BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE SANCHEZ,

Claimant,

vs.

ALTER TRADING CORPORATION,

Employer,

and

ARCH INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5053344

APPEAL

DECISION

Head Note Nos: 1108; 1703; 1803

Defendants Alter Trading Corporation, employer, and its insurer, Arch Insurance Company, appeal from an arbitration decision filed on October 3, 2017. Claimant Jose Sanchez cross-appeals. The case was heard on June 20, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on July 18, 2016.

Claimant sustained a left shoulder injury which arose out of and in the course of his employment with defendant-employer on April 29, 2003. For that injury, a deputy commissioner awarded claimant 20 percent industrial disability, or 100 weeks of permanent partial disability (PPD) benefits. The award was affirmed on appeal. The April 29, 2003, work injury is not the subject of this proceeding.

Claimant sustained a subsequent, stipulated injury to his right shoulder with defendant-employer on December 18, 2013. The December 18, 2013, work injury is the subject of this proceeding.

In the October 3, 2017, arbitration decision, the deputy commissioner found claimant sustained permanent impairment as a result of the stipulated work injury. In applying Iowa Code section 85.34(7)(b)(1), the deputy commissioner found claimant sustained a combined 40 percent industrial disability from the combined effects of the April 29, 2003, work injury and the December 18, 2013, work injury. The deputy commissioner found defendants were entitled to a credit against the award of industrial disability for the 100 weeks of PPD benefits defendants previously paid to claimant for the April 29, 2003, work injury. The deputy commissioner also found pursuant to Iowa

Code section 86.13 that claimant is entitled to penalty benefits in the amount of $3,000.00 for an unreasonable failure to pay weekly benefits. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the deputy commissioner erred in finding claimant sustained a combined 40 percent industrial disability resulting from the April 29, 2003, and December 18, 2013, work injuries. More specifically, defendants assert the deputy commissioner erred in finding claimant's combined disability is more than 20 percent. Defendants assert the deputy commissioner erred in finding as a matter of law claimant's combined industrial disability could not be less than the 20 percent industrial disability awarded for the April 29, 2003, work injury. Lastly, defendants assert the deputy commissioner erred in awarding penalty benefits.

Claimant asserts on cross-appeal that the deputy commissioner erred in finding defendants are entitled to a credit pursuant to Iowa Code section 85.34(7)(b)(1) for the April 29, 2003, left shoulder injury. Claimant asserts the deputy commissioner erred in finding claimant sustained a combined 40 percent industrial disability. Claimant asserts the award for industrial disability should be increased substantially. Lastly, claimant asserts the deputy commissioner erred in assessing $3,000.00 in penalty benefits. Claimant asserts the award for penalty benefits should also be increased substantially.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on October 3, 2017, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant sustained permanent disability as a result of the December 18, 2013, work injury. I affirm the deputy commissioner's finding that claimant sustained a combined disability of 40 percent as a result of the two work injuries. I affirm the deputy commissioner's finding that defendants are entitled to a credit of 100 weeks of PPD benefits under Iowa Code section 85.34(7)(b)(1). I affirm the deputy commissioner's finding that claimant is entitled to receive penalty benefits in the amount of $3,000.00 for defendants' unreasonable failure to pay benefits following receipt of an impairment rating from claimant's authorized treating physician.

I affirm the deputy commissioner's findings, conclusions and analysis regarding all of the above issues. I provide the following additional analysis for my decision:

Claimant began working for defendant-employer in 1983. (Hearing Transcript, p. 7) For his first four years, claimant sorted metal. (Exhibit B, p. 4) Thereafter, he was promoted to driving a bulldozer or operating a loader machine, a position he maintained until his voluntary retirement in May 2015. (Id.)

Claimant sustained an injury to his left shoulder arising out of and in the course of his employment with the defendant-employer on April 29, 2003. (Ex. B) Claimant underwent a decompression of the left shoulder, a repair of the rotator cuff, a debridement of the subscapularis and a labral tear repair. (Ex. B, p. 4; Ex. C) Claimant was released to full duty work, without restrictions. He returned to his same full-time operator position at defendant-employer and he performed all duties required of him. The deputy commissioner did not adopt a specific set of permanent restrictions, but held claimant should not lift above shoulder height on the left side. (Ex. B, p. 7)

Claimant was awarded 20 percent industrial disability in the January 30, 2006, arbitration decision. (Id.) The deputy commissioner discussed a myriad of factors that supported the 20 percent award: claimant's advanced age (62), his poor educational background (fourth grade in Mexico), a poor command of the English language, and his inability to lift above shoulder height on the left (projected restriction). (Ex. B)

Defendant-employer appealed, and the workers' compensation commissioner affirmed the deputy commissioner's decision. (Ex. C) Defendant-employer filed a petition for judicial review. Following a hearing, the district court affirmed the agency's determination. (Ex. H) Claimant received $49,058.00, plus interest in PPD benefits in satisfaction of the award. Defendants did not file a review-reopening petition.

