BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TONY PAZZI, Claimant, vs. EFCO/CPI, Employer, and TRAVELERS INDEMNITY CO. OF CT. Insurance Carrier, Defendants.	File No. 5053306.01 APPEAL DECISION Head Notes: 1702, 1803, 1804, 1806

TONY PAZZI, Claimant, vs. EFCO/CPI, Employer, and SENTRY INSURANCE MUTUAL COMPANY, Insurance Carrier, Defendants.	File No. 5063852.01 APPEAL DECISION Head Notes: 1702, 1803, 1804, 1806

Defendants EFCO/CPI, employer, and Travelers Indemnity Company of Connecticut (hereinafter "Travelers"), insurer, appeal from a review-reopening decision filed on April 6, 2021 in file number 5053306.01. Defendants EFCO/CPI, employer, and Sentry Insurance Company (hereinafter "Sentry"), insurer, appeal from the same

review-reopening decision but in file number 5063852.01. Claimant Tony Pazzi responds to both appeals. The case, which consolidated both file numbers, was heard on October 20, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 11, 2020.

In the review-reopening decision, the deputy commissioner found claimant sustained a physical change in condition in both file numbers. The deputy commissioner determined the worsening in claimant's conditions resulted in claimant being permanently and totally disabled. The deputy commissioner found it "impossible to delineate or separate the disability attributable to each injury date." (Review-Reopening Decision, p. 13) Instead, the deputy commissioner found the two injuries "combined" and caused claimant to be permanently and totally disabled as of April 25, 2019 when claimant was deemed medically unfit to return to work. As a result, the deputy commissioner determined "both carriers should share the responsibility of paying for [claimant's] permanent total disability." (Rev.-Reop. Dec., p. 19)

More specifically, the deputy commissioner determined claimant's permanent total disability benefits should be paid at the rate of $569.82, which is the higher of the two rates between the two file numbers. The deputy commissioner then allocated responsibility as follows:

> The most equitable means of dividing those weekly benefits between the competing carriers is proportionally to their potential risk and weekly rate. A proportional assessment results in Travelers being responsible for paying $302.00 per week and Sentry paying $267.82 per week. This provides claimant a full weekly benefit of $569.82 and a proportional obligation by each carrier.

(Rev.-Reop. Dec., p. 19)

The deputy commissioner awarded claimant reimbursement for his claimed medical expenses and allocated responsibility between the two insurance carriers in both file numbers. The deputy commissioner also awarded claimant penalty benefits in the amount of $5,000.00, which he likewise allocated between the two insurance carriers.

On appeal, Travelers, who insured defendant-employer when claimant sustained his back injury on February 24, 2012 (file number 5053306.01), asserts claimant is permanently and totally disabled as a result of the injury to his neck (for which Sentry is

responsible). Travelers also asserts it cannot legally comply with the proportionate rate awarded by the deputy commissioner.

Sentry, who insured defendant-employer when claimant sustained his neck injury on June 13, 2017 (file number 5063852.01), asserts claimant did not sustain a worsening in his condition as it pertains to his neck. In the alternative, Sentry takes a similar position to Travelers. Sentry asserts claimant's permanent total disability is attributable to his low back injury (for which Travelers is responsible) and that it cannot legally comply with the proportionate rate assigned by the deputy commissioner.

Those portions of the proposed review-reopening 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 review-reopening decision filed on April 6, 2021 is affirmed in part, reversed in part, and modified in part.

I affirm the deputy commissioner's finding that claimant sustained a physical change in condition in both file numbers. I likewise affirm the deputy commissioner's determination that claimant is now permanently and totally disabled. The true crux of this appeal is which insurer is responsible for claimant's permanent and total disability.

This case presents a rare factual scenario. Claimant's successive injuries occurred while claimant was working for the same employer but while the employer was insured by two different insurance carriers. Now the insurers are pointing the finger at one another asserting the other is responsible for claimant's permanent total disability benefits.[1]

In his decision, the deputy commissioner, relying on several opinions garnered by Travelers' attorney and an argument asserted by Travelers' attorney, attempted to fashion an equitable outcome by allocating responsibility for claimant's permanent and total disability between both insurers. As acknowledged by the deputy commissioner, however, this solution was not perfect, as it raised additional practical issues, such as

[1] It is worth noting that Travelers asserted as one of its arguments on review-reopening before the deputy commissioner that liability for claimant's disability should be shared between the two insurers. Travelers' attorney also gathered several opinions by experts in this case providing that it is difficult, if not impossible, to determine the date of injury to which claimant's medical care was attributable. The deputy commissioner relied on these opinions in making his determinations and assigning liability for claimant's permanent total disability to both insurers. Now, on appeal, Travelers asserts this was done in error.

which of the two rates to use as the rate for claimant's weekly benefits and how to apportion that rate between the two insurers.

