

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FRANCIS J. STEPHEN III,

Claimant,

vs.

A TOUCH OF CLASS BANQUET
& CONVENTION CENTRE,

Employer,

and

ACCIDENT FUND INSURANCE
COMPANY OF AMERICA,Insurance Carrier,
Defendants.

File No. 1588289.01

A P P E A L

D E C I S I O N

: Head Notes: 1402.40, 1801; 1803; 2501;
: 2502; 2907; 3001; 3002;
: 4000.1; 4000.2

Defendants A Touch of Class Banquet & Convention Centre (ATC), employer, and its insurer, Accident Fund Insurance Company of America, appeal from an arbitration decision filed on November 4, 2021. Claimant Francis Stephen III cross-appeals. The case was heard on May 19, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 30, 2021.

In the arbitration decision, the deputy commissioner found claimant sustained 50 percent industrial disability as result of the stipulated work injury which occurred on March 24, 2014, which entitles claimant to receive 250 weeks of permanent partial disability (PPD) benefits commencing on December 18, 2019. The deputy commissioner found claimant is entitled to receive healing period benefits from March 1, 2018, through December 17, 2019. The deputy commissioner found claimant's gross average weekly earnings for the injury were \$732.21, with the result that claimant's correct weekly benefit rate for the injury is \$460.17. The deputy commissioner found claimant is entitled to reimbursement in the amount of \$852.85 for medical mileage expense. The deputy commissioner found claimant is entitled to receive \$5,000.00 in penalty benefits for an unreasonable delay by defendants in paying healing period benefits. The deputy commissioner denied claimant's request for costs for an alleged discovery sanction based on defendants' denial of a request for admission. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement for the cost of the independent medical evaluation (IME) of claimant performed by Mark Taylor, M.D. on March 23, 2021. The deputy commissioner found claimant is entitled to reimbursement in the amount of \$500.00 for the cost of Barbara

Laughlin's vocational report. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount \$114.10.

Defendants assert on appeal that the deputy commissioner erred in finding claimant sustained 50 percent industrial disability as a result of the work injury. Defendants assert the award for industrial disability should be reduced substantially. Defendants assert the deputy commissioner erred in awarding claimant additional healing period benefits. Defendants assert the deputy commissioner erred in calculating claimant's weekly benefit rate. Defendants assert it should be found on appeal that claimant's gross average weekly earnings for the injury were \$649.79, with the result that claimant's correct weekly benefit rate for the injury is \$413.22. Defendants assert the deputy commissioner erred in finding claimant is entitled to penalty benefits for delayed payment of healing period benefits. Defendants assert the deputy commissioner erred in finding claimant is entitled to reimbursement for the cost of Ms. Laughlin's vocational report and for the cost of Dr. Taylor's IME.

Claimant asserts on cross-appeal that the deputy commissioner erred in failing to award claimant a 50 percent penalty for delayed payment of healing period benefits and additional penalty benefits based on defendants' termination of permanent partial disability benefits. Claimant asserts the remainder of the deputy commissioner's decision should be affirmed.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as 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 the arbitration decision filed on November 4, 2021, in its entirety.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant to be a credible witness. Defendants assert claimant was not credible. I find the deputy commissioner correctly assessed claimant's credibility. 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 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 claimant's credibility.

I affirm the deputy commissioner's finding that claimant is entitled to receive a total of \$5,000.00 in penalty benefits for defendants' unreasonable delay in paying healing period benefits. I affirm the deputy commissioner's finding that claimant is entitled to reimbursement in the amount of \$852.85 for medical mileage expense. I affirm the deputy commissioner's finding that claimant is not entitled to reimbursement for the cost of an alleged discovery sanction based on defendants' denial of a request for admission. I affirm the deputy commissioner's finding that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement for the cost of Dr. Taylor's IME. I affirm the deputy commissioner's finding that claimant is entitled to reimbursement in the amount of \$500.00 for Barbara Laughlin's vocational report. I affirm the deputy

commissioner's order that defendants pay claimant's costs of the arbitration proceeding in the amount \$114.10. I affirm those findings without additional analysis or comment

With the following additional analysis, I affirm the deputy commissioner's finding that claimant sustained 50 percent industrial disability as a result of the work injury, I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits from March 1, 2018, through December 17, 2019, and I affirm the deputy commissioner's finding that claimant's gross average earnings for the injury were \$732.21, with the result that claimant's correct weekly benefit rate for the injury is \$460.17.

