BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN HILL, Claimant, vs. VERMEER CORPORATION, Self-Insured Employer, Defendant.	File No. 5066032 A P P E A L D E C I S I O N Head Note Nos.: 1402.40, 1803

Defendant Vermeer Corporation, self-insured employer, appeals from an arbitration decision filed on September 27, 2018. Claimant John Hill responds to the appeal. The case was heard on July 31, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 31, 2018.

On January 16, 2020, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

In the arbitration decision, the deputy commissioner found claimant sustained permanent impairment as a result of the stipulated work injury. In making this finding, the deputy commissioner found that claimant's condition was causally related to the stipulated injury as opposed to any actions taken by claimant subsequent to his placement at maximum medical improvement. As such, the deputy commissioner ordered the defendant to pay all causally related medical bills. The deputy commissioner found claimant sustained eight percent impairment to the left upper extremity as a result of the work injury. The deputy commissioner ordered defendant to pay penalty benefits. Lastly, the deputy commissioner ordered defendant to pay a pro-rated portion of Robin Sassman, M.D.'s independent medical examination.

On appeal, defendant asserts the deputy commissioner erred in finding claimant demonstrated a causal connection between his work injury and his current condition. Defendant further asserts the deputy commissioner erred in finding claimant sustained permanent impairment as a result of the stipulated work injury. Lastly, the defendant asserts the deputy commissioner erred in assigning penalty benefits.

Claimant asserts the arbitration decision should be affirmed in its entirety. Claimant further asserts the deputy commissioner erred in not awarding additional

penalty benefits for defendant's failure to investigate the extent of permanent disability and associated refusal to pay PPD benefits.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on September 27, 2018, that relate to issues properly raised on intra-agency appeal are affirmed in part, and modified in part.

I affirm the deputy commissioner's finding claimant met his burden of proving he sustained permanent disability as a result of the work-related injury. Likewise, I affirm the deputy commissioner's finding claimant met his burden of proving the work-related injury is the proximate cause of his disability and need for medical treatment without additional comment.

I affirm the deputy commissioner's award of penalty benefits based on defendant's failure to communicate the basis of its denial to claimant at or about the time of the denial without additional comment.

I modify the deputy commissioner's finding that claimant sustained permanent scheduled member functional disability of eight percent of the left upper extremity based on the impairment rating of Dr. Sassman. Based solely on Dr. Sassman's impairment ratings for loss of flexion and supination range of motion, I find claimant sustained permanent scheduled member functional disability of two percent of the left upper extremity, which entitles claimant to five weeks of PPD benefits. I provide the following additional analysis for my decision:

Dr. Sassman evaluated claimant on May 21, 2018, for purposes of an independent medical examination. (Exhibit 1, page 1). Dr. Sassman, after evaluating claimant and reviewing his medical records, concluded claimant sustained eight percent impairment of the left upper extremity as a result of the October 10, 2016, work injury. (Ex. 1, p. 16).

Dr. Sassman's eight percent cumulative impairment rating included a six percent impairment rating for loss of flexion strength. (Id.). However, no physician, including Dr. Sassman, documented a loss of flexion strength on examination. On January 24, 2017, Steven Aviles, M.D.'s medical record provides, "Strength Description – Upper extremity strength is normal: Bilateral." (Joint Exhibit 2, p. 14). On December 11, 2017, Wesley Smidt, M.D.'s medical record provides, "Exam shows he has full elbow range of motion [...] There is normal strength." (JE5, p. 2). During the IME examination, Dr. Sassman tested claimant's left upper extremity and concluded claimant's elbow strength was 5/5 in flexion, extension, pronation, and supination. (Ex. 1, p. 14).

The deputy commissioner accepted Dr. Sassman's eight percent cumulative impairment rating. In the arbitration decision, the deputy commissioner provided,

> Vermeer and EMC challenge Dr. Sassman's assessment of six percent for loss of flexion strength [...] [D]uring her examination, Dr. Sassman noted elbow range of motion for flexion was 150 degrees for the right and 135 degrees for the left, supporting her impairment rating of six percent for loss of flexion in the left upper extremity. (Ex. 1, p. 14) Defendants' claim lacks merit. Dr. Sassman documented her flexion findings from her examination in the report.
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> (Arbitration Decision, page 7).

