BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CYNTHIA KIRKENDALL, Claimant, vs. CARGILL MEAT SOLUTIONS CORP., Employer, and THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Insurance Carrier, Defendants.	FILED MAY 18 2017 WORKERS' COMPENSATION File No. 5055494 ARBITRATION DECISION Head Note No.: 1803, 3001, 3002

STATEMENT OF THE CASE

Cynthia Kirkendall, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants Cargill Meat Solutions Corp., employer, and The Insurance Company of the State of Pennsylvania, insurance carrier. The arbitration hearing was held in Ottumwa, Iowa, and was fully submitted on February 2, 2017. Both parties submitted briefs.

The evidentiary record includes Joint Exhibits 1 through 36, and Defendants' Exhibits A through E, all of which were admitted without objection. Claimant provided testimony at the hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. The extent of claimant's disability.

2. Claimant's gross earnings.

3. Claimant's weekly rate.

4. Whether claimant is entitled to reimbursement of the cost of an independent medical examination.

5. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Cynthia Kirkendall was 62 years old at the time of her hearing. Claimant graduated high school. She has no other formal education. Before working for Cargill Meat Solution Corp. (Cargill), claimant worked for three enterprises. She was a ticket taker in a movie theater (during high school), priced merchandise for a Target warehouse and was an office clerk for a furniture store. (Exhibit 1, page 2)

Claimant started her employment with Cargill on September 24, 1987. (Ex. 34, p. 13) She has worked for Cargill continuously since then and was employed at Cargill at the time of the hearing. (Transcript, page 14) When she first started working in the plant it was owned by Excel Corporation. (Tr. p. 74) The Cargill Ottumwa plant was acquired by JBS Swift after her injury and JBS Swift is her current employer. (Tr. p. 17; Ex. 34, p. 13) Claimant works for the lower cut department. At the time of the hearing claimant was earning $15.05 per hour, working for over 29 years at the plant. In addition to working for Cargill, claimant works for the union in the Cargill plant and is paid by the union for hours she misses at Cargill during the time she spends on union business. Claimant is the recorder for the union. (Tr. pp. 20, 21)

Claimant has performed a number of jobs at Cargill. Her work was set forth in the vocational assessment prepared by Lana Sellner, M.S., CRC. (Ex. 30, pp. 5, 6) Claimant's first job was to write the weight of each box that came down a conveyor line. For six years she operated a Cryovac. For five years claimant was a scale operator. She worked as a CVP operator for 2 years. Claimant worked in the skirt meat section for about a year and a half. Claimant worked as a Moisture Tech and was working in the cut neck bones position at the time of the hearing. (Ex. 8, pp. 1 – 3)

On Thursday December 10, 2009, claimant was in a parking lot for Cargill and slipped on the ice and fell. She reported her injury. Claimant stayed at work all that day. Claimant went to the emergency department on Sunday, December 13, 2009. Claimant was initially provided treatment from company physicians and also received physical therapy.

Claimant was referred to Theron Jameson, D.O. Dr. Jameson performed shoulder surgery on April 7, 2010.

Claimant was referred to a shoulder specialist, Kyle Galles, M.D., and started treating in October 2010. Dr. Galles performed a shoulder arthroplasty (total shoulder replacement) on December 17, 2010. Claimant returned to the plant at Cargill the day after she was released from the hospital. (Tr., p. 32) Claimant was on light duty and bid on the neck bones job. Claimant was given permanent restrictions on July 27, 2011, of lifting 10 to twenty pounds with her right upper extremity and no repetitive work over the shoulder and no ladder climbing. (Ex. 17, p. 14)

Claimant reported an injury to her left shoulder on July 27, 2012. (Ex. 3) Claimant developed pain in her left shoulder and retuned to Dr. Galles for that problem. Dr. Galles prescribed Hydrocodone. (Tr. p. 36) Dr. Galles has also provided left shoulder cortisone injections and right shoulder cortisone injections. Claimant testified that she takes tramadol and hydrocodone for her shoulder pain. She said that after she has completed her job she will tell her supervisor and go to the nurse's station and then take hydrocodone and the employer lets her sit in the cafeteria. (Tr. p. 52)

Claimant also had problems with her hands and arm. Claimant reported this to Cargill on August 30, 2012. (Ex. 4) Claimant was referred to Benjamin Paulson, M.D., who did surgery on the right elbow and right hand in 2012. Dr. Paulson performed another carpel tunnel release in 2014. (Tr. p. 35).

