BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAY 26 2016
WORKERS' COMPENSATION

TARA LINT f/k/a WILSON, Claimant, vs. EMCO/ANDERSEN CORPORATION, Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5052356 ARBITRATION DECISION Head Note Nos.: 1803, 1700

STATEMENT OF THE CASE

Claimant, Tara Lint f/k/a Wilson, filed a petition in arbitration seeking workers' compensation benefits from EMCO/Andersen Corporation, employer, and Old Republic Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on February 7, 2013. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on December 10, 2015, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 5, defendants' exhibits A through F, and the testimony of the claimant.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's industrial disability;

2. Whether claimant is entitled to reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39;

3. Whether defendants are entitled to a credit for permanent partial disability benefits paid in File No. 5029599 pursuant to Iowa Code section 85.34(7); and

4. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 46 years of age at the time of hearing. She resides in Des Moines, Iowa. Claimant graduated high school; she did not pursue any further postsecondary or vocational education or training. Claimant denied possessing any computer skills and indicated she does not personally own a computer. Claimant is left-hand dominant. (Claimant's testimony)

Claimant's work history includes work as a cashier in fast food restaurants and a drug store. She earned a maximum of $5.00 per hour in these positions. Thereafter, claimant worked operating a sewing machine in a manufacturing setting. She earned in the range of $5.00 to $6.00 per hour. (Claimant's testimony; Exhibit E, pages 2-3) Since March 1995, claimant has worked as a production worker for defendant-employer in the storm door division. At the time of hearing, claimant earned $15.94 per hour. (Claimant's testimony; Ex. D, p. 6; Ex. E, p. 3)

Prior to the stipulated work injury in this case, claimant suffered a work-related injury to her right shoulder in the employ of defendant-employer on October 30, 2007. (Ex. E, p. 6) Following a course of conservative treatment, claimant ultimately underwent right shoulder arthroscopy, subacromial decompression and distal clavicle excision. (Ex. F, p. 2) In connection with this injury, claimant underwent a valid functional capacity evaluation (FCE) on September 25, 2009. The FCE found claimant capable of functioning in the light physical demand category, with lifting up to 30 pounds rarely and up to 20 pounds occasionally with the front carry task. Additional limitations included rare crawling and occasional elevated work, standing forward bend, crouching, or ladder use. (Ex. B, pp. 1-3)

Claimant filed a petition for workers' compensation benefits arising out of the October 30, 2007 work injury, which was assigned File No. 5029599. The claim proceeded to arbitration hearing and was the subject of an arbitration decision dated March 18, 2010. The presiding deputy found claimant sustained a 35 percent industrial disability pursuant to Iowa Code section 85.34(2)(u), as a result of the October 30, 2007 right shoulder injury. He awarded claimant 175 weeks of permanent partial disability benefits, payable at the weekly rate of $392.93. (Ex. F, pp. 1-5) Claimant testified defendants paid the permanent disability benefits awarded in the arbitration decision. (Claimant's testimony)

Following the arbitration hearing, claimant testified she continued to work for defendant-employer without accommodation in the same type of work she performed pre-injury. (Claimant's testimony)

The parties stipulate claimant suffered a work-related injury on February 7, 2013, when her left shoulder snapped while working on the production line. Thereafter, claimant developed pain and a burning sensation of the left shoulder. (Claimant's testimony)

On February 12, 2013, claimant presented to Iowa Methodist Occupational Health for evaluation with Richard McCaughey, D.O. Following interview and examination, Dr. McCaughey assessed left shoulder tendinitis/possible impingement syndrome. He recommended a course of conservative treatment, including use of Aleve, icing, and work restrictions regarding use of the left arm. (Ex. 1, pp. 1-2)

Claimant returned to Dr. McCaughey for evaluation on February 28, 2013 with continued complaints of stiffness and soreness of the left shoulder. Dr. McCaughey assessed left shoulder bursitis/possible impingement and referred claimant for orthopedic consultation. (Ex. 1, p. 3)

