BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIKE RUBY, Claimant, vs. GANNETT PUBLISHING SERVICES, d/b/a DES MOINES REGISTER, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5058620 APPEAL DECISION Head Note Nos: 1801; 2500; 3000; 4000

Defendants Gannett Publishing Services, d/b/a Des Moines Register, employer, and its insurer, New Hampshire Insurance Company, appeal from an arbitration decision filed on October 17, 2018, and from a ruling on limited application for rehearing filed on November 15, 2018. Claimant Mike Ruby responds to the appeal. The case was heard on April 25, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 4, 2018.

In the arbitration decision, the deputy commissioner found claimant's ongoing back pain was causally related to his stipulated work-related injury which occurred on November 23, 2015. The deputy commissioner found claimant had not yet reached maximum medical improvement (MMI) at the time of the hearing and was entitled to a running award of temporary benefits. The deputy commissioner found claimant's weekly benefit rate to be $441.28. The deputy commissioner found claimant was entitled to penalty benefits for defendants' incorrect rate calculation. The deputy commissioner found claimant failed to carry his burden of proof concerning reimbursement/payment for his claimed medical expenses.

In the ruling on limited application for rehearing, the deputy commissioner found there was sufficient evidence to causally connect several of claimant's claimed medical expenses to the medical records contained in the parties' joint exhibits. As a result, the deputy commissioner awarded claimant $20,209.38 in medical expenses.

On appeal, defendants assert the deputy commissioner erred by ignoring the credibility issue and failing to conclude claimant was not a credible witness. Defendants additionally assert the deputy commissioner erred in concluding claimant's ongoing low

back complaints were causally related to the 2015 work incident. If found to be compensable, defendants argue the deputy commissioner erred in awarding a running award of temporary benefits and medical expenses. Lastly, defendants assert the deputy commissioner erred in awarding penalty benefits.

Those portions of the proposed agency 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 17A.5 and 86.24, those portions of the proposed arbitration decision filed on October 17, 2018, as modified by the ruling on limited application for rehearing filed on November 15, 2018, that relate to the issues properly raised on intra-agency appeal are affirmed in part and reversed in part.

Turning first to the issue of credibility, defendants raise several "inconsistencies" in the record that defendants argue amount to "serious credibility issues" for claimant. (Defendants' Appeal Brief, pp. 17-19) I find these inconsistences are examples of claimant either misunderstanding or forgetting - not lying, as defendants suggest – or are examples of defendants attempting to exaggerate the impact of minor discrepancies.

For example, defendants assert claimant denied ever being written up before eventually conceding he had. However, when asked by defendants' counsel, whether he ever had "any prior either disciplinary-type issues or problems," claimant was immediately forthcoming that he was once sent home for an alcohol-related incident. (Hearing Transcript, p. 45) Claimant was also asked about whether he had been written up for temper or refusing to do a job. He initially responded, "I don't believe so," but when confronted with a specific incident from October of 2013 - nearly five years before the hearing - he acknowledged he remembered, though he could "not really" recall what it was about. (Tr., pp. 46, 49-50) I find this was an instance of claimant simply not remembering.

Defendants also assert claimant gave contradictory testimony regarding conflicts with his supervisor in his deposition and at the hearing. I do not find this to be the case, however. In his deposition, claimant acknowledged he had "difficulties" with his supervisor, and at hearing, he acknowledged he got "angry" once. (Joint Exhibit 25, p. 25; Tr., p. 46)

Defendants assert claimant's testimony that he was not taken off work for his pancreatitis condition is "misleading and false" because he did not work for almost a year due to the condition. While defendants are correct that claimant did not work for a time due to his pancreatic condition, this is not the question claimant was asked. Claimant was asked, "During the period of time that you were receiving treatment for your pancreatitis did any physician take you off work for that condition?" (Tr., p. 27) Claimant replied, "No. She said I could work, Doctor Roberts." (Tr., p. 27) This is

accurate. In her note from April 29, 2017, Stacey Roberts, M.D., declined to complete claimant's long-term disability paperwork because "from pancreas standpoint, he is not disabled." (JE 8, p. 134)

Many of defendants' remaining assertions regarding claimant's credibility relate to claimant's back condition and treatment prior to his work-related injury on November 23, 2015. In his deposition, claimant testified the lump in his back appeared after his work-related injury. (JE 25, pp. 20-21) Claimant addressed this testimony at hearing:

> Q. Now, are you aware that we have medical records showing that you've had a lump in your right lower back since 2013?
>
> A. Now, yes.
>
> Q. Because you've told doctors, in other words, after the work injury that you didn't have a lump before, did you?
>
> A. <u>I didn't remember having it. I can't see it. And it - - when I first went to Concentra, Joanne Harbert or whatever her name is mentioned that it was bruised there on that lump.</u>
>
> Q. But now, I mean, has your attorney shown you some of those old records that show that you've had that lump since 2013?
>
> A. Yes. And Doctor Kirkland said it could have been there for a lot of years, not even knowing it.

