BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WENDY L. SEGURA, Claimant, vs. KRAFT FOODS GROUP, INC, Employer, and INDEMNITY INS. CO. OF NORTH AMERICA Insurance Carrier, Defendants.	FILED SEP 10 2015 WORKERS' COMPENSATION File No. 5046348 ARBITRATION DECISION Head Note No.: 2401, 2800 , 1701, 1803

STATEMENT OF THE CASE

Wendy Segura, claimant, filed a petition in arbitration seeking workers' compensation benefits from Kraft Foods Group Inc. (Kraft) and its insurer, Indemnity Insurance Company of North America, as a result of an alleged injury she sustained on November 18, 2011, that allegedly arose out of and in the course of her employment. This case was heard in Davenport, Iowa, on March 4, 2015, and was fully submitted on April 4, 2015. The evidence in this case consists of the testimony of claimant, Lisa Culberson and Rodney Warhank, and Joint Exhibits 1 through 38.

ISSUES

Whether claimant sustained an injury due to cumulative trauma on November 18, 2011, October 1, 2012, or December 27, 2012, which arose out of and in the course of employment.

Whether claimant provided notice for the November 18, 2011, or October 1, 2012 date of injury.

Whether the alleged injury is a cause of temporary disability and, if so, the extent.

Whether the alleged injury is a cause of permanent disability and, if so, the extent of claimant's disability.

The commencement date for any permanent disability benefits.

The claimant's gross earnings for the injury dates of October 1, 2012, and December 27, 2012, and the resulting weekly rate.

Whether claimant is entitled to payment of medical expenses.

Whether claimant is entitled to alternate medical care.

Whether defendants are entitled to a credit under Iowa Code 85.38(2), short term disability payments.

Assessment of costs.

The stipulations contained in the Hearing Report are accepted and incorporated into this decision as if fully set forth.

FINDINGS OF FACT

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

Wendy Segura, claimant, was 54 years old at the time of the hearing. Claimant dropped out of high school in 11th grade and later obtained a GED in 1983. Claimant attended part of one semester at a community college. (Exhibit 21, page 5) Claimant's work history is set out in Exhibit 21, pages 5 and 6. Claimant had two prior back injuries before her currently claimed injury with Kraft. In approximately 1998, claimant injured her back while working for Drop Ship Express. Claimant received some treatment and made a full recovery. (Transcript page 13) Claimant had an injury at Kraft in 2006 or 2007. Her main injury was to her knee, but she also received treatment for her back. Claimant recovered from that injury. (Tr. p. 14)

I find the testimony of the claimant to be credible. Her demeanor at the hearing was non-evasive and straight forward. It was also consistent with the written evidence in the record.

Claimant began her employment with Kraft in August 2005. Claimant worked the shaved meet line until July or August 2011. She then transferred to the PMSU position. Claimant worked for Kraft until July 8, 2013. She was on leave status at Kraft at the time of the hearing.

Claimant was working the PMSU line in November 2011. Claimant testified she bent to pick up a piece of meat and hurt her back. Claimant said that her injury was observed by Douglas Swanson. (Ex. 22, p. 4) Mr. Swanson was a Line Tech and supervised on the line claimant was on working. Claimant did not seek medical treatment at the time of the incident. Claimant said that after that incident she would experience sporadic pain in her back when she was packing. (Tr. pp. 37, 38) Claimant

reported to Lisa Culberson, her supervisor, in November 2012, that her back was sore and requested some ergonomic adjustments to the table she was working on. (Tr. pp. 50, 51)

Claimant's first medical treatment for her back was in June or July of 2012 when she went for some chiropractic care from Dennis Hagemann, D.C., that was offered in the parking lot of Kraft. (Tr. p.39) She went for treatment at Dr. Hagemann's office on August 18, 2012, for her back pain. Claimant said she told her primary care physician that she was having some back issues and she had received chiropractic treatment.