At Dr. McCaughey's referral, on March 12, 2013, claimant presented to Des Moines Orthopedic Surgeons for evaluation with Barron Bremner, D.O. Claimant reported a burning sensation of her left shoulder, with radiation up into the base of the neck and down to the elbow. Dr. Bremner examined claimant and opined her x-rays revealed a type II acromion. Dr. Bremner assessed left shoulder impingement and began a course of conservative care. He performed a subacromial injection, recommended physical therapy, and advised claimant to use anti-inflammatories. Dr. Bremner also imposed work restrictions of a maximum 5-pound lift and no use of the left arm above chest height. (Ex. 2, pp. 1-3)

On April 9, 2013, claimant returned to Dr. Bremner. Claimant expressed some improvement, with Dr. Bremner noting full range of motion, but continued pain with impingement maneuvers. Dr. Bremner assessed left shoulder impingement, recommended continued physical therapy, and maintained the existing work restrictions. (Ex. 2, pp. 4-5)

Claimant returned to Dr. Bremner on May 21, 2013. At that time, claimant reported improvement in her left shoulder, but worsening of the left elbow. Dr. Bremner noted symptoms had been present in both locations throughout treatment, but the shoulder pain had recently improved. He assessed improving left shoulder tendinitis and left elbow lateral epicondylitis. Dr. Bremner recommended physical therapy and use of Tylenol and a tennis elbow strap. He continued claimant's existing work restrictions, with the addition of an allowance for claimant to wear the elbow strap while working. (Ex. 2, pp. 6-7)

On June 18, 2013, claimant presented to Dr. Bremner with complaints of continued soreness. Dr. Bremner assessed pain of the left shoulder and left elbow. He performed a left lateral epicondyle injection and continued the order for physical therapy. Dr. Bremner maintained claimant's existing work restrictions. He also ordered a left shoulder MRI. (Ex. 2, pp. 8-9) Claimant underwent the ordered MRI on July 1, 2013. The radiologist opined the MRI revealed mild supraspinatus tendinopathy without discrete partial or full thickness tear, and mild subacromial subdeltoid bursitis. (Ex. 3, p. 1)

Following MRI, claimant returned to Dr. Bremner on July 9, 2013. Claimant reported continued left shoulder pain. Dr. Bremner reviewed claimant's MRI and assessed left shoulder impingement with rotator cuff tendinitis and acromioclavicular (AC) joint arthritis. He recommended use of anti-inflammatories and lessened claimant's work restrictions to allow for lifting up to 15 pounds and no use of the left arm above chest height. (Ex. 2, pp. 10-11)

On August 20, 2013, claimant returned to Dr. Bremner with continued complaints of left shoulder pain. Following examination, Dr. Bremner assessed left shoulder AC joint pain and subacromial impingement. He recommended a left shoulder arthroscopy, subacromial decompression and distal clavicle excision. (Ex. 2, p. 12)

Claimant underwent surgery on September 6, 2013, as performed by Dr. Bremner. The procedure consisted of left shoulder arthroscopy, subacromial decompression and distal clavicle excision. Dr. Bremner noted a post-operative diagnosis of left shoulder impingement with distal clavicle arthritis. (Ex. 2, pp. 14-15) Following surgery, claimant continued to follow up with Dr. Bremner. Post-surgical care included removal from work and commencement of a physical therapy program. (Ex. 2, p. 16)

Claimant returned to Dr. Bremner in follow up on October 3, 2013. At that time, Dr. Bremner ordered additional physical therapy and released claimant to work with restrictions. Restrictions included no lifting over 1 pound with both hands and no use of the left arm above chest height. (Ex. 2, pp. 17-18)

On November 7, 2013, claimant returned to Dr. Bremner and expressed frustration and anger that her condition had not improved to a greater degree. Dr. Bremner informed claimant he believed part of her pain syndrome was related to anxiety. He also raised the possibility of depression, which claimant adamantly denied. Dr. Bremner advised claimant to follow up for these conditions with her primary care provider. Dr. Bremner informed claimant it takes time to recover from such an injury and assured her there was nothing structurally wrong within the shoulder. He imposed work restrictions of no lifting over 10 pounds and no use of the left arm above chest height. (Ex. 2, pp. 19-20)

On December 10, 2013, claimant returned to Dr. Bremner for evaluation. Claimant complained of some continued pain. Dr. Bremner noted claimant

demonstrated near full range of motion, but did not possess the strength necessary to perform heavy-natured work. Accordingly, he recommended work hardening to accompany physical therapy. Dr. Bremner maintained claimant's existing restrictions, with the addition of avoidance of repetitive motions. (Ex. 2, pp. 21-22)

