

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

COREY TWEETEN,

Claimant,

vs.

LON TWEETEN d/b/a TWEETEN
FARMS,

Employer,

and

GRINNELL MUTUAL,

Insurance Carrier,
Defendants.

File No. 20700058.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.30; 1402.40;
1402.60; 1403.10; 1802; 1803;
2301; 2402; 2501; 2502; 2907;
3203; 3302

Defendants Lon Tweeten, d/b/a Tweeten Farms, employer, and its insurer, Grinnell Mutual, appeal from an arbitration decision filed on September 17, 2021, and from a ruling on motion for rehearing filed on October 13, 2021. Claimant Corey Tweeten responds to the appeal. The case was heard on March 10, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 13, 2021.

In the arbitration decision the deputy commissioner found claimant carried his burden of proof to establish his right lateral epicondylitis and his right deltoid tear arose out of and in the course of his employment with defendant. The deputy commissioner found claimant's claim was timely filed under Iowa Code section 85.26 because claimant did not know of the seriousness of his injury until June 13, 2018. The deputy commissioner found claimant is entitled to receive healing period benefits from June 18, 2018, through October 16, 2018. The deputy commissioner found claimant did not prove he sustained permanent impairment of his cervical spine caused by the work injury. The deputy commissioner found claimant sustained five percent permanent impairment of his right upper extremity caused by the work injury, which entitles claimant to receive 12.5 weeks of permanent partial disability benefits commencing on October 17, 2018. The deputy commissioner found defendants are liable for payment of claimant's requested past medical expenses. The deputy commissioner found claimant is entitled to be reimbursed by defendants for the cost of the independent

medical examination (IME) of claimant performed by Robin Sassman, M.D. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

In the motion for rehearing, defendants assert the compromise settlement between claimant and the Second Injury Fund of Iowa (the Fund) deprives the agency of subject matter jurisdiction over claimant's claim against defendants. Defendants also assert claimant's healing period benefits were incorrectly calculated. The deputy commissioner found the issue raised by defendants relates to the power to adjudicate the issue and not subject matter jurisdiction. The deputy commissioner found defendants waived the issue by failing to raise it on the hearing report or at the start of the hearing and, instead, waited to raise the issue for the first time in their post-hearing brief. The deputy commissioner found, even if defendants did not waive the issue, the compromise settlement between claimant and the Fund does not bar claimant's action against defendants. The deputy commissioner found claimant's weekly rate for healing period benefits should be \$142.22 and ordered defendants to pay claimant healing period benefits from June 18, 2018, through October 16, 2018, at the weekly rate of \$142.22.

Defendants assert on appeal that the deputy commissioner erred in finding the compromise settlement between claimant and the Fund does not bar claimant's claim against defendants. Defendants assert the deputy commissioner erred in finding claimant sustained a deltoid tear caused by the work injury. Defendants assert the deputy commissioner erred in finding claimant's claim is not barred by the statute of limitations. Defendants assert the deputy commissioner erred in awarding claimant healing period benefits. Defendants assert the deputy commissioner erred in finding claimant sustained permanent impairment caused by the work injury and in awarding permanent partial disability benefits. Defendants assert the deputy commissioner erred in finding defendants are responsible for claimant's medical expenses. Defendants assert the deputy commissioner erred in finding claimant is entitled to reimbursement from defendants for the cost of Dr. Sassman's IME.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

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

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility and the credibility of his father. The deputy commissioner found claimant and his father were credible witnesses. I find the deputy commissioner correctly assessed claimant's credibility and the credibility of his father. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant and his father by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this

matter which would cause me to reverse the deputy commissioner's findings regarding the credibility of claimant or his father.

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 October 8, 2021, is affirmed, as modified, with the following additional and substituted analysis.

