BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOYVONNE A. CHAPMAN,

Claimant,

vs.

ABBE, INC.,

Employer,

and

QBE INSURANCE CORPORATION,

Insurance Carriers,
Defendants.

File No. 5047167

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Joyvonne A. Chapman, the claimant, seeks workers' compensation benefits from defendants, Abbe, Inc., the alleged employer, and its insurer, QBE Insurance Corporation, as a result of an alleged injury on September 22, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 3, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on March 11, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex. 1-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On September 22, 2013, claimant received an injury arising out of and in the course of employment with Abbe, Inc.

2. Claimant is entitled to either temporary total disability or healing period benefits from September 23, 2013 through October 7, 2013 and temporary partial disability from October 8, 2013 through July 30, 2014.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. If I award permanent partial disability benefits, they shall begin on July 31, 2014.

5. At the time of the stipulated injury, claimant's gross rate of weekly compensation was $390.15. Also, at that time, she was married and entitled to 4 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $280.65 according to the workers' compensation commissioner's published rate booklet for this injury.

6. Prior to hearing, defendants voluntarily paid $2,611.56 in permanent partial disability benefits for this work injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to weekly temporary total, temporary partial or healing period benefits and permanent disability benefits;

II. The extent of claimant's entitlement to alternate medical care.

III. The extent of claimant's entitlement to reimbursement for an independent medical evaluation (IME) pursuant to Iowa Code section 85.39.

IV. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Joyvonne, and to the defendant employer as Abbe.

From my observation of her demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Joyvonne credible.

Joyvonne was 68 years old on the date of hearing. For the last 37 years, she has been a resident of Greeley, Iowa. She received her high school diploma in 1966. She has been a certified nursing aide (CNA) and certified medication aide (CMA) for many years. She began working for Abbe, a nursing home, in 2003 and continues to do so at the present time as a certified nursing and medication aide. She also served as an assistant cook. Since returning to full-time work after her work injury in this case,

she has worked mostly as a CMA and only occasionally as a cook, but continues to do some nursing work when needed.

Joyvonne states that when working as a nursing aide, the work is very physical. Aides are required to change bedding, flip mattresses, and physically assist disabled residents in the activities of daily living such as getting in and out of bed, getting in and out of wheelchairs, going to the bathroom and taking baths. Work as a medication aide is not physically demanding in that the tasks are to dispense medications, perform injections and maintain medical charts. Working as a cook can also be physically demanding as food containers and cooking appliances can be very heavy.

Joyvonne stated that initially she worked 40 plus hours a week at Abbe. However, after reaching age 65, she chose to reduce her hours to 32 per week. She was working 32 hours a week at the time of her injury in this case.

The work injury in this case involves the right shoulder and neck. There is no dispute that claimant suffered complex fractures of the right scapula and clavicle from a motor vehicle accident in 2005 requiring reduction surgery. (Exhibit F-15:24) She also underwent a clavicle resection and reduction surgery for acromioclavicular (AC) joint arthritis, impingement and rotator cuff tear in the right shoulder in 2011. Also, in January 2013, she injured her right shoulder from a work injury at Abbe. Claimant states that she was returned to full duty work after treatment of these prior conditions and had no work restrictions at the time of her September 22, 2013 injury at Abbe. There is nothing in the record to suggest otherwise.

The stipulated injury occurred on September 22, 2013 when Joyvonne was working in the dining room serving food to residents. One of the heavier residents became dizzy and began to fall. Joyvonne injured her right shoulder and upper back/neck while trying to assist the resident, who ultimately fell down on top of her. (Ex. 5-2) She experienced immediate pain in the right shoulder and at the base of her neck. She reported to the staff lounge to rest after the injury.

Joyvonne was primarily treated for her work injury by Ignatius (Nate) Brady, M.D., an occupational medicine physician chosen by defendants. His assessment has been shoulder sprain/impingement. He immediately took her off of work and prescribed Tramadol for her pain. (Ex. 2-1:2) His initial office note does not describe a fall. He states as follows:

> Yesterday at work at a residential care center in Delhi, patient was gripping shoulder forcibly and putting his full weight on the shoulder and she has pain and poor motion ever since.

(Ex. 2-1)

Defendants believe that the lack of an initial history of a fall is significant, but I do not as no doctor in his case has opined claimant was not injured on September 22, 2013, despite some disagreement as to the nature of the injury. Dr. Brady also noted claimant's prior history of right shoulder problems at the time of his first visit with claimant.

