

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRENDA PERRY,

Claimant,

VS.

ABBEHEALTH, INC.,

Employer,

and

ACCIDENT FUND GENERAL
INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 1653524.01

ARBITRATION

DECISION

Head Note No. 1803

STATEMENT OF THE CASE

The claimant, Brenda Perry, filed a petition for arbitration on March 11, 2022. She seeks workers' compensation benefits from AbbeHealth, Inc., employer, and Accident Fund General Insurance Company, insurance carrier. The claimant was represented by Thomas Wertz. The defendants were represented by Laura Ostrander.

The matter came on for hearing on March 15, 2023, before deputy workers' compensation commissioner Joe Walsh in Des Moines, Iowa, via Zoom video hearing. The record in the case is fairly extensive. It consists of Joint Exhibits 1 through 5; Claimant's Exhibits 1 through 5; and Defense exhibits A through I. The claimant testified at hearing. Joni Thompson testified on behalf of the defendants. Kira Stover served as the court reporter. The matter was fully submitted on April 3, 2023.

ISSUES

The parties narrowed the issues prior to hearing. They submitted the following issues for determination:

1. The extent of impairment in claimant's shoulder under Iowa Code section 85.34.2(n).

2. Whether defendants are entitled to a credit for overpayment.
3. Costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.
2. Claimant sustained an injury which arose out of and in the course of employment on April 2, 2018. This injury is a cause of some temporary and permanent disability.
3. Temporary disability/healing period and medical benefits are no longer in dispute.
4. Claimant's disability is a scheduled member disability to the shoulder.
5. The commencement date for any permanent disability benefits is March 5, 2019.
6. The weekly rate of compensation is \$555.68.
7. Defendants have paid and are entitled to a credit of 12 weeks of compensation (permanent partial disability).
8. Affirmative defenses have been waived.
9. Medical expenses are not in dispute.

FINDINGS OF FACT

Brenda Perry was 63 years old as of the date of hearing. She worked at AbbeHealth, Inc. (hereafter, "AbbeHealth"), in Cedar Rapids as a registered nurse. She testified live and under oath at hearing. I find her to be a highly credible witness. I have no doubt that she told the truth in all of her testimony based upon her consistency with other portions of the record and her honest and forthright demeanor.

Ms. Perry worked with individuals with intellectual disabilities at AbbeHealth. As an RN, she assessed patients and provided medications. In addition, she routinely assisted with the transfer of patients, moving them from place to place. Over time she began to develop pain in her right shoulder and biceps area. The parties have stipulated that she sustained a cumulative injury to her right shoulder which manifested on or about April 2, 2018. This injury resulted in a normal course of authorized medical treatment which culminated in shoulder surgery on September 4, 2018, performed by Matthew Bollier, M.D. The diagnosis was full thickness rotator cuff tear. It appears the

surgery was relatively successful, and she returned to work in March 2019 without any restrictions. The defendants paid her time off as well as her impairment rating as measured by Dr. Bollier at a higher rate than the rate stipulated at hearing. (See Def. Exs. A and B) This resulted in an overpayment of a little less than \$11.00.

After she recovered from the surgery, Ms. Perry still had moderately significant symptoms in her right shoulder, most notably loss of strength which has continued through the date of hearing. The primary issue in the case is the extent of permanent impairment as measured by the AMA Guidelines to the Evaluation of Permanent Impairment, Fifth Edition.

Ms. Perry continued to work for AbbeHealth until April 2021, when she retired. (Defendants' Exhibit E, page 2) At hearing, Ms. Perry testified credibly that she left employment earlier than she would have liked due to her serious health problems which resulted in surgeries to her bilateral hips. Ms. Perry testified that after she retired, her right shoulder symptoms worsened significantly.

Three physicians have rated Ms. Perry's permanent impairment since her release from care: Dr. Bollier, John Kuhnlein, D.O., and David Segal, M.D. Dr. Bollier was the treating surgeon. Both Dr. Kuhnlein and Dr. Segal reviewed records, examined Ms. Perry and provided expert opinions regarding the extent of her impairment in her right shoulder.

