BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

MAY 01 2017

WORKERS COMPENSATION

MIRANDA MOHR,

Claimant,

vs.

INDEPENDENCE MENTAL HEALTH INSTITUTE,

STATE OF IOWA,

Self-Insured,
Employer,
Defendant.

File No. 5043791

ARBITRATION DECISION

STATEMENT OF THE CASE

Miranda Mohr, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Independence Mental Health Institute, as a subdivision of The State of Iowa, which is a self-insured employer. This case proceeded to an arbitration hearing on December 7, 2016, in Des Moines, Iowa.

The parties filed a hearing report at the commencement of hearing. On that hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations.

Claimant testified on his own behalf and called Megan Fessler and Robert Mohr to testify. Defendants did not call any witnesses. Claimant offered exhibits 1 through 16. Defendants offered exhibits A through J. All exhibits were received into the evidentiary record without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. This case was considered fully submitted upon the simultaneous service of post-hearing briefs on January 13, 2017.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to temporary total disability, or healing period, benefits from December 16, 2012 through October 10, 2016.

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

3. The proper commencement date for permanent disability benefits.

4. Defendant's entitlement to credit for benefits paid to date.

5. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Miranda Mohr is a 33 year old woman, who sustained admitted low back, left foot, neck, head, and mental injuries after being assaulted at work at the Independence Mental Health Institute (hereinafter referred to as "MHI"). Ms. Mohr obtained a licensed practical nurse (LPN) degree in approximately 2005. She continued her education while working and obtained a registered nurse (RN) and associate of the arts (AA) degree in 2008. Ms. Mohr presented at the hearing as an intelligent woman. Her educational accomplishments bear out my observations at hearing.

Ms. Mohr has a limited employment history given her age. She worked as a cashier at Lowe's, Sam's Club, and Kwik Star. Each of these positions paid at or under $10.00 per hour. She has worked in property management, specifically as a leasing agent and as a property manager for apartment complexes.

In March 2006, Ms. Mohr began working at MHI as a residential treatment worker. In that position, she assisted residents with bathing, hygiene, and supervised patients at meal time. Essentially, Ms. Mohr assisted residents with activities of daily living, as needed, while working as a residential treatment worker.

After she obtained her LPN certification, Ms. Mohr began working as an LPN at MHI. This required her to perform similar job duties as those performed by the residential treatment worker but also included the responsibility of distributing medications to residents as prescribed. Ms. Mohr continued her educational pursuits while working as a residential treatment worker and later as an LPN.

Once she obtained her RN certification, Ms. Mohr began working as a registered nurse at MHI. In that capacity, she was required to perform all the duties of a residential treatment worker and an LPN. However, she also assumed additional duties involving medical decision making such as treatment planning with a physician, coordination of treatment with social workers, physicians, and other health care professionals. As an RN at MHI, claimant was also responsible for staffing and supervision of all personnel and residents on her floor at MHI.

Ms. Mohr testified that no two days are the same as an RN at MHI. Some days involve lots of paperwork; some days involve significant treatment planning, interacting

with patient families, and/or placement activities for residents leaving MHI. Unfortunately, all of the residents at MHI are chronically ill with mental illnesses. Some of the residents are angry to be at MHI. Other residents are delusional or scared. Some of the residents are very aggressive. Therefore, as a registered nurse at MHI, some of claimant's days involved crisis situations, the use of restraints, and physical altercations. Claimant was required to be able to subdue an aggressive resident in all of the three positions she held at MHI.

Unfortunately, on December 15, 2012, claimant encountered a physically aggressive resident and was brutally assaulted. On that date, claimant noted a disruption in a neighboring unit and obtained the assistance of an LPN to enter the unit and attempt to deal with the crisis. Upon entering the unit, the agitated resident charged claimant and physically assaulted her.

Claimant recalls being struck numerous times on the head. The resident pulled out a portion of claimant's hair. Ms. Mohr recalls the resident choking her and attempting to bite her. She recalls being bent over and seeing several sets of feet and being dragged out of the unit after the assault. Ms. Mohr recalls only portions of the events and testified that she sees the events as a "slideshow" when she relives them in her mind. Unfortunately, the assault was brutal and caused Ms. Mohr significant physical and mental injuries.

After the assault, Ms. Mohr was taken to the emergency room, where she was diagnosed with a cervical strain, posttraumatic headache and a shoulder strain. Ms. Mohr had ongoing, severe headaches, but a head CT disclosed nothing objectively damaged. Ultimately, her headaches resolved.

