BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GLENNIS A. MILLER,

Claimant,

vs.

NORDSTROM DIRECT, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5048444

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Glennis Miller, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendant, Nordstrom Direct, Inc., a self-insured employer. The arbitration hearing was held on July 12, 2016, in Cedar Rapids, Iowa.

The parties offered joint medical exhibits AA through OO, which were admitted without objection. Claimant offered exhibits 1 through 8. Claimant's exhibits 1 through 6 were admitted without objection. Defendant objected to exhibits 7 and 8, which related to the issue of penalty asserting that the same were untimely. In response, claimant asserted that there was no prejudice to defendants and in the alternative, requested that the penalty claim be bifurcated. The undersigned granted claimant's request to bifurcate the penalty claim. Claimant's exhibits 7 and 8 were therefore excluded. Defendant presented exhibits A, C and D, which were admitted without objection. After the hearing and before post-hearing briefs were filed, the undersigned was informed by the parties that the penalty claim had been resolved and the penalty hearing was cancelled. The undersigned was also informed at that time that defendant's objection regarding costs concerning Barb Laughlin's report had been withdrawn.

At the time of the hearing, the parties also submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted and no factual findings or conclusions of law will be made in this decision regarding the parties' stipulations. They are listed below for convenient reference.

Counsel for the parties submitted post-hearing briefs on August 11, 2016, and the case was considered fully submitted on that date.

STIPULATIONS

The parties stipulated to the following:

1. The existence of an employer-employee relationship.
2. Claimant was injured on December 18, 2012, which arose out of and in the course of her employment with defendant.
3. The injury is a cause of temporary disability, the extent of which is not in dispute.
4. The injury is a cause of permanent disability.
5. If additional permanent disability is found to exist, the parties agree that it is an industrial disability.
6. The commencement date for permanency benefits is April 20, 2016.
7. The applicable weekly rate is $508.45.
8. Medical benefits are not in dispute.
9. Prior to the hearing, claimant began receiving PPD benefits, starting on April 20, 2016.

ISSUE

The parties submitted the following disputed issue for resolution:

1. The extent of industrial disability, if any.

FINDINGS OF FACT

At the time of the hearing, claimant, Glennis Miller, was 54 years old. (Transcript page16)

Claimant graduated from high school in Shellsburg, Iowa in 1980. (Tr. p. 17) After high school, she attended cosmetology school full-time and graduated in 1981. (Tr. p. 18)

Claimant helped out on her family's farm while she was in high school. The farm had both livestock and grain. (Tr. p. 17) In addition, during high school, she worked at an ice cream shop, preparing and serving food and cleaning. (Tr. p. 18)

After high school, claimant worked at K's Merchandise stocking shelves and at a small bar in Marion doing dishes and cleaning. (Tr. p. 18) Claimant worked at these jobs while she was in cosmetology school, full-time. (Id.) After completing cosmetology school, claimant worked full-time as a cosmetologist for a little over a year. (Tr. p. 19) When claimant and her husband began having children, she continued working on a part-time basis and did so from 1983 until 1995. (Id.) In 1995, claimant bought a hair salon in Shellsburg and returned to full-time work. (Id.) Claimant ran her salon full-time for 15 years. (Tr. p. 20) She then sold the salon on contract in February, 2011 and began looking for another job, because she was concerned about her lack of retirement benefits as a self-employed person. (Tr. pp. 20, 49) In April, 2011, she began working for the defendant employer, Nordstrom. (Tr. p. 21) She worked in the returns/inspections department. Her job involved sorting clothing and other items that were returned by customers. (Tr. p. 22) Items would be placed in a tote and arrive at her work station on a conveyor belt. Claimant then sorted those items based on condition and season. (Tr. p. 23) She testified that the job required a lot of lifting and was fast paced, so much so, that from time to time she would need to call for help to keep up. (Id.) Her job involved lifting the totes from a conveyor at table height, sorting items and placing totes on another conveyor that was below table height. (Tr. p. 24) Claimant testified that she enjoyed her work at Nordstrom. (Id.)