Claimant returned to Dr. Bremner on January 28, 2014 and reported some continued pain and stiffness. Dr. Bremner noted claimant had experienced little progress in physical therapy. On examination, Dr. Bremner noted claimant made painful facial expressions with range of motion testing, as well as demonstrated notable weakness. Dr. Bremner noted that based on his findings at the time of surgery and given the procedure he performed, he would have anticipated claimant to be in a better condition than she demonstrated. Dr. Bremner indicated he was unable to correlate some of claimant's symptoms to objective findings. He expressed belief claimant "may have to put up with some degree of pain in the shoulder and some of this pain may be inexplicable." Based on the findings of surgery and the type of procedure performed, Dr. Bremner opined he had no justification to keep claimant restricted in activities. He advised claimant to return in three-months' time. (Ex. 2, p. 23; Ex. A, p. 1)

On April 29, 2014, claimant returned to Dr. Bremner. She continued to complain of pain and stiffness with extremes of motion. On examination, Dr. Bremner noted stiffness of the bilateral shoulders and decreased range of motion. He noted claimant was quite apprehensive with examination of the left shoulder. Dr. Bremner assessed left shoulder adhesive capsulitis/frozen shoulder and performed a subacromial injection. He advised claimant to continue a stretching program. (Ex. 2, p. 25)

Claimant returned to Dr. Bremner in follow up on July 15, 2014. Claimant complained of some pain and stiffness, but reported improvement over the prior visit. Examination revealed good strength, but pain in extremes of motion. Dr. Bremner opined claimant's shoulder was not stiff enough to warrant manipulation. He indicated he expected continued improvement and opined claimant demonstrated no true basis for the stiffness, which he attributed primarily to claimant's poor pain tolerance and inability to engage in aggressive physical therapy. Dr. Bremner assessed status post left shoulder arthroscopic intervention and placed claimant at maximum medical improvement (MMI). He recommended claimant remain on light duty work assignments, as she was unable to perform heavy tasks. He specifically opined claimant was capable of performing work with the cardboard boxes. (Ex. 2, p. 27; Ex. A, p. 3)

Dr. Bremner subsequently authored a letter dated October 9, 2014, whereby he addressed the extent of claimant's permanent impairment and need for permanent restrictions. Dr. Bremner opined claimant's condition had stabilized and he did not anticipate a need for further surgery. He opined claimant's condition might improve with time and was unlikely to worsen; however, he indicated nonsurgical maintenance care might be necessary. Dr. Bremner confirmed claimant had achieved MMI. (Ex. A, pp. 4-5)

With respect to the extent of claimant's functional impairment, Dr. Bremner opined claimant did not demonstrate impairment of strength and although she complained of pain, pain was not separately ratable. As a result of the distal clavicle excision, Dr. Bremner opined claimant sustained an 8 percent left upper extremity impairment. He also opined claimant sustained upper extremity impairment due to decrements in range of motion: 4 percent for flexion, 3 percent for abduction, and 2 percent for internal rotation. He opined a total combined permanent impairment of 17 percent left upper extremity, the equivalent of 10 percent whole person. Dr. Bremner imposed a work restriction precluding claimant from working above shoulder height. (Ex. A, pp. 4-5)

Following the right shoulder injury, claimant was removed from her pre-injury production position and placed in a position inserting instructions into cardboard holders and placing the cardboard into a machine. Claimant testified she is the only person who performs this task exclusively. She testified the other workers on the line rotate through positions, but she occupies only this station. Claimant testified it would be difficult for her to perform the other rotating jobs on the production line. She expressed belief her current job was a light duty position which ultimately simply became permanent. She is able to set her own pace of work. (Claimant's testimony)

Claimant admits she has not lost any wages as a result of the move to this singular position, as all production workers receive the same rate of pay per union contract. She earns $15.94 per hour; up from the $14.11 she earned at the time of the 2007 right shoulder injury. Although claimant was uncertain of her hourly wage at the time of the 2013 left shoulder injury, claimant testified she receives the same raises as other production workers, which included two annual raises since the date of injury. (Claimant's testimony)

