BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 14 2017
WORKERS' COMPENSATION

REBECCA THOMAS, Claimant, vs. CENTERVILLE COMMUNITY BETTERMENT, Employer, and TECHNOLOGY INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5053696 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 2907

STATEMENT OF THE CASE

Claimant, Rebecca Thomas, filed a petition in arbitration seeking workers' compensation benefits from Centerville Community Betterment (CCB), employer, and Technology Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on December 1, 2016 with a final submission date of January 25, 2017.

At hearing, defendants objected to Exhibit 4, page 64 and Exhibit 7, page 81 as being untimely served under rule 876 IAC 4.19(3)(d). Exhibit 4, page 64 and Exhibit 7, page 81 were admitted into the record. Defendants were given an opportunity to file rebuttal for the untimely service of the records, to offset any prejudice. By email dated December 11, 2016 defendants indicated they would not be filing a rebuttal to Exhibit 4, page 64 or Exhibit 7, page 81.

The record in this case consists of claimant's Exhibits 1 through 12, defendants' Exhibits A through Y, and the testimony of claimant and Timothy Thomas, claimant's husband.

On the hearing report the parties entered into numerous stipulations. These stipulations are accepted, and no factual or legal issues relative to the parties'

stipulations will be made or discussed in this case. The parties are bound by their stipulations.

ISSUES

1. Whether the injury resulted in a temporary disability.
2. Whether the injury resulted in a permanent disability; and if so
3. The extent of claimant's entitlement to permanent partial disability benefits.
4. The commencement date of benefits.
5. Costs.

FINDINGS OF FACT

Claimant was 52 years old at the time of hearing. Claimant graduated from high school. Claimant attended the University of Alabama, the University of Maryland, the University of Phoenix, and Ashford University. Claimant did not graduate from any of these institutions. (Exhibit S, page 183)

Claimant spent most of her working life in the U.S. Military. Claimant enlisted in 1988. During her service in the military, claimant worked primarily in the motorpool and reached the rank of Sergeant First Class. (Ex. 10, p. 12). When she left the military claimant worked as an HR specialist for the Department of Defense. (Ex. 10, p. 93)

Claimant testified when she left the military she was granted disability pay. (Tr. 53)

In 2012 claimant returned to Centerville, Iowa to be closer to family. Claimant worked for a short time as a teacher's aide at the Mt. Ayr Community School District. Claimant obtained a CNA certificate. Claimant worked as a CNA for Continental in 2014. In October of 2014 claimant began working for CCB. Claimant's job duties as a CNA for CCB included, but were not limited to, assisting clients with bathing and toiletry, assisting with dressing, and getting clients ready for bed.

Claimant's prior medical history is relevant. Claimant testified that in approximately 1982 she was struck by a military truck. She testified she did not think her injury was serious at the time.

In 2003 claimant was treated for lumbar and cervical radiculitis. (Ex. F, p. 35) In 2008 claimant had a cervical fusion. (Tr. p. 28)

In December of 2011 claimant was seen at the Centerville Hospital Emergency Room with complaints of lower back pain going into her right leg. (Ex. H, p. 37)

In November of 2013 claimant was again seen at the emergency room for lower back pain. Claimant requested and was given a Toradol injection. (Ex. H, p. 40)

In February of 2014 claimant was seen in the emergency room following a car accident. Claimant had left hip pain going into the left leg consistent with sciatica. (Ex. H, p. 42)

In March of 2014 claimant was seen in physical therapy with complaints of pain in the right leg after falling on ice. (Ex. I, p. 62)

In May of 2014 claimant was evaluated by Patricia Blackledge, ARNP for lower back pain. Claimant was assessed as having lower back pain and given Toradol. (Ex. J, pp. 65-72) Claimant was given a TENS unit, later in May of 2014, for pain while waiting for a referral to a surgeon. (Ex. J, pp. 74-77)

In June of 2014 claimant was evaluated by David Hatfield, M.D., an orthopedic surgeon, for back and bilateral buttock and leg pain since April of 2009. Dr. Hatfield assessed claimant as having an L5-S1 disc protrusion and recommended a facet rhizotomy with additional pain management. He recommended against surgery. (Ex. L, pp. 116-123)

