BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUDY KEIZER, Claimant, vs. ERNEST PRIMMER, DDS, Employer, ACCIDENT FUND GENERAL INS. CO., Insurance Carrier, Defendants.	File No. 5048376 A R B I T R A T I O N D E C I S I O N Head Note No: 1803

FILED
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WORKERS' COMPENSATION

STATEMENT OF THE CASE

Judy Keizer, claimant, has filed a petition in arbitration and seeks workers' compensation from Dr. Ernest Primmer, DDS, employer and Accident Fund General, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on April 15, 2015, in Cedar Rapids, Iowa. The record in the case consists of claimant's exhibits 1 through 11; defense exhibits A through J; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

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

The correct rate of compensation for the claimant.

To what extent defendants are entitled to a credit for benefits previously paid.

FINDINGS OF FACT

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

Claimant Judy Keizer testified she is 62 years old. She lives in Springville, Iowa. She is married, and they have two adult children who were not her dependents on the date of injury. Her husband is a minister. Claimant is right handed.

She graduated from high school in 1969, in San Antonio, Texas. In 1970 she obtained certification as a keypunch operator. She later obtained a dental assistant certification. She was working as a dental assistant when she was injured in 2011.

Exhibit 11 shows claimant's prior employments. She has moved several times for her husband's employment. She worked for Allegiant Health in Corning, Iowa, for about a year. She performed housekeeping duties. She also worked for a company in Creston, Iowa, where she worked as a packaging machine operator, running a machine that packages candy. She had a work injury there, where she lost her left index finger from the first knuckle outward. She worked there about three years. She left there because it was hard for her to be near the machines after that accident.

She also worked in food service at a school lunch room, helping to serve 600 to 700 lunches daily. She worked in daycare at the same time at a hospital. Both jobs were in the Sioux City area. In the 1980s and 1990s, she worked at several retail jobs as a cashier, ordering supplies, restocking, etc.

In 2000, she attended Kirkwood College and studied to be a dental assistant. Upon graduation she was hired by Dr. Ernest Primmer, D.D.S., defendant employer. She worked three days per week, sometimes four. Her job was to hand the dentist the instruments and materials he needed, as well as assist with x-rays. When there were no patients, she would order supplies, answer the phone, and sanitize the office. There were three assistants, two hygienists, and two office persons.

When she left there she was being paid about $13.65 per hour. About three years before her injury, Dr. Primmer offered to pay her health insurance premium or give her a raise, and she chose the insurance premium. Exhibit 9 shows about $410.00 was paid to claimant by check for the premium. Exhibit 9, page 2, dated April, 2014, is a letter from Dr. Primmer confirming these payments were made to her in addition to her regular salary.

On the date of injury, claimant was helping a hygienist clean up the room and claimant tripped over the nitrous oxide container, falling and hitting her head and right shoulder on the door frame. She felt immediate excruciating pain in her shoulder. She could not get up because she could not use her arm. A co-worker who heard her fall helped her get into a chair.

Claimant was taken for medical treatment at the Mercy Hospital emergency room. She underwent x-rays and blood work, and she was admitted to the hospital, where she stayed two days. She was told she had a broken arm.

Exhibit 1 shows claimant was referred to a specialist, and her treatment occurred at PCI. Cassandra Lang, M.D., took additional x-rays and concluded claimant had more than a broken arm. She consulted with other orthopedic surgeons, including David Hart, M.D., a shoulder specialist. He ordered a CT scan of her shoulder. This showed several fractures and five or six bone fragments, and he conducted a surgical procedure the next day. He described the injury as very serious.

Exhibit 1, page 7, shows claimant talked to Dr. Hart a month later. He noted her shoulder was not healed and would never again be normal. He told her she would not regain full range of motion of her shoulder.

Exhibit 3 indicates that on May 3, 2011, Dr. Hart performed surgery. It was determined later she had damaged a nerve in her arm. She was not responding to physical therapy and still had a lot of pain, so claimant saw Lawrence Krain, M.D., a neurologist. Claimant underwent an ENG test on September 22, 2011. (Exhibit 1, page 14) He found the nerve was severely injured but not severed, and due to this, her deltoid muscles were not responding.

Dr. Hart told her it would be two years before he could determine how much permanent impairment she had from this injury.

In early 2013, claimant received treatment for the pain she was experiencing. Douglas Sedlacek, M.D., a pain specialist, administered several injections beginning January 4, 2013. (Exhibit 4) Claimant experienced partial relief but it was only temporary. Dr. Sedlacek felt she should be getting more relief and discontinued the injections. (Exhibit 4, page 19)

Claimant was given work restrictions of no above shoulder reaching, no crawling, pulling, pushing, reaching, climbing, or repetitive movement, and keeping her right arm at her side with no use of the right arm. (Exhibit 1, p. 34)

She did go in to the office one day, and Dr. Primmer tested her to see if she could reach the supplies, suction the patient's mouth, etc. It was found she could not. She has not been employed anywhere since her injury.

