BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CERIMA CAUSEVIC,

Claimant,

vs.

CATHOLIC HEALTH INITIATIVES,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5051571

ARBITRATION

DECISION

Head Note Nos.: 1803, 2701, 2907

STATEMENT OF THE CASE

Cerima Causevic, claimant, filed a petition for arbitration against Catholic Health Initiatives as the employer and Indemnity Insurance Company of North America as the insurance carrier. An in-person hearing occurred on January 28, 2016.

The evidentiary record includes claimant's Exhibits 1 through 4 and defendants' Exhibits A through I, K, and M. Defendants requested permission and filed Exhibit N after the evidentiary hearing. Exhibit N is received into the evidentiary record.

Defendants also offered Exhibits J and L. Both of these exhibits were objected to by claimant and excluded from the evidentiary record. Claimant testified on her own behalf. Defendants called Kendra Buchanan, the manager at the employer's employee health clinic, to testify.

Counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until February 12, 2016 to file their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties filed separate hearing reports for each of the alleged injury dates. On those hearing reports, the parties entered into numerous stipulations. Those

stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations, including the commencement date for permanent disability, weekly rate, payment of claimant's independent medical evaluation fee, and all other stipulations contained on the hearing report.

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.

2. Whether claimant is entitled to reimbursement of past expenses and payment of future gym membership fees.

3. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

Cerima Causevic is a 51-year-old woman of Bosnian descent. She immigrated to the United States as a refugee in 1997 and has been a citizen of the United States for 12 years. She is a high school graduate and completed three years of college in Bosnia. Unfortunately, she was not able to complete her schooling in her native country. She has never utilized her college training in the work force. (Claimant's testimony; Exhibit 3, page 2)

Ms. Causevic obtained the equivalent of a certified nursing assistant degree while residing in Germany before immigrating to the United States. After coming to the United States, Ms. Causevic took English classes and also obtained both a CNA certification and certification as a CMA to be able to distribute prescription medications to residents and patients. (Ex. 3, p. 2)

Since arriving in the United States, claimant has supported herself by working in a manufacturing job as an assembler and in a few different nursing homes as a certified nursing assistant. She began working for the employer, Catholic Health Initiatives' Bishop Drumm Retirement Center in 1998. (Ex. 3, p. 3)

On December 15, 2013, Ms. Causevic was assisting a resident of Bishop Drumm when she injured her low back. (Ex. 3, p. 4; Claimant's testimony) Ultimately, Ms. Causevic required surgical intervention on her low back, which relieved most of her left leg pain. (Ex. A, pp. 1-3; Claimant's testimony) However, she continues to experience low back pain. (Claimant's testimony)

Post-surgically, claimant was referred to the University of Iowa Hospitals and Clinics' Pain Rehabilitation Center for evaluation. She participated in a two-week rehabilitation program, which she found to be beneficial. (Ex. A, pp. 21-25; Claimant's

testimony) Upon discharge from the rehabilitation program, Joseph J. Chen, M.D. declared claimant to be at maximum medical improvement and assigned a 12 percent permanent impairment of the whole person as a result of her surgical procedure on her low back. (Ex. A, p. 25) Dr. Chen assigned permanent restrictions that include lifting up to 25 pounds on an occasional basis, 13 pound lifts on a frequent basis, pushing or pulling up to 15 pounds of force, and only occasional twisting, bending, reaching, stooping, squatting, or kneeling. (Ex. A, p. 25)

Claimant obtained an independent medical evaluation, performed by Mark C. Taylor, M.D. on November 10, 2015. (Ex. 1) Dr. Taylor ultimately concurred with the 12 percent permanent impairment rating as well as Dr. Chen's declaration of maximum medical improvement. (Ex. 1, p. 8) However, Dr. Taylor offered slightly different permanent work restrictions. Dr. Taylor opined that claimant should lift 25 pounds occasionally and that the lifting preferably be between knee and chest level. He recommended only 10-15 pound lifts below knee level or above head level. (Ex. 1, p. 8)

Dr. Taylor also recommended that claimant be allowed to sit, stand and walk as needed for comfort. He concurred with Dr. Chen that claimant should be limited to occasional squatting, bending, and kneeling and recommended only rarely crawling. Dr. Taylor opined that claimant would be limited to occasional stair climbing and should avoid ladders. (Ex. 1, p. 8) Dr. Taylor also opined that claimant should only be allowed to travel occasionally and that she would require the opportunity to periodically get out of the vehicle to move around. (Ex. 1, p. 9)

