

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CATHY EICHMEYER,

Claimant,

vs.

NORDSTROM, INC.,

Employer,
Self-Insured,
Defendant.

File No. 21700779.01

ARBITRATION DECISION

Head Note Nos.: 1108, 1803.1

STATEMENT OF THE CASE

The claimant, Cathy Eichmeyer, filed a petition for arbitration on August 2, 2021. She seeks workers' compensation benefits from Nordstrom, Inc., a self-insured employer. The claimant was represented by Gary Nelson. The defendant was represented by Thomas Wolle.

The matter came on for video hearing on November 16, 2022, before deputy workers' compensation commissioner Joe Walsh originating in Des Moines, Iowa, via Zoom video conferencing. The parties did an excellent job of narrowing the hearing record, as well as the issues in the case. The record in the case consists of claimant's exhibits 1 through 4; defense exhibits A through C; and joint exhibits 1 through 3. The claimant testified at hearing, and was the only witness. Christal Hansen Ruda served as the court reporter. The matter was fully submitted on December 20, 2022.

ISSUES

The parties submitted the following issues for determination:

1. The nature and extent of permanent partial disability.
2. 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 February 10, 2021.
3. This injury was a cause of both temporary and permanent disability.
4. Temporary disability/healing period and medical benefits are no longer in dispute.
5. The commencement date for any permanent disability benefits is December 27, 2021.
6. The weekly rate of compensation is \$429.52.
7. Defendant has paid and is entitled to a credit of 20 weeks of compensation (permanent partial disability).
8. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant Cathy Eichmeyer was 66 years old as of the date of hearing. She resides with her husband in Cedar Rapids. She graduated from high school in 1975. She testified live and under oath at hearing and I find her to be a highly credible witness. She was a good historian. Her testimony was consistent with other portions of the record. There was nothing about her demeanor which caused me any concern for her truthfulness. On the contrary, the total picture painted was that of a highly credible person.

Ms. Eichmeyer has worked for Nordstrom since September 2009 in the returned inspection department. This position required her to process returns and place totes weighing 15 to 25 pounds on a recycle line above her head. She testified in some detail about her work activities. (Transcript, pages 12-14) She testified it was her understanding that this was the lightest job at Nordstrom. (Tr., pp. 20-21) The parties have stipulated that Ms. Eichmeyer sustained an injury to her left shoulder, which arose out of and in the course of her employment, on February 10, 2021 while performing this work. Ms. Eichmeyer had experienced similar symptoms in her left shoulder in 2019; however, the symptoms had mostly resolved at that time.

Following her February 2021 injury, Nordstrom directed her medical care and sent her to Matthew Bollier, M.D., at the University of Iowa Hospitals and Clinics. Dr. Bollier performed rotator cuff surgery in July 2021. The surgery was described as left shoulder arthroscopy, rotator cuff repair, capsular release, extensive debridement, biceps tenotomy, subacromial decompression, and distal clavicle excision. (Jt. Ex. 2, p. 12) She had a relatively routine course of postoperative treatment, undergoing physical therapy until she was released at maximum medical improvement on January 27, 2021. Dr. Bollier assigned a 5 upper extremity rating. (Jt. Ex. 2, p.18). He provided no rating for the distal clavicle excision.

Ms. Eichmeyer retired from Nordstrom on August 6, 2021, while she was still under care by Dr. Bollier. She testified she was concerned she would reinjure her shoulder or that she would not be able to handle the physical requirements of her job. She testified that she had planned to work until she was 66 years old, but she decided to retire a little early due to her injury. I find this testimony to be highly believable. In fact, she returned to Dr. Bollier in April 2022. Dr. Bollier documented worsening shoulder pain but offered no additional treatment at the time. (Jt. Ex. 2, p. 19) Ms. Eichmeyer testified credibly that her left shoulder continues to be symptomatic and has, in fact, worsened. Prior to hearing, she became employed with Homestead, as a companion for an individual with dementia. She mostly sits with the individual and visits. She does some light cleaning and earns \$15.00 per hour. (Tr., p. 17)

In April 2022, Mark Taylor, M.D. examined Ms. Eichmeyer. Dr. Taylor performed an extraordinarily thorough review of the records, including a summary, and examined her as well. (Cl. Ex. 1, pp. 6-10) He diagnosed her with left-side rotator cuff tear, biceps tendinopathy and AC joint arthropathy. (Cl. Ex. 1, p. 10) He then assigned a 16 percent left upper extremity impairment per the AMA Guides, Fifth Edition, for this condition. (Cl. Ex. 1, p. 11) It is noted that, within this rating Dr. Taylor assigned 1 percent for "slight weakness of supination of the left arm" which is included in the rating. This is one of the primary disputes in the case; namely, whether this additional rating should result in a finding that claimant has sustained permanent functional impairment in two separate body parts, her left shoulder and her left arm. On this point, Dr. Taylor opined the following:

In this circumstance, Ms. Eichmeyer was found to have slight weakness of supination on the left side compared to the right side, and for which I recommended 1% left upper extremity impairment (supination is a forearm/elbow movement). Given this information, it appears that there was a mild functional impact on her arm strength (supination) as result of the biceps injury and subsequent need for treatment (tenotomy).

(Cl. Ex. 1, p. 11) Dr. Taylor also recommended permanent restrictions for her condition. (Cl. Ex. 1, p. 11) I find Dr. Taylor's rating and opinions to be the most comprehensive, thorough, and accurate opinion in the record.

