BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BARBARA JASPER,	:	File Nos. 5052714, 5063163
Claimant,	:	A R B I T R A T I O N
vs.	:	D E C I S I O N
NORDSTROM, INC.,	:	
Employer, Self-Insured, Defendant,	:	Head Notes: 1402.40, 1803, 1804

STATEMENT OF THE CASE

Barbara Jasper, claimant, filed a petition in arbitration seeking workers' compensation benefits from Nordstrom, Inc., defendant, as a result of injuries she sustained on February 9, 2012 and May 16, 2015 that arose out of and in the course of her employment. This case was heard on September 4, 2019 in Des Moines, Iowa and fully submitted on October 21, 2019. The evidence in this case consists of the testimony of claimant, Rachel Frith, Joint Exhibits 1 - 5, Defendant's Exhibits A - B and Claimant's Exhibits 1 - 7. Both parties submitted briefs.

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.

For file number 5063163 claimant moved to amend the injury date and defendant had no objection. The motion to amend the hearing date was granted. The injury date for File No. 5063163 is May 16, 2015.

ISSUES

File No. 5052714 (Date of injury February 9, 2012)

1. The extent of claimant's disability.
2. Whether claimant's proximity to normal retirement age is a factor in industrial disability.
3. Assessment of costs.

File No. 5063163 (Date of injury May 16, 2015)

1. The extent of claimant's disability.

2. Whether claimant's proximity to normal retirement age is a factor in industrial disability.

3. Whether claimant is entitled to payment for a functional capacity examination.

4. Assessment of costs.

FINDINGS OF FACT

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

Barbara Jasper, claimant, was 67 years old at the time of the hearing. Claimant went through ninth grade. Claimant started working full time instead of attending high school after the ninth grade. Claimant does not have a high school degree or a GED. (Transcript page 19) Claimant has no other formal education.

Claimant began her work in 1968; she assembled motorized exercise machines. Clamant worked for Coca-Cola for about a year sorting and stacking bottles. Claimant then ran a printing machine for about a year. (Tr. p. 21) Claimant returned to the workforce after about a seven-year absence to work part-time as a cashier in a convenience store for a short period. Claimant then worked for a discount department store for about 16 years. Claimant said that all of the positions, except for the printing job, had some heavy lifting or stocking components.

Claimant started working for Nordstrom in September 1995. (Tr. p. 34) The Nordstrom claimant worked at was a regional distribution center. Claimant's first position was to process clothing and other merchandise to go to the retail stores. (Tr. p. 25) After about a year claimant started to work in housekeeping. Most of her time was spent cleaning restrooms, but in certain times of the year she would clean other areas of the building. (Tr. pp, 27, 28) Claimant would also empty barrels in the processing department. (Tr. p. 29) Claimant would move some of the waste using a pallet jack. Some waste would be bailed, and she would operate a fork truck to move them. (Tr. p. 33)

In 2011 and 2012 claimant was frequently operating a fork truck. She reported an injury to her left shoulder to Nordstrom in February 2012 and was provided treatment in March 2017. (Tr. pp. 37, 38) Scott Schemmel, M.D. performed left shoulder surgery on July 2, 2012. (Tr. p. 39) Dr. Schemmel's postoperative diagnosis was, "Partial thickness superior edge intra-articular subscapularis tendon." (JE 2, p. 1)

Claimant returned to full-time work after her surgery in mid-October 2012. (Tr. p. 40) Claimant was in agreement that she could return to work. (Tr. p. 87) Claimant was able to perform her cleaner job when she returned and did that work from 2013–2015. (Tr. p. 91) Claimant had not met with anyone from Nordstrom since she received her last set of restrictions. Claimant testified that since her surgery she has always had pain when she lifts her arm. (Tr. p. 41) After claimant's surgery she would take over-the-counter medications and use Bio-freeze for her shoulder. Claimant agreed she told Dr. Taylor in April 2016 her left shoulder had some improvement, but the shoulder never returned to baseline. (Tr. p. 44)

Claimant was having problems with her right shoulder and was examined by Erin Kennedy, M.D., in October 2016, which showed more problems with her right shoulder than left. (Tr. p. 47) Claimant was off work and paid temporary total benefits from November 29, 2016 through January 2, 2017. (Tr. p. 50) On January 3, 2017 Nordstrom placed claimant in a light-duty position at a charity thrift store. (Tr. p. 50)