While I understand the deputy commissioner's findings and rationale and applaud and appreciate his attempt to produce an equitable remedy in this case, unfortunately it does not appear that the deputy commissioner's remedy is allowed by statute or rule.

As noted by the Iowa Supreme Court in Drake University v. Davis, apportionment is generally not allowed without a statute providing for it. 769 N.W.2d 176, 184 (Iowa 2009) In other words, "the workers' compensation statutes control the apportionment of benefits." Id.

At the time of claimant's work-related injuries, Iowa Code section 85.34(7) governed the apportionment of benefits. See id. (citing 2004 First Extraordinary Session Iowa Acts ch. 1001, § 18). More specifically subsection (b) governed successive injuries at the same place of employment with the same employer. It provided, in relevant part:

> If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of section 85.34, subsection 2, as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> If, however, an employer is liable to an employee for a combined disability that is payable under section 85.34, subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

Importantly, as explained in Drake, "[t]he plain and unambiguous language of section 85.34(7)(*b*) indicates the only benefits subject to apportionment are those awarded under section 85.34(2)" and "[s]ection 85.34(2) benefits include scheduled benefits and permanent partial disability of the body as a whole." 769 N.W.2d 176, 184–185. Ultimately, therefore, "[p]ermanent total disability benefits are not subject to apportionment under section 85.34(7)."

I acknowledge the factual scenario in Drake is different from the scenario presented in this case. In Drake, the claimant sustained a 30 percent industrial disability as a result of a 2002 date of injury and then became permanently and totally disabled after a 2004 date of injury. Id. at 180. There was no dispute regarding the responsibility of claimant's permanent total disability among insurers; instead, the dispute was whether the agency should apportion claimant's permanent and total disability benefits based on his earlier award. As explained above, the court found the agency was correct when it refused to apportion the claimant's permanent total disability benefits. Id. at 185.

Despite these factual differences, Drake is illustrative for several reasons. First, the rationale supporting the court's decision remains applicable to this case: "Without an apportionment statute that applies to an award of permanent total disability benefits, there is no basis for the agency to apportion the award." Id. Unfortunately for the two insurers in this case, there is no statute that allows the agency to apportion permanent total disability between two parties, just as there is no statute that allows the agency to apportion a claimant's rate. To the contrary, a claimant's rate is set by statute and must comply with the applicable Iowa Workers' Compensation Manual. See Iowa Code §§ 85.36, 85.37. Thus, I conclude the deputy commissioner's determination that claimant's permanent total disability should be apportioned between Travelers and Sentry is not allowable by law.

The facts in Drake demonstrate the separate analysis that typically occurs in successive disability cases. I acknowledge this case presents a unique overlap of time, symptoms and treatment in a review-reopening action, which is a different scenario from that presented in Drake. However, as Drake demonstrates, there needs to be a separate analysis of each file number with an assignment of permanent disability for each date of injury and only then is there a determination as to whether apportionment applies.

Though this is a review-reopening of two files that have been consolidated, there are still two separate injuries with separate two file numbers. Had claimant brought a review-reopening action in only one file number, for example, the deputy commissioner

would have addressed claimant's increased industrial disability for that date of injury only. The same would be true if the parties had not consolidated the cases. Thus, I conclude there needs to be a separate finding for each date of injury regarding how much it increased claimant's industrial disability, including whether it resulted in claimant's permanent total disability.

In his decision, the deputy commissioner noted claimant became permanently and totally disabled after the fitness for duty evaluation by Dr. Berg on April 25, 2019. (Rev.-Reop. Dec., p. 19) When claimant was evaluated on that date, Dr. Berg noted defendant-employer was concerned about claimant being "disoriented," "cognitively impaired and very sleepy," and "very lethargic." (Joint Exhibit 2, p. 16) Dr. Berg also noted defendant-employer was concerned with claimant "falling asleep in his car" and experiencing "severe drowsiness after lunch." (JE 2, p. 16) Claimant told Dr. Berg that "the medications he is currently on make him extremely drowsy." (JE 2, p. 16)

