

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JACQUELYN L. HAGER,

Claimant,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Employer,

and

OLD REPUBLIC INSURANCE  
COMPANY,

Insurance Carrier,  
Defendants.

**FILED**

NOV 28 2016

WORKERS COMPENSATION

File No. 5051056

ARBITRATION DECISION

Head Note Nos.: 1803, 2500, 4000.2

STATEMENT OF THE CASE

Claimant, Jacquelyn Hager, filed a petition in arbitration seeking workers' compensation benefits against U.S. Bank National Association, employer, and Old Republic Insurance Company, insurer, for an accepted work injury date of October 25, 2012.

This case was heard on August 15, 2016, in Des Moines, Iowa. The case was considered fully submitted on September 6, 2016 upon the simultaneous filing briefs.

The record consists of Joint Exhibits 1-3 except for pages 94-96, Claimant's Exhibits 1-8, and Defendants' Exhibits A-C, along with testimony from the claimant and Cynthia Sue Rindels, the latter via telephone.

ISSUES

Whether the claimant sustained permanent disability, and if so, the extent;

Whether claimant is entitled to a repayment or reimbursement of the medical expenses itemized in Exhibit 2;

Whether claimant is entitled to a penalty benefit award.

STIPULATED FACTS

The parties agree the claimant sustained an injury on October 25, 2012 which arose out of and in the course of her employment. They further agree that the injury

caused some temporary disability during a period of recovery, entitlement to which is no longer in dispute.

They agree that the disability, if one is found, is industrial in nature and that the commencement date of benefits would be November 29, 2012.

At the time of the injury, the claimant's gross earnings were \$1,542.06. She was married and entitled to 2 exemptions. Based on those foregoing numbers, the parties believe the weekly benefit rate to be \$960.66.

Prior to the hearing the claimant was paid 25 weeks of compensation at the rate of \$960.66 per week. The defendants seek a credit against any award.

#### FINDINGS OF FACT

At the time of the hearing, the claimant was a 58-year-old person who was married with one adult child.

Her educational history includes one year at Ellsworth Community College, accounting and psychology classes at the University of Northern Iowa, and a certificate from the American Institute of Business.

Claimant is right-hand dominant.

She began working for the defendant employer approximately 12 years ago as an assistant manager. Over time, she was promoted to branch manager, the position she was working at the time of her injury.

Prior to her work at the defendant employer, claimant worked in accounting for a mortgage company.

As branch manager, she is responsible for the economic production of her bank as well as compliance with security laws. Loans are the key driver of revenue for her employer. As branch manager, she is responsible for prospecting new clients. She spends a great deal of her time, approximately 40 percent, outside of the office making business calls. While her job is in sales and business, she is required to do some heavy lifting of approximately 30 pounds as it relates to moving coins in the bank and traveling with marketing materials in a suitcase she calls Bertha that weighs 20-25 pounds.

On October 25, 2012, claimant tripped and fell, injuring her right shoulder. Claimant was taken to the local emergency room where she was diagnosed with a right mid-clavicular fracture. She testified that it was recommended she go to Mayo Clinic in Rochester, but the medical records indicate that she requested the transfer, which was initially denied. (Joint Exhibit 1, page 2) She did eventually get transferred to Mayo on October 26, 2012, for treatment of the right mid-clavicular fracture. (Jt. Ex. 1, p. 3) Claimant had previously undergone bilateral total hip arthroplasties at Mayo.

Because of her pain, she was admitted overnight. (Jt. Ex. 1, p. 1)

She had a minimally-displaced fracture with only mild shortening and overriding of the fragments. There was only a mild clinical and radiographic deformity. (Jt. Ex. 1, p. 3) It was recommended that claimant use a sling before undergoing a surgical repair. (Jt. Ex. 1, p. 3)

On November 5, 2012, claimant returned to Mayo for treatment. At that time, she was advised that she could heal without surgical intervention, but it would be in a deformed position. She elected to go forward with surgery. (Jt. Ex. 1, p. 9)

On November 8, 2012, claimant underwent open reduction and intramedullary nail fixation of her fracture. (Jt. Ex. 1, p. 13) Following surgery, claimant complained she was unable to use her right arm and had significant numbness and tingling. (Jt. Ex. 1, p. 18) She was evaluated by Alexander Y. Shin, M.D., for numbness in the hand, and it was determined that the neuropraxia would resolve over time. (Jt. Ex. 1, p. 31)

However, the neuropraxia continued even though she was regaining most of her function. On November 13, 2012, Dr. Shin recommended hand therapy. (Jt. Ex. 1, p. 35)

During the January 9, 2013, visit, she had improved use of her hand and parasthesias, but contracture of the shoulder. She agreed to a surgical manipulation of her shoulder. (Jt. Ex. 1, p. 44)

After the manipulation, an injection was performed on February 4, 2013. (Jt. Ex. 1, p. 67) When the injection provided no improvement, claimant underwent another manipulation and a second intraarticular injection. (Jt. Ex. 1, p. 73)

Her last treatment was August 7, 2013. She reported some weakness and lack of full range of motion.

