BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LORRI M. HAGEN, Claimant, vs. SERTA-SIMMONS NATIONAL BEDDING, Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	File No. 5061271.01 A P P E A L D E C I S I O N Head Notes: 1402.40; 1802; 1803; 1804 2502; 2907; 4000.2; 4100

Claimant Lorri M. Hagen appeals from an arbitration decision filed on November 24, 2020. Defendants Serta-Simmons National Bedding, employer, and its insurer, Safety National Casualty Corporation, cross-appeal. The case was heard on September 25, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 30, 2020.

At the arbitration hearing, the deputy commissioner sustained defendants' objections and excluded from evidence claimant's Exhibits 10, 11, 14 and 15, which are claimant's independent medical examination (IME) report, claimant's vocational assessment report and bills related to the two reports. (Hearing Transcript, pp. 17, 59-60) The deputy commissioner reaffirmed his ruling excluding the exhibits on October 9, 2020, in a written ruling on claimant's motion to reconsider.

In the arbitration decision, the deputy commissioner again set forth his rationale for sustaining defendants' objections and excluding Exhibits 10, 11, 14 and 15 from evidence. The deputy commissioner also found claimant was not permanently and totally disabled under either the traditional industrial disability analysis or the odd-lot analysis as a result of the stipulated work injury, which occurred on February 21, 2017. Instead, the deputy commissioner found claimant sustained 60 percent industrial disability, which entitles claimant to receive 300 weeks of permanent partial disability benefits. The deputy commissioner found claimant reached maximum medical improvement (MMI) as of July 22, 2019, and, as a result, was not entitled to receive any

additional temporary disability benefits. The deputy commissioner declined to order defendants to reimburse claimant for her IME because claimant failed to timely exchange and file the invoice. The deputy commissioner awarded penalties in the amount of $5,394.28 for defendants' late payment of weekly benefits. Lastly, the deputy commissioner awarded some of claimant's costs but declined to tax defendants with the costs of claimant's vocational report, among other expenses.

On appeal, claimant asserts the deputy commissioner erred in awarding 60 percent industrial disability. Claimant asserts the deputy commissioner erred in failing to find claimant is permanently and totally disabled as a result of the work injury. Claimant also asserts the deputy commissioner erred in excluding from evidence Exhibits 10, 11, 14 and 15, which again are her IME report, her vocational assessment, and related invoices. Claimant likewise asserts she is entitled to reimbursement for the IME and the vocational assessment. Claimant asserts the deputy commissioner's award of penalty benefits was insufficient. Lastly, claimant argues the deputy commissioner erred in his determination of the MMI date.

On cross-appeal, defendants assert the deputy commissioner erred by awarding penalty benefits in any amount.

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 November 24, 2020, is affirmed in part, modified in part, and reversed in part.

I turn first to the deputy commissioner's exclusion of Exhibits 10, 11, 14 and 15. As correctly noted by the deputy commissioner, claimant's IME report drafted by John Kuhnlein, D.O., and the vocational assessment authored by Tom Karrow were served on defendants less than 30 days before hearing in violation of 876 Iowa Administrative Code rule 4.19(3). The invoices related to these reports were likewise not timely exchanged.

With respect to the reports themselves, Exhibits 10 and 11, defendants asserted prejudice in the form of "complete surprise" leading to inadequate time to prepare for hearing and/or to respond to the opinions contained in the reports. (See Tr., p. 10) Notably, however, defendants were notified of claimant's intent to acquire an IME in November 2019, and claimant also updated discovery responses to add Mr. Karrow as an expert on August 19, 2020. (Tr., p. 11; Claimant's Resistance) Thus, defendants' claim of "complete" surprise is not correct.

That being said, there was some element of surprise, as the reports were not timely exchanged, nor was Mr. Karrow timely designated as an expert under the administrative rules. See 876 IAC 4.19(3)(b), (d).

In Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997), the Iowa Supreme Court reversed the then-commissioner's exclusion of a report from the authorized treating physician because the report did not unfairly surprise or prejudice the employer. "As the treating physician and one who had been submitting medical information to the employer from the date the injury occurred, it was logical to have his evaluation of the permanency of the injury, and the employer could not reasonably claim surprise." Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 122–23 (Iowa 2003) (explaining holding in Schoenfeld); Schoenfeld, 560 N.W.2d at 598 ("Field had provided the employer with detailed medical information from the date Schoenfeld was first examined in November 1992 to his last treatment in April 1993. The employer had also received the hospital operative records and had offered them as exhibits at the hearing. . . . Field was the treating physician and the logical person to evaluate the permanency of the injury.")

Unlike in Schoenfeld, the late reports being offered in this case are not from a treating physician. While defendants may have known that claimant was seeking an IME and a vocational report prior to the 30-day exchange deadline, the Supreme Court has indicated that "Schoenfeld should not be read so broadly as to require admission of evidence received after the cutoff date on the basis the employer merely knew of the existence of the reporting doctor." Trade Professionals, 661 N.W.2d at 122.

In similar circumstances, deputy commissioners often admit late reports and keep the record open to allow defendants additional time to acquire responsive reports. This was done with approval in Trade Professionals. See id. at 123. In this case, however, the deputy commissioner chose to exclude the reports. As noted by the Supreme Court, it has often "been reluctant to reverse the Commissioner's imposition of the sanction of exclusion for noncompliance with the scheduling order or the rule that requires information thirty days prior to hearing." Schoenfeld, 560 N.W.2d at 598 (citations omitted) Furthermore, "these rulings are discretionary." Trade Professionals, 661 N.W.2d at 123 (citing Schoenfeld, 560 N.W.3d at 598).

The IME report and vocational assessment report were not authored by treating physicians and were exchanged for the first time roughly two weeks before hearing in violation of Iowa Administrative Code rule 4.19(3). Furthermore, Mr. Karrow was not designated as an expert until roughly one month before hearing, which was also in violation of the rule, and Mr. Karrow's report concluded claimant was permanently and totally disabled, which was an opinion not shared by any other experts in this case. Thus, I find defendants proved unfair surprise and prejudice by the untimely exchange of these reports. As a result, with this additional analysis, I affirm the deputy commissioner's exclusion of Exhibits 10 and 11.

While keeping the record open and offering the objecting party the opportunity to seek responsive reports is often the preferred remedy employed by deputy commissioners in similar circumstances, exclusion of evidence is an allowable sanction under the rules when a party establishes prejudice, as defendants did in this case. See

876 IAC 4.19(3)(e). I therefore find the exclusion of the reports in this case was not an abuse of discretion.

Exhibits 14 and 15 are invoices related to Dr. Kuhnlein's IME and Mr. Karrow's vocational assessment, respectively, which claimant attempted to admit at hearing. Defendants reasserted their objections relating to Exhibits 10 and 11, and the deputy commissioner relied upon the same rationale for their exclusion.

First, even if Exhibit 15 had been admitted into the record, I affirm the deputy commissioner's decision to not tax defendants the costs of the vocational assessment. The deputy commissioner declined to assess the costs of Mr. Karrow's report because the report itself was excluded and was therefore not relied upon by the deputy commissioner in his findings or analysis. It was the exclusion of the report - not the exclusion of the invoice - that was the basis of the deputy commissioner's decision. I find the decision to not assess Mr. Karrow's report as a cost was appropriate in light of the fact that the report was not relied upon by the deputy commissioner. As a result, the exclusion of Exhibit 15 is affirmed.

The analysis concerning Exhibit 14, the IME invoice, is more complex, however, because the statutory reimbursement provisions of Iowa Code section 85.39 were triggered in this case. That section provides that an employer "shall" reimburse claimant the reasonable fee for the IME. Unlike the costs assessment provision in Iowa Administrative Code rule 876-4.33, section 85.39 is not discretionary. See Iowa Code section 85.39(2); 876 IAC 4.33.