Claimant was working in this position up until she had surgery on her right shoulder on December 13, 2017. (Tr. p. 53) Dr. Schemmel's post-operative diagnoses were,

1. Full-thickness rotator cuff tear of the supraspinatus tendon (3 cm).
2. Significant partial-thickness tearing of the biceps tendon.
3. Degenerative superior bicipital labral complex disorder (degenerative type II superior labrum anterior and posterior).
4. Grade 3 early grade IV humeral hand articular surface changes (posterior aspect of the humeral head).
5. Subacromial impingement with type III acromion morphology.
6. Significant arthritis of the acromioclavicular joint with offending osteophyte at both the undersurface of the clavicle and the acromion.

(JE 2, p. 3) Claimant was completely off work from December 13, 2017 through March 1, 2018. (Tr. p. 54) Claimant was returned to the light-duty charity thrift store work from March 2, 2018 through July 6, 2018. (Tr. pp. 54, 55) Around July 9, 2018 claimant returned to her cleaning job at Nordstrom. (Tr. p. 57) Claimant was given restrictions for her right arm and none for her left. Claimant was working and using her left arm to move the pallet jack and emptying plastic bins and could not do the work. (Tr. p. 59) Claimant was then placed in the hazmat job. The hazmat job consisted of processing returned perfumes, colognes and makeup. (Tr. p. 59) Claimant said the hazmat position was not a regular position and that usually injured workers would perform that work. (Tr. pp. 60, 61)

Claimant had arthroscopic surgery on her left shoulder on February 24, 2019. (Tr. p. 62) Dr. Schemmel's postoperative diagnosis was,

1. Articular-sided partial-thickness rotator cuff tear of the supraspinatus tendon.

2. Partial tear, biceps tendon.
3. Partial tear, subscapularis tendon.
4. Labral degeneration and tearing.
5. Early humeral head osteoarthritis, grade 2.
6. Subacromial impingement.
7. Acromioclavicular joint arthritis with some offending spurring of the undersurface of the clavicle.

(JE 2, p. 7) Claimant was off work from February 24, 2019 through July 14, 2019. (Tr. p. 63)

At the time of the hearing claimant said she has pain in her left bicep and the top of her left shoulder. (Tr. pp. 67-69) Claimant has difficulty working above her shoulder level with her left arm and has loss of strength. (Tr. p. 69) Claimant said she has pain in her right arm and shoulder and her right arm has lost strength. (Tr. p. 71) Claimant said she cannot do overhead lifting. (Tr. 72) Claimant has limited ability to do work around the home, play with grandchildren and some personal care due to her shoulder symptoms. Claimant did not believe she could perform any of her past work other than the printing job. (Tr. p. 77)

Claimant testified that starting the week after the arbitration hearing claimant volunteered to work part-time for Nordstrom; working three eight-hour days. (Tr. p. 81) Claimant said she decided to reduce her hours to protect her shoulders. (Tr. p. 72)

Claimant has not had a meeting with Nordstrom since her February 2019 left shoulder surgery to discuss accommodated work. (Tr. p. 99) Claimant did have a formal accommodation request in July 2018 that was approved by Nordstrom. (Ex. B, pp. 14, 15)

Rachel Frith is a health and safety technician at Nordstrom. Part of her job is to work with employees who have a work injury. (Tr. p. 109) Ms. Frith stated the hazmat job is not a full-time permanent position. (Tr. p. 109) The hazmat work is part of the work that the claims department performs. Ms. Frith said based on the recent 2019 restriction claimant was given, Nordstrom is in the process of determining whether claimant could work in the shoe department, as the work is at waist level. (Tr. p. 113) Nordstrom had not offered the position to claimant at the time of the hearing.