I affirm the deputy commissioner's finding that claimant proved his right lateral epicondylitis and his right deltoid tear arose out of and in the course of his employment. I affirm the deputy commissioner's finding that claimant's claim was timely under Iowa Code section 85.26. I affirm the deputy commissioner's finding that claimant is entitled to healing period benefits from June 18, 2018, through October 16, 2018, at the weekly rate of \$142.22. I affirm the deputy commissioner's finding that claimant did not prove he sustained permanent impairment of his cervical spine caused by the work injury. I affirm the deputy commissioner's finding that claimant sustained five percent permanent impairment of his right upper extremity caused by the work injury and I affirm the award of 12.5 weeks of permanent partial disability benefits commencing on October 17, 2018, at the weekly rate of \$217.99. I affirm the deputy commissioner's finding that defendants are liable for payment of claimant's requested past medical expenses. I affirm the deputy commissioner's finding that claimant is entitled to reimbursement from defendants for the cost of Dr. Sassman's IME. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding.

With the following additional and substituted analysis, I affirm the deputy commissioner's finding that the issue of the compromise settlement does not relate to the agency's subject matter jurisdiction over this case, but rather it involves the agency's authority to hear the case, and I affirm the deputy commissioner's finding that defendants waived the issue.

Claimant filed a petition in arbitration against defendants and the Fund. Claimant sought permanent partial disability benefits from his employer and the employer's insurer for an alleged scheduled loss to his right upper extremity. Claimant sought industrial disability benefits from the Fund for the combined disability caused by an injury to his right lower extremity in 2008, and the subsequent work-related injury to his right upper extremity on February 1, 2018, which is the subject of this case.

On February 15, 2021, the Fund filed a notice of settlement reporting claimant and the Fund had resolved claimant's claim against the Fund.

Claimant's claim against defendant employer and defendant insurer proceeded to an arbitration hearing on March 10, 2021. The record was held open following the hearing until April 13, 2021, for the filing of post-hearing briefs only. Defendants did not allege the settlement between claimant and the Fund bars claimant's claim against defendants in a pre-hearing motion, on the hearing report, or at the start of the hearing. Defendants first raised the issue when they filed their post-hearing brief on April 13,

2021. The agency approved the settlement agreement between claimant and the Fund on April 23, 2021.

The compromise settlement between claimant and the Fund provides, in part:

1. Date of injury: 2ND DOI: 2/1/18; 1ST DOI: 2008
2. The undersigned parties submit this Compromise Settlement under Iowa Code section 85.35(3).
3. A dispute exists under the Iowa Workers' Compensation Law, which the parties seek to resolve by a full and final compromise disposition of claimant's claim for benefits. The subject and nature of the dispute is: the applicability of the Second Injury Compensation Act.

* * * *

6. RELEASE. In consideration of this payment, claimant releases and discharges the above-named defendant Second Injury Fund of Iowa from all liability under the Iowa Workers' Compensation Law for the above compromised claim.
7. STATEMENT OF AWARENESS OF CLAIMANT: I have read the compromise settlement and attached pages (2). I understand that the money I receive under this settlement is the total amount I will receive from my claim against the Second Injury Fund of Iowa and that there will not be a hearing and decision on my claim against the Second Injury Fund. ~~That there will not be a hearing and decision on my claim. I am aware that if the Workers' Compensation Commissioner approves this compromise settlement and the employer/insurance carrier pays me the agreed sum, then I am barred from future claims or benefits under the Iowa Workers' Compensation Law for the injury or injuries compromised.~~ I understand that I may (1) consult with an attorney of my own choosing, or (2) call the Iowa Division of Workers' Compensation at 1-800-645-4583, or both in order to receive a full explanation of the terms of this document and of my rights under the Iowa Workers' Compensation Law. I have either done so or freely waive my rights to do so. I understand that my claim is settled as to the Second Injury Fund, other than as set out in the attachment.

Claimant's attorney initialed the stricken language from the form settlement document used by the agency. Claimant and the Fund agreed to settle claimant's claim against the Fund for \$2,500.00. Claimant, claimant's attorney, and the Fund's attorney fully executed the document.

Iowa Code sections 85.35(3) and 85.35(9), provide,

3. The parties may enter into a compromise settlement of the employee's claim to benefits as a full and final disposition of the claim.

* * * *

9. Approval of a settlement by the workers' compensation commissioner is binding on the parties and shall not be construed as an original proceeding. Notwithstanding any provisions of this chapter and chapters 85A, 85B, 86 and 87, an approved compromise settlement shall constitute a final bar to any further rights arising under this chapter and chapters 85A, 85B, 86 and 87 regarding the subject matter of the compromise and a payment made pursuant to a compromise settlement agreement shall not be construed as the payment of weekly compensation.

