BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PATRICIA DAILEY,	:	
Claimant,	:	File No. 5065024
vs.	:	A R B I T R A T I O N D E C I S I O N
NORDSTROM, INC.,	:	
Employer, Self-Insured, Defendant.	:	Head Notes: 1702, 1803

STATEMENT OF THE CASE

The claimant, Patricia Dailey, filed a petition for arbitration and seeks workers' compensation benefits from Nordstrom, Inc., a self-insured employer. The claimant was represented by William Nicholson. The defendants were represented by James Peters.

The matter came on for hearing on January 29, 2019, before Deputy Workers' Compensation Commissioner Joe Walsh in Cedar Rapids, Iowa. The record in the case consists of Joint Exhibits 1 through 11; Claimant's Exhibits 1 through 4; and Defense Exhibits B and C. The claimant testified under oath at hearing. Marla Jeffrey Happel was appointed court reporter for these proceedings. The matter was fully submitted on February 21, 2019, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's industrial disability.

2. The amount of the credit.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the injury.

2. Claimant sustained an injury which arose out of and in the course of employment on October 22, 2014.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The commencement date for any permanent disability benefits is May 17, 2016.

5. The weekly rate of compensation is $496.64.

6. Defendant has paid and is entitled to a credit of 51.857 weeks of compensation (permanent partial disability).

7. Affirmative defenses have been waived.

FINDINGS OF FACT

Patricia Dailey was 58 years old as of the date of hearing. She testified live and under oath. I find her to be highly credible. Her testimony was consistent with the remainder of the record. She was a reasonably good historian. There was nothing about her demeanor which caused the undersigned any concern about her truthfulness.

Ms. Dailey is a right-handed woman from Memphis, Tennessee. She attended school into the eighth grade. She has no formal education in computer skills or typing. Her work history is outlined in Claimant's Exhibit 3, page 40. Prior to working for Nordstrom, Ms. Dailey had worked as a waitress, a nurse's aide, and a cashier. She also worked briefly as an assistant manager and then manager for Mapco Express, some type of convenience store. Since November 1996 she has worked for Nordstrom, the employer in this case. This is her most relevant work history. In 1997, she transferred to the Cedar Rapids office and worked in a Nordstrom shipping warehouse doing shipping, customer returns and processing orders. The Cedar Rapids warehouse is a large warehouse which processes internet purchases and merchandise returns from all across the United States.

Ms. Dailey had no significant medical or impairment issues with either of her shoulders prior to 2010. Ms. Dailey suffered an injury to her left shoulder which manifested on or about April 23, 2010. (Defendant's Exhibit C, page 10) In October 2011, Ms. Dailey underwent a surgery on her left shoulder at the University of Iowa Hospitals and Clinics. James Nepola, M.D., performed subacromial decompression distal clavicle resection and acromioplasty procedures. (Joint Exhibit 3, page 9) In May 2012, Dr. Nepola assigned a 15 percent upper extremity impairment rating for this condition due to the loss of active range of motion in her shoulder. (Jt. Ex. 3, p. 10) The claimant was also evaluated by David Tearse, M.D., who assigned his own rating, as well as a recommendation for permanent work restrictions for her left arm of limiting above-shoulder reaching and avoid cross-body reaching. (Def. Ex. C, p. 24) The left shoulder claim was settled in early 2013 and approved on March 14, 2013. (Def. Ex. C)

It was agreed that claimant had sustained a 23.97192 percent loss of earning capacity for her left shoulder condition. (Def. Ex. C, p. 10) She continued working for the employer earning the same or better wages.

Ms. Dailey worked in the Research Department. Her work was monitored by management in order to meet processing goals. She was required to process at least 250 pieces of returned merchandise per shift. She worked at a station on a processing line. Ms. Dailey would reach, lift and stack the totes, sorting them so the totes were processed in order. She would then scan the merchandise and enter information on a keyboard in front of her. Ms. Dailey sustained an injury which arose out of and in the course of her employment to her right shoulder on October 22, 2014. She filled out an injury report which described the injury as follows: "Was pulling stacks of totes to move around the floor. Felt a pop in right shoulder." (Cl. Ex. 2, p. 36)

The employer accepted the claim and authorized medical treatment. Eventually, after an MRI, Ms. Dailey was referred back to Dr. Nepola. In January 2015, Dr. Nepola reviewed the MRI. He performed a Lidocaine injection, which initially provided complete relief. After treatment with physical therapy and subacromial injections she was placed at maximum medical improvement (MMI) on May 12, 2015. Unfortunately, her condition worsened and she returned to Dr. Nepola in June 2015. (Jt. Ex. 3, p. 19) After another course of treatment, Dr. Nepola recommended surgery on the right shoulder which was performed on September 2, 2015. (Jt. Ex. 3, p. 23) Dr. Nepola discovered and repaired a large full-thickness tear of the supraspinatus in the rotator cuff. (Jt. Ex. 3, p. 24)