The job in the shoe department would consist of taking the dunnage out of the shoes and shoe boxes so that the shoes are ready for the stores. (Tr. p. 113) A detailer lines up the work so that lifting is limited in the shoe dunnage removal job. (Tr. p. 117)

Claimant was diagnosed with a work-related left shoulder impingement and neck pain on February 9, 2012[1]. (Joint Exhibit 1, p. 2) On January 31, 2013 Dr. Kennedy performed a records review of claimant's treatment for her left shoulder injury. (JE 1, pp. 4–7) On February 15, 2013 Dr. Kennedy, after examining claimant, provided an impairment rating under the AMA Guides 5th Ed. Dr. Kennedy noted,

> . . . She described her current symptoms as being limited to achiness over the deltoid area at the subacromial area. This is very minor discomfort on the order of 1-5/10 though, it is usually about a 2 or 3/10. It responds to BIOFREEZE and IBUPROFEN. She finds that abduction with repetitive motion out to the side causes greater discomfort. She has very little discomfort if the arm is used in other positions such as behind her back or in front of her. Lastly, she indicates numbness into the right hand and arm, though she is not certain this is related to this injury and cites a history of carpal tunnel release in the opposite hand some years earlier.
>
> In terms of physical activity and activity tolerance, she indicates no limitations in sitting, driving, standing, walking, lifting, carrying, pushing, pulling, reaching, bending, climbing, squatting, or kneeling. She states that she has returned to her usual position at Nordstrom and has not required any assistance or activity modifications. She has not had to alter any of her other activities in her personal life or in terms of hobbies either. She does not believe that she has any physical limitations due to this injury.

(JE 1, p. 9) Claimant returned to work with no restrictions. Dr. Kennedy provided a zero impairment rating for the claimant's February 9, 2012 left shoulder injury. (Ex. 1, p. 10)

Mark Taylor, M.D. performed an independent medical examination (IME) on May 13, 2016. (Ex. 2, pp. 3–11) Dr. Taylor opined that claimant suffered a work injury on February 9, 2012 due to the repetitive nature of her fork truck driving. (Ex. 2, p. 8) Dr. Taylor provided a 4 percent whole body impairment rating for her left shoulder. (Ex. 2, p. 8) Dr. Taylor recommended restrictions of:

> With her arms kept close to her body, Ms. Jasper may still be able to handle up to 40 pounds or so on a rare basis and up to 30 pounds on an occasional basis, preferably between approximately knee and chest level. Above chest/shoulder level, I would recommend 20 pounds or less. As noted above, most lifting, to the extent possible, should occur with the arms as close to the body as possible. I would recommend only occasional tasks above head level, especially with the left upper extremity.

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[1] The claimant summarized the treatments she has received for the left and right shoulders for 2012 through 2019 in Exhibit 1, pp. 1–9. The parties agreeing to this summary greatly aided in reducing the number of pages of exhibits and allowed the parties to submit the most relevant documents.

> She should avoid forceful pushing and pulling movements with the left arm.

(Ex. 2, p. 8)

On October 6, 2016 Dr. Kennedy performed another records review of claimant's work-related conditions. Dr. Kennedy noted that in her examination of the claimant in 2013,

> At the time of her impairment rating evaluation by me, she reported pain typically 2-3/10 though it could get as high as 5/10 at times. She used ibuprofen and biofreeze for pain as needed. She reported becoming symptomatic with abduction and repetitive movements performed away from the body to her side. She reported very little discomfort with use of the arm in front of her or behind her back. In regard to activity tolerance, she denied limitations related to the left arm with lifting, carrying, pushing, pulling, or reaching. She reported having returned to her usual position at Nordstrom without work restrictions and was not having any difficulty performing work activities. She denied difficulty performing personal activities or hobbies.

(JE 1, p. 15) Dr. Kennedy reviewed Dr. Taylor's IME report as part of her review of records. (JE 1, pp. 12–17) On October 25, 2016 Dr. Kennedy provided an IME and update on a rating. In the IME exam claimant informed Dr. Kennedy she was stable until May 2015, when her symptoms were increasingly severe. (JE 1, p. 20) Claimant reported right shoulder symptoms to Dr. Kennedy that started in May 2015. (JE 1, p. 20) Upon examination, Dr. Kennedy noted claimant's right shoulder was more symptomatic than the left. (JE 1, p. 22) Dr. Kennedy wrote that Dr. Taylor's "argument" that claimant's current left shoulder condition was related to her February 9, 2012 injury was flawed, as it failed to explain the deterioration between January 2013 and October 2016. (JE 1, p. 23)