In July and August of 2014 claimant saw Steven Quam, D.O. for pain management. Claimant indicated lower back pain, pain in the right lower extremity, and numbness and weakness in the left foot. In August of 2014 Dr. Quam gave claimant bilateral sacroiliac joint injections. (Ex. M, pp. 135-141)

In September of 2014 claimant returned in followup with Nurse Practitioner Blackledge and was again assessed as having sciatica. Claimant was given another Toradol injection. (Ex. J, pp. 95-96)

In January of 2015 claimant again saw Nurse Practitioner Blackledge for back pain. Claimant indicated increased back pain due to lifting patients at work. Claimant was given another Toradol injection and taken off work. (Ex. J, pp. 99-105) On March 9, 2015 claimant was evaluated by Nurse Practitioner Blackledge for back pain. Claimant had worked 14 days in a row, which caused back pain to flare up. Claimant was recommended to avoid heavy lifting. Claimant was given a Toradol injection. (Ex. J, pp. 109-113)

On March 15, 2015 claimant was sent into the field to help a disabled client at his home. Claimant testified she went to the home of a client named Leonard. Claimant said Leonard was blind and weighed approximately 200 pounds.

Claimant testified when she went to go to Leonard's home, Leonard was sitting at a kitchen table and requested to go to bed. Claimant put a gait belt around Leonard and walked into his room. Claimant said when they got to the bedroom, Leonard told claimant he was going to fall. Claimant testified she grabbed the gait belt with both hands to ease Leonard to the floor. Claimant said the gait belt came unlatched and

claimant fell backwards into a wall. Claimant said she hit her lower back. Claimant said she felt immediate pain.

On March 15, 2015 claimant was seen at the emergency department at Mercy Medical in Centerville, Iowa, with low back and bilateral hip pain after falling backwards. Claimant was assessed as having lower back pain. Claimant was treated with medication and told to limit her activity. (Ex. 4, pp. 34-37)

On March 17, 2015 claimant was evaluated by Ryan Arnevik, D.O. for lower back pain after falling at work. Claimant was assessed as having a lumbosacral strain and told to avoid work. Claimant was referred to physical therapy. (Ex. 4, pp. 38-39)

Claimant returned to Dr. Arnevik on March 30, 2015. Claimant reported some improvement with physical therapy. Claimant was continued off of work. (Ex. 4, pp. 40-42)

On March 31, 2015 claimant underwent a CT scan of the lumbar spine. It showed a central disc bulge at the L5-S1 level. (Ex. 4, p. 45)

On April 17, 2015 claimant underwent an MRI of the lumbar spine. It showed a new left lateral disc bulge with an annular tear at the L3-4 level. Claimant also had a synovial cyst at the L4-5 levels. (Ex. 4, p. 53)

Claimant returned to Dr. Quam on May 4, 2015 with complaints of paresthesia and pain in the left and right side. Claimant was given bilateral SI joint injections. (Ex. 7, pp. 77-80)

On May 5, 2015 claimant was evaluated by George Brown, M.D. for back pain. Dr. Brown noted claimant's MRI showed significant changes of a new disc bulge at the L4-5 levels. He opined the changes on the MRI were caused by the March 15, 2015 injury. (Ex. 4, pp. 54-55)

On May 29, 2015 claimant was evaluated at Mercy Neurosurgery by Mark Haven, PA. Claimant was assessed as having lower back pain and bilateral lower extremity radiculopathy. Claimant was referred to have an EMG of the bilateral lower extremities. (Ex. 5, pp. 66-68)

On July 16, 2015 claimant underwent an EMG and nerve conduction studies for the bilateral lower extremities. Studies showed evidence of a chronic peroneal motor neuropathy axonal in the right lower extremity. (Ex. 6)