On October 7, 2013, Dr. Brady recommended Joyvonne begin a course of physical therapy due to ongoing symptoms, but he released her to work four-hour shifts with no overhead lifting and only sedentary work. (Ex. 2-11:12) On October 21, 2013, Dr. Brady recommended an MRI of the right shoulder. (Ex. 2, p. 20) At a follow-up two weeks later, on November 4, 2013, Dr. Brady noted defendants had still not approved his recommended MRI. Dr. Brady stated this failure to approve the MRI was completely unacceptable, and without the MRI he could not treat claimant. (Ex. 2-21) The doctor adds that he considered the insurer in this was actively blocking care. (Ex. 2-22) Claimant testified at hearing that physical therapy was also not approved and she was told by the doctor that defendants were refusing treatment because they felt that her problems were due to her prior shoulder injuries. Defendants eventually approved the MRI and physical therapy, but not until after claimant filed a petition with this agency seeking alternate medical care.

After November 4, 2013, Dr. Brady's office notes containing patient history, his findings and assessments are not contained in the record although he continued to periodically see claimant until the end of July 2014. The only record of the subsequent visits are a series of documents called "Your Plan" which is document apparently provided to Dr. Brady's patients at office visits with describes current medications, a "To Do List,", any future scheduled appointments and instructions such as referrals for physical therapy and restrictions. There is no explanation in the record for this lack of office notations after November 2013.

On February 10, 2014, Joyvonne's counsel sent a letter to Dr. Brady, confirming he had been provided with Joyvonne's prior medical records going back to 2005. These records included treatment related to a motor vehicle accident in August 2005, and her additional treatment in 2006 and 2007. Dr. Brady was also provided with the records detailing Joyvonne's prior shoulder treatment with Dr. Roach and Dr. Lange from 2011 to 2013. (Ex. 7-1:2) After receiving this information, Dr. Brady opined Joyvonne's September 22, 2013 work injury constituted a substantial contributing factor in her current condition. (Ex. 7-3)

Apparently, Dr. Brady did not see Joyvonne again until March 24, 2014. The reason for this delay in treatment is not contained in the record. From the "Your Plan" document for March 24, 2014, Dr. Brady recommended physical therapy and a cervical MRI. There is also a medication added to the "Your Plan" list called diazepam, a medication commonly referred to as Valium. (Ex. 2-24) Absent the doctor's notations, it is unknown why she was given this mediation and by whom. She was seen again on April 7, 2014 and directed to start physical therapy. Apparently, defendants were still

delaying that treatment modality. Also, the doctor at this time changed the restrictions to light work only with no forceful push/pull, reaching or lifting with the right arm, but she was to continue on four hour shifts only. (Ex. 2-26) The cervical MRI performed on April 18, 2014, showed multilevel disk bulging with moderate foraminal narrowing bilaterally at C5-6, on the right at C4-5, and on the left at C6-7. (Ex. 1-3; Ex. 3-1:2) On May 15, 2014, the doctor did not change the restrictions, but told claimant to stop physical therapy. Again, it is unknown why physical therapy was ended, but the "Your Plan" documents then began to direct claimant to perform home exercises. Dr. Brady continued to see claimant thereafter until July 30, 2014, at which time the "Your Plan" document indicated the following under instructions:

> Continue home exercisers
>
> OK to follow up as needed
>
> Work Restrictions: Lift less than 20#

(Ex. 2-40)

Again, we have no office notes to explain these instructions. Claimant never returned to Dr. Brady after July 30, 2014. Joyvonne testified that she attempted to do so and called his office for an appointment, but was refused without explanation.