Dr. Galles performed another shoulder surgery in April 2016. Dr. Galles released claimant to return to the neck bones position in July 2016. (Tr. p. 54)

Claimant testified that on her visit with Dr. Galles in November 2016 she was told that her rotator cuff was tearing and that Dr. Galles was concerned about it. (Tr. p. 55)

Claimant testified that three to four nights a week she sleeps in a recliner due to her shoulder pain. (Tr. pp. 59-60) Claimant has her daughter help with vacuuming in the house. Claimant testified she does not believe she can perform her prior jobs at Cargill.

Claimant testified that she works 48 – 50 hours every week. (Tr. p. 98) Claimant's seniority in the plaint is number 15 and number 1 in her department. (Tr. p. 98) Claimant currently makes $15.05 per hour. (Ex. 34, p. 47) Claimant testified that she thought her lifting restriction was 10 – 20 pounds and was not aware until recently her restrictions for a time period were 30 – 40 pounds. (Tr. p. 100)

Claimant is not looking for other work and testified that she needs her insurance. (Tr. p. 106) She said that she is going to work as long as she can for Cargill/JBS. (Ex. 34, p. 87)

I find the claimant to be a very credible witness. From my observation of her demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I

find claimant credible. I did not find the minor differences in the deposition testimony and her live testimony to be significant.

The medical evidence shows that claimant was seen in the Emergency Department of the Ottumwa Regional Hospital on December 12, 2009, due to pain in her arm after her fall at work on December 10, 2009. (Ex.13, p. 1) Claimant was provided a prescription and discharged.

Claimant received care through physicians who came to the Cargill plant. (Ex. 14. pp 1 – 52) Gregory Clem, M.D., on December 21, 2009, advised claimant to start physical therapy as soon as possible and prescribed additional medication. (Ex. 14, p. 1) On February 3, 2010, Dr. Clem recommended a MRI of the shoulder. (Ex. 14. p. 4) A February 11, 2010, MRI showed a full thickness rotator cuff tear and a posterior humeral head defect most likely a Hill-Sachs deformity. (Ex. 14, p. 5) Claimant was referred by Cargill to Dr. Jameson.

On March 11, 2010, Dr. Jameson examined claimant and recommended a right shoulder surgery. (Ex. 16, p. 1) On April 7, 2010, Dr. Jameson performed surgery. His postoperative diagnosis was " Right shoulder impingement syndrome, partial rotator cuff tear, degenerative joint disease, large Hill-Sachs lesion, and impingement" (Ex. 16, p. 5) Dr. Jameson retuned claimant to office work the day after surgery with restrictions. (Ex. 16, p. 2) Claimant had a CT scan and on May 20, 2010, Dr. Jameson recommended a referral to the University of Iowa Hospital and Clinics (UIHC) to consider doing a rotational osteotomy. (Ex. 16. p. 9)

Claimant was referred to Kyle Galles, M.D. On October 18, 2010, Dr. Galles recommended a "shoulder arthroplasty total." (Ex. 17, p. 2) On November 8, 2010, Dr. Galles responded to a letter from defendants as to whether claimant's condition was related to her work injury. Dr. Galles wrote:

> With regard to Cynthia Kirkendall and your letter to me dated October 22, 2010, it is my opinion that Ms. Kirkendall's current problems seem to be directly related to the fall she took in December, 2009. Radiographs and MRI scan show that she sustained a dislocation of her shoulder causing a significant fracture of the anterior rim of the glenoid and a large impression Hill-Sachs type defect in the posterior aspect of her humeral head again. That is a direct result of the dislocation. The amount of bone loss on the glenoid or socket side of the joint is significant and she continues to have recurrent instability symptoms. In other words, each time the ball comes out of the socket further damage is being done each and every time to the cartilage on the ball and socket side of the joint. At this point and time, I do not think this can be reconstructed short of doing at least a partial shoulder replacement and most likely involve a bone grafting procedure to build up what bone has been lost from the anterior rim of her shoulder socket. Again, I am not aware of any other significant injury she may have

> had to this shoulder which could have caused a dislocation of this magnitude in the past.