By early January 2013, claimant noticed her low back was painful and sought treatment. A lumbar MRI was performed on January 24, 2013, which demonstrated nerve root impingement in claimant's lower back. Claimant was referred to a neurosurgeon, Sergio Mendoza, M.D., at the University of Iowa Hospitals and Clinics for evaluation.

Dr. Mendoza evaluated claimant on February 20, 2013 and recommended an injection for the left S1 nerve root in claimant's low back. Unfortunately, the injection provided no relief. Dr. Mendoza re-evaluated claimant and recommended surgery. On April 1, 2013, Dr. Mendoza performed a left L5-S1 laminotomy and microdiscectomy. Surgery was initially beneficial for claimant, though it did not resolve all of her symptoms.

Dr. Mendoza released claimant to return to light duty work and claimant resumed light duty employment with MHI. Unfortunately, with increased activity, claimant's low back symptoms began increasing again in August 2013. Dr. Mendoza referred claimant to the pain clinic for evaluation.

Foad Elahi, M.D. evaluated claimant and performed another injection in her lumbar spine in August 2013. Dr. Elahi also discussed the possibility of a spinal cord stimulator with claimant. Following another steroid injection and an EMG, a spinal cord stimulator trial was recommended. Given her ongoing difficulties and inability to return to her full work duties, Ms. Mohr was terminated by MHI in late 2013.

Then, on December 16, 2013, claimant submitted to a spinal cord stimulator trial. The trial was deemed successful and surgical implantation of a permanent spinal cord stimulator occurred in February 2014. Unfortunately, claimant developed an infection after implantation of the stimulator. In March 2014, she underwent yet another surgical procedure on her back to remove the spinal cord stimulator.

Claimant required intravenous antibiotics due to her infection and later experienced renal failure as a result of damage to her kidneys caused by the antibiotics. Her antibiotics were changed and she ultimately recovered from her renal complications. However, claimant's low back symptoms did not resolve with the spinal cord stimulator removed.

Claimant was evaluated by another spine surgeon, Chandan D. Reddy, M.D., who recommended and performed a left L5-S1 laminotomy and microdiskectomy on August 15, 2014. Once again, the surgery was beneficial but did not resolve all of claimant's symptoms. Dr. Reddy recommended implantation of another spinal cord stimulator due to claimant's ongoing symptoms.

Again, claimant followed medical advice and submitted to the implantation of a spinal cord stimulator on January 7, 2015. The stimulator improved claimant's symptoms. Dr. Reddy believed claimant was at maximum medical improvement for her back condition by April 3, 2015 and indicated that she sustained a 13 percent permanent impairment of the whole person. Dr. Reddy also assigned permanent restrictions that precluded lifting over 15 pounds, sitting for greater than one hour at a time, or bending or twisting greater than 45 degrees.

Unfortunately, as claimant's back condition appeared to be improving and reaching the end of her treatment regimen, she developed pain in her left foot. Dr. Reddy concluded that the foot pain was the result of altered gait from claimant's back injuries and referred claimant to an orthopaedic surgeon, Phinit Phisitkul, M.D., for evaluation of her foot. Defendants admitted the foot condition and authorized care through Dr. Phisitkul.

Dr. Phisitkul diagnosed claimant with a Morton's neuroma and recommended an injection initially and later surgical intervention. On October 21, 2015, Dr. Phisitkul took claimant to surgery and performed a neurolysis of the left foot. Dr. Phisitkul declared maximum medical improvement for the left foot on January 14, 2016 and released her without permanent restrictions related to the left foot.

Unfortunately, after foot surgery, claimant's back symptoms again began to increase. By November 30, 2015, Dr. Reddy was noting increased back pain and recommended yet another surgical procedure on claimant's low back. On January 27, 2016, Dr. Reddy took claimant back to surgery and performed a transforaminal lumbar interbody fusion at the L5-S1 level and removed prior scarring. As part of this sixth surgical procedure on claimant's low back, Dr. Reddy had to remove and re-implant the spinal cord stimulator.

After a period of recovery, claimant submitted to a functional capacity evaluation (FCE) on September 9, 2016. The results of the FCE demonstrated claimant is capable of medium demand work. (Exhibit 10) Although the FCE was deemed valid, these findings seem optimistic given that claimant has had surgery on her foot and six surgeries on her back.