Defendants assert the deputy commissioner erred in awarding claimant 50 percent industrial disability. Defendants argue claimant has a "lengthy history of treating with chiropractors for low back pain and radiculopathy." The evidence supports the deputy commissioner's finding that claimant had preexisting low back pain, but the evidence does not support defendants' assertion that claimant had a lengthy history of treating for low back pain. Defendants' argument lacks merit.

In finding claimant sustained 50 percent industrial disability, the deputy commissioner relied on Dr. Taylor's opinion that claimant sustained eleven percent permanent whole person impairment related to his low back and eleven percent permanent whole person impairment related to his right shoulder, for a combined 22 percent whole person impairment. The deputy commissioner discounted the opinions of Chad Abernathey, M.D., who assigned claimant eight percent whole body impairment related to his low back, and Matthew Bollier, M.D., who assigned claimant two percent whole body impairment related to his right shoulder. Drs. Abernathey and Bollier both released claimant to full duty without any permanent restrictions. Those releases are not in accord with claimant's functioning. The deputy commissioner also correctly noted that in assigning claimant the two percent whole person impairment for his right shoulder injury, Dr. Bollier did not assign a permanent impairment rating for the distal clavicle resection he performed on claimant. (JE 5, p. 46)

Defendants assert claimant sustained minimal permanent impairment because he is able to engage in outdoor activities. At the time of the hearing, claimant was 43 years old. Before the work injury, claimant was very active. He was an avid cyclist riding approximately 5,000 miles per year. (Tr., p. 49) Following the work injury, claimant had to purchase a new style of bike to accommodate his shoulder and lower back discomfort to limit the pressure on his upper extremities and to reduce the amount of bending. (Tr., pp. 49-50) Claimant testified that in the last two years he estimated he had not even ridden 100 miles. (Tr., p. 50) For the 15 years before the work injury he rode the full 500 miles of RAGBRAI each year. (Tr., p. 50) Following the work injury, he can ride 20 to 30 miles. (Tr., p. 50)

Claimant was an avid snow skier before the work injury. (Tr., pp. 47-48) Claimant frequents Colorado. (Tr., p. 53) Mountain ski runs have different classifications, including green, blue, black, and double black, with double black being the highest level of difficulty. (Tr., p. 48) Double black runs have moguls, tree obstacles, and steep levels of speed. (Tr., p. 48) Claimant regularly skied double black runs every year of his adult life before the work injury. (Tr., p. 49)

Before the work injury claimant would ski all day in Colorado at a high performance level. (Tr., p. 53) Now he is able to ski with his family and friends a partial day. (Tr., p. 53) He cannot ski every day and he now spends time in the condominium where he stays cooking his family and friends lunch and doing other activities. (Tr., pp. 53-54, 57) Claimant testified skiing has too many sharp movements, so he is limited to where he can ski now. (Tr., p. 54) He cannot ski the black or double black runs anymore. (Tr., p. 54) Claimant estimated that following the work injury, his ability to bike and ski has been reduced by 90 percent. (Tr., p. 51)

Before the work injury claimant enjoyed kick boxing and weightlifting. (Tr., pp. 47, 51) After three surgeries on his right shoulder, claimant cannot engage in punching motions. (Tr., p. 51) Claimant testified he is limited to workouts at home with resistance bands. (Tr., p. 52)

Claimant recently went on a biking trip to New Zealand with friends. (Tr., pp. 54-55) Instead of enjoying the cycling, he drove the support van for the two weeks of the trip because he could not physically ride his bike there. (Tr., p. 55)

While claimant has not applied for any jobs after he sold ATC, I agree with the deputy commissioner's finding that claimant demonstrated he is motivated because he continued to work in his business for nearly four years from the time of his work injury during a lengthy healing period. After graduating from college in 2001, claimant purchased a banquet and convention center, which became ATC. (Tr., pp. 19-20) Claimant was very active in the business, running the day-to-day operations on a full-time basis. (Tr., pp. 19, 21) The facility had multiple banquet rooms. (Tr., p. 20) Claimant offered full-service banquets for weddings and other events. (Tr., p. 20) He managed the business, performed marketing, supervised the employees, maintained the 2.5 acre grounds doing the landscaping and mowing, he cooked the food for events, he did the setup and take down, and he did the cleaning. (Tr., pp. 20-22) Claimant described his work as very physical. (Tr., p. 22)

