BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LYUDMILA OWENS, Claimant, vs. HORSESHOE CASINO, Employer, and CANON COCHRAN MANAGEMENT SERVICES, INC., Insurance Carrier, Defendants.	File No. 5025201 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

This is a contested case proceeding in arbitration under Iowa Code chapters 85 and 17A. Claimant, Lyudmila Owens, claims to have sustained a work injury through cumulative trauma in the employ of defendant Horseshoe Casino on March 24, 2007, and now seeks benefits under the Iowa Workers' Compensation Act from that employer and its insurance carrier, defendant Canon Cochran Management Services, Inc.

The claim was heard in Council Bluffs, Iowa, on March 18, 2009, and deemed fully submitted on April 8, 2009, following submission of briefs. The record consists of Owens' exhibits 1-17, defendants' exhibits A-L, and the testimony of Owens and Jeffrey Hedges. Many of the exhibits were duplicates submitted by both parties.

On April 14, 2009, defendants filed a motion to amend the hearing report due to a scrivener's error as to the amount of credit under Iowa Code section 85.38(2). The motion is unresisted and hereby sustained.

ISSUES

STIPULATIONS:

1. An employment relationship existed between Owens and Horseshoe Casino on the alleged date of injury.
2. If liability is established, Owens is entitled to temporary disability benefits from June 6 through August 28, 2007 and September 1, 2007 through February 14, 2008.

3. Permanent disability, if any, should be compensated by the industrial method (loss of earning capacity) commencing February 15, 2008.
4. The correct rate of weekly compensation is $473.96.
5. The cost of disputed medical treatment is reasonable and, if called, providers would testify that the treatment was reasonable; defendants offer no contrary proof.
6. Defendants should have credit under Iowa Code section 85.38(2) in the (amended) total of $28,323.12.

ISSUES FOR RESOLUTION:

1. Whether Owens sustained injury arising out of and in the course of employment.
2. Whether the injury caused either temporary or permanent disability.
3. Extent of industrial disability.
4. Entitlement to medical benefits.
5. Whether the claim is barred under Iowa Code section 85.23 for want of timely notice.

FINDINGS OF FACT

Lyudmila Owens, age 49, was born and educated in the Ukraine. She earned a bachelor's degree in physics and thereafter worked as a research physicist until her job evaporated with the dissolution of the former Soviet Union. She subsequently operated her own hair styling salon for approximately five years, followed by a perfume shop. Owens is currently enrolled in a medical coding and billing course, and hopes to find employment in that area.

In its post hearing brief, Horseshoe Casino challenges Owens' credibility. Based on her convincing demeanor at hearing, bolstered by an impressive life history reflecting motivation and pluck in the face of difficult circumstances, Owens was a fully credible witness in her own behalf.

After immigrating to the United States in December 2000, Owens worked in a meat packing plant for a few months before accepting work at Harrah's Casino in 2001, initially as a cashier. At the time of hire, Owens successfully underwent a pre-employment physical and had no neck or right upper extremity problems. In April 2005, Owens became a blackjack dealer on a gambling boat, and was transferred to the Horseshoe Casino in March 2006.

The Horseshoe Casino featured redesigned blackjack tables which required Owens to reach further on each of the hundreds of blackjack hands she dealt each hour, routinely well in excess of the casino's 350-hand performance standard.

Prior to starting work as a blackjack dealer, Owens had no history of right shoulder or neck symptoms. However, she began to develop pain thereafter, and accordingly consulted internal medicine specialist Michael J. Domalakes, M.D., on April 19, 2006. Dr. Domalakes noted this history:

> SUBJECTIVE: This lady is in complaining of some right shoulder and neck pain plus also bilateral hand discomfort and numbness. Typically her hand numbness occurs during sleep. She feels it involves all ten fingers but really has not checked for sure that all ten fingers would be numb. It is simply her impression when she wakes up during the night. I am unable to elicit Tinel's sign either side. She states that the symptoms started acting up about a year ago when she started working as a dealer at the casinos. She states that the right hand is primarily the one involved and although she has had symptoms for up to a year that the symptoms really seem to get quite severe here in the last couple of weeks. She has not had any studies or any intervention at this point.