Importantly, in a check-the-box style letter dated July 1, 2019, Dr. Quam indicated claimant's "complaints about drowsiness" could be caused by tramadol and Lyrica if taken at the same time. (Sentry's Ex. AA, p. 1) Dr. Quam noted he first prescribed these medications in April of 2019 for claimant's back and thoracic spine. (Sentry's Ex. AA, pp. 1-2) Dr. Berg then indicated in a letter dated September 13, 2019 that the medications being prescribed for claimant's lumbar spine, including tramadol, Lyrica and Mobic, "are the likely source of [claimant's] drowsiness symptoms and/or his mental and cognitive difficulties at this point." (Sentry's Ex. CC, p. 1) Because of these ongoing difficulties, which Dr. Berg agreed began in April of 2019 upon being prescribed Lyrica, Dr. Berg was unable to recommend a return-to-work release. (Sentry's Ex. CC, p. 1)

I recognize both Dr. Quam and Dr. Berg eventually signed off on a letter from Travelers' counsel indicating claimant's need for medication is due to his cumulative condition from both injuries and that "any pain treatment will affect the entire constellation of his pain symptoms even though initially prescribed for a specific back or neck complaint." (Travelers Ex. C, pp. 48-49, 54). However, acknowledging these medications help alleviate the symptoms from both of claimant's dates of injury does not change the fact that these medications were initially prescribed for claimant's back. And it was the effects of these medications prescribed for claimant's back that ultimately resulted in him being restricted from returning to work as of April 25, 2019.

Additionally, claimant participated in a functional capacity evaluation (FCE) that was specifically ordered for purposes of measuring his capabilities as they related to his neck injury. (See Sentry Ex. DD) Per the FCE, claimant was capable of performing in

the medium demand vocation. (Sentry Ex. FF) I agree that this FCE is not an accurate portrayal of claimant's actual physical capabilities on a regular basis, particularly when considering the combined limitations of his neck and back conditions. It does, however, provide some insight as to the severity of claimant's neck injury separate from his back injury. (See Sentry Ex. HH) For example, in an FCE performed in August of 2019 that was not specific to either of claimant's conditions, claimant was deemed capable of performing work only in the sedentary to sedentary/light category. (Travelers Ex. C, pp. 58-60)

Ultimately, as is evidenced by the deputy commissioner's decision, both of claimant's conditions are severe and serious and could very well on their own have resulted in a finding of permanent and total disability. However, in this case, it was the effect of the medications prescribed for claimant's back that led Dr. Berg to restrict claimant from working. The FCE performed specifically for claimant's neck also suggests claimant's neck condition, though severe, is perhaps slightly less of an impediment than claimant's back. For these reasons, I find it was the worsening of claimant's back condition in file number 5053306.01 that resulted in claimant being permanently and totally disabled. Claimant is thus entitled to permanent total disability (PTD) benefits for which defendant-employer and Travelers are responsible. These benefits should be paid at the rate of $569.82, which is the rate for claimant's February 24, 2012 back injury.

The deputy commissioner's finding that it is impossible to assign claimant's permanent total disability to one date of injury is therefore respectfully reversed, as is his finding that the responsibility for claimant's PTD benefits should be shared between the two insurers.

The analysis does not end here, however, as claimant also sustained a worsening in his neck condition in file number 5063852.01. Thus, I must also address the extent of the increase of claimant's industrial disability resulting from the worsening of his neck condition. See Iowa Code § 86.14(2).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be

given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

As discussed above, claimant's neck injury, when considered in isolation, appears be slightly less functionally restrictive than claimant's back injury. "Slightly" is the imperative word, however, as virtually every physician in this case has indicated claimant is incapable of returning to work due to the combination of his injuries and resulting symptoms and medications. Based on his neck symptoms, his functional limitations resulting from his neck condition, and the medications (and side effects thereof) he is taking to help treat his neck condition and headaches, claimant sustained a significant increase in his industrial disability due to the worsening of his neck condition.

Claimant was previously found to have sustained a 45 percent industrial disability due to his back condition and an additional 5 percent industrial disability due to his neck. I find claimant to be 90 percent industrially disabled due to the combined and cumulative effect of his prior awards and his neck condition at the time of the review-reopening. Thus, based on the apportionment provisions under Iowa Code section 85.34(7)(b), claimant sustained a 40 percent industrial disability from the effects of the worsening of his neck condition on review-reopening for which defendant-employer and Sentry is responsible. See Ditsworth v. ICON Ag, 947 N.W.2d 233 (Iowa Ct. App. 2020) (table).

