

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TIMOTHY WENZEL,

File No. 1612257.01

Claimant,

A P P E A L

vs.

D E C I S I O N

ARCHER DANIELS MIDLAND CO.,

Employer,  
Self-Insured,  
Defendant.Headnotes: 1402.40; 1803; 1803.1, 2502;  
2907

Defendant Archer Daniels Midland Company, self-insured employer, appeals from an arbitration decision filed on January 31, 2023. Claimant Timothy Wenzel cross-appeals. The case was heard on October 17, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 28, 2022.

In the arbitration decision, the deputy commissioner found claimant met his burden of proof to establish he sustained sequelae injuries to his left upper extremity and low back caused by the stipulated February 10, 2016, work injury to his right lower extremity. The deputy commissioner found claimant sustained 15 percent whole person impairment of his right lower extremity, three percent whole person impairment of his left upper extremity, and five percent whole person impairment of his low back, for a combined 21 percent whole person impairment caused by the work injury. The deputy commissioner found claimant sustained 30 percent industrial disability, which entitles claimant to receive 150 weeks of permanent partial disability benefits. The deputy commissioner found defendant should reimburse claimant for 95 percent of the cost of the independent medical examination (IME) of claimant performed by John Kuhnlein, D.O. The deputy commissioner found defendant should be responsible for claimant's costs.

On appeal, defendant asserts the deputy commissioner erred in finding claimant proved he sustained sequelae injuries to his left upper extremity and low back caused by the work injury. Defendant asserts the deputy commissioner erred in awarding claimant industrial disability benefits, and defendant asserts claimant's recovery should be limited to the functional impairment of his right lower extremity. Defendant asserts the deputy commissioner erred in finding Dr. Kuhnlein's opinion more persuasive than the opinion of Joshua Kimmelman, M.D., on extent of functional impairment of the right lower extremity, and defendant contends claimant sustained 24 percent functional

impairment of the right lower extremity. Defendant asserts if claimant is entitled to industrial disability benefits, the award should be reduced. Defendant asserts the deputy commissioner erred in finding defendant should reimburse claimant for 95 percent of the cost of Dr. Kuhnlein's IME.

On cross-appeal, claimant asserts the deputy erred in finding claimant sustained 30 percent industrial disability, and claimant asserts the award for industrial disability should be increased substantially. Claimant asserts the remainder of the 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 performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on January 31, 2023, is affirmed in part, and is modified in part, with the following additional analysis.

Without further analysis, I affirm the deputy commissioner's finding claimant proved he sustained sequelae injuries to his left upper extremity and low back as a result of the work injury. I affirm the deputy commissioner's finding claimant sustained 15 percent whole person impairment of his right lower extremity, three percent whole person impairment of his left upper extremity, and five percent whole person impairment of his low back, for a combined 21 percent whole person functional impairment. I affirm the deputy commissioner's finding defendant should be responsible for claimant's costs.

With my additional analysis, I modify the deputy commissioner's findings that claimant sustained 30 percent industrial disability and that defendant should reimburse claimant for 95 percent of the cost of Dr. Kuhnlein's IME.

## **I. Applicable Law**

In 2017, the Iowa Legislature enacted numerous changes to Iowa Code chapter 85, including Iowa Code section 85.34. The changes to the statute went into effect on July 1, 2017. This case involves a work injury that occurred before July 1, 2017, therefore, the new provisions of the statute enacted in 2017 do not apply to this case. 2017 Iowa Acts chapter 23 ("The sections of this Act amending sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, and 86.42 apply to injuries occurring on or after the effective date of this Act," or after July 1, 2017).

## **II. Extent of Disability**

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar

employment.” Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee’s “ability to be gainfully employed.” Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

At the time of the hearing claimant was 56 years old. (Hearing Transcript p. 11) Claimant is a high school graduate. (Tr. pp. 12-13) Claimant earned C’s, D’s, and F’s in high school. (Tr. p. 12) Claimant did not receive any training after high school. (Tr. p. 13)

Following graduation from high school claimant accepted a position with International Paper in 1984 and he continued to work for International Paper until the plant closed in 2001. (Tr. p. 37)

Claimant started working for defendant in January 2002. (Id.) Claimant has worked in a number of positions with defendant in feed shipping loading railroad cars, control room assistant running samples, and control room operator. (Id.) At the time of his work injury, claimant was working as a department supervisor. (Tr. p. 14)

As a department supervisor, claimant supervised six to seven individuals. (Tr. p. 14) His position required lifting and dumping 50 pound bags of soap into tanks and it required him to walk or stand at least 50 percent of the time. (Tr. p. 15)

Claimant sustained a serious fracture of his right lower extremity at work on February 10, 2016, when he stepped off from a ladder and fell ten feet. (Tr. p. 14) Claimant sustained a left tibial plafond fracture and underwent three surgeries, the last of which was an ankle fusion. (Jt. Ex. 4) Due to ongoing issues with his right lower extremity, Mathew Karam, M.D., the treating orthopedic surgeon at the University of Iowa Hospitals and Clinics (UIHC) discussed amputating claimant’s right lower extremity. Claimant declined to undergo the amputation.

