

IN THE IOWA DISTRICT COURT FOR POLK COUNTY**JAMES E. HARRELL,**

Petitioner,

vs.

**DENVER FINDLEY & SONS, INC.,
WEST BEND MUTUAL INSURANCE
CO., and SECOND INJURY FUND OF
IOWA,**

Respondents.

Case No. CVCV060910**ORDER RE: PETITION FOR
JUDICIAL REVIEW****INTRODUCTION**

Petitioner James E. Harrell filed an amended petition for judicial review on November 2, 2020. Telephonic oral argument was held on March 26, 2021 at which Joseph Powell represented petitioner. Sarah Timko represented respondent Second Injury Fund of Iowa and James Ballard represented respondents Denver Findley & Sons, Inc. and West Bend Mutual Insurance, Company.¹

After hearing the arguments of counsel and reviewing the court file, including the briefs filed by both parties and accompanying exhibits, the court now enters the following ruling on the petition for judicial review.

¹ Respondents Denver Findley & Sons, Inc. and West Bend Mutual Insurance, Co. filed a response to the petition on February 26, 2021, but noted that the issues raised by the petition are limited to the agency's award of second injury fund benefits. As petitioner does not appeal any issues relevant to them, respondents Denver Findley & Sons, Inc. and West Bend Mutual Insurance, Co. merely ask the court to affirm the deputy commissioner's arbitration decision. This ruling therefore focuses exclusively on respondent Second Injury Fund of Iowa.

FACTUAL BACKGROUND

James Harrell (hereinafter, “Harrell,” “petitioner,” or “claimant”) filed a petition in arbitration seeking workers’ compensation benefits from his employer Denver Findley & Sons, Inc. for a 2018 injury to his left foot that allegedly arose out of and in the course of his employment. The case was heard before a deputy commissioner on September 24, 2019 and the deputy commissioner issued an arbitration decision on January 6, 2020.²

The deputy commissioner concluded, in relevant part, that the Second Injury Fund was not entitled to additional credit for Harrell’s total left knee replacement.³ The deputy commissioner based this decision on an amendment to the Iowa Workers’ Compensation Act, effective July 1, 2017, which prohibits the use of lay testimony and agency expertise in determining the impairment of a scheduled member injury.⁴ Furthermore, the deputy commissioner found the record devoid of any impairment rating by a physician or medical provider, and thus concluded there was “not sufficient evidence that is permissible to use in determining a credit for the left knee replacement.”⁵ Additionally, the deputy commissioner determined that Harrell “has a 100 percent loss of earning capacity” and is “permanently and totally disabled.”⁶

The Second Injury Fund of Iowa (hereinafter, “the Fund” or “respondent”) appealed the arbitration decision, asserting that the deputy commissioner erred in finding the Fund was not entitled to a credit for Harrell’s pre-existing left knee condition.⁷ The commissioner issued an

² Arbitration Decision, p. 1. The deputy commissioner’s Arbitration Decision is attached to petitioner’s amended petition as Exhibit B.

³ Arbitration Decision, pp. 19–20; Appeal Decision, p. 2. The commissioner’s Appeal Decision is attached to petitioner’s amended petition as Exhibit A.

⁴ Arbitration Decision, pp. 19–20 (referring to Iowa Code § 85.34(2)(x)).

⁵ *Id.* at p. 20.

⁶ *Id.* at p. 19.

