BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LOUIS BRUNK, Claimant, vs. GLENWOOD RESOURCE CENTER, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 19003535.02 A P P E A L D E C I S I O N Head Notes: 1105; 1803; 1402.30; 1702

Defendants Glenwood Resource Center, employer, and its insurer, State of Iowa, appeal from an arbitration decision filed on September 28, 2022. Claimant Louis Brunk responds to the appeal. The case was heard on March 23, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 6, 2022.

In the arbitration decision, the deputy commissioner found claimant met his burden of proof to establish he sustained an injury on July 22, 2019, which arose out of and in the course of his employment, finding claimant's actions did not amount to disqualifying horseplay. The deputy commissioner found claimant is entitled to receive healing period benefits from July 22, 2019, through October 13, 2019. The deputy commissioner found claimant sustained eight percent functional impairment of his low back, which entitles claimant to receive 40 weeks of permanent partial disability benefits. The deputy commissioner found defendants are not entitled to a credit under Iowa Code section 85.34(7) for the 2013 injury claimant sustained to his right shoulder while working for defendant-employer. The deputy commissioner found defendants are responsible for claimant's medical expenses set forth in Joint Exhibit 13. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is not entitled to reimbursement from defendants for the cost of the independent medical examination (IME) of claimant conducted by Sunil Bansal, M.D. The deputy commissioner found that under rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants in the amount of $100.00 for the filing fee, $146.80 for the cost of a deposition transcript, and $1,912.00 for the cost of Dr. Bansal's report.

On appeal, defendants assert the deputy commissioner erred in finding claimant proved he sustained a work-related injury, and defendants assert claimant's actions should be classified as horseplay. Defendants assert that even if claimant's actions do not rise to the level of horseplay, his actions when he was injured did not arise out of and in the course of his employment and are not compensable. Defendants assert the deputy commissioner erred in finding defendants are not entitled to apportionment against the award based on claimant's 2013 right shoulder injury.

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 17A.15 and 86.24, the arbitration decision filed on September 28, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding that claimant's actions when he was injured did not amount to horseplay, and I affirm the deputy commissioner's finding that claimant proved he sustained an injury that arose out of and in the course of his employment. I affirm the deputy commissioner's finding that claimant is entitled to healing period benefits from July 22, 2019, through October 13, 2019. I affirm the deputy commissioner's finding that claimant sustained eight percent functional impairment of his low back which entitles claimant to receive 40 weeks of permanent partial disability benefits. I affirm the deputy commissioner's finding that defendants are responsible for claimant's medical expenses set forth in Joint Exhibit 13. I affirm the deputy commissioner's finding that pursuant to Iowa Code section 85.39, claimant is not entitled to reimbursement from defendants for the cost of Dr. Bansal's IME. I affirm the deputy commissioner's finding that under rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants in the amount of $100.00 for the filing fee, $146.80 for the cost of a deposition transcript, and $1,912.00 for the cost of Dr. Bansal's report.

With the following additional findings and analysis, I reverse the deputy commissioner's finding that defendants are not entitled to credit under Iowa Code section 85.34(7) for the 2013 injury claimant sustained to his right shoulder while working for defendant-employer.

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The statute distinguishes between scheduled and unscheduled disabilities. Scheduled disabilities enumerated in the statute are evaluated using the functional method and unscheduled disabilities that are not enumerated in the statute are evaluated using the industrial method. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983). The statute provides a maximum number of weeks of compensation for the complete loss of a scheduled member or body part. Iowa Code § 85.34(2)(a)-(u) (2017). Compensation for unscheduled disabilities is determined by

examining loss of earning capacity in relation to 500 weeks of compensation. Id. § 85.34(2)(v).

In February 2013, claimant sustained an injury to his right shoulder while working for defendant-employer. In 2013, injuries for the loss of a shoulder were compensated industrially as unscheduled disabilities or losses. See e.g. Warren Prop. v. Stewart, 864 N.W.2d 307, 320 (Iowa 2015) (noting injuries to the back, shoulder, and neck are examples of unscheduled parts of the body). In 2017, the Iowa Legislature added "a shoulder" as a scheduled member under Iowa Code section 85.34(2)(n). Compensation "[f]or the loss of a shoulder" is in relation to 400 weeks. Iowa Code § 85.34(2)(n).