On January 30, 2017 Dr. Kennedy recorded that Dr. Schemmel was willing to evaluate the claimant's bilateral shoulders for surgical consult once claimant had been medically worked up. (JE 1, p. 26) Dr. Kennedy examined claimant on January 30, 2017 and assessed her with bilateral shoulder pain and that her work at Nordstrom was the cause. (JE 1, p. 29) On March 6, 2017, after reviewing an MRI, Dr. Kennedy referred claimant to Dr. Schemmel. (JE 1, p. 35; JE 4, pp. 5-7) Dr. Kennedy opined that claimant's current conditions should be fully evaluated with physical therapy or imaging and that claimant was not at MMI. (JE 1, pp. 23, 24)

A functional capacity examination (FCE) of claimant was requested by the defendant and performed on June 1, 2018. (JE 1, pp. 40–50) The FCE reported that claimant could work at the medium physical demand level and that claimant was able to

perform 89.2 percent of the physical demands of her job. (JE 1, p. 40) The report stated,

> The return to work test items Ms. Jasper was unable to achieve successfully during this evaluation include: Occasional Squat Lifting, Occasional Power Lifting, Occasional Shoulder Lifting, Frequent Shoulder Lifting, Occasional Pulling, Firm Grasping and Walking.

(JE 1, p. 42)

Dr. Kennedy performed another records review on June 14, 2018. She noted claimant had right shoulder surgery on December 13, 2017 by Dr. Schemmel. (JE 1, p. 37) Dr. Kennedy noted that claimant was under restrictions placed by Dr. Schemmel of 10 pounds from floor to waist, five pounds from waist to chest and no lifting above chest. (JE 1, p. 38) On June 28, 2018 Dr. Kennedy performed an IME. (JE 1, pp. 51–53) Dr. Kennedy wrote claimant sustained a right shoulder injury by pulling tightly packed garbage bags at work in May 2015. She recommended restrictions of,

> In regard to permanent restrictions, it is my opinion that she requires a maximum lifting restriction of 30 pounds from floor to waist and 10 pounds above the waist. She is not to lift over shoulder level with the right arm. She may push and pull up to 25 pounds and may not pull with the right arm position behind her. She may not engage in throwing objects with the right arm. Note that restrictions are indicated on an occasional basis.

(JE 1, p. 53) I find these are claimant's restrictions for her right arm/shoulder. Dr. Kennedy provided a 12 percent upper extremity impairment rating for the right shoulder. (JE 1, p. 53)

On October 23, 2018 Dr. Taylor issued an IME report. (Ex. 2, pp. 15 -26) Dr. Taylor's diagnoses were,

1. Left shoulder tendinitis and rotator cuff tearing.
2. Status post left shoulder arthroscopy on July 2, 2012, with debridement of rotator cuff tear due to partial-thickness tearing of the subscapularis tendon.
3. Persistent left shoulder arthralgia.
4. Worsening bilateral shoulder pain and impingement on a cumulative basis.
5. Left shoulder supraspinatus tear as per MRI on March 1, 2017.
6. Right shoulder rotator cuff tear resulting in rotator cuff repair, biceps tenotomy, labral debridement, acromioplasty, and distal clavicle co-planing on December 13, 2017.

(Ex. 2, p. 21) Dr. Taylor noted that there was not unsurprisingly an overlap as to symptoms that she experienced after her initial shoulder injury in 2012. (Ex. 2, p. 22)

Dr. Taylor agreed with Dr. Kennedy and Dr. Schemmel that claimant's work was a substantial factor in causing her right shoulder symptoms. (Ex. 2, p. 22) Dr. Taylor assigned an 8 percent whole body impairment rating for the right shoulder. Dr. Taylor recommended restrictions of:

> In general, I would recommend restrictions somewhere between the two FCEs that occurred. Dr. Kennedy recommended 30 pounds up to waist level and the more recent FCE indicated 15 to 25 pounds. Up to waist level, I would estimate 20 to 25 pounds on a rare to occasional basis assuming that she can keep her arms fairly close to her body. I agree with Dr. Kennedy, as well as the FCEs, that she should not be lifting more than 10 pounds above waist level and up to shoulder/chest level. I recommend that she avoid overhead lifting unless it is on a rare basis and something that is particularly light, such as a couple of pounds or less. The first FCE indicated that she could reach outward and above shoulder level on a frequent basis. I disagree in that regard. Ms. Jasper's issues with her shoulders will more than likely worsen even further should she engage in frequent reaching with her arms fully extended outward or upward. As such, I recommend only rare overhead reaching with the arms and occasional to frequent forward reaching but this will depend on how far she has to reach and the task that she is performing. In general, most lifting activities should certainly occur with her arms as close to her body as possible. Also, when engaging in activities that require reaching and movement of the arms, this should preferentially occur as close to her core as possible because that will offer more protection as far as her shoulders compared to extending the arms out away from the body. She should avoid forceful pushing and pulling and avoid throwing objects.