In August, 2015, claimant was alerted that the purchaser of her salon, who was buying the business on contract, no longer wanted to do cosmetology and "they were giving my shop back." (Tr. p. 50) After getting the shop back, claimant went back to work in the salon on a part-time basis around November 2015. (Tr. p. 68) Claimant continues to work at her salon four or five days per week, but not full-time hours. (Tr. p. 70) The most clients that claimant has served in a single day is about five. (Tr. p. 72)

Claimant testified at hearing that she had a job offer from Cardella, a telemarketing type business. (Tr. p. 75) Claimant was uncertain if she could physically do this type of work due to her concerns about being right handed and holding the phone for long periods of time. Claimant also testified that she was not interested in the job because it did not fit with what she wanted for wages and hours. (Tr. p. 76) She did not look into this job offer further to determine if she would be able to do it. (Tr. p. 76-77)

Claimant included in her exhibits a description of over 20 jobs that she applied for at Nordstrom after the work injury on December 18, 2012, through July, 2016. (Ex. 3, p. 1) In addition, claimant applied for 8 positions from other employers from May, 2015 through June, 2016. It is not insignificant that despite applying for over 20 jobs with her former employer, they have not hired her back as of the date of the hearing.

Claimant also testified that she had recently received a call from Nordstrom's advising her that there was a job opening in the call center, which she applied for. (Tr. pp. 56-57) The job description and/or application asked claimant if she was willing to work nights, weekends and holidays. She replied that she was not. (Tr. p. 57)

Claimant testified that she had a phone interview for the position the day after the arbitration hearing. Claimant hoped that the pay and hours would be what she wanted. (Id.)

Claimant has exhibited motivation to return to work, based on her applications and pursuit of self-employment in cosmetology, although it is tempered by her failure to look into the job offer at Cardella, her unwillingness to work certain hours and her failure to follow up on the jobs located by Barbara Laughlin.

Claimant described her health as "good" before she began working at Nordstrom. (Tr. p. 21) She testified that she had not had any prior problems with her shoulder. (Id.) However, claimant stated that she did have arthritis in her back before she started at Nordstrom and that she had occasionally gone to a chiropractor to get an adjustment after which, she would be back to her regular full-time work after a couple days. (Tr. p. 21-22)

In September, 2012, claimant was lifting a heavy dress overhead, and felt a "snap" in her shoulder. (Tr. p. 25; Ex. GG, p. 1) Claimant reported the injury. (Tr. p. 25) She received treatment from the Medcor, which appears to have been a medical provider made available to employees at the job site. Claimant was given Meloxicam and physical therapy and reported doing well on October 19, 2012. (Ex. GG, p.2)

On October 25, 2012, claimant went to a chiropractor and reported pain in her left leg and low back. (Ex. FF, p.3) The records also indicate that claimant had low back pain and was seen by a chiropractor on November 16, 2012. (Ex. FF, p. 6) Claimant testified that at that time she was having "cramping down my left leg," and that "[i]t woke me up." (Tr. p. 83) Claimant also stated that this was a symptom that she continued to have after she fell on December 18, 2012, but she clarified in her testimony that after the work injury, the pain extended down to her toes and it was worse than she had experienced before the fall. (Tr. p. 83-84) Claimant further testified that after the fall the symptom changed to a shooting pain. (Tr. p. 84)

On December 6, 2012, just 12 days before the work injury, claimant was seen by Dr. Nassiff complaining of left hip pain in her buttock area, which she had been experiencing intermittently for several months. (Ex. EE, p.1) Claimant denied any specific injury. (Id.) She testified that she was not aware of what caused the pain, and described it as a "pull" that resulted in cramps in her leg. (Tr. p. 26) She stated that she was advised to follow up with physical therapy if it did not get better in a couple days. (Tr. p. 27) Claimant did not follow-up with physical therapy because she said, "I didn't need it." (Id.) The evidence leads the undersigned to find that prior to the work injury, the condition of claimant's back condition did not significantly impact her job and there was certainly no medical opinions produced suggesting surgery was recommended.