Compensation for industrial disability benefits shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code § 85.34. Thus, claimant is entitled to 200 weeks of permanent partial disability (PPD) benefits from defendant-employer and Sentry. These benefits are payable at the rate of $505.44, which is the rate for claimant's June 13, 2017 neck injury.

As discussed above, defendant-employer and Travelers are not entitled to apportionment against claimant's permanent total disability benefits. See Drake, 769 N.W.2d 176, 184–185; Iowa Code § 85.34(7)(b)(2). Thus, claimant is entitled to 200 weeks of PPD benefits from defendant-employer and Sentry and PTD benefits from defendant-employer and Travelers.

This does not result in a double recovery; one award is for claimant's permanent partial disability resulting from his neck injury and the other is for his permanent total disability resulting from his back injury. See Drake,769 N.W.2d at 185 ("The legislature stated when it enacted the new apportionment statute that it was intended to avoid 'all double recoveries and all double reductions in workers' compensation benefits for *permanent partial disability*.'" (quoting 2004 First Extraordinary Session Iowa Acts, ch. 1001, § 20 (emphasis in original))).

Having determined each insurer is responsible for separate awards, Sentry is no longer required to reimburse and indemnify Travelers for benefits paid from December 13, 2019 through June 5, 2020.

Claimant's 200 weeks of PPD benefits and his PTD benefits should commence on the date of the filing of the respective petitions for review-reopening, which were October 18, 2019 in file number 5063852.01 and October 16, 2019 in file number 5053306.01. Searle Petroleum. Inc. v. Mlady, 842 N.W.2d 679 (Iowa App. 2013) (table) (finding PTD benefits should commence on the date the review-reopening petition was filed and noting "weekly benefits for review-reopening proceedings cannot be due before a review-reopening petition has been filed"); Verizon Business Network Services v. McKenzie, 823 N.W.2d 418 (Iowa App. 2012) (table) (finding PPD benefits should commence on the date the review-reopening petition was filed). The deputy commissioner's determination that claimant's PTD benefits should commence on April 25, 2019 is therefore modified.

No party appealed the deputy commissioner's findings regarding claimant's entitlement to penalty benefits, so I will not address or disturb those findings herein.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5063852.01

Defendant-employer and Sentry shall play claimant 200 weeks of permanent partial disability benefits commencing on October 18, 2019 at the rate of five hundred five and 44/100 dollars ($505.44).

Defendant-employer and Sentry 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.

Defendant-employer and Sentry shall be entitled to a credit for all benefits paid to date against this award.

Defendant-employer and Sentry are responsible for payment of the medications Ajovy, carbamazepine, topiramate, sumatriptan, and propranolol, as well as any treatment specific to claimant's neck or headaches, as more specifically set forth in the body of the review-reopening.

Defendant-employer and Sentry shall reimburse claimant's independent medical evaluation fee in the amount of three thousand seven hundred and 00/100 dollars ($3,700.00).

File No. 5053306.01:

Defendant-employer and Travelers shall pay claimant permanent total disability benefits commencing on October 16, 2019 and continuing through the present and into the future until claimant is no longer permanently and totally disabled. These benefits shall be paid at the rate of five hundred sixty-nine and 82/100 ($569.82).

Defendant-employer and Travelers 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.

Defendant-employer and Travelers shall be entitled to a credit for all benefits paid to date against this award.

Defendant-employer and Travelers are responsible for payment for any treatment, modifications, or procedures related to claimant's spinal cord stimulator or specific to the low back injury, as more specifically set forth in the body of the review-reopening decision.

Both File Numbers:

Travelers and Sentry shall equally share the expense of all other medications and for treatment rendered by Dr. Gallagher since the date of the review-reopening hearing and moving forward.

Sentry shall reimburse Travelers for past medical expenses in the amount of three thousand six hundred eighty-two and 31/100 dollars ($3,682.31).

Defendant Travelers shall pay claimant penalty benefits in the amount of two thousand six hundred fifty and 00/100 dollars ($2,650.00).

Defendant Sentry shall pay claimant penalty benefits in the amount of two thousand three hundred fifty and 00/100 dollars ($2,350.00).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs as set forth in the review-reopening decision, and the defendants shall split the cost of the appeal, including the cost of the hearing transcript.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 3rd day of November, 2021.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)
William Scherle (via WCES)
Michael Roling (via WCES)