BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHEENA McNULTY-KRALL, Claimant, vs. REM, INC., Employer, LIBERTY MUTUAL GROUP, Insurance Carrier, Defendants.	File No. 5017223 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

Sheena Krall, claimant, has filed a petition in arbitration and seeks workers' compensation from REM, Inc., employer, and Liberty Mutual Group, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on April 14, 2015, in Cedar Rapids, Iowa. The record in the case consists of claimant's exhibits 1 through 19; defense exhibits A through N; as well as the testimony of the claimant and Connie Oppedal.

ISSUES

The parties presented the following issues for determination:

Whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

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

The commencement date for any permanent partial disability benefits awarded.

The correct rate of compensation for the claimant.

Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

Whether the claimant is entitled to penalty benefits.

The amount of credits to which defendants are entitled.

Assessment of costs.

FINDINGS OF FACT

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

Claimant testified she is 31 years old. She is married, and has a son. She graduated from high school in 2001. In June 2003, at the time of her injury, she was not married. While in high school, she worked at a daycare and worked at a restaurant at the Amanas as a waitress.

Her job with REM, defendant employer, was her first full-time job. She worked with children in a residential group home. The ages varied from six to eighteen. Her duties involved helping the children get dressed, preparing food, etc. Her work required the use of both of her hands. She is right handed. At one point she received a promotion to supervisor of an adult home. That was her position in June 2003, when she was injured. Her duties then included writing treatment plans for residents in Microsoft Word. She had some keyboarding training in high school but no regular computer classes.

On the date of injury, she was helping a resident get into a van. The adult woman fell, and claimant caught her with her right arm, which was bent all the way back. The arm made a popping sound, and was very painful. She reported the injury to her employer and began a very long series of medical treatments. Her maiden name at that time was McNulty.

In 2003, claimant first went for treatment. Claimant was experiencing pain in her shoulder. She was still working. (Exhibit 2) She was referred to Physician's Clinic of Iowa beginning in July of 2003. (Ex. 4) There she was treated by Fred Pilchard, M.D. Dr. Pilchard performed two surgeries on her shoulder.

During this time she continued to work, with restrictions. She did light duty, doing office work, and not doing any direct care for residents. In late 2004, claimant was fired by the employer. She was still undergoing treatment with the doctors at the time. In 2005, claimant was sent by her attorney to see Ray Miller, M.D. He also suggested she needed additional care.

In 2005, claimant worked at Manor Care, a nursing home. She attempted work at the Alzheimer's unit there, which involved doing activities with residents. This involved repetitive reaching hand over hand. Claimant found she was unable to do the work, due to causing pain in her right arm. Also, the patients were unpredictable, as patients could fall or strike out at any time. (Ex. 14, p. 39) Also, a document from

Manor Care shows claimant resigned her job there in May 2005. It was noted claimant could not physically do the work.

Claimant then worked for Van Meter Company (VMC), a business that sells electrical parts. Claimant was hired to answer phones and do secretarial work. She found her arm became painful and swollen when doing this work. Exhibit 14, page 40, dated July 29, 2005, shows VMC noted she was unable to perform the essential functions of her position.

Claimant also worked at another daycare center. She found she was unable to do that work due to pain in her shoulder, and only worked there a week. Exhibit 14, page 41, is a document from the daycare center, Waypoint, noting claimant's last day of work was October 24, 2005.

In December 2005, claimant's care was transferred to University of Iowa Hospitals for her to see James Nepola, M.D. Over the next few years she underwent a series of surgeries with him. At times the insurer wanted claimant to be seen by out of state doctors as well, and claimant did so. In 2006, Dr. Nepola did two surgeries on her shoulder. She continued to have problems with her shoulder even after five prior surgeries.

In 2008, she had another surgery at University Hospitals. At that point a fusion of her right shoulder was discussed. Dr. Nepola felt it was appropriate. She was sent to a doctor in St. Louis, who also recommended the procedure.

