and again, I would arbitrarily rate that as 10%. Utilizing the combined values chart, I would rate her permanent impairment for consequence of her bowel and bladder paralysis as 24% of the whole man. I would thus rate her permanent physical impairment as a consequence of her work related accident at 34% of the whole man, assuming that the table 1507 with a surgically treated disk lesion with residual is 10% of the whole man.

(Cl. Ex. 3, pp. 1-2)

Susan K. McBroom, M.S., L.M.H.C., who identifies herself as a vocational rehabilitation consultant, authored a report dated November 14, 2005, concerning what McBroom called "vocational opinions." (Cl. Ex. 4, p. 1) According to her curriculum vitae, McBroom has had over 20 years of experience as a rehabilitation counselor, vocational expert and case manager. (Cl. Ex. 4, p. 12) From 1993 to 1998, she was a vocational expert for the Social Security Administration and 1993, she started her own business. (Cl. Ex. 4, p. 12)

McBroom summarized the claimant's medical treatment, largely consisting of the same reports that are in the record in this case. She also listed the claimant's subjective complaints and in particular, noted that the claimant has constant numbness and pain in her legs and continual bowel and bladder problems. (Cl. Ex. 4, p. 3) She also has constant lower back pain radiating into the left buttocks and intermittent sharp pain into the left foot. (Cl. Ex. 4, p. 3) Subjectively, the claimant reported that she can only lift eight to ten pounds. (Cl. Ex. 4, p. 3)

The claimant has worked as an RN and RN supervisor since 1966 and while the job of registered nurse requires many skills and abilities, McBroom concluded that since she is 61 years old her skills would not transfer into any other occupation at this time. (Cl. Ex. 4, p. 7) McBroom reviewed the job descriptions from other hospitals and found that the claimant would be required to use stairs, transfer patients, push wheel chairs, and monitor other floors. (Cl. Ex. 4, p. 7) She also found out that an RN Supervisor needs to perform a full range of RN duties and must be able to float to other units and perform hands-on work with patients. (Cl. Ex. 4, p. 7)

McBroom concluded that if the claimant were to seek positions at other hospitals within her current restrictions, she would have approximately 50 percent loss of access to the labor market due to her current inability to perform her job as it is described in the national economy. (Cl. Ex. 4, p. 7) She indicated that the major vocational barrier for the claimant, were she to consider employment in the future, would be her inability to

perform her job to full capacity. (Cl. Ex. 4, p. 8) McBroom actually contacted several hospitals in the area and found that nurses must be able to lift 50 pounds on an occasional to frequent basis and frequently walk and go up and down stairs. (Cl. Ex. 4, p. 8) Her conclusion was that while the claimant has not had a wage decrease at her current job, she would be unable to perform her job as it is typically performed in Iowa and on a national basis. (Cl. Ex. 4, p. 9)

The record includes a job description for a registered nurse at the Mount Carmel Continuing Care Retirement Community. (Cl. Ex. 5) According to the job description, a registered nurse must be able to sit, stand and walk for extended periods of time and must be able to lift and carry up to 50 pounds with assistance. (Cl. Ex. 5, p. 2)

The claimant had an MRI done on February 15, 2006. (Cl. Ex. 6) There was no testimony concerning this MRI and no clinical notes that indicate why the MRI was done. Page 2 of the MRI report indicates in small handwriting the following: “let know: prev. operation changes. arthritic changes.” (Cl. Ex. 6, p. 2) The typed portion of the report entitled “Impression” would indicate that the MRI did indeed show “degenerative and post operative changes.” (Cl. Ex. 6, p. 2)

The claimant’s deposition, which is part of the record as Defendants’ Exhibit B, was taken on August 18, 2005. In that deposition, the claimant indicated that she is no longer able to work extra days as she was able to do before her injury. (Defendants’ Ex. B, p. 6) She also testified that she must take three muscle relaxers and four pain pills in order to get any sleep at all at night. (Def. Ex. B, p. 10)

The claimant also asked that judicial notice be taken of a portion of the American Medical Association Guides to the Evaluation of Permanent Impairment , Fifth Edition. This request to take judicial notice will be taken as a request to take administrative notice since this is an administrative and not a judicial hearing.