Dr. Reddy again declared maximum medical improvement after the sixth surgery on October 11, 2016. He opined that claimant sustained a 15 percent permanent impairment of the whole person as a result of her low back injury. Dr. Reddy also imposed restrictions that aligned with the aforementioned FCE, although Dr. Reddy imposed a more stringent lifting restriction, limiting claimant to occasional lifting of not more than 15 pounds. (Ex. 6, page 223) Dr. Reddy also opined that claimant would be qualified for a clerical, or desk, type position if she lifted less than 15 pounds on an occasional basis. (Ex. 6, p. 224)

In May 2016, Dr. Reddy referred claimant to the pain clinic at the University of Iowa Hospitals and Clinics. Joseph J. Chen, M.D. evaluated claimant on July 18, 2016. Dr. Chen recommended she be evaluated by the University of Iowa Pain Clinic. Claimant ultimately declined the pain clinic treatment.

Ms. Mohr sought an independent medical evaluation performed by Robin Sassman, M.D. on August 25, 2016. Dr. Sassman diagnosed claimant with low back pain radiculopathy, acute renal failure, cervicalgia, head trauma, and PTSD. She opined that all of her diagnoses were causally related to the December 15, 2012 assault at MHI. (Ex. 12)

Dr. Sassman opined that claimant achieved maximum medical improvement after the July 18, 2016 appointment with Dr. Chen. Dr. Sassman assigned claimant a 28 percent permanent impairment of the whole person as a result of the low back injury and multiple surgeries. She assigned claimant a 5 percent permanent impairment of the whole person as a result of claimant's neck injuries. Dr. Sassman declined to rate the PTSD as being beyond her credentials and expertise. However, she did identify a 5 percent permanent impairment of the whole person as a result of alterations in claimant's mental status or memory. She assigned no permanent impairment for claimant's left foot. In total, Dr. Sassman opined that claimant sustained a 35 percent permanent impairment of the whole person as a result of the injuries she sustained on December 15, 2012. (Ex. 12, pp. 19-20)

Dr. Sassman also opined that claimant should not lift more than 10 pounds on an occasional basis from floor to waist level. Similarly, Dr. Sassman imposed a 15 pound lifting restriction on an occasional basis from waist to shoulder level and precluded lifting more than 10 pounds above shoulder. Dr. Sassman also recommended that claimant stand and/or walk only occasionally, limit sitting to a frequent basis, that she avoid ladders and uneven surfaces, and that claimant utilize stairs only on a rare basis. (Ex. 12, p. 20)

When considering the competing medical opinions, I find that Dr. Sassman's impairment ratings pertaining to the neck and related to claimant's mental status and memory are undisputed in this record. They are accepted as credible and accurate.

With respect to the low back, Dr. Sassman's impairment rating is most consistent with the fact that claimant required six surgical procedures on her low back, including an ultimate fusion and implantation of a spinal cord stimulator. I accept Dr. Sassman's impairment rating as credible and accurate in this case.

With respect to restrictions for the low back, Dr. Reddy limited lifting to 15 pounds on an occasional basis and utilized the FCE restrictions for the remainder of claimant's permanent restrictions. Dr. Sassman offered similar restrictions, but varied a bit from the FCE. Ultimately, I find the restrictions outlined by Dr. Reddy to be reasonable, consistent and accurate based on all of the available information. Similarly, I find that Dr. Reddy is accurate and credible when he suggests that claimant would be capable of performing clerical or desk work in the sedentary work category even with the multiple low back surgeries and restrictions.

Both parties introduced vocational expert opinions. Claimant retained Bruce Mailey, who opined that claimant is no longer capable of performing direct care nursing given her physical limitations. However, Mr. Mailey opined that claimant may be capable of finding and performing employment in a consulting nurse capacity such as being a nurse case manager, utilization review nurse, or some similar type employment. However, Mr. Mailey did not foreclose the possibility of claimant returning to work based on her physical restrictions. (Ex. 14)

Defendant retained Rene Haigh as a vocational expert to assist claimant in return to work attempts. Ms. Haigh met with claimant and offered practical advice, including a labor market survey and offering specific job leads that Ms. Haigh deemed consistent with claimant's permanent physical restrictions. (Ex. A) Ms. Haigh ultimately opined, "that Ms. Mohr currently possesses the work history, educational background, and residual functional and mental health capacity to obtain and maintain employment in the labor market in occupations up to and including LIGHT physical demand level." (Ex. A, p. 15)

Having considered the medical opinions, restrictions, impairment, as well as the vocational opinions offered, I find that claimant has proven a significant loss of earning capacity related to her low back injuries, as well as her neck and foot injuries, but

Ms. Mohr has not proven that she is permanently and totally disabled based solely upon her physical injuries and restrictions.