(Ex. 2, p. 23)

Dr. Kennedy performed one last IME of the claimant on August 29, 2019. Dr. Kennedy reviewed the results of an FCE on July 9, 2019 that Dr. Kennedy requested and a July 30, 2019 FCE that claimant's counsel requested. The July 30, 2019 FCE found claimant had the capacity for sedentary work and that claimant should not engage in any material handling overhead. (Ex. 3, p. 12) Dr. Kennedy stated claimant had a 7 percent whole body impairment to her left shoulder. Regarding restrictions, Dr. Kennedy wrote,

> It is my opinion that she requires permanent restrictions as follows: She may lift on an occasional basis with floor to waist 20 pounds, waist to shoulder 10 pounds, and overhead none. She may carry 20 pounds on an occasional basis. She may push or pull up to 15 pounds on an occasional basis. She should not engage in throwing objects with her left arm. Further, consistent with previous permanent restrictions set for the right shoulder in June of 2018, she should also not throw with her right arm.

> Otherwise, today's restrictions are intended to supersede the previous set of permanent restrictions.

(JE 5, p. 4) I find these are claimant's restrictions.

Dr. Taylor issued an IME follow-up report on August 29, 2019. (Ex. 6, p. 1) Dr. Taylor provided a 9 percent impairment rating for claimant's left shoulder. (Ex. 6, p. 5)

For File No. 5052714 (Date of injury February 9, 2012) I find claimant's gross weekly earnings were $575.00, she was married and entitled to two exemptions for tax purposes. Claimant's weekly workers' compensation rate is $394.89.

For File No. 5063163 (Date of injury May 16, 2015) I find claimant's gross weekly earnings were $595.00, she was married and entitled to two exemptions for tax purposes. Claimant's weekly workers' compensation rate is $399.48

Claimant has requested reimbursement for costs of the filing fee of $100.00 and for the FCE performed by Short Physical Therapy in the amount of $900.00. The costs for the FCE were detailed as $550.00 for the evaluation and $350.00 for the report. (Statement of cost submitted at hearing.)

CONCLUSIONS OF LAW

File No. 5052714 (Date of injury February 9, 2012)

The first issue to decide is whether claimant has proven a permanent injury for the February 9, 2012 work injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

There is a difference between an "injury" and a "disability" under Chapter 85. Many of the court cases, unfortunately, have used the terms interchangeably. Some cases purporting to define an injury under Chapter 85, are, in fact, actually addressing causation issues (i.e., whether an injury is a substantial cause of disability). Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Excel Corp. v. Smithart, 654 N.W.2d 891 (Iowa 2002). This is likely because in cumulative trauma cases, the issues sometimes become intertwined. There are, however, injuries under Chapter 85, which never result in any permanent, or even temporary, disability. The terms "hurt" or "harm" are common synonyms of "injury." The finding of a "personal injury" is a de minimis finding that the worker suffered a "hurt" or "harm" which arose out of and in the course of their employment. Iowa Code section 85.3(1) (2015).

Defendant admits claimant had a work injury on February 9, 2012, and the left shoulder surgery of July 2012 was related to this injury. Defendant asserts that claimant had no permanent impairment due to this injury. Claimant asserts that she had residual pain with the use of her left shoulder and had permanent impairment due to the February 2012 injury.

I find the opinions of Dr. Schemmel and Dr. Kennedy convincing that claimant had no permanent impairment after she reached MMI after her July 2012 surgery.

Both Dr. Kennedy and Dr. Schemmel had the opportunity to evaluate claimant close to the time of her recovery from the July 2012 left shoulder surgery. Dr. Schemmel examined claimant on October 5, 2012 and noted only minimal end-range restricted motion and that claimant had good rotator cuff strength. (JE 4, p. 4) Dr. Kennedy performed a thorough examination for her January 2013 IME of the left shoulder and concluded no permanent impairment.