Apparently unknown to Dr. Brady at the time, defendants directed Joyvonne to orthopedic surgeon David Tearse, M.D., for purposes of an IME on May 5, 2013 seeking his opinion on causation and to assume care if needed. (Ex. C-6) In his letter report of this IME dated May 22, 2014, Dr. Tearse's impression was persistent right shoulder girdle pain with features of myofascial pain, as well as a probable cervical spondylosis. He did not find any significant clinical evidence for a structural right shoulder condition. Although indicating he was aware of claimant's prior right shoulder problems, he opined, as did Dr. Brady, that her present symptoms were primarily caused or substantially aggravated by her work related incident of September 23, 2013. Dr. Tearse added that given her present clinical findings, he recommended that she continue with her physical therapy program for her shoulder and neck, emphasizing soft tissue mobilization, stretching, and gentle strengthening, as her therapist has noted that she has improved. In view of her persistent radicular symptoms and the findings on MRI, Dr. Tearse also recommended evaluation by a neurosurgeon, to insure that "no further intervention such as [*sic*] epidural steroid injection is indicated." The doctor opined that claimant will not require any surgical intervention regarding her right shoulder, as a result of her work related injury. Dr. Tearse then recommended that claimant continue working with her work restrictions of limiting lifting to very light use with the right arm, due to her persistent weakness and occasional radicular symptoms. This would include providing no baths for residents, or putting her in situations where she would be required to lift residents by herself. (See generally Ex. 2-32:35)

Dr. Tearse's report in May 2013 was not provided to Dr. Brady until October 8, 2014, over a year later, when defense counsel asked the doctor to confirm claimant has reached maximum medical improvement (MMI). In that letter, defense counsel reported to the doctor that claimant had returned to work her full work schedule. (Ex. D-11) In a "To whom it may concern" form prepared by defendants, dated October 23, 2014, Dr. Brady indicated his last visit with claimant was on July 30, 2014 and he then circled yes or no to questions posed on the form. He indicated "No" as to future treatment, "Yes" as to achievement of MMI, and "No" as to whether claimant had incurred permanent restrictions and impairment from the injury. (Ex. 2-42) There was no explanation in the record for Dr. Brady's removal of the restriction imposed on July 30, 2014 since he had not seen claimant in the interim.

Also, on October 8, 2014, defense counsel sent a medical record from Dr. Brady, which purportedly was dated July 30, 2014, asking Dr. Tearse to confirm the achievement of MMI and to provide his opinions as to permanent partial disability from the work injury. It is unknown if this record was the "Your Plan" document or some of Dr. Brady's office notes that were not placed into evidence. Defendants apparently did not advise Dr. Tearse that the treatment recommendations he made in May 2013 had not been followed. Defense counsel only stated that Dr. Brady released her from treatment on July 30, 2014. Dr. Tearse was also told that claimant had returned to working her full work schedule. (Ex. D-10) Dr. Tearse responded on October 20, 2014, placing Joyvonne at MMI on July 30, 2014. He opined she did sustain ratable impairment attributable to her injury, which he assessed at four percent of the upper extremity or two percent of the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 4-1) Dr. Tearse did not comment on permanent restrictions in this last report.

On January 23, 2015, after finally receiving Dr. Tearse's May 22, 2014 report, Joyvonne's counsel wrote defendants requesting authorization for an evaluation with a neurosurgeon, as had been recommended by Dr. Tearse eight months earlier. (Ex. 7-17) This was eventually authorized in February 2015, but not without another petition for alternate medical care.

Chad Abernathey, M.D., a neurosurgeon, may have examined Joyvonne in early 2015, but the evidence does not indicate when this occurred. In brief, unsigned notations, consisting of two and three sentences bearing a date of April 20, 2015, the doctor requested an EMG test for possible carpal tunnel syndrome. (Ex. E-14) In another note dated May 18, 2015, Dr. Abernathey interpreted the EMG results as showing "very minimal carpal tunnel findings." The doctor then recommended no aggressive neurosurgical stance and that conservative management should continue. (Id.) There is no indication that the doctor actually evaluated claimant's spine condition as there is no report of his findings or impressions (or lack thereof) from a review of the cervical MRI and no report of findings or impression (or lack thereof) from any physical examination of the claimant. There is no report of what records he may have reviewed.

I do not consider this evidence of a valid neurosurgical evaluation. There may be such a report somewhere, but it was not placed into evidence.

Joyvonne testified at hearing she continues to work for Abbe, roughly 32 hours per week. She testified this is considered full time by Abbe management. She continues to experience symptomology in her right shoulder, lower neck, and right scapula area. Despite being right-hand dominant, she now uses her left arm primarily for the completion of tasks. She testified she does not use her right arm for any lifting. For her symptomology, Joyvonne testified she takes 2,000 milligrams of Tylenol every 4 hours while at work. She testified Dr. Brady informed her that this was not good for her liver. Joyvonne testified that despite being aware of the potential damage to her liver, she needed the pain medication to help with her pain. Joyvonne also complaints of numbness in 3 fingers in her right hand, which she states began at the time of her work injury.