Thereafter, Ms. Dailey underwent a relatively normal course of post-surgical treatment, including light-duty. She was released to work with no use of her right arm initially. Unfortunately, in April 2016, her left shoulder symptoms flared up, requiring some additional physical therapy and an injection. (Jt. Ex. 3, p. 26) Ms. Dailey was placed at MMI for her right shoulder on May 17, 2016. In June 2016, Dr. Nepola assigned a 15 percent impairment rating on her right upper extremity, however, he did not assign any permanent restrictions. (Jt. Ex. 3, p. 31) In September 2016, Dr. Nepola opined that Ms. Dailey was at MMI for her left shoulder as well, and added that she should have restrictions of no repetitive reaching away from her body and no above-shoulder reaching. (Jt. Ex. 3, p. 29)

Dr. Tearse evaluated Ms. Dailey for purposes of an independent medical evaluation (IME) and prepared a report with his expert opinions on February 4, 2017. (Cl. Ex. 1) Dr. Tearse opined Ms. Dailey suffered a 17 percent impairment of her right upper extremity due to motion deficit and the distal clavicle resection. He also recommended that she work primarily below shoulder level with no repetitive reaching. (Cl. Ex. 1, p. 12)

Subsequent to being released for her shoulders, Ms. Dailey was evaluated for symptoms in her left arm and hand. In March 2017, Ms. Dailey underwent EMG testing. (Jt. Ex. 5, p. 43) She was having numbness and tingling, particularly in her left wrist, hand and arm. Meiying Kuo, M.D., diagnosed left carpal tunnel syndrome, left CMC

joint synovitis, and left lateral epicondylitis. (Jt. Ex. 6, p. 48) A steroid injection was attempted, however, Dr. Kuo performed surgery on August 31, 2017. (Jt. Ex. 8, p. 83)

In October 2017, Ms. Dailey was evaluated by James Milani, D.O., for her right arm pain as well. (Jt. Ex. 7, p. 66) He placed her on medications and began another round of physical therapy. (Jt. Ex. 7, p. 68) Another MRI was performed. (Jt. Ex. 5, p. 45) Dr. Milani reviewed the MRI and documented the following:

> Discussed with patient. Difficult to tell whether the tears on the MRI are old versus new. She does continue to have symptoms, and therefore, I will request referral to Orthopedics to evaluate the shoulder and review the information from the MRI to determine if there are any further treatments that are needed. Did discuss with her that there is a high probability that no more surgery is needed, that she would continue to do anti-inflammatories, stretching that she has learned through therapy, and know that her shoulder is going to bother her off and on because she has a shoulder that has had surgery, and unfortunately, the older she gets, the more shoulders do not tolerate repetitive motion.

(Jt. Ex. 7, p. 70)

Lisa Coester, M.D., evaluated Ms. Dailey in January 2018, and reviewed the MRI. Dr. Coester did not recommend further surgery, however, she did provide another steroid injection. (Jt. Ex. 6, pp. 55-56) Thereafter, Dr. Kuo has continued to treat Ms. Dailey for left hand symptoms up through the date of hearing. (Jt. Ex. 6, pp. 52-64)

In May 2018, Dr. Milani provided medical opinions regarding this case. He assigned a 14 percent right upper extremity impairment rating. He also recommended medical restrictions, suggesting she rarely reach above shoulder level on the right and no forces over 5 pounds, with a max lift of 25 pounds. He recommended avoiding routine/constant repetitive cross-body rotation of the right arm as well. (Jt. Ex. 7, p. 75)

At the time of hearing, Ms. Dailey testified regarding the current condition of her bilateral shoulders and arms. She testified that her right shoulder locks up if she reaches upward. She has significant difficulty carrying objects in front of her body and she cannot reach across her body repetitively. All of her symptoms, particularly in her shoulders, increase with her activity level. She continues to work at Nordstrom at the time of hearing. The employer has provided minimal accommodations to her work in that she is not required to stack the totes as high as she used to. The handheld scanners were phased out for all employees. Other individuals in her position are sometimes required to perform labor in other areas, which require over-the-shoulder or repetitive reaching. She still takes prescription medications for her pain.

Having reviewed the entire file, and considering all of the elements of industrial disability, I find that Ms. Dailey has a loss of earning capacity of 45 percent.