On December 18, 2012, while working at Nordstrom Direct, claimant was pushing three stacked totes across the floor. The top two totes slid off the bottom tote, but she did not realize it and fell over the bottom tote, landing on her right knee and right

arm. (Tr. p. 28) Claimant felt pain in her wrist, elbow and a bit in her shoulder. (Id.) The injury was reported and she was taken by the company nurse in a wheelchair to the main desk, where a cab was called for her to go to St. Luke's Hospital. (Ex. AA, p.1; Tr. pp.28-29: Ex. A, pp.1-2)

On December 18, 2012, claimant arrived at St. Luke's Hospital and was treated by Shirley Pospisil, M.D., an occupational health physician, who assessed claimant with right knee pain, right wrist pain, right elbow pain, right shoulder pain and low back pain without radiation. (Tr. p. 29; Ex. AA, p.1) She was assigned work restrictions of "sitting only and elevating right leg." (Ex. AA, pp.1-2) Claimant continued with treatment with Dr. Pospisil, noting that her right knee was hurting the most. (Ex. AA, pp.3, 5) On January 11, 2013, Dr. Westpheling, of St. Luke's Hospital recommended an MRI of the right knee, which was obtained on January 21, 2013 along with an MRI of the lumbar spine. (Ex. AA, p. 6; Ex. BB, pp1-4) The MRI of the knee revealed bursitis, cartilage thinning, subchondral cyst formation, and among other findings, a greater than 50 percent defect in the lateral aspect of the medial femoral condyle. (Ex. BB, pp.1-2) The MRI of the low back showed a broad based disc bulge and small posterior disc protrusion at L4-5 and degenerative changes at L4-5 and L5-S1, along with moderate canal stenosis at L4-5 and mild to moderate bilateral neural foraminal narrowing with greater severity on the left at L5-S1. (Ex. BB, pp.3-4)

On January 23, 2013, Dr. Pospisil referred claimant to a neurosurgeon for her back condition. (Ex. AA, p. 8) On February 10, 2013, claimant was seen by Chad Abernathey, M.D., who recommended surgery. (Ex. CC, p.1; Ex. AA, p.9) On February 14, 2013, Dr. Abernathey performed surgery, consisting of L4-5 partial hemilaminectomies, medial partial facetectomies, decompression, diskectomy, and osteoectomy. (Ex. BB, p.5) On April 8, 2013, Dr. Abernathey noted that claimant had excellent relief of pain following surgery and wanted to return to active, full duty employment. (Ex. CC, p. 2) On April 1, 2015, Dr. Abernathey responded to a letter from defense counsel and confirmed that claimant had an exacerbation of the disc extrusion that brought about surgical intervention and that the surgery was related to her December 8, 2012 work injury. (Ex. CC, p. 6)

Claimant was seen by David Tearse, M.D., primarily for her right knee condition. His impression after his initial evaluation on March 8, 2013, included: right knee effusion with prepatellar bursitis; right medial epicondylitis; and right shoulder impingement. (Ex. HH, p. 1) Concerning the right knee condition, Dr. Tearse recommended a return to physical therapy. (Id.) But, because claimant's knee pain continued, on July 3, 2014, Dr. Tearse ordered an MRI "to evaluate for [the] possibility of significant meniscal or osteochondral injury." (Ex. HH, p.2) However, he also stated on the same date that claimant could return to work without any restrictions, concerning the knee. (Id.) The MRI was obtained on July 7, 2014 and claimant returned to see Dr. Tearse on July 21, 2014. (Ex. KK, p. 1; Ex. HH, pp. 2-4) At that time, Dr. Tearse did not recommend surgical intervention, but did provide a corticosteroid injection. (Id.) Claimant returned again to Dr. Tearse about a year later, and he administered another injection on August 10, 2015. (Ex. HH, p. 6)

On August 19, 2013, claimant was seen by Peter D. Pardubsky, M.D., for her right elbow pain. (Ex. II, p. 1) Dr. Pardubsky's assessment was, "right ulnar neuropathy at the elbow versus radiculopathy or plexopathy . . . ." (Ex. II, p. 3) He ordered an EMG to refine the diagnosis. (Ex. II, p. 4) Claimant underwent an EMG and returned to see Dr. Pardubsky on September 11, 2013 who then assessed right cubital tunnel syndrome, for which he recommended surgery. (Ex. II, pp.5-7) Surgery was performed to address this condition on October 31, 2013 at Mercy Medical Center. (Ex. BB, pp.6-7) On February 20, 2014, Dr. Pardubsky returned claimant to full duty work concerning the right elbow, but he advised her to continue with the restrictions then in place by Dr. White, regarding her right shoulder. (Ex. II, p. 8) On October 19, 2015, claimant returned to see Dr. Pardubsky with ongoing elbow and arm complaints. (Ex. II, p. 10) At that time, claimant reported decreased grip strength and dexterity in her right hand. (Id.) She returned again to see Dr. Pardubsky on July 11, 2016, primarily for a final assessment at the request of the defendant. (Ex. OO, p. 1)