The first day that claimant missed work due to her back was October 1, 2012, when Rupa Bontu, M.D. took her off work. (Tr. p. 41) Claimant applied for and received FMLA leave with a start date of October 1, 2012. (Ex. 20, p. 10) She was referred to physical therapy and had seven treatments. (Ex. 11, p. 12) Claimant did not return to work until the end of November or beginning of December. (Tr. p. 44) Claimant returned for regular work for about a month, through the end of December 2012. She worked for a few weeks in 2013 and ended her employment in July of 2013. (Tr. p. 45) Claimant said she was informed by Kraft that Kraft could not accommodate her restrictions and terminated her. (Tr. p. 46) Claimant worked for a week in December 2014 at a telemarketer. She was not able to complete the training program due to illness, unrelated to her back. (Tr. p. 71)

Claimant went to the Medical Department at Kraft on December 27. 2012. She reported pain in the lower right side of her back. She put on the incident report that the injury occurred on November 18, 2011. Claimant noted on the form that she was not sure that this pain was work related but didn't feel this pain until she started working in the PMSU Department. (Ex. 19, p. 3) The Job Safety Analysis for this position shows that this position requires constant lifting and carrying of up to 25 pounds. (Ex. 18, p. 5) Claimant was not sure of the date of her injury when she filled out the incident report; the injury date was a "guesstimate". (Tr. p. 56: Tr. p. 78) Claimant noted in the incident report that her back gradually gave her "issues" and that on October 1, 2012, she went to a doctor. (Ex. 19, p. 4)

Claimant was advised that surgery may not help her back. Her current treatment is a medication management approach. Claimant also uses a TENS unit for her pain. (Tr. p. 60)

Claimant went to her primary care physician, Rupa Bontu, M.D. on June 7, 2012, for a physical. She was complaining of low back pain that she was having for several weeks, which got worse after working. (Ex. 9, p. 5) Claimant reported that she was experiencing back pain for several weeks and had seen a chiropractor for adjustments. (Ex. 9, p. 8) On September 28, 2012, Dr. Bontu provided a 10 pound lifting restriction. (Ex. 9, p. 9) On October 1, 2012, claimant told Dr. Bontu she had a difficult time getting out of bed. On October 1, 2012, Dr. Bontu took the claimant off work. The work slip stated that claimant would be able to return to work on October 16, 2012, if feeling better. (Ex. 9, p. 10) Claimant did not report to Kraft that she had a work-related injury

at this time. On October 26, 2012, Dr. Bontu recommend claimant consider going to a pain clinic, which claimant was reluctant to do. (Ex. 9, p. 17) On October 26 and November 29, 2012, Dr. Bontu filled out a short term disability form for Aetna and checked a box that stated claimant's condition was not work related. (Ex. 9, pp. 18, 25) On October 31, 2012, Dr. Bontu's records indicate that an MRI showed a mild disc bulge and arthritis and recommended claimant go to a pain clinic. (Ex. 9, p. 19) On December 22, 2012, claimant called Dr. Bontu's office to ask about an appointment. The note said she decided to go to work and inquire about workers' compensation. (Ex. 9, p. 26) Claimant was informed that her injury was not work related and she returned to Dr. Bontu on January 7, 2013, with back pain and neck pain. (Ex. 9, p. 28) On March 4, 2013, claimant was returned to work without restrictions. (Ex. 9, p. 37) On July 14, 2014, Dr. Bontu responded to questions from claimant's counsel. Dr. Bontu agreed that it was likely or probable that claimant's work duties at Kraft materially aggravated her back problems. She did not know if work accelerated her back condition. (Ex. 28, p. 4) On September 29, 2014, at the request of claimant's counsel, Dr. Bontu stated that when he filled out the reports for Aetna insurance she was not aware that causation in a workers' compensation case could be found with a material aggravation or an acceleration of claimant's conditions due to work. (Ex. 28, p. 7)

Lisa Culberson is a business unit leader for Kraft in Davenport. Ms. Culberson is responsible for the plant on the weekend. Ms. Culberson was the claimant's supervisor from November 2011 through October 7, 2012. (Tr. p. 90) Ms. Culberson was not informed by the claimant that she had any work related injury. (Tr. p. 93) Ms. Culberson said that Mr. Swanson was a Line Tech. He was in charge of the line claimant was working on. Workers on the line were to report to him. Ms. Culberson said that he was not a supervisor in any way. (Tr. p. 108) Ms. Culberson said that if she could not be contacted on the line then the workers were to report to Mr. Swanson. (Tr. p. 109)

