BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT EVANS, Claimant, vs. BOB BROWN CHEVROLET, INC., Employer, and SECURA INSURANCE CO., Insurance Carrier, Defendants.	File No. 20000128.01 APPEAL DECISION Head Notes: 1402.40; 1803; 2907; 5-9999
SCOTT EVANS, Claimant, vs. BOB BROWN CHEVROLET, INC., Employer, and FIRST DAKOTA INDEMNITY CO., Insurance Carrier, Defendants.	File No. 21009683.01 APPEAL DECISION Head Notes: 1402.30; 1803; 2701; 2907

Claimant Scott Evans appeals from an arbitration decision filed on March 1, 2023. This case involves consolidated claims for two dates of injury. File No. 20000128.01 involves a stipulated work injury to claimant's right arm occurring on December 18, 2019. File No. 21012114.01 involves a disputed left wrist injury allegedly occurring on July 2, 2021. Claimant appeals the decision in both files. The case was heard on January 4,

2023, and it was considered fully submitted in front of the deputy workers' compensation commissioner on January 20, 2023.

Defendants Bob Brown Chevrolet, Inc., and Secura Insurance Company, respond to the appeal in File No. 20000128.01. Defendants, Bob Brown Chevrolet, Inc., and First Dakota Indemnity Company, respond to the appeal in File No. 21009683.01 and pursue a cross-appeal in that file.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. 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 March 1, 2023, which relate to any issues not properly raised on intra-agency appeal.

In File No. 20000128.01, the deputy commissioner found claimant failed to prove he sustained permanent disability as a result of a right elbow injury sustained at work on December 18, 2019. In File No. 20000128.01, 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. Although I find no error in the deputy's analysis, findings, or conclusions, I provide the following analysis in response to claimant's appeal.

In his appeal brief, claimant asserts the deputy commissioner had to consider permanent partial disability and was "confronted with a fork in the road. 0%? 8%? Some compromise like 4%?" (Claimant's Brief, page 7) Claimant further asserts the December 18, 2019, injury resulted in permanent disability for the following reasons:

1. This was a significant surgery to Claimant's right arm that being the repair of the right bicep tendon by Dr. Rodgers. It would be normal for a doctor to give an impairment rating for an injury of this nature that resulted in a significant surgery.

2. Evans' uncontroverted testimony was that he was in ongoing pain, suffered lost range of motion, and lost strength as a result of this injury. He also testified that he would be unable in his current condition to return to the kind of work he did for Bob Brown Chevrolet and there is no testimony form the Respondents to the contrary.

3. [The deputy commissioner] finds "Dr. Bruggeman's opinions do not comport with Iowa law." Arbitration Decision Page 18. This is incorrect. Dr. Bruggeman is a Board [sic] Certified [sic] Orthopaedic [sic] surgeon who specializes in the care and surgical treatment of upper extremity injuries. The opinions of Dr. Bruggeman are every bit as valid as any opinions given by Dr. Rodgers.

Iowa Code section 85.34(2)(x) provides:

> In all cases of permanent partial disability described in paragraphs "a" through "u," or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u," or paragraph "v" when determining functional disability and not loss of earning capacity.

Claimant's initial argument is that it would be "normal" for a physician to render a permanent impairment rating after performing a "significant surgery" such as that performed on claimant. Claimant offers no evidence that it would be "normal" for a physician to offer a permanent impairment rating in this type of case or that the surgery was "significant" in some specific way. Claimant fails to offer evidence to support his claim on appeal.

However, even if claimant's argument were well-supported by evidence in this record, claimant's request is really that this agency utilize its expertise in reviewing similar cases to determine that a permanent impairment rating would typically be awarded in similar cases. In this respect, claimant's request directly violates this agency's authority and the mandate of Iowa Code section 85.34(2)(x). As quoted above, Iowa Code section 85.34(2)(x) specifically prohibits this agency from utilizing "agency expertise" to determine permanent impairment or permanent disability in scheduled member injury situations. The deputy was correct to reject this type of argument.

