

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL RIFE,

Claimant,

vs.

P.M. LATTNER MANUFACTURING  
COMPANY,

Employer,

and

ACCIDENT FUND GENERAL  
INSURANCE COMPANY,Insurance Carrier,  
Defendants.

File No. 1652412.02

A P P E A L  
D E C I S I O NHead Notes: 1402.40; 1802; 1803; 1806;  
2502; 2907, 5-9999

Defendants P.M. Lattner Manufacturing Company, employer, and its insurance carrier, Accident Fund General Insurance Company, appeal from an arbitration decision filed on August 20, 2021. Claimant Michael Rife responds to the appeal. The case was heard on September 21, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 23, 2020.

In the arbitration decision, the deputy commissioner found claimant sustained an injury to his right shoulder that did not extend into his body as a whole. The deputy commissioner adopted the impairment rating of Sunny Kim, M.D., and found claimant sustained 19 percent impairment of his right upper extremity. The deputy commissioner found claimant reached maximum medical improvement (MMI) on June 13, 2020, meaning the commencement date for permanent partial disability (PPD) benefits is June 14, 2020. The deputy commissioner found defendants are not entitled to a credit against PPD benefits owed for a prior settlement in which claimant was compensated for industrial disability resulting from an unscheduled injury.

The deputy commissioner found claimant did not refuse an offer of suitable work, meaning claimant was entitled to healing period benefits from July 24, 2019, the date of his termination, through June 13, 2020, when he reached MMI. The deputy commissioner found defendants are responsible for reimbursement of the entirety of Dr. Kim's charge for his independent medical examination (IME). Lastly, the deputy commissioner awarded a portion of claimant's costs of the arbitration proceeding.

On appeal, defendants assert the deputy commissioner erred in finding defendants are not entitled to a credit for past benefits paid. Defendants also assert the deputy commissioner erroneously awarded healing period benefits and reimbursement for the entirety of Dr. Kim's IME.

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

Those portions of the proposed arbitration 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 August 20, 2021 is affirmed with additional analysis.

Regarding apportionment, I affirm the deputy commissioner's finding that defendants failed to prove their entitlement to a credit, but I offer the following additional analysis:

Not only is there no mechanism in the statute for apportioning past compensation for industrial disability against compensation for a scheduled member, as noted by the deputy commissioner, but the statute, as amended, does not support such an apportionment. The post-July 1, 2017, amendments provide that 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 same employer, to the extent that the preexisting disability has already been compensated under this chapter." Iowa Code § 85.34(7) (emphasis added).

Because claimant's prior shoulder injury occurred before the legislature's 2017 overhaul of chapter 85, it was not compensated as a scheduled member. Instead, claimant's pre-existing disability was compensated under former Iowa Code section 85.34(2)(u) (now subsection (2)(v)), which is the section for unscheduled losses that provides compensation based on a reduction in earning capacity.

In determining a claimant's reduction of earning capacity, functional impairment is an element to be considered, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Before the 2017 amendments, this agency stated in countless decisions over several decades that "[t]here are no weighting guidelines that indicate how each of the industrial disability factors is to be

considered.” See, e.g., Logan v. ABF Freight System, Inc., File No. 5047979 (App. April 25, 2018).

In this case, the parties agreed upon a settlement for claimant’s prior right shoulder injury. (Defendants’ Exhibit B) While part of the settlement was certainly for claimant’s functional impairment, the agreed-upon compensation exceeded what would have been payable for claimant’s functional impairment alone. In other words, the parties considered other industrial disability factors when arriving at their settlement.

Claimant’s current right shoulder injury, however, is a scheduled member under the newly added Iowa Code section 85.34(2)(n). Claimant’s compensation under this section is limited only to the extent of loss or permanent impairment of the shoulder itself. See Iowa Code § 85.34(2)(n), (x). There is no consideration of anything but what the American Medical Association’s Guides to the Evaluation of Permanent Impairment prescribe. See id.

Thus, if defendants in this case were entitled to a credit for the entirety of their settlement, which was for industrial disability, 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 for oranges.

I agree with the deputy commissioner that defendants could arguably be entitled to a credit based solely upon the functional impairment attributable to claimant’s preexisting shoulder injury—a credit for oranges against an award for oranges. Unfortunately, in this case, defendants failed to prove that amount. They did not identify which impairment rating the parties adopted or agreed upon when reaching their settlement, for example, nor did they offer any evidence (expert opinions or otherwise) to shed light on which of the impairment ratings was more persuasive than the others. Thus, defendants failed to show how much of the settlement was attributable to the functional impairment of claimant’s right shoulder and not to other factors.

As a result, with this additional analysis, I affirm the deputy commissioner’s finding that defendants failed to prove their entitlement to a credit under the amended version of Iowa Code section 85.34(7).

I affirm the deputy commissioner’s finding that claimant is entitled to healing period benefits from July 24, 2019, through June 13, 2020. I affirm the deputy commissioner’s findings, conclusions and analysis regarding this issue in its entirety.

The final issue on appeal is whether claimant is entitled to reimbursement for the entirety of Dr. Kim’s IME charge. Defendants’ only argument on appeal is that they should not be assessed any portion of the costs associated with Dr. Kim’s evaluation of claimant’s non-work-related right ankle injury.

Defendants are correct that Iowa Code section 85.39, as amended in 2017, provides that defendants are only responsible for reimbursement relating to examinations of compensable, work-related injuries. See Iowa Code § 85.39(2). And defendants are likewise correct that claimant's counsel asked Dr. Kim to address whether claimant had any permanent disability relating to his non-work-related right ankle injury. (Claimant's Ex. 1, p. 5)

Dr. Kim, however, did not review any records relating to claimant's right ankle injury, he did not take any measurements of claimant's right ankle range of motion like he did with claimant's right shoulder, and he offered no opinions regarding claimant's right ankle. (See Cl. Ex. 1, p. 5 for medical records given to Dr. Kim to review; Cl. Ex. 1, pp. 2-3) Instead, Dr. Kim indicated he would defer to claimant's treating surgeon or a foot/ankle specialist. (Cl. Ex. 1, p. 3) As a result, I do not find any of the costs of Dr. Kim's exam to be associated with claimant's right ankle injury.

On appeal, defendants do not take issue with the deputy commissioner's analysis or rationale in finding that the reimbursement provisions of Iowa Code section 85.39 were triggered in this case, so I will not address or disturb that portion of the arbitration decision in this appeal decision.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 20, 2021, is affirmed with the above-stated additional analysis.

Defendants shall pay healing period benefits from February 25, 2019, through June 13, 2020, at the stipulated weekly rate of five hundred four and 58/100 dollars (\$504.58).

Defendants shall pay claimant seventy-six (76) weeks of permanent partial disability benefits commencing on June 14, 2020, at the stipulated weekly rate of five hundred four and 58/100 dollars (\$504.58).

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

Defendants shall reimburse claimant for Dr. Kim's IME charge pursuant to Iowa Code section 85.39 in the amount of two thousand two hundred fifty and 00/100 dollars (\$2,250.00).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding as set forth in the arbitration decision, and defendants shall pay 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 21<sup>st</sup> day of January, 2022.

*Joseph S. Cortese II*

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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Anthony Olson (via WCES)

Laura Ostrander (via WCES)