BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EDWARD MURRAY, Claimant, vs. CITY OF MISSOURI VALLEY, Employer, and IMWCA, Insurance Carrier, Defendants.	File Nos. 1664884.03, 19700585.02 A P P E A L D E C I S I O N Head Notes: 1402.20; 1402.40; 1803; 1806; 2501; 2907

Defendants City of Missouri Valley, employer, and its insurer, IMWCA, appeal from an arbitration decision filed on January 10, 2022. Claimant Edward Murray cross-appeals. The case was heard on November 23, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 20, 2021.

In the arbitration decision, for File Number 19700585.02, the deputy commissioner found claimant met his burden of proof to establish he sustained a work-related injury on April 17, 2019, but the deputy commissioner found claimant failed to prove the incident was causally related to any of claimant's temporary or permanent disability or medical treatment. For File Number 1664884.03, the deputy commissioner found claimant sustained 80 percent industrial disability resulting from the stipulated April 30, 2019, injury. The deputy commissioner found apportionment of successive disabilities applies, and the deputy commissioner found claimant is entitled to receive 391.3 weeks of permanent partial disability (PPD) benefits commencing on May 7, 2021. The deputy commissioner found defendants overpaid claimant's weekly benefit rate and defendants are entitled to a credit against their liability for PPD benefits. The deputy commissioner found defendants are responsible for all causally related medical charges itemized in Exhibit 28, including reimbursement for claimant's out-of-pocket costs. The deputy commissioner ordered the parties to pay their own costs of the arbitration proceeding.

Defendants assert on appeal that the deputy commissioner erred in finding claimant sustained 80 percent industrial disability as a result of the April 30, 2019, injury.

Claimant asserts on cross-appeal that the deputy commissioner erred in finding claimant failed to prove he is permanently and totally disabled. Claimant asserts the

deputy commissioner erred in finding apportionment applies in this case because claimant asserts defendants waived the issue by failing to raise the issue in their answer or on the hearing report, and instead raised the issue for the first time in their post-hearing brief. Claimant asserts the remainder of the arbitration 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 17.15 and 86.24, the arbitration decision filed on January 10, 2022, is affirmed in part, and is reversed in part, with the following additional and substituted analysis.

In File Number 19700585.02, I affirm the deputy commissioner's finding that claimant proved he sustained a work-related injury on April 17, 2019, and I affirm the deputy commissioner's finding that claimant failed to prove the incident was causally related to any of claimant's temporary or permanent disability or medical treatment.

In File Number 1664884.03, I affirm the deputy commissioner's finding that claimant sustained 80 percent industrial disability as a result of the stipulated April 30, 2019, injury, which entitles claimant to receive 400 weeks of PPD benefits commencing on the stipulated commencement date of May 7, 2021. I affirm the deputy commissioner's finding that defendants overpaid claimant's weekly benefit rate and are entitled to a credit against their liability for PPD benefits. I affirm the deputy commissioner's finding that defendants are responsible for all causally related medical bills set forth in Exhibit 28, including claimant's out-of-pocket costs. I affirm the deputy commissioner's order that the parties pay their own costs of the arbitration proceeding. I reverse the deputy commissioner's finding that apportionment applies in this case with the following additional and substituted analysis.

The deputy commissioner found apportionment of successive disabilities applies. On cross-appeal, claimant asserts the deputy commissioner erred in finding apportionment applies in this case because defendants failed to assert it in their answer, or on the hearing report, and did not raise the issue for the first time until they argued it in their post-hearing brief. Defendants assert they are unaware of any requirement to raise the issue of apportionment in the answer or on the hearing report, defendants assert the application of apportionment is obvious, and defendants assert they raised the issue in their answer to interrogatory number 14.

Iowa Code section 85.34(7), provides as follows:

> 7. *Successive disabilities.* 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. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Defendants did not allege the apportionment for successive disabilities provision applied in this case in their answer. Defendants did not raise the issue on the hearing report or at the time of the hearing. The first time defendants raised the issue was in their post-hearing brief.

The agency has previously ruled apportionment is an affirmative defense that must be raised by the defendant. Boots v. Menard, Inc., 2015 WL 6501004 (Iowa Workers' Comp. Comm'n. Oct. 26, 2015) (defendants did not indicate apportionment under Iowa Code section 85.34(7), was an issue in the case on the hearing report, and "as a result, they are precluded from raising the issue in this case"); Cf. Christistianson v. Snap-On Tools, Inc., File Number 5038898, 2017 WL 950979 (Iowa Workers' Comp. Comm'n App. Feb. 28, 2017) (finding apportionment is an affirmative defense under the occupational disease statute and defendant did not meet its burden to prove apportionment applied).

Rule 876 Iowa Administrative Code 4.19(3)(f), requires the parties of record to submit a joint hearing report "that defines the claims, defenses, and issues that are to be submitted to the deputy commissioner who presides at the hearing." The hearing report is signed by all counsel and entered as an order by the deputy commissioner.

This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. I find defendants in this case waived the issue of apportionment of successive disabilities by signing the hearing report without including a reference on it to the issue of apportionment, and by failing to raise the issue with the deputy commissioner during the hearing. Bos v. Climate Eng'rs, 2016 WL 1178116, File No. 5044761 (App. Dec. March 22, 2016) (finding claimant waived an issue by agreeing there was a dispute as to whether claimant was permanently and totally disabled on the hearing report and failing to raise the issue of defendants' response to request for admission regarding the issue until he filed his post-hearing brief) (citing to McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 186-87 (Iowa 1980) (concluding claimant's attorney failed to preserve error on foundation objection by failing to object when the deposition was offered into evidence before the deputy, and by failing to afford "his adversary [with the opportunity] to remedy the alleged defect"); Hawkeye Wood Shavings v. Parrish, No. 08-1708, 2009 WL 3337613, at *4 (Iowa Ct. App. 2009) (concluding the defendants waived the issue of whether they were entitled to a credit for benefits already paid for the September 2000 injury because on the hearing report signed by the defendants, the defendants stipulated "0 weeks" of credit); Burtnett v.

Webster City Custom Meats, Inc., No. 05-1265, 2007 WL 254722, at *3-4 (Iowa Ct. App. Jan. 31, 2007) (concluding the deputy commissioner did not commit an abuse of discretion by refusing the claimant's request to change dates in the joint hearing report, and noting the agency's approach requiring claimants to list dates prior to hearing in a hearing report "is more than reasonable").

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 10, 2022, is affirmed in part, and is reversed in part, with the above-stated additional and substituted analysis.

File 19700585.02 – Injury Date of April 17, 2019:

Claimant shall take nothing from these proceedings.

For File No. 1664884.03 – Injury Date of April 30, 2019:

Defendants shall pay claimant 400 weeks of permanent partial disability benefits at the stipulated weekly rate of eight hundred six and 46/100 dollars ($806.46), commencing on the stipulated commencement date of May 7, 2021.

Defendants are entitled to a credit for the overpayment of claimant's weekly benefit rate against their liability for permanent partial disability benefits.

Defendants 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.

Defendants are responsible for all causally related medical expenses set forth in Exhibit 28, including claimant's out-of-pocket costs.

For Both Files:

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, 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 14th day of June, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Corey Walker (via WCES)

Jane Lorentzen (via WCES)