BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JANET M. POWERS, Claimant, vs. SISTERS OF ST. FRANCIS, Employer, and IOWA LONG TERM CARE RISK MANAGEMENT ASSOCIATION, Insurance Carrier, Defendants.	:	File No. 5025637 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, Janet Powers, sustained a stipulated work injury in the employ of defendant Sisters of St. Francis on December 9, 2006, and now seeks benefits under the Iowa Workers' Compensation Act from that employer and its insurance carrier, Iowa Long Term Care Risk Management Association.

The claim was heard in Dubuque, Iowa, on May 13, 2009, and deemed fully submitted on June 3, 2009, following receipt of briefs. The record consists of joint exhibits 1-10, Powers' exhibit 11, and the testimony of Powers and Kathleen McDonnell.

ISSUES

STIPULATIONS:

1. Powers sustained injury arising out of and in the course of employment on December 9, 2006.

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 April 11, 2007.

5. The correct rate of weekly compensation is $284.14.

6. Entitlement to medical benefits is not in dispute.

7. Defendants should have credit for benefits paid (50 weeks of permanency at the stipulated rate).

ISSUE FOR RESOLUTION:

1. Extent of industrial disability.

FINDINGS OF FACT

Janet Powers, age 54 and left-hand dominant, has only an 11th grade education, but earned GED certification at approximately age 30. Powers earned certified nurse aide licensure in 1987, but has no other formal training or education. She does not know if her CNA licensure remains in effect. Licensure is not a requirement of her present job.

Powers' work history includes experience as a restaurant waitress/prep cook/cashier, fast food cook and cashier, bartender, health food store clerk and nurse aid at two Roman Catholic retirement homes, including Sisters of St. Francis since 1996. Powers also works a few hours each week in a department store as a jewelry sales clerk.

Defendants challenge Powers' credibility based on some suggestions of symptom magnification during a functional capacity evaluation and a 1994 felony conviction for conspiracy to deliver marijuana. However, the FCE was, in the final analysis, deemed valid by the evaluator, and the 1994 conviction is not only remote in time, but did not involve a crime indicative of dishonesty or untruthfulness. Powers' demeanor was otherwise credible, and she is so found.

Powers sustained injury to her left shoulder on December 9, 2006, while supporting a patient who "went to dead weight" and started to fall. After an MRI scan confirmed the existence of a rotator cuff tear, a surgical repair was accomplished on January 31, 2007 by Scott P. Schemmel, M.D. (Exhibit 4, page 8)

A valid functional capacity evaluation was thereafter accomplished by physical therapist Dan Focht on June 26, 2008. Focht would limit lifting, pulling and carrying to various weight on a frequent to occasional basis and concluded that Powers is capable of only "light" physical demand levels. (Ex. 5, p. 31) Following the FCE, Dr. Schemmel agreed that Powers was capable of lifting only 35 pounds floor to waist, 18 pounds waist

to shoulder, and should be limited from transferring patients in excess of a moderate assist transfer. (Ex. 4, pp. 28-29)

Occupational physician Michael Stenberg, M.D., who also served as a treating physician, rated impairment on July 11, 2008 at 5 percent of the upper extremity, convertible to 3 percent of the whole person, and concluded:

> Based on the functional capacity evaluation conducted June 26, 2008, I would recommend that Ms. Powers lift no more than 25 pounds from floor to waist on an occasional basis. From waist to shoulder, this should be reduced to 20 pounds. These restrictions should be permanent. I would recommend that she do above shoulder lifting with her left hand on a rare basis, that is, up to 10% of the workday.

(Ex. 4, p. 36)

On September 23, 2008, Powers presented at her own request for an independent medical evaluation by occupational physician Thomas J. Hughes, M.D. Dr. Hughes' subsequent report rated impairment at 15 percent of the upper extremity, or 9 percent of the whole person, and concluded:

> Ms. Powers unquestionably has significant limitations in terms of movement and strength of her left shoulder. This had been amply demonstrated by the functional testing to which Ms. Powers had been submitted by her therapist, Dan Focht. It apparently has been recommended that Ms. Powers be provided a limitation of lifting to no more than 25 pounds from floor to waist on an occasional basis and from waist to shoulder no more than 20 pounds. I would concur with those limitations and furthermore add that I do not think that Ms. Powers should probably attempt to perform any forceful activities with her left arm above shoulder level. She should certainly not perform any activities in a torquing motion more commonly recognized as a throwing movement with her left arm. In addition, I think she would not likely tolerate repetitive motion activities that would require reaching further away from the trunk of her body much more than the length of her forearm.

(Ex. 7, p. 11)

Powers continues to work at Sisters of St. Francis as a nurse aide, and at a higher hourly wage than before her work injury. Accommodations have been made, especially by barring Powers from work on one floor where a particularly heavy patient resides. However, nurse aide work is generally classified in the medium physical demand category, and Powers is physically unable to perform at that level. Although director of nursing Kathleen McDonnell unconvincingly suggested that Sisters of St. Francis "might" hire an applicant so limited, there is no evidence whatsoever that jobs

are regularly available in the industry for an individual carrying Powers' medical restrictions and restriction to light physical demand employment. If Powers should lose her present job for whatever reason, it is highly unlikely that she will be able to secure a comparable position in the competitive labor market.

Powers currently complains of "throbbing" and "jabbing" pain on a daily basis, diminished strength, and sleep disturbance. Professionally, she has difficulty moving patients and operating a lifting device, and is accommodated by doing lifts with three, rather than two CNAs. She compensates by using the right arm, but recognizes that it is unlikely she could be hired by another elder care facility. Powers considers herself unable to perform any of the jobs she previously held due to the need to lift heavy items as a waitress, bartender or cashier.

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).

Although Sisters of St. Francis has been able to keep Powers employed, it is highly unlikely that she could obtain comparable employment competitively. Other than her work as a CNA, Powers' employment history involves essentially unskilled or semiskilled work. The physical restrictions currently imposed would clearly foreclose her from the ability to perform many jobs she could otherwise do. On the other hand, there are certainly some retail and food service jobs for which Powers could physically qualify, so her industrial loss is far from total.

Powers has limited education and bankable skills. Her age is a factor discouraging significant retraining. Considering all the factors of industrial disability, it is found that as a result of the work injury sustained December 9, 2006, Janet Powers has industrial disability of 65 percent of the body as a whole, or the equivalent of 325 weeks of permanent partial disability benefits.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay three hundred twenty-five (325) weeks of permanent partial disability benefits at the rate of two hundred eighty-four and 14/100 dollars ($284.14) commencing April 11, 2007.

Defendants shall have credit for benefits paid.

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

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

Costs are taxed to defendants.

Signed and filed this ___31st___ day of July, 2009.

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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.