BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZAJIM BAJRAMOVIC, Claimant, vs. JOHNSTON COMMUNITY SCHOOL DISTRICT, Employer, Self-Insured, Defendant.	:	File No. 5063121 APPEAL DECISION Head Note Nos: 1100; 1803; 1803.1; 1700

FILED
JUN 26 2019
WORKERS' COMPENSATION

Claimant Zajim Bajramovic appeals from an arbitration decision filed on January 29, 2018. Defendant Johnston Community School District, self-insured employer, responds to the appeal. The case was heard on November 3, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 8, 2017.

The deputy commissioner found claimant failed to carry his burden of proof that the disability resulting from the stipulated work injury which arose out of and in the course of claimant's employment with defendant on May 14, 2014, extended beyond claimant's right upper extremity into his shoulder and cervical spine. The deputy commissioner found claimant sustained functional scheduled member permanent disability of five percent of the right upper extremity as a result of the work injury, which entitled claimant to receive 12.5 weeks of permanent partial disability (PPD) benefits commencing on November 11, 2015.

On appeal, claimant asserts the deputy commissioner abused her discretion by affording claimant's testimony low weight as a result of his credibility. Claimant asserts the deputy commissioner erred in finding claimant failed to carry his burden of proof that the disability resulting from the work injury extends into the body as a whole. Further, claimant asserts the deputy commissioner erred by failing to award substantial industrial disability. Lastly, claimant asserts the deputy commissioner erred by awarding defendant credit against the award of permanent partial disability benefits for long-term disability benefits paid to claimant.

Defendant asserts on appeal that the arbitration decisions should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.15 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on January 29, 2018, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that the disability resulting from the stipulated May 14, 2014, work injury extends beyond claimant's right upper extremity into his shoulder and cervical spine. Because claimant's injury is to the scheduled member only, it is unnecessary to address the issue of industrial disability. I affirm and adopt the deputy commissioner's finding, with additional analysis, that defendant is entitled to receive a credit for benefits previously paid, including a credit for the net amount of long-term disability benefits paid to claimant.

I affirm the deputy commissioner's findings, conclusions and analysis regarding all of the above issues. I provide the following additional analysis for my decision:

The threshold issue on appeal is whether the deputy commissioner erred in finding the May 14, 2014, cumulative injury is limited to the right upper extremity and does not extend into claimant's right shoulder and cervical spine, or body as a whole.

In the arbitration decision, the deputy commissioner relied upon the medical opinions of claimant's treating physicians to conclude claimant's injury was confined to the right upper extremity. Of the multiple treating physicians, only Jon Yankey, M.D., Michael Jackson, M.D., Kyle Galles, M.D., and Christian Ledet, M.D. provided opinions on causation. Claimant obtained an expert medical opinion from Robin Sassman, M.D. Defendant obtained an expert medical opinion from Todd Harbach, M.D. Dr. Harbach's IME report is not summarized in the arbitration decision. It is possible the deputy commissioner felt Dr. Harbach's report was duplicative and unhelpful. While I ultimately agree with such an assessment, Dr. Harbach's report supports the deputy commissioner's ultimate holding and it should have been analyzed in the arbitration decision.

Dr. Harbach examined claimant on August 25, 2017. (Exhibit A, page 4). Dr. Harbach causally related claimant's cubital tunnel syndrome to his work activities. Dr. Harbach did not believe claimant's work activities caused the alleged symptoms in claimant's right shoulder and cervical spine. (Ex. A, p. 9). Dr. Harbach assigned two percent impairment of the whole person due to claimant's residual paresthesia and pain.

Dr. Harbach recommended claimant pursue trigger point injections and potentially a cervical spinal cord stimulator. (Id.) Dr. Harbach adamantly disagreed with Dr. Sassman's assessment that claimant's condition warranted placement in DRE category III. Likewise, Dr. Harbach disagreed with the 15 percent impairment rating provided by Dr. Sassman, given claimant's full range of motion in the neck, the negative EMG, and normal MRI of the cervical spine. Dr. Harbach deferred to claimant's February 2017 FCE for permanent restrictions. Dr. Harbach did not feel any of the permanent restrictions assigned would be related to the right shoulder or neck conditions. (Ex. A, p. 10).