Dr. Hart released claimant and found her to be at maximum medical improvement on June 21, 2013. (Exhibit 1, p. 42) He imposed permanent restrictions of not lifting more than 20 pounds from floor to waist; not more than 10 pounds lifting with the right arm; and no overhead reaching, pushing, pulling, and no repetitive movements with the right upper extremity. (Id.)

He also found her to have permanent partial impairment of 38 percent of the right upper extremity, or 23 percent of the whole body. (Exhibit 1, p. 43)

Her husband's insurance policy at his work completely covered him but not the family portion of the policy, which her husband and she had to pay. Dr. Primmer paid her that family portion amount each month, in addition to her salary. It was usually $410.00 per month, within a couple of dollars, and claimant would yearly provide documentation on what it would cost for that year.

Exhibit 5 shows Farid Manshadi, M.D., conducted an independent medical examination (IME) of claimant in May, 2014. He noted claimant has pain, and did exercises at home and at physical therapy. He found her to have a right shoulder injury and right axillary nerve injury with neuropathy. (Exhibit 5, p. 4) He determined claimant had a 48 percent permanent partial impairment of the right upper extremity, or 29 percent of the body as a whole. He also recommended permanent restrictions of not lifting more than 10 pounds with the right arm, avoiding activities that require reaching, crawling, pushing or pulling, and not working with ladders. (Exhibit 5, p. 5)

Exhibit 7 is a report from Charles Mooney, M.D. He examined claimant in March, 2015. It contains a medical history, but one paragraph referring to a slip and fall injuring the left shoulder is in error and is apparently for another patient. It is otherwise accurate. He noted claimant reported pain of five or six on a scale of ten, sometimes up to 9. (Exhibit 7, p. 4) He found her to have a combined permanent partial impairment of 42 percent of the right arm, or 25 percent of the body as a whole. He agreed with Dr. Hart's restrictions. (Exhibit 7, pp. 8-9)

Today, her right shoulder is limited in how much she can lift her arm. She demonstrated she could bend her right elbow, she can use the right hand, and she can pick things up from the floor but only raise them waist high, although she often drops things. She doesn't lift things unless her husband is home to help her. She cannot reach very far, and she cannot put things on a high shelf. Sometimes she carries things and suddenly she has no strength in her arm. She has a loss of sensation in her arm and in her hand, which goes numb but not totally. This can also run up her arm. It occurs several times per week but does not last long. She can only extend her arm out from her body to the side about half of normal distance. She can only raise her arm out in front of her no higher than level with the floor. She can only lift less than five pounds, for a minute or so. She can lift an eight pound weight if she keeps her arm close to her body, in the fashion of a curl, which she does for physical therapy at home.

She takes Neurotin three times daily, and Tramadol as needed, up to two per day. She takes the latter in the evening when her arm aches so she can go to sleep. She tried to stop taking the Neurotin but found the pain was too great. These medications were prescribed by Dr. Hart and Dr. Sedlacek.

She has constant pain in her right shoulder. On a scale of zero to ten, she estimates her shoulder pain as five to six. If she tries to do a lot of things, it will go to an eight. The only time it doesn't hurt is when she holds it up by crossing her arms across her chest, and supports her right arm with her left arm. She has to prop her right arm at night with a pillow in order to sleep, otherwise it flops over and it pulls on her right shoulder which is painful. She no longer has a deltoid muscle, as it has atrophied from the nerve damage.

Claimant cannot reach her back on her right side, so she obtained a long wooden handled brush in the shower, which she uses with her left hand. She cannot use a hair dryer because she cannot reach back behind her head.

After not working for about a year, claimant applied for Social Security Disability benefits. (Exhibit 8) She filed on July 26, 2012, and was awarded benefits. A residual functional capacity evaluation by the Social Security Administration found her to be disabled due to her right shoulder injury. Her other medical impairments were non-disabling. (Exhibit 8, p. 13) That assessment concluded there would be a limited number of jobs for which she would be able to transfer, in light of her limitations. (Exhibit 8, p. 15) She did not draw benefits as she was receiving workers' compensation. Although the criteria used by the Social Security Administration differ from the factors of industrial disability the undersigned must use, and their determination has no binding effect on this decision, the conclusion by that federal agency claimant cannot work is duly noted.

She is able to drive a car but only for an hour at a time, as her arm gets too tired. She can use a computer and keyboard but only for a short period of time, not more than 30 to 45 minutes, as again, her right arm gets too tired and she has to stop and rest it. Her missing left index finger affects her ability to type but she has learned to accommodate for that. She feels it would be difficult to type with only her left hand with that finger missing.

