BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MELISSA A. HOUSLEY f/k/a MILLS, Claimant, vs. EAST PENN MANUFACTURING COMPANY, INC., Employer, and SENTINEL INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5060197, 5060198 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803

STATEMENT OF THE CASE

Melissa A. Housley f/k/a Mills filed two petitions for arbitration seeking workers' compensation benefits from, the employer, East Penn Manufacturing Company, Inc., and Sentinel Insurance Company, the insurance carrier.

The matter came on for hearing on February 11, 2019, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 15; Claimant's Exhibits 1 through 7 and Defendants' exhibits A through L, as well the sworn testimony of claimant. Cathy Penniston was appointed court reporter. The parties argued this case and the matter was fully submitted on March 25, 2019.

ISSUES AND STIPULATIONS

A number of issues were stipulated prior to hearing through the Hearing Report. All stipulations contained in the Hearing Report are approved and deemed enforceable at this time.

Claimant suffered two successive injuries which arose out of and in the course of her employment. The first was on July 8, 2014 (File No. 5060197). The second was September 10, 2015 (File No. 5060198). The defendants concede she suffered some temporary disability during a period of recovery for these injuries, however, deny that either injury resulted in permanent disability.

FINDINGS OF FACT

Melissa Housley, formerly known as Melissa Mills, was 38 years old at the time of hearing. She testified live and under oath at hearing. She was highly credible. Her testimony was consistent with other portions of the record. She was a good historian. There was nothing about her demeanor which caused me any concern regarding her truthfulness.

Ms. Housley was single in 2014 and 2015. She married Shad Housley in 2017. They live in Corydon, Iowa. She is a high school graduate of Russell Community School and she attended a year of school at Hamilton Business College. She also earned a CNA Certificate from Indian Hills Community College. She has worked as a teaching monitor, a nurse's aide (CNA) and in manufacturing. She is right-handed.

She began working for the employer in this case, East Penn Manufacturing (hereafter, "East Penn") in 2012. She passed a pre-employment physical in June 2012, which allowed her to work for the employer without restrictions. (Joint Exhibit 1, page 4) She initially worked in assembly where her primary duties were moving auto batteries from a conveyor belt onto a pallet. (Transcript, page 28) She moved to the shipping area in May 2014. In shipping, her job was to fill the batteries with acid, affix stickers to them and ship them out. (Tr., p. 29) The batteries were heavier once they were filled with the acid. Prior to her injury, she worked full-time and earned $13.13 per hour in 2014 and $13.48 per hour in 2015. Her average weekly wages are best reflected in Defendants' Exhibits A and B.

On July 9, 2014, Ms. Housley suffered an injury which arose out of and in the course of her employment for East Penn. While attempting to move a heavy battery from a conveyor belt to a pallet, her right shoulder popped. An injury report was prepared. (Cl. Ex. 4, p. 27) The following day, she was seen at South Central Iowa Medical Clinic where the injury is well-documented. She was diagnosed with a right shoulder strain/sprain and physical therapy was ordered. (Jt. Ex. 1, p. 19) Conservative treatment of diagnostic imaging, physical therapy, medications and restrictions continued thereafter for several weeks. (Jt. Ex. 1, pp. 20-28; Jt. Ex. 2) In August 2014, she was seen by Shehada Homedan, M.D., who documented the injury and her symptoms and diagnosed a suspected right shoulder labral tear. (Jt. Ex. 3, p. 167) Dr. Homedan continued with the conservative care and provided a cortisone injection. After months of conservative care, Ms. Housley was finally referred to Christopher Vincent, M.D., who performed surgery on February 10, 2015. (Jt. Ex. 4, p. 163) The surgery was described as right shoulder arthroscopy with Mumford procedure and distal clavicle excision.