(Ex. 17, p. 4)

On December 17, 2010, Dr. Galles performed a right total shoulder arthroplasty. His postoperative diagnosis was ,"Right posttraumatic shoulder arthrosis." (Ex. 17, p. 5) Claimant testified she was kept in the light duty room for about year after this surgery. Claimant said in her deposition:

> A. Yeah. It was almost a year, because I got tired of being in that little blue room with the door shut all the time with no windows. And before that, after Jameson's surgery I was in the little blue room too.

(Ex. 34, p. 62)

On February 11, 2011, Robert Gordon, M.D., determined that claimant could work either of the CT neck bone job and the CT sort skirt meat job as long as she followed Dr. Galles' restrictions. (Ex. 14, p. 10) On May 12, 2011, Dr. Galles recommended a 10 pound lifting restriction. (Ex. 17, p. 13) On May 23, 2011, Dr. Gordon retuned claimant to full duty, within her restrictions. (Ex. 14, p. 14)

On February 14, 2013, Sandra Elliott, APN-C, noted claimant had reached MMI and that claimant could continue her light duty work, permanent restrictions. (Ex. 14, p. 27)

On July 27, 2011, Dr. Galles found claimant to be at maximum medical improvement (MMI) and provided restrictions of 10 to 20 pounds lifting with her right upper extremity, no repetitive over the shoulder work and no climbing ladders. (Ex. 17, p. 14) On September 22, 2011, Dr. Galles provided an impairment rating of 22.4 percent of the upper extremity. (Ex. 17, p. 17)

On December 14, 2011, claimant underwent an EMG of her right upper extremity On December 14, 2011, the results were consistent with right carpel tunnel syndrome. (Ex. 14, p. 20)

On January 19, 2012, Benjamin Paulson, M. D., examined claimant for her right hand pain. Dr. Paulson opined that claimant had right carpel tunnel syndrome and also a symptomatic cubital syndrome. (Ex. 17, p. 21) On March 30, 2012, Dr. Paulson informed defendants that claimant was not at MMI for her right carpel tunnel syndrome. (Ex. 17, p. 26) On May 24, 2015, Dr. Paulson provided claimant a second injection. (Ex. 17, p. 33) On August 14, 2012, he performed surgery on the claimant's right arm. His postoperative diagnosis was, "Right cubital tunnel syndrome and right carpel tunnel syndrome." (Ex. 17, p. 39) On January 10, 2013, Dr. Paulson found claimant at MMI for her right cubital tunnel syndrome and right carpel tunnel syndrome. He provided no restriction other than advising claimant to follow Dr. Galles' restrictions. (Ex. 17, p. 55)

On January 10, 2013, Dr. Paulson opined claimant had a 6 percent permanent rating under the AMA Guides to the Evaluation of Impairments, 5th Ed. (Ex. 17, p. 56) On May 8, 2013, claimant was having right arm pain and saw Dr. Paulson. Dr. Paulson's assessment was, "Medial epicondylitis" and he provided an injection and referred claimant to physical therapy. (Ex. 17, p. 59) On February 6, 201, Dr. Paulson performed another injection. (Ex. 17, p. 81) On March 27, 2014, Dr. Paulson provided another injection and limited right hand activity to no more than 6 times a minute. (Ex. 17, p. 87)

On May 12, 2014, claimant had an EMG of her right arm. The assessment showed carpel tunnel syndrome and that the nerve conductions show a very mild right median sensory delay at the wrist, but otherwise normal. (Ex. 17, p. 90)

On July 15, 2014, Dr. Paulson performed a second carpel tunnel release surgery. (Ex. 17, p. 101) On November 12, 2014, Dr. Paulson did a repeat right medial epicondyle injection and limited claimant to no more than 10 right hand activities a minute. (Ex. 17, p. 117)

