

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN BARRY,

Claimant,

vs.

JOHN DEERE DUBUQUE WORKS
OF DEERE & COMPANY,Employer,
Self-Insured,
Defendant.

File No. 21003269.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 1403.30;
1701; 1801; 1803; 1803.1
1808; 2402; 2907

Defendant John Deere Dubuque Works (John Deere) appeals from an arbitration decision filed on November 29, 2021. Claimant Brian Barry cross-appeals. The case was heard on August 31, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 30, 2021.

In the arbitration decision, the deputy commissioner found claimant sustained a cumulative work-related injury to his bilateral shoulders which manifested on August 8, 2018. The deputy commissioner found claimant timely filed his petition under Iowa Code section 85.26. The deputy commissioner found claimant sustained scheduled member injuries to his right and left shoulders arising out of the same incident and awarded claimant 40 weeks of permanent partial disability (PPD) benefits for each shoulder, for a total of 80 weeks of PPD benefits, commencing on August 8, 2018. The deputy commissioner found claimant was not entitled to additional temporary benefits. The deputy commissioner found defendant is not entitled to a credit for disability payments paid to claimant. The deputy commissioner found claimant is not entitled to an award of penalty benefits. The deputy commissioner found claimant is not entitled to an award of attorney fees based on denied requests for admission. The deputy commissioner found claimant is not entitled to reimbursement from defendant for the \$2,268.87 cost of the independent medical examination (IME) of claimant performed by Stanley Mathew, M.D. The deputy commissioner ordered defendant to pay claimant's costs of the arbitration proceeding in the amount of \$148.40.

On appeal, defendant asserts the deputy commissioner erred in finding claimant filed his claim in a timely manner under Iowa Code section 85.26. Defendant asserts the deputy commissioner erred in allowing claimant to amend the injury date to conform to the evidence. Defendant asserts the deputy commissioner erred in awarding claimant PPD benefits. Defendant asserts the deputy commissioner erred in finding

defendant was not entitled to a credit for disability payments paid to claimant during the Covid-19 pandemic.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant sustained scheduled member disabilities to his bilateral shoulders instead of industrial disability. Claimant asserts the deputy commissioner erred in finding claimant was not entitled to an award of attorney fees based on denied requests for admission. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to an award of penalty benefits. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to reimbursement for the cost of Dr. Mathew's IME. Claimant asserts the remainder of the decision should be affirmed.

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 29, 2021, is affirmed in part, modified in part, and reversed in part.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant to be a credible witness. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

I affirm the deputy commissioner's finding that claimant sustained a work-related cumulative injury to his bilateral shoulders, which manifested on August 8, 2018. I affirm the deputy commissioner's decision to allow claimant to amend the injury date to conform to the evidence. I affirm the deputy commissioner's finding that claimant filed his petition in a timely manner under Iowa Code section 85.26. I affirm the deputy commissioner's finding that claimant is not entitled to additional temporary benefits. I affirm the deputy commissioner's finding that defendant is not entitled to a credit for disability payments paid to claimant during the Covid-19 pandemic. I affirm the deputy commissioner's finding that claimant is not entitled to an award of penalty benefits. I affirm the deputy commissioner's finding that claimant is not entitled to an award of attorney fees based on denied requests for admission. 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. Matthew's IME. I affirm the deputy commissioner's order that defendant pay claimant's costs of the arbitration proceeding in the amount of \$148.40.

I affirm in part, modify in part, and reverse in part, the deputy commissioner's finding that claimant's injury to his bilateral shoulders is compensated for functional loss with the following additional and substituted analysis:

The deputy commissioner found claimant sustained permanent impairments to his bilateral shoulders arising out of the same incident and that his injury should be compensated for functional loss under the schedule for each shoulder. Claimant asserts the deputy erred in finding his recovery is limited to functional loss under the schedule for each shoulder and claimant asserts he is entitled to industrial disability for his loss. Defendant contends the deputy commissioner correctly determined claimant is entitled only to functional loss under the schedule, and in the alternative, argues claimant's recovery is limited to functional loss because he received greater earnings when he returned to work than he did at the time of the injury.

In Carmer v. Nordstrom, Inc., File No. 1656062.01, 2021 WL 6206792 (Iowa Workers' Comp. Com'm Dec. 29, 2021), I found claimant's injury to her right and left shoulder caused by a single accident should be compensated industrially. Unlike Carmer, claimant in this case voluntarily retired from his employment with defendant.

Iowa Code § 85.34(2)(v), provides, in part,

[i]f an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment rating resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement of benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

The record supports that claimant was earning \$919.02 per week at the time of the injury in August 2018, and he was earning \$1,155.25 per week before he stopped working in March 2020. (Exs. D, p. 17; E, p. 18) Claimant's weekly earnings increased following his work injury. Claimant collected disability benefits from John Deere for his personal asthma condition from March 2020 until he retired in March 2021. John Deere did not terminate claimant's employment. I find claimant's recovery is limited to his functional loss under Iowa Code § 85.34(2)(v) because the earnings he received after

he returned to work following the injury were greater than the earnings he received at the time of the injury.

Defendant asserts claimant is entitled to "little or nothing" in this case, asserting Dr. Mathew's opinion should be given no weight. As correctly noted by the deputy commissioner, Dr. Mathew is the only physician in this case who provided an opinion regarding causation, extent of disability, and the need for permanent restrictions. Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001), Dr. Mathew assigned claimant a ten percent permanent impairment rating for each of his shoulders and recommended permanent restrictions for claimant's shoulders of no repetitive overhead lifting, pushing, or pulling. (Ex. 1, pp. 11-12) Defendant did not obtain an opinion in this case regarding causation, extent of disability, or need for permanent restrictions. Dr. Mathew's opinions are un rebutted.

Functional loss for an injury to the shoulder is limited to 400 weeks. Iowa Code §85.34(2)(n). Claimant is entitled to receive 40 weeks of permanent partial disability benefits for each shoulder, or a total of 80 weeks for both shoulders together, at the stipulated weekly rate of \$599.21, commencing on August 8, 2018.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 2, 2021, is affirmed in part, modified in part, and reversed in part, with the above-stated additional analysis.

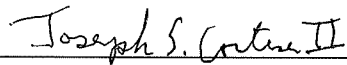
Defendant shall pay claimant eighty (80) weeks of permanent partial disability benefits at the stipulated weekly rate of five hundred ninety-nine and 21/100 dollars (\$599.21), commencing on August 8, 2018.

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, defendant shall pay claimant's costs of the arbitration proceeding in the amount of one hundred forty-eight and 40/100 dollars (\$148.40), 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), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 28th day of April, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)

Dirk Hamel (via WCES)