(Exhibit 1A, page 1)

Initially, Dr. Domalakes suspected right shoulder tendinitis and bilateral carpal tunnel syndrome, prescribing anti-inflammatories and bilateral wrist splints. (Ex. 1A, p. 2) Since then, Owens has received a number of varying diagnoses from different practitioners, both medical and chiropractic, along with varied treatment including steroid injections. On August 28, 2006, orthopedist W. Michael Walsh, M.D., saw Owens in consultation at Dr. Domalakes' request, resulting in an impression of bilateral shoulder pain (actually, more of a description than a formal diagnosis) and probable rotator cuff tendinitis, right greater than left. (Ex. 3E, p. 2)

After several more visits (including some unrelated health issues), Owens began accumulating demerit "points" based on absences for her shoulder symptoms. Her supervisor warned her to "Take FMLA if you don't want to get fired." (Hearing transcript, p. 35) She then asked Dr. Domalakes to sign a Family Medical Leave Act form on December 15, 2006. (Ex. 1A, p. 5) Owens was subsequently off work for shoulder/neck pain on FMLA on intermittent dates: December 13, 2006 (8 hours); January 24 (8 hours), February 4 (8 hours), February 11-12 (4 hours; 8 hours), March 5 (6 hours), March 14-15 (4 hours; 8 hours), March 22, April 12, May 3-4, May 10, June 7 and June 9, 2007. (Ex. J, pp. 1-2) During this succession of intermittent absences, Owens experienced an acute pain extending into the neck while working on March 24, 2007, the claimed date of injury. She then presented to Randall R. Beach, D.C., on March 26, 2007, giving this history:

> SUBJECTIVE:
>
> Ms. Owens states that she deals cards at a casino in Council Bluffs, Iowa (Harrahs) and for the past six months she has been having increasing stiffness and discomfort in her neck, shoulders and midback.

> She states the discomfort has turned into a pain in the neck and right shoulder and she is unable to turn, twist, lift or reach without pain. This pain in her neck has continued to get worse and there is an area between her shoulders that throbs and burns at times. This pain and stiffness started being there in the morning and would get better as the day went on. Now the pain is there almost all of the time and at times she is getting muscle spasm in her neck and shoulders especially after a long day. Her arms feel heavy and tired when she tries to lift them and she gets prickley or tingling sensations in her little fingers and the outer aspect of her right hand. Now Ms. Owens indicates a constant moderate to severe pain in the neck, having a sharp quality, being greater on the right side. She cannot twist or turn her head in any direction without pain. She is getting muscle spasm in her neck, shoulder and mid-back. Her right arm and the outer aspect of her right hand is numb and she cannot extend her arms out straight or raise them over her head without pain. Her right shoulder aches continuously. . . . She has pain with twisting, turning, reaching and even light lifting. The pain in her right arm and shoulder is almost constant . . . . The pain is interfering with her working, eating, and sleeping. On an analog of 1 to 10 she rates her pain an 8. She states these symptoms started after she was working at the Casino and he [*sic*] feels reaching and dealing cards is the cause of the pain.
>
> . . . .
>
> ASSE[S]MENT:
>
> Ms. Owens has a Brachial Plexus entrapment or subclavian artery compression in the interscalene triangle between anterior and medial scalenes caused by the posture she is forced to take at work. (the leaning forward and reaching to deal Blackjack), and the repetitive motion of her arms and hands continually used to deal Blackjack. There may be a [*sic*] some fibrositis (chronic inflammation due to non-supportive chronic inflammation of the soft tissues around the sterno-costo-clavicular region such as the costo-clavicular ligaments) caused by the continual irritation of the trapezius and pectoralis major and minor muscles.