Defendants assert that when the agency approved the compromise settlement under Iowa Code section 85.35, it lost subject matter jurisdiction over claimant's claim against defendants. Claimant rejects defendants' assertion and claimant asserts the compromise settlement does not deprive the agency of subject matter jurisdiction, but rather relates to the agency's authority to hear the matter, which is subject to waiver.

The Iowa courts distinguish between jurisdiction of the case and subject matter jurisdiction. Ney v. Ney, 891 N.W.2d 446, 453 (Iowa 2017) (citing Schaefer v. Putnam, 841 N.W.2d 68, 80 (Iowa 2013); Alliant Energy-Interstate Power & Light Co. v. Duckett, 732 N.W.2d 874 (Iowa 2007)). In Ney, the court noted:

Subject matter jurisdiction is "the authority of a court to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention." Schaefer, 841 N.W.2d at 80 n.13 (quoting Christie v. Rolscreen Co., 448 N.W.2d 447, 450 (Iowa 1989)). Jurisdiction of the case refers to a court's "authority to hear the particular case." Christie, 448 N.W.2d at 450.

This distinction is important because although a statute cannot deprive a court of its constitutionally granted subject matter jurisdiction, it can affect the jurisdiction of the case by prescribing specific parameters of the court's authority to rule on particular types of matters. See Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 181 (Iowa 2001) ("[T]he legislature may impose a duty to grant an injunction by specifying conditions [under which an injunction must be granted] in a statute. When this is done, the conditions specified in the statute supersede the traditional equitable requirements." (Citation omitted)); see also Mensch v. Netty, 408 N.W.2d 383, 386 (Iowa 1987) ("[C]ourts of equity are bound by statutes and follow the law in absence of fraud or mistake.") Further, while parties cannot waive

the absence of subject matter jurisdiction, a defect in the court's jurisdiction of the case can be obviated by consent, waiver, or estoppel. In re Marriage of Seyler, 559 N.W.2d 7, 10 n.3 (Iowa 1997) (citing State v. Mendicino, 509 N.W.2d 481, 482-83 (Iowa 1993), which overruled cases to the contrary).

(Id. at 453-454)

The distinction between subject matter jurisdiction and jurisdiction of the case is significant because a judgment entered by a court without subject matter jurisdiction is void and subject to collateral attack, whereas a judgment entered by a court without jurisdiction over the case is voidable, rather than void. Schaefer, 841 N.W.2d at 83 n.13. If a party waives the court's authority to hear a particular case the judgment is not subject to collateral attack. Id. (quoting Klinge v. Bentien, 725 N.W.2d 13, 16 (Iowa 2006)).

By enacting Iowa Code chapter 85, the legislature removed the district court's general, original jurisdiction to hear claims involving the rights and remedies of injured employees against employers for industrial injuries and placed such claims within the exclusive jurisdictional purview of the workers' compensation commissioner. Heartland Express, Inc. v. Gardner, 675 N.W.2d 259, 262 (Iowa 2003) (citing Shirley v. Pothast, 508 N.W.2d 712, 715 (Iowa 1993)). Thus, the legislature has vested subject matter jurisdiction over workers' compensation claims in the workers' compensation commissioner, "subject to any further circumscription by the legislature." Id. An example of such a circumscription is found in Iowa Code section 85.71, which governs the commissioner's subject matter jurisdiction over claims involving injuries sustained outside of Iowa. Id. (citing Heartland Express, Inc. v. Terry, 631 N.W.2d 260, 265 (Iowa 2001)).