On February 5, 2015, Dr. Paulson found claimant to be at MMI and did not provide any restrictions. (Ex. 17, p. 125) On February 5, 2015, Dr. Paulson provided claimant with a 4 percent impairment rating under the AMA Guides. (Ex. 17, p. 127) On December 7, 2015, he confirmed to defendants he provide claimant a 4 percent upper extremity rating. (Ex. 17, p. 137)

On May 22, 2015, claimant reported to Dr. Paulson that she was having right long finger locking over the past few weeks and followed up on the EMG. Dr. Paulson injected the finger. He also recommended repeat right carpel tunnel release procedure. (Ex. 17, p. 92) Dr. Paulson wrote on June 30, 2014, that claimant's carpel tunnel and work was not the cause of claimant's right long trigger finger.

On April 5, 2012, Dr. Gales recommended that Cargill modify claimant's work to lifting no more than 10 pounds for 3 to 4 weeks as claimant's shoulder was causing her more difficulty. (Ex. 17, p. 28) On May 9, 2012, Dr. Galles provided claimant with a cortisone injection in her shoulder. (Ex. 17, p. 29)

On September 26, 2012, claimant saw Dr. Galles for increasing pain in her left shoulder. Dr. Galles provided claimant with a cortisone injection in her left shoulder. (Ex. 17, p. 46) On November 8, 2012, claimant had a right shoulder injection. (Ex. 17, p. 51) On December 12, 2012, Dr. Galles assessed claimant with "1. RIGHT total shoulder arthroplasty. 2. LEFT shoulder impingement." And he found claimant at MMI for both conditions and put her on permanent restrictions of 10 – 20 pounds and no repetitive work over shoulder with both extremities. (Ex. 17, p. 54) On February 7, 2013, Dr. Galles wrote that claimant did not have a ratable impairment for the left shoulder and that she should minimize overhead activities with her left arm. (Ex. 17, p. 57) On June 6, 2012, claimant was having her right shoulder locked and an increase in pain. Dr. Galles provided a subacrominal injection of the right shoulder. (Ex. 17, p. 63)

On October 30, 2013, Dr. Galles provided another right shoulder injection. (Ex. 17, p. 74) On December 4, 2013, claimant had a left shoulder injection. (Ex. 17, p. 77) On June 4, 2014, Dr. Galles provided claimant with a right shoulder injection. (Ex. 17, p. 95) On September 3, 2014, Dr. Galles injected claimant's left shoulder. (Ex. 17, p. 111) On October 8, 2014, Dr. Galles injected the claimant's right shoulder. (Ex. 17, p. 115) On January 21, 2015, claimant had a left shoulder injection. (Ex. 17, p. 123) On March 11, 2015, June 11, 2015, and October 21, 2015, claimant had a right shoulder injection. (Ex. 17, pp. 129, 131, 135)

On December 2, 2015, Dr. Galles wrote defendants that his rating for the claimant had not changed and it still was 23 percent to the upper extremity and 14 percent to the body as a whole. (Ex. 17, p. 136)

On March 2, 2016, claimant had a left shoulder injection. Dr. Paulson also recommended a right shoulder scope with sub acromial decompression. (Ex. 17, pp. 139, 140) This surgery was performed on April19, 2016. The claimant had a right shoulder arthroscopic acromioplasty and the postoperative diagnosis was "Right shoulder impingement." (Ex. 17, p. 142)

Dr. Galles found claimant to be at MMI on July 7, 2016. (Ex. 17, pp. 148, 149) On August 1, 2016, Dr. Galles found that claimant had a 19.4 percent upper extremity impairment to her right upper extremity. He said generally he recommends no lifting over 30-40 pounds. (Ex, 17, p. 151)

On September 23, 2016, Dr. Galles responded and filedl out a questionnaire prepared by the defendants. Dr. Gales agreed that he provided a 19.4 percent upper extremity rating on August 1, 2016, and should limit overhead lifting and lifting to 30 – 40 pounds. Dr. Gales agreed that claimant had a zero impairment rating for her left shoulder. (Ex. 17, pp. 152, 153)

