BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LAUREL LOBENSTEIN, Claimant, vs. MCI COMMUNICATIONS SERVICES, INC., Employer, NEW HAMPSHIRE INS. CO. Insurance Carrier, Defendants.	File No. 5043363 A R B I T R A T I O N D E C I S I O N Head Note No: 1803

STATEMENT OF THE CASE

Laurel Lobenstein, claimant, has filed a petition in arbitration and seeks workers' compensation from MCI Communications Services, Inc., employer and New Hampshire Insurance Company, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on April 15, 2015, in Cedar Rapids, Iowa. The record in the case consists of claimant's exhibits 1 through 12, defense exhibits A through H, as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

Whether the alleged injury is a cause of permanent disability.

The extent of the claimant's entitlement to permanent partial disability benefits.

The correct rate of compensation for the claimant.

Compensabilty of the costs of a Functional Capacity Evaluation.

FINDINGS OF FACT

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

Claimant Laurel Lobenstein testified she lives in Marion, Iowa. She is 58 years old. She graduated from high school in 1974, and attended Iowa Central Community College for one year. She did not obtain any degree or certificate.

Her work history includes grocery store work, working at a locker plant, as a security guard, in retail sales, and most recently at a conference calling center. For the last 20 years she worked at Verizon Conferencing, now known as MCI Communications Services, Inc., defendant employer. She was a conference calling coordinator, setting up conference calls using a computer and the internet. She was paid $18.35 per hour when she left there. She worked eight hours per day, five days per week, forty hours per week, Monday through Friday, with a half hour unpaid lunch. There was no overtime in recent years. She also received a profit sharing bonus of $1,500.00 to $1,800.00 for each of the last five years. She considered it a regular bonus and relied on it. The amounts did vary each year, depending on the business and the employee's job evaluation. The lowest bonus was around $1,500.00.

Exhibit 10, page 49, shows her wages, but claimant cannot interpret the form. She does not think the bonus information is on the form. She understands that form came from Verizon. She was laid off December 19, 2014. Others were laid off as well. She is not alleging she was laid off due to her injury. She received a severance payment of $28,000.00 before taxes. She has not worked since then, as she has not been able to find employment.

On the date of injury, February 7, 2013, claimant and some co-workers were leaving the building going down a short flight of stairs. Claimant apparently tripped as she suddenly found herself lying flat on her face, having hit her right shoulder and left knee. The employer has accepted liability for this injury.

The employer sent her to Ignatius Brady, M.D., for treatment. He sent her for an MRI and ordered physical therapy and medications. The MRI showed a right shoulder impingement and slight tear in the right rotator cuff. She at no time told Dr. Brady she had hurt her left shoulder.

Dr. Brady sent her first to David Tearse, M.D., and later to Sunny Kim, M.D. Claimant disputes any records that suggest she cancelled an appointment with Dr. Tearse or refused to attend an appointment. She has not refused to meet with any physician in this case. She is willing to see any doctor she is referred to.

On February 24, 2014, she saw Dr. Kim for the first and only time. He examined her, administered an injection, and kept her on sedentary activity.

Claimant underwent a functional capacity evaluation (FCE) that recommended she only perform sedentary work. It was done in 2013. Claimant would like the employer to pay that bill, which is around $900.00. (Exhibit 8, p. 42)

Claimant saw Mark Taylor, M.D. He told her not to lift more than 20 pounds from floor to chest, and not over 10 pounds over her head. He also assigned a rating of permanent partial impairment of six percent of the body as a whole. No other doctor has assigned a rating of impairment. She agrees with Dr. Taylor's restrictions.

She has looked for work since being laid off, between 65 and 70 places. She has only gotten a couple of phone interviews. Exhibit 12, pages 51 and 52, is a list of her job applications from December 19, 2014, to March 22, 2015. Claimant plans to continue applying for jobs. She and her husband plan to move to Arkansas in July 2015, for the milder winter weather. She has received positive responses from three employers there.

She has had prior problems with her right shoulder. In 1999, she had a repetitive motion injury to her right shoulder while working at MCI. She underwent physical therapy, which helped resolve the pain. She did not pursue a workers' compensation claim. The shoulder condition resolved on its own. In the spring of 2010, while doing housecleaning and gardening, she began to experience right shoulder pain and consulted her doctor. That condition also resolved. (Ex. D) Claimant was also in a car accident where she was rear ended. The seat belt injured her right shoulder again. After a few months of treatment, that condition also resolved. At the time of her work injury herein, she was not having any right shoulder problems.

Today she has pain in her right shoulder blade, into her shoulder and down the front of her arm. The left knee injury resolved quickly. Since her injury, she can no longer engage in gardening and baking, two things she enjoyed. She cannot play with her young grandchildren. Her sleep is disrupted. When typing, she has a great deal of pain after an hour or two. She did not have these problems prior to this injury.

On cross examination, she agreed Dr. Tearse gave her an injection and referred her to physical therapy. On May 3, 2013, he noted she had not gone for physical therapy. Claimant said she was waiting for approval. She was unaware it had been approved. She did not recall any appointment where Dr. Tearse told her it would be her last appointment. She is aware his records indicate she called and cancelled an appointment, but claimant denies doing so. She did not find out about this record until a later date. She took no action to get the record corrected.

Her one appointment with Dr. Kim was authorized. She attended and did not return.

