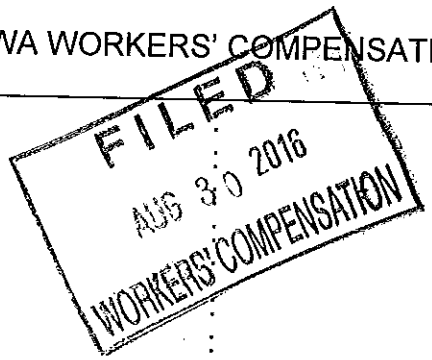
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER




KAYLA M. MURPHY,

Claimant,

vs.

PORTER APPLE COMPANY, INC. D/B/A APPLEBEE'S,

Employer,

and

CONTINENTAL WESTERN,

Insurance Carrier,
Defendants.

File No. 5052453

ARBITRATION

DECISION

Head Note Nos.: 1803, 3001, 3002

## STATEMENT OF THE CASE

Kayla Murphy, claimant, filed a petition in arbitration seeking workers' compensation benefits from Porter Apple Company d/b/a Applebee's (hereinafter Applebee's) and its insurer, Continental Western as a result of an injury she sustained on September 7, 2013 that arose out of and in the course of her employment. This case was heard in Sioux City, Iowa and fully submitted on December 16, 2015. The evidence in this case consists of the testimony of claimant, and claimant's Exhibits 1 – 12 and defendants' Exhibits A – Q[1]. Both parties submitted post-hearing briefs.

The primary issues in the case are how to calculate claimant's gross income and the extent of her disability.

## ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. The gross weekly earnings of the claimant.
3. Assessment of costs (filing fee).

[1] The parties submitted a large number of duplicate exhibits. The better practice is to jointly submit one set of exhibits.

The stipulations of the parties contained in the Hearing Report and Order approving same are incorporated in this decision as if fully set forth in this arbitration decision.

## FINDINGS OF FACT

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

Claimant, Kayla Murphy, was 28 years old at the time of the hearing. She graduated from high school and was enrolled in an online college at the time of the hearing. She is working on obtaining a Bachelor's degree in psychology. Claimant was expecting to graduate in January 2017 and then expected that she would need to get a Master's degree. (Transcript, page 12) Claimant's work history is set forth in Exhibit 8 and Exhibit M, page 3. She has worked in food service and marketing. She has had a number of jobs as a food server. Claimant worked as a food server at Applebee's in Sioux City, Iowa at the time of her injury in September 2013. She continued to work for Applebee's until August 2015. (Tr. p. 13) Claimant left Applebee's due to dissatisfaction on how she felt she was treated by supervisors and co-workers after her injury. (Ex. P, p. 22)

Claimant obtained employment in a Mini-Mart shortly after she left Applebee's in August 2015 and was employed there working 25 hours a week. (Tr. p. 19) Claimant operates the cash register and makes breakfast foods at the Mini-Mart. She was earning $10.00 per hour at the Mini-Mart. Before taking the job at Mini-Mart claimant applied for two jobs, a Fire Watch at CF Industries and a cashier/stocker at Wal-Mart. Claimant was not hired for either job due to lifting/weight limitations. (Tr. pp. 21, 22) Claimant also discussed with her mother whether she could work for her mother who operates Trademark Enterprises. Claimant was not physically able to perform that work as well. (Ex. 23, p. 23)

While employed at Applebee's claimant earned $4.35 per hour plus tips. (Tr. p. 25; Ex. J, p. 1) Eight percent of sales were reported to the IRS by her employer.[1] Claimant testified that 18 percent of sales was a more accurate representation of her tip income, rather than 8 percent. She testified her tips were generally between 15 and 20 percent; closer to 20 percent. (Tr. p. 25) Claimant testified that if she were to utilize the 18 percent tip for the pay period ending September 1, 2013 her biweekly income would be $1,207.10. (Tr. p. 29)