Given that both Dr. Chen and Dr. Taylor concur, I accept the 12 percent permanent impairment ratings as accurate. I also accept the physicians' declarations of maximum medical improvement. When considering the restrictions outlined by the physicians, I accept the recommendations from Dr. Chen as most accurate. Dr. Chen evaluated claimant over a two-week rehabilitation stay at the University of Iowa Hospitals and Clinics, which likely involved multi-disciplinary observations and evaluations of claimant. Dr. Taylor evaluated claimant only once. I find Dr. Chen's opinions regarding restrictions to be most consistent and sufficient for claimant's condition.

Ms. Causevic also testified that she has ongoing low back pain and requires the use of over-the-counter ibuprofen to control her symptoms. (Ex. C, p. 7) I found claimant's testimony in this regard to be credible and accurate.

Claimant testified that she would not be able to return to her positions as an assembler or as a certified nursing assistant with her current restrictions and symptoms. (Claimant's testimony; Ex. C, p. 3) I find claimant's testimony in this regard to be credible and accurate. I find that claimant is now precluded from returning to any of the lines of work she previously held and for which she has been trained. Ms. Causevic has not returned to work since she was terminated by Catholic Health Initiatives in June 2014.

Defendants assert that claimant is currently enrolled in a community college and is obtaining further education and retraining. Defendants have agreed to pay for this retraining to increase claimant's employment opportunities into the future. Claimant has demonstrated the aptitude to complete the course of training.

Mercy's witness, Kendra Buchanan, offered testimony that the medical billing and coding industry is a high demand industry. Medical billing and coding jobs are available within Catholic Health Initiatives, and numerous jobs related to this industry have been outsourced by the corporation.

Claimant conceded she was confident that she can obtain employment once she completes the educational requirements for the medical coding and billing industry. (Claimant's testimony; Ex. C, p. 7) I find it is likely, based upon the evidence presented, that claimant will successfully complete her medical coding and billing training and that she is likely to be able to secure a position within this field after her training is completed.

Finally, I find Ms. Causevic to be a motivated worker. She has obtained new training since arriving in the Unites States. She has worked consistently prior to her work injury. Since her work injury, claimant has investigated, enrolled, and successfully completed part of her necessary retraining to move into a new career. She clearly desires to work and is diligently attempting to improve her employability given her current physical condition.

Considering claimant's age, educational background, employment history, inability to return to any of her former employment opportunities, her level of motivation, her permanent impairment rating, her permanent work restrictions, her likely ability to retrain and find new employment, as well as all other relevant industrial disability factors outlined by the Iowa Supreme Court, I find that claimant has proven she sustained a 50 percent loss of future earning capacity as a result of the December 15, 2013 work injury.

Ms. Causevic requests award of past gym membership fees and an order for alternate medical care that includes payment of future gym membership fees. Claimant relies upon Dr. Taylor, who opines:

> This is a circumstance where Ms. Causevic apparently took the recommendations of her medical providers very seriously. She was regularly attending the gym. She was able to participate in various types of programs, including yoga. She took advantage of some of the machines, including treadmills that she could walk on which were easier on her back. She also used the stationary bikes and took advantage of the pool. In this case, it appears that the variety of options available as part of her membership was advantageous to Ms. Causevic and it was my understanding that she utilized the facility on a routine basis. She stated that it was definitely beneficial for her back pain and helping to minimize

> her need for other types of treatments and other medications. She has not required narcotic pain medications.
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> In this circumstance, it would be beneficial for Ms. Causevic to continue with a program.... As long as she continues to take advantage of the membership, this should be continued. This will help her to maintain her core strength and to remain active from a physical standpoint and if she can decrease her weight even further, this will only serve to potentially further improve her chronic back condition which resulted from the work injury.