Dr. Bollier prepared his initial opinion in March 2019, shortly after she reached maximum medical improvement (MMI). He opined that she had sustained a 3 percent impairment per the AMA Guidelines, Fifth Edition. (Jt. Ex. 2, p. 3) He did not use any measuring device to measure her loss of range of motion. He rated her solely based upon her loss of range of motion.

Dr. Kuhnlein performed his examination on October 22, 2019, roughly six months after Dr. Bollier's opinion. Dr. Kuhnlein thoroughly reviewed medical records and performed an examination. He opined Ms. Perry sustained a 4 percent impairment to her right shoulder. (Cl. Ex. 2, p. 15) The primary difference between his rating and Dr. Bollier's rating is that he assigned an additional rating for the distal clavicle excision. (Id.) At that time, Ms. Perry's condition was not as symptomatic.

Dr. Segal performed his examination much later, on December 8, 2022. He prepared a report dated January 13, 2023, containing his opinions. His report is voluminous and meticulously detailed. The report itself is 27 pages, but also contains an 18-page addendum summarizing the medical file. (Cl. Ex. 1, pp. 3-47) I reviewed both the actual records as well as Dr. Segal's highly-descriptive summary. Dr. Segal documented Ms. Perry's range of motion measurements with photographs. (Cl. Ex. 1, pp. 48-50) Dr. Segal rated Ms. Perry for range of motion, motor deficit (weakness) and for the distal clavicle excision, ultimately assigning a 21 percent impairment of the right upper extremity. (Cl. Ex. 1, p. 25)

The primary dispute in the case is which of these ratings best evaluates Ms. Perry's functional impairment in her right shoulder. Claimant argues that Dr. Segal's rating is superior because it is the most recent rating, it was the most thorough evaluation, and it most closely corresponds with her actual symptoms. Defendants argue that claimant doctor shopped to an unreliable physician and that the earlier two ratings best reflect her condition. Having reviewed all of the evidence in the record, I find that the claimant has sustained an impairment under the AMA Guides, in the amount of 16 percent.

The only other disputes revolve around a very small, alleged overpayment and the cost of Dr. Segal's report. I find that claimant was overpaid benefits in the amount of just under \$11.00 and claimant's costs are reasonable.

CONCLUSIONS OF LAW

The first question submitted is the nature and extent of Ms. Perry's disability in her right shoulder.

The claimant's disability is a scheduled member disability to her right shoulder under Iowa Code section 85.34(2)(n) (2021).

x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019).

Thus, the law, as written, is not specifically concerned with an injured worker's actual functional loss or disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of the AMA Guides to the Evaluation of Permanent Impairment. The only function of the agency is to determine which impairment rating should be utilized.

The statute itself provides no guidance whatsoever on how to determine which impairment rating should be utilized. I interpret the statute to mean that the impairment rating which most closely assesses the injured worker's actual functional disability is the rating which should be adopted by the agency.

In this case, I am not satisfied that any of the ratings provided by the medical experts accurately assess Ms. Perry's functional loss. Her primary functional losses in her right shoulder are strength loss and loss of range of motion. She also has some

impairment associated with the distal clavicle excision. I tend to agree with the claimant that these losses are more accurately assessed closer to the date of hearing, rather than in 2019, when Dr. Kuhnlein and Dr. Bollier performed their respective assessments. Dr. Segal performed his examination in December 2022, shortly before hearing. Dr. Segal also performed the most thorough and well-documented evaluation particularly as it relates to her loss of range of motion and motor deficit. (See Cl. Ex. 1, pp. 24, 49-50) Dr. Segal also documented her increased loss of function following her retirement. (Cl. Ex. 1, p. 8) He is the only physician to do so.