In addition to being duplicative, Dr. Harbach's IME report contains three flaws that raise some concerns. First, Dr. Harbach inaccurately describes claimant's janitorial work as light duty. Second, Dr. Harbach was operating under the mistaken belief that claimant's symptoms began once he became a full-time employee in 2013. Lastly, Dr. Harbach provides little analysis in assessing claimant with two percent permanent impairment of the whole person other than loosely referencing the AMA Guides and the fact he discussed claimant's condition with colleagues. For these reasons, I afford little weight to Dr. Harbach's IME report.

No medical opinion, expert or otherwise, in the evidentiary record causally relates claimant's right shoulder condition to the work activities he performed for defendant. It would appear from a cursory reading of the arbitration decision that Dr. Jackson provided such an opinion; however, this is inaccurate.

In a responsive letter to claimant's counsel, dated December 4, 2015, Dr. Jackson provided the following opinions:

> . . . In response to the questions posed, (1) Mr. Bajramovic's current diagnosis is right common extensor tendinopathy. (2) As you correctly point out in your letter dated December 4, 2015, Mr. Bajramovic did report to me that he worked as a janitor at Johnston schools, and his work activities require repetitive activities at and above shoulder level. As a result, he developed both right shoulder and elbow pain. It is my opinion, based upon the history provided and information I have in my possession, that Mr. Bajramovic's job at Johnston Public Schools as a janitor did aggravate and accelerate his current condition diagnosed above . . .

(Joint Ex. 11, p. 127)

Dr. Jackson's December 15, 2015, opinion causally relates the diagnosis of right common extensor tendinopathy to claimant's work activities. The opinion provides claimant developed right shoulder pain as a result of his work activities; however, it does not provide a diagnosis for claimant's right shoulder condition. Dr. Jackson limits his ultimate causation opinion to the singular form "condition diagnosed." Because Dr. Jackson did not provide a diagnosis for claimant's right shoulder condition, it cannot be said he provided a definitive causation opinion with respect to that condition.

Because no medical opinion exists to causally relate a right shoulder injury to claimant's work activities with defendant, I affirm the deputy commissioner's finding that claimant did not prove a right shoulder injury arose out of and in the course of his employment with defendant-employer.

Turning to the alleged cervical spine injury, I find the opinions of Dr. Yankey and Dr. Ledet more convincing than the opinions of Dr. Sassman.

Dr. Sassman is the only physician in the evidentiary record to causally relate claimant's cervical spine condition to his work activities. Unlike Drs. Yankey and Ledet, Dr. Sassman evaluated claimant on a one-time basis for purposes of litigation. Dr. Sassman's opinions are conclusory in nature and are not sufficiently supported with analysis. For example, at no point in her causation analysis does she address how claimant's symptoms waxed and waned over the course of three years, or how claimant consistently described his symptoms as radiating pain from the right elbow.