A fusion was attempted in 2009, but the procedure was terminated. During surgery, it was discovered a cap put on her shoulder in a prior surgery was infected and that needed to be treated first. She later returned and the fusion was completed in a second procedure in 2009.

In 2010, claimant continued in treatment. After each surgery, she underwent recovery and rehabilitation over several months. She was required to wear a sling. In 2010 she underwent yet another surgery, and again, the surgery was terminated. A plate previously inserted had broken since the surgery the year before. That needed to be replaced before the new surgery could be performed. Then claimant had a bad reaction to an antibiotic. That surgery was eventually rescheduled and the broken hardware was replaced. Her last surgery was in 2011. Again, hardware needed to be changed.

Claimant applied for Social Security Disability benefits. She was denied the first two times, but eventually in 2012 she was awarded benefits. (Ex. 11)

Today she has pain in her arm which varies from day to day. The muscles in her back that compensate for her inability to use her shoulder grow painful also. If she stands for a period of time without any support, she has pain.

She does not feel she could return to her work as a waitress, as many of those duties involve the use of her right arm. She would only be able to greet customers, and she would not be able to carry or deliver drinks or food. She would not be able to write down the food orders. She would not be able to enter the order onto a computer unless she used her non-dominant left hand. She would not be able to reach up to grab plates or food trays. She could not reach across a table or clear a table.

REM has never offered her job back to her. She does not feel she could do daycare work, as evidenced by the fact she tried to do so but was not able to. She has a computer at home and she is able to operate it with her left hand. She does very little with a computer, other than checking emails from her children's school. She has Facebook but is seldom on it. She is able to drive a motor vehicle, a Dodge Durango. She has had to make accommodations in the form of buying a vehicle with the gearshift on the floor, not on the steering column. She has to lower the steering wheel so she can reach it. She drives with her left hand.

She now is married and has a seven-year-old son. When he was younger, she had difficulty in physically caring for him. For a long time she had to have help with her at all times to get him out of the crib, etc. Now that he is older, he has had to learn to do many things for himself. He helps her with things she can't do. She relies on her family for many things.

She has had to change the way she dresses herself. She wears sweatpants because she can't button jeans without help. Her bra does not stay up on her right side because she "doesn't have a shoulder". Around the house, she has difficulty doing laundry. Her husband has to take the laundry up and down the stairs for her. Vacuuming often causes great pain. She can dust a little but not up high. It often takes two hands to move what she is dusting. She can cook simple things.

She and her husband do not do many things, although they do go camping in the summer. She is unable to help with any of the camping setup or lifting. Enjoying time with her family is her only recreation.

Claimant consulted with Iowa Vocational Rehabilitation in order to find work. This was interrupted many times by her medical treatment, such as when she recovered from her fusion surgery. (Ex. 14). Because of this, those services did not work out and it was terminated by the agency, who recommended she apply for Social Security Disability benefits.

Exhibit 16 shows medical expenses for therapeutic massage, which was recommended by the University of Iowa Hospitals for her muscles. She went to Preferred Massage Therapy. Their services did help. The insurer refused to pay for those services, saying Dr. Nepola was the only authorized treating physician. However, by then the fusion had already been performed.

On cross examination, she agreed she has two computers, an iPad, and a smart phone at home. When she worked and was using Microsoft Word, she also used Excel. She uses her computer to check the family bank account.

In 2004, she treated with Dr. Pilchard, who did not have anything to offer her. She was sent to Kary Schulte, M.D. in Des Moines to see if he had anything to offer. He recommended a Functional Capacity Evaluation (FCE), and REM then decided they did not have a job for her due to her restrictions and an inability to perform her job. (Ex. 15, p. 2)

Dr. Pilchard gave her an impairment rating and assigned restrictions. Defendants began paying workers' compensation benefits. Since treating with him in 2005, her treatment has stayed at the University of Iowa, with treatment and surgeries by Dr. Nepola and one by Brian R. Wolf, M.D.