Nevertheless, nothing in the above findings is intended to suggest claimant is physically capable of employment that requires significant physical exertion. She was clearly uncomfortable while testifying at the hearing. Hearing commenced at 1:15 p.m. after a short conversation with the parties and counsel off the record. Approximately 15 minutes into the hearing (at 1:30), Ms. Mohr appeared physically uncomfortable and stood up while testifying. She stood for approximately three minutes and then returned to her chair at 1:33 p.m. Ms. Mohr stood again approximately 15 minutes later at 1:48 p.m., again appearing to be physically uncomfortable. She sat back down at 1:51 p.m.

At 2:02 and 2:05 p.m., I observed claimant fidgeting in her chair. She did not appear to be exaggerating or fidgeting consciously. Rather, she appeared to be physically uncomfortable. At 2:06 p.m., Ms. Mohr stood again. She remained standing for three minutes again and sat back down at 2:09 p.m.

Ms. Mohr again stood during her testimony at 2:33 p.m. and remained standing for approximately 1-2 minutes. Again at 2:51 p.m., Ms. Mohr stood from her chair and remained standing for 1-2 minutes before retaking her seat. I noted two additional times that claimant stood for short periods of time during cross-examination. Her behavior in this regard was consistent throughout the hearing, appeared genuine, and, unfortunately, appeared to be the result of physical discomfort. Ms. Mohr would have significant difficulties with any employment that required her to remain in a standing or sitting position for an extended period of time.

In addition to the headaches, neck symptoms, renal complications, conservative treatments, six low back surgeries and a left foot surgery, claimant also experienced significant mental trauma as a result of the December 15, 2012 assault at MHI. Following the assault, Ms. Mohr began experiencing flashbacks and nightmares, as well as anxiety and depression.

On March 18, 2013, claimant was referred to a neuropsychologist, Robert Jones, Ph.D., at the University of Iowa Hospitals and Clinics. Dr. Jones obtained an MMPI test from claimant and interviewed her in the clinical setting. Dr. Jones diagnosed claimant with post-traumatic stress disorder (PTSD) and causally related the PTSD to the December 15, 2012 assault at work. However, Dr. Jones was able to rule out any post-concussive symptoms or residual injuries.

In June 2013, claimant began treatment with a psychiatrist, Abid Kassas, M.D. Dr. Kassas noted claimant's prior history of mental health treatment, including depression, an attempted suicide, and medications for a mood disorder. However, Ms. Mohr was not seeking active treatment or taking medications for depression at the time of the December 15, 2012 assault.

Dr. Kassas concurred with Dr. Jones's diagnosis of PTSD and added a diagnosis of major depressive disorder, recurrent. Dr. Kassas started claimant on medications for depression and referred her for psychotherapy counseling with Amy Miller, Ph.D.

Dr. Miller initially evaluated claimant on July 8, 2013. Dr. Miller concurred with the diagnoses of PTSD and depressive disorder and initiated therapy for claimant.

Dr. Kassas continued to follow claimant and evaluated her numerous times from 2013 through 2016. He declared claimant's mental health condition to be stabilized, chronic and at maximum medical improvement on October 27, 2015. (Ex. 7, p. 52) Ultimately, Dr. Kassas opined that claimant is not capable of employment given her psychiatric conditions and symptoms. He indicated that claimant is not capable of handling stressful or confrontational situations that would be involved in any work place. (Ex. 7, p. 53) In fact, Dr. Kassas opined that Ms. Mohr's mental health symptoms are exacerbated by her attempts at vocational rehabilitation. (Ex. 7, p. 62)

As a result of her ongoing low back pain, claimant was referred to a pain psychologist, Frank Gersh, Ph.D., who evaluated Ms. Mohr initially on September 23, 2014. Dr. Gersh documented claimant's flashbacks occurring daily or multiple times per day, as well as nightmares occurring approximately two times per week. Dr. Gersh concurred with the diagnosis of PTSD and added diagnoses of major depressive disorder, generalized anxiety disorder and panic disorder. (Ex. 9, p. 3)

Dr. Gersh administered the MMPI to claimant. He concluded that she demonstrated no signs of exaggeration or malingering. He indicated that the test demonstrated symptoms consistent with PTSD, major depressive disorder, anxiety disorder and panic disorder as his diagnoses. (Ex. 9, pp. 3, 6)