Rod Warhank, Associate Human Resources Manager, was called by the defendants to testify. Workers' compensation benefits are among his responsibilities for Kraft at the Davenport plant. Workers are trained to report their work injures, regardless of severity. He testified that workers are trained to report to a supervisor, but reporting to a line tech "would probably be appropriate." (Tr. p. 112) Mr. Warhank was not aware of claimant reporting a work injury before December 27, 2012. (Tr. p. 113) Kraft paid claimant $3,437.98 in short term disability benefits. Short term disability payments are paid for non-work related disabilities. (Tr. p. 113) At the time of the hearing, claimant was still an employee at Kraft. She was on leave. Under the contract she could not be on leave for more than two years before she would be terminated. (Tr. p. 117) As claimant was off work as of July 8, 2013, claimant had about four months left on her leave. (Tr. p. 117)

Claimant contacted the Kraft company nurse, Rachel Nelson, R.N., on December 27, 2012. A first report of injury form was completed on December 27, 2012, by claimant and Kraft. (Ex. 19, p. 3) The notes of that contact reveal that claimant reported she had been off work for about two months due to her primary care provider's

recommendation. When she returned to work she experienced back pain. Claimant was told by her primary care physician to consider her condition as a workers' compensation case. Claimant commented her back condition got worse when she started to work in the PMSU department. (Ex. 2, p. 1) An appointment was made for claimant to see Rick Garrels, M.D.

On January 3, 2013, Rick Garrels M.D. examined the claimant for a causation opinion as to whether her neck and back conditions were related to work. He stated that the claimant had right cervicothoracic and right lumbar pain. He concluded that these conditions were an extension of one another. He restricted work activities and delayed making a determination of causation pending a review of additional records. Dr. Garrels commented on the fact that in his opinion claimant was familiar with workers' compensation and her delay in reporting her injury does not make sense. (Ex. 1, p. 5) He provided restrictions of rarely lifting or pushing or pulling over five pounds and to rarely bend, twist with the neck and low back as well as rarely reach with the right and left arm. (Ex. 1, p. 6) On February 7, 2012, Dr. Garrels stated that he reviewed additional medical records and found no correlation between claimant's symptoms and her work at Kraft. He concluded that claimant's back condition was not work-related. (Ex. 1, p. 7)

On January 23, 2013, claimant was examined by Michael Dolphin, D.O. for her complaint of low back pain. Dr. Dolphin's assessment was low back pain, lumbar degenerative disc disease and lumbar spinal stenosis. He recommended aggressive physical therapy and if that doesn't work, a discogram. (Ex. 6, p. 4) Claimant had a discogram on April 2, 2013. (Ex. 7, p. 1) The L4-5 level was abnormal on CT and it showed concordant pain at L4-5. (Ex. 6, p. 8) Dr. Dolphin discussed fusion surgery with the claimant and they decided to follow more conservative methods.

Claimant presented restrictions to her employer from Robert Chesser, M.D. on July 8, 2013. These restrictions included alternating sitting and standing every 45 minutes and no lifting more than 15 pounds or working more than eight hours per day. (Ex. 2, p. 8. Ex. 27, p. 7) Dr. Chesser wrote on September 9, 2014, that the work performed by claimant at Kraft materially aggravated and accelerated her back problems. Dr. Chesser wrote:

> The job duties performed by Ms. Segura which involved repetitive bending, twisting or lifting imposed more trauma on her disc. This caused the disc to significantly worsen and accelerated its decline. The work duties materially aggravated the inflammation of the disc which produced pain as well as a decrease in function. Ms. Segura went from asymptomatic to symptomatic because of her work duties. She gradually worsened to the point she could no longer perform her job duties because of pain problems.

(Ex. 27, p. 7)

And, provided the following restrictions:

> Squatting/deep bending: None; avoid.
> Kneeling/climbing: none; avoid.
> Bending: A few times per hour.
> Twisting: rare.
> Sitting/standing: No more than 8 hours per day. Ms. Segura should be allowed to change positions as needed. The time spent between sitting and standing should be close to equally divided.
>
> Lifting: Must be close to the body. No lifting of weight out in front of her or away from the body.
> Floor to waist: up to 5 lbs. on a rare basis.
> Knee to waist: up to 10 lbs. on a rare basis.
> Waist to shoulder level: up to 5 lbs. on a rare basis.
> Reaching and pushing or pulling: up to 5 lbs. of force on a rare basis
> Rare, as used above, is defined as only once per hour.

(Ex. 27, p. 7)

I find that these are claimant's current restrictions.

On September 1, 2013, claimant was examined by John Wight, M.D., neurologist, for blurred vision in her right eye. Dr. Wright's assessment was stroke. (Ex. 3, p. 5) Claimant testified she has recovered from the stroke.