(Tr., pp. 57-58 (emphasis added))

Furthermore, claimant indicated he did not believe the lump to be caused by his work-related injury, so his memory of when the lump appeared is not particularly significant. (Tr., p. 58) For these reasons, I am not persuaded that this inconsistency should weigh against claimant's credibility.

Regarding his back condition in the months leading up to his work-related injury, there is a notation of "low back pain" in a treatment record from July 7, 2015. (JE 1, p. 20) However, the focus of this appointment was very clearly on treatment of claimant's hypertension and showing claimant how to appropriately monitor his blood pressure at home:

> He continues to struggle with a labile blood pressure, he has been monitoring at home. We went ahead and had him actually show me how he monitors his blood pressure, he does it totally incorrectly. I showed him how to do it properly with the arm at the proper height, properly supported, resting comfortably with his back support.

(JE 1, p. 19)

Defendants key in on the phrase "back support" and the deputy commissioner's error in referring to "back supported," but this error is essentially meaningless when considered in the actual context of the appointment—which was treatment of claimant's high blood pressure and not claimant's back pain. In fact, other than the mention of "low back pain" on the last page of the notes from the appointment, there is no actual discussion regarding claimant's low back symptoms or any treatment relating thereto.

Claimant testified both in his deposition and at hearing that while he had some pain between 2013 and his work-related injury in 2015, including on July 7, 2015, it was not an everyday occurrence. (JE 25, p. 15; Tr., p. 43) I find this testimony to be credible.

Ultimately, I am not persuaded by defendants' arguments against claimant's credibility. Like the deputy commissioner, I decline to make a finding that claimant was not a credible witness.

With respect to the remaining issues on appeal, I affirm the deputy commissioner's finding that claimant's ongoing back complaints were related to his work-related injury. In doing so, I affirm the deputy commissioner's reliance on the opinions of Daniel Moyse, M.D., and Mark Taylor, M.D. Ultimately, none of the experts relied upon by defendants were able to explain why claimant continued to have symptoms if his work-related injury was merely a temporary flare-up of an underlying condition. I affirm the deputy commissioner's finding that claimant is entitled to penalty benefits in the amount of $90.00 for defendants' failure to include claimant's shift differential in the rate calculation. I affirm the deputy commissioner's finding in his ruling on limited application for rehearing that claimant proved his entitlement to medical expenses in the amount of $20,209.38. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

For the reasons that follow, however, I reverse the deputy commissioner's finding that claimant is entitled to a running award of temporary benefits.

In his report, Dr. Taylor opined that claimant was not at MMI because he had not yet undergone the radiofrequency ablations recommended by Dr. Moyse. (JE 13, p. 175) Dr. Taylor went on to provide that should claimant decline all further care, his MMI date would be his last appointment with Dr. Moyse, which occurred on July 5, 2017. At hearing, claimant testified he was unsure whether he wanted to pursue the recommended ablations. (Tr., p. 31) Based on claimant's own testimony that he was unsure whether he wanted to seek the recommended treatment and the absence of evidence that the treatment would serve as more than maintenance care, I find claimant reached MMI as of July 5, 2017. The deputy commissioner's finding that claimant had not yet reached MMI at the time of the hearing is therefore reversed.

As of July 5, 2017, claimant had not yet returned to work, nor was he capable of returning to substantially similar employment. The sedentary work restrictions that defendants were unable to accommodate before claimant began treatment for his

pancreatitis were never lifted. (See JE 3, p. 81; JE 7, p. 117; Tr., p. 67) Instead, defendants stopped providing treatment based on their denial of liability. Thus, I find that at the time claimant reached MMI on July 5, 2017, he had not yet returned to work and was incapable of returning to substantially similar employment.

The Iowa Supreme Court has specifically noted that permanent partial disability (PPD) benefits commence whenever the first of three factors in Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). In other words, once a claimant achieves one of the factors outlined in Iowa Code section 85.34(1), permanent disability benefits commence.

The factors are whether (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code section 85.34(1).