(Ex. 1, pp. 7, 8)

Claimant also points out that Dr. Chen initially opined "that she needs to manage her chronic back pain using her physical exercises and cognitive-behavioral skill she has learned through the program. I encouraged her to continue with her home exercise and fitness, and weight loss program." (Ex. A, p. 25)

Defendants resist the award of gym membership fees. Defendants point out that Dr. Chen revised his medical opinion. On August 26, 2015, through someone at his office, Dr. Chen opined, "the requested post-MMI gym membership was not necessitated by the work injury. She is encouraged to improve her fitness and join a gym, however, it should be done outside the scope of her work claim." (Ex. 2, p. 4)

Relevant to this issue, claimant testified that she did not have a gym membership or regularly work out prior to the December 2013 work injury. This testimony is not rebutted and is accepted as accurate. Considering claimant's testimony and comparing it to the opinions of Dr. Chen and Dr. Taylor, I find that claimant did not require a gym membership or require regular physical exercise prior to the work injury. However, since the work injury, exercise is helpful in controlling and managing her low back and left leg symptoms.

I find Dr. Taylor's opinion most convincing with request to the need for a gym membership. Dr. Chen opines that claimant requires home exercise and encourages her to join a gym to control her low back symptoms. Although Dr. Chen does not believe the gym membership is necessitated by the work injury, claimant clearly benefits from the gym membership by reduced low back symptoms. Therefore, I find that claimant has proven a gym membership is related to her work injury and is a necessary and beneficial means of providing self-treatment to manage her symptoms. Therefore, I find that claimant's request for a gym membership is reasonable, necessary and causally related to the December 15, 2013 work injury.

Review of Exhibit 2, page 2, Exhibit G, page 1 discloses that defendants initially agreed "to cover a gym membership until her three month follow up with the Spine Center and then they will reevaluate." Defendants agreed that claimant "can be reimbursed for up to $85.00 per month."

In reliance upon that agreement, claimant obtained a membership at Lifetime, which is a gym close to her residence. (Claimant's testimony) Defendants authorized an expense of up to $85.00 per month, and claimant acted upon that authorization before it was modified or rescinded by defendants.

In her alternate medical care claim, Ms. Causevic has not requested a membership at a specific gym. She has not proven that she requires a specific gym or a gym within a specific radius of her residence. Defendants previously offered a membership at their fitness center on the main campus in Des Moines. (Testimony of Kendra Buchanan; Ex. G, p. 2) I find that any gym or fitness center consistent with the recommendations of Dr. Taylor would be reasonable and sufficient.

CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work related low back injury on December 15, 2013, that the injury resulted in permanent disability, and that the injury should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Reports)

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.

Claimant contends that her ongoing retraining cannot be considered in assessing her industrial disability because the completion of her coursework remains speculative, as does her ability to obtain employment after completing the training. See Lovic v. Construction Products, Inc., File No. 5015390 (Appeal December 2007). The Iowa Supreme Court has directed that this agency finds the facts as they stand at the time of the hearing and that the agency should not speculate about the future course of the claimant's condition. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

On the other hand, defendants contend that retraining efforts can be considered in determining industrial disability if there is evidence in the record about the likely success of the retraining and evidence of the employability of the claimant after the training is completed. See Jenkinson v. Hon Industries, File Nos. 5001037, 5001038 (Appeal July 2004).

In this case, the employer has agreed to pay for the claimant's retraining. Although Iowa Code section 85.70 does provide for some increased weekly benefits on a temporary basis, there is no statutory provision that requires an employer to directly pay for the claimant's retraining. Yet, the retraining likely provides the claimant new skills and access to an expanded labor market once the training is completed.

Employers are only likely to agree to provide the retraining if their funding of the retraining is considered when rendering an industrial disability award. Otherwise, the employer's funding is not considered and the employer must rely upon a review-reopening to obtain any benefit from the money they spent retraining the claimant and potentially after the entirety of the permanent disability award is paid in full. Refusing to consider employer funded retraining efforts when assessing industrial disability would financially discourage employers from paying for the retraining of injured employees and seems contrary to the goals of the workers' compensation system.

On the other hand, if the retraining efforts ultimately fail or an employee is not able to obtain employment in the retraining field, the employee likely would retain the right to seek review-reopening and an increased industrial disability award. Prior agency precedent seems to place the burden of proving retraining will be successful upon the party that does not control the claimant's efforts at retraining. Moreover, prior agency precedent seems to require a larger industrial disability award to be subsequently challenged by an employer if the claimant ultimately completes the retraining and finds a job. Of course, if the industrial disability award is sufficient to satisfy the claimant, the claimant may not complete the training or seek further employment. This seems like a reversal of the burden of proof and a strange result.