After analyzing Dr. Sassman's report, as well as the evidentiary record as a whole, I do not reach the same conclusion as the deputy commissioner. Dr. Sassman's report does not indicate claimant sustained any loss of strength in the left elbow. The 135 degrees of flexion referenced by the deputy commissioner describes a loss in claimant's left elbow range of motion, not a loss in strength. This deficit is accounted for in the one percent impairment rating assigned to the left upper extremity for loss of flexion range of motion. (Ex. 1, p. 16; See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Figure 16-34, page 472). As will be discussed in detail below, this loss in claimant's range of motion does not directly translate to an impairment rating for loss of strength.

Dr. Sassman's impairment rating for loss of flexion strength is not supported with significant analysis. Unlike with the 1 percent impairment rating for loss of range of motion, Dr. Sassman's impairment rating for loss of strength is not supported by her findings on examination. (See Ex. 1, p. 14). Dr. Sassman's report merely provides,

> Turning to Table 16-35 on page 510, [claimant] can be assigned 6% impairment [of] the upper extremity for loss of flexion strength.
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> (Ex. 1, p. 16).

Chapter 16 of the AMA Guides provides criteria for evaluating permanent impairment of the upper extremities. Table 16-35 is titled, "Impairment of the Upper Extremity Due to Strength Deficit from Musculoskeletal Disorders Based on Manual Muscle Testing of Individual Units of Motion of the Shoulder and Elbow." According to Section 16.8c of the AMA Guides, Fifth Edition, manual muscle testing assesses an individual's ability to move a joint through a full range of motion against gravity, or move it against additional resistance applied by an examiner, and/or hold the joint position against resistance. Manual muscle testing requires more than a simple range of motion examination.

Section 16.8c on page 510 provides the severity of strength deficits in Table 16-35 are classified and rated on the same principles used in Table 16-11. When measuring the strength of individual muscle groups, muscle strength is rated on a scale from 0 to 5. AMA Guides, Fifth Edition, § 16.5, page 484. The numeric grades are sometimes referred to as 5, normal (0% strength deficit); 4,

good (1-25%); 3, fair (26-50%); 2, poor (51-75%); 1, trace (76-99%); and 0, no muscle contraction (100%). According to Section 16.8c, most weaknesses usually fall in the grade 4 category. Few injuries result in more profound weakness, such as a grade 3 category. A grade 3 classification means the individual exhibits normal range of motion without an examiner applying resistance. In contrast, some resistance is applied in a grade 4 classification, and full resistance is applied in a grade 5 classification. AMA Guides, Fifth Edition, Table 16-11, page 484.

Table 16-35 only includes impairment ratings for strength deficits in grades 4 and 3. This is because a grade 5 classification means zero percent strength deficit. According to Table 16-35, claimant's six percent impairment rating for loss of flexion strength reflects a strength deficit of 30 to 50 percent, or a "profound weakness." AMA Guides, Fifth Edition, § 16.8, page 510. Such a classification does not align with the strength assessment detailed in Dr. Sassman's report wherein claimant demonstrated 5/5 strength in left elbow flexion, extension, pronation, and supination. (Ex. 1, p. 14). Dr. Sassman's report offers no explanation for the apparent discrepancy between said strength findings and her ultimate conclusion claimant sustained six percent impairment for loss of strength. I find that Dr. Sassman's impairment rating with respect to claimant's loss of strength is not consistent with the directives of the AMA Guides, Fifth Edition.

Further, the AMA Guides caution physicians against assigning impairment for loss of strength. Section 16.8 on page 507 provides the AMA Guides do not assign a large role to strength measurements due to the fact strength measurements are functional tests influenced by subjective factors that are difficult to control. Review of Section 16.8a of the AMA Guides to the Evaluation of Permanent Impairment Fifth Edition, page 508, indicates:

> In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength *could be combined* with the other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.* Decreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (eg, thumb amputation) that prevent effective application of maximal force in the region being evaluated.
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> (Emphasis in original document).

