BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARCY I. BROWN,	:	
Claimant,	:	FILED JAN 29 2019 WORKERS' COMPENSATION
vs.	:	File No. 5062271
DAL GLOBAL SERVICES,	:	
	:	ARBITRATION
Employer,	:	
	:	DECISION
and	:	
	:	
CHUBB CUSTOM INSURANCE,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	Head Note No.: 1803

STATEMENT OF THE CASE

Darcy Brown, claimant, filed a petition in arbitration seeking workers' compensation benefits from DAL Global Services (DAL) and its insurer, Chubb Custom Insurance as a result of an injury she sustained on January 12, 2013 that arose out of and in the course of her employment. This case was heard in Cedar Rapids, Iowa and fully submitted on July 2, 2018. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 – 5, Defendants' Exhibits A –C and Claimant's Exhibits 1 – 5. 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.

After the hearing the parties reached an agreement as to the rate for healing period benefits, and claimant withdrew her claim for underpayment of healing period benefits as well as for penalty benefits. (Claimant's brief, page 1; Defendants' brief page 2) Those two issues will therefore not be addressed in this decision.

ISSUES

1. The extent of claimant's disability.

2. The credit the defendants are entitled to as a result of an overpayment of permanent disability benefits.

3. Assessment of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Darcy Brown, claimant, was 53 years old at the time of the hearing. Claimant graduated from high school. She completed most of her course work in 2002, for a bachelor's degree in psychology, but did not receive a college degree. (Transcript page 13) Claimant also attended a community college for about three years. (Tr. p. 38)

At the time of the hearing claimant was employed with DAL. Claimant has been employed with DAL or its predecessor organization for about ten years. (Tr. p. 14) Claimant works as an airline ticketing agent, gate agent and in customer service at the Cedar Rapids airport. (Tr. p. 15) The type of work claimant currently performs is similar to the work she was performing when she had her injury on January 12, 2013. (Tr. p. 15)

When claimant works, she works up to a nine-hour shift. (Tr. p. 19) Sometimes she will work the gate position rather than the ticketing position. (Tr. p. 16) Sometimes claimant will perform both ticketing and gate work. (Tr., p. 20) The physical aspect of her work involves checking in baggage which can involve lifting and tagging passenger baggage. Claimant's work required occasional lifting of weights up to 100 pounds. (Ex. 2, p. 10) Claimant works part time and has worked part time since 2006. Claimant has been receiving Social Security Disability and limits her hours and earnings so as to remain eligible[1]. (Tr. p. 40)

Claimant described that on January 12, 2013 she did not have a specific traumatic injury, but she was performing her regular work for DAL. When she left her shift and went to her car she could not use her right hand to turn the ignition key.

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[1] For the year 2019 the amount a SSDI recipient can earn a month is up to $1,220.00 per month. https://www.ssa.gov/pubs/EN-05-10095.pdf

Claimant went to the emergency room the next day, as her pain had not subsided. (Tr. pp. 24, 25)

Claimant had neck fusion surgery with Chad Abernathey, M.D. about seven months later. (Tr. p. 26) Claimant was off work for about eight weeks after her surgery. (Tr. p. 43) Claimant returned to her same job at the same pay rate after her surgery. (Tr. p. 44) At the time of the hearing claimant was attending physical therapy for her neck. (Tr. p. 27) Claimant said that the physical therapy has reduced the number of migraines. Claimant had migraines before her work injury, but she said that they were not to the same extent. (Tr. p. 41)

Claimant testified that if DAL has more hours available for her to work she does not work them due to too much pain. (Tr. p. 30) Claimant testified that even if she did not have anxiety concerns she would not be able to work full time for DAL. Claimant said that two days a week of work is causing strain, and additional work would require a lot of accommodations. (Tr. p. 34) Claimant said she does have some difficulty in turning her head and noticed it during driving. (Tr. p. 47) Claimant said she could turn about 45 degrees left or right and has adapted to her condition. (Tr. pp. 50, 51) Claimant testified that her anxiety issues are improving, and if it were not for her neck issues she could work full time for DAL. (Tr. p. 34)

Claimant testified that if she had formal restrictions she would not be able to work for DAL. (Tr. pp. 34, 35) Claimant did not believe she would be employed at DAL with the restrictions that Sunil Bansal, M.D. provided her and she would not be allowed to work at DAL. (Tr. p. 35) Claimant testified that her coworkers assist her in lifting heavier bags. (Tr. p. 35) I find that claimant is receiving accommodation at work.