In October 2019, Dr. Kimmelman conducted an IME for defendant and opined claimant would not be able to return to his job as a department supervisor as a result of the injury, but also found claimant was capable of sedentary work. (Exhibit B, p. 54) At that time of Dr. Kimmelman’s IME, claimant had not been placed at maximum medical improvement (MMI) by Dr. Karam.

On January 21, 2020, claimant returned to Dr. Karam. (JE 4, p. 235) Dr. Karam imposed permanent restrictions of no lifting over 40 pounds, no standing for long periods, limit walking, no walking on uneven surfaces, and limiting claimant to working eight hours per day. (Id.)

Defendant accommodated claimant's restrictions and permanently moved him to a warehouse attendant position. (Tr. p. 27) Arlen Steines, the safety manager at defendant's plant in Clinton, Iowa, testified the only job available to claimant within his restrictions at the plant is his current warehouse job. (Tr. pp. 66-67, 74)

Claimant obtained a chauffer's license for the position. (Tr. p. 29) Claimant drives a fork truck and he receives and delivers parts, hauling parts to and from the warehouse and plant. (Id.) At the time of the hearing claimant continued to work as a warehouse attendant, earning \$39.10 per hour. (Tr. pp. 28, 32) The other warehouse attendants are paid between \$23.00 and \$25.00 per hour. (Tr. p. 29) Considering all of the factors of industrial disability, I find claimant has sustained 50 percent industrial disability, which entitles claimant to receive 250 weeks of permanent partial disability benefits.

### **III. Reimbursement for IME**

Defendant next asserts the deputy commissioner erred in finding defendant should reimburse claimant for 95 percent of the cost of Dr. Kuhnlein's IME because the IME also addresses claimant's claim against defendant Second Injury Fund of Iowa (the Fund). Defendant agrees claimant is entitled to some reimbursement for the IME under Iowa Code section 85.39, but defendant asserts it should only be responsible for one-half of the cost of the IME.

In addition to his claim against defendant, when claimant filed his petition he also stated a claim against the Fund for the combined disability of an alleged first qualifying injury to his left knee in 2012 and a second qualifying injury to his right lower extremity as a result of the stipulated February 10, 2016, work injury. Claimant settled his claim against the Fund before the hearing in this case. Dr. Kuhnlein's IME report addresses claimant's claims against defendant and against the Fund involving the 2012 left knee injury. Dr. Kuhnlein examined claimant's left knee and assigned two percent permanent impairment of the left lower extremity. (Ex. 11). The total cost for the IME is \$6,292.50. Because Dr. Kuhnlein devotes most of his report by far to the February 10, 2016, work injury, with very little of the report devoted to the 2012 non-work injury, I find defendant should reimburse claimant for 80 percent of the cost of the IME, or \$5,034.00.

### **ORDER**

IT IS THEREFORE ORDERED that the arbitration decision filed on January 31, 2023, is affirmed in part, and is modified in part, with my additional analysis.

Defendant shall pay claimant 250 weeks of permanent partial disability benefits at the weekly rate of seven hundred fifty-one and 80/100 dollars (\$751.80), commencing on October 7, 2019

Defendant shall pay all accrued benefits in a lump sum. Interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable

at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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 injury, plus two percent. Gamble v. AG Leader Tech., 2018 WL 2006435, File No. 5054686 (Iowa Workers' Comp. Comm'n Apr. 24, 2018).

Defendant shall receive credit for all benefits paid to date.

Pursuant to Iowa Code section 85.39, defendant shall reimburse claimant in the amount of five thousand thirty-four and 00/100 dollars (\$5,034.00) for the cost of Dr. Kuhnlein's IME.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding, and defendant shall pay the cost of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 16<sup>th</sup> day of June, 2023.

*Joseph S. Cortese II*

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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Corey Walker (via WCES)

Peter Thill (via WCES)