(Ex. 7A, pp. 1, 5)

Dr. Beach reserved prognosis and did not recommend activity restrictions, but recommended an orthopedic evaluation of the right shoulder. (Ex. 7A, p. 5)

During this time, Owens did not anticipate permanent ramifications from her neck/shoulder issues:

> Q. Did you believe in late 2006 or early 2007 that your shoulder condition was permanent and that you would have to give up your job as a blackjack dealer?
>
> A. No. No. I believe in American medicine like a god. I thought I go to doctors, they give me medicine, I'm going to be fine. You know, I wanted to work.

(Hearing Transcript, p. 36)

On March 8, 2007, Owens first learned of the existence of workers' compensation from a coworker on light duty after his own injury. She then went to Horseshoe Casino's safety/risk administrator, Jeff Hodges, to report:

> A. I told him that I have terrible pain in my shoulder and my neck, and I'm pretty sure this is related to my work. This is because it's come out exactly when I'm working. And I said I want to apply about workmen's comp.

(Hrg. Tr., p. 39)

On June 4, 2007, Dr. Domalakes thought Owens had "at the very minimum" tendinitis and a possible rotator cuff tear, but also suspected a herniated cervical disc and ordered cervical and right shoulder MRI scans. (Ex. 1A, p. 9) A cervical MRI scan on June 11, 2007 demonstrated a broad based disc herniation abutting the spinal cord at C5-6 and a smaller posterior central disc herniation at C6-7. (Ex. 5A, p. 2) A cervical CT scan on July 5, 2007 showed herniations at those levels touching the thecal sac, but causing no cord compression or nerve root compromise. (Ex. 5A, p. 3) On July 10, 2007, Dr. Domalakes imposed work restrictions:

> Ms. Owens has a cervical radiculopathy & has return to work with light duty restrictions. No repetitive reaching or lifting more than 20 lbs or bending.

(Ex. 1B)

On July 27, 2007, Owens was seen for another orthopedic consultation by Dr. Walsh, who began a series of steroid injections into the right shoulder. As late as August 21, 2007, Dr. Walsh remained optimistic with respect to permanent consequences:

> PLAN: I have discussed the future outlook with Lyudmila. I have told her that as long as she continues to work on her rehabilitative exercises which should be more of a long term help, and do such things as icing after she works hopefully she will continue to enjoy success with her shoulder and not have any significant recurrence of her pain. We will give

> her a back to work slip for Thursday of this week. She will see how things go and return p.r.n. [as necessary].

(Ex. 3E, p. 6)

Notwithstanding that optimism, Dr. Walsh ordered a right shoulder MRI scan, which was accomplished on August 29, 2007. The study demonstrated a SLAP ("superior labrum from anterior to posterior") lesion in the biceps anchor, minimal rotator cuff tendinopathy and minimal edema in the subacromial bursa. (Ex. 11A) In a letter to Owens' attorney dated September 18, 2007, Dr. Walsh referred Owens to his associate, orthopedic surgeon Kirk S. Hutton, M.D., for recommended surgery. Dr. Walsh added this opinion relative causation:

> I do feel the rotator cuff tendinitis and subacromial bursitis are related to her repetitive work activity. Some of the symptoms associated with the labrum tear may also be due to her repetitive work activity, but I do not feel the labrum tear itself is associated with her work activity. This typically comes from a more traumatic injury.

(Ex. 12A, p. 2)

A surgical repair, arthroscopic SLAP lesion repair, rotator cuff repair and subacromial decompression, was accomplished by Dr. Hutton on October 22, 2007. (Ex. 12A, p. 1; Ex. 12D, p. 1)

On March 10, 2008, Dr. Hutton rated impairment at 6 percent of the body as a whole, along with imposing permanent work restrictions as follows:

> Sedentary work, keep work below shoulder level & within18" of body. Avoid repetitive movements.

(Ex. 12B, p. 1)

Consulting orthopedist Eric Phillips, M.D., offered this opinion in his report to Dr. Domalakes dated July 26, 2007:

> She questions today whether she has a legitimate Workers' Compensation claim. By the history that I obtained, without the benefit of the medical records, it does appear that she, in her own words, describes a scenario where she had an overuse injury from her job which requires her to frequently turn her neck repeatedly throughout the day and to have repeated right upper extremity movements in a fashion that would cause pain of impingement.