Claimant is earning the same hourly rate as she earned when she was injured, $10.87 per hour. (Tr. p. 30) Prior to claimant's work for DAL, claimant taught gymnastics for about eight years to preschool students, special needs students, gifted students, and gave individual lessons. (Tr. p. 32) Claimant was also an assistant teacher at a Head Start program. (Tr. p.38)

On January 13, 2013 claimant went to the Mercy Medical Center in Cedar Rapids, Iowa due to neck pain. (Joint Exhibit 2, p. 1) The clinical impression was cervical strain and myalgia. Claimant was instructed not to work for three days.

On February 15, 2013 Jeffrey Westpheling, M.D. assessed claimant as, "Right cervical radiculitis, resolving" and found claimant at maximum medical improvement (MMI). (JEx. 5, p. 1)

Claimant returned to Mercy Medical Center on March 13, 2013 after she slipped and hit her head. The clinical impression was, "Syncope. Concussion without loss of consciousness. Fall. [Illegible] C spine CT - 1 mm of anterior listhesis of C4 on C5 and C7 on T1." (JEx. 2, p.10)

On June 28, 2013 Dr. Abernathey examined claimant. His impression and recommendations were,

> Ms. Darcy Brown clinically presents with chronic neck and primary right upper extremity pain and paresthesia consistent with the focal disc degeneration with osteophyte formation and stenosis at C5-6. I discussed the risks, goals, and alternatives of conservative management vs. surgical intervention with the patient in detail.

(JEx. 1, p. 2) Claimant agreed to proceed with a C5-6 ACDF with instrumented allograft. (JEx. 1, p. 3) Claimant had this surgery on August 1, 2013. On September 30, 2013 claimant was allowed to return to normal activities. Dr. Abernathey initially allowed claimant to return to work with no restrictions as of October 14, 2013, but he later amended the return to work date to October 31, 2013. (JEx, 1, pp. 3 - 5) On March 21, 2014 Dr. Abernathey found claimant to be at MMI and assigned a nine percent whole body impairment. (JEx. 1, p. 5) Claimant last saw Dr. Abernathey on May 7, 2017. Dr. Abernathey reviewed an MRI of the C-spine. The MRI showed excellent decompression of the neuro elements without any new acute findings. Claimant requested a referral to Mark Kline, M.D. for her pain management options. (JEx. 1, p. 7)

On July 18, 2018, Dr. Kline saw claimant at a pain clinic due to her neck pain. . Dr. Kline's impression was,

> Persistent neck pain and bilateral upper extremity pain in the setting of cervical degenerative disk disease, spondylitic changes, and previous anterior cervical discectomy and fusion. The patient does have foraminal stenosis bilaterally at the C5-C6 level. She is reporting moderate-to-severe pain levels and activity limitations due to her ongoing pain. Per Dr. Segal's recommendation, we will proceed with an epidural steroid injection today for symptomatic relief.

(JEx. 3, p. 2) Dr. Kline performed a

> Cervical epidural steroid injection under fluoroscopic guidance and cervical, trapezius, and periscapular trigger point injections.

(JEx. 3, p. 1) Dr. Kline performed a number of procedures for claimant's neck pain including diagnostic medial branch nerve blocks on September 4, 2014 (JEx. 3, p. 4), right cervical and trapezius trigger point injections, right nerve block on February 7, 2015 (JEx. 3, p. 7), bilateral cervical, trapezius and periscapular myofascial trigger point injections on November 2, 2016 (JEx. 3, p.9), cervical epidural steroid injections bilateral cervical and trapezius point injections on December 23, 2016 (JEx. 3, p. 13), cervical epidural injections and cervical trapezius trigger point injections on July 31, 2017 and January 26, 2018 (JEx. 3, pp. 15,18).

