BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAMELA CARMER (f/k/a HYDE), Claimant, vs. NORDSTROM, INC., Employer, Self-Insured, Defendant.	File No. 1656062.01 A P P E A L D E C I S I O N Head Notes: 1402.40; 1801; 1803.1; 2907; 4000.2

Defendant Nordstrom, Inc., self-insured employer, appeals from an arbitration decision filed on September 13, 2021. Claimant Pamela Carmer responds to the appeal. The case was heard on March 2, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 9, 2021.

In the arbitration decision, the deputy commissioner found claimant sustained a sequela injury to her left shoulder as a result of her work-related right shoulder injury which occurred on August 6, 2018. The deputy commissioner found those injuries are scheduled member injuries and do not extend into claimant's body as a whole. However, the deputy commissioner found claimant's injuries are compensable industrially under Iowa Code section 85.34(2)(v). The deputy commissioner found claimant sustained 70 percent industrial disability and is entitled to penalty benefits in the amount of $250.00. The deputy commissioner also awarded costs.

On appeal, defendant asserts claimant did not sustain a sequela injury to her left shoulder and that claimant's permanent disability is limited to her right shoulder. In the event I affirm the deputy commissioner's finding regarding claimant's alleged sequela injury, defendant alternatively asserts claimant is not entitled to industrial disability under section 85.34(2)(v). Defendant asserts the two shoulders should be compensated as separate scheduled members under section 85.34(2)(n). Defendant likewise alternatively asserts the deputy commissioner's award of 70 percent industrial disability is excessive. Finally, defendant asserts the deputy commissioner's penalty and costs assessments are in error.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as a 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 86.24 and 17A.15, the arbitration decision filed on September 13, 2021, is affirmed in part and is modified in part.

The first issue on appeal is whether claimant sustained a sequela injury to her left shoulder as a result of her work-related right shoulder injury. Defendants question why claimant's left shoulder complaints did not manifest until more than a year after her right shoulder injury. For example, during her independent medical examination (IME) with Mark Taylor, M.D., in the fall of 2019, claimant's left shoulder was essentially normal. (Claimant's Exhibit 1, pp. 3, 5-6, 9)) Per claimant's hearing testimony, it was not until the fall of 2019 and into 2020 when her left shoulder symptoms began to worsen. (See Hearing Transcript, pp. 56-58) Claimant did not request any treatment for her left shoulder until the fall of 2020. (Cl. Ex. 6, p. 77)

Claimant attributes this late onset of symptoms to "favoring her right arm and corresponding with overuse of her left arm" after her right shoulder surgery. (Cl. Ex. 2, p. 16) More specifically, claimant told David Segal, M.D., during an IME that following her surgery she "rarely does anything with her right arm" and "[h]er right shoulder, which was already bad, started bothering her more; and then later, her left shoulder, which she was using much more to protect the right, started hurting." (Cl. Ex. 2, p. 20) In his report, Dr. Segal causally relates claimant's left shoulder symptoms, at least in part, to "overuse and compensation due to right shoulder injury." (Cl. Ex. 2, p. 29)

Defendant obtained expert opinions from James Milani, M.D. Dr. Milani was unable to causally relate claimant's left shoulder complaints to her allegations of overuse. Dr. Milani opined that claimant's "[m]ost likely contributor to pain is underlying degenerative changes and/or progressive underlying systemic inflammatory arthritis/rheumatologic disorder that has not been diagnosed yet." (Defendants' Ex. A, p. 9) Dr. Milani went on to state, "It appears [claimant] has an advancing destructive joint disease rheumatologic etiology." (Def. Ex. A, p. 9)

Dr. Segal offered a response to Dr. Milani's opinions. Dr. Segal acknowledged claimant had some swelling in her hands but noted swelling "is also a sign of osteoarthritis and is not necessarily systemic in a way that would specifically affect [claimant's] left shoulder." (Def. Ex. 2, p. 24) Dr. Segal also indicated claimant had two workups for rheumatoid/inflammatory/autoimmune arthritis, both of which were negative. (Def. Ex. 2, p. 24) Dr. Segal noted that a history of osteoarthritis or even inflammatory arthritis "does not preclude one material factor in the causation of her left shoulder symptoms, being overuse and compensation due to the limited function of her right shoulder." (Def. Ex. 2, p. 24)

Like the deputy commissioner, I find Dr. Segal's opinions to be more persuasive than those of Dr. Milani. While it is undisputed that claimant has swelling in her fingers and hands, there is no objective evidence of rheumatoid/inflammatory/autoimmune arthritis—only Dr. Milani's speculation. Furthermore, even if claimant has underlying arthritis, such a pre-existing condition does not preclude the possibility that overuse caused or materially aggravated that condition.

