

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK SWANSON,

Claimant,

vs.

PELLA CORPORATION,

Employer,
Self-Insured,
Defendant.

File No. 19700687.01

A P P E A L

D E C I S I O N

: Headnotes: 1402.20; 1402.40; 1703; 1802;
: 1803; 2501; 2502; 2701; 2907

Defendant Pella Corporation, self-insured employer, appeals from an arbitration decision filed on February 10, 2022, and from a ruling on application for rehearing filed on April 7, 2022. Claimant Mark Swanson responds to the appeal. The case was heard on September 28, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 26, 2021.

In the arbitration decision, the deputy commissioner found claimant sustained an injury to his right shoulder on June 11, 2019, which arose out of and in the course of his employment with defendant, and the deputy commissioner found claimant's labral tear and need for surgery were caused by the work injury. The deputy commissioner found claimant failed to prove his right carpal tunnel condition arose out of and in the course of his employment with defendant. The deputy commissioner found claimant is entitled to temporary benefits from September 1, 2020, through September 10, 2020. The deputy commissioner found claimant sustained eight percent permanent impairment of his right shoulder, a scheduled member, which entitles claimant to receive 32 weeks of permanent partial disability benefits. The deputy commissioner found defendant is responsible for claimant's medical bills set forth in Exhibit 1. The deputy commissioner found claimant is not entitled to alternate medical care under Iowa Code section 85.27. The deputy commissioner found that under Iowa Code section 85.39, claimant is not entitled to reimbursement from defendant for the independent medical examination (IME) of claimant conducted by Jacqueline Stoken, D.O., but found that under rule 876 IAC 4.33, claimant is entitled to reimbursement from defendant for the \$2,000.00 cost of Dr. Stoken's IME report and for the \$300.00 cost of the report from Brian Crites, M.D.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant's current right shoulder complaints, the labral tear and the need for surgery are causally related to the June 2019 work injury. Defendant asserts the deputy commissioner erred in awarding claimant permanent partial disability benefits.

Defendant asserts the deputy commissioner erred in ordering defendant to reimburse claimant for the costs of the reports from Dr. Stoken and Dr. Crites.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

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 February 10, 2022, is affirmed in part, modified in part, and reversed in part, with my additional and substituted analysis.

Without additional analysis, I affirm the deputy commissioner's finding that claimant's current right shoulder complaints, the labral tear, and the need for surgery are causally related to the June 11, 2019, work injury. I affirm the deputy commissioner's finding that claimant failed to prove his right carpal tunnel condition arose out of and in the course of his employment with defendant. I affirm the deputy commissioner's finding that claimant is entitled to temporary benefits from September 1, 2020, through September 10, 2020. I affirm the deputy commissioner's finding that defendant is responsible for claimant's medical bills set forth in Exhibit 1. I affirm the deputy commissioner's finding that claimant is not entitled to alternate medical care under Iowa Code section 85.27. I affirm the deputy commissioner's finding that pursuant to Iowa Code section 85.39, claimant is not entitled to reimbursement from defendant for the cost of Dr. Stoken's IME. I affirm the deputy commissioner's finding that under rule 876 IAC 4.33, claimant is entitled to reimbursement from defendant for the \$2,000.00 cost of Dr. Stoken's IME report and for the \$300.00 cost of Dr. Crites's report.

With my additional and substituted analysis, I modify in part, and I reverse in part, the deputy commissioner's finding that claimant sustained eight percent permanent impairment of his right shoulder.

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

This case involves an injury to claimant's right shoulder, a scheduled member, which is evaluated functionally based on 400 weeks. Iowa Code section 85.34(2)(n). For functional loss determinations,

. . . when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A.

Lay testimony or agency expertise shall not be utilized in determining loss or percentage of impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(x).

In the arbitration decision, the deputy commissioner found Dr. Stoken's opinion on causation and extent most persuasive and found claimant sustained eight percent permanent impairment of his right shoulder. In the motion for rehearing, defendant asserted the deputy commissioner erred in finding claimant sustained eight percent permanent impairment of his right upper extremity because Dr. Stoken's calculation included two percent impairment due to loss of range of motion at the wrist. The deputy commissioner rejected defendant's argument, as follows:

However, other than the calculation form, found at Exhibit 3, page 28, Dr. Stoken offers no opinion regarding apportionment of permanent impairment. It is unclear to the undersigned if the two percent allotted to the wrist is due, in part, to claimant's work-related shoulder injury. The undersigned lacks the expertise to make apportionment opinions in this case, based solely on Exhibit 3, page 28. Defendant could have deposed Dr. Stoken regarding apportionment but failed to do so. Defendant could have procured an opinion from Dr. Stoken regarding apportionment but failed to do so. Defendant carries the burden of proof apportionment applies to the eight percent functional rating. Given this record, defendant failed to carry its burden of proof. Based on the above, it is again found claimant is due permanent partial disability benefits based on the eight percent permanent impairment to the upper extremity.