In addition to limiting her abilities at work, Joyvonne testified her injury also impacts her life outside of work. She now requires the assistance of her children for home cleaning projects, is unable to continue with her hobby of quilting, and is unable to pick up her grandchildren and great grandchildren. Joyvonne testified that she continues to own four horses, but has not been able to ride any of the horses since her injury.

On October 22, 2015, Joyvonne was evaluated for purposes of an IME by John Kuhnlein, D.O. Dr. Kuhnlein issued his report on December 30, 2015. Dr. Kuhnlein diagnosed a right shoulder strain, with right parascapular pain, as well as a cervical spine contusion. He opined these conditions were causally related to her work injury. (Ex. 1-10) Joyvonne's counsel wrote Dr. Kuhnlein on January 4, 2016, requesting clarification of his opinions. (Ex. 1-13) On January 6, 2016, Dr. Kuhnlein responded, indicating that despite the lack of a definitive diagnosis, he believed her work injury was a substantial contributing factor in producing her ongoing symptoms. (Ex. 1-14)

Dr. Kuhnlein opined that claimant required further objective workup of the scapular area of the right shoulder as a possible cause of her pain as that had not been done. He also recommended that clamant be referred to a pain specialist to better deal with her pain. He noted that her current excessive use of Tylenol was not medically appropriate. (Ex. 1-9:10)

Dr. Kuhnlein states that if the treatment modalities he suggests are not provided, then she is at MMI and has sustained a five percent upper extremity functional impairment, converting to a three percent body as a whole impairment. (Ex. 1-10) Dr. Kuhnlein recommended permanent restrictions, including limiting lifting to ten pounds occasionally at all levels with the right upper extremity. He further indicated she should not be in situations where she would have to lift or aid patients by herself. (Id.) Dr. Kuhnlein could not provide an explanation for her finger numbness or causally relate those problems to the work injury. (Ex. 1-9)

Joyvonne's job history is detailed in Exhibit 5, pages 6-7. Aside from her work as a CNA/CMA, she has performed work as a cook in a restaurant; work on a factory assembly line; work at a fast food restaurant; and, work as a gas station cashier. She testified she would be unable to return to any of these jobs due to the lifting and repetitive upper extremity activities required of these kinds of positions. Joyvonne submits that if not for the existing relationship she has with defendant employer, it would be difficult, if not impossible, to obtain a job as a CNA or CMA at a different facility. Joyvonne testified she does her job one-armed, with her non-dominant arm. It is doubtful another employer would deem this satisfactory in completing the necessary job functions. This is particularly true given Joyvonne's advanced age.

Ultimate Findings:

The first issue is whether Joyvonne has achieved maximum medical improvement (MMI). Clearly, Dr. Brady and Dr. Tearse believe so. Dr. Abernathey recommends continued conservative management. Dr. Kuhnlein believes that there should be a further workup of the shoulder problems. Frankly, defendants have done a lot of inappropriate tinkering with the claimant's medical care. We have no explanation why Dr. Brady's office notes after November 2013 are not in evidence, but I am expected to give weight to his views that claimant has no impairment or restrictions. This I cannot do given the lack of any explanation for a change in his views on restrictions between July and October 2014 when he had not seen the claimant in the interim. Possibly he was relying on defense counsel's misleading statement that claimant had returned to full duty or some other unknown information which is not a part of this record. While claimant had returned to her job, clearly she did not return to full function. Also, Dr. Tearse' s views are also suspect given his reliance on the views of Dr. Brady and defense counsel's statements. However, his impairment rating is substantially the same as Dr. Kuhnlein's. As stated earlier, the records concerning the views of Dr. Abernathey are incomplete and also unconvincing.

Given this record, the impairment and restrictions opinions of Dr. Kuhnlein are the most convincing. He certainly does suggest further workup for the shoulder and a referral to a pain specialist. I agree that taking 2,000 mgs of Tylenol every 4 hours is clearly not medically appropriate. However, the only alternate care requested by claimant is the pain specialist to prescribe a better modality to deal with claimant's pain. Claimant agreed to a MMI date of July 30, 2014 when she agreed in the hearing report to commence permanency benefits on July 31, 2014. There is nothing in this record to suggest that Dr. Tearse, the orthopedist, performed an incomplete shoulder workup. Pain management would not be expected to remove the permanent restriction recommended by Dr. Kuhnlein and continued pain management should not impact the date of maximum medical improvement. Therefore, the MMI date of July 30, 2014 is found to be correct. I find that continued pain management by a pain specialist is medically reasonable and necessary.

