

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAMELA OSTWINKLE,

Claimant,

vs.

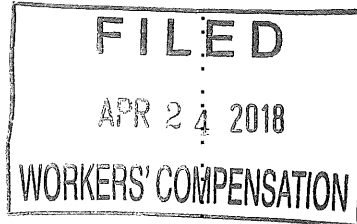
EDGEWOOD-COLESBURG
COMMUNITY SCHOOL DISTRICT,

Employer,

and

EMPLOYERS MUTUAL CASUALTY
COMPANY,

Insurance Carrier,
Defendants.



File No. 5058106

ARBITRATION
DECISION

Head Note Nos.: 1803; 3003

STATEMENT OF THE CASE

Claimant, Pamela Ostwinkle, filed a petition in arbitration seeking workers' compensation benefits from Edgwood-Colesburg Community School District, (EC), employer, and Employers Mutual Casualty Company, insurer, both as defendants. This matter was heard on December 13, 2017, with a final submission date of January 17, 2018.

The record in this case consists of Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 7, Defendants Exhibit A through J, and the testimony of claimant.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

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

2. Rate.

FINDINGS OF FACT

Claimant was 55 years old at the time of the hearing. Claimant graduated from high school. Claimant has a Bachelor's degree in English and Education. Claimant has a special endorsement in teaching children with disabilities. Claimant began a Master's program in 2015.

Claimant has worked as a florist. Claimant taught piano lessons both part time and full time. Claimant has done freelance writing and has published three books.

In 2011 or 2012 claimant began working as a substitute teacher for EC. In August 2012, claimant was hired as a full time special education teacher. As a special education teacher, claimant provides general education, and life and job skills to students with moderate to severe learning disabilities. (Def. Ex. I, p. 33)

Claimant's prior medical history is relevant. In 1985, claimant had a lower back injury while working as a florist. Claimant was assessed as having a bulging disc at the L4-5 levels with a right foot drop. Claimant underwent conservative care for her injury. Claimant testified she left the florist position as she felt physically unable to do the work. (Def. Ex. I, pp. 30-31; Tr. pp. 11, 46)

In July 1990, claimant was assessed as having anxiety and depression. Claimant was treated with medications for those disorders. (Jt. Ex. 5, p. 20)

In 1996, claimant was treated for and was assessed as having depression. Claimant was treated with medication. (Jt. Ex. 5, p. 21)

In 1996, 2011, and 2014, claimant was assessed as having a depressive disorder and treated with medication. (Jt. Ex. 5, pp. 21-25)

On November 6, 2015, claimant was accompanying special education students on a field trip. Claimant was on a school bus supervising. One of the students on the trip required a Rifton chair. Claimant testified a Rifton chair is a special chair for people with disabilities.

Claimant said she put the Rifton chair at the rear of the bus by the emergency door. Claimant said when the bus returned to school, she got out to get the Rifton chair from the back of the bus. Claimant said a student pushed open the emergency door. She said the day was windy. Claimant said the emergency door was pushed open by the wind. At the same time, a student pushed the Rifton chair out of the back of the bus. Claimant was struck from behind by the bus door as the Rifton chair fell on top of her.

On the same date, claimant was taken to the Regional Medical Center emergency room. Claimant indicated the bus door struck the right side of her head. Claimant indicated she did not lose consciousness. Claimant complained of headaches, neck pain, nausea, and sensitivity to light. A CT scan of claimant's head was normal. A CT scan of claimant's neck showed a reversal of a cervical lordosis, possibly due to muscle spasms, and multi-level degenerative disc disease. Claimant was assessed as having a head injury, contusions on the scalp, and neck pain. (Jt. Ex. 3, pp. 9-14)

Claimant testified at hearing she believes she was briefly unconscious following the accident. (Tr. p. 18)

On November 18, 2015, claimant was evaluated at the Manchester Regional Health Center. Claimant had been doing well, but began having pain in the left shoulder and arm. (Jt. Ex. 2, pp. 6-8)

While waiting at the clinic, claimant's condition worsened and claimant was taken to the emergency room. Claimant complained of severe neck pain radiating to the left arm. She was assessed as having neck pain with possible neuralgia. Claimant was treated with medication. (Cl. Ex. 2, pp. 8-9)

Claimant was treated by Nikolas May, M.D., on November 24, 2015 for neck pain. She was assessed as having cervical radiculopathy and a cervical strain. Claimant was treated with medication. (Jt. Ex. 2, pp. 8-9)