In December 2013, Sanchez injured his right shoulder after slipping on a step and striking his loader. (Ex. 2, p. 3) He underwent surgery in February 2014 to repair a large to massive rotator cuff tear. (Ex. M, p. 45) He received extensive follow-up treatment, including restrictions, medications, and physical therapy. Fortunately, he eventually saw significant progress and was returned to work without restrictions in September 2014. (Ex. M, p. 59) Upon his release, claimant returned to the same full-time loader-operator position he had prior to the December 2013, work injury. Claimant was able to complete the job duties required of him without difficulty. His rate of pay on his date of retirement was the same as his rate of pay on the date of injury.

Claimant voluntarily retired from full-time employment on May 29, 2015. (Ex. P) At the time of the June 2016 hearing, claimant remained interested in finding part-time employment.

Claimant continues to experience pain in the right shoulder. While he is not prescribed any pain medications, he takes over-the-counter pain medications on an as-needed basis. Claimant's range of motion in the right shoulder decreased following surgical intervention. (Ex. W, p. 93, Deposition Transcript pp. 35-36) Claimant limits his lifting if he feels pain in the right shoulder. (Depo. pp. 45-46)

Abdul Foad, M.D., provided an impairment rating of four percent of the whole person as a result of the December 2013 work injury. (Ex. M, p. 62) He did not assign any permanent restrictions. Richard Kreiter, M.D. provided an impairment rating of 20 percent of the whole person. He recommended restrictions of no overhead lifting with the right arm and waist level activity. (Ex. 3, p. 6)

The deputy commissioner's application of Iowa Code section 85.34(7)(b)(1) is the focal point of both appeal briefs.

Iowa Code section 85.34(7) is known as the successive-disability statute. The statute became effective September 7, 2004, and applies to all injuries occurring on or after its effective date. 2004 First Extraordinary Session Iowa Acts ch. 1001, section 18. Iowa Code section 85.34(7)(a) makes defendants responsible for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. Iowa Code section 85.34(7)(b) governs how successive injuries are to be assessed and what credits should be given to the employer for past payments of weekly benefits.

The deputy commissioner correctly determined Iowa Code section 85.34(7)(b)(1) applies to this case as opposed to section 85.34(7)(b)(2). Defendants frequently reference the deputy commissioner's statement, "there is no evidence that the claimant suffered an actual loss of earnings as a result of the 2003, left shoulder disability" in support of their argument that claimant's left shoulder injury improved following the original arbitration decision. This statement is taken out of context. The deputy commissioner was explaining why Iowa Code section 85.34(7)(b)(2) does not apply to the matter at hand because claimant's wages did not decrease following the April 2003 injury. The deputy commissioner was not concluding that claimant did not sustain a loss of earning capacity as a result of the April 2003 injury. Earning capacity is not necessarily coextensive with actual earnings. See 7 Larson, section 81.01, at 81–2 to 81–5 (indicating actual earnings are not the same as earning capacity); see also Clark v. Vicorp Rests., Inc., 696 N.W.2d 596, 605 (Iowa 2005) (finding a reduction in actual earnings is not necessary to show reduced earning capacity).

Under 85.34(7)(b)(1), when a subsequent work injury occurs while working for the same employer and the subsequent injury is compensated under the same subsection of Iowa Code section 85.34(2), then this agency is to determine the combined disability that is caused by both injuries. The employer's liability for the combined disability shall be considered satisfied to the extent of the percentage of disability for which the employee was previously compensated.

On cross-appeal, claimant asserts Iowa Code section 85.34(7)(b)(1) is not applicable in this matter because claimant's first injury occurred prior to section 85.34(7)(b)(1)'s enactment. In support of this argument, claimant points to the date of claimant's first injury, April 29, 2003, and the effective date of Iowa Code section 85.34(7)(b)(1), September 7, 2004. Claimant asserts this agency has previously held that for section 85.34(7)(b)(1) to apply, both the prior injury and the successive injury

must both occur after the effective date. Main v. Quaker Oats Co., File No. 5017903 (App. Dec. 19, 2007) Claimant's brief fails to acknowledge that both the district court and court of appeals found the agency's determination was made in error. Only the successive injury must occur after the effective date of the statute in order to trigger its application. Quaker Oats Co. v. Main, 779 N.W.2d 494 (Iowa Ct. App. 2010); see also Drake University v. Davis,769 N.W.2d 176, 184 (Iowa 2009) Therefore, I affirm the deputy commissioner's finding that Iowa Code section 85.34(7)(b)(1) applies in this case.

