BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHARON VOGT, Claimant, vs. XPO LOGISTICS FREIGHT, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5064694.01 A P P E A L D E C I S I O N Head Notes: 1108.50; 1402.40; 1801; 1803; 2501; 2701; 2907; 5-9999

Defendants XPO Logistics Freight, employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on February 17, 2021. Claimant Sharon Vogt responds to the appeal. The case was heard on September 24, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 24, 2020.

In the arbitration decision, the deputy commissioner found claimant failed to satisfy her burden of proof to establish she sustained a compensable left shoulder injury as a result of the stipulated work injury which occurred on August 8, 2017. However, the deputy commissioner found claimant did sustain permanent disability as a result of her nasal fracture, her post-concussive symptoms, and her cervical injuries. The deputy commissioner found claimant is not permanently and totally disabled as a result of the work injury but is entitled to permanent partial disability (PPD) benefits for her loss of earning capacity under Iowa Code section 85.34(2)(v) (post-July 1, 2017). The deputy commissioner found claimant sustained 65 percent industrial disability as a result of the work injury, which entitles claimant to receive 325 weeks of PPD benefits starting on October 24, 2017. The deputy commissioner found claimant is entitled to reimbursement for the requested past medical expenses and for ongoing treatment related to her causally related conditions. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of $1,000.00.

On appeal, defendants assert the deputy commissioner erred in finding claimant proved she sustained a neck condition or post-concussive conditions that are causally related to the work injury. Defendants also assert claimant's permanent partial disability should be limited to her functional disability. In the alternative, defendants assert the deputy commissioner's industrial disability award is excessive and should be reduced substantially.

Defendants assert 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 February 17, 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 claimant proved her cervical and post-concussive conditions are the result of the work injury and resulted in permanent disability. I affirm the deputy commissioner's finding that claimant is entitled to reimbursement for the requested past medical expenses and for ongoing treatment related to her causally related conditions. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding in the amount of $1,000.00. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I likewise affirm the deputy commissioner's finding that claimant's PPD benefits should not be limited to her functional impairment and should instead be awarded in relation to her loss of earning capacity. I offer the following additional analysis in support of that finding:

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).

In this case, I acknowledge that when claimant initially returned to work after her injury, she returned to her regular duties and regular hours. (Hearing Transcript, p. 50) I also acknowledge that at the time of the hearing, claimant's hourly wage was higher than it was at the time of the injury. Claimant, however, began working less hours in late-December of 2019. This reduction in hours was first assigned by claimant's primary care provider, Stephanie Vogeler, PA-C, as a temporary restriction and later by her independent medical examiner, David H. Segal, M.D., as a permanent restriction due to work-related injuries and conditions. (See Joint Exhibit 3, pp. 62-63; Claimant's Ex. 6, pp. 52, 67-68, 74) Claimant was continuing to work reduced hours, albeit at a higher hourly wage, at the time of the hearing. In fact, as correctly noted by defendants in their appeal brief, claimant was experiencing a more than 25 percent reduction in her average weekly earnings due to her reduced hours at the time of the hearing as compared to the time of the injury. Again, this reduction in claimant's hours and in her average weekly earnings was due to temporary and later permanent restrictions caused by her work-related injuries and conditions.

Despite this reduction in her average weekly earnings, defendants assert the increase in claimant's hourly rate limits her compensation to her functional impairment resulting from the injury.

In McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021), I addressed a scenario similar to the scenario presented in this case. In McCoy, I noted that defendants' position would lead to illogical and absurd results:

> [T]his 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).

To avoid this result, I concluded "a claimant's hourly wage, considered in isolation, is not sufficient to limit a claimant's compensation to functional disability." I explained as follows:

> 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).

Thus, applying my rationale in McCoy to this case, I reject defendants' position and I find claimant's hourly wages must be considered in concert with the actual hours she worked.