On July 15, 2016, the workers' compensation commissioner approved an agreement for settlement between claimant and defendants involving the 2013 injury. (Joint Exhibit 10, p. 102) The parties stipulated claimant sustained 22.5 percent industrial disability, which entitled claimant to receive112.5 weeks of permanent partial disability benefits. (JE 10, p. 102)

On July 22, 2019, claimant sustained a stress fracture of his L1 vertebra at work. An injury to the back is not an enumerated loss and is unscheduled. While unscheduled losses are typically compensated industrially, in 2017 the Iowa Legislature amended Iowa Code section 85.34(2)(v), which now provides that if an injured employee returns to work and receives the same or greater salary, wages, or earnings the employee received at the time of the injury, the employee's recovery for an unscheduled loss is limited to the employee's functional loss.

Following surgery, claimant returned to work in October 2019. At the time of the hearing claimant was earning the same or greater earnings than he was at the time of the work injury. As such, his recovery for the 2019 injury is limited to his functional loss under Iowa Code section 85.34(2)(v). Sunil Bansal, M.D. opined claimant sustained eight percent permanent impairment. The deputy commissioner correctly found claimant is entitled to 40 weeks of permanent partial disability benefits for the 2019 work injury.

Defendants assert the deputy commissioner erred in finding defendants are not entitled to a credit for the prior 2013 injury under Iowa Code section 85.34(7) and defendants assert claimant should take nothing further in the way of permanent partial disability benefits. Defendants' argument raises an issue of statutory interpretation.

The goal of statutory interpretation is "to determine and effectuate the legislature's intent." Rameriz-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing United Fire & Cas. Co. v. St. Paul Fire & Marine Ins. Co, 677 N.W.2d 755, 759 (Iowa 2004)). The court begins with the wording of the statute. Myria Holdings, Inc. v. Iowa Dep't of Rev., 892 N.W.2d 343, 349 (Iowa 2017). When determining legislative intent, the court looks at the express language of the statute, and "not what the legislature might have said." Id. (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). If the express language is ambiguous the court looks to

the legislative intent behind the statute. Sanford v. Fillenwarth, 863 N.W.2d 286, 289 (Iowa 2015) (citing Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014)). A statute is ambiguous when reasonable persons could disagree as to the statute's meaning. Rameriz-Trujillo, 878 N.W.2d at 769 (citing Holstein Elect. v. Brefogle, 756 N.W.2d 812, 815 (Iowa 2008)). An ambiguity may arise when the meaning of particular words is uncertain or when considering the statute's provisions in context. Id.

Iowa Code section 85.34(7) governs successive disabilities. The provision was initially enacted in 2004 and it was recently amended in 2017. 2017 Iowa Acts, ch. 23, § 13. As recently discussed by the Iowa Court of Appeals in Newton Community School District v. Hubbard-McKinney, No. 22-0030 (Feb. 22, 2023), a comparison of the textual changes in 2017 from the original statute is helpful in determining whether defendants are entitled to a credit under the amended statute.

> ~~*a.*~~ An employer is ~~fully~~ liable for compensating ~~all~~ 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 employees claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's pre-existing 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 pre-existing disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's pre-existing disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
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> ~~*b.* (1) If an injured employee has a pre-existing disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the pre-existing disability was compensable under the same paragraph of 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 employees 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.~~
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> ~~(2) If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "*u*", and the employee has a pre-existing 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.~~

~~*c.* A successor employer shall be considered to be the same employer if the employee became part of the successor employer's workforce through a merger, purchase, or other transaction that assumes the employee into the successor employer's workforce without substantially changing the nature of the employee's employment.~~

See 2017 Iowa Acts ch. 23, §§ 13, 14.

