

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL NEWBURY,

Claimant,

vs.

THE LUTHERAN HOME FOR THE
AGED ASSOCIATION,

Employer,

and

ACCIDENT FUND GENERAL
INSURANCE COMPANY,Insurance Carrier,
Defendants.

File No. 21000314.02

A P P E A L

D E C I S I O N

Head Notes: 1402.40; 1402.60; 1803.1;
2501; 2502, 2907, 3001; 3002;

Defendants The Lutheran Home for the Aged Association, employer, and its insurer, Accident Fund General Insurance Company, appeal from an arbitration decision filed on January 9, 2023. Claimant Michael Newbury responds to the appeal. The case was heard on August 1, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 16, 2022.

In the arbitration decision, the deputy commissioner found claimant's recovery in this matter is not limited to his functional loss because at the time of the arbitration hearing claimant was earning less than he earned at the time of the work injury, and claimant could not return to his prior work offered by defendant-employer. The deputy commissioner found claimant sustained 60 percent industrial disability as a result of the work injury, which entitles claimant to receive 300 weeks of permanent partial disability benefits, commencing on September 3, 2021. The deputy commissioner found claimant's weekly benefit rate for the work injury is \$682.21. The deputy commissioner found claimant is not entitled to recover any past medical expenses under Iowa Code section 85.27. The deputy commissioner found that under Iowa Code section 85.39, claimant is entitled to reimbursement from defendants in the amount of \$2,500.74 for the cost of the independent medical examination (IME) of claimant performed by Stanley Mathew, M.D. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$103.00.

On appeal, defendants assert the deputy commissioner erred in calculating the weekly benefit rate, and defendants assert they are entitled to a credit for an alleged overpayment of \$402.38 in temporary total disability benefits based on the alleged incorrect rate. Defendants further assert the deputy commissioner should have

excluded Exhibit 3, claimant's rate calculation, because it was not served on defendants until "immediately prior to hearing." Defendants assert the deputy commissioner erred in finding claimant is entitled to receive industrial disability benefits, and defendants assert claimant's recovery for permanent disability should be limited to his functional loss. Defendants assert the deputy commissioner erred in finding claimant is entitled to reimbursement from defendant for the cost of Dr. Mathew'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 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 January 9, 2023, 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 recovery for permanent disability is not limited to his functional loss because, at the time of the hearing, claimant was earning less than he was at the time of the work injury, and claimant could not return to his prior work offered by defendant-employer. I affirm the deputy commissioner's finding that claimant's rate calculation in Exhibit 3 should be included in the evidentiary record. I affirm the deputy commissioner's finding that claimant sustained 60 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's finding claimant is not entitled to recover any past medical expenses under Iowa Code section 85.27. I affirm the deputy commissioner's finding that under Iowa Code section 85.39, claimant is entitled to reimbursement from defendants for the cost of Dr. Mathew's IME. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding in the amount of \$103.00.

With my additional and substituted analysis, I reverse the deputy commissioner's rate calculation.

In the arbitration decision at pages 10 and 15, the deputy commissioner found the period ending on October 25, 2020 "does not fairly reflect claimant's customary earnings and therefore should not be included in the [rate] calculation." The deputy commissioner then found at page 15, "[i]n this case, claimant's total average weekly wages of \$15,602.98 are based on pay periods from June 26, 2020 through August 10, 2020 and August 26, 2020 through October 25, 2020 which consists of 15.286 weeks. Thus, I conclude claimant's average weekly wage is \$1,020.74." The two findings of fact are inconsistent. The deputy commissioner included the excluded period ending October 25, 2020, in the calculation.

Defendants assert the deputy commissioner erred in excluding the periods ending August 25, 2020, and October 25, 2020, from the rate calculation. Defendants assert the deputy commissioner erred in calculating the rate.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's weekly benefit rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. The statute defines "weekly earnings" as:

gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar.