On July 20 and July 21, 2015 claimant underwent a functional capacity evaluation (FCE) at WorkWell. The FCE found claimant gave maximal effort on all tests. The FCE found claimant could function at the sedentary job level and her job as a CNA was not a match for her current safe maximum abilities. (Ex. 8)

On August 25, 2015 claimant was again evaluated with Dr. Arnevik. He recommended claimant have future treatment at the VA Hospital. Dr. Arnevik found claimant was at maximum medical improvement (MMI). He noted claimant would need chronic medication and therapy over time. (Ex. 4, pp. 57-59)

In an October 23, 2015 letter, written by claimant's counsel, Dr. Arnevik agreed claimant sustained an annular tear and an L3-4 disc bulge due to the March 15, 2015 accident. He agreed with the restrictions outlined in the FCE. He found claimant was at MMI as of August 25, 2015. He agreed claimant would require ongoing care for her back condition. (Ex. 4, pp. 62-63)

On March 17, 2016 claimant underwent an MRI of the lumbar spine. The MRI was compared to claimant's April of 2015 MRI. The MRI showed the L4-S1 disc bulge without nerve compromise. The MRI suggested improved spondylosis changes including resolution of the L4-5 synovial cyst. (Ex. 4, p. 61)

In an August 26, 2016 letter, written by defense counsel, Dr. Arnevik indicated he had seen claimant's prior MRI but was not aware of the degree of prior complaints regarding her lower back. Dr. Arnevik reviewed records for claimant from 2014. As a result of that review, he was unable to relate any structural changes to claimant's back caused by the March of 2015 incident. Dr. Arnevik indicated he was unable to conclude the March 15, 2015 incident caused a permanent aggravation of claimant's lower back condition. He was unable to say if claimant's need for permanent restrictions was caused by the May 15, 2015 injury. (Ex. A)

In an August 26, 2016 letter, written by defendants' counsel, Dr. Quam indicated he did not relate claimant's need for medical treatment for the lower back to the March 15, 2015 incident. This was due, in part, as claimant had not given him the history of a March 15, 2015 injury at work. (Ex. B)

On September 1, 2016 claimant was evaluated by Philip Ascheman, Ph.D., for a psychological evaluation. Dr. Ascheman opined claimant's mental health symptoms were due to situations not related to her physical injury of March of 2015.
Dr. Ascheman also questioned the credibility of claimant's symptoms and limitations based on his review of claimant's records. (Ex. C)

In a September 7, 2016 report Eva Christiansen, Ph.D., gave her opinions of claimant's condition following an independent psychological evaluation. She assessed claimant as having a somatic symptom disorder and other specified depressive disorder. Dr. Christiansen opined claimant's disorders would likely significantly impair her ability to obtain and maintain employment. (Ex. 2)

In a September 29, 2016 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an independent medical evaluation (IME). Claimant complained of constant lower back pain. Claimant also indicated pain in both legs constantly. Dr. Sassman assessed claimant as having lower back pain with

radiculopathy. She found the March 15, 2015 incident was related to claimant's current lower back symptoms. Claimant indicated prior back pain, but noted prior back pain was intermittent and limited to claimant's right leg. (Ex. 1, pp. 1-10)

Dr. Sassman opined claimant's lower back symptoms were causally related to the incident of March 15, 2015. This opinion was based, in part, on records showing claimant had intermittent back pain and left leg symptoms before the March of 2015 incident. Claimant had constant pain and pain in both legs following the incident. Dr. Sassman also noted changes in the MRI taken before and after the March of 2015 incident. Dr. Sassman found claimant was at MMI as of July 5, 2016. (Ex. 1, pp. 11-12)

Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition Dr. Sassman found claimant had a 16 percent permanent impairment to the body as a whole for loss of range of motion in the lumbar spine, and a 9 percent permanent impairment to the body as a whole for claimant's issues with discs. The combined value of both impairments results in a 24 percent permanent impairment to the body as a whole. She limited claimant to rarely carrying 5 pounds from floor to waist, and 10 pounds occasionally at the waist level. (Ex. 1, pp. 12-13)