On June 16, 2017 Dr. Bansal performed an independent medical examination (IME). (Exhibit 1, pp. 1 – 23) Dr. Bansal's diagnosis is,

> C5-C6 disc herniation.
>
> Status post C5-C6 anterior cervical discectomy, osteophytectomy, and instrumented allograft fusion.

(Ex. 1, p. 21) Dr. Bansal stated the claimant's neck condition was caused by her work for DAL. Dr. Bansal provided a 26 percent whole body impairment rating for the claimant. He recommended a 10-pound lifting limitation, with no lifting beyond shoulder level. (Ex. 1, p. 22) Dr. Bansal stated that claimant is at high risk for adjacent segment disease and that claimant will likely need a fusion extension in the future. (Ex. 1, p. 23)

On August 16, 2017, Joseph Chen, M.D., performed an IME of claimant. (Exhibit A, pages 20 – 31) Dr. Chen wrote, "I discussed that she [claimant] should not view her neck pain as coming from an injury but rather as pain that occurred at work performing her usual duties that are not out of the ordinary for her employment." (Ex. A, p. 23) Dr. Chen stated that claimant sustained an acute cervical strain and was at MMI on February 15, 2013. (Ex. A, p. 34) Dr. Chen further stated, "It is my opinion that Ms. Brown's acute cervical strain progressed into a chronic pain condition." (Ex. A, p. 25) Dr. Chen did not recommend any restriction stating that claimant may hurt, but would not harm herself in performing work activities. (Ex. A, p. 29)

Claimant has requested costs in the amount of $119.49 based upon filing and service fees. (Attached to hearing report)

RATIONALE AND CONCLUSIONS OF LAW

Dr. Abernathey and Dr. Bansal find claimant has a permanent impairment due to the January 12, 2013 work-related injury and provide a permanent rating. Dr. Chen is of the opinion that claimant's injury was misdiagnosed and she should not have had her fusion surgery. Dr. Chen found that claimant's acute cervical strain turned into chronic myofascial pain. I find based upon the stipulation of the parties, medical evidence and testimony, claimant has proven she has a permanent impairment that arose out of and in the course of the employment at DAL.

Extent of industrial loss

The claimant has a permanent disability. Defendants argue that claimant has not proven any industrial loss due to her injury. Claimant argues that claimant's industrial loss is substantial.

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).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges, 528 N.W.2d 614, 617.

The Iowa Supreme Court held in Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, (Iowa 1992) that the fact that a claimant did not have a loss of income is not dispositive as to whether the claimant has an industrial disability.

> Oscar Mayer, nevertheless, urges us to adopt a definition of disability that would require an actual diminution in earning capacity as of time of injury. As we have noted above, the Commissioner is entitled to draw reasonable inferences based upon the evidence presented and thus conclude that Tasler is currently foreclosed from full participation in manual labor of the sort she was accustomed to while in the employ of Oscar Mayer. Thus, it can be said that Tasler has suffered a loss of earning capacity even though she did not suffer an actual diminution in her earnings while in the employ of Oscar Mayer.
>
> Requiring a claimant to also demonstrate an actual diminution in earnings would place a premium on missing work-often unnecessarily-merely to establish an actual diminution in earnings and thereby penalize devoted employees who faithfully perform job duties despite bodily discomfort and damage. *See* Bellwood Nursing Home, 106 Ill. Dec. at 237,

> 505 N.E.2d at 1028. This is not to say, however, that an actual diminution in earnings is unimportant in establishing an industrial disability; we only decide that in this age of insidious work place injuries, compensable disabilities will often be present despite the fact that the employee has not, as yet, suffered any actual diminution in earning capacity. Thus, a showing of actual diminution in earnings will not always be necessary to demonstrate an injury-induced reduction in earning capacity.

Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992).

Claimant was working for DAL and earning the same hourly rate in 2018 as she was earning in 2013, $10.87 per hour. Claimant was working part time at the time of her injury and part time at the time of the hearing. Claimant was receiving help at work from co-workers. Claimant was receiving an informal accommodation from her co-workers.