With respect to the second factor, the Iowa Supreme Court has described MMI as "stabilization of the condition or at least a finding that the condition is 'not likely to remit in the future despite medical treatment.'" Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010) (citing Guides, Sixth Edition, p. 27). "[T]he persistence of pain may not itself prevent a finding that the healing period is over, provided the underlying condition is stable." Myers v. F.C.A. Servs., Inc., 592 N.W.2d 354, 359 (Iowa 1999) (citations omitted). When it is not likely that further treatment will decrease the extent of permanent industrial disability, then continued treatment does not prolong the healing period. See id. In other words, neither maintenance medical care nor a claimant's persistent symptoms will necessarily prolong the healing period when claimant's condition is stable.

As explained above, I found claimant reached MMI on July 5, 2017 because he received no additional treatment after that date, he was unsure whether he wanted to pursue the treatment recommended for him, and there was no evidence that the recommended treatment was anything but maintenance care.

Having found that claimant achieved MMI on July 5, 2017, did not return to work before that date, and was not medically capable of performing substantially similar work before that date, I conclude the date of MMI is the first factor of Iowa Code section 85.34(1) to have been achieved in this case. I therefore conclude claimant's healing period terminated on July 5, 2017, and his PPD benefits should commence on July 6, 2017.

Should claimant decide to pursue the recommended ablations or any other therapy, he may be entitled to an additional healing period. See Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

Having reversed the deputy commissioner's determination that claimant was entitled to a running award of temporary benefits, I must determine the extent of claimant's permanent disability. Because I adopted the opinions of Dr. Taylor, I find claimant sustained an eight percent whole body permanent impairment as a result of his work-related injury on November 23, 2015, and now has restrictions of no heavy lifting; no lifting more than 20 pounds on an occasional basis at waist level or between knee and chest level; no lifting more than 10 to 15 pounds below the knee level or above the head level; and occasional squatting, bending, kneeling, and use of stairs. (JE 13, p. 175)

Claimant credibly testified his limitations would prevent him from returning to his job with defendant-employer and at least some of his prior jobs. (Tr., p. 39) In at least one of his former jobs, claimant was required to lift bundles of paper weighing roughly 25 pounds, which is outside the restrictions recommended by Dr. Taylor. (Tr., pp. 14-15)

Claimant, who was 61 years old at the time of the hearing, is a high school graduate with a limited work history in the printing industry (Tr., p. 11, 13-16) I find he is not a good candidate for retraining and now has significant barriers to returning to the employment for which he was fitted.

Claimant testified he does not believe he is capable of returning to work even on a part-time basis, but he acknowledged he has not attempted to search for other jobs since being terminated by defendant-employer. (Tr., p. 38) While claimant is now limited in the type of work he could perform, his failure to attempt any job searches suggests he lacks motivation to return to the workforce. For those reasons I find claimant has sustained 50 percent industrial disability as a result of the work injury.

The parties stipulated any permanent disability is industrial in nature. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, 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).

Considering these factors, I find claimant sustained a 50 percent industrial disability as a result of the work injury. This entitles claimant to receive 250 weeks of

PPD benefits. Iowa Code section 85.34. The deputy commissioner's award of running temporary benefits is therefore reversed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 17, 2018, as modified by the ruling on limited application for rehearing filed on November 15, 2018, is affirmed in part and reversed in part.

Defendants shall pay claimant healing period benefits commencing on June 29, 2016, through July 5, 2017.

Defendants are entitled to the stipulated credit of eight thousand nine hundred twenty-nine and 19/100 ($8,929.19) for payment of short term disability benefits under Iowa Code section 85.38(2) against healing period benefits.

Defendants shall pay claimant 250 weeks of permanent partial disability benefits commencing on July 6, 2017.

All weekly benefits shall be paid at the rate of four hundred forty one and 28/100 dollars ($441.28) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be 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, See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants are ordered to reimburse claimant for his out-of-pocket medical expenses and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses as set forth and described in the ruling on limited application for rehearing in the sum of twenty thousand two hundred nine and 38/100 dollars ($20,209.38).

Defendants shall pay claimant penalty benefits in the amount of ninety dollars ($90.00).

Pursuant to rule 876 IAC 4.33, defendants shall pay costs of the arbitration hearing in the amount of six hundred thirty two and 73/100 dollars ($632.73), 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-employer shall file subsequent reports of injury as required by this agency.

Signed and filed on this 11th day of February, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Jason Neifert Via WCES

Aaron T. Oliver Via WCES