⁷ Appeal Decision, p. 7.

appeal decision on October 6, 2020, which in part modified the deputy commissioner's determination regarding the Fund's credit.⁸ The commissioner disagreed with the deputy commissioner's application of the amendments to the Iowa Workers' Compensation Act and instead found that the AMA's Guides provide a minimum, compulsory impairment rating of 37 percent for Harrell's total left knee replacement.⁹ The commissioner therefore determined that "the Fund is entitled to receive an additional credit of 91.4 weeks for the 37 percent permanent disability of claimant's left total knee replacement"¹⁰

Furthermore, although the issue was not raised on appeal by either party, the commissioner modified the deputy commissioner's finding that Harrell "is permanently and totally disabled as a result of the combined effects of the 1953 right eye injury and the April 23, 2018, work injury."¹¹ On this issue, the commissioner concluded that Harrell is not permanently and totally disabled, but rather "sustained 75 percent industrial disability"¹²

On November 2, 2020, Harrell filed an amended petition seeking judicial review of the final agency action by the Iowa Workers' Compensation Commissioner.¹³ Petitioner asserts that the commissioner's appeal decision wrongly modified the deputy commissioner's arbitration decision regarding appropriate credits for the Fund, as well as the extent of Harrell's permanent industrial disability.¹⁴

Additional facts are set forth below.

⁸ *Id.* at p. 9.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at p. 5.

¹² *Id.* at p. 7.

¹³ Am. Pet. ¶ 1.

¹⁴ *Id.* at ¶ 2.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act codifies a court's judicial review of agency action in Iowa Code section 17A.19. Pursuant to this section, a district court has the power to "affirm the agency action or remand to the agency for further proceedings."¹⁵ Additionally, "[t]he court shall reverse, modify, or grant other appropriate relief from agency action . . . if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action" falls within any of the categories enumerated in subsection ten, paragraphs "a" through "n."¹⁶

ANALYSIS

Petitioner presents two issues for review: (1) whether the agency erred in interpreting and applying Iowa Code section 85.34(2)(x) to allow respondent Second Injury Fund of Iowa to receive credit for a prior knee issue and (2) whether the agency erred in *sua sponte* modifying petitioner's extent of industrial disability on appeal when that issue was not appealed by either party.¹⁷

A. Application of Iowa Code § 85.34(2)(x) and Credit for Prior Knee Injury

Petitioner first argues that the commissioner erred in allowing respondent to receive a credit for petitioner's pre-existing left knee condition pursuant to Iowa Code section 85.34(2)(x). In the arbitration decision, the Fund requested a credit for Harrell's left knee replacement, arguing that it is entitled to a credit for the minimum rating as set out in the American Medical Association's Guides to the Evaluation of Permanent Impairment (hereinafter, "the Guides") for a total knee replacement with good results.¹⁸

¹⁵ Iowa Code § 17A.19(10).

¹⁶ *Id.*

¹⁷ Pet'r's Br. in Supp. of Pet. for Judicial Review p. 1 (hereinafter, "Pet'r's Br.").

¹⁸ Arbitration Decision, p. 19.

The deputy commissioner found, however, that the record reflected “no rating by any physician or medical provider” for Harrell’s knee replacement.¹⁹ This is important because, as the deputy commissioner noted, Harrell’s injury was “governed by the law changes that became effective on July 1, 2017” and were in relevant part codified at Iowa Code section 85.34(2)(x): “The law in evaluating scheduled member injuries was amended to prohibit the use of lay opinion or the use of agency expertise in determining the extent of a scheduled member injury.”²⁰ Therefore, the deputy commissioner concluded that there was “not sufficient evidence that is permissible to use in determining a credit for the left knee replacement.”²¹

The Fund appealed the deputy commissioner’s decision.²² In his resistance, Harrell argued that the Fund should not receive a credit for his left knee condition “without a supporting medical opinion because the amount of impairment would be speculative.”²³ The commissioner noted that pursuant to the Guides, “a total knee replacement yields a compulsory rating of at least 37 percent of the lower extremity.”²⁴ Furthermore, the commissioner pointed out that “[s]ome impairment ratings are assigned on the basis of a diagnosis as opposed to findings on physical examination[,]” and that total knee replacements fall into this category.²⁵

The commissioner acknowledged that the evidentiary record was void of any impairment ratings attributable to Harrell’s left knee replacement, but stated that the agency has previously held “a medical impairment rating is not an absolute legal requirement when establishing

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at p. 20.

²² Appeal Decision, p. 5.

²³ *Id.* at p. 8.