Unfortunately, however, the legislature failed to provide specific guidance as to when or how this consideration is to take place. As I noted in McCoy,

> [t]he Legislature provided no guidance as to how or when to measure whether an employee is receiving or 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 that are to be used when computing a claimant's 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).

Furthermore, the recency of the amendment means this agency is similarly without guidance from the appellate courts on this issue. 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 in situations like the one presented in this case. Thus, while the appellate courts may have the final say, statutory interpretation by this agency is a necessary inevitability here.

When the plain language of the statute is clear as to its meaning, courts apply the plain language and do not search for legislative intent beyond the express terms of the statute. Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014). A statute is only ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015). Statutes should be read as a whole, rather than looking at specific words or phrases in isolation. Id.

Given the lack of guidance contained in this new provision of Iowa Code section 85.34(2)(v), I conclude there is an ambiguity in the statute pertaining to when and how claimant's post-injury salary, wages, or earnings are supposed to be measured.

From the standpoint of logic and fairness, the post-injury "snapshot" of claimant's salary, wages or earnings should occur at the time of the hearing, just as industrial disability is measured as the evidence stands at the time of the hearing. Performing the comparison based on a claimant's initial return to work could lead to unfair and illogical 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, claimants frequently return to work for a period of time after an injury before a condition worsens or before undergoing surgery. In other words, there are many cases in which restrictions that reduce a claimant's salary, earnings, or wages are not imposed until later in the progression of a claimant's treatment. Furthermore, such restrictions often fluctuate as a claimant receives treatment. Thus, taking a snapshot of a claimant upon his or her initial return to work may not be a fair representation of whether he or she is earning the same or greater salary, earnings, or wages. It is for those same reasons that both physicians and this agency wait until a claimant has reached maximum medical improvement (MMI) before addressing the extent of a claimant's permanent impairment and permanent disability.

Notably, this new provision regarding whether a claimant's benefits are to be limited to functional disability is nestled inside the code section pertaining to industrial

disability. Again, this agency measures a claimant's industrial disability as the claimant's condition stands at the time of the hearing. This is important, as there is a presumption that the legislature is aware of the courts' prior holdings when crafting new legislation. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (as amended); State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980). Had the legislature intended to depart from when industrial disability is measured and use a different moment for this snapshot of claimant's post-injury earnings to occur, it could (and should) have said so. Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802, 812 (Iowa 2011) (holding "legislative intent is expressed by omission as well as by inclusion of statutory terms").

Thus, given logic, fairness, and the rules of statutory construction, I find claimant's post-injury earnings snapshot should occur at the time of the hearing. Specifically, how many weeks to consider in this snapshot is a question that remains to be answered but will not be decided in this case - because in this case, starting in late-2019 and continuing through the time of the hearing, claimant experienced a reduction in her average weekly earnings as compared to her average weekly earnings at the time of her injury that was due to permanent restrictions related to her injury. In other words, this reduction was stable and permanent.

Therefore, with this additional analysis, I affirm the deputy commissioner's finding that claimant was not receiving the same or greater salary, wages, or earnings than she received at the time of the hearing. I therefore likewise affirm the deputy commissioner's finding that claimant's compensation should be based on her loss of earning capacity and it should not be limited to her functional disability.

I affirm the deputy commissioner's finding that claimant sustained 65 percent industrial disability. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 17, 2021, is affirmed in its entirety with the above-stated additional analysis.

Claimant shall take nothing further for temporary total disability or healing period benefits.

Defendants shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the weekly rate of six hundred sixty-three and 95/100 dollars ($663.95) from the commencement date of October 24, 2017.

Defendants shall receive credit for benefits previously paid in the amount of twelve thousand seven hundred sixty-one and 81/100 dollars ($12,761.81), as stipulated.

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 reimburse the providers or health insurer thirty-two thousand one hundred sixty-two and 57/100 dollars ($32,162.57).

Claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one thousand and no/100 dollars ($1,000.00), and defendants shall pay the costs of the appeal, including the costs 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 11th day of June, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Darin Luneckas (via WCES)

Timothy Wegman (via WCES)