

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GREGORY A. HIMMELSBACH,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

INDEMNITY INSURANCE CO. OF  
NORTH AMERICA,Insurance Carrier,  
Defendants.

File Nos. 5066732 and 5066867

## A P P E A L

## D E C I S I O N

Head Notes: 1402.20; 1402.30; 1402.40;  
1402.50; 1803; 1803.1; 2401;  
2402; 2907; 3002; 4000.2

Defendants Quaker Oats Company, employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on June 23, 2021. Claimant Gregory Himmelsbach cross-appeals. The case was heard on June 9, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on July 20, 2020.

In the arbitration decision, in File No. 5066732, injury date of June 25, 2018, the deputy commissioner found claimant provided timely notice of his injury. The deputy commissioner found claimant sustained injuries to his right arm and right shoulder, but not to his body as a whole. The deputy commissioner found claimant is entitled to receive healing period benefits from November 5, 2018, through September 9, 2019, and 48 weeks of permanent partial disability (PPD) benefits for 12 percent impairment of his right shoulder. The deputy commissioner adopted claimant's weekly benefit rate calculation of \$983.10. The deputy commissioner awarded penalty benefits in the amount of \$30,000.00 for an unreasonable delay by defendants in paying weekly benefits.

In File No. 5066867, injury date of September 12, 2018, the deputy commissioner found claimant's pre-existing right knee condition was materially aggravated by his work activities leading up to and occurring on September 12, 2018. The deputy commissioner found claimant provided timely notice of his injury and timely filed his claim within the statute of limitations. The deputy commissioner found claimant

is entitled to a running award of healing period benefits starting on January 20, 2020. The deputy commissioner adopted claimant's rate calculation of \$970.70. The deputy commissioner awarded claimant's medical expenses and ordered defendants to authorize care with David Hart, M.D. The deputy commissioner awarded penalty benefits in the amount of \$450.00. The deputy commissioner awarded reimbursement for claimant's independent medical examination with Farid Manshadi, M.D., and ordered defendants to reimburse the costs of claimant's filing fee. The deputy commissioner declined to assess defendants with the costs of Dr. Hart's report or the costs of obtaining copies of medical records.

On appeal, defendants assert the deputy commissioner erred when assessing penalty benefits by failing to take into account defendants' credits for short-term and long-term disability benefits paid. Defendants also assert the deputy commissioner erred in adopting claimant's rate calculations. Lastly, defendants assert the deputy commissioner erred in File No. 5066867 by finding causation between claimant's right knee condition and his employment with defendant-employer.

On cross-appeal, claimant asserts the deputy commissioner erred in File No. 5066732 by finding claimant's injury was limited to his scheduled member right shoulder. Claimant also asserts the deputy commissioner erred in refusing to assess defendants with the cost of Dr. Hart's report.

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 June 23, 2021, is affirmed in part, reversed in part, and modified in part.

I affirm the deputy commissioner's finding in File No. 5066732 that claimant's injury is limited to the scheduled member right shoulder and does not extend into claimant's body as a whole. I affirm the deputy commissioner's finding in File No. 5066867 that claimant's work activities leading up to and on September 12, 2018, materially aggravated claimant's pre-existing degenerative right knee condition. I affirm the deputy commissioner's costs assessment; specifically, I affirm the deputy commissioner's decision to decline to assess Dr. Hart's report as a cost. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues in their entirety.

This leaves two remaining issues on appeal: the deputy commissioner's penalty award and claimant's weekly benefit rates for the two injuries.

Turning first to claimant's weekly benefit rates, I affirm the deputy commissioner's adoption of the weeks included in claimant's proposed rate calculations. I agree with

the deputy commissioner that the weeks included in claimant's rate calculations fairly represent his customary earnings. I also affirm the deputy commissioner's inclusion of claimant's higher rate for vacation hours. See Oxley v. Lennox, File No. 5067306 (Arb. March 18, 2020) (aff'd App. Nov. 16, 2020); Stallman v. Quaker Oats Co., File No. 5065202 (Arb. Jan. 25 2019) (aff'd App. June 16, 2020).

