

ZULEI GOMEZ,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	File No. 5026633
ABM INDUSTRIES, INC.,	:	
	:	
Employer,	:	ARBITRATION
	:	
and	:	DECISION
	:	
ACE AMERICAN INSURANCE	:	
COMPANY,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	Head Note No.: 1400

This is a contested case proceeding in arbitration under Iowa Code chapters 85 and 17A. Claimant, Zulei Gomez, sustained a stipulated work injury in the employ of defendant ABM Industries, Inc., on September 15, 2005, and now seeks benefits under the Iowa Workers' Compensation Act from that employer and its insurance carrier, defendant Ace American Insurance Company.

ISSUES

1. Gomez sustained injury arising out of and in the course of employment on September 15, 2005.
2. The injury caused both temporary and permanent disability.

3. Healing period entitlement is not in dispute.
4. Permanent disability should be compensated by the industrial method (loss of earning capacity) commencing January 15, 2007.
5. The correct rate of weekly compensation is \$237.93.
6. Entitlement to medical benefits is not in dispute.
7. Defendants should have credit for benefits paid (25 weeks of permanency benefits at the stipulated rate).

ISSUE FOR RESOLUTION:

1. Extent of industrial disability.
- 2.

FINDINGS OF FACT

Zulei Gomez, age 32, was born in Mexico and attended "high school" (locally, the ninth grade) in Mexico before immigrating to the United States in 1996. She relocated to Iowa in 1998. Gomez is a notably petite woman who weighs approximately 100 pounds and is less than five feet tall. She does not speak English language fluently, but is able to understand spoken English somewhat better.

Gomez's work history is that of essentially unskilled or semi-skilled employment. She worked in restaurants stocking buffet tables and busing tables before taking employment as an office cleaner with janitorial service ABM Industries on September 23, 1999. Her varied duties as "day porter" included emptying trash, cleaning floors, bathrooms, cafeterias, and the like, but did not require heavy lifting except some trash, especially tipping heavy bins of old photographs into a recycling container. It was while doing that on September 12, 2005, that she sustained a low back injury.

Gomez was first treated by occupational physician A.J. Sciorrotta, D.O., on September 15, 2005. She was released to work with a temporary 10-pound lifting restriction and with no repetitive bending. (Exhibit 1, page 1) When her condition was worse a week later, Dr. Sciorrotta referred his patient to orthopedic surgeon Daniel McGuire, M.D.

Dr. McGuire's initial impression was of neck and back strain with overuse. (Ex. 3, p. 1) He was the first of several physicians to treat Gomez unsuccessfully with conservative therapy. In October, Dr. McGuire ordered the first of two MRI studies of the low back, but the study was benign. (Ex. 3, pp. 10, 12) On November 16, 2005, Dr. McGuire released Gomez from care:

I am convinced there is no logical surgery.

I believe her clinical situation is stable. She is at MMI [maximum medical improvement] as of today. I do not see where her clinical situation is going to change dramatically here in the next 2 or 3 months and I have explained that to her several times.

As far as the work incident is concerned, I really would not put any lifelong restrictions on her. Given her petite size she probably should not be lifting much more than 10, 15, 20 pounds, but that is not related to work.

(Ex. 3, p. 18)

In December 2005, Gomez began a course of conservative care with physiatrist Donna J. Bahls, M.D. Gomez continued with various medications, including steroids, and physical therapy. Dr. Bahls ordered a bone scan, which was normal. (Ex. 5, p. 4) In June 2006, another MRI scan was normal. (Ex. 5, p. 21) On February 8, 2006, Dr. Bahls released Gomez to return to her normal job duties. (Ex. 5, p. 9) This did not last, and Gomez was eventually given a single restriction as follows, although it is not clear whether the restriction was meant to be permanent:

X Return to regular work/no restrictions: No emptying recycle bins.