Claimant had a number of injections to her spine and was prescribed a number of medications by Kerry Panozza, M. D. and Robert Rossi, M.D. (Ex. 5, pp. 1 – 42)

Claimant experienced back pain in November 2011. It was not until September 2012 that she experienced back pain that significantly impacted her ability to work. It was on October 1, 2012, that claimant reported to Dr. Bontu that she had difficulty getting out of bed. I find that this is the date of the claimant's cumulative injury. Dr. Bontu, as of November 29, 2012, in his report to Aetna, did not consider claimant to have a work injury. Claimant, around December 27, 2012, decided to inquire as to whether her back problem was related to her work. Claimant had no acute injury. Her primary care physician, chiropractor and physical therapist did not suggest to her that she had a work injury. I find that December 27, 2011, is the date claimant became aware that her injury may be work related. This is the date claimant reasonably understood the nature, seriousness, and probable compensable character of her injury.

Richard Kreiter M.D. examined the claimant on August 27, 2014, at the request of claimant's counsel. Dr. Kreiter's impressions were:

1. Degenerative arthritis of the lumbosacral spine, primarily L4-5 and L5-S1 with bilateral facet arthritis, neurologically intact with chronic pain and limited motion.

2. Hypertension.

3. History of CVA with acute stroke and good recovery.

4. Hypothyroidism.

(Ex. 13, p. 9)

Dr. Kreiter responded to a series of question from claimant's counsel. He stated that it was likely the work performed by the claimant at Kraft materially aggravated the back condition treated by Drs. Bontu, Chesser, Dolphin, Miller and Rossi. He also opined that the work at Kraft probably accelerated claimant's back problems. (Ex. 13, p. 10) Dr. Kreiter provided an eight percent whole body impairment rating and found that claimant was at maximum medical improvement (MMI) as of June 1, 2014. (Ex. 13, p. 10) He recommended restrictions of alternating standing, walking and sitting. He limited lifting to ten pounds on an occasional basis. (Ex. 13, p. 10)

On September 15, 2014, Michael Cullen, M.D., a neurologist, performed an independent medical examination of the claimant. Dr. Cullen found that claimant did not experience an injury to her low back during her employment at Kraft in November 2011 or subsequently. He found that claimant's low back pain was not related to her employment and therefore no restrictions due to an employment related injury. (Ex. 14, p. 12)

Steve Mootz M.A., CRC conducted a vocational assessment of the claimant. Claimant's attorney did not consent to allow the claimant to meet with Mr. Mootz. Mr. Mootz used restrictions of limiting claimant to sedentary to light and the need to change positions every 45 minutes in his vocational evaluation. (Ex. 15, p. 8) Mr. Mootz identified three positions in the Davenport labor market area that claimant could perform. Two of the three were part-time positions and the full-time position was with APAC. Claimant, subsequently to this evaluation, attempted to work at APAC, but was not successful. (Ex. 21, p. 22)

Claimant applied for and was awarded Social Security Disability Benefits with an onset date of December 31, 2012. (Ex. 16, p. 9) Claimant requested disability based upon degenerative disc disease, herniated discs, spinal stenosis and arthritis pain. (Ex. 16, p. 2)

RATIONALE AND 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).

Claimant has argued that her back and neck condition was materially aggravated and/or accelerated as a result of the work at Kraft. Claimant alleges three possible injury dates for cumulative trauma.

There are conflicting opinions among the physicians in this case.

Dr. Cullen stated that within a reasonable degree of medical probability, claimant did not experience an injury to her back during her employment with Kraft. Dr. Garrels stated that claimant's back condition was not related to her work at Kraft. Dr. Bontu opined that claimant's work materially aggravated her back condition. Dr. Kreiter held that claimant's work at Kraft materially aggravated and accelerated her back condition. Claimant had a degenerative back condition. She had an event in November 2011 that was the start of a process that lit up her back condition.

Dr. Garrels' and Dr. Cullen's opinions concerning causation were unconvincing. Dr. Garrels relies, in part, that there was a delay in claimant reporting her injury and

found no correlation with her work at Kraft. Dr. Cullen opined that the type of work claimant was performing would not medically cause her low back pain or lumbar disc herniation.