In April 2010, Dr. Nepola told claimant she would have permanent restrictions of an ergonomically placed keyboard in front of her rather than at her side. Exhibit 11, page 6, is Claimant's Social Security Disability decision, which notes restrictions of no reaching and no lifting with the right arm.

In September 2012, Dr. Nepola discharged her from his care other than annual follow-up appointments. Exhibit 9, page 180, shows that in 2013 he felt she was doing well with intermittent mild discomfort during weather changes, and her hardware was minimally bothersome. He felt she could do activities as tolerated. (Ex. 9, p. 183) He continued her permanent restrictions.

Claimant then saw Dr. Nepola a last time on March 10, 2015, about a month before the hearing. (Ex. C, p. 13) In exhibit C, p. 16, it was recommended claimant strengthen her upper arm muscles. She states she has tried to do so, but is limited to lifting a pop can in terms of weight. She is to see him again in one year. Exhibit A is claimant's deposition taken in 2013. At that time she stated she had not applied for any jobs since 2010, and that is still the case. She agreed some of the companies at which she applied were not even hiring. Only a couple of them specified her arm and shoulder as the reason they were not hiring her. She also has not looked for a job online. She last contacted Iowa Workforce Development for a job in 2011.

She also agreed she can go to the grocery store or Walmart alone. Dr. Nepola has never told her she cannot work. She acknowledged her permanent restrictions are all for her right shoulder, not for any other body parts.

On re-direct examination, she stated at each visit to the University of Iowa Hospitals she completed a questionnaire where she set forth the activities of daily living that were adversely affected by her injury. Her use of Excel in her prior job was very minimal. She used it to log staff comments about each resident. Her supervisor actually set up the Excel worksheets. Claimant's last experience with Excel was in 2003, 11 years ago.

Her education after high school consisted of a little college, but she did not obtain a degree. She did obtain a Certified Medication Aide certificate through her employment at REM. She took some classes at Kirkwood Community College, but discontinued those when she became a supervisor, due to the increased time demands.

Connie Oppedal testified for defendants. She identified Exhibit D, page 36, as her resume. She works with persons with disabilities. She is a vocational consultant and has done that work for several years. She authored a vocational report assessing claimant's employability. (Exhibit D) On page 16, she listed claimant's transferable skills, including supervisory skills, good communication skills, both oral and written, knowledge and skills for caring for persons with disabilities, good instructional skills for training both staff and persons with disabilities, good reporting skills, and organizational skills. On page 17, she listed jobs claimant could perform. This was based on the restrictions of Dr. Nepola.

She listed seven jobs that were actually available at that time. She learned of them by using MonsterJobs, Iowa Workforce Development, CorridorCareers.com, and other sources. She contacted the potential employers listed, and confirmed claimant could do those jobs within her restrictions. Dr. Manshadi's restrictions on page 16 were also considered, and she could do those jobs with his restrictions as well. One of the jobs listed, general office clerk, involved answering phones, etc. Family advocate required assisting case workers and nurses in helping children and others. Ms. Oppedal did not meet with claimant.

On cross examination, she was asked about exhibit D. The documentation she was given to review in the preparation of her report includes 35 items. She agreed the positions of Telephone Fundraiser, Inbound Customer Service, and Account Support Rep all require computer skills, and would involve using a computer throughout the day, documenting notes, entering data, etc., and she agreed these jobs would be more difficult for someone with limitations. The Family Advocate position would most likely assist a case manager or social worker, and might involve a caseload with as many as 200 children.