Musculoskeletal: She is able to lift her arm forward flexion to about 95 degrees. Abduction to about 100 degrees. When she goes into a supine position, she can lift her arm forward flexion to about 150 degrees. She has very good strength with external rotation/internal rotation of the arm. She has no numbness in the upper extremity. She is able to fire wrist extensors, finger flexors, biceps, triceps, deltoid, intrinsic, abductors, and adductors of the hand. Her incisions are well healed. No concern for infection.

(Jt. Ex 1, p. 86)

It was recommended she continue to do home exercises as well as some physical therapy. Id. Claimant stopped attending sessions on September 27, 2013, and did not call to reschedule. (Jt. Ex. 2, p. 50) She had commented during a June 27, 2013, physical therapy session that she did not believe she could progress further but

then later reported she saw a difference with therapy. (Jt. Ex. 2, p. 46) Regardless, she had approximately the same symptoms from July through September.

Claimant underwent an independent medical evaluation (IME) with Donna J. Bahls, M.D. on September 9, 2015. (Claimant's Ex. 1, p. 1) To Dr. Bahls, claimant reported the following:

The individual reports she does not have a lot of pain if she does not over use her right arm. When she tries to use it in elevation at the shoulder she will experience a brief knifelike pain in the anterior clavicle area. This may occur one time every 3 weeks. When this occurs she notices tingling in her wrist and forearm. The pain may occur when she has at rest or with activity. Also if she tries to elevate it and use it she feels like something catches in the shoulder and then she feels less strength in her right arm. She cannot reach very far away from her body nor can she elevate her arm at the shoulder. She has learned how to use her arm to stay in her "comfort zone." She also does most activity with her left arm even though she is right-handed. She does eat with her right side and if she leans her head over she can use her arm to curl her hair. She states everything is harder than it used to be trying to use her arm. She cannot reach up into the cupboards with her right side. She vacuums with her left arm. She carries her purse on the left side. She admits she was not a very good golfer before her injury and now she cannot golf because of her right arm. She used to mow the lawn using the riding lawnmower and walk behind but she does not do this anymore. She used to help shovel the snow but she cannot now. Her husband does a lot of the cooking because she cannot safely carry pots and pans from the stove over to the sink. She does do the laundry. She states she manages her daily activities but she has had to learn how to do things in a different manner. She has noticed her neck rotation is decreased bilaterally. She does feel some pulling on the right side of her neck. She does get a headache about one time per week that is over the crown of her head. She is able to sleep but cannot sleep on her right side.

(Cl. Ex. 1, pp. 1-2) Dr. Bahls noted the following mechanical and range of motion issues upon examination:

With standing her right sternoclavicular joint was slightly more prominent than the left. Her right shoulder drops slightly lower than her right. She had a prominent red acromioclavicular joint on the right side. She had a well-healed scar on the anterior clavicle and posterior aspect of her right shoulder. She had about 50% loss of rotation of her head bilaterally. She had normal range of motion of her left shoulder. Normal strength of her left upper extremity, Right shoulder flexion 70°, abduction 60°, internal rotation 30°, external rotation 50°. She was able to abduct with her upper arm against resistance with her arm not elevated at the shoulder. She could resist biceps and triceps strength. She was able to

open and close her fist and oppose her digits. She was able to get her right hand to her mouth. Grip strength using the Jamar dynamometer in the third position on the left 15, 18, 16 kg and on the right it was not measurable. Sensation to pinprick on her hand was symmetrical to the left. Her right forearm was smaller than her left forearm but she had functional supination and pronation at the elbow and functional extension and flexion of her right wrist.

(Cl. Ex. 1, p. 4) Based on claimant's oral history along with Dr. Bahls' own examination, Dr. Bahls concluded "the brachial plexus involvement from the nail placement impacted the individual's function . . . . The records indicate the manipulation would increase her range of motion but she did not have the strength to maintain the range of motion." (Cl. Ex. 1, p. 5) Based on the loss of strength and reduced range of motion, Dr. Bahls assigned a 29 percent whole person impairment. Restrictions included claimant using her left upper extremity as her dominant side and her right upper extremity for light ADLs and functional tasks. (Cl. Ex. 1, p. 6)

Michael E. Torchia, M.D., wrote an opinion letter on May 2, 2016, wherein he said that claimant had not yet plateaued the last time he saw her.