Claimant has had a spinal fusion. She has continued to receive treatments from a pain clinic since her operation. Claimant has limitation in the range of motion of her head. Claimant has not asked for restrictions and is currently working at a heavier level than recommended by Dr. Bansal. Given the job requirements for claimant's work it is not likely she could work for DAL with lifting restrictions that restricts claimant to occasional lifting of medium to heavy items.

Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Claimant has lost access to the labor market after her neck injury. While she is earning about the same income, claimant should not be performing work over her head. She has restricted mobility in her neck and should not frequently lift more than light items or more than occasionally medium items.[2] Claimant has a 26 percent whole body

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[2] I am using weight terms generally consistent with Social Security Disability terms.

20 CFR 404.1567

To determine the physical exertion requirements of work in the national economy, we classify jobs as *sedentary, light, medium, heavy,* and *very heavy.* These terms have the same meaning as they have in the *Dictionary of Occupational Titles,* published by the Department of Labor. In making disability determinations under this subpart, we use the following definitions:

(a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. (Footnote continued on next page)

rating form Dr. Bansal and 9 percent from Dr. Abernathey. Claimant has adapted to working part-time with her pain and limitations.

Based on claimant's work experience, transferrable skills, education, intelligence, and physical capabilities, I conclude that the work injury did not result in a total loss of earning capacity. I conclude claimant is not permanently and totally disabled.

Claimant would have difficulty in returning to work as a trainer for gymnastics. Returning to Head Start if it required lifting children or working with children with significant behaviors could be problematic.

Considering all the factors for industrial disability I find that claimant has a 50 percent loss of earning capacity. I find that claimant has a 50 percent industrial loss. This entitled claimant to 250 weeks of permanent partial disability benefits.

Credit

Iowa Code section 85.34(5) states:

> 5. Recovery of employee overpayment. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a current or a subsequent injury to the same employee.

In Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 136-137 (Iowa 2010), claimant was paid healing period benefits and permanent partial disability benefits at a higher weekly rate than was later awarded at hearing. The agency found defendants had a right to a credit against the current permanency award for the overpayment of healing period benefits.

(b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

(c) *Medium work.* Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work.

(d) *Heavy work.* Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If someone can do heavy work, we determine that he or she can also do medium, light, and sedentary work.

On appeal, the Supreme Court noted the parties agreed that defendants should receive a credit for the overpayment of permanency benefits, but they disagreed as to what type of credit would be permitted under chapter 85.

In interpreting Iowa Code section 85.34(5), regarding the recovery of an employee overpayment, the Supreme Court noted:

> The plain language of section 85.34(5) directs the overpayment of any weekly benefits to be credited to payment of subsequent injuries. "Any" is commonly understood to have broad application. . . . by using a word with expansive import, we conclude that section 85.34(5) must be interpreted to apply to all overpayment of benefits. . . . as a result, Swiss Colony is only entitled to a credit for the overpayments against future benefits for a subsequent injury and not against future benefits for this injury.

Deutmeyer, 789 N.W.2d at 136-137.

Defendants overpaid claimant's permanent partial disability benefits at a rate higher than the rate stipulated to by the parties. As defendants overpaid due to a higher initial computation of rate, defendants are entitled to a credit for overpayment of those benefits against the liability of the employer for any future weekly benefits due for permanent benefits, for a current or a subsequent injury to the same employee. Under the law in effect at the time of this injury, defendants may only collect a credit for a subsequent injury to her January 12, 2013 injury claimant has with DAL.

I find that the claimant has generally prevailed in this case and awarded her costs of $119.49 based upon 876 IAC 4.33.

ORDER

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the weekly rate of one hundred eighty-one and 19/100 dollars ($181.19) commencing on November 2, 2013.

Defendants shall have a credit of the benefits previously paid.

The credit for overpaid permanent partial disability can only be applied against permanent benefits that claimant is entitled to as a result of an injury with DAL that has occurred after the January 12, 2013 injury.

Defendants shall pay claimant costs in the amount of one hundred nineteen and 49/100 dollars ($119.49).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to

the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this 29th day of January, 2019.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.