Claimant's second argument in favor of awarding permanent disability is that claimant offered uncontroverted testimony that establishes he sustained loss of range of motion, loss of strength, and has ongoing pain as a result of the December 18, 2019, right elbow injury. Claimant's argument urges this agency to rely upon the lay testimony of claimant, rather than the permanent impairment ratings offered by the physicians, to determine that permanent disability has been sustained. Once again, claimant's request seeks to have this agency exceed its authority and the mandate of Iowa Code section 85.34(2)(x). That statute specifically provides that this agency "shall not" utilize lay testimony in determining permanent disability. Once again, the deputy commissioner was correct to reject claimant's argument in this respect.

Claimant's final argument for awarding permanent disability in File No. 20000128.01 is that Dr. Bruggeman's permanent impairment rating is "every bit as valid as any opinions given by Dr. Rodgers." (Claimant's Appeal Brief, p. 7) I find the deputy commissioner again accurately applied Iowa Code section 85.34(2)(x). The statute specifically requires permanent impairment and permanent disability in scheduled member injuries to be awarded "solely by utilizing the guides to the evaluation of permanent impairment, published by the America Medical Association, as adopted by the workers' compensation commissioner by rule." Iowa Code section 85.34(2)(x). This agency enacted administrative rule 876 IAC 2.4, which specifically adopts the Fifth Edition of the Guides to the Evaluation of Permanent Impairment.

Dr. Rodgers referenced and cited the AMA Guides, Fifth Edition, when rendering his permanent impairment opinion. Dr. Rodgers' permanent impairment opinion specifically complies with the requirements of Iowa Code section 85.34(2)(x). Dr. Bruggeman's permanent impairment rating provides, "Based on his current situation and the above weakness, Mr. Evans has sustained an eight percent (8%) right upper extremity impairment." (Joint Exhibit 11, p. 152) Dr. Bruggeman cites to no portion of the AMA Guides, Dr. Bruggeman does not confirm that his impairment rating is pursuant to the Fifth Edition of the AMA Guides. In fact, it is not clear whether Dr. Bruggeman utilized the AMA Guides or some other method or standard in formulating his impairment rating.

The deputy commissioner concluded "Dr. Bruggeman's opinions do not comport with applicable Iowa law." (Arbitration Decision, p. 18) Indeed, the deputy commissioner is correct. Dr. Bruggeman fails to offer any reference to, citation to, or even confirmation that he used the Fifth Edition of the AMA Guides when formulating his permanent impairment rating and opinion. Dr. Bruggeman's opinion does not comport with Iowa Code section 85.34(2)(x)'s requirement that permanent impairment or permanent disability in a scheduled injury case such as this "be determined solely by utilizing" the Guides to the Evaluation of Permanent Impairment, Fifth Edition. Iowa Code section 85.34(2)(x); 876 IAC 2.4.

Finally, claimant urges this agency to award four percent permanent disability of the right arm in his prayer for relief on appeal. The competing permanent impairment ratings are zero percent from Dr. Rodgers and eight percent from Dr. Bruggeman. No physician has offered a permanent impairment rating of four percent of the right upper extremity. Nor has claimant explained how the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, would support an award of four percent permanent impairment of the right upper extremity. Realistically, claimant is asking this agency to formulate an impairment rating on its own, or to "compromise" between the competing impairment ratings. Nothing in Iowa Code section 85.34(2)(x) would permit this agency to compromise the impairment ratings to something other than specified in the AMA Guides. Nor would Iowa Code section 85.34(2)(x) permit this agency to exercise some type of expertise to formulate its own permanent impairment rating. Claimant's prayer for relief specifically requests this agency exceed its statutory mandate and limits. Claimant's invitation is respectfully rejected. I find the deputy commissioner provided an accurate analysis and I concur with his findings and conclusions in File No. 20000128.01.

Therefore, in File No. 20000128.01, I affirm the deputy commissioner's finding that claimant failed to prove permanent disability. I further affirm the deputy commissioner's finding that claimant's costs should not be assessed in this file.

In File No. 21009683.01, claimant alleges a left arm injury arising out of and in the course of employment on July 2, 2021. Two distinct conditions were alleged to be causally related to, and to have arisen out of, claimant's employment. Specifically, claimant asserts he has an ulnar abutment syndrome that was caused by, or was materially aggravated by, his employment as well as a TFCC tear, also allegedly the result of, or materially aggravated by, his work.