5. You inquired "If Ms. Hager has not reached Maximum Medical Improvement for her condition, what further medical treatment do you feel is necessary to enable her to reach Maximum Medical Improvement and when do you anticipate the same?"

When I last saw Mrs. Hager on August 7, 2013, she had not yet regained enough strength to elevate the arm overhead. We discussed possible causes for the weakness and recommended further workup with an MRI and an EMG. Because she was satisfied with the comfort and function of the shoulder at that point, together we elected to proceed with observation and formulated plans to reevaluate the shoulder in three months' time. Of note, Mrs. Hager was unable to keep the appointment, which was scheduled for November 11, 2013.

(Ex. 1, p. 99)

In August, claimant had a follow-up appointment with Dr. Torchia, the office notes of which are not part of the record. She testified that Dr. Torchia anticipated claimant would be plateauing at some point and encouraged her to return to see him.

Claimant further testified that she continues to have reduced strength in her right hand along with tingling and numbness in her right upper extremity along with shooting pain. She takes aspirin every day. She has significant pain in the right shoulder from time to time. She uses both hands, but utilizes her left hand more for answering the phone, typing, opening doors, and other regular tasks throughout the day.

Because she cannot carry as much, she is not as efficient. She attributed part of the declining profitability of the bank on her decline in prospecting and the increased time it takes her to prospect because she cannot take Bertha out into the field with her or she takes along an assistant. She did admit that part of the reason she is not out prospecting is because the office is short staffed. She also testified that her branch profit had not decreased, but it also had not increased vis-à-vis other competing branches.

Her salary has not decreased, but rather it has increased. She has not been in the upper tier of an awards/incentive program within the bank since her injury but for one quarter.

During her 2012 performance review, claimant received an exceptional rating, which was the highest an employee could achieve. (Jt. Ex. 8) The following year, her rating fell in nearly every category from exceptional to solid performance. (Jt. Ex. 8, pp. 6-8)

Cynthia Rindels testified on behalf of the claimant that she assists the claimant and that there has been some reduction in new business development due to inefficiencies brought about by claimant's injury but also because of the insufficient staffing levels. She observed claimant having difficult sorting papers and lifting chairs and trays in the office.

On November 5, 2015, defendants voluntarily paid a five percent industrial disability benefit. (Cl. Ex. 6, p. 1)

#### CONCLUSIONS OF LAW

Defendants' argument is that because claimant has had no loss of income and no specific physical restrictions which prevent her from returning to the same job she was performing prior to the injury that there is no permanent disability. While claimant's treating physician, Dr. Torchia, has not assigned any permanent restrictions or any impairment rating, neither does he feel the claimant has plateaued. In other words, she is at a physical level below her preinjury base. Dr. Bahls ordered claimant to switch her dominant lifting hand from her right to her left and to use the right upper extremity only for stabilization purposes and for light activities of daily living.

On the other hand, the evidence does not support the claimant's opinions as to her impairment. Claimant's position at the bank has not changed since her injury. While she does have difficulty lifting, she is still able to drive and make sales calls. While her numbers are not down, there is some varying evidence regarding the cause. Some of the lack of gross of her branch is attributable to market conditions, not necessarily claimant's reduced efficiency. Claimant can still undertake all of the tasks of her position as branch manager, but, she maintains, the injury has slowed her down. She is not able to make as many calls in a certain period of time as she would like. Her day-to-day tasks within the bank take longer. At home, she has modified the way she cooks, grocery shops and undertakes yardwork.

She credibly testified that she has weakness in her right shoulder and that weakness prevents her from lifting significant weights. The testing shows that she has reduced range of motion due to a loss of strength in her right shoulder. With additional therapy, claimant may be able to regain that strength. It is likely what Dr. Torchia is hopeful for. She has not reached that yet, but her symptoms have remained substantially the same since 2013. Permanent benefits are appropriate when there is no reasonable expectation for improvement.

Defendants refer to claimant's deposition testimony in the third-party lawsuit as evidence that claimant's work has not been affected. During that deposition, claimant testified she was limited in her reach:

Q. Has it interfered with your work at all?

A. Well, my office job, no, but I'm limited because I can't raise it all the way up.

Q. So you're referring to range of motion meaning how far you can reach.

A. Yes.

(Def. Ex. A, p. 50) Similarly, in her deposition for this case, claimant testified:

Q. Go back to the same duties?

A. Yes.

Q. Did you take any more periods of time off work due to the work injury?

A. I'm sure for appointments and stuff I did, but I didn't take long-term, you know if that's what you're asking.

Q. Not weeks at a time?

A. Correct.

Q. When you went back to work, did your duties change in any way?

A. Well, I just don't do some of the – you know, like I don't help with the coin. You just figure out what you can do and what you can't do and then you work around that.

