BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHERRY CRABBS,

Claimant,

vs.

TARGET CORPORATION,

Employer,
Self-Insured,
Defendant.

FILED
AUG 17 2017
WORKERS COMPENSATION

File Nos. 5055922
5056062
5056063

ARBITRATION

DECISION

Head Note Nos.: 1801.1, 1803, 4000.2

STATEMENT OF THE CASE

Sherry Crabbs, claimant, filed a petition in arbitration seeking workers' compensation benefits from Target Corporation (Target), self-insured, as a result of injuries she allegedly sustained on July 2, 2015; September 17, 2015 and December 10, 2015 that allegedly arose out of and in the course of her employment. This case was heard in Des Moines, Iowa and fully submitted on February 27, 2017. The evidence in this case consists of the testimony of claimant, Deidra Dirth, Connie Oppedal and Claimant's Exhibits 1 – 16 and Defendant's Exhibits A – S. Both parties submitted briefs.

ISSUES

For File No. 5056062 (Date of injury, July 2, 2015—right shoulder)

Whether claimant is entitled to temporary partial disability benefits from December 14, 2015 through August 7, 2016.

Whether claimant is entitled to payment for an alleged underpayment of temporary partial disability benefits.

Whether defendant is entitled to a credit for an alleged overpayment of temporary partial disability benefits.

The extent of any permanent partial disability benefits.

Whether claimant refused suitable work under Iowa Code § 85.33(3).

Whether claimant is entitled to payment of medical expenses.

Whether claimant is entitled to penalty benefits.

Assessment of costs.

For File No. 5055922 (Date of injury, September 17, 2015—left shoulder and neck)

Whether claimant sustained an injury on September 17, 2015, which arose out of and in the course of employment.

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability.

Whether defendant is entitled to a credit for an alleged overpayment of temporary partial disability benefits.

Whether claimant refused suitable work under Iowa Code § 85.33(3).

Whether claimant is entitled to payment of medical expenses.

Assessment of costs.

For File No. 5056063 (Date of injury, December 10, 2015—left shoulder and neck)

Whether claimant sustained an injury on December 10, 2015, which arose out of and in the course of employment.

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability.

Whether defendant is entitled to a credit for an alleged overpayment of temporary partial disability benefits.

Whether claimant refused suitable work under Iowa Code § 85.33(3).

Whether claimant is entitled to payment of medical expenses.

Assessment of costs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that: Sherry Crabbs was 73 years old at the time of the hearing. She graduated from high school and took one course on using computers post-high school. (Transcript, pages 14, 15; Exhibit A, p. 4) She has no other formal education. Claimant worked as a part-time preschool associate from approximately 1989 – 1992 and as a Head Start home worker from approximately 1985 – 1989. Claimant worked at a health spa in sales and reception part-time in the 1970s. (Ex. 10, pp. 3, 4)

Claimant began working for Target in 1990. Over the years she has held a number of positions with Target. She started as a part-time cashier. She has worked security, worked on the sales floor as a zoner closer, a jewelry boat associate, cosmetics captain and in the fitting rooms. (Tr. p. 16) Claimant has no intention to retire. (Ex. A, p. 19)

In July 2015 claimant was working in the Altoona Target as a Fitting Room Operator. At that time claimant said she was working part-time. She would work for 20 to 30 hours a week. (Tr. p. 18) She believes she averaged 22 hours a week. (Ex. A, p. 21) Claimant said that while working in the fitting room position she would perform repetitive lifting. The weight could be from a couple of ounces to around 40 pounds when she worked doing price changes. (Tr. p. 19)

On July 2, 2015, claimant felt a pain in her right shoulder while working in the fitting room at Target. Claimant finished her shift and told her supervisor.