I understand defendant's frustration with this outcome. Claimant's left shoulder complaints did not manifest until long after her initial right shoulder injury. As a result, mentions of claimant's left shoulder are scant in the evidentiary record. However, as explained by Dr. Segal, "There was no mention of the left shoulder symptoms in the records because the records predated the time that [claimant] realized the left shoulder was substantial and not transient." (Cl. Ex. 2, p. 25)

With this additional analysis, I affirm the deputy commissioner's finding that claimant sustained a work-related sequela injury to her left shoulder.

I affirm the deputy commissioner's finding that claimant's right shoulder injury and her left shoulder sequela injury are scheduled member injuries and do not extend into claimant's body as a whole. I find the deputy commissioner provided a well-reasoned analysis of this issue and I affirm her findings of fact and conclusions of law pertaining to it.

But this does not end the analysis. Claimant asserts, and the deputy commissioner found, that sustaining two shoulder injuries as a result of a single incident entitles claimant to industrial disability benefits under Iowa Code section 85.34(2)(v) (post-July 1, 2017) (formerly section 85.34(2)(u)). As correctly noted by the deputy commissioner, the legislature made changes to Iowa Code Chapter 85 that took effect as of July 1, 2017. Among those changes was the re-categorization of a shoulder injury from an unscheduled injury to a scheduled injury. See Iowa Code § 85.34(2)(n).

Importantly, however, not among the sections amended was section 85.34(2)(t) (formerly section 85.34(2)(s)). This section provides that the "loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such." Iowa Code § 85.34(2)(t). Thus, while the legislature made the shoulder a scheduled member, it did not add the shoulder to the list of scheduled members that can be compensated on a 500-week basis when two are injured in a single accident.

This omission is significant because "legislative intent is expressed by what the legislature has said, not what it could or might have said" and "[i]ntent may be

expressed by the omission, as well as the inclusion, of statutory terms. Put another way, the express mention of one thing implies the exclusion of other things not specifically mentioned." State v. Beach, 630 N.W.2d 598, 600 (Iowa 2001); see In re Myers, 874 N.W.2d 679, 682 (Iowa Ct. App. 2015) ("When the legislature includes specific language in one section but omits it from another, we presume the legislature intended the omission."). Thus, despite the shoulder's similarity to other scheduled members, the legislature's failure to add it to section 85.34(2)(t) indicates two shoulder injuries occurring in a single accident are not to be compensated on a 500-week basis.

That leaves two options: either each shoulder is compensable separately on a 400-week basis under section 85.34(2)(n), or the shoulders are compensated industrially pursuant to the "catch-all" provision in section 85.34(2)(v).

Section 85.34(2)(n) provides that compensation shall be paid for 400 weeks "[f]or the loss of a shoulder." Iowa Code § 85.34(2)(n) (emphasis added). Section 85.34(2)(v) provides for industrial disability benefits "[i]n all cases of permanent partial disability other than those . . . described or referred to in paragraphs 'a' through 'u'." Iowa Code § 85.34(2)(v) (emphasis added).

With respect to section 85.34(2)(n), I conclude the use of the word "a" refers to a singular shoulder, just as every other section enumerating a scheduled member refers to the loss of a singular member. See Iowa Code §§ 85.34(2)(a)-(e), (h)-(i), (l)-(q). If this were not the case and "a" was meant to include more than a singular member, there would be no need for section 85.34(2)(t) to exist.

This interpretation is also consistent with past agency precedent. This agency has long held that "the permanent disability of three separate scheduled members occurring in the same incident entitles a claimant to industrial disability benefits under section 85.34(2)(u) [now section 85.34(2)(v)]." See Martinez v. Pavlich Inc., File No. 5063900 (App. July 30, 2020). As explained in Wallingford v. Atlantic Carriers, File No. 5008405 (Arb. July 23, 2004):

> "Three or more scheduled member injuries in the same incident constitute a body as a whole injury. Subsection 85.34(2)(s) [now (2)(t)] of the Iowa Code applies only to injuries that involve an injury to two members. Subsection 85.34(2)(u) [now (2)(v)] is the 'catch-all' provision. In other words, it is the receptacle for a variety of odds and ends that can occur in the workers' compensation arena."
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> (emphasis added).