Defendants cite to Heartland Exp. v. Gardner, 675 N.W.2d 259 (Iowa 2003), for the proposition that the compromise settlement in this case deprives the agency of subject matter jurisdiction in this case. In Gardner, at the time of the work injury, Iowa Code section 85.71 provided an employee could bring a claim for workers' compensation benefits for an injury occurring outside of Iowa if the employee worked under a contract of hire in Iowa for employment not principally located in any state and the employee spent a substantial part of the employee's working time in Iowa. The claimant in Gardner, a resident of Georgia, sustained an injury while working for the defendant employer in Georgia. The parties conceded claimant worked under a contract of hire made in Iowa and his employment was not principally localized in any state. The court noted claimant worked in approximately 40 states for the defendant and spent no more or less time in any one state. The court held claimant did not spend a substantial part of his working time for the defendant in Iowa, and for that reason, "the statutory prerequisites for the exercise of subject matter jurisdiction over his claim by an Iowa judicial body were not established," and his claim was "wrongly filed in Iowa." Unlike Gardner, this case involves an alleged work injury involving a claimant living in and working in Iowa for his family's farming operation. This case falls within the subject

matter jurisdiction vested in the workers' compensation commissioner under Iowa Code chapter 85. Defendants' reliance on Gardner is misplaced.

Defendants next cite Harvey's Casino v. Isenhour, 713 N.W.2d 247 (Iowa 2006) in support of their argument. Isenhour involved claimants who were injured on two riverboat casinos. Iowa Code section 85.1(6) provided if an injured employee was covered by a compensation statute enacted by Congress, the employee was not covered by the Iowa Workers' Compensation Act. The court in Isenhour found the agency lacked subject matter jurisdiction over the claims finding claimants were "seaman" under the federal Jones Act because the mission of the riverboats was to provide gambling to patrons and claimants contributed to that function as the term was defined in federal maritime law and the riverboats were capable of being used as a means for transportation. In this case, defendants' reliance on Isenhour is also misplaced. This case does not involve an employee covered by a compensation statute enacted by Congress. Neither case supports defendants' argument that the compromise settlement deprives this agency of subject matter jurisdiction in this case.

The Iowa Supreme Court has heard other cases, also cited by defendants involving the agency's jurisdiction of the case. White v. Northwestern Bell Tel. Co., 514 N.W.2d 70 (Iowa 1994); United Fire & Cas. Co. v. St. Paul Fire & Marine Ins. Co., 677 N.W.2d 755 (Iowa 2004). In both cases the Iowa Supreme Court discussed whether the court had jurisdiction of the case. Neither case finds the jurisdictional issue relates to the agency's general subject matter jurisdiction.

In White, the agency approved a compromise settlement between claimant and defendant. Later, a dispute arose concerning claimant's entitlement to future medical care to be paid by defendant for the work injury that was the subject of the compromise settlement. The court found under Iowa Code section 85.35, the agency's approval of the compromise settlement constituted a final bar to any further rights under Iowa Code chapter 85 involving the parties. White does not support defendants' contention. This case involves an original claim for workers' compensation benefits by claimant against defendants within the agency's exclusive general subject matter jurisdiction; it does not involve enforcement of the compromise settlement between claimant and the Fund.

In United Fire, the claimant sustained two work injuries. The claimant sustained a back injury in September 1995 while working for Woodmarc. At the time of the injury, Woodmarc's insurer was USF&G. St. Paul Fire and Marine Insurance Company (St. Paul) later acquired USF&G. Claimant filed a claim for workers' compensation benefits against Woodmarc and St. Paul involving the 1995 injury.

In February 1998, the claimant in United Fire developed a new onset of pain in the same area as the 1995 injury while working for Coon River Bar & Grill, which was insured by United Fire. Claimant's treating physician determined claimant's back discomfort was related to her degenerative disc disease and not related to the 1998

work injury. Claimant did not file a workers' compensation claim against Coon River Bar & Grill and United Fire for the 1998 injury.

The claimant in United Fire underwent spinal fusion surgery and the treating surgeon opined the 1995 injury was probably the main cause of claimant's condition. St. Paul filed an application for an order under Iowa Code section 85.21 to pursue a claim for indemnification or contribution against United Fire, alleging the February 1998 injury was responsible for the majority of claimant's medical bills and caused her industrial disability. The agency issued an order approving the request.