In response to this, Nordstrom had Ms. Eichmeyer evaluated by James Milani, D.O., an occupational medicine physician in September 2022. Dr. Milani reviewed records and performed an examination. (Def. Ex. A) Dr. Milani assigned a 7 percent rating per the AMA Guides, Fifth Edition. (Def. Ex. A, p. 5) Like Dr. Bollier, Dr. Milani downplayed any rating for the distal clavicle resection. (Def. Ex. A, p. 6) He also did not provide any rating for loss of strength in her elbow. In fact, it does not appear that Dr. Milani evaluated the elbow in any meaningful way. He did comment on the issue of rating strength loss, opining that strength loss should only be rated separately in rare instances when the range of motion measurements do not adequately encompass a person's functional loss. (Def. Ex. A, pp. 5-6) I interpret Dr. Milani's opinion to mean that strength loss in the elbow/forearm should not be rated in this case because her shoulder impairment rating adequately assesses her loss of function. Ms. Eichmeyer testified credibly that Dr. Milani chose not to evaluate her left elbow and/or forearm. (Tr., pp. 17-18)

As mentioned previously, Ms. Eichmeyer has testified that her ongoing symptoms in her left shoulder impacted her ability to use her shoulder both at work and in her activities of daily living. (Tr. pp. 20-25) She specifically testified regarding the weakness in her left arm. (Tr., p. 22)

Having reviewed all of the evidence in the file, I find the following by a preponderance of the evidence:

1. Ms. Eichmeyer has sustained a permanent functional loss in her left shoulder in the amount of 15 percent. In addition, Ms. Eichmeyer has sustained a 1 percent impairment to her left elbow/forearm as a result of her work injury. I find that the combination of these disabilities to two separate body parts places her disability into her whole body under Iowa Code section 85.34(2).
2. The combined impact of these impairments to two separate body parts have resulted in a mild industrial disability to Ms. Eichmeyer, slightly lessened by her near proximity to retirement age.

CONCLUSIONS OF LAW

The first question submitted is whether claimant's disability should be evaluated under Iowa Code section 85.34(2)(n) for the loss of a shoulder, or whether it should be evaluated under section 85.34(2)(v) as two separate scheduled members within the same disability. This is an issue of medical causation.

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).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that “naturally and proximately flow from the accident.” Iowa Workers’ Compensation: Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following: “If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable.” Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

As set forth in the findings of fact, I have found that Ms. Eichmeyer’s work injury is a cause of permanent impairment in both her left shoulder and her left elbow and forearm. This finding is based upon the medical opinion of Dr. Taylor combined with Ms. Eichmeyer’s highly credible testimony.

The next issue is the nature of the disability. Iowa Code section 85.34(2)(v) governs in all cases of permanent partial disability other than those “described or referred to” elsewhere in subsection 85.34(2). Because of this, paragraph (v) “is often referred to as the ‘catch-all’ section” of the Iowa Workers’ Compensation Act. Id. see also Carmer v. Nordstrom, Inc., File No. 1656062.01 (App. Dec. 29, 2021)

In Anderson v. Bridgestone Americas, Inc., and Second Injury Fund of Iowa, File No. 5067475 (Arb. Sep. 2, 2021), aff’d (App. Jan. 25, 2022), the Commissioner affirmed and adopted the conclusion of law that a shoulder injury and arm disability resulting from the same date of injury are not described or referred to elsewhere in subsection 85.34(2) and permanent partial disability is therefore determined under paragraph (v). Id.

Since the disability is located in Ms. Eichmeyer’s left shoulder and left arm, I find that the disability must be evaluated under Iowa Code section 85.34(2)(v) (2021). Ms. Eichmeyer retired in August 2021.

Compensation for permanent partial disability under Iowa Code section 85.34(2)(v) is:

... paid during the number of weeks in relation to five hundred weeks as the reduction in the employee’s earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee’s earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of injury.

The assessment of how disability caused by work injuries impact a claimant’s earning capacity is based on multiple factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before

and after the injury, motivation to work, personal characteristics of the claimant, the claimant's inability, because of the injury, to engage in employment for which the claimant is fitted, and the employer's inability to accommodate the claimant's functional limitations. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012); IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

I have considered all of the relevant factors of industrial disability set forth above. In addition, I have factored in that Ms. Eichmeyer was already near the age which she planned to retire. Specifically, her disability would be higher but for the age provisions of subsection (v). Ms. Eichmeyer, however, was already working the lightest job at Nordstrom and was likely unable to perform that position on a consistent, gainful basis. Her decision to retire following recuperation from the injury was entirely rational. She had worked for Nordstrom since 2009, and at the time of hearing, did not possess the education, training, or work skills to reenter the workforce in any position other than entry level service type work. Considering all the relevant factors of industrial disability, I find that she sustained a 20 percent loss of earning capacity as a result of her work injury. I conclude this entitles her to 100 weeks of compensation commencing on December 27, 2021. Defendant is entitled to a credit for the benefits paid.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay the claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred twenty-nine and 52/100 (\$429.52) per week from December 27, 2021.

Defendant shall pay accrued weekly benefits in a lump sum.

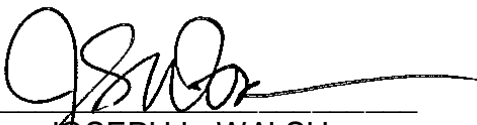
Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for the 20 weeks previously paid.

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

Costs are taxed to defendant as set forth in claimant's exhibit 4, in the amount of \$100.00.

Signed and filed this 2nd day of June, 2023.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Thomas Wolle (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.