With respect to the alleged July 2, 2021, injury, the deputy commissioner found claimant failed to prove the ulnar abutment syndrome was causally related to, or was materially aggravated by, his employment with Bob Brown Chevrolet. However, the deputy commissioner found claimant did prove his TFCC tear was materially aggravated by his work. Claimant appeals the finding that the ulnar abutment syndrome did not arise out of claimant's employment and defendants cross-appeal, asserting the deputy commissioner erred in finding the TFCC tear to be materially aggravated by claimant's employment activities on July 2, 2021.

As the deputy accurately recited, two physicians rendered causation opinions. The deputy commissioner accurately set forth those opinions and I will not reiterate all of those opinions. Having reviewed the competing medical opinions, I concur with the deputy commissioner and I find the opinions of Dr. Paulson are the most credible and convincing with respect to the ulnar abutment syndrome. Specifically, I find the opinions set forth in Dr. Paulson's August 5, 2021 report (Joint Exhibit 10, page 142) and the August 23, 2021, report (Joint Exhibit 10, p. 145) to be the most convincing opinions in this record.

I find claimant's ulnar abutment syndrome is due to a congenital condition that caused his ulna to grow longer than his radius. I accept Dr. Paulson's explanation that this is congenital and "not a direct result" nor "an aggravation nor exacerbation" of claimant's work activities on July 2, 2021. (Joint Ex. 10, pp. 142, 145) Instead, I accept Dr. Paulson's explanation that claimant "would have likely become symptomatic from his ulnar positive variance, ulnar impaction, and degenerative tear of the TFCC, no matter what he did for work or activities." (Joint Ex. 10, p. 142)

I reject the opinion of Dr. Bruggeman. His analysis of the conditions and his explanation of how these conditions may be related to, or materially aggravated by, claimant's work activities is lacking and unconvincing. In total, Dr. Bruggeman's analysis states, "Based on his history of increasing pain after the injury on July 2, 2021, his injury represents a preexisting condition that was aggravated by a work injury." (Claimant's Ex. 3, p. 9) He provides no explanation how the action of claimant reaching with his left arm caused an aggravation of the preexisting condition or posed an actual risk of injury to claimant.

As the deputy commissioner accurately noted:

> . . . a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

In fact, the Iowa Supreme Court has specifically rejected the positional risk doctrine. Lakeside Casino v. Blue, 743 N.W.2d 169, 176-177 (Iowa 2007). Consequently,

experiencing pain and a temporal development of pain occurring at work is not a sufficient causal connection to demonstrate either a direct cause or a material aggravation of a condition. Claimant must establish an actual risk caused by his work activities. Id.

Dr. Bruggeman's analysis appears to assume that development of pain during work activities is sufficient to declare an aggravation of an underlying condition. As noted above, this is a positional risk approach to work injuries and is not the legal standard to establish an injury or aggravation that arises out of and in the course of employment. Id. I find claimant failed to prove an actual risk posed by his employment to cause or materially aggravate his left wrist, left hand, or left arm condition. Therefore, I find claimant failed to prove by a preponderance of the evidence that he sustained a left wrist, left hand, or left arm injury that arose out of and in the course of his employment.

Having reached these findings and conclusions, I affirm the deputy commissioner's finding that clamant failed to prove his ulnar abutment syndrome arose out of and in the course of his employment. I modify the arbitration decision with respect to the TFCC issue and I find claimant failed to prove this condition is related to work or was materially aggravated by his work activities.

The deputy commissioner also awarded alternate medical care for treatment of the TFCC condition based upon his finding that claimant's work materially aggravated the TFCC condition. Having found claimant failed to prove the TFCC condition arose out of and in the course of his employment, I find claimant is not entitled to alternate medical care for this condition. Therefore, I modify the arbitration decision in this respect.

The final challenge asserted on appeal is the issue of assessment of costs. This agency has discretion in the assessment of costs. Iowa Code section 86.40. Exercising that discretion, and noting claimant will take nothing from these proceedings, I find the parties should pay their own costs of the arbitration proceeding, and I find claimant shall pay the cost of the appeal.

ORDER

THEREFORE, IT IS ORDERED that the arbitration decision filed on March 1, 2023, is affirmed in part and is modified in part.

In File No. 20000128.01, claimant shall take nothing further from these proceedings.

In File No. 21009683.01, claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own 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), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 30th day of August, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Jacob Peters (via WCES)

M. Anne McAtee (via WCES)

Caroline Westerhold (via WCES)