(Ex. 10C, p. 5)

On October 4, 2007, Dr. Phillips signed approval to a statement drafted by Owens' counsel that "Ms. Owens' work as a black jack dealer is a contributing factor in her rotator cuff tendinitis." (Ex. 10A)

Although Owens considers the Hutton surgery generally helpful, she does not think she has had complete relief. She experiences continued neck pain and stiffness in the right arm. She was discharged by Horseshoe Casino on January 30, 2008 due to her medical condition, and has not found a comparably remunerative job since then. She is currently doing housekeeping work at only ten hours per week while simultaneously "attending" (on-line) classes, taking English as a second language classes and a one-year program in medical records.

Vocational consultant Gail Leonhardt evaluated Owens at her own request and issued a report dated June 14, 2008. Leonhardt's assessment is bleak:

> Lyudmila Owens' past work as a blackjack dealer is classified as Light, requiring continuous reaching and frequent fingering and handling. The only Sedentary job that she has had in her past work experience was as a gambling cashier; however, this job is also restricted against, as it requires frequent reaching and handling, the latter of which is interpreted as being repetitive (against Dr. Hutton's restrictions).
>
> In a labor market employability assessment, conducted of the entire area, no matches were discovered based upon transferable skills. Ms. Owens has lost her entire ability to do any of her past work.

(Ex. 14A, pp. 6-7)

However, Leonhardt does not take into account Owens' experience in retail and management while still residing in the Ukraine.

CONCLUSIONS OF LAW

Claimant has the burden of proving by a preponderance of the evidence that the alleged injury occurred and that it arose out of and in the course of employment, McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place and circumstances of injury, Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1986); McClure v. Union, et al., Counties, 188 N.W.2d 283 (Iowa 1971). The requirement is satisfied by proof of a causal relationship between the employment and the injury, Id.

An injury occurs in the course of employment when an employee is where he was directed to be, and in the process of performing, about to perform, or engaging in acts incidental to the required job duties. See, Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996).

An injury must also arise out of the employment, and does so only if it is a "rational consequence of the hazard connected with the employment." Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 700, 73 N.W.2d 732, 737 (1955). The "arising out of" element is satisfied if "the nature of the employment exposes the employee to risk of such an injury." Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990).

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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187 (Iowa 1985).

Determination of the correct date of cumulative trauma injury is an issue that has been repeatedly visited by the Iowa appellate courts, starting with McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). In McKeever, the court ruled that, for timeliness purposes, a gradual injury occurs when, because of pain or physical inability, the employee is unable to continue working. In Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992), the high court held that the commissioner is entitled to consider "a multitude of factors" including absence from work or the point at which medical care is received, or unspecified others, "none of which is necessarily dispositive." The court held:

> . . . Consistent with a liberal construction of the workers' compensation statute, Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 261 (Iowa 1980),

> we believe that for purposes of computing benefits it is appropriate to fix the date of injury as of the time at which the "disability manifests itself." Larson [1B A. Larson, Workers' Compensation Law (1991)] at [section] 39.50; Bellwood Nursing Home v. Industrial Comm'n, 115 Ill.2d 524, 106 Ill.Dec. 235, 238, 505 N.E.2d 1026, 1029, (Ill. 1987). "Manifestation is best characterized as "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." Bellwood, 106 Ill.Dec. at 238, 505 N.E.2d at 1029.
>
> Although the date of injury is relevant to notice and statute of limitations issues, the cumulative injury rule is not to be applied in lieu of the discovery rule. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-373 (Iowa 1985). According to the Iowa Supreme Court in Herrera, the preferred analysis is to first determine the date of injury is deemed to have occurred under Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992), and then to examine whether the statutory period commenced on that date or whether it commenced upon a later date based upon the application of the discovery rule. The statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition. Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980).

Moore v. Clinton Engine Corp., File no. 1198528 (Remand Dec. 2002)

The Tasler court found substantial evidence in support of the agency determination: that various traumas combined to manifest themselves as a single compensable injury on the date of a plant closing.

In Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa App. 1993), the Iowa Court of Appeals overturned an agency ruling that pegged an injury date to the date claimant was hospitalized:

> When Venenga was hospitalized in October he had no compensable worker's [sic] compensation claim. Venenga did not miss work during his hospitalization [being on strike at the time]. Venenga first stopped work due to his back injury on July 24, 1987. Prior to that time, he would not have been eligible for worker's [sic] compensation benefits. We do not read Tasler to require an employee to stop working to make a cumulative injury worker's [sic] compensation claim. However, we find more is required than knowledge of an injury or receipt of medical care. The employee must realize his or her injury will have an impact on employment.

In George A. Hormel & Company v. Jordan, 569 N.W.2d 148 (Iowa 1997), the court held that substantial evidence supported an agency determination tying the date of injury to claimant learning from an orthopedic surgeon that he would not recover from a cumulative injury to his shoulder, and that permanent restrictions on work activities would be required. The court found that claimant having merely gained knowledge of his subluxated shoulder on prior medical visits was not dispositive; quoting Tasler, the court continued:

> We thus reject an interpretation of the term "manifestation" that will always require an employee suffering from a repetitive-trauma injury to fix, as the date of accident, the time at which the employee first became aware of the physical condition, presumably through medical consultation, since by their very nature, repetitive-trauma injuries often will take years to develop to the point where they will constitute a compensable worker's compensation injury.

Taken together, these cases teach that the compensable date of injury in a cumulative trauma claim occurs when the worker is compelled to leave work due to injury; however, if that does not occur, the date of injury occurs when the injury "manifests" itself. Manifestation occurs when the worker, as a reasonable person, knows or should know that the injury has occurred, that it is causally related to his or her work, and that it will have a permanent adverse impact on employment. Employment does not necessarily mean employment with the present employer, but employability in general. Alcorta v. H.J. Heinz, No. 02-0581 (Iowa App., unpublished decision July 23, 2003).

Although defendants dispute whether Owens sustained injury arising out of and in the course of employment via repetitive trauma, the weight of medical opinion in this case convinces that she did. More seriously, defendants contend that Owens' labrum tear typically arises from a more traumatic injury, as indicated by Dr. Walsh. Nevertheless, the labrum tear was part and parcel of Owens' discomfort – the immediate cause for surgery – and can fairly be seen as part of the constellation of problems that "lit up" her need for surgical relief. Owens has established injury arising out of and in the course of employment.

When Owens presented to Dr. Domalakes in April 2006, she was symptomatic and clearly believed that work caused her symptoms. The same is probably true of every worker who comes home tired and sore after a day's labor. She was not then aware that her symptoms would have significant impact on her employment, and no definitive diagnosis was yet even on the horizon. There is no showing in any event that Dr. Domalakes told her that work was causing her symptoms; rather, that she told him.

When Owens presented to Dr. Beach on March 27, 2006, he concluded that her problem was work-related, even if his various diagnoses were not necessarily related to the subsequent surgery (by Dr. Hutton, to whom Dr. Beach referred her). Owens' work injury is therefore held to have manifested itself on that date. As she had already given

notice to defendants prior to that date, the notice defense under Iowa Code section 85.23 fails.

Liability having been established, the parties have stipulated to the extent of healing period: June 6 through August 27, 2007 and September 1, 2007 through February 14, 2008. Permanent disability benefits commence on February 15, 2008.

Permanent partial disability that is not limited to a scheduled member is compensated industrially under section 85.34(2)(u). Industrial disability compensates loss of earning capacity as determined by an evaluation of the injured employee's functional impairment, age, intelligence, education, qualifications, experience and ability to engage in employment for which the employee is suited. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808. 813 (Iowa 1994), Guyton v. Irving Jensen Co., 373 N.W.2d 101, 104 (Iowa 1985), Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

The concept of industrial disability is similar to the element of tort damage known as loss of future earning capacity even though the outcome in tort is expressed in dollars rather than as a percentage of loss. The focus is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965).