(Ex. 5, p. 52)

On September 28, 2006, Dr. Bahls declared Gomez at maximum medical improvement and assigned an impairment rating of 5 percent of the whole person. (Ex. 5, p. 53)

In March 2007, Gomez began treating with orthopedic surgeon Kenneth L. Pollack, M.D. She was clearly not feeling much improved:

CURRENT SYMPTOMS: Ms. Gomez reports pain over her whole body. Pain is similar on the dorsal as ventral surfaces and extends truly from the base of the skull to the feet. Character of pain is aching. Left and right sides hurt similarly. She reports a continuous pain level of 8/10. She states that her symptoms are aggravated by sitting, walking, bending forward, arching the back or lifting. She only gets relief when lying down. She reports numbness and tingling in the thighs, legs and feet bilaterally. She states that both legs are weak. She has no bowel or bladder incontinence. Pain intensity level does not change throughout the day. She finds it difficult to "do everything" and specifically states that she is

depressed, edgy, has trouble sleeping, trouble interacting with family members and trouble with sexual activity. She has not made progress with physical therapy.

Ex. A, p. 2)

Dr. Pollack found a generally negative physical examination, except for Gomez's exaggerated responses. His impression included these findings:

1. Thirty-year-old Hispanic woman nearly two years status post injury to the lumbar spine from repetitive motion.
2. Whole body myofascial pain without anatomic abnormality. There is no correlation whatsoever between her subjective symptoms and the mechanism of injury.
3. Multiple inconsistencies on examination. These inconsistencies are highly suggestive of malingering.

(Ex. A, pp. 4-5)

On August 28, 2007, Gomez underwent a functional capacity evaluation accomplished by physical therapist Bill Fellows at Dr. Pollack's request. The study was invalid with minimal symptom/disability exaggeration. (Ex. 7) Dr. Pollack subsequently wrote:

Functional Capacity Evaluation performed on Zulei Gomez 8-28-07 was reviewed. In reviewing the reliability profile, Ms. Gomez displayed 3/5 positive Waddell's and 5/21 by Korbon's protocol indicating a non-organic component to her pain. Furthermore, she passed only 5/14 validity criteria which suggests poor effort or voluntary sub-maximal effort. In my opinion, this is a non-valid study. I am, therefore, unable to utilize the information in the report for assigning permanent restrictions. In the absence of an objective basis for assigning restrictions, it is my opinion that Ms. Gomez can return to normal activities both at work and outside the workplace without a medical need for restrictions.

(Ex. A, p. 8)

On February 12, 2009, Gomez presented at her own request for an independent medical evaluation by physiatrist Jacqueline M. Stoken, D.O. Based on an impression of status post work injury with acute low back strain and chronic low back pain with left sacroiliac joint dysfunction, Dr. Stoken rated impairment at 8 percent of the whole person and recommended permanent restrictions against repetitive bending, stooping, and lifting, and lifting over 20 pounds frequently. (Ex. 8, pp. 6, 7)

In her hearing testimony, Gomez complained of constant back, right and left lower extremity pain, worse with use, and diminished ability to walk, stand, sit, lift and work. She is still working the same job on a full-time basis at a slightly higher hourly wage than before, but is restricted from emptying recycling bins. She claims that Dr. Bahls recommended additional restrictions, but given the language barrier and the lack of any written evidence of additional restrictions, the claim is not persuasive.

CONCLUSIONS OF LAW

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).

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).

Zulei Gomez complains of severe, intractable pain from head to foot without known anatomic cause. A functional capacity evaluation designed to measure her residual physical abilities was invalid due to symptom magnification and inconsistencies. The single restriction imposed by Dr. Bahls is consistent not only with her complaints, but her petite body habitus. Dr. Pollack's opinions are best supported by the objective evidence and are persuasive.

Given, however, that the parties have stipulated to the existence of permanent impairment, an award of 5 percent of the body as a whole in accordance with Dr. Bahls's impairment rating is justified. As defendants have voluntarily paid that rating, no further award is appropriate.

ORDER

THEREFORE, IT IS ORDERED:

Gomez takes nothing further.

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

Costs are taxed to Gomez.

Signed and filed this 31st day of July, 2009.

DAVID RASEY
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.