On July 8, 2015, claimant was examined at Iowa Ortho by Scott Meyer, M.D. (Ex. 1, p. 1) Claimant was referred for physical therapy. Dr. Meyer recommended an MRI. The MRI of August 8, 2015 found a small articular-sided tear at the anterior supraspinatus foot print. (Ex. 2, p. 47) On August 28, 2015, claimant was informed she had a rotator cuff tear and surgery was recommended. (Tr. p. 25) Claimant requested a second opinion. Claimant decided to have the surgery after talking to Dr. Meyer and had surgery in February 2016. Claimant had a preoperative examination by her family physician on February 8, 2016. (Ex. 3, p. 48) Claimant went to 45 physical therapy sessions after the surgery. (Tr. p. 27) Claimant testified that Dr. Meyer provided her permanent restrictions of 20 pounds lifting floor to waist and 20 pounds lifting overhead occasionally and to avoid repetitive overhead lifting. (Tr. p. 30)

Claimant said she was off work after the surgery until May of 2016 and returned to work, four hours per week, zoning in the health and beauty and cleaning supplies. (Tr. p. 33)

Claimant testified that she felt pain in her left shoulder and neck while working at Target on September 17, 2015 and December 10, 2015. She attributed the symptoms to overuse of her left arm. (Tr. p. 31; Ex. A, p. 22) In her April 2016 deposition she testified that her left shoulder aches on and off. (Ex. A, p. 22) In her deposition claimant testified that on December 10, 2015 her neck hurt. She attributed this symptom due to the way she was using her right shoulder. (Ex. A, p. 24) Claimant said she obtained chiropractic treatment for her neck. The chiropractor did not recommend restrictions. (Ex. A, p. 42)

Claimant said the last time she physically worked for Target was October 23, 2016. On that date she was scheduled to work as a cashier. (Tr. p. 34) Deidra Dirth, Executive Team Leader of Human Resources with Target told claimant she could work the cashier job. Claimant did not believe the job was within her restrictions. (Tr. 35) Claimant said the cashier job would require her to reach for every item to run over the scanner and lifting the items to a shelf for the customer or putting the items in a cart. The cashier work was repetitive. (Tr. 39) Claimant said, "Because of my height I would have to be reaching up and out for it." (Tr. p. 39) Claimant said that after October 24, 2016, she checked the schedule at Target weekly to see if she was scheduled to work. (Tr. p. 33) Claimant was not told of an offer to have someone assist her with her cashier work as set forth in the email of December 27, 2016. (Tr. p. 40; Ex. K, p. 79)

Claimant applied for and was found eligible for unemployment benefits as of November 9, 2016. (Tr. p. 35; Ex. 12, p. 1)

Claimant said that her right shoulder felt pretty good currently. If she overextends or lifts repetitively above her head she has pain. She also said she has no strength above her head when getting things down. (Tr. p. 31) She is not taking any prescription medication and only very occasionally takes an over-the-counter medication for her right shoulder. (Tr. p. 41)

Claimant testified that she was not paid workers' compensation benefits on time. (Tr. p. 45) An impairment rating was provided on October 24, 2016, and a check for permanent benefits was not issued until December 8, 2016. (Ex. 15, p. 105)

Claimant testified that at the time of her July 2, 2015 injury, she was available to work on Wednesday, Thursday, Friday and Saturday mornings. (Tr. p. 56) Claimant said that she wanted to change her availability times but Target did not allow her to do so. (Tr. p. 57)

Claimant has not had any treatment for her right shoulder since October 14, 2016 and claimant has had no treatment for her left shoulder. (Tr. p. 62) She has gone to a

chiropractor for her neck. Claimant stated she is not claiming her neck is work related. (Tr. p. 62)