Concerning claimant's right shoulder, claimant saw Matthew White, M.D., on January 31, 2014. (Ex. JJ, p. 1) Dr. White reviewed the MRI results and after evaluation, recommended surgery. (Ex. JJ, p. 2) Surgery was performed on March 20, 2014 at Mercy Medical Center, which included: (1) right rotator cuff repair; (2) arthroscopic extensive labral debridement; (3) arthroscopic subacromial decompression; (4) arthroscopic abrasion chondroplasty of inferior glenoid; and, (5) a mini open biceps tenodesis. (Ex. BB, p. 8) On September 3, 2014, Dr. White stated that claimant was doing well about 5 months after surgery and returned her to work as of September 8, 2014, with the restriction of 4 hours of full duty and 4 hours of light duty per day, then on the following week, 6 hours full duty and 2 hours light duty, and the next week, increase to 8 hours full duty. (Ex. JJ, p. 4) On September 30, 2014, Dr. White saw claimant, noting that she returned to work and was "doing her regular job," and that she was having "further discomfort anteriorly at the end of the day in her bicipital groove." (Ex. JJ, p. 5) An injection in her shoulder was administered and her restriction was increased to 5 days per week for 9-hour shifts, with the requirement that she have 2 days off consecutively. (Ex. JJ, p. 6)

Dr. White requested an FCE, which was performed on November 4, 2014 at Mercy Medical Center, which indicated that claimant gave maximum effort and was capable of work in the light to medium category of work. However, after the FCE, Dr. White obtained more imaging of the shoulder and noted on November 12, 2014, that claimant had initially done well after surgery, "but has had a setback when trying to go back to work." (Ex. JJ, p. 7) Claimant did not have a "specific injury that she recalls, but has not done any activities outside of work other than ADL's." (Id.) At that time, Dr. White suspected that claimant likely had a recurrent rotator cuff tear, and discussed treatment options including surgery. (Ex. JJ, p. 8)

On December 23, 2014, claimant was seen by Dr. Nepola at the University of Iowa Hospitals and Clinics for a second opinion concerning her unresolved right shoulder pain. (Ex. LL, pp. 1) Like Dr. White, Dr. Nepola also recommended surgery. (Ex. LL, p. 3) He assigned restrictions at that time of "No lifting/pushing/pulling greater

than 5 pounds with the Right arm. No above shoulder reaching/pushing/pulling with Right arm. No repetitive movement with Right arm." (Id.) Claimant proceeded to surgery with Dr. Nepola on February 4, 2015, which was described as arthroscopy of the right shoulder with rotator cuff repair and subacromial decompression. (Ex. LL, p. 9) Claimant had follow up care with Dr. Nepola who reported in August, 2015 that claimant was continuing to work on her exercises and that she felt that she was "advancing slowly." (Ex. LL, p. 14)

On September 14, 2015, Dr. Nepola prepared a letter to Premier Case Management confirming, among other things that claimant was progressing as expected, given the multiple procedures to her shoulder. (Ex. LL, p. 17) He also stated that the recurrent tear was related to the original tear and a sequela of treatment. (Ex. LL, p. 18) Claimant was progressing, but in December, 2015, she had an increase in pain during her work hardening program. (Ex. LL, p. 24) She then had a corticosteroid injection in her shoulder on March 1, 2016. (Ex. LL, p. 28)

By April 19, 2016, claimant was no longer progressing. She continued doing physical therapy, which provided only about a half a day of relief, but nothing long lasting. (Ex. LL, p. 37) At that time, Dr. Nepola declared her to be at maximum medical improvement (MMI) and recommended a functional capacity evaluation (FCE). (Id.) The FCE was completed on April 27 and 28, 2016 at Balanced Fitness and Health in Hiawatha, Iowa. (Ex. MM) Claimant was found to have provided "maximum effort on all test items." (Ex. MM, p. 1) The test results placed claimant in the sedentary-light category of work. (Id.) The FCE results identified restrictions as follows:

Lift, Carry, Push/Pull	Unable	Rare	Occasional	Frequent
Waist to Floor		20	10	5
Waist to Overhead, Bilateral		10	5	2
Waist to Overhead, Right		6	4	Negligible
Waist to Overhead, Left		10	8	5
Waist to Shoulder		15	10	5
Bilateral Carry		25	15	5

Lift, Carry, Push/Pull	Unable	Rare	Occasional	Frequent
Right Carry		9	5	2
Left Carry		30	15	5
Extended Reach Lift		5# R/10# L	2# R/ 8# L	Negligible R/5# L
Push		57	35	15
Pull		63	40	20

Non-Material Handling	Never	Rare	Occasional	Frequent
Firm Grip			X, 45# R, 55# L	X, 10# R, 20# L
Walk				X
Bilateral Sustained Elevated Work			X	
Repeated Forward Reach		X, R/L		
Repeated Overhead Reach		X, R	X, L	
Dexterity			X, R	X, L

(Ex. MM, pp. 3, 4)

On May 24, 2016, Mark Taylor, M.D., of Medix, issued his report following an independent medical examination at the request of claimant's counsel. Claimant was evaluated on April 27, 2016. (Ex. 1) Dr. Taylor was made aware of the FCE, which was completed on April 27 and 28, 2016 and Dr. Nepola's 5 percent impairment rating assigned on May 2, 2016, referencing both in his report. (Ex. I, p. 6) In his report, Dr. Taylor noted that claimant was working as a self-employed cosmetologist, doing 2 to 4 haircuts per day. He also noted that she is able to position the clients lower in the chair in order to keep her right arm nearer her side and not elevated, to remain within the restrictions identified by Dr. Nepola. (Ex. 1, p. 7) Dr. Taylor's examination of claimant found a loss of motion in her right shoulder compared to her left, particularly in the areas of adduction and internal rotation, with mild weakness and tenderness on the right AC

joint and bicipital groove and anterior glenohumeral joint. (Ex. I, p. 9) Claimant demonstrated positive Yergason's and Hawkins' tests and mild weakness with Jobe's testing and posterior shoulder pain with Speed's testing. (Id.) Her grip strength was also reduced on her right hand, and she was noted to be right hand dominant. (Id.) Dr. Taylor also noted tenderness in both the left and right knees, with crepitus in the right knee, but with negative drawer and negative varus and valgus stresses on the right knee. (Ex. I, p. 10)

Considering permanency, on April 8, 2013, Dr. Abernathey gave claimant a release to return to full duty work regarding neurological issues. (Ex. CC, p.3) On August 19, 2013, Dr. Abernathey sent a letter to Premier Case Management at their request in which he opined, "Based upon the AMA Guidelines for chronic pain, decreased range of motion of the lumbosacral spine, previous disc extrusion and subsequent surgery; I would consider the patient to have a 7% whole body impairment rating. I would consider the patient to be at MMI as of this date." (Ex. CC, pp.4-5) There is no confirmation that Dr. Abernathey was relying on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, nor any reference to a particular section of the guides relied upon, or discussion or analysis related thereto.

On August 21, 2014, Dr. Tearse placed claimant at maximum medical improvement and assigned no work restrictions for her knee. (Ex. HH, p.5) Dr. Tearse noted at that time, claimant indicated that her knee "feels 'so much better' after the shot," and that she "did a significant amount of walking at both Adventureland and the Iowa State Fair and states she had no knee problems with this." (Ex. HH, p.5)

On May 2, 2016, following the completion of the FCE at Balanced Fitness and Health, Dr. Nepola issued a letter to Premier Case Management concluding that claimant sustained a 3 percent whole person impairment based on loss of active forward flexion/extension, per figure 16-40 and loss of active internal rotation per figure 14-46 of the AMA Guides, Fifth Edition. (Ex. LL, p. 44) On June 21, 2016, Dr. Nepola provided the following permanent restrictions related to claimants shoulder condition:

> (1) Two handed lifts from floor to waist, rare - 20 pounds occasional - 10 pounds, frequent – 5 pounds; from waist to overhead: rare - 10 pounds; occasional - 5 pounds, frequent – 2 pounds; waist to shoulder, rare - 15 pounds, occasional - 10 pounds, frequent – 5 pounds.
>
> (2) Right upper extremity lift, waist to overhead, rare – 6 pounds, occasional – 4 pounds, frequent – none.
>
> (3) Bilateral carry, rare - 25 pounds, occasional – 15 pounds, frequent – 5 pounds.
>
> (4) Right upper extremity carry, rare - 9 pounds, occasional - 5 pounds, frequent – 2 pounds.