It is presumed the legislature is aware of the decisions of this agency and the courts when it crafts statutes. See Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015), as amended (June 11, 2015) (citations omitted). Thus, relevant to this case, it is presumed the legislature knew that this agency has long treated section (2)(v) as the "catch all" for injuries that do not fall within the provisions of sections (a) through (t)—such as the injuries sustained in this case.

Furthermore, compensating each shoulder as a separate scheduled member could lead to absurd results. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58, 75 (Iowa 2015) (noting courts have "long recognized that statutes should not be interpreted in a manner that leads to absurd results"); Iowa Code § 4.4(3) (setting forth a presumption that "[i]n enacting a statute ... [a] just and reasonable result is intended"); *id.* § 4.6(5) (noting that when a statute is ambiguous, we should consider "[t]he consequences of a particular construction")). Short of permanent and total disability, the maximum number of weeks payable to a claimant for injuries sustained in a single incident is 500 weeks. See Iowa Code §§ 85.34(2)(t), (v). If two shoulders were to be compensated separately, both on a 400-week basis, it is possible that the scheduled injuries could amount to more than 500 weeks of compensation. There is no other scenario under which two scheduled members injured in the same accident could result in compensation in excess of 500 weeks.

Ultimately, had the legislature intended two shoulder injuries occurring in a single accident to be compensated separately on two 400-week schedules, it could have said so—just as it could have added "shoulder" to section 85.34(2)(t). But that is not what the legislature did. See Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802, 812 (Iowa 2011); Beach, 630 N.W.2d at 600.

As a result, with this additional analysis, I affirm the deputy commissioner's finding that claimant's injury must be compensated industrially under section 85.34(2)(v).

The deputy commissioner found claimant sustained 70 percent industrial disability. In making this finding, the deputy commissioner did not rely on Dr. Segal's full impairment ratings because Dr. Segal improperly included loss of strength. I agree. That being said, claimant still has impairment for her loss of range of motion in both shoulders: 17 percent for the right shoulder and 13 percent for the left. (Cl. Ex. 2, p. 37) The deputy commissioner also found claimant's permanent restrictions would preclude her from returning to much of her past work. I likewise agree with this finding. This supports a finding of significant industrial disability.

However, claimant returned to work in a different position and was working at the time of the hearing. Though her hourly rate was roughly 35 percent lower than what she was earning at the time of the injury, she was working without accommodation or physical difficulties. (See Hrg. Tr., pp. 14, 35 (testifying she was earning roughly $16.70 per hour at the time of the injury and $11.33 per hour at the time of the hearing)) I also agree with the deputy commissioner that claimant is capable of retraining.

Thus, although I agree with most, if not all, of the deputy commissioner's findings with respect to the factors to be considered when determining claimant's industrial disability, I disagree with the deputy commissioner's ultimate assessment of industrial disability. Balancing claimant's successful return to work with the decrease in her hourly wage, along with the other factors of industrial disability, I find claimant sustained 50 percent industrial disability as a result of the work injury. The deputy commissioner's industrial disability award is therefore modified.

Having found claimant sustained 50 percent industrial disability as a result of the work injury, claimant is entitled to receive 250 weeks of permanent partial disability (PPD) benefits commencing on the stipulated commencement date of May 8, 2019, at the stipulated weekly benefit rate of $476.20.

Defendant also asserts claimant is not entitled to receive penalty benefits and reimbursement for the cost of Dr. Segal's report. However, I affirm the deputy commissioner's award of $250.00 in penalty benefits and the taxation of Dr. Segal's report. I find the deputy commissioner provided a well-reasoned analysis for both of those issues and I affirm the deputy commissioner's findings of fact and conclusions of law for those issues.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 13, 2021 is affirmed in part and modified in part.

Defendant shall pay claimant two hundred (250) weeks of permanent partial disability benefits at the stipulated weekly rate of four hundred seventy-six and 20/100 dollars ($476.20), commencing on the stipulated commencement date of May 8, 2019.

Defendant shall receive credit for the permanent partial disability benefits paid to date.

Defendant 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.

Defendant shall pay claimant two hundred fifty and 00/100 dollars ($250.00) in penalty benefits.

Defendant shall reimburse claimant five hundred fifty-seven and 22/100 dollars ($557.22) for medical mileage.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding as set forth in the arbitration decision, and the parties shall split 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 29th day of December, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Benjamin Roth (via WCES)

James Peters (via WCES)