BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| CHARLIE ANNE MCNITT,<br><br>Claimant,<br><br>vs.<br><br>NORDSTROM, INC.,<br><br>Employer,<br>Self-Insured,<br>Defendant. | FILED<br>JUL 19 2019<br>WORKERS' COMPENSATION | File Nos. 5065697, 5065698<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Notes: 1402.40, 1804 |

**STATEMENT OF THE CASE**

Claimant Charlie Anne McNitt filed a petition in arbitration seeking workers' compensation benefits from defendant Nordstrom, Inc., self-insured employer. This matter was heard in Des Moines, Iowa on June 1, 2018, by Deputy Workers' Compensation Commissioner Erica J. Fitch.

On July 2, 2019, pursuant to Iowa Code section 17A.15(2), the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a proposed decision in this matter due to the unavailability of Deputy Commissioner Fitch.

Pursuant to the requirements of Iowa Code section 17A.15(2), I have read the entirety of the record created before Deputy Commissioner Fitch as well as the parties' post-hearing briefs.

Although there are several factual disputes between the parties, neither party argues demeanor is the operative decision making factor in this case. Thus, I conclude I can proceed to issue a proposed decision pursuant to Iowa Code section 17A.15(2).

At the start of the hearing, claimant moved to dismiss file number 5065698 (August 1, 2014 date of injury). That motion was granted. Only file number 5065697 (October 2, 2007 date of injury) proceeded.

The parties submitted two hearing reports prior to the commencement of the evidentiary hearing, both for file number 5065697. One of the hearing reports pertained to claimant's right arm, elbow, hand, and shoulder, all of which were admitted injuries, and the other pertained to claimant's neck, for which defendant disputed liability. In both hearing reports, the parties entered into certain stipulations. Deputy Commissioner Fitch accepted the hearing reports and entered an order at the time of hearing noting

her approval of the stipulations and disputes noted on the hearing reports. I therefore accept the stipulations noted on the hearing reports, and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are bound by their stipulations.

The record presented to and accepted by Deputy Commissioner Fitch at hearing consists of Joint Exhibits 1 through 33, Claimant's Exhibits 1 through 11, Defendants' Exhibit A, and the testimony of claimant. The evidentiary record closed on June 1, 2018. The case was considered fully submitted upon receipt of the parties' briefs on July 16, 2018.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a neck injury as a result of her October 2, 2007 work injury.

2. The extent of claimant's industrial disability.

3. Whether defendant is responsible for reimbursement of claimant's independent medical examination (IME).

## FINDINGS OF FACT

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

The parties agree claimant sustained work-related injuries to her right arm, elbow, hand, and shoulder. Claimant's symptoms began in October of 2007 when she developed swelling in her hand after a 10-hour day of scanning orders. (Hearing Transcript, page 14) After a short stint of conservative treatment, claimant's symptoms improved. (See Joint Exhibit 4, p. 5) On December 24, 2007, claimant was released from care with a permanent restriction of no scanning. (JE 4, p. 5)

Claimant then returned to work for defendant-employer in a different position that did not require use of a hand-held scanner. She was placed at the "singles machine" where she was required to pull items off of a conveyor for packaging. (Hrg. Tr., p. 17) It appears claimant experienced general periods of waxing and waning in her symptoms in this position. (Hrg. Tr., p. 20) In May of 2012, however, claimant experienced a significant flare-up in her symptoms after she was asked to use a "picking scanner." (See Hrg. Tr., p. 18; JE 13, p. 16)

Claimant was eventually referred to Peter Pardubsky, M.D., who recommended proceeding with a right elbow radial neurolysis. (JE 16, p. 24) That surgery was performed on January 28, 2014. (JE 18, p. 27) Claimant testified the surgery was "very helpful." (Hrg. Tr., p. 22)

After surgery, claimant was placed on light duty through defendant-employer's re-employability program known as "REA." (Hrg. Tr., p. 46) Through this program, claimant was paid wages through defendant but was performing volunteer services at either Mercy Hospital or the local science center. (See Hrg. Tr., p. 22-23, 46) Claimant was essentially a greeter for patients and families entering the hospital. (See Hrg. Tr., p. 22)