Claimant testified she enjoys her job and intends to remain employed at defendant-employer. She has not attempted to bid into any other positions or applied for work outside of defendant-employer. Claimant testified she continues to suffer with left shoulder pain, but has not missed work as a result of symptoms. She self-treats with use of Tylenol, Advil or Aleve. (Claimant's testimony)

At the arranging of claimant's attorney, on September 8, 2015, claimant presented for independent medical evaluation (IME) with Jacqueline Stoken, D.O. Dr. Stoken issued a report containing her findings and opinions dated September 21, 2015. In connection with the IME, Dr. Stoken reviewed records pertaining to the left and right shoulder conditions. (Ex. 4, pp. 1-4)

Dr. Stoken interviewed claimant, at which time claimant reported improvement following surgery, but continued left shoulder pain. (Ex. 4, p. 1) Claimant described her left shoulder pain as "aching and tiring," ranging from a level 1 to level 2 on a 10-point scale. (Ex. 4, p. 4) She noted pain worsened with work, sleep, lying in a single position for too long, reaching up, or lifting. Claimant reported her pain interfered mildly with activities of daily living and moderately with sleep. Claimant reported receiving relief

with use of Aleve and Tylenol. Dr. Stoken noted claimant continued to work for defendant-employer under permanent restrictions. (Ex. 4, pp. 4-5)

Following records review, interview, and examination, Dr. Stoken assessed status post work injury with left shoulder impingement syndrome, surgically treated with left shoulder arthroscopy, subacromial decompression, and distal clavicle excision; and chronic left shoulder pain. Dr. Stoken opined claimant sustained permanent impairments of 13 percent left upper extremity for decrements in range of motion and 10 percent left upper extremity for the performed distal clavicle excision. Dr. Stoken found a combined impairment of 22 percent left upper extremity or 13 percent whole person. (Ex. 4, p. 6)

Dr. Stoken recommended permanent restrictions of avoidance of work at or above shoulder level and avoidance of lifting more than 10 pounds frequently and 20 pounds occasionally. She opined claimant was capable of functioning in the light physical demand category. (Ex. 4, p. 6) Additionally, Dr. Stoken opined if claimant were to lose her current employment with defendant-employer, claimant would be unable to transition into another manual labor job requiring repetitive use of the upper extremities. Dr. Stoken opined claimant would then be limited to sedentary or light level work without repetitive use of the upper extremities. (Ex. 4, p. 7)

On October 6, 2015, claimant met with vocational specialist Phil Davis, M.S. Mr. Davis performed a records review and issued a report containing his opinions dated November 9, 2015. (Ex. 5, p. 1) During interview, claimant reported she graduated high school in 1987. Claimant also noted she received academic assistance while in junior high and high school; during high school, claimant reported she was placed in "behavioral disability" classes. Following high school, claimant completed a six-week bank teller course; she never used this training in her employment history. Claimant denied possessing computer skills and indicated she did not personally own a computer. Mr. Davis noted claimant's work history included as a cashier until 1990, sewing in a manufacturing setting until 1995, and from 1995 to the present as a production worker for defendant-employer. (Ex. 5, p. 2)

Mr. Davis reviewed selected medical records regarding the right and left shoulder work injuries. Mr. Davis noted claimant received permanent restrictions as a result of the prior right shoulder injury. He noted Dr. Jones limited claimant of occasional overhead lifting and a maximum lift of 40 pounds occasionally and 20 pounds frequently with the bilateral hands from floor to waist. He also noted claimant's FCE placed her in the light physical demand category, with the ability to lift up to 30 pounds rarely and 20 pounds occasionally with front carry tasks. (Ex. 5, pp. 2-3) With respect to the left shoulder, Mr. Davis noted Dr. Bremner imposed a restriction precluding claimant from working above shoulder height. He also noted Dr. Stoken recommended restrictions limiting claimant to the light physical demand category, with no work at or above shoulder level and limiting lifting to 10 pounds frequently or 20 pounds occasionally. Mr. Davis also noted Dr. Stoken's opinion that if claimant were unable to continue in her

current employment, she would be unable to perform manual work requiring repetitive use of the upper extremities. (Ex. 5, pp. 3-4)