In a September 30, 2016 letter, David Boarini, M.D. noted he reviewed claimant's MRIs both before and after the March of 2015 incident. He noted claimant had lower back pain dating 2-1/2 decades. He opined there was no evidence of claimant's scan or history that the March of 2015 event caused significant structural damage. Dr. Boarini also noted claimant's incident of March of 2015 was a very trivial type of injury. (Ex. D)

In an October 11, 2016 report, Carma Mitchell, M.S., C.D.M.S., C.R.C., gave her opinions of claimant's vocational opportunities. Ms. Mitchell found claimant had performed work requiring heavy lifting. Based on claimant's limitations, she opined claimant was unable to perform any of her prior work on a full-time basis. She opined claimant lost access to 100 percent of jobs she had access to prior to the injury. (Ex. 3, pp. 25-28)

In an October 31, 2016 report, Ronald Schmidt, M.S., C.R.C., gave his opinions of claimant's vocational opportunities. Using Drs. Arnevik, Quam, Boarini, and Ascheman's opinions, claimant had no loss of earning capacity. (Ex. E, pp. 25-33)

Using Dr. Sassman's opinions, Mr. Schmidt opined claimant had a 15-20 percent loss of earning capacity due to her loss of access to heavy, medium, and light occupations. Mr. Schmidt opined claimant could potentially find jobs as an office clerk, administrative assistant, or receptionist. (Ex. E, pp. 33-34)

In a November 11, 2016 letter, Ms. Mitchell indicated she reviewed Mr. Schmidt's report of October 31, 2016. She opined claimant could not perform jobs as an office clerk, administrative assistant, or a receptionist, as claimant would not be able to sit and stand as needed. Ms. Mitchell also opined claimant's lifting restrictions would not allow claimant to perform duties for jobs in the light to sedentary work area. (Ex. 3, p. 29)

In a November 21, 2016 letter, written by claimant's counsel, Dr. Arnevik indicated the injury of March 15, 2015 caused an increase in claimant's symptoms and increase in pain. (Ex. 4, p. 64)

In a November 29, 2016 letter, written by claimant's counsel, Dr. Quam indicated he was unable to give opinions either way if the March of 2015 incident exacerbated claimant's lower back symptoms. (Ex. 7, p. 81)

Claimant testified that before the March of 2015 incident, she had back pain. She testified it was intermittent, and when the pain went away claimant would continue to work. She testified that prior to the March of 2015 incident she could walk her dog, cook, do housework and laundry. She said after the March of 2015 incident, she has constant pain and no relief of pain. Claimant said she has difficulty sleeping. Claimant said she frequently has to lay down due to back pain.

Claimant testified that since leaving CCB she has not looked for work and has not made any applications for jobs. Claimant has not sought vocational help. Claimant has not gotten any additional training. Claimant has not looked for help finding work at Iowa Workforce Development. The record indicates defendants have also not offered claimant any vocational assistance.

Claimant testified she did work for a few hours at a thrift shop owned by her sister. Claimant testified she believes she can only work two hours per week at her sister's thrift shop given her limitations and back pain.

Claimant testified that in 2008 she was assigned a 20 percent disability rating by the Veterans' Administration. She said in December of 2015, the VA increased that impairment to 60 percent. She said the increase was due to frostbite on her hands, her shoulder, her neck, anxiety and depression. She said she also made a back claim for disability to the VA, but the military did not accept that claim. (Tr. p. 86)

Timothy Thomas testified he is claimant's husband. Mr. Thomas testified claimant's job in the military was a very physical position.

Mr. Thomas testified his wife did have a preexisting back condition. He said his wife's condition would flare up if she did strenuous work or slipped on ice. He said prior to March of 2015, when the condition flared, claimant got an injection, she would heal and then return to work. He said claimant's condition did not improve after the March of 2015 incident and claimant has not been able to return to work.