On July 30, 2015, Ms. Housley underwent a functional capacity evaluation (FCE) which recommended a 40-pound lifting restriction and placed her in the medium work category. (Jt. Ex. 7, pp. 178-179) Dr. Vincent released claimant to return to work on August 10, 2015. Dr. Vincent opined Ms. Housley had sustained a 3 percent whole body impairment rating. (Jt. Ex. 5, p. 175)

On September 10, 2015, Ms. Housley sustained a second injury to her right shoulder which arose out of and in the course of her employment. Again, this injury is stipulated. She was moving a heavy battery when her arm "gave out." (Cl. Ex. 4, p. 28) She was again treated conservatively with diagnostic tests, restrictions, injections and medication management. (Jt. Exs. 9, 10) Ms. Housley saw several other specialists during this period of time including Jason Sullivan, M.D., John Rayburn, M.D., Ojiaku Ikezuagu, M.D., and Mark Kirkland, D.O. There was some debate or discussion during this timeframe of the precise diagnosis. She was eventually referred to Richard Goding, M.D. Dr. Goding eventually performed surgery on June 20, 2017. This surgery was described as right shoulder biceps tenodesis and subacromial decompression. (Jt. Ex. 12, p. 223) Ms. Housley testified this surgery was initially helpful and provided substantial relief.

On September 21, 2017, Dr. Goding released Ms. Housley to light-duty work. (Jt. Ex. 12, p. 242) She was to work 4 hours per day in a sedentary capacity. East Penn initially accommodated this restriction. The insurance carrier referred Ms. Housley to Nathan Nicholson, M.D. Dr. Nicholson recommended another FCE, which was performed at Athletico Physical Therapy in November 2017. This test was valid and recommended restrictions of lifting no more than 5 pounds. (Jt. Ex. 14, pp. 258-59) After this FCE, East Penn continued to accommodate the restrictions until approximately February 2018, when it terminated her employment. (Tr., pp. 41-42)

Thereafter, Ms. Housley continued to treat with Dr. Goding, who eventually performed a third surgery in August 2018. This surgery, described as labral debridement and extensive debridement in subacromial space, was not helpful according to Ms. Housley. (Jt. Ex. 12, p. 249)

Ms. Housley was evaluated by William Boulden, M.D., in March 2018. He opined that it was difficult to state from a pathological standpoint whether there was any pathology caused by either of claimant's work injuries. (Def. Ex. H, p. 8) He seemed to question whether Ms. Housley was really injured at all, but stopped just short of stating that clearly. (Def. Ex. H) He did begrudgingly concur with Dr. Vincent's 3 percent rating for the distal clavicle resection (i.e., the first surgery). (Def. Ex. H, p. 8) He did not agree with any of the restrictions assigned to Ms. Housley. Ms. Housley also had an independent medical examination (IME) with Sunil Bansal, M.D. He prepared a report in April 2018. He assigned an 8 percent whole body impairment rating and concurred with Athletico Physical Therapy's FCE. (Cl. Ex. 1, p. 18)

Since being terminated, Ms. Housley testified that she has made reasonable efforts to secure employment. She has searched for jobs in the Corydon area in rural southern Iowa. She just had surgery in August 2018. Ms. Housley appears to be bright and articulate. She presents well and is hard-working. While she is certainly employable, her work injuries undoubtedly have caused a major adverse impact on her earning capacity.

CONCLUSIONS OF LAW

The first question is the claimant's gross wages for both files.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Ms. Housley's wages are in evidence. The parties agree as to what she earned in the 13 weeks prior to the injury. Claimant alleges that certain weeks should be excluded because they are not customary and do not reflect her full-time status. Defendants included low weeks should be included in her rate. For example, defendants included the week ending May 10, 2014, wherein Ms. Housley only worked 32 hours, whereas claimant excluded this week from her calculations. While the evidence reflects that Ms. Housley was certainly a full-time employee, it appears it was not entirely uncommon for her to work less than 40 hours on occasion. There is no evidence in the record that the weeks which were less than 40 hours were aberrations. As such, I find that the defendants' rate calculations set forth in Defendants' Exhibits A and B are the best evidence of claimant's gross earnings. Therefore, for File No. 5060197, I conclude claimant's gross wages were $699.12 per week. For File No. 5060198, I conclude that the gross wages were $585.79 per week. All benefits for the respective injury dates shall be paid accordingly.

The next issue is the extent of claimant's industrial 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.

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

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.
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> 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.