Claimant's first surgery was by Dr. Pilcher, on September 18, 2003, and involved a subacromial arthroscopy of the right shoulder. (Ex. 5, p. 1) When this procedure failed, a second one was conducted on December 11, 2003. (Ex. 5, p. 2) A third procedure was performed on May 27, 2004. (Ex. 5, p. 3) When this failed as well, claimant was referred to David P. Hart, M.D. at the University of Iowa Hospitals and Clinics. At this point claimant's employment was terminated by the employer for inability to do her job. (Ex. 15, pp. 1-3)

Dr. Pilcher assigned work restrictions of not lifting over 5 pounds floor to waist with the right arm, with only tabletop activity. (Ex. 4, p. 14) On January 17, 2005, Dr. Pilcher concludes he cannot do anything further for claimant's condition, and assigns an impairment rating of 35 percent of the right upper extremity, or 21 percent of the body as a whole. However, he also mentions further treatment may be possible. (Ex. 4, p. 5)

Ray Miller, M.D. conducted an independent medical examination (IME) and concluded on August 10, 2005, claimant was significantly impaired. He felt claimant was not yet at MMI and would benefit from further treatment by a shoulder surgeon. (Ex. 8, p. 6)

Claimant then tried to return to work at other jobs, at HCR Manor Care from May 6 to 19, 2005 (a care facility), Van Meter Company from July 6 to 29, 2005 (telephone duties), and Waypoint Childcare October 3 to 24, 2005 (daycare teacher), but found she could not perform the duties of any of them. (Ex. 14, pp.39- 40)

Claimant then began treatment with James Nepola, M.D. at the University of Iowa Hospitals and Clinics. He performed an arthroscopic anterior capsular release, claimant's fourth surgery, on March 10, 2006. (Ex. 9, p. 10) Claimant's fifth surgery was by Brian R. Wolf, M.D., at the University of Iowa, and involved a right shoulder interpositional meniscus transplant. (Ex. 9, pp. 21-23) Her sixth surgery was performed on June 26, 2008, by Dr. Nepola, and involved a right Copeland hemi-resurfacing and anterior capsular relaxation. (Ex. 9, pp. 42-44)

Claimant's seventh procedure, an iliac crest bone graft harvest, was begun but terminated due to infection that was found. (Ex. 9, pp. 64-67) Her eighth procedure completed this operation on August 27, 2009. (Ex. 9, pp. 70-72) Dr. Nepola released her, but she continued to have symptoms so he performed her ninth procedure on May 19, 2010, removing the fusion hardware. This procedure was terminated due to an adverse reaction to the anesthesia. (Ex. 9, pp. 113-120) In a tenth procedure, this removal was completed on July 29, 2010. (Ex. 9, pp. 136-141)

Claimant was released to return to work with restrictions of not lifting over one pound with her right arm, no reaching away from her body, and no reaching above the shoulder. (Ex. 9, p. 151) When claimant returned to Dr. Nepola with pain complaints, he performed her eleventh and final procedure to remove more hardware on June 21, 2011. (Ex. 9, p. 164)

Dr. Nepola found claimant to be at MMI on December 11, 2012. He assigned a rating of permanent partial impairment of 45 percent of the right arm, or 27 percent of the body as a whole. He recommended permanent restrictions of no repetitive reaching away from the body, no lifting above shoulder height with the right arm, and no lifting weight with the right arm away from the body or above shoulder height. (Ex. 9, p. 178)

Dr. Manshadi conducted an independent medical examination on December 4, 2014. He rated her impairment as 45 percent of the right upper extremity, or 29 percent of the body as a whole. He assigned permanent restrictions of avoiding any activity which required reaching away from the body, avoid reaching at or above shoulder height, no lifting of more than one-half to one pound, no lifting of any weight with the right arm away from the body or above shoulder height. (Ex. 12, pp. 7-8)

CONCLUSIONS OF LAW

The first issue is whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant states defendants have improperly characterized certain payments as permanent partial disability benefits, which should have been temporary total disability benefits. Those periods of benefits are December 3, 2004, through May 5, 2005; May 20, 2005, through June 30, 2005; July 29, 2005, through September 29, 2005; October 28, 2005, through December 15, 2005; and May 7, 2010, through May 19, 2010. (Hearing Report)