Ms. Dirth was working in the Altoona Target store at the same time as claimant. Her position in human resources included working with claimant. Ms. Dirth testified that following the July 2, 2015 injury, claimant continued to work 30 — 40— 50 hours a week until December 2015. (Tr. p. 68; Ex. P, p. 98) In December 2015 claimant requested reduced hours due to pain in her shoulders. (Tr. p. 69) Ms. Dirth said there was work available consistent with her limitations. (Tr. p. 70) Ms. Dirth said that the computer that schedules work can only schedule work based upon times that are entered into the system as having a worker available. "The computer system writes our schedule." (Tr. p. 70) Ms. Dirth said that claimant could have viewed open shifts and requested additional work. (Tr. p. 72) Dr. Dirth said that claimant told her she would like to work two days a week, as claimant could not get it submitted through the computer. (Tr. p. 74)

Ms. Dirth said that after claimant was issued permanent restrictions Target offered her work as a front end team member as a cashier position. She believes the offer was the week of October 19, 2015. Ms. Dirth said she told claimant that as a cashier Target could accommodate her lifting restrictions as there is a team leader at all times around that position. (Tr. p. 75) Ms. Dirth said. "She [claimant] stated I do not want to cashier and the one shift she was scheduled for, we then placed on the board for someone else to take as she was stating she was not going to be present for her scheduled shift." (Tr. p. 76) That was the last conversation Ms. Dirth had with claimant. (Tr. p. 80)

A December 8, 2016 email from defendant's counsel to claimant's counsel said that claimant was offered work on or about October 13, 2016, but claimant refused the work and that Target has work within her restrictions. (Ex. 9, p. 81)

Ms. Dirth testified that the cashier is easiest position to provide work to employees with restrictions as there is always a team leader and the position is very stationary. She said a cashier moves items along a scanner, about 12 inches. She testified there is no overhead or above the shoulder work as a cashier unless they choose to randomly lift something. (Tr. pp. 77, 78)

Ms. Dirth has worked and continued to work the cashier position at Target. She stated that items come to the cashier on the right. (Tr. p. 83) Items come on a belt and then are scanned and lifted into a bag. Mr. Dirth said that a cashier would see a guest every couple of minutes and in quieter times you are seeing guests once every five to ten minutes. (Tr. p.83) Ms. Dirth agreed that during busier times a cashier would be scanning and lifting items into a bag or place them elsewhere repetitively. (Tr. p. 84)

Connie Oppedal, M.S., CDMS provided a vocational evaluation report on December 12, 2016. Ms. Oppedal reviewed records but did not meet with claimant.

Ms. Oppedal opined that claimant, based on her past work experience and current limitations that Dr. Meyer and Dr. Neff recommended, was employable. (Ex. I, p 69) Ms. Oppedal identified ten jobs that claimant could perform ranging from $9.00 per hour to $12.00 per hour. (Ex. I, p. 69)

Ms. Oppedal also testified at the hearing. She did not interview claimant before her report. Ms. Oppedal testified that had she interviewed claimant she would have had more information that would identify more skills. (Tr. p. 92) Ms. Oppedal testified that any restrictions by Michael Taylor, M.D. would not change any of the jobs she identified in her report. (Tr. p. 93)

On July 8, 2015, Scott Meyer, M.D. examined claimant for right shoulder pain. X-rays showed early mild glenohumeral arthritis that was likely aggravated with repetitive overhead lifting. He provided restrictions and ordered physical therapy. (Ex. 1, p. 2) On August 8, 2015, Dr. Meyer recommended an MRI. (Ex. 1, p. 6) Michael Clark, P.A., informed claimant she had a torn rotator cuff and advised claimant of her options. (Ex. 1, p. 8) Claimant, at that time, wanted a second opinion. (Ex. 1, p. 9) On October 2, 2015, Dr. Meyer advised claimant she had a small tear and he and claimant agreed she should have surgery. (Ex, 1, p. 11) Dr. Meyer assessed claimant's left shoulder after claimant attributed her left shoulder condition to overuse. Dr. Meyer wrote;

> She attributes this to overuse because of less use of her RIGHT shoulder. Her exam does not show any significant weakness, so likely this is a correct assessment due to overuse. For now would recommend observation as she goes through the management of her RIGHT shoulder. If it gets more severe, she may need x-rays and magnetic resonance imaging of this side as well.