CONCLUSIONS OF LAW

The primary question submitted is the extent of claimant's industrial disability. The secondary question involves what credit the employer is entitled to.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Comm'r. Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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.

The parties have stipulated to a commencement date of May 17, 2016.

It has long been the law of Iowa that employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

The law requires the agency to evaluate an injured worker's industrial disability objectively, that is, without regard to any accommodation provided by the employer. Loss of earning capacity "must be based on the injured worker's present ability to earn wages in the competitive job market without regard to any accommodation furnished by that person's present employer. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440, 445 (Iowa 1999).

Furthermore, in this case, I am required to consider all of claimant's industrial disabilities together. Pursuant to Iowa Code section 85.34(7) (2017), the employer is entitled to a credit for permanent partial disability paid as a result of a previous injury to its employee against any subsequent award.

Section 85.34(7) states:

> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. (1) 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.

The purpose of this section is to assure that an employee is fully compensated for all disability caused by the work-related injuries without compensating the same disability more than once. Workers' Compensation, Iowa Practice 15, (2014-2015), Section 13.6. The agency has interpreted this provision in Steffen v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

In my reading of section 85.34(7), the agency is required to assess the claimant's full loss of earning capacity for all injuries for which he was compensated industrially and provide a credit for benefits previously paid.

Having reviewed all of the evidence in the record, I find claimant has suffered industrial disability, from a combination of both injuries, of 45 percent. Considering Ms. Dailey's present ability to earn wages in the competitive job market without regard to any accommodations provided by her employer, I agree with the claimant that she has suffered a substantial loss of earning capacity. Ms. Dailey is 58 years old with an 8th grade education, no GED, and limited transferrable skills. She has significant functional impairments in both shoulders. She also has significant symptoms in her left wrist, hand and fingers, which further complicates her industrial disability. Her restrictions assigned by Dr. Milani are relatively strict and would prohibit her in the competitive job market for many jobs for which she would otherwise qualify. In the competitive workforce, Ms. Dailey is a significantly less attractive prospect for employment due to the combination of her successive disabilities.

Fortunately for all parties, as of the time of hearing, claimant retained employment with the employer. The position she is working in is clearly not "make work" and I find she is doing real work. In other words, she continues to work in a real job. Her position, is, however, somewhat accommodated. The claimant has been working for Nordstrom since approximately 1996. It is really her only relevant work history. Her position appears stable as of the time of hearing, although there is some uncertainty regarding how much longer she can continue to work in a position which involves such a high amount of repetitive work activities with her upper extremities. Her employer has set reasonable performance standards for quantity and monitors the output of all employees. Ms. Dailey has continued to meet these standards and is able to work through her pain and symptoms of disability. I find that she is highly motivated to continue working.

I attribute 23.91792 percent of the disability to the 2010 left shoulder injury and disability. The parties settled this dispute as an Agreement for Settlement (AFS) and agreed upon all benefits owed to the claimant for the disability. (Def. Ex. C) It is important to note that the claimant had suffered a 23.91792 percent industrial disability from her left shoulder before she suffered a successive disability to her right shoulder and arms. Her left shoulder also worsened (although neither party filed a petition for review-reopening). I am not free to reassess or re-adjudicate the AFS. In essence, the

23.91792 percent disability memorialized in the 2014 AFS, serves as a floor for her full disability. The employer is entitled to a full credit for all weeks paid. The remainder of the industrial disability (21.08208 percent) is assigned to the October 22, 2014, work injury.

ORDER

THEREFORE, IT IS ORDERED

Defendant shall pay the claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the rate of four hundred ninety-six and 64/100 dollars ($496.64) per week from May 17, 2016.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

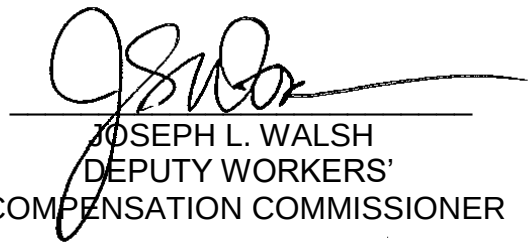
Defendant shall be given credit for the fifty-one point eight five even (51.857) weeks previously paid on this claim as stipulated.

Defendant shall also receive a credit under Iowa Code section 85.34(7)(b)(1) for the payments made pursuant to the 2010 AFS set forth in Defendant's Exhibit C, for a two three point nine one seven nine two (23.91792) percent industrial disability.

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

Costs are taxed to defendant.

Signed and filed this 24th day of February, 2020.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)
James Peters (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.