Importantly, defendants in this case stipulated in the "Medical Benefits" section of the hearing report in which claimant indicated she was seeking reimbursement for her IME that "[t]he fees or prices charged by providers are fair and reasonable." (Hearing Report, p. 3) Their only basis for not paying the IME is that the report and the invoice were served late. Again, however, Iowa Code section 85.39 does not carve out an exception to the reimbursement provisions for untimely service. Furthermore, claimant testified as to the amount of the IME ($4,312.50). (Tr., p. 58) As such, I respectfully reverse the deputy commissioner's exclusion of Exhibit 14 and I reverse the finding that claimant is not entitled to reimbursement for her IME with Dr. Kuhnlein.

I now turn to claimant's claim for disability benefits. With respect to when claimant reached MMI, I affirm the deputy commissioner's determination that July 22, 2019, is the proper MMI date. Claimant, therefore, is not entitled to any additional temporary disability benefits. I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner regarding this issue.

Regarding claimant's permanent disability, the deputy commissioner found claimant was not permanently and totally disabled and instead sustained 60 percent industrial disability. Claimant asserts on appeal that she is permanently and totally disabled. With the following additional analysis, I affirm the deputy commissioner's finding that claimant is not permanently and totally disabled by the work injury.

No physician has indicated to claimant that she is physically incapable of working. After his IME of claimant in July of 2019, Thomas Gorsche, M.D., indicated claimant "could return to work with sit-down work duties with limited standing and walking," along with no climbing or squatting. (Def. Ex. G, p. 57) This is consistent with the prognosis offered by claimant's treating physician, Edward Henrich, D.P.M., who indicated in November of 2019 that claimant would be very limited in her ability to stand for prolonged periods of time. (Cl. Ex. 6, p. 3)

I acknowledge that Dr. Henrich also indicated in November of 2019 that he did not recommend claimant working "at this time"; however, claimant subsequently returned to work with a different employer in January of 2020. When she returned to Dr. Henrich for treatment in April of 2020, Dr. Henrich made no mention regarding work restrictions in his notes. (JE 4, pp. 78-79) After claimant reported problems upon her return to work in June of 2020, Dr. Henrich placed her on restrictions of limited hours and shifts "until I see her back further in mid to late July 2020." (JE 4, p. 87) Based on the use of the word "until," I agree with the deputy commissioner that those restrictions were intended to be temporary. When claimant returned to Dr. Henrich in August of 2020, he did not renew the restrictions, nor did he mention restrictions in any capacity. (JE 4, p. 90) Thus, I find claimant's permanent restrictions are confined to sedentary work and do not include a limitation on shifts or hours worked.

While being limited to sedentary work no doubt limits claimant's earning capacity, the vocational assessment offered by defendants identified some available work consistent with claimant's restrictions. Based on this fact, combined with the fact that no physician has indicated claimant is permanently physically unable to return to the workforce, I agree with the deputy commissioner's finding that claimant is not permanently and totally disabled. With this additional analysis, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner and affirm the deputy commissioner's determination that claimant is not entitled to permanent total disability benefits under either the traditional or odd-lot analysis.

I affirm the deputy commissioner's finding that claimant sustained 60 percent industrial disability. I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner regarding this issue.

The final issue on appeal is claimant's entitlement to penalty benefits. Claimant asserts the deputy commissioner's award was insufficient, while defendants assert the deputy commissioner erred in awarding any penalty benefits.

Claimant asserts she should be entitled to penalty benefits dating back to April 3, 2018, when Dr. Henrich recommended surgery for claimant's Achilles. Though there were at least two attempts made to obtain authorization for the recommended surgery, defendants did not respond with a denial until May 18, 2018, in response to claimant's petition for alternate medical care.

Defendants assert their May 18, 2018, denial was based "on the medical records available at the time," including the opinion of Michael Crane, M.D., that "claimant's symptoms were not a result of the work injury." (Def. App. Brief, p. 17) The problem with defendants' position, however, is that Dr. Crane's opinion was referring to claimant's plantar fasciitis - not the Achilles issue for which surgery was being recommended. (See JE 2, p. 22; JE 4, p. 44) As of their denial in May of 2018, they had no contrary causation opinions pertaining to claimant's Achilles. Thus, I respectfully reverse the deputy commissioner's finding and find defendants' denial through May of 2018 was not reasonable.

