

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TAMMY NEYENS,

**FILED**

Claimant,

AUG 21 2019

File No. 5065481

vs.

WORKERS COMPENSATION ARBITRATION

NORDSTROM DISTRIBUTION  
CENTER,

DECISION

Employer,  
Self-Insured,  
Defendant.

Head Note No.: 1803

## STATEMENT OF THE CASE

This is a petition in arbitration. The contested case was initiated when claimant, Tammy Neyens, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on April 20, 2018. Claimant alleged she sustained a work-related injury on February 15, 2017. Claimant alleged the work injury affected her upper back, neck, shoulder and body as a whole. (Original notice and petition)

For purposes of workers' compensation, Nordstrom Distribution Center, is self-insured. Defendant filed its answer on April 19, 2018. Defendant accepted the claim for the neck injury. A first report of injury was filed on May 20, 2017.

The hearing administrator scheduled the case for hearing on April 15, 2019. The hearing took place in Davenport, Iowa at the Iowa Works Center. The undersigned appointed Ms. Michele Proesch as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified at the hearing. Ms. Paula Kamm, an assistant manager at the Nordstrom Distribution Center in Dubuque., Iowa, also testified. The parties offered Joint Exhibits 1 through 7. Claimant offered Exhibits 1 through 9. The exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on May 8, 2019. The case was deemed fully submitted on that date.

### STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the injury;
2. Claimant sustained an injury on February 15, 2017 which arose out of and in the course of her employment;
3. The injury resulted in temporary disability;
4. The injury resulted in a permanent disability;
5. Temporary benefits are no longer an issue;
6. The disability is an industrial disability;
7. The commencement date for permanent partial disability benefits for the cervical spine, is August 16, 2018; if any permanency benefits are due for the left carpal tunnel, the commencement date is October 17, 2018;
8. The parties agree, the weekly benefit rate is \$536.51;
9. Defendant has withdrawn any affirmative defenses it may have had available to it;
10. Medical benefits are no longer at issue;
11. Prior to the date of this hearing, defendant paid claimant 34.714 weeks of permanent partial disability benefits at the rate of \$536.51 per week; and
12. The parties agree certain costs that are detailed were paid by claimant.

### ISSUE

The issue presented is:

1. What is the extent of claimant's permanent partial disability?

This deputy, after listening to the testimony of claimant and Ms. Paula Kamm at hearing, after judging their credibility, and after reading the evidence, the transcript, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is a 37-year-old married mother of 2 minor children. She is right-hand dominant. The highest grade level, claimant ever achieved was eleventh grade in high school. Claimant testified she has no immediate plans to obtain a general equivalency diploma (GED). She commenced employment with the Nordstrom Distribution Center in Dubuque in 2003. She has worked there ever since she started. Claimant testified she enjoys her job and plans to stay there until she is at an age where she is able to retire.

The defendant does not dispute the work injuries in question. Claimant underwent magnetic resonance imaging (MRI) on March 29, 2017. (Joint Exhibit 2, page 7) According to the radiologist, Jack Engelken, M.D., the results showed:

Impression:

There is a left lateral disk protrusion/extrusion at C6-7 causing mild left lateral recess and left proximal neural foramen. There is no spinal canal stenosis. There is mild left lateral recess stenosis and moderate to severe left-sided neural foraminal narrowing.

Otherwise essentially normal.

(Jt. Ex. 2, p. 7)

Claimant was referred to Michael P. Chapman, M.D. Dr. Chapman is an orthopedic surgeon at Medical Associates Clinic, P.C. in Dubuque, Iowa. Dr. Chapman evaluated claimant on May 3, 2017. Dr. Chapman informed claimant she suffered from:

1. Herniated cervical disc . . . .
2. Herniated nucleus pulposus . . . .

(Jt. Ex. 2, p. 15)

Dr. Chapman recommended a disc replacement via the anterior approach rather than a cervical fusion. Claimant was in agreement. (Jt. Ex. 2, p. 15) A petition for alternate medical care was filed as defendant did not want to provide the disc replacement. However, claimant prevailed in her alternate medical care action.

On July 28, 2017, Dr. Chapman performed a C6-7 anterior cervical discectomy and foraminotomy and then placement of Mobi-C artificial disk with SSEP monitoring. Claimant tolerated the procedure well without any complications. (Jt. Ex. 5, p. 1)

Claimant had a follow-up visit with Dr. Chapman on August 9, 2017. Claimant reported significant improvement of her preoperative radicular pain and improving

postoperative neck pain. Claimant had normal strength and sensation in her left arm. Physical therapy was ordered. Claimant was released to return to light duty work with a ten pound restriction. (Jt. Ex. 2, p. 17)

Claimant returned to work on August 21, 2017 with a ten pound weight restriction. (Jt. Ex. 2, p. 19) Effective November 1, 2017, claimant was returned to full unrestricted work.