(5) Extended reach lift with right upper extremity, rare - 5 pounds, occasional – 2 pounds, frequent-none.

(6) Two handed push, rare - 57 pounds, occasional – 35 pounds, frequent-15 pounds.

(7) Two handed pull, rare – 63 pounds, occasional – 40 pounds, frequent – 20 pounds.

(8) Right upper extremity firm grip, occasional-45 pounds, frequent-10 pounds.

(9) Occasional bilateral upper extremity sustained elevated work.

(10) Rare repeated forward reach.

(11) Rare overhead reach.

(12) Occasional right upper extremity dexterity.

(Ex. LL, p. 45)

Dr. Pardubsky who treated claimant's elbow condition, returned her to work with full use of both hands on September 25, 2014. (Ex. II, p. 9) On July, 11, 2016, Dr. Pardubsky opined that based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, claimant sustained a 5 percent upper extremity impairment "as a result of ongoing median nerve symptoms with improvement but persistent findings on EMG." (Ex. OO, p. 3) This along with a 3 percent upper extremity impairment based on ulnar nerve dysfunction, supported by table 16-10 and table 16-15, combine for an 8 percent upper extremity impairment, which is 5 percent to the whole person. (Id.)

As described above, Dr. Taylor conducted an independent medical exam at the request of claimant's counsel and issued a report on May 24, 2016. (Ex. 1) Concerning permanent impairment, Dr. Taylor combined the right shoulder and right elbow conditions and thoroughly described the particular tables and figures from the AMA Guides, Fifth Edition that he relied upon to reach a conclusion of 10 percent to the whole person. (Ex. 1, p. 11) He then also described an additional 10 percent whole person impairment that he assigned for claimant's back condition. In so doing, he provided justification for determining claimant should be placed in the DRE lumbar category III, rather than category II. (Id.) In contrast, Dr. Abernathey does not make reference to either category or any particular portion of the AMA Guides, Fifth Edition that he relied upon. (Ex. CC, p. 5) Concerning the right knee, Dr. Taylor assigned a 2 percent whole person rating, again citing to the particular portions of the AMA Guides, supporting his conclusion. (Ex. 1, p. 11) All of these ratings are then combined by Dr. Taylor and result in a whole person impairment rating of 21 percent. (Ex. 1, p. 12)

Regarding permanent restrictions, Dr. Taylor states that "[t]he FCE results are reasonable." (Ex. 1, p. 12) He then specifically recommended:

> [A] 20-pound lifting on a rare to occasional basis at waist level. Between floor and waist level, 20 pounds rarely and 10 pounds occasionally (as per FCE). Waist to overhead of 10 pounds rarely, and 15 pounds between waist and chest level. I would recommend that she avoid lifting more than 5 pounds with the right upper extremity above chest/shoulder level. She should avoid forceful pushing and pulling movements with the right arm. I would recommend only occasional overhead tasks, which will mainly require use of her left arm. Such tasks should only occur rarely with the right arm.
>
> She should alternate sitting, standing, and walking as needed for comfort. This is mainly related to her knee, and to some extent related to her back. She can squat rarely but should have something to hold onto when arising from a squatted position. She can bend occasionally. I would recommend crawling on a rare basis due to her right knee condition. Additionally, she should kneel on a rare basis. If she finds that she must kneel down on the right knee, she should use a kneepad or some other device to avoid kneeling directly onto a hard surface. She can climb stepladders for two to three steps on a rare basis but she should avoid extension ladders.
>
> There are no vision, hearing or communication restrictions. She can travel occasionally. I would generally recommend that she avoid the use of vibratory or power tools other than on a rare basis for a limited amount of time.

(Ex. 1, p. 12)

Based on the thoroughness of Dr. Taylor's evaluation, including his clear citation to specific portions of the AMA Guides, Fifth Edition, and rational discussion and support therefore, I find his assessment of impairment to be most persuasive.