Claimant first complained of neck pain on May 30, 2014. (Jt. Ex. 2, p. 7) Three weeks later, claimant told Joe Johns, MSPT, physical therapist, his neck pain had resolved. (Jt. Ex. 4, p. 43) On June 23, 2014, claimant reported his neck pain resolved to Alison Good, ARNP, adding his belief that his upper arm and shoulder pain was just a radiation of pain from his elbow. (Jt. Ex. 2, p. 9) Between May and October 2014, claimant's range of motion in the cervical spine was consistently described as normal. (Jt. Ex. 10, p. 91) Movement of the neck did not elicit radicular symptoms (Jt. Ex. 5, p. 45); and his chief complaints centered on the right elbow. In July 2014, claimant was unsure whether his upper arm and shoulder pain was radiating pain from the right elbow, but stated the majority of his pain was still located in the right elbow. (Jt. Ex. 2, p. 11) Due to persistent pain in the right elbow and shoulder, claimant's treating physician ordered an MRI; it came back unremarkable. (Jt. Ex. 8, p. 55) While claimant did complain of some symptoms in the cervical spine in September 2014, the complaints did not linger. (Jt. Ex. 6, p. 51) Claimant's cervical spine range of motion tested normal in October 2014. (Jt. Ex. 10, p. 91) On November 3, 2014, claimant told Dr. Yankey he experienced only mild pain in the right shoulder whenever his right elbow pain flared up. (Jt. Ex. 9, p. 63) At the same appointment, claimant told Dr. Yankey he was no longer experiencing significant neck pain. (Jt. Ex. 9, p. 63). On November 10, 2014, claimant's cervical range of motion was normal, and neck flexion did not produce tingling down the spine or arm. (Jt. Ex. 10, p. 93)

Due to his work restrictions, claimant was taken off work from November 2014 to November 2015. On April 24, 2015, Michael Gainer, M.D., orthopedic surgeon, performed an anterior subcutaneous transfer of the ulnar nerve on claimant's right elbow. (Jt. Ex. 13, p. 137) Between February and November 2015, claimant's chief complaints were his right upper extremity and shoulder. In October 2015, claimant exhibited full range of motion and good strength in the shoulder upon examination by Dr. Galles. (Jt. Ex. 14, p. 138). He exhibited no increased pain or radicular symptoms with neck range of motion. (Id.) Claimant did not complain of significant issues in the neck until he presented to Dr. Ledet in November 2015. I therefore affirm the deputy

commissioner's finding that Dr. Sassman's causation opinion with respect to claimant's cervical spine is not supported by the evidentiary record.

Similar to Dr. Harbach's IME report, Dr. Sassman's assessment of permanent impairment lacks a sufficient amount of analysis. Dr. Sassman placed claimant into DRE Cervical Category III with 15 percent impairment of the whole person due to signs of radiculopathy on examination. (Ex. 4, p. 32) She cites to Table 15-5 on page 392 of the AMA Guides. However, she does not explain how claimant's condition warrants placement in DRE Category III, as opposed to Categories II or IV, which also involve radiculopathy on examination. In this regard, the reports of Dr. Ledet and Dr. Harbach sufficiently rebut Dr. Sassman's assessment of impairment.

I affirm the deputy commissioner's finding that the opinions of Dr. Ledet are most convincing on the subject of claimant's alleged cervical spine injury. Dr. Ledet is a board certified pain management specialist. His skillset uniquely qualifies him to opine on claimant's condition following the positive reaction to the diagnostic steroid injection. While it is true Dr. Ledet amended his original causation opinion, the amendment came after a significant development, namely, claimant's condition responding "very favorabl[y]" to the epidural steroid injection. (Jt. Ex. 16, p.177) Dr. Ledet thoroughly explained the basis of his change in opinion:

> In the independent medical evaluation report by Dr. Sassman[,] the history includes a statement that the injured worker experience (sic) a slow increase in his symptoms since the injection almost a year ago in an associated increase in symptoms with any type of exertion. The report further indicates that he states he is not yet at a point that he feels the need for another injection. This history is of interest for a couple of reasons. First, the history is most consistent with cervical degenerative spine disease of reversible nature and treated through cervical epidural steroid. The injured worker's response to the cervical epidural steroid is favorable. In fact, the response to the cervical epidural steroid was very favorable and relief of symptoms persisted beyond the presence of the medication within the spinal canal or the patient's body. This extended duration of improvement in symptoms is consistent with the clinical picture presented by patients with cervical degenerative spine associated cervical radiculopathy without nerve impingement. In other words, this clinical presentation is consistent with a patient experiencing symptoms from a normal process of aging and not a person experiencing symptoms from an injury.