Dr. Taylor performed an IME in April 2016 and concluded claimant had permanent restriction due to the February 9, 2012 injury. This IME was performed well over three years after her injury. Medical records close to the time of injury show claimant was having de minimis symptoms due to the February 2012 injury. I find claimant has not met her burden of proof to show she had a permanent impairment due to the February 9, 2012 injury.

File No. 5063163 (Date of injury May 16, 2015)

The parties have stipulated claimant has a permanent impairment due to the May 16, 2015 injury. The parties dispute the extent of claimant's 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).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

I accepted Dr. Kennedy's restriction as being the most accurate. For the left shoulder injury, Dr. Kennedy limited claimant to only occasionally lifting floor to waist of 20 pounds, waist to shoulder occasionally 10 pounds, no overhead lifting and no throwing with her left arm. For the right shoulder Dr. Kennedy limited claimant to floor to waist 30 pounds occasionally, 10 pounds above waist and no overhead lifting. Claimant was not to throw with her right arm as well.

All of the lifting limitations were based upon only lifting occasionally. The limited weight and the occasional lifting presents a severe limitation in competitive employment in warehouse, factory or positions that do not involve office work. Claimant was working at the time of the hearing, but her hours were part time. I acknowledge that claimant restricted her hours, not Nordstrom.

Claimant has been very motivated to work. She has worked light duty and accommodated jobs at Nordstrom. She has attempted to work regular jobs whenever she has been released to return to regular work. I believe claimant is quite sincere

about her desire to keep working as long as she can. Nordstrom was considering offering claimant a job that would allow her to work at waist level removing dunnage from shoe boxes. The position would require her work to be set up by a detailer so she did not have to lift the work out to boxes or put them into large boxes. The position appears to be rather unique and not the type of work generally available in the labor market. At the time of the hearing the job had not been offered to claimant. All of the job descriptions for claimant's work at Nordstrom exceeded her limitations.

The only previous job claimant believed she could perform was at the printer. However, claimant explained that, as she had others load her machine with the paper. Claimant worked that job for about a year around 1970 and it is not likely that the equipment and machine she operated is the same.

Claimant was 67 years old at the time of the hearing. She has a ninth grade education. She has no other formal education. She has worked at Nordstrom since 1995, over twenty years.

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

I considered the relevant industrial disability factors outlined by the Iowa Supreme Court, including claimant's functional impairment, age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, and her inability to engage in employment for which she is fitted. 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). Having considered these factors, I found claimant's injury to her left and right shoulders essentially preclude her from obtaining gainful employment. I therefore conclude claimant satisfied her burden to prove she is permanently and totally disabled.

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, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

For injuries occurring after June 30, 2017 age is a factor to consider in industrial disability; neither injury was after that date. Defendant invited the undersigned to speculate as to what claimant's age would mean if I was to apply the age factor effective July 1, 2017. I decline to speculate on a section of the law that is inapplicable

to this case. The invitation is declined.

Claimant also seeks an assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code § 86.40. Because claimant was generally successful in her claim, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant seeks $100.00 for her filing fee, which I conclude is reasonable and taxable pursuant to 876 IAC 4.33(7). Claimant has requested taxation for the cost of the FCE examination and report. The defendant obtained a number of FCEs. Claimant obtaining an FCE was reasonable and responsible in proving her claim. I award the cost of the FCE report of $350.00 pursuant to 876 IAC 4.33 (6).

ORDER

For File No. 5052714 (Date of injury February 9, 2012)

Claimant shall take nothing further.

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

File No. 5063163 (Date of injury May 16, 2015)

Defendant shall pay claimant permanent total disability for so long as claimant remains permanently and totally disabled at the weekly rate of three hundred ninety-nine and 48/100 dollars ($399.48) commencing August 29, 2018.

Defendant shall pay costs of four hundred fifty-nine and 00/100 dollars ($459.00).

Defendant shall have a credit for workers' compensation benefits previously paid.

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

Signed and filed this 23rd day of December, 2019.

James F Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Peters (via WCES)
Mark Sullivan (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 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.