Claimant admitted that based upon her estimation of her wages and tips from Applebee's her annual income would be around $31,000.00. None of claimant's tax returns show that much income from Applebee's. (Ex. K, pp 12 – 23; Tr. 53) However, client started work in August 2013 and was injured and had surgery in May 2014, was off work and received temporary total disability benefits. (Ex. 4, p. 1; Tr. p. 73) Also, for a time period, when claimant was on light duty, she worked on the car side and was paid $8.50 per hour. (Tr. p. 65)

Claimant's first day on the job for Applebee's was August 6, 2013. (Ex. J, p. 1) Claimant testified that the paycheck for the period ending August 18, 2013 did not fairly represent her hours. (Ex, C, pp. 1, 2) (See also Ex. 7, p. 15) She worked six days, and one time period was for orientation. (Tr. p. 27) Claimant testified that the 55.8 hours she worked for the pay period ending September 1, 2013 was representative of the hours she worked. (Tr. p. 27) Claimant testified that her effective hourly rate was $21.91 per hour. (Tr. p. 31)

Brenda Reid, General Manager of Applebee's, testified via deposition. (Ex. 7, pp. 1 – 16: Ex. Q, pp. 1 -22) Ms. Reid explained that claimant was paid $4.35 per hour plus tips. Claimant's pay stub would reflect her hourly wage plus the tips she received. The amount of tips is based upon 8 percent of claimant's sales. The hourly wage and 8 percent of total sales is the amount reported on the pay stub. (Ex. 7, p. 5) The payroll system counts the actual amount credit card tips claimant receives, but does not record cash tips. (Tr. p. 5) Ms. Reid did not know the average percent of tips servers received at Applebee's. She thought that it was between 10 and 15 percent. (Ex. 7. p. 5) Ms. Reid, testified that if claimant said her tips were 18 percent she would not disagree with that statement. (Ex. 7. p. 6) Ms. Reid agreed that claimant working 55 hours for a two-week period would be fairly representative of the hours claimant worked during a two-week period. (Ex. 7, p. 6)

Defendant's rate calculation is found in Exhibit O. Defendants took her total income for four weeks and divided it by four and applied the applicable benefits schedule of married with two exemptions. (Ex. O, p. 1)

Claimant's rate calculation is found in Exhibit 11. Claimant excludes the week starting August 8, 2013 as being unrepresentative. Claimant assumes an hourly rate of $4.35 per hour plus 18 percent of sales in tips in her calculation of gross income.

I find that the fist pay period is unrepresentative of claimant's work. It was 6 days and contained an orientation/training period. I also find that claimant earned more than the 8 percent in tips which was reported. I find that claimant earned 15 percent in tip income, based upon Ms. Reid and claimant's testimonies.

On September 7, 2013 claimant slipped on some water and fell at Applebee's while carrying plates. She landed on her back and right side. At the time of the hearing claimant was still having symptoms in her right wrist and shoulder from the fall. (Tr. p. 35; Ex. P, p. 26) Claimant eventually had surgery on her right shoulder. Claimant testified that she is in more pain now after her surgery, than before the surgery: She considers the surgery unsuccessful. (Tr. p.37) Claimant is not receiving any active treatment for her shoulder, other than taking over-the-counter ibuprofen and wearing a wrist splint when her wrist hurts. (Tr. p. 58)

Claimant testified that the restrictions that Sunil Bansal, M.D. recommended are accurate, based upon her symptoms. She testified that the restrictions in the functional

capacity evaluation (FCE) were based upon testing with her using two arms to lift and that Dr. Bansal's restrictions considered her just using the right arm. (Tr. pp. 40, 41)

Claimant has modified her daily activities due to her shoulder injury. She cannot carry her dog's food and take it for walks, due to pulling on her shoulder. (Tr. p. 41) She has stopped playing softball, although she stopped softball before her injury. (Ex. P, p. 29)

Claimant was seen by Tracey Pick, ARNP on September 12, 2013 for an evaluation. ARNP Pick's assessment was,