Q. And these are things you did personally?

A. Yes.

Q. How did you change your duties?

A. Well, I don't do – you know, I don't help with any lifting. This hand is heavy a lot. And today happens to be one of those days. So –

Q. When you say "this," the right hand?

A. Yes, and so I use it more as a support system, you know. And I've gotten pretty good at keyboarding with my left hand when this one feels, you know, heavy, like it does today. So I just – I work around a lot of stuff, you know.

Q. Did your hours change at all?

A. No.

Q. Pay change at all?

A. No.

Q. Pay has actually increased due to raises?

A. Yes.

Q. Any other ways that you think your duties have changed since the fall?

A. You know, like I said, I just use my left hand for what my right hand would do.

(Ex. B, p. 12)

Therefore it is found the claimant has sustained a loss of function in her right shoulder as a result of her work injury, entitling her to 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.

Based on claimant's age, education, work history, motivation to return to work, and her functional impairment along with the restrictions imposed by Dr. Bahls, it is determined that claimant's loss of access to the labor market is 20 percent. Claimant's past work history is primarily in financial industries that are not reliant on claimant's physical abilities, but rather her sales and marketing skills.

Whether claimant is entitled to a repayment or reimbursement of the medical expenses itemized in Exhibit 2; claimant seeks repayment for unpaid medical bills from the Mayo Clinic for medical bills for the following medical visits:

- November 28, 2012: \$244.93
- December 4, 2012: \$25.88
- December 21, 2012: \$19.52
- April 3, 2013: \$38.87

Defendants argue that claimant was not seen for any work-related injury on those dates. Claimant was seen on November 28, 2012 by David M. Brogan M.D., Dr. Torchia, Nurse Tracy Grabau, Dr. Shin and Keith A. Bengtson, M.D., at the Mayo Clinic for claimant's shoulder injury. (Jt. Ex. 1, pp. 31-37) Therefore, the November 28, 2012, bill is related to her work injury.

On December 4, 2012, claimant was seen by A. E. Kearns, M.D., Ph.D., regarding osteoporosis. (Jt. Ex. 1, pp. 38-39) The December 4, 2012, medical bill is disallowed.

On December 21, 2012, claimant was seen by Dr. Torchia and Nurse Schweitzer for matters pertaining to claimant's shoulder. The December 21, 2012, medical bill is to be reimbursed.

On April 3, 2013, claimant was seen by Dr. Torchia, Nurse Schulz, for matters pertaining to claimant's shoulder. (Jt. Ex. 1, pp. 81-82) The April 3, 2013, bill is allowed.

Finally, we turn to the issue of whether claimant is entitled to a penalty benefit award pursuant to Iowa Code section 86.13(4). This particular provision requires that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award

additional weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied. Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

(3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c)).

Defendants have the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty. Defendants voluntarily paid five percent permanent partial disability on November 6, 2015. Claimant argues that the defendants made no effort to investigate the claim and did not request an evaluation or impairment or restrictions until on or after November 4, 2015.

Claimant's last treatment was with Dr. Torchia on August 7, 2013. Iowa Code section 86.13 requires more than a reasonable or probable cause or excuse at the time the case comes to hearing. The law requires proof of a prompt investigation and that factual basis be provided to the injured worker at the time of the denial, delay, or termination of benefits.

Defendants must show that they undertook a timely investigation of claimant's shoulder injury and that the denial was based on a timely investigation and that there was contemporaneous communication to the claimant for reasons for the denial. The investigation does appear to be lacking. Claimant's care ended in August of 2013. The medical records make it clear that claimant's injury was related to her work. Even if she had only minimal injury, the records show lingering pain and discomfort. Actual denial did not occur for two years. Therefore, due to the failure of defendants to make any attempt to provide evidence of compliance with Iowa Code section 86.13, a 20 percent penalty shall be assessed of the permanent benefits owed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of nine hundred sixty and 66/100 dollars (\$960.66) per week from November 29, 2012.

That defendants shall pay penalty benefits in the amount of twenty (20) percent of the permanent partial disability benefits owed at the time of the order.

That defendants shall pay medical expenses for the following medical visits:

- November 28, 2012: two hundred forty-four and 93/100 dollars (\$244.93).
- December 21, 2012: nineteen and 52/100 dollars (\$19.52).
- April 3, 2013: thirty-eight and 87/100 dollars (\$38.87).

That defendants shall pay accrued weekly benefits in a lump sum.

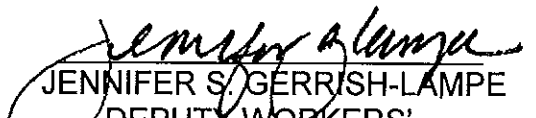
That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 28th day of November, 2016.

  
JENNIFER S. GERRISH-LAMPE  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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JGL/srs

**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.