At home she has had to buy a "grabber", a device for reaching for high things. She cannot steady herself with one arm to reach with the other. She is active in her husband's church, teaching Sunday school and acting as Sunday school superintendent. She is part of a babysitting team at the church but she has to have someone else lift the babies as she cannot. She goes to Ability Fitness three times per week for physical therapy. They gave her an exercise plan that will not aggravate her arm and shoulder.

She also volunteers as treasurer for the Friends of the Library, helping with fundraisers, and putting books on lower shelves but not the upper ones. She does this about three hours per week.

Exhibit 11, page 6, refers to job searches claimant has done. The insurer sent a vocational person, Lana Selner, to meet with claimant on November 13, 2012. Claimant

indicated to vocational evaluator Lana Salner she was worried about losing her $750.00 per month in benefits. She also stated she did not want to drive to Cedar Rapids for a part time job as the gas expense would make that impractical. Ms. Salner concluded claimant was capable of working, and told claimant she would send her jobs for which she could apply, but those jobs turned out to be jobs claimant was not qualified for, such as medical transcriptionist. Claimant called some of them, such as the Maid Rite restaurant in Marion, Iowa, but found this would require serving food on large, heavy trays. It would also involve lifting large boxes out of the freezer, which she cannot do. Marion Physical Therapy did not have any openings. Claimant inquired at Security State Bank for any teller jobs, but they did not have any openings, and the job would require some lifting of coins. That inquiry was in July, 2014, and claimant has not looked since, as she has given up on finding a job.

On a typical day, claimant goes to physical therapy, then returns home to do housework. She sometimes takes a disabled woman to nearby appointments, perhaps twice per month. She may work on Sunday School projects at the church. She cooks lunch, and a light meal at night. She often has church or library meetings in the evenings. She is able to use a phone and send and receive texts. She travels by plane to Alaska,and flies or drives to San Antonio, with her husband doing the driving. She normally drives a Ford Escape locally.

Exhibit 6 is Barbara Laughlin's vocational report. Claimant met with her in November, 2014. Ms. Laughlin is a certified vocational expert. She found claimant to have a 100 percent loss of transferable occupations. She felt claimant would have difficulty finding employment. (Exhibit 6, p. 16)

CONCLUSIONS OF LAW

The first issue in this case is the extent of the claimant's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v.

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 62 years old at the time of the hearing. Her education is limited to a high school diploma and a dental hygienist license. However, she cannot return to that position due to her work injury.

She has very high ratings of permanent impairment following her injury. She also has work restrictions that preclude her not only from her old job, but many jobs she might apply for in the future. She attempted a return to work and her employer agreed she was unable to perform the duties. She lost her job as a result and has suffered a severe, complete loss of earnings.

She has shown good motivation to find substitute work, applying at several recommended positions without success. The vocational specialist who concluded she could work suggested jobs for which she was not qualified, and claimant did apply for others but was not hired. That vocational assessment was more than two years ago, and was conducted before claimant had reached maximum medical improvement.

The other vocational specialist has concluded claimant cannot work. So has the Social Security Administration. So does the undersigned. It is difficult, given claimant's restrictions, her work background, her limited education, her age, and the severity of her impairments from her injury, to conceive of a position for which she could reasonably expect to be hired.

It is concluded that claimant, as a result of her work injury, is permanently and totally disabled.

The next issue is the correct rate of compensation for the claimant.

Although listed as a disputed issue on the hearing report, claimant, subsequent to the hearing, agreed to defendants' rate of $212.38.

The next issue is to what extent defendants are entitled to a credit for benefits previously paid.

Defendants assert a credit for overpayment of benefits, based on the late determination of claimant's rate as being $212.38. The parties agree claimant was overpaid $9,972.80 for temporary disability benefits. However, they disagree as to whether defendants are entitled to a credit for this amount in this case.

Defendants claim a credit for the overpayment to be applied to an award of benefits in this case, relying on Iowa Code section 85.34(4) which states:

> 4. *Credits for excess payments.* If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated. (Emphasis added)

Claimant relies on Swiss Colony, Inc., v. Deutmeyer, 789 N.W. 2d 129, 136-137 (Iowa 2010), which holds a credit is only available against future injuries. This agency has only not followed that holding when ordered to do so by a district court ruling. Elmer v.Clayton County Recycling, file 5030948. The award of credit in that case was pursuant to a remand by the district court and was the law of the case, binding on the agency for application in that case only. In all other cases, this agency follows the clear direction of the Iowa Supreme Court in Swiss Colony. Defendants will be awarded a credit of $9,972.80 but only against any future injury claimant may suffer as set forth in the Swiss Colony decision.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant permanent total disability benefits at the rate of two hundred twelve and 38/100 dollars ($212.38) per week commencing April 4, 2011, and during the time claimant remains permanently and totally disabled.

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 be given credit for benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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.

Signed and filed this 24th day of July, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.