Claimant worked through REA until August of 2014, when she was instructed by defendant to initiate work hardening. (See Hrg. Tr., p. 23) While performing an exercise during a work hardening session, claimant tore her right rotator cuff. (See Hrg. Tr., pp. 24-25; JE 22, p. 36) She underwent a right shoulder rotator cuff repair on January 21, 2015. (JE 23, p. 37)

Unfortunately, in September of 2015, Dr. Pardubsky informed claimant that the surgical repair failed. (JE 24, p. 40) Claimant was referred to James Nepola, M.D., for a second opinion. (JE 25) Dr. Nepola performed a second rotator cuff repair on January 29, 2016. (JE 26, p. 45) Like the first surgery, however, the second surgery also failed. (JE 27; JE 28, p. 51)

Despite her attempts at physical therapy after the second failed surgery, claimant continued to complain of right shoulder symptoms. (JE 29) Based on her ongoing symptoms, Dr. Nepola opined that claimant had reached maximum medical improvement (MMI) as of November 8, 2016 with the following permanent restrictions: no repetitive reaching away from her body or above chest height with the right arm, and no lifting, pushing, or pulling with the right arm away from the body or above chest height. (JE 29, p. 53) Claimant was instructed to return to the clinic as needed. (JE 29, p. 53)

In a letter dated December 16, 2016, Dr. Nepola assigned a 9 percent whole person impairment rating for the loss of motion in claimant's right shoulder. (JE 31, p. 58) He indicated claimant may need reverse total shoulder arthroplasty in the future for her known recurrent rotator cuff tear. (JE 31, p. 58)

Dr. Pardubsky evaluated claimant for a final time on December 15, 2016. She reported being "pleased by her elbow pain relief" but remained "discouraged by her overall arm function." (JE 30, p. 55) Dr. Pardubsky indicated he did not anticipate the need for any further treatment of claimant's right elbow. (JE 30, p. 56) He assigned a 12 percent upper extremity (7 percent whole body) impairment rating for her decreased grip strength and reduced elbow flexion and released claimant from his care. (JE 30, pp. 54, 55)

Since being placed at MMI by Dr. Nepola, claimant returned to Dr. Nepola's office for three right shoulder injections, the most recent of which was in April of 2017. (Hrg. Tr., p. 28; JE 32, p. 63) Dr. Nepola told claimant at her April 4, 2017 appointment that she could consider a reverse total shoulder replacement. (JE 32, p. 62) While Dr.

Nepola was hopeful that such a surgery would improve her pain, he indicated it "would not give her a shoulder that could do a labor job." (JE 32, p. 63)

Claimant was evaluated by Robin Sassman, M.D., for purposes of an IME on August 2, 2017. In a report dated January 9, 2018, Dr. Sassman diagnosed claimant with cervical radicular symptoms in addition to her right shoulder and arm conditions. (Claimant's Ex. 6, p. 34) Dr. Sassman recommended an MRI of the cervical spine to address whether claimant's injury aggravated or caused a "disc issue." (Cl. Ex. 6, p. 34) Claimant testified she asked for adjustments to her neck during physical therapy because she was experiencing "really bad headaches." (Hrg. Tr., p. 35) She also testified she reported these neck symptoms to Dr. Nepola, who told her, "Yeah, your neck is attached to your arm, so it's all attached." (Hrg. Tr., p. 35) Short of these two instances, however, there is little mention of claimant's neck in claimant's evidence. Significantly, neither Dr. Pardubsky nor Dr. Nepola—who treated claimant over the course of many years—suggested claimant's symptoms originated from her neck. For these reasons, I am not persuaded by Dr. Sassman's opinions regarding claimant's neck. I therefore find insufficient evidence that claimant sustained a neck injury as a result of her October 2, 2007 work injury.

