

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE HAYES,

Claimant,

vs.

GEORGIA PACIFIC CORP.,

Employer,

and

OLD REPUBLIC INSURANCE,

Insurance Carrier,
Defendants.

File No. 5067990

A P P E A L

D E C I S I O N

: Head Notes: 1402.20; 1402.40; 1803; 2907;
: 2206; 2209; 3001; 3002;

Claimant Dale Hayes appeals from an arbitration decision filed on September 29, 2020. Defendants Georgia Pacific Corporation, employer, and its insurer, Old Republic Insurance, respond to the appeal. The case was heard on August 6, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 28, 2020.

In the arbitration decision, the deputy commissioner found claimant sustained ten percent industrial disability as a result of the stipulated work injury, which occurred on March 15, 2018. The deputy commissioner found claimant's benefits should be paid at the weekly rate of \$484.98. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$50.00.

Claimant asserts on appeal that the deputy commissioner's industrial disability award is inadequate. Claimant also asserts the deputy commissioner erred in calculating claimant's weekly benefit rate.

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 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 September 29, 2020, is modified in part, and affirmed in part with some additional analysis.

Turning first to the extent of claimant's industrial disability, I modify the deputy commissioner's award and I find claimant sustained 25 percent industrial disability. I agree with the deputy commissioner that Mark Taylor, M.D.'s permanent impairment rating is most persuasive, and I likewise agree claimant has permanent restrictions as set forth by Erin Kennedy, M.D., including being limited to working eight hours per shift and five shifts per week.

However, I disagree with the deputy commissioner that Dr. Taylor "simply relied on lifting restrictions." Importantly, Dr. Taylor also indicated claimant could "not tolerate the operation of equipment over particularly rough surfaces," such as those at defendant-employer's facility. (Claimant Exhibit 2, p. 10) This restriction is consistent with the medical evidence and I therefore find it persuasive.

Together, these restrictions from Dr. Kennedy and Dr. Taylor effectively precluded claimant from continuing his job with defendant-employer, which included overtime work and driving on a rough surface. As correctly noted by the deputy commissioner, this resulted in a loss of actual earnings. Claimant was earning \$17.25 per hour at the time of his injury, plus some overtime, but he was earning only \$13.00 per hour at the time of the hearing with no opportunity for overtime. I find claimant's loss of access to overtime combined with his actual loss of earnings is indicative of an industrial disability award higher than ten percent. Considering these and all other appropriate factors in the industrial disability analysis, I find claimant sustained 25 percent industrial disability as a result of the work injury. This entitles claimant to receive 125 weeks of permanent partial disability benefits. The deputy commissioner's award is therefore modified.

With respect to claimant's weekly benefit rate, I affirm the deputy commissioner's rate calculation with the following additional analysis, which is consistent with the deputy commissioner's analysis in Scott-Gray v. Buresh Building Systems, File No. 5058676 (Arb. Dec., Dec. 17, 2018).

The first sentence of Iowa Code section 85.36 (post-July 1, 2017) states generally that “[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury.”

However, subsection (6) more specifically provides as follows:

In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings . . . of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

Iowa Code section 85.36(6).

Iowa Code section 85.36(6) does not specifically contemplate the scenario in which a claimant receives a pay raise during the 13 weeks immediately preceding the work-related injury. Claimant asserts that pursuant to the first sentence of section 85.36, all of the hours he worked during the 13-week period should be calculated at the \$17.25 hourly wage he was paid on the injury date. See Iowa Code section 85.36. However, pursuant to the more specific language of Iowa Code section 85.36(6), I find actual wages earned during the 13-week period should be used. Thus, with this additional analysis, I affirm the deputy commissioner's rate calculation and I affirm the finding that claimant's weekly rate is \$484.98.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 29, 2020, is modified in part and affirmed in part.

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits beginning on the stipulated commencement date of January 3, 2019.

All benefits shall be paid at the weekly rate of four hundred eighty-four and 98/100 dollars (\$484.98).

Defendants shall receive credit for all benefits previously paid.

Defendant 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 in the amount fifty and 00/100 dollars (\$50.00), 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 10th day of March, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Mark J. Sullivan (via WCES)

Christopher C. Fry (via WCES)