On appeal, defendants' main assertion is that claimant's combined industrial disability is equal to or less than 20 percent. In support of this argument, defendants assert a number of sub-arguments. In essence, these sub-arguments challenge how the deputy commissioner applied Iowa Code section 85.34(7)(b)(1) to the facts of this case.

The Iowa Supreme Court has observed that section 85.34(7)(b)(1) explains exactly how the offset is to be calculated when an employee suffers successive injuries while working for the same employer. Roberts Dairy v. Billick, 861 N.W.2d at 822. Unlike in scenarios involving different, or concurrent employers, the combined disability analysis is straightforward when an employee suffers successive injuries with the same employer.

Iowa Code section 85.34(7)(b)(1) states:

> If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Defendants assert the deputy commissioner erred in concluding the 20 percent industrial disability awarded for the 2003 left shoulder injury serves as a "floor" or otherwise impacts the combined disability analysis under Iowa Code section 85.34(7)(b)(1). Defendants assert the combined disability analysis is to be based on the then-current evidence, as presented at the time of hearing on the combined disability. In this regard, defendants assert the previously assigned industrial disability has no bearing on the combined disability analysis. In their reply brief, defendants assert, "[t]here is absolutely no evidence that Claimant's left shoulder resulted in any kind of disability or industrial disability for purposes of the combined disability analysis required under Iowa Code section 85.34(7)(b)(1)." (Def. Reply Brief, p. 5) Defendants cite no legal authority to support their position.

By asserting the industrial disability assessment from the first injury has no bearing on the combined disability analysis, and that claimant's combined disability could be less than the previously adjudicated 20 percent, defendants are implicitly requesting this agency to reassess the industrial disability attributable to the original injury based on "current" information. Such an analysis is impermissible. A redetermination of the condition of an injured worker as it was adjudicated by a prior award is inappropriate. If defendants felt they could prove a change in condition or change in earning capacity occurred following the original award, the proper vehicle to assert such a change would be through a review-reopening proceeding. Defendants did not file a petition for review-reopening between 2006 and 2013.

Defendants cannot, for the first time, argue claimant has sustained a change in industrial disability from the original injury in an arbitration hearing involving a subsequent, unrelated injury. Claimant's loss of earning capacity as a result of the 2003 injury was established by this agency in April 2006. The original award was affirmed on appeal to the commissioner and the district court. Defendants did not file a review-reopening petition, and the window for which defendants could file a petition for review-reopening has long since passed. As such, that decision is binding. Claimant's industrial disability was not reassessed by this agency or the competitive labor market prior to the 2013 injury. To reassess claimant's industrial disability stemming from the 2003 injury would undermine the appeals process. Defendants cannot circumvent the statute of limitations for review-reopening by way of a successive disability. Because the logical conclusion of defendants' argument necessarily results in a reassessment of a prior award, the argument must fail. For those reasons, I find the deputy commissioner correctly applied Iowa Code section 85.34(7)(b)(1).

However, even assuming for the sake of argument that the industrial disability assigned to the original injury does not impact the combined disability analysis, I would still affirm the deputy commissioner's determination as defendants provided insufficient evidence of a change in condition. Defendants assert claimant's combined disability for the left and right shoulder injuries could be less than or equal to the industrial disability stemming from the original left shoulder injury alone. In support of this assertion, defendants correctly assert an injured workers' industrial disability can change over time. Defendants argue it is plausible the industrial disability stemming from the 2003 left shoulder injury could have lessened or improved with the passage of time.

While it is true post-injury industrial disability can improve or worsen over time, no such evidence was presented by defendants in this case to show claimant's reduced earning capacity resulting from the 2003 injury had been restored in whole or in part as a consequence of unexpected healing, a change in qualifications, training, education, or other factors prior to the 2013 injury. See Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992). All factors relevant to industrial disability were substantially similar or worse in 2013 as they were at the time of the original arbitration hearing in 2006.

