BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PATRICK PATRIE, Claimant, vs. MARTINSON CONSTRUCTION CO., INC., Employer, and ATLANTIC STATES INS. CO., Insurance Carrier, Defendants.	File No. 5068408 A P P E A L D E C I S I O N Head Notes: 1402.40; 1803; 1804; 2502; 2907; 5-9999

Defendants Martinson Construction Company, Inc., employer, and its insurer, Atlantic States Insurance Company, appeal from an arbitration decision filed on January 29, 2021. Claimant Patrick Patrie responds to the appeal. The case was heard on August 28, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 18, 2020.

In the arbitration decision, the deputy commissioner found claimant was permanently and totally disabled as a result of the stipulated work injury which occurred on or about December 6, 2017. The deputy commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding.

On appeal, defendants assert the deputy commissioner erred in finding claimant to be permanently and totally disabled. More specifically, defendants assert the deputy commissioner erred by failing to limit claimant's industrial disability due to his age and nearness to retirement, by adopting the opinions contained in claimant's independent medical evaluation (IME) report, and by not properly considering the factors for industrial disability.

Claimant asserts on appeal that the arbitration decision 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.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed decision filed on January 29, 2021, which relate to the issues properly raised on intra-agency appeal with the following additional analysis.

I affirm the deputy commissioner's finding that the opinions in claimant's IME report from Arnold Delbridge, M.D., are more convincing than those of Joseph Chen, M.D., and Matthew Bollier, M.D. I affirm the deputy commissioner's findings, conclusions and analysis regarding that issue.

With respect to defendants' position that the deputy commissioner failed to properly consider claimant's age and nearness to retirement, I acknowledge the legislature added this directive in its 2017 amendments to Iowa Code chapter 85. Notably, however, the directive to "take into account . . . the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury" was only added to Iowa Code section 85.34(2), which applies in cases of "permanent partial disabilities." See Iowa Code §85.34(2)(v) (post-July 1, 2017). That language was not added to subsection (3), which applies in cases of "permanent total disability." See Iowa Code §85.34(3)

Thus, I conclude this new consideration of the number of years into the future a claimant reasonably anticipated working is not applicable when a claimant is permanently and totally disabled. See Wilke, File No. 5064366 (Arb. Dec. Oct. 28, 2019) (citing Drake University v. Davis, 769 N.W.2d 176, 184-85 (Iowa 2009) (holding apportionment statute did not apply to permanent total disability benefits because the language of the apportionment statute only referenced the code section regarding permanent partial disability benefits)), affirmed on appeal (Sept. 2, 2020).

I recognize the loss of earning capacity analysis under former section Iowa Code section 85.34(2)(u) - now subsection (v) - was generally the analysis that was used, in large part, to determine whether a claimant was permanently and totally disabled. In other words, in may have been assumed by the legislature that this new provision in subsection 85.34(2)(v) would apply in cases of permanent total disability under 85.34(3) because, practically speaking, the analysis is one and the same. As noted by the Iowa Supreme Court, however, I must "follow what the legislature actually drafted . . ., not what it might have wanted to draft." JBS Swift & Co. v. Ochoa, 888 N.W.2d 887 (2016). And as discussed, this new provision regarding the number of years an employee reasonably anticipated working in the future was not added to Iowa Code section 85.34(3) in 2017.

Ultimately, however, even if I assume this new provision applies in this case, it does not change my determination that claimant is permanently and totally disabled for the reasons set forth by the deputy commissioner in the arbitration decision. Thus, taking into account the number of years in the future claimant reasonably anticipated working, I still find claimant to be permanently and totally disabled.

Defendants suggest in their brief that the number of years which claimant in this case anticipated working should be a mitigating factor toward his loss of earning capacity. As correctly noted by claimant, however, the legislature did not specify what impact this consideration should have on a determination of earning capacity, nor did the legislature indicate this consideration should be given any greater weight than the other industrial disability factors.

Before the 2017 amendments, this agency stated in countless decisions over several decades that "[t]here are no weighting guidelines that indicate how each of the industrial disability factors is to be considered." See, e.g., Logan v. ABF Freight System, Inc., File No. 5047979 (App. April 25, 2018). Thus, had the legislature intended to give this new consideration additional weight, it could easily have said so. See Celotex Corp. v. Auten, 541 N.W.2d 252, 256 (Iowa 1995); see also Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (setting forth proposition that the legislature is presumed to be familiar with court decisions relative to legislature enactments).

In sum, as directed by statute, the deputy commissioner considered the number of years in the future claimant reasonably anticipated he would work at the time of his injury. However, because claimant's work injury precluded him from performing any of that remaining work, the fact that claimant is nearing the end of his working life does not change my affirmation of the deputy commissioner's finding that claimant is permanently and totally disabled. See Wilke, File No. 5064366.

With this additional analysis, I affirm the deputy commissioner's consideration of the industrial disability factors and I affirm the deputy commissioner's finding that claimant is permanently and totally disabled.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 29, 2021, is affirmed in its entirety with the above-stated additional analysis.

Defendants shall pay claimant permanent and total disability benefits at the weekly rate of five hundred ninety-seven and 06/100 dollars ($597.06) from September 22, 2018.

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 receive credit for all benefits previously paid.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding itemized in the hearing report, except for cost of the examination performed by Dr. Delbridge, 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 (SROI) as required by this agency.

Signed and filed on this 26th day of May, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

Judith O'Donohoe (via WCES)

Jason A. Kidd (via WCES)