(Ex. 1, p. 11)

On December 14, 2014, claimant was seen by Dr. Meyer. Claimant reported that during the prior two weeks her neck began hurting all the time. Dr. Meyer confirmed claimant wanted to proceed with surgery. Regarding her neck Dr. Meyer wrote,

> I discussed with her that I think her neck pain is likely related to trapezial muscle spasm guarding because of her shoulder pain and likely does not reflect a long-term problem with her neck. Advised her that I do not think we have Worker's [*sic*] Compensation approval to evaluate her neck. We can seek approval for that if she wants but again I think a lot of her trapezial "pain" will resolve as we manage her shoulder. Otherwise she can be evaluated by a spine specialist with regard to her neck pain.

(Ex. 1, p. 15) Dr. Meyer recommended a 5 pound restriction and four hours' work daily. (Ex. 1, p. 16)

On February 16, 2016, Dr. Meyer performed surgery. (Ex. 1, p. 20) The postoperative diagnoses were,

1. Right shoulder rotator cuff tear.

2. Long head biceps tendon partial tearing and humeral head grade 3-4 chondromalacia with loose bodies, approximately 15 x 20 mm in size.

(Ex. 1, p. 20) On March 28, 2016, claimant was taken off the immobilizer and started on physical therapy and told not to do any repetitive work with her shoulders. (Ex, 1, p. 28) On May 2, 2016, claimant told Dr. Meyer her left shoulder hurt as she was using it more. (Ex. 1, p. 30)

On August 8, 2016, Dr. Meyer recommended a functional capacity evaluation (FCE). He provided a 10 pound restriction and to avoid repetitive lifting and claimant could work up to 8 hours. (Ex. 1, p. 40) Dr. Meyer found claimant to be at maximum medical improvement (MMI). (Ex. 1, p. 41)

On September 6, 2016, Scott Neff, D.O. performed an IME. Dr. Neff stated that claimant's left shoulder and cervical degenerative disease was not related to her work activities. (Ex. G, p. 31) He stated that claimant was at MMI six months after her surgery. He found an eight percent whole person impairment rating for claimant's right shoulder. (Ex. I, p. 33) On December 9, 2016, Dr. Neff responded to defendant's letter. Dr. Neff had the opportunity to review the FCEs. Dr. Neff did not change his opinions and agreed with the restriction that Dr. Meyer stated on October 14, 2016, although he noted that those restrictions are no different than what he would typically recommend to any 74-year-old small framed female patient. (Ex. G, p. 37)

Claimant had an FCE on September 7, 2016. The FCE was deemed valid. The FCE noted the following notable limitations,

Significant Limitations:
1. Lifting waist to/from floor up to 20 lbs.
2. Lifting waist to/from crown up to 15 lbs.
3. Front carry up to 15 lbs. up to 50 ft.
4. Right arm overhead lift up to 5 lbs.
5. Left arm overhead lift up to 8 lbs.

Unable to perform:
1. Crouching

(Ex. 4, pp. 54, 55)

On September 26, 2016, claimant told Dr. Meyer that cashier work that Target wanted her to perform was stressful on her right shoulder. (Ex. 1, p. 44) Dr. Meyer

provided restrictions of 20 pounds floor to waist rarely and 15 pounds overhead rarely. (Ex. C, p. 10)

On October 6, 2016, claimant underwent a second FCE by Darrin Ausman, OT. (Ex. H, pp. 40 – 52) This FCE found claimant could work at the medium level[1]. (Ex. H, p. 40) Mr. Ausman stated that claimant could work at the medium physical demand level and said, "This was delineated by her ability to perform a 2-Hand occasional lift of 22# from 21" to 34"." (Ex. H, p. 40)

On October 14, 2016, Dr. Meyer met with claimant to discuss the results of two FCEs. He listed the following permanent restrictions.