²⁴ *Id.* (citing AMA’S GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, 547, Table 17-33 (5th ed. 2000) (hereinafter, “AMA’s Guides”)).

²⁵ *Id.* (citing AMA’s Guides, p. 545).

qualifying first injuries.”²⁶ The agency has also concluded that “it would create a double standard to allow a claimant to establish a qualifying first injury without an impairment rating, while simultaneously not allowing the Fund to assert a credit for a qualifying injury without an impairment rating.”²⁷

Ultimately, the commissioner disagreed with the deputy commissioner’s conclusion and asserted that using the Guides “to locate a minimum, compulsory rating for purposes of a credit” is not utilizing agency expertise or acting as a medical professional and assigning an impairment rating.²⁸ Therefore, the commissioner modified the deputy commissioner’s decision and found that the Fund was entitled to receive a credit “for the 37 percent permanent disability of [Harrell’s] left total knee replacement”²⁹

Petitioner argues that the commissioner improperly relied on Harrell’s lay testimony that he had a knee replacement prior to his work injury and used agency expertise and his understanding of the Guides to assign an impairment rating in violation of Iowa Code section 85.34(2)(x).³⁰ In opposition, respondent asserts that petitioner reads two requirements into the statute that do not exist: “(1) that a physician must assign a percentage of permanent impairment solely by utilizing the Guides; and (2) that the Commissioner is barred from using lay testimony to determine the claimant’s diagnosis or course of care.”³¹

²⁶ *Id.* (citing *George v. Second Injury Fund of Iowa*, File No. 5001966 (App. Nov. 1, 2004)).

²⁷ *Id.* (citing *Meader v. Second Injury Fund of Iowa*, File No. 5057325 (App. Nov. 25, 2019)).

²⁸ *Id.* at p. 9.

²⁹ *Id.*

³⁰ Pet’r’s Br. p. 7.

³¹ Resp’t Second Injury Fund of Iowa’s Judicial Review Br. p. 7 (hereinafter, “Resp’t’s Br.”).

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act, including adding a new prohibition on using lay testimony and agency expertise to determine impairment resulting from an injury. Section 85.34(2)(x) provides the following:

In all cases of permanent partial disability . . . the extent of loss or percentage of permanent impairment *shall be determined solely by utilizing the guides* to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. *Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment . . .*³²

Therefore, “[t]he only evidence to be considered regarding the extent of impairment is impairment ratings under the AMA Guide, Fifth Edition.”³³

It is important to note that this amended section only applies to injuries occurring on or after July 1, 2017.³⁴ In other words, the Guides are “not binding on the commission for injuries occurring prior to July 1, 2017.”³⁵ Nevertheless, “an impairment rating based on the Guide . . . is considered best evidence of the extent of impairment.”³⁶ Furthermore, in a recent case, the deputy commissioner determined that although section 85.34(2)(x) prohibits using lay testimony to determine the percentage of impairment, “lay testimony can be used to aid in determining

³² Iowa Code § 85.34(2)(x) (emphasis added).

³³ John Lawyer & James R. Lawyer, *Iowa Practice Series: Workers' Compensation*, § 13:5 (2020) (hereinafter, “*Iowa Practice Series*, § 13:5”). Although the AMA released a sixth edition of the Guides in 2008, the agency has officially adopted the fifth edition for determining the extent of loss or percentage of impairment for permanent partial disabilities. Iowa Admin. Code § 876-2.4.

³⁴ *Id.* See also *VanGetson v. Aero Concrete, Ltd.*, 949 N.W.2d 442 (Table), 2020 WL 4201233, *1 (Iowa Ct. App. July 22, 2020) (“The legislation provided the amendments to other statutory provisions would ‘apply to injuries occurring on or after’ the act’s effective date – July 1, 2017 . . .”).

³⁵ *Iowa Practice Series*, § 13:5.