Defendants paid temporary total disability (TTD) benefits from December 2, 2004, to January 17, 2005. Those benefits were stopped when Dr. Pilcher put claimant at maximum medical improvement (MMI) on January 17, 2005. (Ex. 4, p. 15) Defendants then paid permanent partial disability (PPD) benefits from January 18, 2005, to December 12, 2005, a total of 47 weeks. Claimant did not receive any medical treatment during this time. She was not seen by Dr. Nepola until December 12, 2005. (Ex. 9, p. 1)

Following claimant beginning to see Dr. Nepola, defendants paid TTD benefits again from December 13, 2005, to December 10, 2012. Those benefits were stopped on December 11, 2012, when Dr. Nepola again put claimant at MMI. (Ex. 9, p. 178)

Defendants then paid PPD benefits from December 11, 2012, to January 4, 2015. Defendants assert an overpayment was made and that overpayment was "used up" by January 4, 2015, a total of 154.857 weeks of PPD benefits. (Ex. N)

Iowa Code section 85.34(1) states:

> *Healing Period.* If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable

> of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Defendants characterized the payments made to claimant between Dr. Pilcher finding claimant at MMI, and claimant beginning further treatment with Dr. Nepola. During this approximately 11 month period, claimant underwent no medical treatment. Defendants argue once claimant was placed at MMI by Dr. Pilcher, payments made thereafter were paid as permanent partial disability benefits. Once claimant began receiving medical treatment again with Dr. Nepola, defendants switched the designation of the payments back to temporary total disability or healing period benefits. Defendants point out a claimant can have intermittent healing periods.

Claimant on the other hand asserts since claimant was still in need of further treatment, she was not at MMI when Dr. Pilcher found her to be so, and payments during the 11 months without treatment should properly be considered healing period benefits, except for the brief periods she worked during that time.

Dr. Pilcher clearly did find claimant to be at MMI. He reviewed the FCE report and recommenced restrictions of not lifting over 5 pounds and 2 pounds repetitively. He assigned a 21 percent impairment of the body as a whole. (Ex. 4, p. 15)

Claimant was then seen by Dr. Miller, who concluded she needed further treatment. This led to claimant treating with Dr. Nepola. Dr. Nepola found claimant to be at MMI as of December 11, 2012, and assigned a 27 percent body as a whole rating. (Ex. 9, p. 178) However, Dr. Manshadi felt she had reached maximum medical impairment as of February 25, 2013. (Ex. 12, p. 7) Dr. Neff agreed with Dr. Nepola's MMI date. Claimant agrees as well. Dr. Nepola was the treating physician, performed many of claimant's surgeries, and had much more contact with claimant than Dr. Manshadi, so Dr. Nepola's MMI date will be utilized over Dr. Manshadi's. The parties agree payments made after Dr. Nepola's MMI date are properly classified as permanent partial disability benefits. It is the 11 months between Dr. Pilcher's finding of MMI and commencement of treatment with Dr. Nepola that is in dispute.

Claimant submits Dr. Pilcher's report, which set out restrictions and ratings of impairment, was not really a finding of MMI. Prior to then, Dr. Pilcher had expressed frustration with determining how to treat claimant. He did mention he hoped some remedy could be found for her. But this wordage does not change the fact he had concluded nothing further could be done for claimant. A physician does not assess permanent impairment unless a claimant has reached MMI. A physician does not assign permanent restrictions unless claimant has reached MMI. If a claimant is still undergoing treatment, neither permanent impairment nor permanent restrictions can be determined, as claimant's condition would still be in flux. It could still improve further. Clearly, Dr. Pilcher felt all that could be done had been done, and he gave claimant both ratings of permanent impairment and permanent work restrictions. Defendants then properly began paying permanent partial disability benefits.

Claimant's condition was then evaluated by Dr. Miller, who felt further treatment, and therefore further improvement, was possible. Dr. Pilcher then agreed a referral to Dr. Nepola was appropriate. Claimant then began treating for her condition again, and clearly entered a healing period while doing so.