At her deposition, Claimant stated she was unaware at that time what Dr. Taylor had said in his IME report. She was not familiar with IME reports. She relied on what

he told her verbally. She stopped all treatment at that time as further treatment was not authorized. She agreed she did not inquire as to obtaining further treatment.

After the injury, claimant continued working, doing the same job. Other than five days of work missed in February, 2013, she continued working until her layoff over a year later. It was her intent to continue in that job if she had not been laid off. She liked her job and her employer liked her.

The 65 or 70 jobs listed were found by claimant during the last four months. Arkansas is where they hope to retire, for the warmth. Her husband is able to transfer there.

Claimant does not know what her rate of pay was at the time of the injury, February 7, 2013. She agreed it was probably less than what she was being paid when she left two years later. The bonuses were dependent upon how both the company and claimant performed. The amount was not guaranteed, but a contract set out a percent that would be paid each year. The bonus was not guaranteed.

Her pay never went down at MCI. She did not have to stop doing the kind of work she did before the accident. She acknowledged she had done clerical or desk work even before working at MCI. On re-direct, she enthusiastically stated she would go see any doctor the insurer sent her to for her injury.

CONCLUSIONS OF LAW

The first issue is the extent of the 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.

Claimant's work injury involved both her left knee and her right shoulder, but the left knee has resolved. She continues to have right shoulder problems. She has been found to have right shoulder impingement and a rotator cuff tear.

Dr. Taylor assigned claimant a rating of permanent partial impairment of six percent of the right upper extremity, or four percent of the whole person. This was the only rating in the record. He also imposed work restrictions of not lifting over 20 pounds from floor to chest level, and not more than 10 pounds above shoulder level. (Ex. 7, p. 37) Dr. Kim did not assign work restrictions but only because claimant was already doing sedentary work.

Her shoulder pain affects her personal life, in that she has difficulty with such tasks as typing, sitting, gardening, and playing with her grandchildren. Her sleep is disrupted by her pain.

Claimant is 58 years old, putting her at an age where retraining for a new profession would be a challenge. Her education is limited to a high school diploma and one year of community college. Her work experience includes working in grocery stores, a meat packing plant, and security work, but for the last several years she has done clerical and retail work. Her work activities were mostly performed sitting at a desk.

A functional capacity evaluation (FCE) showed claimant capable of working in the sedentary category. (Ex. 5, pp .20-26) Her employment was terminated as part of a series of layoffs by the employer, not due to her work injury. However, she has been unable to find substitute employment after making over 70 applications. (Ex. 12, pp. 51-52) She plans to move to Arkansas with her husband and hopes to find employment there.

Claimant agreed her wages did not go down after her work injury. She was able to return to her regular work involving telephone conference calls until she was laid off.

Based on these and all other appropriate factors of industrial disability, claimant is found to have, as a result of her work injury, an industrial disability of 35 percent.

The next issue is the correct rate of compensation for the claimant.

Claimant testified she received a bonus between $1,500.00 and $1,800.00 in February every year. The bonus was never less than $1,500.00, and was paid each year of the last four or five years.

Claimant asserts a rate different than the one set forth in the hearing report, due to an error in claimant's hourly wage. Claimant accepts the employer's figure of $683.68 for claimant's gross earnings, but claimant feels the bonus should be included as well. The bonus of $1,500.00 divided over 52 weeks of the year is $28.85. When added to the gross earnings, claimant's average weekly wage would be $712.53.

Claimant was married and entitled to two exemptions, yielding a rate of $479.06 according to claimant.

Defendants argue the bonus should not be included, as it was an irregular bonus because it varied in amount from year to year, was not guaranteed, and varied according to job performance and the success of the business. In addition, the bonus was not paid during the 13 weeks preceding the injury. They submit a rate of $461.98.

Iowa Code section 85.61(3) states:

> "*Gross earnings*" means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Agency precedent establishes that a bonus need not be paid during the 13-week period to be included in gross wages. In addition, the fact a bonus varies according to company performance does not make it irregular. The bonus in this case is found to be a regular bonus, and includable in claimant's gross wages for the calculation of average weekly wages. Mayfield v. Pella Corp., No. 5019317, (Remand Dec. June 30, 2009).

Claimant's calculation of rate is found to be correct. Claimant's rate is found to be $479.06.

The final issue is the compensability of the costs of a Functional Capacity Evaluation.

Claimant underwent an FCE on December 13, 2013. The cost was $960.00. (Ex. 5, p. 42) Defendants dispute assessment of this as a cost or as a medical benefit because it was not ordered by a physician.

Vocational studies such as Functional Capacity Evaluations are costs pursuant to Rose v. Menards, File No. 5024837, App. Oct. 29, 2009. In addition, vocational reports are considered practitioner's reports under 876 IAC 4.17. Defendants shall pay the costs of the FCE.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant 175 weeks of permanent partial disability benefits at the rate of four hundred seventy nine and 06/100 dollars ($479.06) per week from February 18, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendants.

Signed and filed this 22nd day of July, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

COPIES TO:

Randall P. Schueller
Attorney at Law
1311 50th Street
West Des Moines, IA 50266
randy@loneylaw.com

Caroline M. Westerhold
Attorney at Law
1248 "O" Street, Suite 600
Lincoln, NE 68508
cwesterhold@baylorevnen.com

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date below, 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.