³⁶ *Id.* See also *Perkins v. Wilken & Sons Auto Wrecking*, File No. 5055189, p. 8 (App. June 27, 2018) (“While lay witness testimony is relevant and material, this agency has previously ruled that impairment ratings determined under the AMA Guides are the best evidence of the degree of scheduled member disability.”).

credibility between two competing ratings.”³⁷ This does not apply to the present case, however, as the record is devoid of any proposed ratings at all for Harrell’s left knee replacement.

In its brief, respondent echoes the commissioner’s quotation from the Guides that “[s]ome impairment estimates are assigned more appropriately on the basis of a diagnosis than on the basis of findings on physical examination.”³⁸ As previously mentioned, the commissioner reads this portion of the Guides as requiring a minimum impairment rating for any total knee replacement, namely, 37%. In reaching this conclusion the commissioner cited section 17.2j of the Guides which specifically stated: “Some impairment estimates are assigned more appropriately on the basis of a diagnosis than on the basis of findings on physical examination.”³⁹ Additionally, the commissioner asserted that “a deputy commissioner does not act as a medical professional or utilize agency expertise when” using the Guides “to locate a minimum, compulsory rating for purposes of a credit” for the Fund.⁴⁰ The court, in this instance, agrees with the commissioner. The Fund sought the application of the lowest possible credit allowed in this instance. While a review by a medical professional of Table 17-35 for a knee replacement may have resulted in a higher credit the Fund did not seek to impose anything other than the minimum allowed for a knee replacement. An actual assessment under Table 17-35 may have resulted in a higher credit for the Fund to the detriment of Harrell. Accordingly, the court affirms the commissioner’s decision on this issue.

B. Agency’s *Sua Sponte* Modification of the Extent of Petitioner’s Industrial Disability

Second, petitioner argues that it was legal error for the commissioner to raise an issue himself on appeal and modify the deputy commissioner’s finding when neither party appealed that

³⁷ *Iowa Practice Series*, § 13:5 (citing *Streif v. John Deere Dubuque Works of Deere & Co.*, File No. 5068621 (App. July 10, 2020)).

³⁸ Resp’t’s Br. p. 10 (quoting AMA’s Guides, p. 545).

³⁹ AMA Guides, at p. 545.

⁴⁰ Appeal Decision, p. 9.

issue (specifically, the extent of Harrell’s disability or the finding that Harrell was permanently and totally disabled).⁴¹ Petitioner asserts that because no party appealed this issue to the commissioner, no party had an opportunity to argue or brief the issue.⁴²

The commissioner acknowledged that the Fund did not specifically appeal the deputy commissioner’s finding that claimant was permanently and totally disabled.⁴³ Nevertheless, the commissioner notes that “the Fund appealed ‘the Arbitration Decision and all adverse findings of fact and conclusions of law therein.’”⁴⁴ In further support, the commissioner asserted that “the extent of [Harrell’s] disability is necessarily incident to, or dependent upon, an issue that was expressly raised on appeal,” and therefore, the commissioner may consider it.⁴⁵ Respondent includes these arguments in its brief.⁴⁶

An appeal from the deputy commissioner’s decision “will consider the issues presented for review by the appellant and cross-appellant in their briefs and any issues necessarily incident to or dependent upon the issues that are expressly raised”⁴⁷ The commissioner also quoted the portion of section 876-4.28(7) which provides “the scope of the issue [raised on appeal] is viewed broadly”:

If the ruling from which the appeal was taken made a choice between alternative findings of fact, conclusions of law, theories of recovery or defenses and the alternative selected in the ruling is challenged as an issue on appeal, de novo review includes reconsideration of all alternatives that were available to the deputy.⁴⁸

⁴¹ Pet’r’s Br. p. 10.

⁴² *Id.* at pp. 9–10.

⁴³ Appeal Decision, p. 5.

⁴⁴ *Id.* (citing Second Injury Fund Notice of Appeal).

⁴⁵ *Id.* (quoting Iowa Admin. Code § 876-4.28(7)).

⁴⁶ Resp’t’s Br. pp. 11–13.