Instead of filing a petition under Iowa Code section 85.21 against United Fire, St. Paul entered into a compromise settlement with claimant for the 1995 injury that the agency approved. In the compromise settlement St. Paul included a clause that it could pursue United Fire for the amount of the settlement. St. Paul later filed a petition against United Fire for indemnification under Iowa Code section 85.21 for the entire amount paid under the compromise settlement. The treating expert opined the 1998 injury was an aggravation of the 1995 injury, both injuries were significant reasons why he performed surgery, and the precipitating event for the surgery was the 1995 injury. The expert noted he would not have recommended surgery absent a four to five-year history of problems relating to the 1995 injury. The deputy commissioner denied a motion for summary judgment filed by United Fire, finding the compromise settlement did not constitute a final bar to St. Paul's right to indemnification or contribution under Iowa Code section 85.21(3). The commissioner and district court affirmed the decision. The supreme court reversed, finding the compromise settlement terminated the agency's jurisdiction over any claims arising out of a properly approved compromise settlement. The current case does not involve an action for contribution or indemnification.

I agree with the deputy commissioner's finding that defendants' assertion that the agency lacks subject matter jurisdiction over this case is without support in fact or law. The issue is whether the agency has jurisdiction of the case, not subject matter jurisdiction. I also agree with the deputy commissioner that defendants waived the issue of whether the agency has jurisdiction of the case.

Prior to the hearing the parties filed a hearing report. Defendants did not allege the agency lacked jurisdiction based on the compromise settlement between claimant and the Fund on the hearing report, or during the hearing. The hearing report order was entered following the hearing. The record was left open at the conclusion of the hearing for the filing of post-hearing briefs only and also for the refiling on Exhibit G, the payroll register. Defendants first raised the jurisdiction issue when they filed their post-hearing brief on April 13, 2021. In their post-hearing brief defendants alleged, "[b]y settling with the Second Injury Fund on a Compromise Settlement basis, Claimant has deprived the Iowa Workers' Compensation Commissioner of jurisdiction of his claim. Claimant's claim should thus be dismissed." (Def. Post-Hearing Brief, p. 14) As discussed above, jurisdiction of the case is subject to waiver. Ney, 891 N.W.2d at 453-54.

This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. I find defendants waived their argument that the agency lacked jurisdiction of this case by signing the hearing report and by failing to raise the issue with the deputy commissioner at the start of the hearing. Bos v. Climate Eng'rs, 2016 WL 1178116, File No. 5044761 (App. Dec. March 22, 2016) (finding claimant waived the issue by agreeing there was a dispute as to whether claimant was permanently and totally disabled on the hearing report and failing to raise the issue of defendants' response to request for admission regarding the issue until he filed his post-hearing brief) (citing to McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 186-87 (Iowa 1980) (concluding claimant's attorney failed to preserve error on foundation objection by failing to object when the deposition was offered into evidence before the deputy, and by failing to afford "his adversary [with the opportunity] to remedy the alleged defect"); Hawkeye Wood Shavings v. Parrish, No. 08-1708, 2009 WL 3337613, at *4 (Iowa Ct. App. 2009) (concluding the defendants waived the issue of whether they were entitled to a credit for benefits already paid for the September 2000 injury because on the hearing report signed by the defendants, the defendants stipulated "0 weeks" of credit); Burnett v. Webster City Custom Meats, Inc., No. 05-1265, 2007 WL 254722, at *3-4 (Iowa Ct. App. Jan. 31, 2007) (concluding the deputy commissioner did not commit an abuse of discretion by refusing the claimant's request to change dates in the joint hearing report, and noting the agency's approach requiring claimants to list dates prior to hearing in a hearing report "is more than reasonable"). For these reasons I find defendants' argument has no merit.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 17, 2021, and the ruling on motion for rehearing filed on October 13, 2021, are affirmed with the above-stated additional and substituted analysis.

Defendants shall pay claimant healing period benefits from June 18, 2018, through October 16, 2018, at the weekly rate of one hundred forty-two and 22/100 dollars (\$142.22).

Defendants shall pay claimant twelve point five (12.5) weeks of permanent partial disability benefits commencing on October 17, 2018, at the weekly rate of two hundred seventeen and 99/100 dollars (\$217.99).

Defendants shall receive credit for all benefits paid to date.

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.

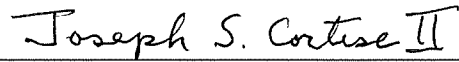
Defendants shall pay claimant's requested past medical expenses.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant for the costs associated with Dr. Sassman's IME, including mileage.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and defendants 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 20th day of May, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Janece Valentine (via WCES)

Stephen Spencer (via WCES)