Dr. Nepola and Dr. Taylor issued their opinions concerning restrictions after the FCE was completed on April 27 and 28, 2016. Dr. Neploa's treatment and opinions focused on the right shoulder, whereas Dr. Taylor's restrictions related to all aspects of the injury, including both the right shoulder and the back. I therefore accept Dr. Taylor's restrictions as the more accurate statement of restrictions concerning the whole of claimant's injuries.

Claimant lives on an acreage and prior to the work injury, she had been engaged in outdoor activities related to horses, chickens, and spending time in her flower beds. (Tr. p. 58-59) Claimant testified that since the injury she no longer rides or leads horses, she needs help from her husband to care for the chickens, and she has had to

neglect her flower beds. (Id.) Inside the home, claimant testified that she no longer carries laundry baskets up the stairs, and she requires her husband's help when canning. (Tr. p. 60) Claimant testified that she is recently back to light mowing on a riding lawn mower. (Id.) Concerning her job duties at the salon, claimant has had to adapt some of the ways that she does things, including lowering the chair so that she does not have to reach upward to cut and style hair. (Tr. p. 51-52; Ex. 1, p. 7) In addition, she now hires someone to mow the lawn around her shop, which she did herself prior to the work injury. (Tr. p. 62)

According to Dr. Taylor's report, claimant is currently seeing between two and four clients per day, five days per week at the salon. (Ex. 1, p. 7) Although claimant is uncertain about the future concerning the salon, she is presently working on building up the clientele. (Ex. A, p. 13; Tr. p. 70, 73-74) She is presently advertising in a local newspaper to increase clients. (Tr. p. 71)

Claimant was able to assist her husband in the process of painting the salon, although she testified that her husband did the painting above waist level. (Tr. p. 65)

After claimant returned to work at the salon around November 2015, she had a conversation with Dr. Nepola about her work. (Tr. p. 66-67) She testified that she was able to do the work and Dr. Nepola then included in her restrictions that she was allowed to use a comb and scissors. (Tr. p. 66-67; Ex. LL, p. 24)

On March 9, 2016, Ms. Lana Sellner of Encore Unlimited, LLC, provided an initial vocational assessment to defense counsel. (Ex. A, p. 7) Ms. Sellner noted that she met with claimant on February 17, 2016, and that she was pleasant and cooperative. (Id.) Claimant advised Ms. Sellner that she had already applied for a number of positions at Nordstrom as well as other employers, and despite several interviews, she had not yet had success. (Ex. A, pp. 12-13) Ms. Sellner indicated that claimant appeared "open to working in any areas that are within her restrictions." (Ex. A, p. 13) Ms. Sellner also discussed her current part-time salon work with claimant, in which she is "trying to build up her clientele at her salon" and claimant's desire to work around her salon schedule with a flexible schedule from another employer, and her desire to have a job that will allow her to move around and not sit stationary, due to her diabetes. (Id.) Ms. Sellner advised that Nordstrom would like to have claimant return to work, but at the time of that conversation, Nordstrom required a statement of permanent restrictions, which claimant did not yet have. (Id.) Contrary to this assertion, claimant advised Ms. Barbara Laughlin, claimant's vocational expert, that Nordstrom told her they did not intend to hire her back. (Ex. 2, p. 13) At the time of the hearing, claimant had not been offered work within her restrictions by Nordstrom.

Ms. Sellner believed that claimant is a good candidate for rehabilitation, possessing many transferable skills to enter into a clerical or customer service position. Ms. Sellner agreed to "explore the return to work opportunities at Nordstrom as her restrictions change or becomes permanent." (Ex. A, p. 14) Ms. Sellner's concerns are whether claimant will try to keep the salon and the hours related thereto. (Id.)