On November 28, 2016, Dr. Galles provided an injection into each shoulder. (Ex. 17, p. 157)

On December 7, 2016, Dr. Galles responded to a letter and filled out a questionnaire from claimant. Dr. Galles responded that the previous rating of 19.4 percent would now be higher due to loss of mobility. Dr. Galles also responded that due to concern for the rotator cuff he would suggest a 10- 20 pound lifting limit. (Ex. 17, p. 159) Dr. Galles responded that claimant's job cutting neck bones may be a factor in a risk of worsening pathology and increased symptoms. (Ex. 17, p. 160)

On September 30, 2015, Michael O'Neil, M.D., issued an independent medical examination (IME) report. (Ex. 22, pp. 1 – 9) He provided an opinion concerning claimant's' right shoulder and did not examine the left shoulder. He opined that claimant's right elbow and wrist problems were not directly and casually related to the right shoulder injury. (Ex. 22, p. 7) Dr. O'Neil provided a 33 percent impairment to the right upper extremity. He recommended no lifting more than 10 – 15 pounds frequently

and no use of the right arm above the shoulder. . He did not believe that the neck bones position, as being performed, exposed claimant to undue risk of re-injury. (Ex. 22, p. 9) The record shows that claimant's attorney paid for this IME. (Ex. 22, p. 10) There is no evidence that defendants paid for this examination.

On September 23, 2014, Suni Bansal, M.D., performed an IME. Dr. Bansal opined claimant had a 30 percent upper extremity impairment, and 18 percent to the whole body due to the right shoulder injury. (Ex. 24, p. 26) Dr. Bansal provided restrictions of no lifting greater than 10 pounds occasionally, or 5 pounds frequently with the right arm and no lifting with right arm above shoulder level. (Ex. 24, p. 27) For the right arm carpel tunnel, Dr. Bansal provided a 4 percent upper extremity rating and for the right elbow, ulnar nerve component, a 5 percent upper extremity rating. (Ex. 24, pp. 27, 28) Dr. Bansal stated that he was unable to provide a permanent impairment for the left shoulder as no MRI has been performed. However,in the absence of additional medical testing he assigned a rating of 2 percent of the whole body. (Ex. 24, pp. 30, 31) Dr. Bansal recommended lifting restrictions for the left shoulder of occasionally 25 pounds or 15 pounds frequently with no lifting over 5 pounds over the shoulder. (Ex. 24, p. 33) On December 12, 2016, Dr. Bansal reviewed an additional note of Dr. Galles from November 26, 2016. He noted that Dr. Galles had concerns about a rotator cuff tear and that the next viable surgical option for claimant could be a reverse shoulder replacement. (Ex. 24, p. 35)

An undated deposition of Dr. Bansal was defendants Exhibit A. The deposition shows that Dr. Bansal earns substantial income performing IMEs. (Ex. A, pp. 2, 3)

I find that the medical evidence and claimant's testimony show that the claimant's right shoulder and right carpel tunnel and cubital tunnel symptoms were caused by her fall at work on December 10, 2009. I find that claimant's left shoulder symptoms are a sequela to her right shoulder injury.

Given Dr. Galles' most recent concerns that claimant may have had additional right shoulder difficulties, I find that she is restricted to lifting no more than 10- 20 pounds on regular basis and no lifting above her right shoulder and moderate lifting with her left arm above her shoulder. She cannot use vibratory tools and scissors nor have extensive/prolonged used of her right hand and arm.

Kent Jayne,M.B.A., M.A., C.R.C., V.L.C.P., C.CM., provided a vocational assessment of the claimant on November 13, 2016. (Ex. 27, pp. 1 – 22) Mr. Jayne stated:

> If she were to lose her employment at JBS/Cargill, Ms. Kirkendall would not be employable in the open labor market. Her failed scores in fine motor coordination, finger dexterity, and manual dexterity with regard to a more likely norm group for work selection, as well as her limitations as set forth by Dr. Galles would render Ms. Kirkendall vocationally disabled at the present time. At nearing 62 years of age, she is an individual of advanced

> age under Social Security guidelines with a very narrowed bandwidth of potential residual transferability if any remains at all. Given her test scores as noted above, and her limitations as well as her age, she retains no residual marketable transferable skills to the labor market. Further vocational services would not be appropriate, and would be potentially psychologically devastating for her as she would face failure due to insurmountable barriers in seeking other employment, should she lose her present employment for any reason.