(Ruling on Application for Rehearing, p. 2)

In the arbitration decision, the deputy commissioner found no expert had opined claimant's right carpal tunnel syndrome is causally related to the work injury. Claimant did not appeal that finding. In her August 9, 2021, IME report, Dr. Stoken opined claimant sustained permanent impairments of his right shoulder, right upper extremity, and right hand caused by his employment with defendant. (Ex. 3, p. 15) Dr. Stoken's report contains her findings on exam. Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") Dr. Stoken found claimant sustained two percent upper extremity impairment of his wrist and six percent upper extremity impairment of his right shoulder, for total upper extremity impairment of eight percent. (Ex. 3, p. 28) Dr. Stoken did not opine the two percent impairment for claimant's wrist is related to the shoulder. (Ex. 3) I find claimant has established he sustained six percent impairment of his right shoulder based on Dr. Stoken's report, which entitles claimant to receive 24 weeks of permanent partial disability benefits.

Defendant alleges the deputy commissioner erred in awarding claimant an additional 32 weeks of permanent partial disability benefits under the successive disabilities provision, Iowa Code section 85.34(7).

Iowa Code section 85.34(7) provides,

An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. . . .

In analyzing the successive disabilities provision, the deputy commissioner found:

Claimant was awarded 100 weeks of permanent partial disability benefits regarding the 2015 shoulder injury. Dr. Stoken found that claimant had an 8 percent permanent impairment to the right upper extremity, converting to a 5 percent permanent impairment to the body as a whole. The combined disabilities of the 2015 and 2019 injury resulted in claimant having a 25 percent industrial disability. Claimant is only due benefits for the 2019 injury. As noted in the record, a 5 percent permanent impairment to the body as a whole results in an 8 percent permanent impairment to the upper extremity. Claimant is due 32 weeks of benefits for the 2019 injury (132 weeks – 100 weeks). See Ditsworth v. ICON, File No. 5054080 (App. Dec. November 5, 2018); Knaeble v. John Deere Dubuque Works, File Nos. 5066463 and 5066464 (App. Dec. May 10, 2021)

(Arb. Dec., pp. 13-14)

This case involves a June 2019 injury to claimant's right shoulder. In August 2013, claimant initially alleged he sustained an injury to his right shoulder. At hearing he claimed his injury was only to his arm and not to his shoulder. Claimant sustained a second injury to his right shoulder in September 2015. Under the plain meaning of the successive disabilities statute, defendant is not liable for compensating claimant for any preexisting disability from a prior injury or injuries to his right shoulder with defendant to the extent the injury has, or the injuries have, already been compensated under Iowa Code chapter 85.

Dr. Stoken performed an IME for claimant with respect to the 2013 injury in September 2015 and issued her report on October 19, 2015. (Ex. L) In her report, Dr. Stoken found claimant had right shoulder flexion to 130 degrees, extension to 50 degrees, adduction to 30 degrees, abduction to 120 degrees, internal rotation to 50 degrees, and external rotation to 60 degrees. (Ex. L, p. 95) Using the AMA Guides, Dr. Stoken opined claimant sustained ten percent permanent impairment of the right upper extremity due to deficits in range of motion, which Dr. Stoken converted to a six percent whole person impairment. (Ex. L, p. 96) Dr. Stoken also found claimant had a "15% loss of strength of elbow flexion and supination with some pain associated with his strength testing which is equal to a 5% impairment of the Upper Extremity based on loss of strength in the biceps muscle unit," which she converted to a three percent whole person impairment. (Ex. L, p. 96) Using the Combined Values Chart, Dr. Stoken opined claimant sustained nine percent whole person impairment. (Ex. L, p. 96)

During the 2016 arbitration hearing involving the 2013 work injury, claimant alleged he sustained an injury to his right upper extremity and he denied having right shoulder problems. Swanson v. Pella Corp., File No. 5053253, 2016 WL 6838230 (Iowa Workers' Comp. Comm'n Nov. 17, 2016). The deputy commissioner rejected Dr. Stoken's opinion because her rating was based on claimant's alleged right shoulder problems he denied having at hearing. The deputy commissioner found Dr. Stoken agreed claimant had sustained five percent impairment to the arm only, consistent with the opinion of the other expert, Christopher Vincent, M.D., the treating physician, and awarded claimant 12.5 weeks of permanent partial disability benefits for five percent permanent impairment of the right upper extremity.

Claimant sustained a second work injury to his right upper extremity on September 15, 2015, which proceeded to hearing in 2017. Swanson v. Pella Corp., File No. 5055114, 2017 WL 3707592 (Iowa Workers' Comp. Comm'n Aug. 23, 2017) A different deputy commissioner presided over the second hearing and also presided over the case which is the subject of this appeal.

The deputy commissioner found while claimant initially reported he sustained an injury to his right shoulder as a result of the August 2013 injury, the arbitration decision limited his loss to his right arm and the deputy commissioner found the injury did not result in a permanent impairment to the right shoulder because claimant denied having any right shoulder problems at hearing.