Mr. Davis performed a vocational analysis and compared claimant's post-injury restrictions with her past employment experience. He noted claimant had only retained employment in unskilled manual labor and in the fast food industry. He opined each of these positions fell in the light to medium physical demand categories. (Ex. 5, p. 4) He further opined claimant's past employment required stooping, bending, kneeling, crouching and crawling, as well as full range of motion of the bilateral upper extremities, including overhead reaching. Additionally, he noted claimant's past employment required work at a fast, production pace. (Ex. 5, p. 5)

Mr. Davis opined the restrictions recommended by Dr. Bremner and Dr. Stoken would place claimant in the "sedentary to aspects of light" physical demand category. He opined claimant was limited in lifting and range of motion of the arms to such an extent as would preclude claimant's return to past employment, without accommodations. Mr. Davis opined claimant was unable to perform the essential functions of her past employment positions. (Ex. 5, p. 5) Mr. Davis opined if defendant-employer did not accommodate claimant, claimant would be precluded from obtaining or maintaining employment in a similar factory setting, or in any of her prior employment positions. (Ex. 5, pp. 5-6)

Mr. Davis opined claimant lacked the education, computer skills, and knowledge bases typically required in the majority of sedentary occupations. He questioned claimant's ability to retrain, given her need for academic assistance in high school. Mr. Davis noted claimant then earned $15.94 per hour, plus benefits, in her employment for defendant-employer. He opined claimant would be unable to secure commensurate compensation were it not for defendant-employer's accommodations. He further opined claimant would be otherwise limited to entry level employment positions, earning $7.25 per hour. (Ex. 5, pp. 5-6)

At the time of evidentiary hearing, the parties stipulated defendants had paid 55 weeks of permanent partial disability benefits at the weekly rate of $416.21.

CONCLUSIONS OF LAW

The first issue for determination is the extent of claimant's industrial disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

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 was 46 years of age at the time of evidentiary hearing. She is left-hand dominant and resides in Des Moines, Iowa. Claimant's formal education consists of graduation from high school, with evidence indicating she required academic assistance in order to complete this course of education. Claimant also completed a six-week course of training as a bank teller shortly after high school graduation; however, she never used this training in her employment history. The training is likely largely outdated at this time, given the rise of technology in the intervening decades. Claimant possesses no computer skills and denies owning a computer. Claimant's employment experience is limited to minimum wage work as a cashier or operating a sewing machine up until 1995, at which point she began work at defendant-employer. Claimant has remained employed as a production worker for defendant-employer for approximately 20 years.

While performing her work duties for defendant-employer, claimant suffered a work related injury to her right shoulder on October 30, 2007, which ultimately required right shoulder arthroscopy, subacromial decompression and distal clavicle excision. Claimant underwent an FCE following the right shoulder injury which found claimant capable of functioning in the light physical demand category, with lifting up to 30 pounds rarely and up to 20 pounds occasionally with the front carry task. The FCE also noted limitations of rare crawling and occasional elevated work, standing forward bend, crouching, or ladder use. The extent of claimant's industrial disability as a result of the October 30, 2007 injury became the subject of an arbitration hearing, following which the presiding deputy determined claimant sustained an industrial disability of 35 percent. Following the October 30, 2007 injury, claimant testified she returned to her job as a production worker, performing the same tasks as pre-injury, without accommodation.

Claimant thereafter, on February 7, 2013, sustained a stipulated left shoulder injury while performing her work duties. Claimant initially received conservative care,

but eventually underwent left shoulder arthroscopy, subacromial decompression and distal clavicle excision. Surgeon, Dr. Bremner, issued a post-operative diagnosis of left shoulder impingement with distal clavicle arthritis. Post-surgical care included work restrictions, physical therapy, and a subacromial injection to treat the development of adhesive capsulitis. Dr. Bremner placed claimant at MMI on July 15, 2014, at which time he recommended claimant continue to work light duty assignments, as she was unable to tolerate heavy work. He specifically opined claimant was capable of performing the light duty assignment involving cardboard boxes. Dr. Bremner subsequently opined claimant sustained a 17 percent left upper extremity or 10 percent whole person impairment, based upon undergoing a distal clavicle excision and range of motion decrements. He also restricted claimant from working above shoulder height.