Ms. Sellner opined that claimant "is employable in her job interest of general office work or receptionist type work like she has been applying [for]." (Ex. A, p. 20) She continued to maintain this opinion after reviewing the permanent restrictions assigned by Dr. Nepola. (Ex. A, p. 22)

Ms. Barbara Laughlin, of Laughlin Management, issued an Employee Assessment concerning claimant. (Ex. 2) Her report indicates that she was "not tasked with obtaining employment for Ms. Miller." (Ex. 2, p. 11) Ms. Laughlin reviewed claimant's medical history, including the April 27 and 28, 2016 FCE results and the restrictions as assigned by Dr. Taylor. (Ex. 2, p. 5-6) At that time, Ms. Laughlin did not have the June 21, 2016, restrictions assigned by Dr. Nepola. (Ex. 2, p. 10) Ms. Laughlin reviewed claimant's educational history and her employment history dating back to 1995. (Ex. 2, p. 6-8) Ms. Laughlin stated, "considering the FCE, recommended by Dr. Nepola and endorsed by Dr. Taylor," that claimant has sustained "a loss of 97.1% of all directly transferable occupations," with "no loss of closely transferable occupations, as she had none prior to the injury event," a "loss of 81.1% of generally transferable occupations," and a "loss of 98.6% of unskilled occupations." (Ex. 2, p. 10) Interestingly, Ms. Laughlin identifies two available positions of a "telephone solicitor" in her report, which is the same type of position that claimant did not accept when offered and did not follow-up on from Cardella. (Tr. p. 75-76)

Ms. Laughlin expressed her opinion that "no jobs would be found in any quality, quantity or dependability consistent with her abilities and restrictions without very significant accommodation." (Ex. 2, p. 14) However, as stated above, she found two job openings of a type that claimant did not choose to pursue.

Claimant was surveilled by Photofax, Inc., and an investigation summary is contained at defendants' exhibit C. The surveillance was for a period of two days on November 30, 2015 and December 1, 2015. The videos and report show and describe the claimant walking, bending over, carrying unknown items, driving, sweeping using a dust pan, and performing a haircut, with no apparent difficulty. (Ex. C) The surveillance video and photos show short clips of information and defendants make no arguments that claimant was outside her restrictions in the surveillance. The surveillance does appear to show claimant bending at the waist and generally moving about without significant difficulty. However, the information provided is for a relatively short period of time and not necessarily indicative of claimant's overall ability and therefore given little weight by the undersigned.

Regarding claimant's industrial disability, I consider her age, education, and work history. I also consider her motivation to return to work with her self-imposed limitations concerning the hours and pay that she is willing to accept, along with her medical history, the nature of her injuries including surgery to her L4-5, two right shoulder surgeries, surgery on her right arm, the impairment ratings and restrictions applicable to the injuries as a whole, her present functional ability as testified to by claimant at hearing and as demonstrated by her return to work in cosmetology, along with all other appropriate considerations regarding industrial disability, I find that claimant has

sustained a 65 percent industrial disability as a result of the December 18, 2012 work injury. Claimant, while having reduced physical ability maintains an ability to work in the areas of cosmetology and general office work. These areas are not foreclosed to claimant and she has skills applicable in these areas.

CONCLUSIONS OF LAW

The disputed issue in this case is the extent of 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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

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.

Defendants argue that claimant has returned to cosmetology and is able to carry out her duties in the salon without significant difficulty. Claimant testified that she is interested in and able to perform general office work and although she has only some computer skills she is willing to be trained. Claimant's self-employment in her salon

demonstrates a marketable skill which she has the ability to perform. The restrictions do not limit claimant's hours, nor was there evidence that claimant is unable to work within the restrictions of alternating sitting, standing and walking at the salon or in a general office environment.

Claimant argues that she is permanently and totally disabled. However, for the reasons there stated herein and above, I have determined that claimant has sustained 65 percent industrial disability.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant industrial disability benefits of three hundred twenty-five weeks (325 weeks), beginning on the stipulated commencement date of April 20, 2016 until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date.

All weekly benefits shall be paid at the stipulated rate of five hundred eight and 45/100 dollars ($508.45) per week.

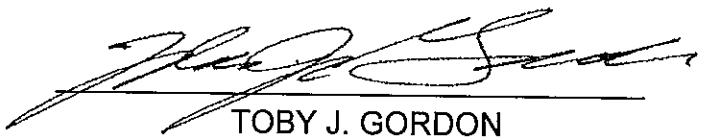
All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Costs of this matter are assessed against defendants.

Signed and filed this 10th day of November, 2016.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Robert R. Rush
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406-0637
bob@rushnicholson.com

James M. Peters
Attorney at Law
115 Third St., SE, Ste. 1200
Cedar Rapids, IA 52401-1266
jpeters@simmonsperrine.com

TJG/kjw

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.