Mr. Thomas said prior to the March of 2015 incident, claimant did all the household chores. He said since the March of 2015 incident, he has been doing housework, yard work, and cooking.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury is a cause of temporary disability.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

According to the hearing report, claimant seeks temporary benefits from March 15, 2015 through August 25, 2015. Defendants contend claimant is not due any

temporary benefits as, allegedly, claimant has a long history of back problems, and her condition before and after her March of 2015 incident, was essentially unchanged. (Defendants' brief, pp. 1-2, 10-12)

Defendants have accepted liability for a work-related injury to claimant occurring on March 15, 2015. The injury occurred when claimant fell backwards after a gait belt gave way. Claimant fell backwards and struck her lower back.

As noted in the finding of facts section of this decision, claimant has a long history of back problems. Claimant was treated with Toradol injections and a TENS unit. Claimant also had injections in the SI joint. (Ex. F, p. 35; Ex. H, p. 37, 40, & 42; Ex. I, p. 62; Ex. J, p. 74; Ex. L, p. 116; Ex. M, p. 135)

Claimant admitted at hearing she did have a long history of back problems. She testified she received treatment for these problems, including injections. Claimant testified that before the March 15, 2015 incident, she would have intermittent pain, receive an injection and return to work. She testified that after the March 15, 2015 incident, she has been in constant pain and has not been able to return to work.

Claimant's husband corroborated this testimony. He testified that before the March 15, 2015 injury, claimant's back condition would flare. He testified that after flare-ups of the back condition, claimant would get an injection and return to work. He said after the March of 2015 incident, claimant has not been able to return to work.

Both Mr. and Mrs. Thomas also testified that prior to the March of 2015 incident claimant did cooking, yard work, and household chores. Both testified that since the March of 2015 injury, Mr. Thomas now performs those tasks.

Medical records corroborate this testimony. Medical records indicate while claimant did see medical providers for back issues, claimant's back condition did not incapacitate her. Medical records indicate after receiving treatment, before the March of 2015 incident, claimant returned to work as a CNA. Claimant's job as a CNA required heavy lifting, and involved aiding clients in bathing, toileting, and walking.

A number of experts have opined regarding causation. Dr. Arnevik is claimant's family doctor. Dr. Arnevik indicated he was not able to opine the March 15, 2015 incident caused or materially aggravated claimant's lower back condition. However, he did opine the March 15, 2015 incident exacerbated claimant's symptoms. (Ex. 7, p. 81)

Dr. Boarini opined there was no evidence the March 15, 2015 incident caused significant structural damage to claimant's spine. Dr. Boarini also referred to claimant's injury as ". . . a very trivial type of injury." (Ex. D) Based on the record in this case, this appears to be a mischaracterization of claimant's fall backwards at work. As noted in the findings of fact section, claimant's injury occurred when a gait belt gave way, claimant fell backwards and her back struck a wall. Because Dr. Boarini either did not

know, or did not appreciate the nature of the mechanics of claimant's injury, it is found his opinion on causation and permanency is found not convincing.

Dr. Quam treated claimant for pain relief both before and after her March 15, 2015 incident. Dr. Quam initially opined he could not relate claimant's need for medical treatment to the March 15, 2015 event. (Ex. B) He later indicated he could not say either way if the March 15, 2015 injury exacerbated claimant's symptoms. (Ex. 7, p. 81)

Dr. Sassman evaluated claimant once for an IME. Dr. Sassman found the injury of March 15, 2015 materially aggravated claimant's preexisting back condition. Dr. Sassman based this opinion, in part, on three factors. First, she believed claimant only had left-legged symptoms before the injury, and bilateral symptoms after the injury. (Ex. 1, p. 11) This is not entirely correct, as the record indicates claimant expressed bilateral pain to Dr. Hatfield in June of 2014 (Ex. H, p. 37) and to Dr. Quam in July of 2014. (Ex. N, p. 135)

Second, Dr. Sassman opines MRIs taken before and after the work accident show changes in claimant's lumbar spine. (Ex. 1, p. 11) Dr. Boarini opines there is nothing in claimant's diagnostic scan suggesting a significant aggravation. (Ex. D, p. 26)