Claimant was 38 years old as of the date of hearing. She has a high school diploma and she lives in Corydon, Iowa. Her past employment history includes work as a teaching monitor, a nurse's aide and manufacturing work. Between the two injuries, she has essentially been in a period of active treatment and recuperation from July 10, 2014, up through at least August 2018. This is an extensive time to be recuperating from injuries. Much of this timeframe, Ms. Housley has been on temporary light-duty work. She has undergone a total of three right shoulder surgeries during this timeframe. Following her first surgery, Ms. Housley healed up relatively nicely. She was given a 3 percent whole body impairment rating by Dr. Vincent and a 40-pound lifting restriction from her FCE. She worked for a few weeks before suffering the second injury and undergoing the two additional surgeries. I find that all of this treatment is causally connected to her work injuries.

I find that her current work restrictions are best stated in the Athletico Physical Therapy FCE. (Jt. Ex. 14) This is essentially a restriction to lift no more than 5 pounds with her right arm. This restriction prevents her from her past work as a nurse's aide

and the vast majority of manufacturing or assembly-type positions. She could likely work as a teaching monitor. This is not high paying work.

Considering all of the factors of industrial disability, I find that Ms. Housley has suffered a 65 percent loss of earning capacity as a result of the combination of her two injuries. Twenty percent of her industrial loss is attributed to her July 2014, work injury and forty-five percent to her September 2015, work injury.

The parties dispute the proper commencement date for permanent partial disability benefits. Permanent partial disability benefits commence upon the termination of the healing period. Iowa Code section 85.34(1). As the Iowa Supreme Court explained, the healing period terminates and permanent partial disability benefits commence at the earliest of claimant's return to work, medical ability to return to substantially similar employment, or the point at which the claimant achieves maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374 (Iowa 2016).

For her July 2014, work injury, Ms. Housley returned to work on March 25, 2015. For her September 2015, work injury, Ms. Housley reached maximum medical improvement on or about December 21, 2018, following her third shoulder surgery by Dr. Goding.

The next issue is the claimant's need for medical expense under Section 85.27 as set forth in Claimant's Exhibit 6.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code Section 85.27 (2017).

Claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

For both of these injuries, the employer directed all of the claimant's medical care. The employer chose the physicians. At the conclusion of the treatment, defendants retained Dr. Boulden who questioned whether some of the treatment is related to any work injury at all. I give Dr. Boulden's medical opinions no weight. I find that all of the surgeries taken by the authorized physicians chosen by defendants, were, in fact, causally connected to her work injuries. Even if they were not, however, these treatments were authorized by operation of law since they were directed by authorized treating physicians. There is certainly no evidence in this record that defendants ever

de-authorized her treating physician or otherwise challenged the care that Dr. Goding, or any other physician undertook. As such, defendants are responsible for the medical expenses set forth in Claimant's Exhibit 6.

The final issue is penalty.

Iowa Code section 86.13(4) provides:

a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
   (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
   (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
   (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
   (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
   (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

I find the claimant has failed to prove any claim for penalty. Claimant contends

that defendants failed to reassess her disability after her second surgery by Dr. Goding. Claimant ended up, however, having a third surgery which extended her healing time through December 2018, just a few weeks prior to the hearing in this matter. I have found that claimant's healing period for the second injury extended through this period of time. Defendants paid additional disability benefits in May 2018. (*See* Def. Ex. I) Based upon the way this case developed, I find claimant has failed to prove a claim for penalty benefits.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5060197

Defendants shall pay all benefits at the rate of four hundred forty-one and 72/100 dollars ($441.72) per week.

Defendants shall pay the claimant one hundred (100) weeks of permanent partial disability benefits from March 24, 2015.

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 (2015).

Defendants shall be given credit for the benefits previously paid.

File No. 5060198

Defendants shall pay all benefits at the rate of three hundred seventy-seven and 34/100 dollars ($377.34) per week.

Defendants shall pay the claimant two hundred twenty-five (225) weeks of permanent partial disability benefits from December 21, 2018.

Defendants are responsible for the medical expenses outlined in Claimant's Exhibit 6, consistent with this decision.

Defendants shall be given credit for the benefits previously paid.

Defendants 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).

For both files

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.

Signed and filed this 28th day of February, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jason Neifert (via WCES)
Tiernan Siems (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.