> We elected to put her at a 20-pound lifting restriction for floor to waist and 10 pounds overhead, all this is on an occasional basis. She should also avoid repetitive lifting and repetitive reaching overhead or working above shoulder level of the lesser weights. She is at maximum medical improvement.

(Ex. 1, p. 45)

I find that these restrictions contained in the medical records of Dr. Meyer are claimant's restrictions.

On October 24, 2016, Dr. Meyer returned a form with restrictions to Broadshire, a third party administrator. (Ex. C, p. 11; Ex. 1, p. 46)

On December 8, 2016, Dr. Taylor performed an IME. Dr. Taylor noted that her left shoulder started to improve when she was able to use her right more frequently and claimant's neck pain was improving. (Ex 5, p 65) Dr. Taylor's diagnoses were,

1. Right shoulder injury with rotator cuff tear resulting in surgery.
2. Left shoulder impingement with no additional treatment noted.
3. Cervical strain, currently doing well.

(Ex. 5, p. 68)

Dr. Taylor agreed with Dr. Meyer that claimant's left shoulder condition was likely due to overuse and that claimant's work activities contributed to her left shoulder symptoms. (Ex. 5, p. 68) He assigned an eight percent whole body rating for the left

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[1] The Dictionary of Occupational Titles , used by the Social Security Administration defines medium work as: **MEDIUM:** work involves exerting 20 to 50 pounds of force occasionally, or 10 to 25 pounds of force frequently, or an amount greater than negligible and up to 10 pounds constantly to move objects. Physical demand requirements are in excess of those for Light Work.
http://www.occupationalinfo.org/appendxc_1.html#STRENGTH

shoulder and a two percent rating for the left shoulder. (Ex. 5, pp. 69, 70) Dr. Taylor assigned no rating for claimant's neck, cervical spine condition as it was doing well. (Ex. 5, p. 70) Dr. Taylor recommended restrictions are,

> I would recommend no more than 20 pounds between approximately knee and waist level and no more than 15 to 20 pounds up to chest level. Above chest/shoulder level, I would recommend 10 pounds or less. This is all on an occasional basis, or up to one or two lifts per hour.
>
> I would recommend only occasional overhead reaching with the left arm and rare to occasional with the right arm. Most lifting activities should occur with her arms as close to her body as possible. As she extends her arms out away from the body, and in particular the right arm, she will have even more difficulty maintaining any significant amount of weight. She should avoid forceful pushing and pulling movements with the right arm.

(Ex. 5, p. 70)

Claimant has a number of medical bills that Medicare and she has paid that she is claiming are related to her work related injuries. These bills include an Iowa Ortho bill of $1,878.00, a pre-operative examination with her family physician of $137.00, Quest Diagnostics for pre-operative blood work of $146.83 and two prescriptions of $6.99 and $24.57 that Dr. Meyer's office wrote. (Tr. p. 47; Ex. 16, pp. 106 – 117) I find these expenses are related to claimant's right shoulder injury.

Claimant has requested reimbursement of medical expenses. (Ex. 16, p. 106) Claimant's Medicare has paid $1,068.82 and claimant has paid out-of-pocket $36.53.

A December 8, 2016 email from defendant's counsel to claimant's counsel said that claimant was offered work on October 13, 2016, but claimant refused the work. Target asserted the work was within her restrictions.

Claimant was asked in discovery if she was claiming penalty in this case. Claimant responded that she was not, but was investigating the matter. (Ex. L, pp. 84, 85, 89) Claimant did not supplement this discovery. Claimant's original notice and petition in all three files did not list that she was claiming penalty. There was no amendment filed by claimant in all three files to claim penalty. In an email of December 12, 2016, claimant's counsel states that a claim for penalty for underpayment will be made. (Ex. 9, p. 80)

Claimant has worked part-time for a number of years. She has worked at Target for many years in a variety of capacities. She has had shoulder surgery and has significant restrictions on lifting with her right shoulder. The claimant's industrial base has been diminished by her right shoulder injury. While it is clear that claimant before her right shoulder injury was not going to engage in heavy or medium to heavy work,

she is quite limited in repetitive lifting and lifting above her right shoulder. I find claimant has a 25 percent loss of earning capacity.