(Jt. Ex.16, pp. 176-177)

In addition to the above analysis, Dr. Ledet addressed the issues presented by claimant's concurrent employment, providing that a reasonable causation assessment would be unable to differentiate between the concurrent employments without a specific, temporal injury. Dr. Ledet stated, "Differentiation of a causal relationship

associated with the primary or secondary employment as well as from non-work-related activities of daily living cannot be accomplished within a reasonable degree of medical certainty." (Jt. Ex.16, p. 177)

Despite being the first individual aware of claimant's concurrent employment, Dr. Sassman does not address what impact, if any, the concurrent employment had on claimant's condition and her findings on causation. For these reasons, I find Dr. Sassman's opinions to be less persuasive than the opinions of Dr. Ledet. Dr. Yankey's opinions support the opinions of Dr. Ledet. As such, I affirm the deputy commissioner's determination that claimant did not prove his work activities for defendant caused or materially aggravated the alleged cervical spine condition.

The next issue to be decided on appeal is whether the deputy commissioner abused her discretion by affording the entirety of claimant's testimony low weight as a result of claimant's omission regarding his concurrent employment immediately prior to the date of injury. Claimant asserts his omission was unintentional, and should not be held against him. Alternatively, claimant asserts that regardless of whether the omission was intentional, defendant had ample opportunity to cross-examine claimant about his concurrent employment.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant was not credible. I find nothing in the record which causes me to reverse the deputy commissioner's finding regarding claimant's credibility. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review, I give considerable deference to findings of fact impacted by the credibility findings, expressly or impliedly made, of the deputy commissioner who presided at the arbitration hearing.

At hearing, claimant testified he did not mention his concurrent employment in the interrogatory concerning his employment because he was working for defendant at the same time. (Hearing Transcript, pp. 80-81) Claimant's attorney asserts that because his client was not familiar with the workers' compensation system, his omission should not impact his overall credibility. I do not find this argument persuasive. First and foremost, one does not have to be familiar with the workers' compensation system to appreciate the fact information pertaining to an injured worker's concurrent employment leading up to the date of alleged injury would be relevant to a workers' compensation claim. Moreover, claimant retained an attorney well-versed in workers' compensation law to assist him with understanding the workers' compensation system. Claimant is a man of at least average intelligence. He described the education he received in Bosnia as the equivalent of graduating from high school in the United States. Remarkably, claimant taught himself how to understand the English language. Claimant can speak, read, and write the English language. Claimant knew, or should have known, the significance of his concurrent employment with Dahl's and its potential to impact his then-pending workers' compensation claim.

When confronted by defendant, claimant offered no plausible excuse for his omission. When asked to provide his employment history through discovery, claimant listed nine past employers. The answers to interrogatories contained in the evidentiary record are highly detailed. It is clear claimant took his time and provided in-depth responses to the point where it would be uncharacteristic of him to inadvertently withhold information pertaining to a particular past employer, concurrent or otherwise. Claimant did not disclose his concurrent employment until he was directly asked about it by Dr. Sassman. It cannot be said that the phrasing of Dr. Sassman's questionnaire is substantially different from the phrasing used by defendant in the interrogatories.

Regardless of whether claimant's omission was an unintended oversight, it is difficult to afford claimant's testimony regarding his concurrent employment a significant amount of weight.