Regarding the inclusion of bonuses, I affirm the deputy commissioner's finding that claimant's annual bonuses, the "pay for performance" bonus and the vacation bonus, are regular and should therefore be considered in claimant's rate calculation. However, I do not agree with the deputy commissioner's inclusion of the bonuses claimant received when union contracts were ratified. I acknowledge claimant received a bonus every time the union successfully negotiated a contract, but the negotiation/ratification itself was not regular, nor were the timeframes in which claimant was paid the bonuses.

From the evidence presented by claimant, claimant was paid a ratification bonus in 2007 and 2011 for a collective bargaining agreement (CBA) that expired in 2012. Then he was paid a ratification bonus in 2012 and 2013 for a CBA that expired in 2016. Then he was paid a ratification bonus in 2016 and 2017 for a CBA that expired in 2019. (See Claimant's Exhibit 3) Claimant offers no explanation as to why these CBAs were of varying years in length or why his bonuses were paid at different points during the CBAs. There is simply not enough evidence to determine whether claimant expected those payments annually or bi-annually or in some other consistent timeframe. See Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 266 (Iowa 2012). As a result, I do not find those bonuses to be regular. The deputy commissioner's inclusion of these bonuses in the rate calculation is therefore respectfully reversed. I find claimant's ratification bonuses should not be included in his rate calculations. See Iowa Code § 85.61(3).

For the June 25, 2018, injury date, File No. 5066732, claimant's ratification bonus amounted to \$7.21 per week, or a total of \$93.73 for the relevant 13-week period. (Cl. Ex. 3, p. 1) As a result, claimant's 13-week total for wages is reduced from \$21,077.89 to \$20,984.16. This results in an average weekly wage of \$1,614.17. According to the rate book in effect from July 1, 2017, through June 30, 2018, an individual who is married and entitled to two exemptions with average gross weekly earnings of \$1614.17 is entitled to a weekly benefit rate of \$979.19. The deputy commissioner's rate calculation for File No. 5066732 is therefore modified.

For the September 12, 2018, date of injury, File No. 5066867, claimant's 13-week total for wages is likewise reduced by \$93.73 from \$20,219.76 to \$20,126.03. (Cl. Ex. 3, p. 2) This amounts to an average weekly wage of \$1,548.16. According to the rate book in effect from July 1, 2018, through June 30, 2019, an individual who is married and entitled to two exemptions with average gross weekly earnings of

\$1,548.16 is entitled to a weekly benefit rate of \$966.66. The deputy commissioner's rate calculation for File No. 5066867 is therefore modified.

Turning next to the penalty award, defendants assert on appeal that the deputy commissioner failed to take into account their stipulated credit for payments of short- and long-term disability benefits when assessing penalty. Defendants also assert the maximum 50 percent penalty is not warranted.

In this case, the deputy commissioner found defendants had no reasonable basis to deny claimant's claim until January 25, 2020, when they received Dr. Jameson's report. Though defendants did not pay claimant any healing period or PPD benefits through this date, claimant was receiving short-term and long-term disability benefits during this time. More specifically, between November 5, 2018, and January 25, 2020, net short-term disability (STD) and net long-term disability (LTD) benefits were paid in the total amount of \$23,926.55. The parties stipulated to defendants' credit in this amount. (Hearing Report)

Iowa Code section 86.13 provides that penalty can be awarded "up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse." Iowa Code § 86.13(4)(a) (emphasis added).

Defendants assert any penalty award should be based on the difference between the total healing period and PPD benefits owed and their credit for STD and LTD benefits paid. Per defendants, under Iowa Code section 86.13, a penalty can only be assessed on weekly benefits that were unpaid when due, and when defendants are entitled to a credit for group disability benefits paid under section 85.38, the amount of the net credit is no longer due and owing as a weekly compensation benefit.

Defendants' position is supported by past agency precedent. DeWitt v. AT&T, File No. 989177 (App. Feb. 28, 1994) ("However, as defendant is entitled to a credit for long term disability benefits paid to claimant under Iowa Code section 85.38(2), it is inappropriate to assess a penalty for the full amount of unpaid workers' compensation benefits. Defendant shall pay a penalty of 50 percent of the difference between any long term disability benefits paid to claimant and qualifying for a credit under Iowa Code section 85.38(2), and the full amount of workers' compensation benefits claimant has been found to be entitled to. . ." (citation omitted)); see Moon v. AT&T, File No. 946325 (Arb. Sept. 21, 1993) ("Defendant shall pay a penalty on each week of the entitlement to benefits to date consisting of 50 percent of the difference between the weekly rate of compensation and the net weekly amounts of long-term disability payments received after taxes.") see also Doty v. Polaris Industries, Inc., File No. 5044352 (App. Oct. 29, 2015); Ainesworth v. Envipco, File No. 5009970 (Arb. Aug. 14, 2006).