On February 5, 2018, claimant was experiencing numbness and tingling in her left hand and her second to fifth fingers. Claimant showed a positive Phalen's sign at the left wrist. (Jt. Ex. 2, p. 22) Dr. Chapman imposed work restrictions at that time. Claimant was restricted to working part of her shift in the "hot pick area" lifting up to 50 pounds and then to work the remainder of her shift where the work was less labor intensive. (Jt. Ex. 2, pp. 23-24)

Dr. Chapman referred claimant to Edwin T. Castaneda, M.D., an orthopedic surgeon who specializes in hand surgery. (Jt. Ex. 2, p. 31) Dr. Castaneda diagnosed claimant with left carpal tunnel syndrome. (Jt. Ex. 2, p. 31) The surgeon found:

Patient does have signs symptoms [sic] consistent with a left carpal tunnel syndrome in conjunction with a cervical radiculopathy. She has numbness into [sic] across her entire hand. I have recommended she undergo an open carpal tunnel release with decompression both median and ulnar nerves to rule out any involvement at the wrist for compressive neuropathy. The diagnosis of a carpal syndrome within with [sic] the compressive neuropathy of the median nerve at the wrist is confirmed with electrodiagnostic studies. However, I would decompress the ulnar nerve as well due to her present symptomatology. She appeared [to] understand she concurs with a management program. She will be scheduled for an open carpal tunnel release with decompression both median and ulnar nerves the wrists [sic].

(Jt. Ex. 2, p. 32)

On July 17, 2018, Dr. Castaneda, performed the following surgery on claimant: Left open carpal tunnel release with decompression of both median and ulnar nerves. Claimant tolerated the procedure well and was transferred to the recovery room. (Jt. Ex. 5, pp. 3-4)

On July 24, 2018, claimant presented for a follow-up appointment with personnel in Dr. Castaneda's office. (Jt. Ex. 2, p. 39) Claimant was advised not to lift more than two pounds. On August 13, 2018, claimant was informed not to lift anything heavier than a gallon of milk. (Jt. Ex. 2, p. 40)

Dr. Chapman deemed claimant to be at maximum medical improvement on August 15, 2018. (Jt. Ex. 2, p. 41) Erin J. Kennedy, M.D. of Tri-State Occupational Health provided the opinion relative to permanent partial impairment of the cervical spine. (Jt. Ex. 2, p. 42) Dr. Kennedy explained how she arrived at her opinion. She opined:

I have been asked to provide a permanent partial impairment rating according to the AMA Guides to the Evaluation of Permanent Partial Impairment: 5<sup>th</sup> edition relating only to the cervical spine. Please be directed to chapter 15, figure 15-4, to see that this individual is appropriately rated according to the DRE method as this is her first injury and only injury at the cervical spine and it affected only one level which was the C6-7 level. Then be directed to table 15-5, which is the criteria for rating impairment due to cervical disorders. It is my opinion that she has sustained a category 3 impairment as she had significant signs of radiculopathy such as pain, sensory loss in the dermatomal distribution consistent with C7 nerve root, and MRI findings consistent with a C6-7 disk herniation. She has gone on to have significant improvement of her radiculopathy following surgery to being nearly asymptomatic and without functional loss resulting from the cervical condition. Therefore, it is my opinion that she sustained a 15% whole person impairment as a result of the cervical condition. Please note that the patient did go on to develop peripheral nerve entrapment with some residual symptoms remaining even after surgery for the carpal tunnel syndrome. She has also had notable hypothenar wasting consistent with permanently damaged ulnar nerve of the left hand. This came about after she had a period of improvement following surgery for the cervical spine. Therefore, I am confident that these findings are related to the peripheral nerve entrapment and not the cervical spine condition.

(Jt. Ex. 2, pp. 45-46)

Dr. Castaneda rated claimant for any permanent partial impairment due to the carpal tunnel syndrome. (Jt. Ex. 2, p. 47) The surgeon opined:

Patient's [*sic*] doing well following her open carpal tunnel release. No new medical problems or complaints. No changes in her medical history, or review of systems. There have not been any changes in her medical history, her medications, or any new drug allergies.

Patient is transitioning to a clerical position. She has no residual disabilities. Neurovascular status has returned[,] normal grip strength is back to normal. She has no residual permanent disability consequently, her impairment rating for this particular injury would be 0%.

(Jt. Ex. 2, p. 47)

Claimant's counsel referred claimant for a functional capacity evaluation (FCE) with Short Physical Therapy PLLC, in Callender, Iowa. The FCE occurred on December 27, 2018. Daryl Short, DPT, found claimant had the following limitations for an 8 hour day and 40 hours per work week:

**Slight Limitations:**

1. Sitting
2. Standing work
3. Walking
4. Crouching
5. Kneel/Half-Kneeling
6. Stairs
7. Lifting waist to/from floor up to 10 lbs.
8. Front carry up to 10 lbs. up to 50 ft.

