BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN MCCOY, Claimant, vs. MENARD, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	File No. 1651840.01 A P P E A L D E C I S I O N Head Notes: 1803; 1803.1; 2907; 4000.2

Claimant John McCoy appeals from an arbitration decision filed on November 30, 2020. Defendants Menards, Inc., employer, and its insurer, XL Insurance America, Inc., respond to the appeal. The case was heard on August 20, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 10, 2020.

In the arbitration decision, the deputy commissioner found that because claimant's hourly wage did not change, his disability should be limited to his functional impairment under Iowa Code section 85.34(2)(v) (post-July 1, 2017). The deputy commissioner found claimant sustained 14 percent functional impairment of his whole body. The deputy commissioner also awarded claimant penalty benefits and costs.

The deputy commissioner issued an order nunc pro tunc on December 16, 2020, in which she clarified that claimant was entitled to receive 70 weeks of permanent partial disability benefits as a result of the 14 percent functional impairment of his body as a whole.

On appeal, claimant asserts the deputy commissioner erred in finding claimant's compensation was limited only to his functional impairment under Iowa Code section 85.34(2)(v). Claimant argues he is entitled to a substantial award of industrial disability.

Those portions of the proposed agency decisions 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 November 30, 2020, is affirmed but with the following substituted findings and analysis:

As correctly noted by the deputy commissioner, the legislature made amendments to Iowa Code section 85.34 that went into effect on July 1, 2017. Prior to that date, unscheduled injuries were automatically compensated in relation to a claimant's reduction in earning capacity through an evaluation of industrial disability. See Iowa Code section 85.34(2)(u) (pre-July 1, 2017). Effective July 1, 2017, however, the legislature introduced a prerequisite before industrial disability is to be considered:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code section 85.34(2)(v).

Unfortunately, the Iowa Legislature provided no guidance as to how or when to measure whether an employee is receiving or is being offered the same or greater salary, wages, or earnings than what he or she was receiving at the time of the injury. The Legislature did not indicate when this comparison is supposed to take place, nor did the Legislature indicate how many weeks are to be considered in this comparison. Unlike Iowa Code section 85.36, which provides the number of weeks to be used when computing a claimant's weekly rate of compensation, there is no instruction in section 85.34(2)(v) for how to take the post-injury "snapshot" of a claimant's salary, wages or earnings. There is also no indication from the Legislature as to whether to replace a week that does not reflect the employee's customary earnings, such as what is contained in section 85.36. See Iowa Code section 85.36(6).

The Iowa Supreme Court has repeatedly stated this agency lacks the Legislature's expressly vested authority to interpret workers' compensation statutes. See, e.g., Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016), reh'g denied (May 27, 2016). Practically speaking, however, this agency acts as the front-line authority in interpreting statutory workers' compensation provisions, particularly when statutory amendments are enacted. Thus, while the appellate courts may have the final say, statutory interpretation by this agency is a necessary inevitability.

In this case, the deputy commissioner resolved the lack of guidance offered by the legislature by interpreting the new provision in Iowa Code section 85.34(2)(v) as follows: "if any one of the itemized factors are met [meaning salary, wages, or earnings], the injured workers' disability should be measured by the functional impairment." (Arb.

Dec., p. 8) Because the deputy commissioner found claimant's hourly wage had not diminished, the deputy commissioner concluded one of the factors was "met," meaning claimant's compensation was limited to his functional disability.

More specifically, the deputy commissioner found that the hours worked by claimant "dropped off post injury," but his hourly wage had not changed. (Arb. Dec., p. 7) In doing so, the deputy commissioner effectively determined that claimant's compensation was limited to his functional impairment solely because he was being offered and paid the same hourly wage—irrespective of his actual hours worked.

Said differently, this interpretation implies that the hours worked by the claimant post-injury are irrelevant so long as the employer maintains the pre-injury hourly wage. Though the Legislature clearly intended to limit the scenarios under which industrial disability benefits are owed, such an interpretation would lead to illogical and absurd results. See Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968) ("It is a familiar, fundamental rule of statutory construction that, if fairly possible, a construction resulting in unreasonableness as well as absurd consequences will be avoided."); see also Sherwin–Williams Co. v. Iowa Department of Revenue, 789 N.W.2d 417, 427 (Iowa 2010) ("'[E]ven in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act.'" (quoting *Pac. Ins. Co. v. Or. Auto. Ins. Co.*, 490 P.2d 899, 901 (1971)).