Claimant alleges a cumulative trauma and was uncertain if her on-going low back and neck problems were related to her work. The fact that there is not a specific report of an injury in a cumulative trauma case is not uncommon or unexpected. It is more uncommon in a traumatic injury case. Employees can be engaged in benign activities at work and still suffer a work injury. The fact that a certain activity is not generally known to cause a work injury is not dispositive. It is certainly a relevant piece of evidence, but it is not determinative. I find the testimony of the claimant that she did not experience significant back pain until she changed her job to the PMSU line credible. Claimant began experiencing more pain in her back when she had to engage in more lifting and rotating of her back.

I find the opinions of Dr. Bontu and Dr. Kreiter the most convincing. These opinions analyze better whether claimant's work significantly aggravated or accelerated her degenerative back condition than Dr. Grarrels and Dr. Cullen. Dr. Kreiter is board Certified as an orthopedic surgeon. Dr. Cullen is a neurologist and is board certified in psychiatry and neurology.

Defendants have raised a notice defense under Iowa Code section 85.23. It is the defendants' burden of proof to show that they did not receive notice. Claimant's credible testimony was that she told Mr. Swanson about her back incident in November 2011. It is true that claimant was not working on November 18, 2011. Claimant credibly testified that she made a "guesstimate" of the exact date she told Mr. Swanson. Mr. Swanson was the line supervisor and had the authority to receive reports. (Tr. p. 112) While, according to Kraft policy, the matter should have been reported by Mr. Swanson to another supervisor, apparently it was not. Defendants had notice that claimant had an incident at work concerning her back in November of 2011. Defendants did not assert a statute of limitations defense.

The Iowa Supreme court set forth the proper test as to whether claimant has filed a workers' compensation case within the statute of limitations in Herrera v. IBP, Inc., 633 N.W.2d 284. The Court stated,

> This court adopted the "cumulative injury rule" in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). We held that when a disability develops over a period of time, the compensable injury is held to occur when the employee, "because of pain or physical inability," can no longer work. McKeever, 379 N.W.2d at 374. The date such an injury occurs is important because it impacts the determination of "which employer and carrier is at risk, whether notice of injury and claim are within the statutory period, whether statutory amendments were in effect, which wage basis applies, and other important considerations." Thilges, 528N.W.2d at 618. Although the date of injury is relevant to notice and statute-of-limitations issues, the cumulative injury rule is

> not to be applied in lieu of the discovery rule. See McKeever, 379 N.W.2d at 372-73. As we said in McKeever, although "[t]hese two rules are closely related, ... they are not the same." Id. Thus, although an injury may have occurred, the statute of limitations period does not commence until the employee, acting as a reasonable person, recognizes its "nature, seriousness and probable compensable character." Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980) (applying discovery rule to workers' compensation actions).
>
> The McKeever "missed-work" test was later refined in Tasler, where we endorsed an analysis of more general applicability. In Tasler, we adopted the manifestation test, fixing the date of injury "as of the time at which the `disability manifests itself." 483 N.W.2d at 829 (quoting 1B Arthur Larson,Workers' Compensation Law § 39.10 (1991)). We held that an injury manifests itself when both "the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." Id. (quoting Peoria County Belwood Nursing Home v. Indus. Comm'n, 115 Ill.2d 524, 106 Ill.Dec. 235, 238, 505 N.E.2d 1026, 1029 (1987))
>
> ....
>
> To summarize, a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition. Orr,298 N.W.2d at 257

Herrera v. IBP, Inc., 633 N.W.2d 284, 287-288 (Iowa 2001)

It is somewhat of a paradox that defendants argue that claimant suffered no work injury and claimant's primary care physician indicated her back issues were not work-related at first, but claimant should have known to report her back issues as a work-related injury.

I previously found that claimant had an injury on October 1, 2012. I also find that the claimant knew, or should know, the nature, seriousness, and probable compensable character of her injury or condition on December 27, 2012. As such defendant has failed to prove that claimant did not provide notice.

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.

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).

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).

I previously found that claimant's restrictions were those imposed by Dr. Chesser. These are very significant restrictions. The do not allow light work and require accommodation by employers on standing, sitting and walking. Claimant has been found eligible for Social Security Disability. Kraft was not able to accommodate her restrictions as of the time of the hearing. Claimant has a limited education. Claimant credibly testified she is limited in her ability to work and engage in basic adult living skills. She has a very sedentary lifestyle due to her back impairment.