Id.

The term "gross earnings" is defined as "recurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61. Weekly earnings for employees paid on an hourly basis:

shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. § 85.36(6).

Thus under the statute, overtime is counted hour for hour, and shift differential, vacation, and holiday pay are also included. Premium and irregular pay are not included.

At the time of the hearing claimant had worked full-time for defendant-employer for approximately 16 years. (Tr. p. 17) At the time of the injury, claimant was working as a certified nursing assistant (CNA). (Id.) Before the work injury, claimant worked 12 hour shifts, overnight, from 6:00 p.m. until 6:30 a.m. (Tr. pp. 18-19) Claimant received pay differential for working overnight. (Tr. p. 19)

Claimant testified that under the weekend package his hourly wage was \$26.66. (Tr. p. 20; Ex. 4, pp. 6-12) Claimant also received earned time for vacation hours he took. (Ex. 4, p. 12) Defendant-employer paid claimant \$16.66 per hour for earned time or vacation time. (Tr. p. 21; Ex. 4, pp. 6, 12,13) Claimant also received overtime pay at \$39.99 per hour, which is one and one-half times his weekend package rate of \$26.66 per hour. (Ex. 4, pp. 6, 11) When claimant worked a holiday, he was paid \$39.99 per hour. (Ex. 4, pp. 7, 11) The paystub for the period of June 11, 2020, through June 25, 2020, shows additional pay at the rate of \$16.66 that is not recorded as "earned time." (Ex. 4, p. 6)

Claimant's wage records reflect claimant received an increase in his hourly weekend package rate to \$29.68 per hour starting the period of September 26, 2020. (Ex. 4, pp. 13, 14) His overtime pay became \$44.52 per hour, or one and one-half times \$29.68. (Ex. 4, p. 14) After his pay increase, the paystub for the period of October 11, 2020, through October 25, 2020, shows additional pay at the rate of \$19.66 that is not recorded as "earned time." (Ex. 4, p. 6)

A review of claimant's paystubs reveals he was scheduled to regularly work and was paid for regular work and vacation 80 or more hours per period, consistent with his testimony that he worked full-time. (Exs. 4 and B) I agree with the deputy commissioner that the period of August 11, 2020, through August 25, 2020, is not representative because claimant worked 72.50 hours. (Ex. 4, p.10)

For the period of October 11, 2020, through October 25, 2020, claimant worked 76.75 hours and he was paid for 12 hours of vacation, for a total of 88.75 hours. The deputy commissioner found the period of October 11, 2020, through October 25, 2020, "does not fairly reflect claimant's customary earnings and therefore should not be included in the [rate] calculation," and later stated the amount was identified in the calculation that claimant's average weekly wages total \$15,602.98. I disagree with the deputy commissioner's finding that this period is not representative and I find it should be included in determining claimant's weekly benefit rate.

I find the periods of June 26, 2020, through July 10, 2020, July 11, 2020, through July 25, 2020, July 26, 2020, through August 10, 2020, August 26, 2020, through September 10, 2020, September 11, 2020, through September 25, 2020, September 26, 2020, through October 10, 2020, October 11, 2020 through October 25, 2020 and amounts are representative of claimant's customary earnings. (Exs. 4 and B) I find claimant's paystubs are the best evidence of his earnings.

For the period of June 26, 2020, through July 10, 2020, claimant received \$1,946.18 for 73 hours of work at \$26.66 per hour and \$479.88 for 12 hours of holiday worked pay at \$39.99, for total earnings of \$2,426.06. (Ex. 4, p. 6) Claimant received premium pay for the holiday worked of \$39.99 per hour. 12 hours of holiday worked times \$26.66 is \$319.92. Claimant had total countable earnings under the statute for the period of June 26, 2020, through July 10, 2020, of \$2,266.10. (Ex. 4, p. 7)

