

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SANDRA EMRY,

Claimant,

vs.

WALMART, INC.,

Employer,

and

AIU INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 20012160.01

ARBITRATION DECISION

Head Notes: 1803, 3003

STATEMENT OF THE CASE

Claimant, Sandra Emry, filed a petition in arbitration seeking workers' compensation benefits from Walmart, Inc., employer, and AIU Insurance Company, insurer, both as defendants. This matter was heard on August 12, 2022, with a final submission date of August 19, 2022.

The record in this case consists of Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 3, Defendants' Exhibits A through D, 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 59 years old at the time of hearing. Claimant is employed with Walmart. Claimant has been employed at Walmart for approximately 31 years. At the

time of hearing claimant worked as a department manager for the bakery. (Claimant's Exhibits 1, page 1)

On October 9, 2020, claimant tripped on the edge of a cart. Claimant fell and landed on her left hand. Claimant said she immediately felt pain and saw a deformity in her left wrist. (Ex. 1, p. 1)

Claimant was taken to the Pella Regional Emergency Center on October 9, 2020. X-rays showed a left distal radial fracture with a dorsal displacement and angulation, and a distal ulnar fracture. (Joint Exhibit 1, pages 1-4) Claimant was put in a wrist splint and was instructed to follow-up with an orthopedic hand surgeon. (JE 1, p. 5)

On October 16, 2020, claimant underwent surgery consisting of open reduction and internal fixation of the left distal radial fracture. Surgery was performed by Ze-Hui Han, M.D. (JE 3, pp. 37-39)

Claimant underwent follow-up care with Dr. Han from November 11, 2020, through December 23, 2020. (JE 2, pp. 18-27) On December 23, 2020, claimant was released to return to work with no restrictions. (JE 2, p. 28)

On February 17, 2021, claimant was released from care with Dr. Han and found to be at maximum medical improvement (MMI). (JE 2, pp. 33-35)

In a March 14, 2021, letter, written by defendant employer, Dr. Han opined that claimant had a 2 percent permanent impairment to the left upper extremity based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 2, p. 36)

In a January 31, 2022, report, John Kuhnlein, D.O., gave his opinion of claimant's condition following an independent medical evaluation (IME). Dr. Kuhnlein compared claimant's left wrist to the right wrist and found that claimant had a 6 percent permanent impairment to the left upper extremity due to a deficit of range of motion. Dr. Kuhnlein also found that claimant had a 6 percent permanent impairment to the left upper extremity using Tables 16-28 and 16-31 of the Guides. This converted to a 4 percent permanent impairment to the body as a whole. (Ex. 1, pp. 2-3)

Dr. Kuhnlein limited claimant to occasionally lifting 40 pounds floor to waist and 50 pounds to and above shoulder height. (Ex. 1, p. 3)

Claimant testified she has returned to work at Walmart. She said she still has a plate in her wrist. She said she has pain, loss of strength and loss of range of motion in the left wrist. Claimant said Dr. Kuhnlein's restrictions are consistent with the way she restricts herself. Claimant testified Dr. Kuhnlein's exam of her wrist was quite thorough. She said that surgery improved the condition in her wrist, but her wrist did not return to normal.

Claimant testified her work week at Walmart begins on a Saturday. She said her accident happened on a Friday. As such, claimant's injury occurred on the last day of a pay period.

Claimant testified that prior to her injury she worked overtime. She said that since the injury, she has worked some overtime.

At the time of injury, claimant earned \$22.86 per hour. As noted, claimant was injured on October 9, 2020. The week claimant was injured (October 3, 2020, through October 9, 2020), claimant worked 46.73 hours and earned \$1,068.25. (Ex. 2, p. 5)

The 13 weeks prior to claimant's injury, claimant earned the following wages:

Week	Period Ending	Total Hours	Hourly Wage	Gross Wages	Other Earnings	Total
1	10/2/2020	43.20	\$22.86	\$987.55	\$188.51	\$1,176.06
2	9/25/2020	44.25	\$22.86	\$1,011.56	\$0.00	\$1,011.56
3	9/18/2020	46.53	\$22.86	\$1,063.68	\$11.25	\$1,074.93
4	9/11/2020	47.02	\$22.86	\$1,074.88	\$0.00	\$1,074.88
5	9/4/2020	45.35	\$22.86	\$1,036.70	\$11.25	\$1,047.95
6	8/28/2020	39.72	\$22.86	\$908.00	\$0.00	\$908.00
7	8/21/2020	41.27	\$22.86	\$943.43	\$1,245.83	\$2,189.26
8	8/14/2020	38.37	\$22.86	\$877.14	\$0.00	\$877.14
9	8/7/2020	44.78	\$22.86	\$1,023.67	\$311.25	\$1,334.92
10	7/31/2020	42.02	\$22.86	\$960.58	\$0.00	\$960.58
11	7/24/2020	40.22	\$22.86	\$919.43	\$11.25	\$930.68
12	7/17/2020	46.64	\$22.86	\$1,066.19	\$0.00	\$1,066.19
13	7/10/2020	44.17	\$22.86	\$1,009.73	\$11.25	\$1,020.98