Mr. Mootz's vocational assessment was of limited value due to only identifying three jobs: Two were part time and the third was a position the claimant unsuccessfully tried. The restrictions Mr. Mootz used of sedentary to light work exceeded the limitations that Dr. Chesser provided. (Floor to waist up to 5 pounds on a rare basis; knee to waist up to 10 pounds on a rare basis; waist to shoulder up to 5 pounds on a rare basis. (Ex. 27, p. 7))

I find that claimant has proven that she is permanently and totally disabled. Claimant is entitled to benefits commencing October 1, 2012. Defendants shall have a credit for the wages paid to claimant for the periods claimant worked after October 1, 2012, approximately 5 ½ weeks. (Ex. 31, p. 3)

Defendants have requested a credit for short term disability payments they have made. The parties stipulated that the gross amount was $2,017.79 in the hearing report. While there was evidence presented that the amount of the credit may be different, the parties' stipulation in the hearing report is binding on the parties as to the total amount of the short term disability. There was no evidence of the net amount; the amount claimant received after she paid taxes. This agency held in Miller v. University of Iowa Hospita,l File No. 1253772/1253773, (App. August 6, 2002):

> The agency has held for several years that the amount of the credit is the net amount of the group disability benefit after applicable taxes. Waters v. University of Iowa Hospitals and Clinics, Nos. 1159901, 1205026 (App. November 16, 2001), DeWitt v. AT&T, No. 989177, (App. February 28, 1994), Beller v. Iowa State Penitentiary, No.799401 (App. July 10, 1991). The Iowa statutory weekly benefit is 80 percent of the employee's customary net pay after taxes are deducted. Allowing credit for the gross amount of the LTD benefit is contrary to the statute because it leaves the employee with a benefit of less than 80 percent of the employee's customary wages.

The parties agree that the payment to claimant of short term disability was a gross payment and that taxes were due on the amount. Claimant presented no evidence as to what amount of taxes was paid on the short term disability. As I have no information to calculate the amount of net credit the claimant and defendants are entitled to receive, I award a credit of $2,017.79 to the defendants.

The weekly rate is in dispute. I find that the calculations shown in attachment A of the defendants' brief are the most accurate and reflect the correct calculation of claimant's average weekly rate. I find that claimant is entitled to a weekly rate of $442.81.

Claimant has requested reimbursement of medical costs and medical mileage and of expenses set forth in Exhibits 29, 30, 32 and 33. Defendants are responsible for these costs.

Defendants shall reimburse claimant directly for any out of pocket medical expenses for treatment of injuries related to her back and neck injury. Defendants shall pay claimant the medical mileage found in Ex. 30, page 3, of $639.83. Defendants shall reimburse any insurance company for medical bills paid that were related to the back injury. Defendants shall provide medical care for claimant's back injury.

Claimant has requested costs in the amount of $2,267.57. (Ex. 36, p. 1) The filing fee service costs and deposition cost are allowable under 876 IAC 4.33. In my discretion I award these costs in the amount of $187.57. Claimant has requested reimbursement for medical reports of Dr. Bontu and Dr. Chesser. Two medical reports are allowable under rule 4.33. However, the invoices submitted by the claimant show that claimant was charged for conferences with claimant's attorney and chart review, not for reports. (Ex.36, pp. 3 - 5) I am not awarding these costs.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant permanent total disability benefits commencing on October 1, 2012, and continuing during the period of claimant's total disability at the weekly rate of four hundred forty two and 81/100 dollars ($442.81).

Defendants shall have credit for wages paid after October 1, 2012, as set forth in this decision.

Defendants are entitled to a credit of two thousand seventeen and 79/100 dollars ($2,017.79) for payment of short term disability benefits.

Defendants shall pay medical expenses and medical mileage as set forth in this decision.

Defendants shall pay any past due amounts in a lump sum as interest as provided by law.

Defendants shall file subsequent reports of injuries (SROI) as required by this agency.

Defendants shall pay claimant's costs in the amount of one hundred eighty seven dollars and 57/100 dollars ($187.57).

Signed and filed this 10th day of September, 2015.

JAMES F. ELLIOTT
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

COPIES TO:

Michael T. Hines
Attorney at Law
326 West Third Street, #701
Davenport, IA 52801
attymhines@qwestoffice.net

Peter J. Thill
Paul M. Powers
Attorneys at Law
1900 East 54th Street
Davenport, IA 52807
pjt@bettylawfirm.com
pmp@bettylawfirm.com

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.