Claimant returned to Dr. May on December 9, 2015. Claimant had complaints of neck pain radiating to the left arm and hand. An MRI and physical therapy were recommended. (Cl. Ex. 2, p. 9)

Claimant underwent an MRI on December 12, 2015. It showed a large right herniated nucleus pulposus at the C6-7 levels and stenosis at C6-7. (Cl. Ex. 2, p. 9)

On December 21, 2015, claimant underwent an epidural steroid injection (ESI) at C6-7 level. Claimant indicated a 75 percent improvement in neck pain following the injection. (Cl. Ex. 2, pp. 9-10)

On January 4, 2016, claimant had a second ESI, this time at the C7-T1 levels. (Cl. Ex. 2, p. 10) Claimant had a third ESI at the C6-7 levels on February 23, 2016. (Cl. Ex. 2, p. 10)

Claimant returned to Dr. May on March 9, 2016 with complaints of neck pain radiating into the left arm. Claimant was referred to physical therapy and recommended to see a neurosurgeon. (Cl. Ex. 2, p. 11)

Claimant saw Dr. May on April 1, 2016 in regards to depression. Claimant indicated she was feeling depressed since the injury. Dr. May increased her medication dosage. (Jt. Ex. 5, p. 30)

On April 8, 2016, claimant was evaluated by Chad Abernathey, M.D., a neurosurgeon. Claimant was assessed as having neck and left arm pain consistent with degenerative changes and a disc protrusion at C5-C7 levels. Surgery was recommended and chosen as a treatment option. (Jt. Ex. 1, p. 1)

On April 28, 2016, claimant underwent a C5-6 and C6-7 discectomy and fusion. Surgery was performed by Dr. Abernathey. (Jt. Ex. 1, p. 4)

Claimant saw Dr. Abernathey in follow up between May and June 2016. (Jt. Ex. 1, p. 2) Records from June 29, 2016 indicate claimant was pleased with the results from surgery. Claimant was released to return to her regular work duties. Claimant was released from care. (Jt. Ex. 1, p. 2)

On July 2, 2016, claimant was cleaning her cupboards at home. Claimant attempted to step from a chair to the counter when she heard a pop in her left knee and felt immediate pain. Claimant began physical therapy for the left knee pain in August 2016. Claimant was released from physical therapy for the knee pain by the end of the month. (Jt. Ex. 4, pp. 17-19)

On October 28, 2016, Dr. Abernathey opined claimant had a 9 percent permanent impairment to the body as a whole based on her injury and her subsequent surgery. (Jt. Ex. 1, p. 2)

Claimant returned to Dr. Abernathey in November and December 2016. Claimant had left arm pain and numbness while directing the school play. Claimant was dissuaded from having aggressive neurosurgical treatment. An ESI was discussed as a treatment option. (Jt. Ex. 1, p. 3)

Claimant returned to Dr. May on December 14, 2016 with indications of worsening depression. Claimant had life stressors that included: illness of a brother and sister, and other family issues. Counseling was discussed as a treatment option. Claimant had an increase in dosage of her medication. (Jt. Ex. 5, p. 33)

On December 19, 2016, claimant had an ESI of the C7-T1 levels. (Cl. Ex. 2, p. 13)

In an August 17, 2017 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an independent medical evaluation (IME). Claimant indicated continued pain and numbness in the left hand and forearm. Claimant had loss of strength in her left upper extremity. Claimant was assessed as having a cervical disc herniation at the C5-C7 levels and a C5-C7 fusion. Claimant was also assessed as having head trauma. Dr. Sassman found claimant at maximum medical improvement (MMI) as of April 28, 2017. Based upon the AMA Guides to the Evaluation of

Permanent Impairment, Fifth Edition, Dr. Sassman found that claimant had a 30 percent permanent impairment to the body as a whole. She limited claimant to no lifting, pushing, pulling, or carrying over 20 pounds occasionally from floor to waist. Claimant was also limited to rarely lifting 10 pounds above shoulder level. (Cl. Ex. 2, pp. 7-17)

In an October 11, 2017 letter, Dr. Abernathey indicated claimant did not require permanent restrictions. He opined he had a better ability to assess claimant's functional ability because he had managed claimant's care. He reiterated claimant had a 9 percent permanent impairment to the body as a whole. (Ex. A, p. 1)

Claimant testified she has neck pain and limited range of motion in the neck. She said she has numbness in the fingers of her left hand and poor grip strength on the left.

Claimant said she has pain and physical problems that limit her ability to teach. Claimant says she lacks endurance at work. Claimant said she relies on teacher's aides to help her teach classes.