The only other physician to offer an opinion as to the extent of claimant's permanent impairment and her need for work restrictions is Dr. Stoken. Dr. Stoken also rated claimant's permanent impairment based upon the distal clavicle excision and range of motion decrements, opining claimant sustained a combined impairment of 22 percent left upper extremity or 13 percent whole person. Dr. Stoken recommended permanent restrictions of avoidance of work at or above shoulder level and avoidance of lifting more than 10 pounds frequently and 20 pounds occasionally. In the event claimant was to seek employment outside of defendant-employer, she recommended a further restriction of avoidance of repetitive use of the upper extremities.

Both Drs. Bremner and Stoken opined claimant sustained permanent functional impairment as a result of the performed distal clavicle excision and decrements in range of motion of the shoulder. While the percentage ratings ultimately reached by Drs. Bremner and Stoken are not identical, they fall within a limited range and were computed based on consistent methodologies. Therefore, it is determined the opinions of Drs. Bremner and Stoken regarding the extent of claimant's permanent impairment, 10 and 13 percent whole person, accurately reflect claimant's permanent functional impairment.

Prior to sustaining the February 7, 2013 work injury, a valid FCE revealed claimant was capable of functioning within the light physical demand category. Specifically, the FCE revealed claimant could lift up to 30 pounds rarely and up to 20 pounds occasionally with the front carry task, as well as noted limitations of rare crawling and occasional elevated work, standing forward bend, crouching, or ladder use. Following the February 7, 2013 injury, Dr. Bremner added a further limitation, restricting claimant from working above shoulder height. Dr. Bremner, on January 28, 2014, opined he was unable to correlate some of claimant's symptoms to objective findings and he further lacked justification for imposition of restrictions given his surgical findings and the procedure performed. The restrictions recommended by Dr. Stoken are more limiting of claimant's activities. Dr. Stoken recommended restrictions of avoidance of work at or above shoulder level and avoidance of lifting more than 10 pounds frequently and 20 pounds occasionally. In the event claimant was to seek employment outside of defendant-employer, she recommended a further restriction of avoidance of repetitive use of the upper extremities.

Dr. Stoken's restrictions impose a 10-pound lifting limit on a frequent basis. Claimant's prior FCE did not address the weight claimant could lift on a frequent basis. However, the 20-pound occasional lift remains the same per Dr. Stoken's restrictions as existed in the pre-injury FCE. The only other distinction is Dr. Stoken's mention of avoidance of repetitive use of the upper extremities, should claimant no longer work for defendant-employer.

Upon review of the entirety of the evidentiary record, the undersigned declines to adopt these additional restrictions recommended by Dr. Stoken. Dr. Bremner served as claimant's treating surgeon, who possessed the benefit of observing and evaluating claimant on a number of occasions over the course of over 1 ½ years. His treatment of claimant included arthroscopic intervention. Dr. Bremner subsequently opined that based on the findings observed during arthroscopy, he lacked justification to restrict claimant's activities. He subsequently imposed only an additional, modest restriction. Given Dr. Bremner had the benefit of observing claimant on multiple occasions, including intra-operatively, the undersigned adopts the restrictions set forth by Dr. Bremner over those of Dr. Stoken.

Mr. Davis based his vocational opinions upon the restrictions imposed by both Dr. Bremner and Dr. Stoken. As the undersigned adopts only the restrictions of Dr. Bremner, the probative value of Mr. Davis' ultimate vocational opinions is lessened. However, Mr. Davis' vocational report does provide pertinent details relevant to consideration of the extent of claimant's loss of earning capacity, including claimant's education, likelihood of retraining, and past employment history.

Claimant has demonstrated motivation to continued employment with defendant-employer, having returned to work as a production worker. Claimant remains employed in the same production division; however, she does not rotate amongst job positions on the line like her coworkers. Rather, claimant remains assigned to one such position which involves placing instructions into cardboard. Claimant described the job as a light duty assignment which simply became permanent. Although claimant's job description was not entered into evidence, the undersigned reasonably assumes that if claimant were able to complete the duties required of her pre-injury position, defendant-employer would have returned claimant to her pre-injury duties as opposed to leaving her assigned to only one station.

Nevertheless, claimant testified she enjoys her job and has no intention of seeking other employment. Claimant therefore remains employed full time for defendant-employer, performing job tasks which fulfill a legitimate need for defendant-employer. Claimant's hourly wage is higher than at the time of the February 2013 injury, having received two annual raises since the work injury. Claimant's hourly rate is the same as all other production workers at defendant-employer, as required by union contract.