Claimant testified his right shoulder is not as strong as it was before the injury. (Tr., p. 34) He has pain with motion and activity, including tightening his belt, washing his hair, reaching across, reaching out forward, reaching up overhead, and carrying weight in front of him. (Tr., p. 35) He testified his low back pain makes it difficult for him to stand, sit, and walk for any length of time. (Tr., p. 32)

Claimant testified that on March 1, 2018, "I sold my business. I came to the realization that I could no longer work physically in my business and be successful, and waiting for approval for surgeries and whatnot, I pretty much had to make the decision to sell while I still could." (Tr., p. 37) Claimant stated the business required a lot of heavy lifting and much time on his feet. (Tr., p. 38) After the injury, claimant had employees perform the duties he performed previously, but it was "increasingly difficult finding people to do things." (Tr., p. 39) Based on the findings of the deputy commissioner, and considering all the factors of industrial disability, with this additional analysis I affirm the deputy commissioner's finding that claimant sustained 50 percent industrial disability as a result of the work injury. (JE 5, pp. 45, 50)

I also affirm the deputy commissioner's finding that claimant is entitled to healing period benefits from March 1, 2018, through December 17, 2019. As did the deputy commissioner, I find claimant's decision to sell the business reasonable given his condition and inability to perform all aspects of his position that he performed prior to the injury. I do not find the sale is akin to a voluntary quit. The deputy commissioner properly noted the test for determining whether healing period benefits are owed is, "(1) whether the employee was offered suitable work, (2) which the employee refused." Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 559 (Iowa 2010). There was no evidence presented that after claimant sold his business the new owner offered him work. After selling the business claimant received additional treatment, including surgery by Dr. Bollier. Dr. Bollier found claimant did not reach MMI until December 17, 2019. (JE 5, pp. 45, 50) I find claimant is entitled to receive healing period benefits from March 1, 2018, through December 17, 2019.

Defendants allege the deputy commissioner erred in calculating claimant's weekly benefit rate. The deputy commissioner found claimant received a salary of \$27,000, plus tips and commissions. On appeal, defendants argue the deputy commissioner considered an exhibit that does not exist, Exhibit 4, page 72, with "estimated remuneration." Defendants' argument is without merit. The record contains Exhibit 4, page 72, which is claimant's rate calculation. Defendants also raise issues of a "fraudulent rate claim." The deputy commissioner found claimant to be a credible witness. I do not find any evidence of fraud in my de novo review. Defendants' arguments are not persuasive.

As noted by the deputy commissioner, Iowa Code section 85.36 defines "weekly earnings" as "gross salary, wages, or earnings of an employee." The bookkeeper for ATC sent defendants a letter, documenting claimant was paid a regular salary of \$27,000.00 per year, plus tips and commissions that were paid out quarterly. (Ex. C, p. 1) Claimant summarized his earnings in Exhibit 4, page 72, for the 12 months immediately preceding the injury. As found by the deputy commissioner, defendants have offered no precedent or legal analysis as to why commissions should not be included within gross weekly earnings. I affirm the deputy commissioner's finding that claimant's gross average weekly earnings on the date of the injury were \$732.21, using the earnings during the 12 months immediately preceding the injury, and I affirm the deputy commissioner's finding that claimant's weekly benefit rate for the injury is \$460.17.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 4, 2021, is affirmed with the above-stated additional analysis.

Defendants shall pay claimant healing period benefits from March 1, 2018, through December 17, 2019.

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on December 18, 2019.

All weekly benefits shall be payable at the weekly rate of four hundred sixty and 17/100 dollars (\$460.17).

Defendants shall pay accrued weekly benefits in a lump sum together with interest payable 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 the injury, plus two percent as required by Iowa Code section 85.30.

Defendants shall pay claimant penalty benefits in the amount of five thousand dollars (\$5,000.00).

Defendants shall reimburse claimant's medical mileage in the amount of eight hundred fifty-two and 85/100 dollars (\$852.85).

Defendants shall reimburse claimant in the amount of one thousand eight hundred five and 00/100 dollars (\$1,805.00) for the cost of Dr. Taylor's IME.

Pursuant to the deputy commissioner's evidentiary ruling at the time of the arbitration hearing, defendants shall reimburse claimant in the amount of five hundred and 00/100 dollars (\$500.00) for Barbara Laughlin's vocational report dated June 14, 2021.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred fourteen and 10/100 dollars (\$114.10), 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 28th day of March, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)

Laura Ostrander (via WCES)