Dr. Gersh promoted the idea of potential return to work and even administered claimant a vocational interest inventory. (Ex. 9, p. 11) However, by November 2015, Dr. Gersh opined, "I see no way she can work but she continues to apply for jobs." (Ex. 9, p. 39) In April 2016, Dr. Gersh continued the conversation with claimant about returning to work and noted, "she knows she will eventually be able to work and find a job." (Ex. 9, p. 49) Yet, on August 10, 2016, Dr. Gersh notes, "She wants to work but worries she will never be able to work. With her current symptom picture, she clearly is not ready to go back to work." (Ex. 9, p. 61)

In his October 11, 2016 office note, Dr. Gersh notes, "she has been applying for a lot of jobs and has had four interviews . . . . I am concerned about her ability to work given that she cannot get out of bed some days." (Ex. 9, p. 69) Dr. Gersh opines in a report to claimant's attorney that he is concerned about claimant's ability to concentrate, focus, about her potential irritability, social isolation and distrust of others. (Ex. 9, p. 72) In a report signed September 29, 2016, Dr. Gersh opines that claimant's mental health symptoms "present a barrier to Miranda's return to the work force." (Ex. 9, p. 75) Dr. Gersh apparently also believes that claimant lacks the necessary emotional constitution to return to work. (Ex. 9, p. 75)

Although it has selected and authorized the above providers, defendant elected to also obtain a psychiatric evaluation performed by C. Scott Jennisch, M.D., on September 16, 2016. Dr. Jennisch concurred with the diagnosis of PTSD and that it was related to the assault at work on December 15, 2012. He also opined that claimant experienced an exacerbation of her depressive disorder as a result of the assault. However, Dr. Jennisch opined that neither the PTSD nor the depressive disorder were permanent conditions.

Having considered the numerous opinions pertaining to Ms. Mohr's mental health, I find the opinions of Dr. Kassas to be most convincing in this record. Dr. Kassas evaluated and treated claimant for an extended period of time. He is most familiar with claimant and has the best vantage point from which to assess her capabilities moving forward.

Dr. Gersh's opinions are also accepted as generally accurate and as convincing. Dr. Gersh's opinions are generally consistent with Dr. Kassas and support those conclusions and opinions in many respect.

On the other hand, I do not find Dr. Jennisch's opinions to be convincing with respect to the nature of claimant's mental health conditions. While Dr. Jennisch opines that claimant's mental health conditions are not permanent in nature, they have existed for four years. Although claimant has experienced some improvement over that period of time, she does not appear to be on track for complete resolution of her mental health symptoms. Ideally, Dr. Jennisch's opinions will become true and claimant will someday improve from a mental health standpoint. However, taking a snap-shot in time four years after the injury, claimant continues to experience significant mental health difficulties. Her long-time treating psychiatrist, Dr. Kassas, opines that she is not capable from a psychiatric standpoint of returning to work. I find this opinion to be convincing and credible based on the other evidence in this record, including but not limited to the opinions of Dr. Jones, Dr. Miller, and Dr. Gersh, as well as my observations of Ms. Mohr at the hearing.

Once released physically to attempt return to work by Dr. Reddy, claimant made a legitimate work search. She applied for more than 50 jobs openings, including recommended openings from defendants' vocational expert. Claimant obtained a few interviews but has not received any job offers. Claimant performed a legitimate work search and I find that she is motivated to return to work.

Unfortunately, claimant's work search in and of itself was stressful and, according to Dr. Kassas, was actually detrimental to her mental health. Despite her efforts, claimant has not been able to find employment since she was terminated by MHI.

Realistically, Ms. Mohr's mental health difficulties, which result from the assault on December 15, 2012, present a significant barrier to claimant's return to work. I find the claimant has proven by a preponderance of the evidence that she is not currently capable of returning to employment or performing gainful employment from a mental

health standpoint. I acknowledge the vocational reports and opinion in this file. However, I find that neither Mr. Mailey nor Ms. Haigh specifically applied the restrictions offered by Dr. Kassas (who I find most credible) in their attempts to ascertain claimant's employability. When Dr. Kassas's opinions are considered and applied, it is apparent that claimant's mental health currently precludes her from returning to gainful employment.

Therefore, given her ongoing physical and psychological difficulties, I find that Ms. Mohr is wholly disabled from performing work that is consistent with her experience, training, education, intelligence, physical and mental capacities as those existed prior to the December 15, 2012 work injury. I find that Ms. Mohr is not currently capable and is not likely to be capable into the foreseeable future of performing substantial gainful employment within the competitive labor market.