I find the work injury of September 22, 2014 is a cause of a three percent permanent impairment to the body as a whole as opined by Dr. Kuhnlein. I, also, find as a result of this work injury, claimant is unable to perform physical activities consisting of lifting more than ten pounds occasionally at all levels with the right upper extremity. She also cannot lift or aid patients by herself. This clearly disqualifies claimant from working as a certified nursing aide, especially in nursing homes, and most duties of a cook. Work as a CNA or cook are occupations for which she is best suited given her age, education and work experience. She likely could work as a CMA if she is not expected to also lift or carry beyond ten pounds with the right arm. Therefore, claimant has lost considerable earning capacity.

On the other hand, she continues in her job at Abbe and has no plans to leave such work in the foreseeable future. As long as she can remain doing only light duty work and receive accommodations such as assistance with heavy lifting, there is no reason she cannot continue at Abbe.

From examination of all of the factors of industrial disability, I find that the work injury of September 22, 2013 was a cause of a 40 percent loss of earning capacity. This award is lower than it would be due to her continued employment at Abbe. If claimant is not able to continue in this job or similar work due to her impairment and restrictions from this work injury, such would constitute a significant change of condition.

Defendants offered no excuse or a reasonable basis for paying a weekly rate of compensation for healing period and permanency benefits (per Dr. Tearse's rating) lower than what they stipulated to in the hearing report. This resulted in an underpayment of $778.44 as calculated by clamant.

Defendants assert that they had a reasonable basis for an over 6-month delay in commencing weekly benefits. Although a right shoulder injury was timely reported by claimant, defendants state that she previously injured that shoulder and there was a delay in obtaining records and analyzing causation. As stipulated, claimant was entitled to healing period benefits from September 23, 2013 through October 7, 2013 (2.143 weeks), which totals $601.39 at the stipulated weekly rate. Defendants' first payment of healing period occurred on April 7, 2014 when it paid the sum of $614.36 which defendants assert includes interest. (Ex. 7-10; Ex. 8-7)

As again stipulated, claimant is entitled to temporary partial disability from October 8, 2013 through July 30, 2014. Claimant submits a calculation pursuant to Iowa Code section 85.33(4) of entitlement of temporary partial disability, which totals $3,348.33 and claims only $2,815.20 was paid. Defendants did not use a calculation provided in Iowa Code section 85.33(4) to determine temporary partial disability. If appears during some of the weeks they simply paid 2/3 of 1/2 of claimant's average gross weekly earnings. In other weeks, they simply paid what they thought was the proper weekly rate of $117.30. Defendants appear to have paid claimant the following for additional weekly benefits for temporary partial disability:

1) $3,220.30 and $614.36 on April 7, 2014

2) $707.18 on May 16, 2014

3) Ten payments of $117.30 between May 23, 2014 and July 25, 2014 or $1,173.00

(Ex. 8-1:2, 7-12)

These payments total $5,100.48.

Claimant asserts an underpayment and defendants assert an overpayment of temporary partial disability. I simply cannot decipher the exhibits presented and I am unable to find that claimant is entitled to additional temporary partial disability benefits.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is

considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

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 worker's qualifications intellectually, emotionally and physically; the worker's earnings 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).

The parties in this case agreed that if the work injury is a cause of permanent impairment, the disability is industrial. Consequently, this agency must determine the loss of earning capacity caused by the work injury.

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earning capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers'

compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffen v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, e.g. the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve viewing a loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just

"make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

In the case sub judice, I found that claimant suffered a 40 percent loss of her earning capacity as a result of the work injury. Such a finding entitles claimant to 200 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 40 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

Claimant asserts that this agency should ignore claimant's current accommodated work in assessing industrial disability. Claimant is apparently relying on an Iowa Supreme Court decision in U.S. West Communications, Inc. v. Overholser, 566 N.W.2d 873 (Iowa 1997). Claimant misreads the Court's opinion in Overholser. In that case, the claimant failed to establish that the loss of her employment was due to a discontinuance of an accommodation and the claimant also failed to establish that the prior agreement for settlement was lower due to her accommodated employment. However, the Court in Overholser cited favorably their opinion in Gallardo v. Firestone Tire & Rubber Co., 482 N.W.2d 393, 396 (Iowa 1992), which allowed a review-reopening proceeding and an increase in compensation when the prior agency decision specifically stated that the award was adjusted downward due to continued accommodated employment. Overholser, 566 N.W.2d at 876-877. In this case, a specific adjustment downward is set forth in this decision. See Norton v. Hy-Vee, Inc., File No. 5041551 (App. December 16, 2015).