The crucial focus is on Dr. Pilcher's report of January 17, 2005. (Ex. 4, p. 15) Was he finding claimant at MMI at that time? He did not expressly so state. He incorporated his office note of December 21, 2004. (Ex. 4, p. 14) In that note, he states what he thinks will be her permanent restrictions, which he then adopts in his January 17, 2005, letter. He does then, in his letter, assign permanent restrictions and a rating of permanent impairment. This would normally indicate a finding of MMI, but again, he does not expressly state this. When he was treating claimant, he often commented he was disappointed when a treatment did not work. In his January 17, 2005, letter, he states:

> It is still my hope that some treatment can be afforded this young woman so as to not have as much difficulty as she does with that right shoulder.

(Ex. 4, p. 15)

This comment indicates to the undersigned Dr. Pilcher was not saying claimant was at MMI and no further treatment was available to her. On the contrary, he expresses the hope there is treatment available to help her. He is instead stating there is nothing further he can offer her. That is different than saying the medical profession has nothing further to offer her.

It is understandable that defendants considered his report to be a finding of MMI, as he did assign both permanency and restrictions. But now, with the benefit of hindsight, it is clear claimant had not reached MMI at the time of his report, whether he made such a finding or not.

It is found claimant did not reach MMI until Dr. Nepola's report of December 11, 2012. Payments made to claimant between Dr. Pilcher's January 17, 2005, report and commencement of treatment by Dr. Nepola would therefore be considered healing period benefits. However, the conclusions as to the extent of claimant's disability, below, determine the commencement date for permanent benefits.

The next 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 injury has resulted in a long history of medical treatment, spanning nine years and 11 surgeries to her right shoulder, including a fusion of her right shoulder, her dominant side.

She cannot return to her job, due to the work restrictions from this injury. The employer terminated her employment because those restrictions meant she could not do her job, resulting in a severe loss of earnings for her. She attempted other jobs briefly, but she was unable to perform them. She has not been employed since 2005, over 10 years ago.

As a result of her work injury, she now has work restrictions. Dr. Nepola, a treating doctor who has performed more of claimant's surgeries than any other doctor, has recommended permanent restrictions of no repetitive reaching, and no working above shoulder heights. Dr. Nepola found claimant to be at MMI on December 11, 2012. He assigned a rating of permanent partial impairment of 45 percent of the right arm, or 27 percent of the body as a whole. He recommended permanent restrictions of no repetitive reaching away from the body, no lifting above shoulder height with the right arm, and no lifting weight with the right arm away from the body or above shoulder height. (Ex. 9, p. 178)

Dr. Manshadi conducted an independent medical examination on December 4, 2014. He rated her impairment as 45 percent of the right upper extremity, or 29 percent of the body as a whole. He assigned permanent restrictions of avoiding any activity which required reaching away from the body, avoid reaching at or above shoulder height, no lifting of more than one-half to one pound, no lifting of any weight with the right arm away from the body or above shoulder height. (Ex. 12, pp. 7-8)

The vocational report of Connie Oppedal found claimant capable of employment. However, many of the jobs she identified involve using a computer all day, but claimant credibly testified she would be limited in doing so. Claimant showed good motivation to find substitute work, but the jobs she attempted were too much for her. Given her restrictions, her 11 surgeries, etc., this is not surprising.

The Functional Capacity Evaluation found claimant capable of working only in the sedentary category of occupations. (Ex. 7)

Ray Miller, M.D., conducted an independent medical examination (IME) as well. Claimant was 21 years old at the time. He concluded, "Ms. McNulty-Krall remains severely limited and significantly symptomatic with pain complaints involving her right shoulder and affecting her right upper extremity." (Ex. 8, p.5) At that time, claimant had not reached maximum medical improvement and no ratings of impairment were assigned. He did note:

> Presently, Ms. McNulty-Krall's experience with her recent attempt at employment would suggest that she is not employable. She can occasionally lift 5 pounds from floor to waist, preferably using 2 hands and not just the right hand. She can lift 2 pounds frequently with the right hand from floor to waist. She cannot reach above her shoulder. She cannot reach far in front of her, in back of her, or to the side. She is not able to significantly push or pull with any force. In fact, she cannot sit with her arm hanging at her side for more than 30 to 60 minutes without significant increase in pain and subsequent swelling.