Claimant said that because of pain and numbness, she has difficulty sleeping. Claimant has difficulty typing. Claimant can no longer play the piano. Claimant said she is limited in doing housework and driving.

Claimant testified that in the 2015-2016 school year she earned \$36,084.00 per year. She said from the 2017-2018 school year, she earned \$38,572.97. (Def. Ex. B, p. 5; Ex. F, pp. 13-14)

Records indicate that after surgery, claimant returned to work as a teacher with no restrictions. Claimant testifies she continues to work with no restrictions. (Ex. B, p. 5)

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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 53 years old at the time of the hearing. Claimant graduated from high school. She has a Bachelor's degree in English and Education.

Claimant has worked as a florist. She has taught piano lessons. Claimant has published three books. Since August 2012, she has worked as a full time, special education teacher.

Two experts have opined regarding claimant's permanent impairment. Dr. Abernathey treated claimant for an extended period of time and performed surgery on claimant. He found claimant had a 9 percent permanent impairment to the body as a whole. (Jt. Ex. 1, p. 2; Ex. A, p. 1)

Dr. Sassman evaluated claimant once for an IME. She found claimant had a 30 percent permanent impairment to the body as a whole. (Cl. Ex. 2, p. 17)

Dr. Sassman's calculations regarding claimant's permanent impairment are detailed. I am able to follow and understand her analysis for her rating of claimant's permanent impairment. Dr. Sassman's calculations for finding permanent impairment are based on the Guides. I am able to use and able to understand the calculations with the use of the Guides.

It is unclear how Dr. Abernathey arrived at his figure for the 9 percent permanent impairment. There is no rationale given for the rating. There is no reference to any testing, treatise, or exam to help understand his opinion of permanent impairment.

Given this record, it is found Dr. Sassman's opinion regarding claimant's permanent impairment are more convincing than those of Dr. Abernathey. It is found that claimant has a 30 percent permanent impairment to the body as a whole.

Dr. Sassman gave claimant permanent restrictions regarding lifting, pushing, pulling, and working above shoulder level. The record indicates that at the time of hearing, claimant was working at her job with no restrictions.

Claimant earned \$36,084.00 for the 2015-2016 school year. She earned \$38,572.97 for the 2017-2018 school year.

Claimant had a multi-level cervical fusion. The record indicates claimant worked with medium to severely disabled children in her job as a teacher. The record suggests claimant's job is more physical than the job of an average school teacher. Claimant's un rebutted testimony is that she is physically weaker in her left upper extremity and has lost range of motion in her neck. Claimant's un rebutted testimony is that she is physically less able to deal with students after her injury.

In brief, claimant has a physically demanding job for a teacher. Her injury and subsequent surgery make her less physically able to work at her job as a teacher.

When all relevant factors are considered, it is found claimant had a 40 percent loss of earning capacity or industrial disability.

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

In Area Educ. Agency 7 v. Bauch, 646 N.W.2d 398 (Iowa 2002) where an educator is paid monthly, the compensation rate is to be calculated pursuant to Iowa Code section 85.36(4). Application of this Code section first requires calculation of gross monthly earnings as set forth in Iowa Code section 85.61(3) and then taking into account the educator's earned compensation deferred into the non-school year months. See also Hanigan-Kinney v Council Bluffs Community School District and United Heartland, File No 5030328 (App. October 10, 2011).

A review of the record indicates that defendants have calculated claimant's rate pursuant to the law in Bauch and Hanigan-Kinney and other cases. Given this record, it is found defendants calculation for rate is more accurate than that of claimant. Claimant's average weekly wage is \$900.22 per week. Claimant was married with six exemptions. Claimant's rate is \$610.79 per week.

I appreciate claimant's position regarding the issue of rate. However, the formula for calculating a teacher's average weekly wage, found in Bauch, has been applied to a number of agency proceedings. I do not have the authority to change agency precedent, found in Hanigan-Kinney, and applied by the Iowa Supreme Court in Bauch.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits at the rate of six hundred ten and 79/100 dollars (\$610.79) per week commencing on July 1, 2016.

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

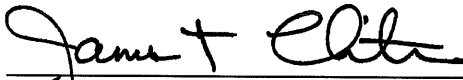
That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive credit for benefits previously paid.

That defendants shall pay costs.

That defendants shall file subsequent report of injury as required by this agency under rule 876 IAC 3.1(2)

Signed and filed this 24th day of April, 2018.



JAMES F. CHRISTENSON
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.