(1) Right wrist sprain

(2) Right knee sprain/contusion

(3) Lumbar strain

(4) Right hip strain

(Ex, 1, p. 2) On September 18, 2013 claimant saw ARNP Pick for pain in the right wrist, right shoulder, bilateral knees and lumbar spine. (Ex. 1, p. 4) ARNP Pick's assessment was,

(1) Right wrist sprain with concern of ligamentous or tendon injury

(2) Bilateral knee sprain/contusion

(3) Lumbar strain

(4) Right hip strain

(5) Right shoulder strain

(Ex. 1, p. 5) On October 10, 2013 ARNP Pick injected claimant's right shoulder. (Ex. 1, p. 12) She provided another injection on October 22, and November 7, 2013. (Ex. 1, pp. 14, 17) On December 2, 2013 ARNP Pick recommended an MRI for the right shoulder. (Ex. 1, p. 19) The MRI showed some mild acromioclavicular arthropathy. (Ex. 1, p. 20)

Claimant was seen by Raymond Sherman, M.D. who examined claimant on January 6, 2014. His impression was right wrist sprain, possible dorsal capsular injury and right shoulder rotator cuff tendinitis with possible grade 1 AC joint strain. He provided an injection into the AC joint. (Ex. 2, p. 3) On May 7, 2014 Dr. Sherman assessed claimant with long head biceps tendonitis and recommended right shoulder arthroscopy and possible bicep tenotomy. (Ex. 2, p. 8) On May 13, 2014 Dr. Sherman performed surgery. His post-operative diagnosis was,

1. Right shoulder intraarticular long head of the biceps tendonitis.

2. Articular-sided partial supraspinatus rotator cuff tear with impingement.

(Ex. 4, p. 1)

Dr. Sherman referred claimant for an EMG of the right arm. The results showed mild carpal tunnel syndrome. (Ex. A, p. 19) On December 11, 2014 Dr. Sherman placed claimant at maximum medical improvement (MMI) on work restrictions of light medium work, which were detailed in a functional capacity examination (FCE) on November 6, 2014. (Ex. 2, pp. 18, 19) On December 18, 2014 Dr. Sherman provided claimant with a 1 percent upper extremity rating. (Ex. 2, p. 20)

The FCE on November 6, 2014 found that claimant could perform up to the light-medium work, lifting up to 35 pounds on an occasional basis, less than one-third of the day. She was not deemed a candidate for frequent overhead activities and repetitive forceful pushing and pulling. (Ex. 5, pp. 7, 8)

On February 9, 2015 Dr. Bansal performed an independent medical examination (IME). Dr. Bansal's diagnosis was,

RIGHT WRIST:

Right carpal tunnel syndrome.

RIGHT SHOULDER:

Right shoulder rotator cuff tendinitis.

Status post right shoulder arthroscopic surgery.

(Ex. 6, p.12) He provided a 2 percent upper extremity impairment rating for claimant's right wrist and a 3 percent impairment rating for the right shoulder. (Ex. 6, p. 13) Dr. Bansal agreed with the restriction in the November 2014 FCE, but noted that the restrictions were based upon using two hands. He provided additional restrictions of no lifting greater than 10 pounds occasionally and 5 pounds frequently with the right arm, (Ex. 6, p. 13) I find that Dr. Bansal's' restrictions are claimant's restrictions.

Based upon her restriction of lifting with her right arm 10 pounds occasionally and 5 pounds frequently, and her work history I find that claimant has a 35 percent loss of earning capacity.

## CONCLUSIONS OF LAW

The first issue to determine is claimant's rate, which requires determining which weeks to include and the amount of her gross income. Claimant began her employment

on August 6, 2013 and was injured on September 7, 2013. Iowa Code section 85.36(7) states:

> In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

No party tried to prove the earnings of other employees for the above section. Some earnings of other employees were submitted, but it was for the purpose of showing that the employer would report 8 percent of sales for counting tip income. I find the claimant has proven that her first pay period August 6, 2016 through August 18, 2016 was not representative and it included an orientation/training period and only six work days, was short and not reflective of her customary work. I agree with claimant that that week should be disregarded. The pay period from August 19, 2013 through September 1, 2013 is representative. That shows 55.08 hours worked. Claimant earned $4.35 per hour plus tips at that time. Multiplying the 55.08 hours by $4.35 equals $239.60.