(Ex. 8, p. 6)

Scott Neff, D.O., conducted an IME. He agreed with Dr. Nepola's analysis. He also noted a fusion procedure results in a complete inability to move the glenohumeral joint. He found claimant to have a 45 percent impairment of the upper extremity. However, he felt three percent should be added for ongoing chronic pain. He assigned an overall impairment of 30 percent of the whole person. (Ex. 19, p. 6)

Claimant's education is limited to a high school diploma and some college work. She is only 31 years old, which means most of her working life is still ahead of her. She suffered this injury when she was in her early 20s, and has been unable to work since. This alone indicates a devastating economic effect on claimant in that it represents a substantial loss of earnings which will continue indefinitely into the future, probably for the rest of claimant's life.

She has been found to be disabled by the Social Security Administration. Although that program utilizes differing criteria, the determination of total disability is noted.

Claimant asserts the odd lot doctrine.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled

if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

The Iowa Supreme Court has adopted the full-responsibility rule. Under that rule, where there are successive work-related injuries, the employer liable for the current injury also is liable for the preexisting disability caused by any earlier work-related injury if the former disability when combined with the disability caused by the later injury produces a greater overall industrial disability. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995); Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995). The full-responsibility rule does not apply in cases of successive, scheduled member injuries, however. Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002).

Claimant's right shoulder is the only part of her body affected by her work injury, but that part is severely affected.

Claimant made a reasonable job search after losing her job with the employer. She found three jobs, none of which worked out. She made 101 job contacts that did not result in employment. Claimant used Iowa Vocational Rehabilitation Services, but her medical treatment, which has been substantial, interrupted those efforts. Eventually, the Vocational Rehabilitation people told her to apply for Social Security Disability benefits, which are only available to those who are totally disabled. She applied for Social Security Disability benefits, was found to be totally disabled under that program's criteria, and her status as disabled was later reviewed and re-affirmed.

Although she has not applied for any jobs in recent years, she showed good motivation when her health permitted her to apply for jobs. This case has pended for over a decade, and it is clear further job applications would be similarly unsuccessful.

It is concluded claimant has established a prima facie case of entitlement to permanent total disability benefits as an odd lot worker.

Once she has made a prima facie case of being an odd lot worker, the burden shifts to defendants to go forward with evidence that shows she is in fact employable in the competitive labor market. In this case, defendants have offered only the vocational opinions of Connie Oppedal. However, Ms. Oppedal never interviewed claimant in person. She did not have claimant's deposition available to her when she formed her conclusions. Many of the factors she relied upon are outdated, given the length of time this case has been pending.

Ms. Oppedal provided generalized jobs she felt claimant could do. However, no specific jobs with specific employers were provided. Many of those were temp agency jobs. (Ex. D, p. 35)

Claimant's credible testimony about her job search efforts, her demonstrated motivation to find substitute work, and the fact the three jobs she attempted proved to be beyond her capabilities outweighs the conclusions of Ms. Oppedal that jobs are available in the job market that claimant could do. It is concluded defendants have not rebutted the prima facie showing that claimant is totally disabled.

It is found claimant has carried her burden of proof to show she is an odd lot employee and is permanently and totally disabled.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

It is further found that claimant has proven by a preponderance of the evidence entitlement to permanent total disability benefits without resort to the odd lot doctrine, in that her injury has wholly disabled her from performing work that the employee's experience, training, intelligence and physical capacity would otherwise permit the employee to perform.

The next issue is the commencement date for any permanent partial disability benefits awarded.

In that a finding of permanent total disability has been made, permanent benefits will commence on the date of injury, less any days thereafter in which claimant worked.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

The only medical expenses in dispute are the costs of massage therapy, set forth in exhibit 16. They total $954.00 for 27 massage visits.