I affirm the deputy commissioner's finding that claimant downplayed his job duties at Dahl's Food Store, his concurrent employer. Claimant testified he began working for Dahl's in the summer months of 2013. (Tr. p. 23) Outside of claimant's testimony, there is no evidence in the record to confirm that fact. This could be because Dahl's filed for bankruptcy in November 2014, and sold its remaining stores by the end of March 2015. Claimant contends he worked 10 to15 hours per week as a part-time stocker. (Tr. pp. 23-24; 77) Claimant described his work activities as light-duty work. According to claimant, he was responsible for hauling goods to the salad bar, stocking produce, and facing products. (Tr. pp. 24, 78) At hearing, claimant testified the heaviest items he had to lift were bananas, apples, and grapes. (Tr. p. 24) Claimant denied involvement with the loading and unloading of delivery trucks. (Tr. pp. 77-78) Given claimant's pre-employment physical with defendant providing he could meet the heavy physical demand category, and claimant's testimony he had no prior injuries, it is at the very least questionable that claimant's job duties at Dahl's would be unnecessarily limited; especially in a stocker position that in practice routinely meets or exceeds the medium demand category of work. Claimant's termination from Dahl's as a direct result of his May 2014 work restrictions (Tr. pp. 78-79) further supports the finding claimant downplayed his job duties at Dahl's.

Claimant argues any prejudice suffered by defendant was mitigated by its ability to depose and cross-examine claimant at hearing. While I agree defendant had ample opportunity to cross-examine claimant regarding his concurrent employment, that opportunity did not present itself until well over three years after the date of injury. By this time claimant had presented to all treating physicians in the evidentiary record. No treating physician was privy to information pertaining to claimant's concurrent employment when making their initial assessments. What's more, it is reasonable to assume both parties had difficulties obtaining employment records from the concurrent employer that went bankrupt over two years prior to the arbitration hearing. The prejudice to defendant was simply too great to be overcome by testimony alone.

I find the deputy commissioner's ultimate holding is supported by the evidentiary record as a whole, regardless of claimant's overall credibility. Claimant equates the

"low weight" language used by the deputy commissioner to be the express rejection of claimant's testimony. It is speculative to suggest the deputy commissioner did not afford any weight whatsoever to claimant's testimony. Moreover, the deputy commissioner relied heavily on the medical opinions in the evidentiary record in reaching her conclusions of law. It cannot be said claimant's credibility was a conclusory factor.

Claimant's credibility does not impact the objective medical findings regarding claimant's right elbow, right shoulder, and cervical spine. Claimant's authorized treating physicians requested and obtained diagnostic imaging of claimant's right shoulder and cervical spine. Ms. Good ordered an EMG which was performed on July 2, 2014 (Jt. Ex 2, pp.10-11). Drs. Ledet and Harbach interpreted the EMG results as unremarkable and negative for cervical radiculopathy. (Jt. Ex.16, p. 146; Ex. A, p. 8) Ms. Good ordered an MRI of the right shoulder in August 2014. The MRI was interpreted as normal, with no evidence of rotator cuff or labral pathology. (Jt. Ex. 7, p. 54) Dr. Ledet ordered an MRI of the cervical spine in November 2015. The MRI did not reveal anatomic impingement of the cervical nerve root. X-rays of the cervical spine did not reveal instability. (Jt. Ex.16, p. 151)

Similarly, claimant's credibility does not impact the multiple treating physicians' physical findings on examination. Claimant exhibited no radicular symptoms with neck movement on examination with Dr. Bahls in July 2014. (Jt. Ex. 5, p. 45) Claimant exhibited normal range of motion in the right shoulder at his initial evaluation with Dr. Yankey on August 25, 2014. (Jt. Ex. 9, p. 56) Claimant exhibited normal range of motion in the right shoulder and cervical spine at his initial evaluation with Dr. Troll on October 27, 2014. (Jt. Ex. 10, p. 91) Claimant's cervical range of motion and shoulder range of motion were normal at his November 3, 2014, follow-up appointment with Dr. Yankey. (Jt. Ex. 9, p. 63) Dr. Troll's medical notes from November 10, 2014, reflect normal range of motion in the cervical spine, with no tingling down the right upper extremity with flexion. (Jt. Ex. 10, p. 93) Claimant demonstrated normal range of motion in the right shoulder and cervical spine on examination with Dr. Galles on October 14, 2015. (Jt. Ex. 14, p. 138) Claimant exhibited normal range of motion in the right shoulder and cervical spine on examination with Dr. Yankey in October 2016. (Jt. Ex. 9, p. 77) Claimant exhibited symmetrical range of motion in the bilateral shoulders upon examination with Dr. Sassman. He also exhibited normal strength in the right shoulder. (Ex. 4, p. 30) Similarly, claimant had symmetrical range of motion in the cervical spine when bending and rotating to the left and right. (Id.)