Moreover, the Iowa Supreme Court noted in Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995) that the ability to retrain is a relevant consideration to be made when an odd-lot claim is asserted. It seems an odd result that retraining is only considered when an odd-lot claim is asserted but is not considered when determining industrial disability under the traditional industrial disability analysis. In fact, this would set up a strange scenario in which a claimant would have to make a strategic decision whether to utilize the burden-shifting benefits of the odd-lot doctrine and risk consideration of any ability to retrain or to pursue a permanent-total disability under the traditional industrial disability analysis to preclude any consideration of retraining.

If the claimant were successful in proving a permanent-total disability under the traditional industrial disability analysis, the claimant may not complete the retraining or pursue further employment because such would terminate the permanent total

disability. I conclude that the Iowa Supreme Court likely did not intend to implement such a strange result when it discussed retraining as a factor in an odd-lot case. See Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995).

Rather, I believe that the Iowa Supreme Court mentioned retraining and believed it an important factor in an industrial disability analysis. Therefore, although the parties point to potentially conflicting agency precedent, I conclude that the analysis of Jenkinson v. Hon Industries, File Nos. 5001037, 5001038 (Appeal July 2004) is applicable, particularly where the defendants pay for the retraining, there is evidence that the retraining is being completed successfully, and there is a reasonable anticipation of future employment as a result of the retraining.

After consideration of all of the relevant factors of industrial disability, including the likelihood that claimant will successfully complete her retraining and be able to find employment in that field, I found that claimant proved she sustained a fifty percent (50%) loss of future earning capacity. Therefore, I conclude claimant has proven entitlement to 250 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant also seeks an award of past and future expenses related to a gym membership. Claimant contends that Dr. Chen recommended claimant obtain a gym membership and perform regular exercise to improve her back symptoms. Claimant similarly relies upon Dr. Taylor, who opines that a gym membership is a reasonable and necessary means of claimant being able to control her low back symptoms and that it is related to her December 2013 low back injury at work. (Ex. 1, p. 8)

Defendants contend that the requested gym membership is not medically necessary or causally related to the work injury. Defendants rely upon Dr. Chen, who stated on August 26, 2015 that claimant was encouraged to join a gym, but that a gym membership was not necessitated by the work injury. (Ex. 2, p. 4)

Iowa Code section 85.27(4) provides:

> [T]he employer is obligated to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing any or any part of the care and the reason for the change in authorization.

I found that claimant acted in reliance upon defendants' authorization of charges up to $85.00 per month for a gym membership before that authorization was modified or rescinded. Therefore, defendants are obligated to reimburse claimant for the $85.00 expense she incurred. Iowa Code section 85.27(4).

Claimant also seeks an alternate medical care award, requiring defendants to provide her a gym membership into the future pursuant to the recommendations of Dr. Taylor. An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner, 78 (Review-Reopening 1975).

In this instance, I found the opinion of Dr. Taylor most convincing on the issue of the gym membership. Having found that the recommended gym membership was reasonable, necessary, and causally related to the work injury, I conclude that claimant has established entitlement to an order for alternate medical care to include an order that defendants provide claimant an ongoing gym membership consistent with the recommendations of Dr. Taylor.

However, claimant has not requested or proven a specific gym or health center is necessary. The employer retains the right to direct care. The employer has previously offered a membership at its health center at its main campus in Des Moines. Provided that the employer's health center meets the criteria and exercise equipment recommended by Dr. Taylor, the employer shall remain entitled to offer its own health center to claimant or select a gym or health center at which it will purchase a membership for claimant.

Finally, all parties seek assessment of their costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on the majority of issues, claimant's filing fee of $100.00 in each file shall be assessed pursuant to 876 IAC 4.33(7). Defendants shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on June 1, 2015 at the stipulated weekly rate of four hundred seventy-six and 70/100 dollars ($476.70).

Defendants shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall provide claimant a gym membership moving forward, consistent with the recommendations of Dr. Taylor.

Defendants are permitted to select the gym at which claimant's membership will be provided, including the employer's fitness center at its main campus, provided that fitness center meets Dr. Taylor's recommendations.

Defendants shall reimburse claimant's costs totaling one hundred and 00/100 dollars ($100.00).

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

Signed and filed this 21st day of April, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.