The defendants attack Dr. Segal's report by attacking his credibility and suggesting that the claimant was "doctor-shopping." I reject these arguments by defendants. I do not find that Dr. Segal's medical board violation has any impact upon his well-reasoned opinions of Ms. Perry in this case. (See Def. Ex. F, pp. 1-14) It does appear that the claimant disagreed with her own physician's rating (Dr. Kuhnlein) and sought further opinion closer to the hearing after her symptoms had worsened.

The problem with Dr. Segal's rating in this case is that Dr. Kuhnlein's evaluation and rating are also thorough and well-reasoned. Dr. Kuhnlein is well-known before this agency as an even-handed, outstanding disability evaluator. When comparing the ratings of Dr. Segal with Dr. Kuhnlein, the primary difference is their treatment of the rating for the distal clavicle excision. The other differences present regarding the range of motion and strength loss (motor deficit) are likely due to the time in which the evaluation was undertaken. In other words, it appears to me that Dr. Kuhnlein utilized the same or similar method for rating her functional losses, however, Dr. Segal performed his rating later when her condition was significantly more symptomatic. The other difference is the distal clavicle excision. (*Compare* Cl. Ex. 1, pp. 14-15 with Cl. Ex. 2, pp. 10-15) Having reviewed the relevant portions of the Guides, I tend to agree with Dr. Kuhnlein's medical analysis on this point.

Having reviewed all the evidence in the record, I find that Dr. Kuhnlein's rating best reflects Ms. Perry's actual impairment as it relates to the distal clavicle excision. Therefore, I find that Ms. Perry sustained a 3 percent impairment to the right upper extremity for distal clavicle excision. (Cl. Ex. 2, p. 15) I find, however, that Dr. Segal's ratings related to her range of motion and strength (motor loss) are most accurate. These ratings are most closely aligned with Ms. Perry's credible testimony. Therefore, I find that she sustained a 6 percent functional impairment rating for range of motion loss and a 7 percent functional impairment rating for motor loss. (Cl. Ex. 1, p. 24) I find that these ratings combine to a 13 percent right upper extremity impairment. (See AMA Guides, 5th ed. Combined Values Chart, p. 605) When the 13 percent is combined with the 3 percent for distal clavicle excision, the total rating is 16 percent of the right upper extremity. I conclude this entitles the claimant to 64 weeks of compensation commencing on March 5, 2019.

The next issue is overpayment credit. The parties have stipulated that claimant was paid at the rate of \$556.25, for a total (between permanency and temporary benefits) of 18 weeks and 3 days. This has resulted in a gross overpayment of \$10.63.

The claimant alleges in her brief that defendants already took credit for this overpayment. (See Def. Ex. A)

The defendants contend in their payment log that they paid \$6,675.00 for permanency benefits on March 6, 2019. (Def. Ex. A, p. 4) The check to the claimant, however, is in evidence as well. (Cl. Ex. 5) It shows that the check which was cut by the carrier was for \$6,556.32, indicating she was actually paid at the rate of \$546.32. The parties did stipulate, however, that claimant was actually paid at the rate of \$566.25. Whatever the case, the defendants are entitled to a credit for the payments they have actually made prior to the hearing.

The final issue is costs.

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, “persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation.” A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors’ and practitioners’ reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Using the discretion provided to the agency, I award the following itemized costs:

Filing Fee	\$103.00
Certified Mail	\$7.33
Certified Mail	\$7.33
Dr. Segal Medical Report	\$2,800.00
Total Costs	\$2,917.66

ORDER

THEREFORE, IT IS ORDERED

Defendants shall pay the claimant sixty-four (64) weeks of permanent partial disability benefits at the rate of five hundred fifty-five and 38/100 (\$555.68) per week commencing March 5, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.


Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall have a credit for the gross amount of permanency paid prior to hearing. It appears from the record that this amount was six thousand five hundred fifty-six and 32/100 dollars (\$6,556.32).

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

Costs are taxed to defendants in the amount of two thousand nine hundred seventeen and 66/100 dollars (\$2,917.66).

Signed and filed this 29th day of August, 2023.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Laura Ostrander (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.