(Ex. 2, p. 5; Defendants' Exhibit B, page 3)

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. 6.904(3).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Two experts have opined regarding the permanent impairment to claimant's left upper extremity. Dr. Han performed surgery on claimant's wrist and saw claimant approximately six times for care. He opined that claimant had a 2 percent permanent impairment to the left upper extremity. (JE 2, p. 36)

Dr. Kuhnlein saw claimant once for an IME. (Ex. 1) Dr. Kuhnlein found that claimant had a 6 percent permanent impairment to the left upper extremity. Dr. Kuhnlein's report is more detailed than that of Dr. Han. Dr. Han's opinion regarding permanent impairment is a "fill in the blank" report supplied by defendant employer. Dr. Kuhnlein compared the range of motion of claimant's left wrist to the right wrist to reach, in part, his opinions on permanent impairment. I understand and track Dr. Kuhnlein's rationale for his opinions of impairment better than Dr. Han's report. Given this record, it is found that Dr. Kuhnlein's opinion regarding permanent impairment is more convincing than that of Dr. Han. It is found that claimant has a 6 percent permanent impairment to the left upper extremity. Claimant is due 15 weeks of permanent partial disability benefits (6 percent x 250 weeks).

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 the employee was 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.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Claimant's injury occurred on a Friday. Claimant's pay period began the prior Saturday. The parties appear to agree that claimant's injury occurred on the last day of a weekly pay period. Claimant contends the week in which claimant was injured should be included in the computation of claimant's weekly rate, as it, allegedly, fairly represents claimant's earnings. (Claimant's Post-Hearing Brief, page 1) Defendants contend that the week in which claimant was injured should be excluded from the computation as it is not a week "preceding" the injury. (Defendants' Post-Hearing Brief, pages 3-5)

Iowa Code section 85.36(6) reads in relevant part:

6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately **preceding** the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks **preceding** the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary

earnings shall be replaced by the closest **previous** week with earnings that fairly represent the employee's customary earnings. (Emphasis added)

In Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008), the Iowa Supreme Court noted that when confronted with the task of determining the meaning of a statute, that:

The goal of statutory construction is to determine legislative intent. We determine legislative intent from the words chosen by the legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute.

Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004) (citations omitted).

The word “preceding” is defined as being immediately before in time or place. (Merriam-Webster, <https://www.merriam-webster.com/dictionary/preceding> (last viewed October 26, 2022)).

Agency caselaw indicates that an average weekly wage is determined by calculating the average 13 weeks preceding an injury. If one of the 13 weeks preceding the injury is not fairly representative of claimant’s average weekly wages, that week is excluded, and another week, which fairly represents claimant’s average weekly wage preceding the date of injury, is used. (Arnold v. Dick’s Sporting Goods, File No. 5059581 (App. Dec. Feb. 12, 2020); Rundell v. Johnson County Refuse, File No. 5067416 (Arb. Dec. May 27, 2020); Butler v. City of Waterloo, File Nos. 5054780, et al. (Arb. Dec. March 8, 2019); Kessler v. Watertown Paint and Repair, File No. 872798 (Arb. Dec. May 6, 1991); Cabrera v. Civco Holding, Inc., File Nos. 5036167, et al. (Arb. Dec. Jan. 9, 2013))

Iowa Code section 85.36(6) indicates the weeks to be used in calculating a claimant’s average weekly wage are those weeks “preceding,” not including, the week of the injury. Using the ordinary and common usage of the word “preceding” indicates that the legislature intended claimant’s rate to be determined by the week before the injury, not including the week of injury. This interpretation is supported by agency caselaw.

Based on the above, the wages used for the 13 weeks preceding claimant’s injury are the wages to be utilized to calculate claimant’s average weekly wage. In the 13 weeks preceding the date of injury in this case, claimant earned \$14,673.11. Her average weekly wage was \$1,128.70 (\$14,673.11 divided by 13). Claimant was single with one exemption. Her rate is \$687.30.

ORDER

THEREFORE IT IS ORDERED,

That defendants shall pay claimant fifteen (15) weeks of permanent partial disability benefits at the rate of six hundred eighty-seven and 30/100 dollars (\$687.30) per week commencing on February 17, 2021.

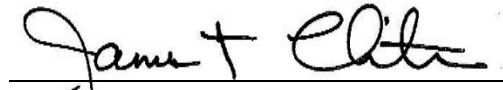
That defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendants shall be given credit for overpayment and for benefits previously paid.

That defendants shall pay costs.

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

Signed and filed this 27th day of October, 2022.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

David Lawyer (via WCES)

Alison Stewart (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.