RATIONALE AND CONCLUSIONS OF LAW

Defendant has admitted claimant sustained an injury to her right shoulder. Defendant denies claimant has any injury that arose out of and in the course of her employment for her left shoulder and neck.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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 personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

For File No 5056063 (Date of injury December 17, 2015)

Claimant alleged an injury to her neck and left shoulder. I find that claimant has failed to meet her burden of proof that she has suffered any permanent or temporary injury that was from her work at Target. While the record shows she did have some neck pain, there is not convincing evidence that she had an injury that would entitle her to indemnity benefits. There are no convincing medical opinions concerning causation for this file. As the claimant has not met her burden of proof for this file no benefits are awarded.

For File No. 5055922 (Date of injury September 17, 2015)

Dr. Meyer agreed with claimant that her left shoulder pain was probably the result of overuse due to guarding of her right shoulder. Dr. Taylor agreed with Dr. Meyer and opined that claimant's left shoulder condition was a work related injury. I find claimant has met her burden of proof by a preponderance of the evidence that she sustained an injury that arose out of and in the course of her employment at Target to her left shoulder and that she has a permanent impairment. The left shoulder impairment is a slight impairment. The only physician to measure her left shoulder for an impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, purposes was Dr. Taylor. Dr. Taylor found a two percent whole body impairment. I do not find that there is specific evidence that this injury resulted in eligibility for any temporary benefits, either healing period or temporary partial.

Pursuant to rule 876 IAC 4.33, I award claimant costs of the $100.00 filing fee.

For File No. 5056062 (Date of injury July 2, 2015)

The parties agree claimant has a permanent impairment to her right shoulder as

a result of her work at Target. The fighting issues are the extent of permanency and whether claimant refused suitable work and is not eligible for temporary 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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

I do not find the FCE of October 6, 2016 that stated claimant could perform medium work to be convincing. Claimant was able to perform a 2-hand lift at 22 pounds on an occasional basis. Claimant is much more limited in her right arm and does not have the ability to frequently lift such weight. Her right arm, waist to shoulder lift limitation was 8 pounds. (Ex, H, p. 41) The report is not clear as to how these limitations translate to medium work. Claimant does have the capacity to perform some work at a lower weight however.

Although claimant is past a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund 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, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Claimant was 73 years old with a high school education. She has worked for Target since 1990. She worked work full time for Target in the mid-1990s in store security, but changed and went part-time when the physical aspects of the job, assisting in restraining customers, was made part of the job. She was working part-time by her personal choice at the time of her injury. Her age is not a positive factor nor is her limited education. She does have a long work history in which she had contact with the public and co-employees, which is a positive factor. She can perform sedentary to light work that does not require repetitive lifting.

I previously found that claimant had a 25 percent loss of earning capacity. I find, considering all the factors of industrial disability, that claimant has a 25 percent industrial disability due to her right shoulder injury. I found the restrictions of Dr. Meyer on October 14, 2016 to be claimant's restrictions. These restrictions include that claimant was to avoid repetitive lifting.

When considering her left shoulder injury as well, I do not find that her industrial disability increases. Her total industrial disability is 25 percent.

This finding entitles claimant to 125 weeks of permanent partial disability.

Pursuant to rule 876 IAC 4.33, I award claimant costs of the $100.00 filing fee.

Iowa Code Section 85.33(3) provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

The correct test is (1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in 85.33(3). Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549 (Iowa 2010).

Thus, if the employer offers suitable work, and the employee refuses the work, then "the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal." During such a period of refusal, temporary benefits are simply not payable; that is, they are forfeited. McCormick v. North Star Foods, Inc, 533 N.W.2d 196 (Iowa 1995).