I find the deputy commissioner correctly assessed claimant's credibility. The deputy commissioner in this case clearly stated the reasons why she found claimant to be lacking in credibility. I find the deputy commissioner's detailed analysis in that regard to be convincing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility. Consistent with the above analysis, I find the deputy commissioner did not abuse her discretion by assigning low weight to claimant's testimony.

The final issue to be determined is defendant's entitlement to credit under Iowa Code section 85.38(2).

As previously stated, the arbitration decision was filed on January 29, 2018. Claimant filed a notice of appeal on February 13, 2018, appealing from all rulings adverse to claimant. On March 8, 2015, claimant filed an Application for an Order Nunc Pro Tunc to correct alleged errors in the January 29, 2018, arbitration decision. Specifically, claimant requested that the arbitration decision be amended to correctly reflect the credit provided to defendant for the payment of long term disability benefits. The deputy commissioner denied claimant's application as it was not seeking a mere correction of a scrivener's error, but a reversal or amendment of the deputy commissioner's application of law as it relates to the claimed credit. The deputy commissioner explained that the correct avenue for a reversal of error is through a post-hearing motion or appeal.

Credit for group long-term disability benefits was stipulated in the hearing report submitted to the deputy and confirmed on the record at the start of the hearing. It was also stipulated that claimant's entitlement to healing period benefits was not disputed and that benefits for permanent partial disability were payable commencing November 11, 2015.

On the November 3, 2017, hearing report, claimant stipulated to the following:

> With respect to credit, claimant has rec'd LTD benefits in the net monthly amount of $1,903.34 in the period from 9/28/17 to 10/27/17. The gross amount is $2,061.00. Claimant stipulates to a credit for the net amounts for workers' compensation benefits paid after 9/28/17.

(Hearing Report, p. 2)

The arbitration decision states defendant is to receive "credit for benefits previously paid, including a credit for the net amount of long-term disability that has been paid." (Arbitration Decision, p. 16) The arbitration decision awarded claimant 12.5 weeks of permanent partial disability benefits commencing on November 11, 2015. As such, the 12.5 weeks of benefits would have accrued by February 7, 2016. Claimant did not receive LTD benefits until September 28, 2017. This lack of overlap in when the two benefits were payable is the crux of claimant's argument on appeal.

In his appeal brief, claimant asserts the deputy commissioner incorrectly ordered a credit for past payments of long-term disability benefits in accordance with Iowa Code section 85.38(2). According to claimant, a dispute arose as to the scope of the employer's credit following the arbitration decision. Claimant took the position that the credit only applied to workers' compensation benefits that accrued on or after September 28, 2017, or the date that claimant began receiving LTD benefits. September 28, 2017, is approximately 98 weeks after the stipulated commencement date. In other words, by stipulating to a credit for benefits paid *after* September 28,

2017, claimant was saying defendants would only receive a credit if the arbitration decision awarded him greater than 98 weeks of permanent partial disability benefits.

Claimant does not dispute defendant's entitlement to a credit. In fact, he expressly agrees defendant is entitled to a credit; however, claimant essentially asserts the credit was contingent on claimant receiving a significant award of industrial disability. Ultimately, the credit was not realized because the arbitration award did not create a scenario where workers' compensation and LTD benefits were payable at the same time. In this way, the language of the stipulation on the hearing report operates as a hedge for claimant.

Claimant asserts there must be an overlap between when workers' compensation benefits are payable and when LTD benefits were paid. Claimant supports his position with the Iowa Supreme Court's holding in State v. Erbe, 519 N.W.2d 812, 813 (Iowa 1994).