For the period of July 11, 2020, through July 25, 2020, claimant received total countable earnings under the statute of \$2,252.77 for 84.50 hours of work at \$26.66 per hour. (Ex. 4, p. 8)

For the period of July 26, 2020, through August 10, 2020, claimant received total countable earnings under the statute of \$2,246.11 for 84.25 hours of work at \$26.66 per hour. (Ex. 4, p.9)

For the period of August 26, 2020, through September 10, 2020, claimant received \$1,599.60 for 60 hours of work at \$26.66 per hour and \$479.88 for 12 hours of holiday worked pay at \$39.99. 12 hours of holiday worked times \$26.66 is \$319.92. Claimant had total countable earnings under the statute for the period of August 26, 2020, through September 10, 2020, of \$1,919.52. (Ex. 4, p. 11)

For the period of September 11, 2020, through September 25, 2020, claimant received \$1,926.19 for 72.25 hours of work at \$26.66 per hour and \$199.92 for 12 hours of earned time or vacation at \$16.66 per hour, countable earnings under the statute of \$2,126.11. (Ex. 4, p. 12)

For the period of September 26, 2020, through October 10, 2020, claimant received \$1,795.64 for 60.5 hours of work at \$29.68 per hour and \$599.76 for 36 hours of earned time or vacation at \$16.66 per hour, for countable earnings under the statute of \$2,395.40. (Ex. 4, p. 13)

For the period of October 11, 2020, through October 25, 2020, claimant received \$712.32 for 24 hours of work at \$29.68 per hour, \$199.92 for earned time for 12 hours of earned time or vacation at \$16.66 per hour, \$786.40 for 40 hours of work at \$19.66 per hour, and \$567.63 for 12.75 hours of overtime at \$44.52 per hour. (Ex. 4, p. 14) Under the statute, overtime is calculated hour-for-hour. Claimant's hourly rate for this pay period was \$29.68 per hour. 12.75 hours times \$29.68 per hour is \$378.42. For the period of October 12, 2020, through October 25, 2020, claimant had total countable earnings under the statute of \$2,077.06. (Ex. 4, p. 14)

I find claimant had total countable earnings for the periods of June 26, 2020, through July 10, 2020, July 11, 2020, through July 25, 2020, July 26, 2020, through August 10, 2020, August 26, 2020, through September 10, 2020, September 11, 2020, through September 25, 2020, September 26, 2020, through October 10, 2020, October 11, 2020 through October 25, 2020 of \$15,283.07. For these periods, claimant was paid for a period of 15 days for five pay periods and 16 days for two pay periods, for a

total of 107 days, or 15.29 weeks. \$15,283.07 divided by 15.29, results in an average weekly wage of \$999.55, which rounds up to \$1,000.00.

The parties stipulated on the Hearing Report Order that at the time of the work injury claimant was married and entitled to four exemptions. According to the Rate Book in effect at the time of the October 31, 2020, work injury, claimant's weekly benefit rate is \$669.81. <https://www.iowaworkcomp.gov/ratebook>. Given defendants underpaid the rate, no overpayment occurred, and defendants are therefore not entitled to a credit for an overpayment.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 9, 2023, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Defendants shall pay claimant 300 weeks of permanent partial disability benefits at the weekly rate of six hundred sixty-nine and 81/100 dollars (\$669.81), commencing on September 3, 2021.

Defendants shall receive credit for all benefits paid to date.

Defendants shall pay any underpayment of all previously paid weekly benefits.

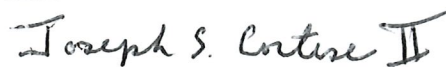
Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Pursuant to Iowa Code Section 85.39, defendants shall reimburse claimant in the amount of two thousand five hundred and 74/100 dollars (\$2,500.74) for the cost of Dr. Mathew's IME.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred three and 00/100 dollars (\$103.00), 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 20th day of April, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Connor Mulholland (via WCES)

Laura Ostrander (via WCES)