⁴⁷ Iowa Admin. Code § 876-4.28(7).

⁴⁸ Appeal Decision p. 5 (quoting Iowa Admin. Code § 876-4.28(7)).

The commissioner also noted that this issue was raised before the presiding deputy commissioner.⁴⁹

Additionally, section 876-4.29 grants the commissioner the ability to “review the decision, order or ruling of a deputy commissioner in any contested case upon the commissioner’s own motion.”⁵⁰ However, to do so, the commissioner must file a proper motion within twenty days of the filing of the decision, order, or ruling.⁵¹ The commissioner did not follow this procedural scheme.

In their briefs, both petitioner and respondent cite an Iowa Supreme Court case that seeks to clarify the two methods identified by the Iowa Administrative Code by which the commissioner may review a deputy commissioner’s decision.⁵² This case specifically grappled with the question of whether the commissioner could file an appeal decision after a party appealed the deputy’s decision but neither party filed a brief.⁵³ The court stated that “[u]nder each method of review, the rules clearly contemplate that the issue or issues for review will be identified.”⁵⁴ The court in reaching its conclusion relied on the fundamental requirement that parties are entitled to due process of law which the court noted were “(1) notice and (2) the opportunity to defend. Mere notice of the commencement of the action is insufficient.”⁵⁵ Additionally, the court noted that “[t]o comply with the notice requirement of due process, the appealing party must present the issues to

⁴⁹ *Id.* (referring to section 876-4.28(7)’s limitation that “[a]n issue will not be considered on appeal if the issue could have been, but was not, presented to the deputy”).

⁵⁰ Iowa Admin. Code § 876-4.29.

⁵¹ *Id.* See also *Aluminum Co. of Am. v. Musal*, 622 N.W.2d 476, 478 (Iowa 2001) (noting that “the discretion given to the commissioner under rule 876-4.29 to review decisions *sua sponte* is predicated upon timely notice given by the commissioner following the deputy’s decision”).

⁵² Pet’r’s Br. pp. 8–9 and Resp’t’s Br. pp. 13–14 (citing *Aluminum Co.*, 622 N.W.2d 476).

⁵³ *Aluminum Co.*, 622 N.W.2d at 477–78.

⁵⁴ *Id.* at 478.

⁵⁵ *Id.* at 479.

be addressed to provide the opposing party an opportunity to adequately defend.”⁵⁶ Ultimately, the court affirmed the district court’s ruling that “the commissioner must provide a statement of the issues subject to review when the commissioner reviews the deputy’s decision on its own motion or on appeal once the parties fail to submit briefs.”⁵⁷ The court added that in this statement, the commissioner “must also provide the parties an opportunity to submit briefs.”⁵⁸

The court finds while the issue of the extent of Harrell’s disability or the finding that Harrell was permanently and totally disabled industrial disability was before the deputy commissioner the Fund never appealed this issue. Since the Fund never appealed the deputy commissioner’s finding that Harrell was totally and permanently disabled there was no reason for Harrell to assume the commissioner would address this issue. If the commissioner, on his own motion, decided it should be addressed the fundamental requirements of due process should be applied. The commissioner should have given the parties the opportunity to brief this issue. Accordingly, the court remands this case to the agency to give the parties an opportunity to brief and argue this issue in the proper forum.⁵⁹

CONCLUSION

For the foregoing reasons, the agency’s decision is **AFFIRMED** in part and **REMANDED** in part for further proceedings.

⁵⁶ *Id.*

⁵⁷ *Id.* at 480.

⁵⁸ *Id.*

⁵⁹ *See id.* (concluding that “[t]he district court should have remanded the case to the industrial commissioner, and given the industrial commissioner the option of imposing sanctions or notifying the parties of the review to be taken”).



State of Iowa Courts

Case Number
CVCV060910
Type:

Case Title
JAMES HARRELL VS DENVER FINDLEY AND SONS ET AL
OTHER ORDER

So Ordered

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa

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