Dr. Sassman assigned a 17 percent upper extremity (10 percent whole person) impairment rating for claimant's right elbow and right wrist conditions, and a 12 percent whole person impairment rating for claimant's right shoulder condition. (Cl. Ex. 6, pp. 35-36) She recommended restrictions of lifting, pushing, pulling, and carrying no more than 5 pounds occasionally with the right arm at waist height, and no lifting, pushing, pulling, or carrying with the right arm extended away from her body. (Cl. Ex. 6, p. 36)

Claimant testified Dr. Sassman's lifting restrictions accurately reflect her physical capabilities. (Hrg. Tr., p. 34) Claimant also testified Dr. Nepola verbally indicated to her that she should not lift significantly more than five pounds; she explained that Dr. Nepola used a gallon of milk as a reference point. (Hrg. Tr., p. 51) While I acknowledge Dr. Nepola did not address weight limits in his formal recitation of claimant's restrictions, I find claimant's testimony that Dr. Nepola suggested a five-pound lifting limit to be credible. That being said, even if no specific weight limit had been assigned, the use of claimant's right arm is significantly restricted when considering the restrictions assigned by either doctor; she is effectively limited to using her arm at her side.

At the time of the hearing, claimant had not worked in any capacity since October 31, 2016, when defendant informed claimant that she would no longer be assigned to her volunteer position through the REA program. (Hrg. Tr., pp. 26-27) She was also told there were no jobs available within her restrictions. (Hrg. Tr., p. 29) On her own volition, claimant went to a state job services office with the intent of "checking on jobs on the computers." (Hrg. Tr., pp. 52-53) Claimant was instructed to "go through the program," which had a waiting list at the time. (Hrg. Tr., p. 53) Claimant was placed with a job services counselor for the first time in May of 2018, just before the hearing. (Hrg., Tr., p. 54)

While claimant was on the job services waiting list, defendant arranged for claimant to be assisted by their own vocational counselor, Lana Sellner. With Ms. Sellner's help, claimant created a resume and attended some free computer workshops. (See Defendant's Ex. A, p. 53) Despite these workshops, claimant's computer skills are still very rudimentary. She is unable to type, for example, and when asked to describe her comfortableness with computers at hearing, she replied, "It's like Greek to me." (Hrg. Tr., pp. 37, 41) As such, I find claimant would not be a good candidate for retraining in positions that required any substantive computer use.

Claimant applied for roughly 15 jobs with the assistance of Ms. Sellner. (Hrg. Tr., p. 38) The only offer she received was from defendant's call center, but this offer was later retracted. (Hrg. Tr., p. 40) Claimant testified she was unsure she would have been qualified for this job due to the typing requirements, but she would "be willing to learn." (Hrg. Tr., pp. 40-41)

I find claimant is motivated to work. She went to job services on her own accord, cooperated with Ms. Sellner, and expressed her willingness to learn new skills. Unfortunately, however, claimant's work restrictions would preclude her from returning to the work to which she is trained and accustomed. Defendant has been unable to accommodate claimant's restrictions, and claimant credibly testified she would be unable to return to her former packaging or soldering work. (Hrg. Tr., p. 44)

Ms. Sellner indicated she believes claimant is "employable in customer service type positions." (Ex. A, p. 54) While this may be true from the standpoint of claimant's physical capacity, it overlooks the computer literacy required in many of these roles. (See Hrg. Tr., p. 58) Claimant testified she was physically capable of performing the greeting jobs assigned through REA and that she actually contacted the coordinator at Mercy Hospital to see what opportunities were available, but she was told "they only do that kind of job volunteering." (Hrg. Tr., pp. 46-48, 62)

Claimant, who was 64 years old at the time of the hearing and a high school graduate, has spent most of her career performing warehouse jobs. As she explained it, "Every job I've ever had, I've always done warehouse because I know I can do it." (Hrg. Tr., p. 41) Claimant, however, is now precluded from returning to the warehouse work for which she is fitted and to which she is accustomed. Claimant's physical capabilities are now essentially limited to customer service or receptionist positions—many of which require computer skills she lacks. While she indicated she is suited for the greeter positions she performed through REA, these positions are volunteer in nature and, based on claimant's inability to find work even with Ms. Sellner's assistance, they do not appear to be widely available in the competitive labor market.