Claimant asserts the deputy commissioner's penalty award was appropriate because Iowa Code section 86.13 makes no mention of credits against a penalty award.

Claimant argues a finding that penalty is only to be assessed on benefits that exceed defendants' credits would allow employers to skirt their obligations under the law.

While claimant is correct that this section of the statute makes no explicit allowance for credits against a penalty award, Iowa Code section 85.38 provides that the employer "shall be credited" for payments made under group disability plans when benefits should have been paid for a work-related injury. See Iowa Code § 85.38(2)(a). In other words, the credit is applicable when benefits were paid as STD or LTD but should have been paid as workers' compensation benefits. Because claimants in such circumstances are entitled to either STD/LTD or workers' compensation, but not both, defendants get a credit for benefits paid and are responsible only for the difference. As a result, claimants are made whole, and do not double recover, while defendants' obligations are met, and defendants do not double pay. Thus, I find assessing penalty only on the benefits that exceed the credit is appropriate.

This scenario is similar to when a claimant is underpaid due to a rate miscalculation and is ordered to pay the difference; the penalty is only based on the underpayment.

For those reasons, I find the deputy commissioner erred when assessing penalty on the full amount of unpaid workers' compensation benefits without considering defendants' stipulated credit. As noted by the deputy commissioner, approximately 62 weeks of weekly benefits were payable prior to when the claim became fairly debatable in File No. 5066732. At the modified weekly rate of \$979.19, this amounts to \$60,709.78 of weekly workers' compensation benefits. Considering claimant's stipulated credit of \$23,926.55, the remaining workers' compensation benefits owed and on which penalty can be assessed are roughly \$37,000.00 (\$60,709.45 - \$23,926.55 = \$36,783.23). Because I agree with the deputy commissioner that a penalty in the range of 50 percent is appropriate, a penalty in the amount of \$18,000.00 is imposed. The deputy commissioner's penalty award in File No. 5066732 is therefore modified.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 23, 2021, is affirmed in part, reversed in part, and modified in part.

**File No. 5066732 – injury date of June 25, 2018 - right arm/shoulder:**

Defendants shall pay claimant healing period benefits for the period of November 5, 2018, to September 9, 2019, at the weekly rate of nine hundred seventy-nine and 19/100 dollars (\$979.19).

Defendants shall pay claimant forty-eight (48) weeks of permanent partial disability benefits, commencing on September 10, 2019, at the weekly rate of nine hundred seventy-nine and 19/100 dollars (\$979.19).

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 receive credit pursuant to Iowa Code section 85.38(2) for payment of sick pay/disability income as stipulated by the parties.

Defendants shall pay claimant penalty benefits in the amount of eighteen thousand and 00/100 dollars (\$18,000.00).

Defendants are responsible for all reasonable and necessary medical care related to the right shoulder injury, as itemized in claimant's exhibit 7.

Pursuant to rule 876 IAC 4.33, the parties shall pay costs as set forth in the arbitration decision.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

**File No. 5066867 - injury date of September 12, 2018 - right lower extremity:**

Defendants shall pay claimant temporary total disability benefits at the weekly rate of nine hundred sixty-six and 66/100 dollars (\$966.66), commencing January 20, 2020, until such time as claimant meets the requirements of Iowa Code section 85.34(1).

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 receive credit pursuant to Iowa Code section 85.38(2) for payment of sick pay/disability income as stipulated by the parties.

Defendants shall pay claimant penalty benefits in the amount of four hundred fifty and 00/100 dollars (\$450.00).


Defendants are responsible for all reasonable and necessary medical care related to claimant's right knee injury, pursuant to Iowa Code section 85.27.

Defendants shall reimburse claimant's independent medical evaluation fee in the amount of one thousand eight hundred dollars and 00/100 (\$1,800.00).

Pursuant to rule 876 IAC 4.33, the parties shall pay costs as set forth in the arbitration decision, 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), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 7<sup>th</sup> day of December, 2021.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows

Andrew Giller (Via WCES)

Timothy Wegman (Via WCES)