As noted above, on April 17, 2015 claimant underwent a post-injury MRI showing a disc bulge and an annular tear at the L3-4 level and a synovial cyst at the L4-5 level. (Ex. 4, p. 53) On May 5, 2015 Dr. Brown found the changes in claimant's April of 2015 MRI significant with a new disc bulge at the L3-4 level. He also opined the changes to claimant's MRI were caused by the March of 2015 incident. (Ex. 4, pp. 54-55)

Dr. Boarini opines the diagnostic scans did not reveal a significant structural change to claimant's back. Dr. Sassman opined the April of 2015 MRI showed changes suggesting an aggravation of a preexisting condition. Dr. Sassman's opinions are corroborated by the findings of Dr. Brown, made in May of 2015. Based upon this, the opinions of Dr. Sassman, finding aggravation caused by the March of 2015 incident, based on a change in the MRI scans, are found convincing.

Third, Dr. Sassman found claimant's March of 2015 incident caused an aggravation of preexisting condition based upon increased symptoms. As noted, this opinion is substantiated by the medical records and by the testimony of claimant and her husband. Based on changes in the MRI and claimant's increased symptoms, it is found Dr. Sassman's opinions regarding causation are found convincing.

Claimant had a preexisting back condition. The record indicates that before March 15, 2015, claimant's condition would flare, claimant would receive treatment, and claimant could return to work and her normal activities. On March 15, 2015 claimant had a traumatic injury when she hit her lower back into a wall when a gait belt gave way. After this incident, claimant could not return to work and could not return to her normal activities. Dr. Brown and Dr. Sassman opined an MRI taken in April of 2015

showed significant changes caused by the March of 2015 incident. Dr. Sassman opined claimant's March 15, 2015 injury caused an aggravation to a preexisting condition. Dr. Boarini's opinions regarding causation and permanency are found not convincing. Dr. Quam has no opinion regarding causation. Dr. Arnevik opined claimant's March of 2015 incident resulted in a significant increase in claimant's symptoms. Based on this record, claimant has carried her burden of proof her low back injury of March of 2015 is a cause of temporary disability. Based on this, claimant is due temporary benefits from March 2015 through August 25, 2015.

The next issue to be determined is if claimant's injury resulted in a permanent disability.

Dr. Sassman opined claimant has a permanent impairment. Approximately two years after the date of injury, claimant still has symptoms from that injury. An FCE indicates claimant cannot return to work to her prior job. Dr. Boarini's opinions regarding causation and permanency are found not convincing. Given this record, claimant has carried her burden of proof the March 15, 2015 injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Rus v. Bradley Puhrmann, File No. 5037928 (Appeal Decision December 16, 2014); Gaffney v Nordstrom, File No. 5026533 (App. September 8, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App.

October 25, 2007). Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997). See Also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant was 52 years old at the time of hearing. Claimant graduated from high school. She has attended four different schools for secondary education but has not received any certificates or graduated from those institutions. Claimant spent most of her working life in the U.S. Military in the motor pool. Since 2014 claimant worked as a CNA.

Dr. Sassman opined claimant had a 24 percent permanent impairment to the body as a whole. There is no other opinion regarding claimant's permanent impairment other than that of Dr. Boarini. As detailed above, because of Dr. Boarini's mischaracterization of claimant's accident, his opinion regarding permanent impairment is found not convincing. Based on this, it is found claimant has a 24 percent permanent impairment to the body as a whole as a result of the March 15, 2015 incident.

Claimant underwent an FCE. The FCE found claimant could work in the sedentary job category and her abilities would not allow her to return to work as a CNA. (Ex. 8) The FCE limited claimant to lifting 5 pounds waist to floor and waist to head. It also limited claimant to carrying 10 pounds a long distance. (Ex. 8)

Claimant appears to make a claim for a mental injury. Claimant did not plead a mental injury in her pleadings. Claimant does contend, in her post-hearing brief, her mental state increases her loss of earning capacity. (Claimant's brief, p. 14)

Dr. Ascheman, defendants' expert, opined claimant's mental health issues were not caused or materially aggravated by her March of 2015 injury. (Ex. C)
Dr. Christiansen did not give a causation opinion of claimant's mental health condition. (Ex. 2) The record indicates claimant is receiving a VA disability, in part, for mental health conditions. (Tr. pp. 86-87) Given this record, claimant has failed to carry her burden of proof her mental health condition arose out of and in the course of employment.