CONCLUSIONS OF LAW

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.2d 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 issue for determination in this case is the extent of the claimant's industrial disability. Industrial disability is impairment of earning capacity. In order to properly evaluate the claimant's impairment of earning capacity, a number of factors must be considered and weighed. Industrial disability is not conclusively established by a percentage of permanent impairment or a vocational expert's conclusion on a claimant's loss of access to the competitive labor market or any other single factor.

In this case, the claimant was 60 years old at the time of the hearing and has spent her entire working life as a registered nurse or registered nurse supervisor. Nursing is an occupation that requires many skills and through the course of her working life, the claimant has undoubtedly acquired many skills that potentially transfer to other jobs such ordering supplies, supervision of personnel, interaction with the public, and computer skills. However, these skills were acquired in the nursing field and at age 60, the claimant would be at a disadvantage in trying to find a job outside the nursing field without some retraining or reeducation. The claimant is an intelligent, well-spoken individual and while she might be able to secure employment outside the nursing field, it is highly unlikely that employment would pay anything comparable to what she is able to earn as a registered nurse.

The claimant credibly testified that she has chronic ongoing pain in her back and legs that requires her to use prescription medication on a daily basis in order to remain employed. While her hourly wage has increased, she testified in her deposition that she actually works less hours now than she did before her injury. Her employer has accommodated her restriction of lifting no more than 40 pounds and the claimant credibly testified that she has difficulty lifting anything more than 8 to 10 pounds. The fact that her employer could continue to employ her even with this lifting restriction is evidence that she has retained some earning capacity.

While a 40-pound lifting restriction in and of itself might not seem to be a serious impediment to employment, it is important to remember that the claimant's training, education and experience qualify her to be a registered nurse. A 40-pound lifting restriction for a nurse is a significant restriction given the jobs that nurses are required to perform as caregivers for ill people.

The report of Susan McBroom was very persuasive evidence that were the claimant to look for employment as a registered nurse or registered nurse supervisor, her lifting restriction alone would likely disqualify her from working in a hospital. The claimant's subjective complaints would also likely prevent her from working in a hospital and again, it is reiterated that the claimant was a very credible witness concerning her

subjective limitations. The claimant might be able to find employment in a physician's office where there were lesser demands to lift, walk and climb stairs or perhaps as a clerk in a medical facility. The claimant would not likely earn more wages in these jobs as compared to her present job.

There is an obvious difference of opinion concerning the level of claimant's permanent impairment. Dr. Field opines that the claimant has a 12 percent impairment, which he insists takes into account the claimant's bowel and bladder problems, while Dr. Cairns believe that the claimant has a 34 percent impairment. Again, the medical record is incomplete and it is difficult to know for certain how serious the claimant's problems are with bowel and bladder incontinence. The claimant herself testified that she must frequently use the bathroom and that her problem can arise at unexpected and inopportune times. While Dr. Cairns' rating is by his own words arbitrary, Dr. Field seems to have essentially ignored these problems in his rating despite his statement to the contrary. Given the claimant's pain complaints in her back and legs, and her credible testimony on her bowel and bladder problems, the claimant has significant permanent impairment as a result of her injury of September 16, 2003. The actual percentage of physical impairment is not critical to a determination of industrial disability. What is significant is that the claimant's permanent physical impairment has affected the claimant's earning capacity in this case.

Considering, then, all the factors that make up a determination of industrial disability, it is concluded that the claimant has an industrial disability of 50 percent as a result of her injury of September 16, 2003.

ORDER

IT IS THEREFORE ORDERED:

That defendants, Brothers of the Christian Schools and Atlantic Mutual Companies, pay to the claimant, Julia Colby, two hundred fifty (250) weeks of permanent partial disability benefits at a rate of three hundred twenty-eight and 87/100 dollars ($328.87) per week commencing January 3, 2004;

That defendants shall receive credit for any weekly benefits that have been previously paid to the claimant;

That defendants shall pay interest as provided in Iowa Code section 85.30;

That all accrued benefits, including any amounts to compensate the claimant for the underpayment of weekly benefits, should any there be, shall be paid to the claimant in a lump sum plus interest;

That costs are taxed to the defendants;

That defendants shall file subsequent reports of injury as required by this agency.

Signed and filed this _____31st_____ day of March, 2006.

_____
VICKI L. SEECK
DEPUTY WORKERS'
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