Defendant asserts claimant is attempting to rescind the parties' stipulation. First, defendant asserts claimant's argument is untimely and prejudicial. Defendant asserts the argument is untimely as it was not brought up until the award had been made and the deadline for appeal had expired. In this regard, defendant is referring to the Motion for Nunc Pro Tunc filed more than 20 days after the arbitration decision was filed. In addition, defendant takes the position that the credit for LTD benefits paid applies against any benefits, including those that have accrued in the past. Alternatively, defendant asserts there is an overlap of benefits in this case as the LTD benefits pertain to the same injury claim for which PPD benefits were awarded. Lastly, defendant asserts the language of Iowa Code section 85.38(2) is broad and does not contain the limiting language asserted by claimant.

Iowa Code section 85.38(2) provides:

> 2. *Benefits paid under group plans.*
>
> *a.* In the event the employee with a disability shall receive any benefits, including medical, surgical, or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A, or chapter 85B, then the amounts so paid to the employee from the group plan shall be credited to or against any compensation payments, including medical, surgical, or hospital, made or to be made under this chapter, chapter 85A, or chapter 85B. The amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational

> disease under chapter 85A or an occupational hearing loss under chapter 85B.

As claimant points out in his appeal brief, the Iowa Supreme Court has held that the purpose of Iowa Code section 85.38(2) is to preclude an employee with a disability from receiving a double recovery of workers' compensation benefits and group disability plan benefits provided by the employer. State v. Erbe, 519 N.W.2d 812, 815 (Iowa 1994).

Both parties addressed the Erbe decision in their respective briefs. Predictably, both parties interpret the case differently. Claimant urges a narrow interpretation while defendant urges a broad interpretation.

In Erbe, an injured worker at Iowa State University was paid long-term disability benefits. The state alleged a credit against the workers' compensation benefits owed for each dollar the State paid under the long-term disability policy. Claimant argued no credit could be taken against the workers' compensation benefits ordered by the agency. Claimant maintained because the long-term disability policy provided benefits that were in excess of the workers' compensation benefits, the state could not take an offset against workers' compensation benefits.

The Iowa Supreme Court looked to Professor Larson for guidance with respect to the issue of credit as it pertains to a group disability plan. The court determined the state could provide benefits beyond the amount required by statute for workers' compensation benefits. The court wrote:

> We conclude section 85.38 was adopted for the purpose of avoiding a double recovery by a disabled employee who receives benefits under both workers' compensation and a group disability plan provided by the employer. As a part of an overall system of wage protection, duplication of benefits from workers' compensation and other parts of the system should not ordinarily be allowed. *See* 4-79 Larson's, *Workers' Compensation Law* § 79.00, at 18-19 (1993). Iowa's employee disability program is a part of the overall system and the general rule to avoid duplication of benefits should apply.

(519 N.W.2d at 815)

Claimant asserts the general principle of Erbe is that overlapping benefits are not permitted and defendant should receive a credit only if the LTD benefits and workers' compensation benefits are for the same time period. Claimant asserts there is no double recovery or duplication of benefits in this instance, as claimant's LTD benefits and workers' compensation benefits were not payable at the same time. Claimant does not address defendant's assertion that because the benefits arise out of the same injury there remains an overlap or double recovery, despite the lack of overlap in time periods.

Typically, in order to prove entitlement to a credit, a defendant must prove: 1) benefits were received under a group plan; 2) the defendant-employer contributed to that group plan; 3) the disability benefits should not have been paid if workers' compensation benefits were paid or payable; and 4) defendants must prove the amount to be credited/deducted from the payments made or owed under Chapter 85. Greenlee v. Cedar Falls Community Schools, File No. 934910 (App., December 27, 1993); McKernan v. Morningside College, File No. 955069 (App., February 22, 1993).