In cases involving successive injuries with the same employer, this agency is not tasked with assessing whether an injured workers' industrial disability has improved between a first and second injury. The statute does not instruct this agency to assess the injured worker's condition immediately prior to the second injury, nor does the statute instruct this agency to reassess a prior award. Such a reassessment is only possible through the appeal process, a petition for review-reopening, or via the competitive labor market. Iowa Code section 85.34(7)(b)(1) provides an injured worker's combined disability is measured in relation to the employee's condition immediately prior to the first injury.

Immediately prior to the initial injury, claimant was 59 years old. He had performed manual labor jobs his entire working life. Claimant could read, write, and speak some English, but felt most comfortable using Spanish. He had a fourth grade education from Mexico. He was not operating under any restrictions. By all accounts, it appears claimant's bilateral shoulders were not limited in any way. Claimant's job possibilities were limited prior to his injures given his language barrier, educational limitations, and limited work history. Supplementing these factors with physical restrictions, whether minimal or otherwise, would make retraining and/or finding alternative employment in a competitive labor market more difficult.

In comparison, claimant was 72 years old on the date of hearing for the 2013 right shoulder injury. He was retired; however, he was searching for part-time employment. Claimant's understanding of the English language had not significantly improved. His education level remained the same. Between April 2003 and June 20, 2016, claimant sustained separate surgical injuries to the left and right shoulder. The deputy commissioner who presided over the left shoulder injury found claimant should not be lifting above shoulder height on the left. The deputy commissioner who presided over the right shoulder injury found claimant should not be lifting above shoulder height on the right. These restrictions did not hamper claimant's ability to perform his regular job duties with the defendant employer. However, such restrictions are significant in the competitive labor market. Claimant has received permanent impairment ratings for both shoulders.

In assessing claimant's combined disability, the deputy commissioner found claimant had sustained 40 percent industrial disability as a result of two surgically repaired shoulder injuries. The deputy commissioner clearly considered all factors relevant to industrial disability in reaching this conclusion. Like the deputy commissioner, I too, find the four percent permanent impairment rating provided by Dr. Foad to accurately reflect claimant's condition. It is likely Dr. Foad declined to provide permanent restrictions given the fact claimant could perform the job duties required of his pre-injury position with defendant-employer. According to Dr. Foad's records, claimant's job duties required climbing into his loader, turning a wheel without resistance, and no lifting. With this in mind, I find it likely claimant requires some limitations on the use of his right arm outside of his position with the defendant-employer, and I adopt the restrictions discussed by Dr. Kreiter.

Given the above analysis, I affirm the deputy commissioner's finding that claimant sustained a combined industrial disability of 40 percent for all injuries attributable to defendant-employer.

Both parties address penalty benefits in their appellate briefs. Having performed a de novo review, I find no reason to disturb the deputy commissioner's findings with respect to this issue. The deputy commissioner provided a thorough, well-reasoned analysis. I provide the following additional analysis:

I acknowledge defendants' citation to Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005); however, the holding in Keystone does not establish a bright line rule, and the case is distinguishable from the matter at hand. Penalty benefits are awarded on a case-by-case basis. Given the circumstances in the case at bar, it was not reasonable for defendants to deny PPD benefits based on the argument that claimant's combined industrial disability was less than or equal to 20 percent.

While it is true claimant was released to return to work without restrictions, functional impairment is but one factor in an industrial disability analysis. Additionally, this case is distinguishable from Keystone in that the claimant in Keystone left employment with the employer and was able to secure substantially similar employment with another nursing home. The claimant in Keystone was able to maintain her pre-injury earning level.

In this case, there is some uncertainty as to whether claimant would be able to maintain his pre-injury earning level. Moreover, defendants were aware of the fact a substantially similar injury to claimant's left shoulder resulted in an award of 20 percent industrial disability. Lastly, defendants' original basis for denial was that they possessed a credit for benefits previously paid to claimant following the April 2003 injury. Iowa Code section 85.34(7) does not provide for a "credit" per se, as asserted by defendants. That code section provides for an offset for benefits previously paid against the assessment of an injured worker's combined disability.

As discussed throughout this appeal decision, it was not reasonable to argue claimant's combined disability was less than or equal to 20 percent. As such, I affirm the deputy commissioner's finding that claimant is entitled to receive penalty benefits in the amount of $3,000.00 for defendants' unreasonable failure to pay benefits following receipt of an impairment rating from claimant's authorized treating physician.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 3, 2017, is affirmed in its entirety.

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the weekly rate of four hundred thirty-four and 51/100 dollars ($434.51) commencing November 20, 2014.

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 shall pay claimant penalty benefits in the amount of three thousand and 00/100 dollars ($3,000.00).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, 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 19th day of July, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
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