The claimant asserts that she would earn 18 percent in tips. Her employer reported 8 percent in tips, the minimal amount required by the Internal Revenue Service. The defendants used the 8 percent in calculating her gross income and the claimant used 18 percent. Reporting a lower amount of tip income "benefits" the employee and employer in paying lower amounts in taxes. This underreporting has been noted in other decisions of this agency. See Tickal v. Perkins Family Restaurant, File No. 1275145, page 3 (Arb. November 7, 2002) The claimant's proof, and it is the claimant's burden of proof, is her testimony that she earned at least 18 percent and that of Ms. Reid who would not disagree with claimant's statement that she earned 18 percent in tips. The defendants offered the pay records that show that 8 percent was reported and that claimant's tax records do not reflect her reporting income from Applebee's that would reflect an effective wage of about $21.00 per hour.

I find the convincing evidence is that claimant would earn 15 percent in tip income. Ms. Reid testified that industry averages were 10 to 15 percent. Claimant did not provide any bank records or evidence from a co-employee to support the 18 percent tip income amount. Given the lack of documentary proof, and considering claimant and Ms. Reid's testimonies, I find she has proven by a preponderance of the evidence that she earned 15 percent in tips.

Based upon $5,375.0 in sales, (Ex. 11, p. 1), results in tip income of $806.25 [$5,375 x 15% = $806.25]. Adding her hourly wages of $239.60 plus tip income of $806.25 results in a gross income of $1,045.85 for a two-week period. Dividing this by two results in a gross weekly income of $522.92 per week. Using the rate book in effect at the time of the injury, with married and two exemptions, I find the claimant's weekly rate to be $355.03.

The next item to determine is the extent of claimant's industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

I found that claimant has a 35 percent loss in earning capacity. Claimant has significant lifting limitation with her right arm. Claimant is enrolled in an online college and is working toward a Bachelor's degree. Claimant was working part-time in a convenience store, which was within her work restriction. She was making $10.00 an hour at her part-time job. Claimant hopes to obtain a Master's degree in psychology so that someday she can work with the elderly. While her efforts to go to school and obtain a Master's degree are to be commended, it is somewhat speculative to determine that she will be able to complete such a course of study and what the value of an online degree(s) will be. Considering her younger age, her education and her lifting limitations I find claimant has a 35 percent industrial disability, entitling claimant to 175 weeks of permanent partial disability benefits.

Claimant has requested costs for the filing fee in this case. In my discretion I award this cost pursuant to 876 IAC4.33.

ORDER

Defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the weekly rate of three hundred fifty-five and 03/100 dollars ($355.03) commencing December 11, 2014.

Defendants shall pay claimant one hundred dollars ($100.00) for costs.

Defendants shall pay any past due amounts in a lump sum with interest.

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

Signed and filed this 30th day of August, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

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[i] https://www.irs.gov/businesses/small-businesses-self-employed/reporting-tip-income-restaurant-tax-tips (Last visited 8/30/2016) The IRS generally requires that minimum Tip income of 8 percent be reported.

Employer Requirements

Employers must collect income tax, employee social security tax and employee Medicare tax on tips reported by employees. You can collect these taxes from an employee's wages or from other funds he or she makes available.

Allocation of Tips

As an employer, you must ensure that the total tip income reported to you during any pay period is, at a minimum, equal to 8% of your total receipts for that period.

In calculating 8% of total receipts, you do not include nonallocable receipts. Nonallocable receipts are defined as receipts for carry out sales and receipts with a service charge added of 10% or more.

**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.