**Some Limitations:**

1. Elevated work
2. Forward bent standing
3. Reaching
4. Lifting waist to/from floor up to 15 lbs.
5. Lifting waist to/from crown up to 5 lbs.
6. Front carry up to 15 lbs. up to 50 ft.

**Significant Limitations:**

1. Lifting waist to/from floor up to 25 lbs.
2. Lifting waist to/from crown up to 10 lbs.
3. Front carry up to 25 lbs. up to 50 ft.

**Summary/Recommendations:**

1. These projections are for an 8 hour per day and 40 hours per week at the levels indicated with the FCE Test Results and Interpretation.
2. The WorkWell Protocol includes functional lifting test items that the client performed over multiple trials and repetitions. It is recommended that due to her decreased strength and endurance of her left side neck/upper back and left hand that Ms. Neyens's capabilities are in the **sedentary to light** category (up to 15 lbs. on an occasional basis at waist level) of physical demand.
3. It is recommended that Ms. Neyens due to her decreased strength and endurance of her left side neck/upper back and left hand limit material and non-material activities at or above shoulder level to an occasional basis.
4. Ms. Neyens provided a valid effort.
5. Time with Ms. Neyens 10:00 AM to 12:30 PM

6. Please call if you have any questions regarding this report.

(Jt. Ex. 7, pp. 2-3) (emphasis in original)

On January 28, 2019, Dr. Chapman reviewed the restrictions outlined in the FCE. The orthopedic surgeon agreed and adopted those restrictions as permanent ones for claimant. (Jt. Ex. 2, p. 51)

Claimant exercised her right to an independent medical examination pursuant to Iowa Code section 85.39. Claimant presented to Sunil Bansal, M.D., M.P.H. on February 15, 2019. (Claimant's Ex. 1) Dr. Bansal conducted a physical examination of claimant's cervical spine and her left wrist/hand. (Cl. Ex. 1, p. 10) Dr. Bansal found:

### **PHYSICAL EXAMINATION:**

#### **NECK:**

Well-healed surgical scarring is noted.

There is tenderness to palpation over the cervical paraspinal musculature, greater on the left.

Spasms are noted over the left cervical paraspinals.

#### **RANGE OF MOTION**

Flexion: 35 degrees

Extension: 33 degrees

Left Lateral Flexion: 28 degrees

Right Lateral Flexion: 21 degrees

#### **LEFT WRIST/HAND:**

There is mild tenderness to palpation of the volar aspect of the wrist.

Well-healed surgical scarring is noted on the wrist.

There is a positive Tinel's sign.

There is a positive Phalen's sign.

Negative Finkelstein's test.

Full range of motion of the wrist.

No thenar atrophy is noted.

There is a loss of two-point sensory discrimination over the thumb (12mm).

#### **UPPER EXTREMITY REFLEXES:**

RIGHT: +2 biceps, brachioradialis, and triceps.

LEFT: +2 biceps, brachioradialis, and triceps.

#### **UPPER EXTREMITY STRENGTH:**

|          | Right | Left |
|----------|-------|------|
| Triceps: | 5/5   | 5/5  |
| Biceps:  | 5/5   | 5/5  |

(Cl. Ex. 1, pp. 10-11)

Dr. Bansal diagnosed claimant with a herniated nucleus pulposus at C6-C7 on the left. However, her status was post C6-C7 disc replacement. With respect to the left wrist/hand, claimant had left carpal tunnel syndrome. She required surgical intervention. As a result, claimant had a left open carpal tunnel release with decompression of both the median and ulnar nerves. (Cl. Ex. 1, p. 11)

Dr. Bansal provided permanent impairment ratings for the cervical spine and the left wrist and hand. The occupational medical expert described how he calculated claimant's permanent impairment. He wrote in his report of February 15, 2019:

NECK:

With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Table 15-5, we find that Ms. Neyens meets criteria from DRE Category IV. She is status post cervical disc replacement at C6-C7. She is assigned a **25% whole person impairment**.

LEFT WRIST/HAND:

With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Tables 16-10, 16-11, and 16-15, she qualifies for the following impairment values based on her digital sensory deficits.

Severity of sensory deficit is 20% for the first digit.

Severity of motor deficit is 0%.

Upper extremity impairment due to sensory deficit of the median nerve below the mid forearm involving the radial and ulnar palmar digital nerves of the thumb is 18%.

Multiplied together: **(20% x 18%) = 4% upper extremity impairment**.

(Cl. Ex. 1, pp. 13-14) (emphasis in original)

The parties stipulated claimant sustained an industrial disability. The issue is the extent of the industrial disability. 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.

The Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, does not address disk replacement surgery. That is because the surgical procedure was developed after the Fifth Edition was published. However, it can be argued disk replacement surgery is often used in lieu of a cervical fusion. As a consequence, a disk replacement surgery ought to be placed in the same DRE Category as a cervical fusion which would be DRE Cervical Category IV.

The Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, provides at page 379:

Spinal impairment rating is performed using one of two methods: the diagnosis-related estimate (DRE) or range-of-motion (ROM) method.

*The DRE method is the principal methodology used to evaluate an individual who has had a distinct injury. When the cause of the impairment can be well characterized by the DRE method, the evaluator should use the DRE method.*

Id.

Since claimant had a disk replacement surgery, the undersigned accepts the opinion of Dr. Bansal. Claimant has a DRE Category IV injury under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Bansal accurately assessed claimant's permanent partial impairment for the cervical spine in the amount of twenty-five (25) percent.

With respect to the left arm, Dr. Short, the physical therapist, determined various restrictions were needed for claimant, not only for her cervical spine but also for her left arm. Those restrictions were listed in previous paragraphs of this decision. Dr. Bansal rated claimant as having a four percent permanent impairment to the upper extremity as

a result of the carpal tunnel syndrome and the decompression of the ulnar and median nerves. Using the combined values chart on page 439 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, a four percent impairment to the upper extremity equates to a two percent permanent impairment to the body as a whole. The undersigned accepts the two percent rating as reasonable, given the findings of the FCE.

Claimant is still employed at the Nordstrom Distribution Center but not in the same capacity as she was employed on the day of her work injury. At the time of her hearing, claimant was employed as a processor. She had to lift heavy boxes; some weighed as much as fifty (50) pounds. There was bending, stooping, and reaching over her head to place garments on racks. Claimant is no longer able to fulfill the duties of a processor. When the year was busy, such as during the holidays, the processors often worked overtime hours. Claimant no longer works overtime. She is in a light duty clerical position. It is laudable; the employer is accommodating all of claimant's restrictions. According to the testimony of Ms. Kamm, claimant is an excellent worker. Claimant is fulfilling a meaningful position within the company.

It is fortunate she remains employed at the Nordstrom Distribution Center as she does not have a high school diploma or the equivalency. She has few transferable skills outside of the ones she acquired at Nordstrom. She worked as a waitress, a cashier, and a telemarketer. Due to her restrictions, claimant would not be able to perform waitress work. Unless she could alternate sitting and standing, she would not be able to work as a cashier or a telemarketer either. In the competitive labor market, claimant would have to undergo training if she wanted to engage in viable employment.

After considering all of the factors involving industrial disability, it is the determination of the undersigned; claimant has a permanent partial disability in the amount of thirty-five (35) percent.

Defendant shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing from October 17, 2018. All weekly benefits shall be paid at the rate of \$536.51 per week. The carpal tunnel injury was a sequela of the original injury and was not a separate work injury even though claimant did not reach maximum medical improvement from it until October 17, 2018. Therefore, claimant did not reach maximum medical improvement until all parts of her injury had reached maximum medical improvement.

Defendant shall take credit for 34.714 weeks of permanent partial disability benefits paid at the weekly benefit rate of \$536.51.

Defendant shall pay all accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to

the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686.

The final issue is costs to litigate. 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).

Filing fee        \$100.00

Service Fee

FCE REPORT    \$350.00

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing from October 17, 2018 and payable at the rate of five hundred-thirty-six and 51/100 dollars (\$536.51).

Accrued benefits shall be paid in a lump sum together with interest as detailed in the body of the decision.

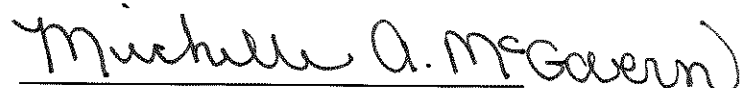
Defendant shall take credit for thirty-four point seven one four (34.714) weeks of compensation at the rate of five hundred thirty-six and 51/100 dollars (\$536.51) which were paid prior to the hearing.

Defendant shall pay the costs to litigate as detailed in the body of the decision.

The attorneys of record, if they have not already done so, shall register within seven (7) days of this order in Workers' Compensation e-Filing System (WCES) and as a participant in this case to receive future filings from this agency.

Defendant shall file all reports as required by law.

Signed and filed this 21<sup>st</sup> day of August, 2019.

  
MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies To:

Eric Loney  
Attorney at Law  
1311 – 50<sup>th</sup> St.  
West Des Moines, IA 50266  
[eric@loneylaw.com](mailto:eric@loneylaw.com)

Cynthia Sueppel  
Attorney at Law  
118 – 3<sup>rd</sup> Ave. SE, Ste. 200  
Cedar Rapids, IA 52401  
[csueppel@smithmillslaw.com](mailto:csueppel@smithmillslaw.com)

MAM/srs