In the event claimant was unable to retain her current employment with defendant-employer, however, her outlook for obtaining subsequent employment at a

commensurate level of compensation is bleak. Claimant's education is limited to graduation from high school, with evidence indicating she required academic assistance to successfully complete this level of education. Her prospects for retraining are questionable, especially given claimant's lack of computer skills and the prevalence of computer usage in light-natured and sedentary positions. Claimant has never worked in an office-setting, with her entire work history being comprised of unskilled manual labor as a cashier, sewing machine operator, or production worker.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 65 percent industrial disability as a result of the stipulated work-related injury of February 7, 2013. Such an award entitles claimant to 325 weeks of permanent partial disability benefits (65 percent x 500 weeks = 325 weeks), commencing on the stipulated date of July 16, 2014. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $608.00, and claimant was married and entitled to two exemptions. The proper rate of compensation is therefore, $416.21.

The next issue for determination is whether claimant is entitled to reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39. At the time of evidentiary hearing, defendants stipulated payment would be made for Dr. Stoken's IME. No additional determination is required on this issue.

The next issue for determination is whether defendants are entitled to a credit for permanent partial disability benefits paid in File No. 5029599 pursuant to Iowa Code section 85.34(7).

Iowa Code section 85.34(7)(a) makes defendants responsible for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer.

Iowa Code section 85.34(7)(b)(1) states:

> If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Iowa Code section 85.34(2)(u) states:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

As a result of the October 30, 2007 right shoulder injury, claimant was found to have sustained a 35 percent industrial disability pursuant to section 85.34(2)(u). Final agency action awarded claimant 175 weeks of permanent partial disability benefits as a result of this determination. Claimant admits defendants paid these benefits. By this arbitration decision, the undersigned found claimant sustained a combined industrial disability of 65 percent following the left shoulder injury of February 7, 2013, pursuant to section 85.34(2)(u). As each injury was compensated pursuant to section 85.34(2)(u), defendants' liability for the combined disability is considered partially satisfied to the extent of the prior award.

There is no evidence claimant's earnings were less at the time of the February 7, 2013 work injury than they were at the time of the prior October 30, 2007 injury. In fact, it appears claimant's earnings have increased in the interim, as her hourly rate of pay has increased from $14.11 per hour to $15.94 and there is no evidence her work hours have decreased. Accordingly, the extent of the partial satisfaction is computed according to section 85.34(7)(b)(1).

It is determined defendants are entitled to a credit for 175 weeks of permanent partial disability benefits paid in File No. 5029599, as claimant's current award of 325 weeks of permanent partial disability benefits is partially satisfied to the extent of the prior award of 35 percent industrial disability issued as a result of the October 30, 2007 injury.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33.

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 expense 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. Dec. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. Dec. 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. Dec. July 21, 2009).

Claimant requests taxation of the costs of: $100.00 filing fee and $1,148.25 vocational report of Mr. Davis. Defendants dispute taxation of the cost of Mr. Davis' report. Vocational reports are taxable pursuant to rule 4.33. Mr. Davis' service invoice itemized how he arrived at the charged fee; the undersigned sees nothing unreasonable about the fee and no argument was presented which would lead me to conclude Mr. Davis' fee was unreasonable. The costs of filing fee and vocational report of Mr. Davis are allowable costs and are taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant three hundred twenty-five (325) weeks of permanent partial disability benefits commencing July 16, 2014 at the weekly rate of four hundred sixteen and 21/100 dollars ($416.21).

Defendants are entitled to a credit in the amount of one hundred seventy-five (175) weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(7).

Defendants are entitled to credit for benefits paid.

Defendants shall pay accrued weekly benefits in a lump sum.

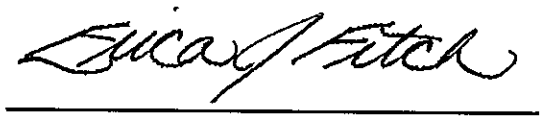
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall reimburse claimant for Dr. Stoken's independent medical evaluation.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 26th day of May, 2016.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jerry Jackson
Attorney at Law
1603 - 22nd St., Ste. 205
West Des Moines, IA 50266
moranvillejacksonlaw@mac.com

Timothy W. Wegman
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266
tim.wegman@peddicord-law.com

EJF/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.