Claimant's entitlement to permanent partial disability also entitles her to weekly benefits for healing period under Iowa Code section 85.34 for her absence from work during a recovery period until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work she was performing at the time of injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

In this case, it was stipulated that claimant is entitled to healing period benefits from September 23, 2013 through July 30, 2014. This will be awarded.

Claimant was also seeking additional temporary partial disability benefits for her partial return to work pursuant to Iowa Code section 84.33(4). As set forth in the Findings of Fact, I was unable to find entitlement to additional benefits due to the confusing record presented.

II. Pursuant to Iowa Code section 85.27, claimant is entitled additional medical care upon a showing that such care is reasonable and necessary. I found that claimant is in need of pain management and this will be awarded.

III. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained

physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Claimant seeks reimbursement for the exam by Dr. Kuhnlein. This was performed after the evaluation by Dr. Tearse, an employer-retained physician. Claimant is entitled to this reimbursement in the amount of $3,180.00. (Ex. 11-1)

IV. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4). That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)) A reasonable or probable cause or excuse must satisfy the following requirements pursuant to Iowa Code section 86.13(4)(c):

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." City of Madrid v. Blasnitz, 742 N.W.2d 77, 83 (Iowa 2007); Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Claimant seeks penalty for an underpayment of the weekly rate in paying healing period and permanency benefits; delay in commencing benefits; and, underpayment and delay in paying temporary partial disability benefits.

As stated previously, due to the confusing record presented, I am unable to determine entitlement to additional temporary partial disability benefits.

However, I found that defendants did not provide an excuse or reasonable basis for underpayment of the weekly rate for healing period and permanency benefits

resulting in a delay in paying $778.44. A 50 percent penalty is appropriate in the amount of $389.22.

There was also a six month delay in paying healing period benefits in the amount of $614.36. Defendants assert that this was a reasonable delay in order to investigate her prior injury. The existence of a prior injury is not sufficient be itself to constitute a reasonable grounds to deny or delay benefits, especially when there is not a supportive medical opinion. Employers and their insurers are expected to commence payment within 11 days unless they have a reasonable excuse or basis for delay. A 50 percent penalty is also appropriate for this delay in the amount of $307.18. Again, there was a delay in commencing temporary partial disability, but there may have also been an overpayment. I cannot determine which is correct.

The total penalty for underpayment and delays is $696.40.

ORDER

1. Defendants shall pay to claimant two hundred (200) weeks of permanent partial disability benefits at a rate of two hundred eighty and 15/100 dollars ($280.15) per week from July 31, 2014. As stipulated, defendants shall receive a credit against this award in the amount of two thousand six hundred eleven and 56/100 dollars ($2,611.56).

2. Defendants shall pay to claimant healing period benefits from September 23, 2013 through October 7, 2013, at the rate of two hundred eighty and 15/100 dollars ($280.15) per week. Credit against this award shall be the amount paid on April 7, 2014, six hundred fourteen and 36/100 dollars ($614.36).

3. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

4. Defendants shall pay interest on unpaid or delayed weekly benefits awarded herein pursuant to Iowa Code section 85.30.

5. Defendants shall reimburse claimant in the amount of three thousand one hundred eighty and 00/100 dollars ($3,180.00) for the fee of Dr. Kuhnlein.

6. Defendants shall pay clamant the sum of six hundred ninety six and 40/100 dollars ($696.40) as penalty for their unreasonable denial and delay of weekly benefits.

7. Defendants shall immediately designate and authorize claimant's pain management treatment by a board certified specialist in pain management.

8. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

9. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 7th day of April, 2016.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Daniel J. Anderson
Attorney at Law
PO Box 849
Cedar Rapids, IA 52406-0849
danderson@wertzlaw.com

Joseph A. Happe
Attorney at Law
215 – 10th St., Ste. 1300
Des Moines, IA 50309-3993
joehappe@davisbrownlaw.com

LPW/srs

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.