For example, under an extreme application of this interpretation, so long as the employer offers a claimant even one hour of work at the same or greater pre-injury hourly wage, a claimant's compensation would be limited to functional impairment. Given the potential for such an absurd and illogical outcome, I reject the deputy commissioner's interpretation of Iowa Code section 85.34(2)(v).

Instead, consistent with the statute, I conclude a claimant's hourly wage, considered in isolation, is not sufficient to limit a claimant's compensation to functional disability. Iowa Code section 85.34(2)(v) states that the employee's compensation is limited when the employee "receives or would receive the same or greater salary, wages or earnings." Iowa Code section 85.34(2)(v) (emphasis added). This provision says nothing about hourly rates, and the use of the word "receive" implies a comparison of what the claimant was actually paid or offered to be paid both before and after the injury. See "Receive," https://www.merriam-webster.com/dictionary/receive (last visited on April 5, 2021) (defining "receive" as "to come into possession of") Thus, I conclude a claimant's hourly wage must also be considered in tandem with the actual hours worked by that claimant or offered by the employer when comparing pre- and post-injury wages and earnings under section 85.34(2)(v).

As set forth above, the Legislature left several questions unanswered about how and when to take the snapshot of a claimant's post-injury earnings, and as correctly noted by the deputy commissioner, the recency of the amendment means this agency is similarly without guidance from the appellate courts on this issue. While these

questions undoubtedly need to be decided, they will not be decided in this case - because in this case, I find claimant was consistently offered work for which he would have received the same wages or earnings as what he received at the time of the injury. In other words, in this case, no matter which weeks or how many weeks are considered, defendants offered claimant the same hourly wage and the same number of hours he was receiving at the time of his injury.

In this case, leading up to, and on, the date of claimant's injury, claimant was consistently offered four-hour shifts four days per week at the wage of $12.20 per hour. (Hearing Transcript, pp. 16, 49, 62, 66) After claimant's injury, defendant-employer continued to offer claimant four-hour shifts four days per week at the wage of $12.20 per hour. (Tr., pp. 57, 66, 71-72)

I recognize claimant did not regularly work 16 hours per week either before or after the injury. (Def. Ex. B; Cl. Brief, pp. 7-8 n. 5) This was due, in part, to personal appointments and time off, but I also recognize claimant's testimony that after the injury he would occasionally leave a few minutes early when his work was completed and he was experiencing back pain. (Tr., pp. 50, 65, 77) However, this was not a doctor-imposed recommendation, nor could claimant recall when in the months leading up to the hearing he had actually chosen to leave early. (Tr., pp. 70, 84) While defendant-employer apparently acquiesced to claimant leaving a few minutes early if his work was finished, the fact remains that defendant-employer consistently offered claimant four four-hour shifts per week at the rate of $12.20 per hour, which was the same number of shifts and the same hourly rate of pay offered to claimant before, and at the time of, the injury. I therefore find claimant was offered work for which he would receive the same wages or earnings as he received at the time of the injury. As a result, I find claimant shall be compensated based only upon his functional impairment for the injury. Iowa Code section 85.34(2)(v).

With these substituted findings and analysis, I affirm the deputy commissioner's ultimate finding that claimant's disability should be measured by his functional impairment. I likewise affirm the deputy commissioner's finding that claimant sustained 14 percent functional impairment of the whole body.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 30, 2020, is affirmed with the above-stated substituted findings and analysis.

Defendants shall pay claimant seventy (70) weeks of permanent partial disability benefits at the weekly rate of two hundred twenty-three and 54/100 dollars ($223.54) from January 7, 2019.

Defendants shall pay claimant penalty benefits in the amount of twenty-five (25) percent of all benefits underpaid for six (6) weeks and three (3) days of PPD and five (5) percent of the overall PPD owed for the unreasonable delay of benefits due to the lack of timely and contemporaneous communication.

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.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding as set forth in the arbitration decision, 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 9th day of April, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Neal (via WCES)

Charles Blades (via WCES)