In this case, the overall analysis is complicated by the fact claimant stipulated to defendant's entitlement to a credit under 85.38(2), as opposed to disputing the issue. Further complicating the issue is the lack of evidence in the evidentiary record regarding the long term disability plan; presumably as a result of the stipulation. For instance, defendant asserts the LTD benefits in this case arose out of the same medical conditions subject to claimant's workers' compensation claim. Circumstantial evidence supports this contention. However, the only letter in evidence regarding the September 28, 2017, to October 27, 2017, LTD benefits does not explain why the benefits were granted. Similarly, claimant's application for the benefits is not in the evidentiary record. (See Johnson v. University of Iowa, File No. 1203989 (Arb. Dec. June 13, 2001)).

Claimant presents a novel legal argument. In analyzing agency precedent, several cases have addressed the intersection of LTD benefits and workers' compensation benefits. However, few have addressed the timing of benefits paid or payable. During my research, I was able to find only one case on point. In Miller v. University of Iowa Hospitals, the overall issue on appeal was whether the deputy commissioner correctly determined the credit to which defendants were entitled under Iowa Code section 85.38. File Nos. 1253772, 1253773 (App. Dec. Aug. 6, 2002). The decision analyzed three issues: (1) whether the credit is computed before or after applicable taxes are deducted from the gross amount, (2) whether the credit must be for a similar type of benefit, and (3) whether credit for LTD benefits is limited to the LTD benefits paid for weeks when defendants also had an obligation to pay weekly workers' compensation benefits.

In Miller, the former commissioner opined the Erbe decision stands for the proposition that LTD benefits are properly credited to the employer's liability for permanent partial disability benefits that accrue during the same week. While I agree such a statement is consistent with the supreme court's holding, I respectfully disagree with the notion that the court's holding limits a credit to situations where there is an overlap in benefits. The Erbe court was not presented with a fact scenario in which LTD benefits were paid for weeks different from those which workers' compensation weekly benefits were due. The LTD benefits addressed in Erbe were paid for weeks in which weekly workers' compensation benefits were due. The decision does not contain language expressly limiting 85.38 credits to overlapping benefits. Rather, the holding in Erbe, much like the statute, is rather broad. The decision provides that duplication of benefits from workers' compensation and other parts of the system should not ordinarily be allowed. To limit a credit to situations involving an overlap of benefits would frustrate the legislative intent of 85.38(2), and the ultimate holding in Erbe.

The former commissioner asserts such an interpretation would allow LTD benefits paid for a prior non-occupational injury to be used as a credit against a future, work-related injury. I do not foresee the slippery slope anticipated by the former commissioner. Defendant still must carry the burden to prove entitlement to a credit. In this case, evidence exists to support a finding that the LTD benefits paid were related to the injury which is the basis for this claim. Therefore, I do not reach the same conclusion as the former commissioner. Instead, I conclude in this case that Iowa Code section 85.38(2) grants defendant a credit for the net LTD benefits stemming from the work injury and paid to claimant against any claim for permanent partial disability benefits.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 29, 2018, is affirmed with my additional analysis.

Defendant shall pay claimant twelve and one-half (12.5) weeks of permanent partial disability benefits at the weekly rate of five hundred four and 25/100 dollars ($504.25) commencing on November 11, 2015.

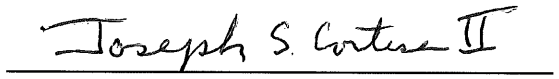
Defendant shall receive a credit for all benefits previously paid, including a credit for the net amount of the long-term disability benefits paid to claimant .

Defendant shall pay accrued weekly benefits in a lump sum together with the interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 26th day of June, 2019.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Jason Neifert
Attorney at Law
1441 – 29TH Street, Suite 111
West Des Moines, Iowa 50266
jneifert@nbolawfirm.com

Andrew T. Tice
Attorney at Law
100 Court Ave., Ste. 600
Des Moines, IA 50309
atice@ahlerslaw.com