Considering these factors, I find claimant is wholly disabled from performing work that her experience, training, education, intelligence, and physical capabilities would otherwise allow her to perform. I find claimant is permanently and totally disabled as a result of her work injuries.

## CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

I found there was insufficient evidence that claimant's neck was injured as a result of her October 2, 2007 work injury. I therefore conclude claimant failed to satisfy her burden to prove she sustained a work-related neck injury.

Regardless, the parties stipulated claimant sustained an industrial disability as a result of her right shoulder injury. The question is the extent of her disability.

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).

Claimant argues she is permanently and totally disabled as a result of her work-related injuries.

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).

The focus for evaluating total disability is on the person's ability to earn a living. Diederich v. Tri-City R. Co., 219 Iowa 587, 594, 258 N.W. 899, 902 (1935). The question is whether the person is capable of performing a sufficient quantity and quality of work that an employer in a well-established branch of the labor market would employ the person on a continuing basis and pay the person sufficient wages to permit the person to be self-supporting. Tobin-Nichols v. Stacyville Community Nursing Home, File No. 1222209 (App. December 2003). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. 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). Industrial disability is determined by the effect the injury has on the employee's earning capacity. Bearce v. FMC Corp., 465 N.W.2d 531, 535 (Iowa 1991); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa App. 2003).

Another important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013) Western v. Putco Inc., File Nos. 5005190/5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 9512062

(App. Jan. 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. Jan. 22, 1993); see also Larson, Workers' Compensation Law, Section 57.61, pps. 10-164.90-95; 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 knows the demands that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

In this instance, defendant was unable to find work within claimant's restrictions. Despite being motivated and attempting to find work, both on her own and with the assistance of a vocational counselor retained by defendant, claimant has been unable to do so. Claimant is not capable of returning to her prior employment and is of an age and skillset in which it is unrealistic to expect her to retrain, particularly for positions that require the use of a computer. Considering these factors, along with claimant's age, the situs and severity of her injuries, her residual function, permanent restrictions, educational background, employment background, motivation to improve, and all other relevant industrial disability factors outlined by the Iowa Supreme Court, I found claimant was permanently and totally disabled as a result of her work-related injuries. Claimant has satisfied her burden to prove her entitlement to permanent total disability benefits.

The final issue to be decided is whether defendant is responsible for payment of Dr. Sassman's IME. Iowa Code section 85.39 allows a claimant to request reimbursement for an IME "[i]f an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low." Iowa Code § 85.39(2). Both Dr. Pardubsky and Dr. Nepola—physicians retained by defendant—provided impairment ratings in December of 2016. Thus, the reimbursement provisions of Iowa Code section 85.39 were triggered in December of 2016. Claimant's IME was performed in August of 2017, after Iowa Code section 85.39 was triggered. Thus, I conclude defendant is responsible for payment of the entirety of Dr. Bansal's bill—not just the portion for the examination. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) ("[A] physician's written report of an examination and evaluation under section 85.39 would be a reimbursable expense under 85.39."); Plew v. AJS of Des Moines, Inc., File No. 5056490 (App. Feb. 11, 2019) ("The holding in DART only limited what could be assessed as a cost pursuant to rule 876 IAC 4.33. . . . In other words, the holding did not limit the reimbursement provisions of Iowa Code section 85.39.").

## ORDER

Defendant shall pay to claimant permanent total disability benefits, commencing on May 23, 2016, and payable through the present and continuing during claimant's ongoing period of total disability.

Defendant shall pay benefits at the stipulated rate of four hundred twelve and 14/100 dollars ($412.14) per week.

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).

Per the parties' stipulations, defendant is entitled to credit for any weekly benefits paid after May 26, 2016.

Defendant shall reimburse claimant for the remainder of Dr. Sassman's IME in the amount of two thousand seven hundred seventy-two and 50/100 dollars ($2,772.50).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 9th day of July, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Dirk Hamel
Attorney at Law
770 Main St.
Dubuque, IA 52001-6820
dhamel@dbqlaw.com

James M. Peters
Attorney at Law
115 Third St. S.E., Ste. 1200
Cedar Rapids, IA 52401-1266
jpeters@simmonsperrine.com

SJC/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.