Defendants resist these expenses as Dr. Nepola did not specifically authorize them. However, it appears other staff at the University of Iowa Hospitals and Clinics did. (Ex. 9, p. 174) Because the treatment was ordered by an authorized provider, defendants will be responsible for those costs.

The next issue is what credits defendants may claim.

The parties agree the correct rate of compensation is $305.52 per week. However, benefits during the pendency of this case were paid to claimant at the rate of $319.20. There is a dispute whether defendants are entitled to a credit for the overpayment.

Iowa Code section 85.34(3) states:

Permanent total disability.
a. Compensation for an injury causing permanent total disability shall be upon the basis of eighty percent per week of the employee's average spendable weekly earnings, but not more than a weekly benefit amount, rounded to the nearest dollar, equal to two hundred percent of the statewide average weekly wage paid employees as determined by the department of workforce development under section 96.19, subsection 36, and in effect at the time of the injury. The minimum weekly benefit amount is equal to the weekly benefit amount of a person whose gross weekly earnings are thirty-five percent of the statewide average weekly wage. The weekly compensation is payable during the period of the employee's disability.

b. Such compensation shall be in addition to the benefits provided in sections 85.27 and 85.28. No compensation shall be payable under this subsection for any injury for which compensation is payable under subsection 2 of this section. In the event compensation has been paid to any person under any provision of this chapter, chapter 85A or 85B for the same injury producing a total permanent disability, any such amounts so paid shall be deducted from the total amount of compensation payable for such permanent total disability.

Iowa Code section 85.34(4) states:

Credits for excess payments.
If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period or temporary partial disability benefits are terminated.

Iowa Code section 85.34(5) states:

Recovery of employee overpayment.
If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B and 85, excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee. An overpayment can be established only when the overpayment is recognized in a settlement agreement approved under section 86.13, pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid, or pursuant to final agency action in a contested case for a prior injury to the same employee. The credit shall remain available for eight years after the date the overpayment was established. If an overpayment is established pursuant to this subsection, the employee and employer may enter into a written settlement agreement providing for the repayment by the employee of the overpayment. The agreement is subject to the approval of the workers' compensation commissioner. The employer shall not take any adverse action against the employee for failing to agree to such a written settlement agreement.

The Iowa Supreme Court in Swiss Colony, Inc., v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010), stated the only credit for overpayment of temporary benefits is a credit for any future workers' compensation injury. In this case, claimant was overpaid both healing period and permanent disability benefits due to use of the incorrect rate.

Defendants argue the Swiss Colony case is inapplicable. The Swiss Colony case dealt with overpayment of weekly permanency benefits, as is the case here. Therefore, Swiss Colony controls as to overpayment of permanency benefits in this case. Defendants can only claim a credit for that overpayment against a future injury.

Defendants assert Swiss Colony does not apply to the overpayment of temporary benefits. They also state Swiss Colony does not apply to the overpayment of

permanent total disability benefits, citing Iowa Code section 85.34(3)(b). Swiss Colony specifically addressed overpayment of permanent partial disability benefits only.

However, the Court in Swiss Colony stated, "The plain language of section 85.34(5) directs that the overpayment of any weekly benefits be credited to payments for subsequent injury...we conclude that section 85.34(5) must be interpreted to apply to all overpayments of benefits, including an overpayment of weekly benefits...". Swiss Colony at 137 (emphasis in original)

The statement that the holding in Swiss Colony is to apply to all overpayments of benefits is controlling. Defendants are not entitled to a credit for the overpayment of temporary or permanent, including permanent total, benefits in this case but only against a future injury.

The last issue is the assessment of costs.

Claimant's costs are set forth in exhibit 18. As claimant has established a compensable work injury and the costs are reasonably related, defendants will reimburse claimant for those costs.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant permanent total disability benefits at the rate of three hundred five and 52/100 dollars ($305.52) per week commencing June 19, 2003, as set forth in the decision above, and during the time claimant remains permanently and totally disabled.

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 29th day of July, 2015.

JON E. HEITLAND
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.