The deputy commissioner noted three experts provided causation opinions with respect to claimant's September 2015 injury. Dr. Vincent opined claimant's right shoulder problems were not caused by the August 2013 or September 2015 injuries. Dr. Crites, who performed a records review, agreed claimant had preexisting chronic AC arthropathy, but also opined the September 2015 incident acutely exacerbated claimant's preexisting condition, and after reviewing claimant's MRI, Dr. Crites opined claimant's Type II SLAP tear was directly attributed to the September 2015 work injury. Jason Sullivan, M.D., a treating orthopedic surgeon, opined claimant's right shoulder

problems were a result of the September 2015 work injury. Based on the opinions of Drs. Crites and Sullivan, the deputy commissioner found claimant proved he sustained an injury to his right shoulder on September 15, 2015, that arose out of and in the course of his employment with defendant.

On January 30, 2017, Dr. Sullivan opined claimant sustained permanent impairment of his right shoulder, finding:

His latest range of motion was 170 degrees of forward flexion equating to 1% and 130 degrees of abduction equating to 2% impairment rating. In addition to his distal clavicle excision, which equates to a 10% rating, he has a 13% permanent impairment rating of the right upper extremity which equates to an 8% whole person permanent impairment rating.

(JE 2, p. 7)

Dr. Sullivan assigned claimant three percent impairment for loss of range of motion.

In the August 2017 arbitration decision, the deputy commissioner found claimant sustained eight percent permanent impairment of his right shoulder, consistent with Dr. Sullivan's opinion. At that time, an injury to the shoulder was compensated industrially. Using the factors for determining industrial disability, the deputy commissioner found claimant sustained 20 percent industrial disability.

The August 2017 arbitration decision does not mention that Dr. Stoken examined claimant with respect to the September 2015 work injury. Defendant argues in this case claimant is not entitled to additional permanent partial disability benefits, relying on Dr. Stoken's findings with respect to the 2013 injury. The deputy commissioner rejected Dr. Stoken's opinion in the November 2016 arbitration decision and found claimant sustained a scheduled member disability of the right upper extremity. Claimant was not compensated based on an injury to the right shoulder for the 2013 injury.

Defendant next relies on the opinion of Dr. Kuhnlein to support claimant at most having an additional functional impairment of his right shoulder when comparing to claimant's baseline. Without additional analysis, I affirmed the deputy commissioner's finding Dr. Kuhnlein's opinion finding no causation is not persuasive.

In her August 2021 IME report, Dr. Stoken notes the September 2015 injury and Dr. Sullivan's finding that claimant sustained 13 percent impairment of the right upper extremity for his right shoulder injury, which equates to an eight percent whole person impairment. (Ex. 3, pp. 8-9) As noted above, Dr. Sullivan found claimant had forward flexion to 170 degrees and assigned one percent permanent impairment, and claimant had abduction to 130 degrees and assigned two percent permanent impairment, for a total permanent impairment of three percent for loss of range of motion. (JE 2, p. 7) In

her 2021 IME report, with respect to the right shoulder, Dr. Stoken assigned three percent permanent impairment for forward flexion to 130 degrees, one percent permanent impairment for abduction to 150 degrees, and two percent permanent impairment for internal rotation to 90 degrees, for a total of six percent permanent impairment of the right shoulder. (Ex. 3, p. 28) When comparing Dr. Stoken's 2021 findings with Dr. Sullivan's January 30, 2017 findings, Dr. Stoken assigned claimant an additional two percent permanent impairment for loss of forward flexion and two percent for loss of internal rotation. Dr. Stoken assigned a one percent permanent impairment for loss of abduction based on abduction to 150 degrees, an improvement over the finding of Dr. Sullivan, who assigned two percent permanent impairment for abduction to 130 degrees. Comparing Dr. Stoken's findings to those of Dr. Sullivan, claimant has established he has sustained an additional three percent permanent impairment based on deficits for loss of range of motion caused by the 2019 work injury. The schedule provides a maximum of 400 weeks of permanent partial disability benefits for an injury to a shoulder. Iowa Code § 85.34(2)(n). Therefore, claimant is entitled to an additional 12 weeks of permanent partial disability benefits for the 2019 work injury.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 10, 2022, is affirmed in part, modified in part, and reversed in part.

Defendant shall pay claimant healing period benefits from September 1, 2020, through September 10, 2020, at the rate of six hundred seven and 33/100 dollars (\$607.33) per week.

Defendant shall pay claimant 12 weeks of permanent partial disability benefits at the rate of six hundred seven and 33/100 dollars (\$607.33) per week, commencing on April 14, 2021.

Defendant shall receive credit for all benefits previously paid.

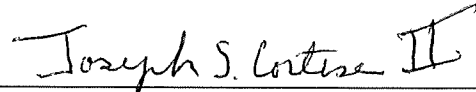
Defendant shall pay accrued weekly benefits in a lump sum together with interest at the annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendant shall pay claimant's medical expenses set forth in Exhibit 1.

Pursuant to rule 876 IAC 4.33, defendant shall reimburse claimant two thousand and 00/100 dollars (\$2,000.00) for the cost of Dr. Stoken's IME report and three hundred and 00/100 dollars (\$300.00) for the cost of Dr. Crites' report, and the parties shall split 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 19th day of October, 2022.

Handwritten signature of Joseph S. Cortese II in cursive script.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Erik Luthens (via WCES)

Matthew Phillips (via WCES)