The record indicates claimant received a 60 percent disability rating from the VA. There is no indication this disability rating is based at all on claimant's back condition. The law concerning veterans' disability is different from that of the Iowa Workers' Compensation Act. Given this record, claimant's VA disability is not a factor in determining claimant's industrial disability.

Two vocational experts have opined regarding claimant's vocational opportunities. Mr. Schmidt opined even given the restrictions under the FCE, claimant only would have a 15 to 20 percent loss of earning capacity. (Ex. E) Claimant spent a good part of her work life doing physically hard work. She now has permanent restrictions that limit her to lifting and carrying 5 to 10 pounds. To suggest claimant has

a 15 to 20 percent loss of earning capacity given these restrictions and the FCE is not realistic.

Ms. Mitchell opines claimant has lost 100 percent access to the jobs she had prior to the injury. There is no indication Ms. Mitchell performed any sort of labor market search in claimant's geographic area. I find problems with both vocational reports from both experts. However, both reports are helpful in understanding claimant's loss of access to the labor market.

Claimant testified since leaving CCB she has not looked for work. Claimant has not applied for a job. Claimant has not sought vocational help. She has not sought additional training. She has not used the resources available to her at Iowa Workforce Development to locate employment.

Claimant has a 24 percent permanent impairment to the body as a whole. She has permanent restrictions that limit her to lifting 5 to 10 pounds. Most of claimant's prior employment was physically demanding work. Claimant has made no effort to apply for work, seek employment, get retraining, or seek any help in locating employment. When all relevant factors are considered, it is found claimant has a 50 percent loss of earning capacity or industrial disability.

Using the same factors discussed above to determine claimant's loss of earning capacity, it is also found claimant has failed to carry her burden of proof she is an odd-lot employee.

Dr. Arnevik found claimant was at MMI as of August 25, 2015. (Ex. 4, pp. 57-59) Benefits should commence on that date.

The final issue to be determined is costs. At hearing, defendants agreed to pay the costs for Dr. Sassman's IME. If this IME has not yet been paid by defendants, claimant may file an application for rehearing asking that an order awarding reimbursement for the IME be added to this decision.

Claimant seeks costs associated with Dr. Christiansen's psychological IME and for Ms. Mitchell's vocational report.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

Iowa Code section 85.39 limits an injured worker to one IME, regardless if the examination is paid by the employer or its insurance carrier. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

Defendants have agreed to pay Dr. Sassman's IME. Under the law, claimant is entitled to only one IME. Claimant has failed to carry her burden of proof she is due reimbursement for the Christiansen IME.

Regarding taxation of the vocational report on Ms. Mitchell, claimant is not permitted to receive reimbursement for the full cost of a vocational report as a practitioner's report under rule 4.33. The Iowa Supreme Court has ruled only the portion of the expenses incurred in preparation of the written report can be taxed. Des Moines Area Reg'l Transit Auth v. Young, 867 N.W.2d 839 (Iowa 2015).

Ms. Mitchell indicated in her billing she charged $65.00 an hour. The billing, attached to the hearing report, indicates she spent 2.5 hours preparing her report. Claimant is due reimbursement for Ms. Mitchell's vocational report of $162.50 (2.5 hours x $65.00).

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant healing period benefits from March 15, 2015 through August 25, 2015 at the rate of three hundred fifty-five and 71/100 dollars ($355.71) per week.

That defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of three hundred fifty-five and 71/100 dollars ($355.71) per week commencing on August 26, 2015.

That defendants shall pay accrued weekly benefits in a lump sum.

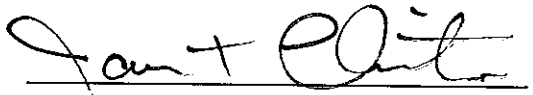
That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay costs as detailed above.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 14th day of March, 2017.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.