(Ex. 27, p. 15)

Mr. Jayne concluded that even with substantial accommodation he did not believe claimant could perform competitive work. (Ex. 27, p. 22) Mr. Jayne submitted an invoice to claimant for 15.90 hours work for a total of $3,111.75. (Ex. 29, p. 29)

Lana Sellner, M.S., C.R.C., performed a vocational assessment on November 18, 2016. Ms. Sellner stated that based upon the 30 – 40 pound restriction of Dr. Galles, claimant can work up to the medium category of work and using Dr. Bansal's restrictions Ms. Sellner concluded claimant could work up to a selectively chosen medium physical demand level[1]. (Ex. 30, p. 7) Ms. Sellner, taking a "snap shot" of positions, identified that claimant could be a security officer, or host at Applebee's under Dr. Bansal's restrictions. (Ex. 30, pp. 9, 10) Using Dr. Galles and Dr. Paulson's restrictions she identified a number of positions including food service at the hospital machine operator, quality inspector, delivery driver-pizza and Front of the House restaurant work. (Ex. 30, pp. 10, 11) On December 12, 2016, claimant supplemented her report after receiving additional information that Dr. Galles had provided a 10 -20 pound lifting restrictions. In reviewing test results Ms. Sellner incorrectly identified claimant as "Ms. Simpson", although in other parts of the report correctly identified claimant. (Ex. 30, p. 15) Ms. Sellner did not agree that claimant could not benefit from vocational services or that Mr. Jayne's citations to chronic pain was not supported. (Ex. 30, pp. 16, 17)

Defendants assert claimant's average gross income is $504.94, which results in a weekly workers' compensation rate of $353.99, with married and 2 exemptions. (Ex. C, pp. 1 - 22) Claimant did not offer any contrary evidence. I find the claimants weekly rate to be $353.99.

RATIONAL AND CONCLUSIONS OF LAW

EXTENT OF IMPAIRMENT

[1] Ms. Sellner incorrectly referred to the claimant a "Ms. Smith" in this portion of her report. (Ex. 30, p. 7)

The parties have stipulated claimant has an injury that arose out of and in the course of her employment. One of the primary disputes in this case is the extent of disability.

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Defendants assert that clamant has not suffered a loss of wages since her injury, is currently working for JBS at 48 – 58 hours per week and has significant seniority at work. Defendants state that claimant is able to perform many aspects of her prior work at Cargill. Defendants also have a vocational report that has identified jobs that Ms. Sellner believes claimant is capable of performing.

Claimant asserts that she has a substantial industrial disability. Claimant has significant limitations. She receives ongoing injections in both shoulders. Both Dr. Galles and Dr. Bansal have imposed significant lifting limitations. Mr. Jayne opines that claimant will not be able to work if she is no longer employed in the Ottumwa plant.

I found both vocational reports have significant weakness and were of marginal assistance in this claim. Mr. Jayne dwelt a significant portion of his report on chronic pain. While relevant, it was an overemphasis of this element of claimant's symptoms. It is certainly a real medical concern for claimant; however the medical evidence does not

support the hyper importance that he included in the report. Mr. Jayne's opinion that claimant could not benefit form vocational service also appears to be hyperbolic.

Mr. Jayne did conduct some testing and evaluation of claimant's vocational skills that are relevant in making a determination of claimant's vocational skills.

Ms. Sellner identified potential jobs for claimant. The pizza driver required lifting up to 40 pounds as did the Front of the House restaurant job. The quality inspector required packing and stacking of boxes. There was no discussion as to how age and limited education might realistically affect transition into a new profession or how likely a person with 29 years of working in a meat packing plant, who was over 60 and with significant limitations, would do in the competitive labor market. Ms. Sellner's first report relied upon lifting limitations that were modified and reduced by Dr. Galles.