In finding defendants were not entitled to a credit for the 2013 loss, the deputy commissioner relied on the case of Rife v. P.M. Lattner Mfg. Co., File No. 1652412.02, 2021 WL 3849591 (Iowa Workers' Comp. Comm'n Aug. 20, 2021), aff'd 2022 WL 265661 (Iowa Workers' Comp. Comm'n Jan. 21, 2022). The commissioner approved a full commutation where the parties agreed claimant sustained a 29.6 percent industrial disability as a result of a 2009 right shoulder injury, entitling the claimant to 148 weeks of permanent partial disability benefits. Claimant sustained a subsequent injury to his right shoulder with the same defendant-employer in August 2018. The deputy commissioner found claimant sustained 19 percent functional loss to his right shoulder, entitling him to 76 weeks of compensation as a result of the 2018 injury.

The deputy commissioner found defendants were not entitled to apportionment, noting Iowa Code section 85.34 does not provide a mechanism for apportioning a loss between the current functional loss and the prior industrial loss. The deputy commissioner found allowing a credit from prior industrial loss to the present functional loss would lead to an absurd result because it would be difficult to imagine a scenario where a claimant would receive any additional compensation for second functional loss to a shoulder following an industrial loss. The deputy commissioner found an argument could be made that the defendants are entitled to a credit based on the impairment rating attributed to the first injury, but it was unclear which impairment rating the parties adopted.

The commissioner affirmed, finding if defendants received a credit for the industrial disability settlement against claimant's current scheduled member injury, "they would receive an unfair excess credit for considerations and factors that are not applicable to claimant's current injury. Put differently, their credit would be for apples against an award of oranges." The commissioner agreed while defendants could arguably be entitled to a credit based on the functional impairment attributable to the first shoulder injury, defendants had failed to show how much of the settlement was attributable to the functional impairment of the right shoulder and not to the other industrial factors. The Iowa District Court Judge Michael Huppert reversed the decision and found defendants were entitled to a credit for the prior industrial loss against the current functional loss. Ruling on Petition for Judicial Review, Case No. CVCV063141 (Iowa Dist. Ct. Aug. 15, 2022).

Defendants argue a different agency decision is more directly applicable to this action, Loew v. Menard, Inc., File Nos. 1652966.01, 20700736.01, 2021 WL 6066571 (Dec. 12, 2021), aff'd 2022 WL 1787554 (Apr. 12, 2022). In Loew, the claimant sustained a 30 percent industrial loss for a 2015 injury to his back. He sustained a second injury to his back in 2018. At the time of the hearing Loew had returned to work for defendant-employer earning the same or greater wages than he received at the time of the injury. The parties agreed Loew was only entitled to recover for his functional loss for the 2018 injury. Claimant's expert, Sunil Bansal, M.D., assigned claimant 28 percent functional impairment and apportioned 20 percent to the prior injury and eight percent to the 2018 work injury. The deputy commissioner found the total functional loss for claimant's combined injuries while working for defendant-employer was 28 percent, which was less than the prior 30 percent award he received following the 2015 injury and determined claimant was not entitled to any additional weekly benefits. The commissioner affirmed the decision and the Iowa District Court Judge Samantha Gronewald affirmed the decision. Ruling on Petition for Judicial Review, Case No. CVCV063592 (Oct. 22, 2017).

In 2015, the Iowa Supreme Court noted when the Iowa Legislature enacted Iowa Code section 85.34(7) it included a statement of intent in adopting the statute, explaining "the statutory changes would 'prevent all double recoveries and all double reductions in workers' compensation benefits for permanent partial disability.'" Roberts Dairy v. Billick, 861 N.W.2d 814, 818 (Iowa 2015) (quoting 2004 First Extraordinary Session Iowa Acts ch. 1001, § 20. The full text of section 20 provides:

> Sec. 20. LEGISLATIVE INTENT. It is the intent of the general assembly that this division of this Act will prevent all double recoveries and all double reductions in workers' compensation benefits for permanent partial disability. This division modifies the fresh start and full responsibility rules of law announced by the Iowa supreme court in a series of judicial precedents.
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> The general assembly recognizes that the amount of compensation a person receives for disability is directly related to the person's earnings at the time of injury. The competitive labor market determines the value of a person's earning capacity through a strong correlation with the level of earnings a person can achieve in the competitive labor market. The market reevaluates a person as a working unit each time the person competes in the competitive labor market, causing a fresh start with each change of employment. The market's determination effectively apportions any disability through a reduced level of earnings. The market does not reevaluate an employee's earning capacity while the employee remains employed by the same employer.
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> The general assembly intends that an employer shall fully compensate all of an injured employee's disability that is caused by work-related injuries with the employer without compensating the same

> disability more than once. This division of this Act creates a formula that applies disability payments made toward satisfaction of the combined disability that the employer is liable for compensating, while taking into account the impact of the employee's earnings on the amount of compensation to be ultimately paid for the disability.
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> The general assembly does not intend this division of this Act to change the character of any disability from scheduled to unscheduled or vice versa or to combine disabilities that are not otherwise combined under law existing on the effective date of this section of this division of this Act. Combination of successive scheduled disabilities in section 85.34, subsection 7, as enacted in this division of this Act, is limited to disabilities affecting the same member, such as successive disabilities to the right arm. A disability to the left arm that is followed by a disability to the right arm is governed by section 85.64 [of the Second Injury Compensation Act] and is not a successive disability under this division. This division does not alter benefits under the second injury fund, benefits for permanent total disability under section 85.34, subsection 3, the method of determining the degree of unscheduled permanent partial disability, the compensable character of aggravation injuries, or an employer's right to choose the care an injured employee receives, expand the fresh start rule to scheduled disabilities, or change existing law in any way that is not expressly provided in this division.
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> The general assembly intends that changes in the identity of the employer that do not require the employee to reenter the competitive labor market will be treated as if the employee remained employed by the same employer.

Prior to the 2017 changes, Iowa Code section 85.34(2)(u) addressed compensation for unscheduled losses, covering injuries to the shoulder and the spine. Following the amendments, the provision addressing compensation for unscheduled losses was renumbered as Iowa Code section 85.34(2)(v). When the Iowa Legislature made the changes to Iowa Code section 85.34(7), it did not limit the credit of a prior industrial award for an unscheduled loss before 2017 to a subsequent functional loss of an unscheduled body part. The Iowa Legislature removed subsection b, which provided the formula for crediting "preexisting disability [that] was compensable under the same paragraph of subsection 2 as the employee's present injury." Before the 2017 amendments, Iowa Code section 85.34(2) included the enumerated scheduled losses in subparagraph (a) through (t), and unscheduled losses in subparagraph (u). At that time unscheduled losses were compensated industrially, not functionally in the event of a claimant returned to work earning the same or greater wages. With the 2017 amendments, unscheduled functional losses are included in the same subsection as unscheduled industrial losses, Iowa Code section 85.34(2)(v), in relation to 500 weeks of benefits. Under the plain text of the statute viewed in the light of the intent to avoid double recoveries, I find defendants are entitled to a credit for the prior 2013 industrial

loss for the unscheduled loss to claimant's shoulder with respect to the 2019 unscheduled functional loss to his back. Because claimant's 2019 injury resulted in an eight percent functional loss entitling claimant to 40 weeks of permanent partial disability benefits which does not exceed the prior 22.5 percent industrial loss entitling claimant to 112.5 weeks of permanent partial disability benefits, claimant is not entitled to any additional permanent partial disability benefits in this case.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 28, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Defendants shall pay claimant 11.86 weeks of healing period benefits at the rate of six hundred forty-four and 64/100 dollars ($644.64) for the time period from July 22, 2019, through October 13, 2019.

Defendants shall pay accrued 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 shall pay claimant's medical expenses set forth in Joint Exhibit 13.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant one hundred and 00/100 dollars ($100.00) for the filing fee, one hundred forty-six and 80/100 dollars ($146.80) for the cost of the deposition transcript, and one thousand nine hundred twelve and 00/100 dollars ($1,912.00) for the cost of Dr. Bansal's report, and defendants shall pay the cost 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 27th day of February, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

Jacob J. Peters (via WCES)

Jonathan D. Bergman (via WCES)