The question in this case turns on whether the work offered by the employer was "suitable." At a minimum, in order to be "suitable" the offered employment must be consistent with any medical restrictions. If the work is offered consistent with medical

restrictions--and the injured worker refuses the work for no good reason--then temporary benefits will be terminated. Id.; 533 N.W.2d at 196-97. An offer of unreasonable work will not terminate benefits when refused. West Side Transp. v. Cordell, 601 N.W.2d 691, 693 (Iowa 1999).

"Failure to accept suitable work" is an affirmative defense by the Commissioner, and defendants have the burden of proving that: (1) defendants' offer was suitable under the statute; and, (2) claimant's refusal was unreasonable under McCormick, infra.

Actual Offer Required. The statute speaks of an "offer" of employment. Generally speaking, it is not sufficient for the employer to claim that they are not liable for temporary disability benefits because suitable work was available. Rather, the employer must actually offer that suitable work to the injured worker. Mitchell v. IBP, Inc., File No. 9980259 (Arb. Dec., March 1994).

Ms. Dirth's testimony was when she made an offer to claimant to work as a cashier, claimant said she did not want to cashier and the one shift she was scheduled for was put back on the board. (Tr. p. 76) The record is not clear that Target offered more than one shift of work as cashier in October 2016.

While Target provided evidence that a team leader was available to assist her lifting heaver items, there is no convincing evidence that claimant could avoid repetitive lifting as a cashier. While maybe items can be kept on the belt and slid over the scanner so she would not have to lift at that stage, she would still need to repetitively lift them into bags and lift products so the UPC code could be scanned. Target did, by email, offer cashier work on December 2016, however the email mentioned accommodation for lifting heaver items and did not provide accommodation for repetitive lifting. In any event, the offer of work of cashier was not suitable work that would avoid repetitive lifting. I find that no offer of suitable work was made.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

I have found that claimant's medical expenses in Exhibit 16 were related to her work injury. Defendant shall reimburse claimant and Medicare $1,105.35.

As I have found that claimant did not refuse suitable work, claimant did not receive an overpayment.

Claimant has requested penalty. Claimant did not plead penalty or provide notice to defendant that she would be claiming penalty. Claimant made no motion to bifurcate the penalty issue to be heard at a different date.

Under Iowa Code section 86.13 the claimant must show that there has been a delay or termination of benefits. After this showing defendant then has the burden to show that it investigated the claim and made a reasonable decision based upon the facts available at the time of the investigation and contemporaneously convey the reason for the denial or delay of payment of benefits to the claimant. A penalty claim can require specific proof of a defendant. The claimant chose not to supplement discovery or amend her petitions to provide a claim for penalty. There is a mention in an email by claimant's attorney on December 12, 2016 of a claim of penalty for rate underpayment. (Ex. 9, p. 80) Discovery was not supplemented to give defendant notice that penalty was going to be an issue at the hearing. There is no evidence that defendant acquiesced that the issue of penalty could be a disputed issue in the hearing.

The claim for penalty benefits is being denied.

ORDER

For File No 5056063 (Date of injury December 17, 2015)

Claimant shall take nothing.

For File No. 5056062 (Date of injury July 2, 2015)

Claimant is not awarded any temporary or permanent benefits.

Pursuant to rule 876 IAC 4.33, I award claimant costs of the one hundred and 00/100 dollar ($100.00) filing fee.

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

For File No. 5055922 (Date of injury September 17, 2015)

Defendant shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of two hundred and 09/100 dollars ($200.09) per week.

Defendant shall have credit for any indemnity benefits previously paid.

Defendant shall pay claimant any underpayment.

Pursuant to rule 876 IAC 4.33, I award claimant costs of the one hundred and 00/100 dollar ($100.00) filing fee.

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

Signed and filed this 17th day of August, 2017.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.