Claimant's age is not a positive factor. She did graduate from high school but has no additional education. She is an officer in the union and is able to keep minutes of meetings by hand. Claimant does not have vocationally usable computer skills. Claimant has worked for over 29 years in the Cargill plant in Ottumwa. The record shows an extremely strong work ethic and dedication by claimant. Claimant testified that after she completes her work day she often is in a lot of pain. Claimant is currently required to work at least 48 hours a week. She continues to receive shots in her shoulders on a regular basis. She visits the nurse's station at work. Claimant needs to sleep in a recliner three to four nights a week. Claimant has, to date, two carpel tunnel surgeries and one cubital tunnel surgery. She has had two shoulder surgeries including a total shoulder replacement. Claimant has significant lifting limitations for both her shoulder and limitation with vibratory tools with her right arm. In reviewing the medical records it is remarkable about how dedicated claimant has been in working with pain and limitations over many years. Claimant has been performing light work for a number of years and is still experiencing pain and limitations in the shoulders. Claimant has worn out her right shoulder and the replaced right shoulder working for Cargill.

Considering all the factors of industrial disability I find claimant has a 60 percent loss of earning capacity. I find claimant has an industrial disability of 60 percent, entitling her to 300 weeks of permanent partial disability benefits. The industrial disability award I have ordered considers the fact that claimant is still employed and would be substantially higher if she were no longer working in the plant.

RATE

Claimant has argued that the correct rate should be determined by using the gross pay from the center column of Exhibit C Employee Earnings Record. The difficulty with that is it appears to include hours over 40 per week and that would include time and a half payments, which is not allowed. The best evidence in the record is defendants' calculation found in Exhibit C, page one. This calculation is the most accurate evidence provided by either party. I find claimant's gross weekly earnings to be $504.94 and her weekly workers' compensation rate to be $353.99.

COSTS

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expenses is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The claimant paid the filing fee in this case. Claimant's deposition was used as an exhibit in this case and was submitted as a joint exhibit. I award claimant these costs.

I also award a portion of Mr. Jayne vocational report. As stated above I did not find portions of this report useful or material to some of the issues in this case. I find that an award of $2,000.00 is appropriate in this case.

Defendants have objected to the payment of the IME of Dr. Bansal. Claimant's brief states the IME of Dr. Bansal has been paid. Defendants argue in their brief that Dr. Bansal's IME fee should not be paid as it is a second IME and the cost is not reasonable. While there are two IME in the record, Dr. O'Neil and Dr. Bansal, there is no evidence that defendants paid for the report by Dr. O'Neil.

I find that claimant obtained the IME of Dr. Bansal after the defendants obtained a rating from physicians they had retained and that claimant is entitled to payment of Dr. Bansal's IME fee. Based upon the costs this agency sees in claimant's record, I find that the fee charged by Dr. Bansal for this case is reasonable. Defendants shall pay the costs of $3,950.00. Claimant is also entitled to medical mileage of $105.84 for the IME.

The claimant is not entitled to the copy fees for records and for consulting with Dr. Galles.

I award claimant costs $6,155.84. ($100.00 + $3,950.00 + $2,000.00 + $105.84 = $6,155.84)

ORDER

Defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits at the weekly rate of three hundred fifty three and 99/100 dollars ($353.99) commencing on July 28, 2011.

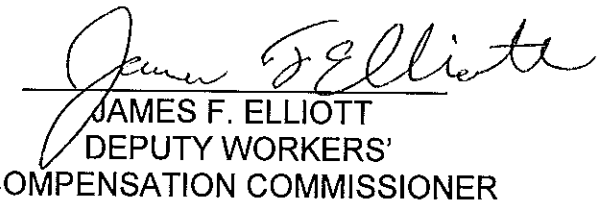
Defendants shall pay any past due amounts in a lump sum with interest provided by law.

Defendants shall pay costs to the claimant in the amount of six thousand one hundred fifty-five and 84/100 dollars ($6,155.84).

Defendants shall have credit for permanent partial disability benefits they previously paid as stipulated in the Hearing Report.

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

Signed and filed this 18th day May, 2017.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/SKB

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.