Impairment of physical capacity creates an inference of lessened earning capacity. Changes in actual earnings are a factor to be considered but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Earning capacity is measured by the employee's own ability to compete in the labor market. An award is not to be reduced as a result of the employer's largess or accommodations. U.S. West v. Overholser, 566 N.W.2d 873, 876 (Iowa 1997), Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 9512062 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); see also Larson, Workers' Compensation Law, Section 57.61, pps. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A 2d 188 (1950).

An employer who chooses to preclude an injured workers' re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous

decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. Dec. 2006).

While the impairment rating does not set an absolute minimum level of industrial disability in all cases it is, nevertheless, material evidence that must be factored into the determination of lost earning capacity. In all but the rarest of industrial disability cases, the impairment rating is the minimum level of compensation owed to a claimant by virtue that the impairment rating signifies the extent of the claimant's loss of use of the whole body. Ferch v. Oakview, Inc., File No. 5010952 (App. April 13, 2006).

Although Owens has training as a physicist, there is no evidence suggesting that her skills in that field are easily transferrable to work in the United States, particularly since she is still perfecting her English language skills. Given Owens' demonstrated motivation to work and earn, it is inescapable that she would already have secured such a job if she could. Her current reduced position as a housekeeper, however, is not fairly indicative of her earnings potential, because she is continuing to take ESL and medical records courses. Horseshoe Casino, of course, cannot claim credit for such success as is to be anticipated, because defendants have not contributed in any way to the cost. Still, Owens' capacity for personal and vocational growth as an intelligent and hardworking citizen is a factor tending to reduce her industrial disability.

Owens cannot any longer work as a blackjack dealer. There is no apparent reason, however, why she cannot find at least some suitable jobs in retail, especially as a cashier, so long as the work is essentially sedentary.

Considering all factors of industrial disability as set forth above, it is found that as a result of the work injury sustained March 26, 2007, Lyudmila Owens has experienced loss of earning capacity on the order of 50 percent of the body as a whole, or the equivalent of 250 weeks of permanent partial disability.

The parties also dispute entitlement to medical benefits. Under Iowa Code section 85.27, the employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury or the worker has sought and received authorization from this agency for alternate medical care. Freels v. Archer Daniels Midland Co., File No. 1151214 (App., June 30, 2000). Defendants cannot admit injury arising out of and in the course of employment and claim the right to control medical treatment, but at the same time deny that the disabling condition is causally connected to the injury and therefore they are not liable for the disability. Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119 (Iowa 2003).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Where an employer does not exercise its right to choose the medical care under Iowa Code section 85.27, the employer may be held to have acquiesced in claimant's choice of physician. Munden v. Iowa Steel & Wire, 33 Biennial Report of the Iowa Industrial Commissioner 99 (Arbitration Decision, September 12, 1977). Harker v. IBP, Inc., File no. 1169917 (App.Dec. 1999).

Having established liability in this claim, Owens is entitled to recover disputed medical expenses. Horseshoe Casino's "lack of authorization" defense was ruled invalid at hearing because defendants have at all times relevant disputed liability on this claim.

Defendants are, however, entitled to credit under Iowa Code section 85.38(2) in the sum of $28,323.12

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay healing period benefits from June 6, 2007 through August 28, 2007 and from September 1, 2007 through February 14, 2008, at the rate of four hundred seventy-three and 96/100 dollars ($473.96) per week.

Defendants shall pay two hundred fifty (250) weeks of permanent partial disability benefits at the rate of four hundred seventy-three and 96/100 dollars ($473.96) commencing February 15, 2008.

Accrued weekly benefits shall be paid in a lump sum together with statutory interest.

Defendants shall have credit under Iowa Code section 85.38(2) in the total of twenty-eight thousand three hundred twenty-three and 12/100 dollars ($28,323.12).

Defendants shall pay all disputed medical expenses under Iowa Code section 85.27.

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

Costs are taxed to defendants.

Signed and filed this __22nd___ day of July, 2009.

_____
DAVID RASEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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