Ms. Mohr's disability started on the date of injury. Although she returned to work for a period of time on light duty, Ms. Mohr was never mentally capable of a return to full-time gainful employment after the date of the work injury.

Defendant's Exhibit G contains a summary of all weekly indemnity benefits paid to claimant through the date of hearing. The payments reflected in Exhibit G are accepted as accurate for purposes of determining defendant's credit.

CONCLUSIONS OF LAW AND REASONING

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).

The parties appropriately stipulated that claimant's injuries should be compensated on an industrial disability. (Hearing Report) 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' 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).

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).

In this case, I found that Ms. Mohr is not capable of performing work that her experience, education, intelligence, as well as her physical and mental capabilities would otherwise permit her to perform. I found that Ms. Mohr is essentially unable to perform gainful employment activities as a result of the mental sequela resulting from December 15, 2012 assault. As such, I conclude that Ms. Mohr is entitled to permanent total disability benefits. Iowa Code section 85.34(3).

Having found that Ms. Mohr has been permanently and totally disabled since the date of the injury, I conclude that permanent total disability benefits commenced on December 16, 2012 and continued through the date of the arbitration hearing. Defendants introduced payment records at Exhibit G that demonstrate some temporary partial disability benefits were made, all work performed by claimant during that period of time was accommodated work. Claimant was never capable of full-time, gainful work in the competitive labor market since the date of injury.

Claimant also asserted an alternative claim for temporary disability, or healing period benefits on the hearing report. Temporary disability benefits are only payable under Iowa Code section 85.33 if there is not a permanent disability. Having found claimant proved permanent disability, claimant is not entitled to an award of temporary disability pursuant to Iowa Code section 85.33.

Healing period benefits are payable under Iowa Code section 85.34(1) only if the claimant sustains a permanent partial disability compensable under Iowa Code section 85.34(2). In this instance, I have determined that claimant is entitled to permanent total disability benefits pursuant to Iowa Code section 85.34(3). Therefore, healing period benefits are not payable pursuant to Iowa Code section 85.34(1).

The parties noted a dispute on the hearing report about the extent of the defendant's entitlement to credit for benefits paid to date. Defendant introduced its payment records as Exhibit G and there is a question about which benefits should be categorized as temporary or permanent disability. In this instance, I have concluded that claimant is entitled to permanent total disability benefits. Iowa Code section 85.34(3) provides that any benefits paid as temporary or permanent disability benefits "shall be deducted from the total amount of compensation payable for such permanent total disability." Therefore, defendant is entitled to credit for all weekly benefits paid to date, regardless of how they were categorized when paid, against its liability under this award.

Ms. Mohr seeks assessment of her costs and submitted a motion for taxation of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant has prevailed on the major disputed issues. Therefore, I conclude it is reasonable and appropriate to assess costs against defendants.

Claimant seeks reimbursement of her filing fee ($100.00), which is a reasonable cost to be assessed pursuant to 876 IAC 4.33(7).

Agency rule 876 IAC 4.33(6) permits the assessment of costs that include "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." Claimant seeks assessment of the cost of a medical report from Medical Associates Clinic (Dr. Kassas) dated September 20, 2016. (Ex. 7, pp. 62-63) This report cost $325.00. (Claimant's Motion for Taxation of Costs) I find that the claimed charge is reasonable and conclude that it is a permissible cost under 876 IAC 4.33(6). I conclude that defendant should be ordered to reimburse claimant's expense totaling $325.00 to obtain a report from Dr. Kassas.

The second charge claimant sees as a cost pursuant to 876 IAC 4.33(6) is from Dr. Kassas for a telephone conference with claimant's attorney. (Claimant's Motion for Taxation of Costs) Agency rule 876 IAC 4.33(6) does not appear to provide for reimbursement of the expense of an attorney conference with a physician. I conclude that the second claimed cost is not reasonable or permissible under 876 IAC 4.33.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant permanent total disability benefits on a weekly basis from December 16, 2012 through the date of the arbitration hearing and continuing into the future during the period of claimant's total disability.

Permanent total disability benefits shall be paid at the stipulated weekly rate of seven hundred forty-seven and 97/100 dollars ($747.97).

Defendant shall pay all accrued weekly benefits in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendant shall be entitled to a credit for all weekly benefits paid and reflected in Exhibit G.

Defendant shall reimburse claimant's costs totaling four hundred twenty-five and 00/100 dollars ($425.00).

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

Signed and filed this 1st day of May, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
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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.