In this situation Dr. Sassman clearly rates both loss of flexion range of motion and loss of flexion strength in the left elbow. Dr. Sassman did not explain why she considered claimant's situation to be one of the rare cases in which loss of strength is not adequately considered by range of motion testing. Dr. Sassman does not provide claimant's loss of strength is due to an unrelated etiological or pathomechanical cause, and her assessment of six percent impairment for loss of strength contradicts her finding of 5/5 strength in claimant's flexion, extension, pronation, and supination. (Ex. 1, p. 14). Moreover, the Guides provide decreased strength cannot be rated in the presence of decreased motion or painful conditions. AMA Guides, Fifth Edition, § 16.8a, page 508. On examination with Dr. Sassman, claimant exhibited a loss of range of motion and described ongoing pain in the left elbow. Thus, proper application of the Guides would preclude use of strength as the methodology for impairment.

Lastly, Section 16.8c provides results of strength testing should be reproducible on different occasions or by two or more trained observers. There is no indication Dr. Sassman tested claimant's strength on different occasions. In fact, as previously noted, claimant's medical records reflect he exhibited normal strength at prior examinations. (See JE2, p. 14; JE5, p. 2).

Given the discrepancies between Dr. Sassman's rating and the AMA Guides instructions, as well as the discrepancies between Dr. Sassman's examination findings and her ultimate opinion, I cannot accept Dr. Sassman's six percent impairment rating for loss of strength.

While I acknowledge such a finding seemingly diminishes the credibility of Dr. Sassman's report as a whole, the decision to reject Dr. Sassman's six percent impairment rating ultimately does not change my finding that claimant sustained permanent impairment as a result of the October 10, 2016, work injury. Dr. Sassman is the only physician to provide an impairment rating in this case. Her analysis of claimant's loss of range of motion is supported by objective measurements. In this regard, her two percent impairment rating for loss of range of motion is persuasive and consistent with claimant's testimony. I therefore respectfully modify the deputy commissioner's finding regarding the extent of claimant's permanent disability. Based on the above analysis, I conclude claimant sustained two percent permanent functional loss of the left upper extremity as a result of the October 10, 2016, work injury. This entitles claimant to five weeks of permanent partial disability benefits.

Lastly, claimant challenges the extent of the deputy commissioner's award for penalty benefits. Both parties seemingly agree that the deputy commissioner only awarded penalty benefits for defendant's failure to communicate its basis for denial to claimant. (Appellant Brief, p. 10; Appellee Brief, p. 6). Claimant urges the undersigned to modify the arbitration decision to include additional penalty benefits for defendant's failure to seek an impairment rating following claimant's placement at MMI by Dr. Aviles.

It is unclear from the arbitration decision whether penalty benefits were awarded for both offenses or only defendant's failure to communicate its basis for denial. Given this uncertainty, I modify the arbitration decision to definitively award penalty benefits for defendant's failure to communicate the basis for its denial, only. I decline to award additional penalty benefits for defendant's alleged failure to investigate whether claimant had sustained any permanent functional impairment.

On February 14, 2017, Dr. Hill opined claimant was at maximum medical improvement. He did not assign permanent impairment, but he did release claimant to return to work with no restrictions and to perform activities as tolerated. (JE2, pp. 19-20, 22). This agency has previously held that a release to full-duty work coupled with the failure to expressly opine as to impairment produces an inference that the employer-retained physician did not believe the claimant had permanent impairment related to the injury. Countryman v. Des Moines Metro Transit, File No. 5009718 (Appeal Decision, March 16, 2006). This is a close call given a defendant's ongoing duty to investigate; however, in this instance, the aforementioned inference protects defendant from additional penalty.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 27, 2018, is affirmed in part, and modified in part.

Defendant shall pay claimant five (5) weeks of permanent partial disability benefits, at the rate of four hundred seventy-three and 92/100 dollars ($473.92) per week, commencing on February 14, 2017.

Defendant shall take credit for all benefits previously paid.

Defendant is responsible for all causally related medical expenses as set forth in the arbitration decision.

Defendant shall pay claimant five hundred and 00/100 dollars ($500.00) in penalty benefits.

Defendant shall pay the costs of: nine hundred three and 75/100 dollars ($903.75) for Dr. Sassman's independent medical examination, one thousand three hundred forty-four and 53/100 dollars ($1,344.53) for Dr. Sassman's report, one hundred and 00/100 dollars ($100.00) for the filing fee, and six and 77/100 dollars ($6.77) for service.

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

The parties shall split the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 30th day of January, 2020.

MICHAEL J. LUNN
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Joseph S. Powell Via WCES

William D. Scherle Via WCES