On August 30, 2018, defendants sent Dr. Crane a request to issue a formal causation opinion. (Def. Ex. D, p. 30) Though Dr. Crane indicated in a letter dated September 22, 2018, that claimant's first MRI did not reveal any issues with the Achilles tendon, it does not appear Dr. Crane reviewed the second MRI which was done on April 3, 2018, which did reveal the tear in claimant's Achilles. (Def. Ex. D, p. 29) Still, defendants relied on Dr. Crane's opinion to reaffirm their denial in an October 3, 2018, letter to claimant's counsel. (Def. Ex. D, p. 28) Because Dr. Crane's opinion was based on an incomplete records review, I respectfully reverse the deputy commissioner's finding and instead I find defendants' denial through October 3, 2018, was not reasonable.

Defendants continued to rely upon Dr. Crane's flawed opinion through November 18, 2018, when they accepted liability upon receipt of the IME conducted by Charles Mooney, M.D. Given the flaws in Dr. Crane's report, I respectfully reverse the deputy commissioner's finding and instead find defendants' denial of liability through November 18, 2018 was not reasonable.

After accepting liability defendants did not issue their first payment of benefits until January 29, 2019, roughly two months later. Defendants assert the delay was due to the time it took to calculate their credit for short-term disability benefits paid. That excuse does not explain a two-month delay, however. I therefore affirm the deputy commissioner's finding that this delay was not reasonable.

Claimant was entitled to receive temporary disability benefits which were not timely paid, from June 12, 2018, through January 28, 2019, when defendants finally started making weekly benefit payments. Thus, I find defendants unreasonably denied or delayed payment of 33 weeks of benefits, or roughly $17,000.00 at claimant's rate.

Given defendants' initial silence in response to claimant's requests for authorization for surgery and the inattentiveness that followed, including their reliance on Dr. Crane's opinions that were outdated and based on a review of the records, that failed to include one of the key records, the second MRI, I find a maximum penalty is appropriate. I therefore award a penalty in the amount of $8,500.00, which represents roughly 50 percent of the benefits that were unreasonably denied or delayed from June 12, 2018, through January 28, 2019.

Defendants assert the additional penalty awarded by the deputy commissioner for late payments was not justified because the deputy commissioner made no findings regarding any pattern or history of such behavior by defendants. Defendants, however, offer no justification whatsoever on appeal regarding these late payments. I therefore affirm the deputy commissioner's penalty award in the amount of $3,671.36 for the five instances of late payments.

The deputy commissioner's penalty award is therefore modified and defendants are responsible for penalty benefits in the amount of $12,171.36.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 24, 2020, is affirmed in part, modified in part, and reversed in part.

Defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits at the weekly rate of five hundred twenty-four and 48/100 dollars ($524.48) commencing on July 23, 2019.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

If not already paid, the defendants shall reimburse claimant one thousand thirty-two and 43/100 dollars ($1,032.43) for time off attending medical appointments.

If not already paid, the defendants shall reimburse the claimant three thousand three hundred seventy-five and 29/100 dollars ($3,375.29) for medical mileage.

Defendants shall pay claimant penalty benefits in the amount of twelve thousand one hundred seventy-one and 36/100 dollars ($12,171.36).

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant in the amount of four thousand three hundred twelve and 50/100 dollars ($4,312.50) for the cost of Dr. Kuhnlein's IME.

Pursuant to rule 876 IAC 4.33, defendants shall play claimant's costs of the arbitration proceeding in the amount of six hundred eighty-five and 00/100 ($685.00), 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 (SROI) as required by this agency.

Signed and filed on this 17th day of May, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

John M. Loughlin (via WCES)

Lindsey E. Mills (via WCES)