

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL KEHRLI,

Claimant,

vs.

OVERHEAD DOOR CO. OF
WATERLOO, INC.

Employer,

and

GRINNELL SELECT INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 1653327.01

A P P E A L

D E C I S I O N

Head Notes: 1402.40; 1403.30; 1600; 1803;
2907; 4000

Defendants Overhead Door Company of Waterloo, Inc., employer, and its insurer, Grinnell Select Insurance Company, appeal from an arbitration decision filed on January 19, 2023. Claimant Michael KehrlI responds to the appeal. The case was heard on July 28, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 26, 2022.

In the arbitration decision, the deputy commissioner found defendants did not preserve error on their failure to mitigate defense. The deputy commissioner found claimant met his burden of proof to establish he sustained 35 percent functional impairment of his right lower extremity as a result of the stipulated July 20, 2018, work injury, which entitles claimant to receive 77 weeks of permanent partial disability benefits at the stipulated weekly rate of \$696.06, commencing on November 19, 2018. The deputy commissioner found claimant is entitled to receive \$1,031.34 in penalty benefits. The deputy commissioner found defendants are responsible for the \$41.06 cost for two prescriptions and for the \$58.00 cost of crutches. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$306.20.

Defendants assert on appeal that the deputy commissioner erred in finding defendants failed to preserve error on their failure to mitigate defense. Defendants assert the deputy commissioner erred in finding claimant sustained 35 percent functional impairment of his right lower extremity. Defendants assert the deputy

commissioner erred in awarding claimant penalty benefits. Defendants assert the deputy commissioner erred in finding the commencement date for permanent partial disability benefits is November 19, 2018. Defendants assert the deputy commissioner erred in ordering defendants to pay claimant's costs of the arbitration proceeding.

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 19, 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 defendants are responsible for the \$41.06 cost of two prescriptions and for the \$58.00 cost of crutches. I affirm the deputy commissioner's finding that claimant is entitled to an award of \$1,031.34 in penalty benefits. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding in the amount of \$306.20.

With my additional and substituted analysis, I affirm the deputy commissioner's finding that claimant sustained 35 percent functional impairment of his right lower extremity. I reverse the deputy commissioner's finding that defendants did not preserve error on their failure to mitigate affirmative defense. I reverse the deputy commissioner's finding that the commencement date for permanent partial disability benefits is November 19, 2018.

I. Extent of Disability and Failure to Mitigate

The parties stipulated claimant sustained an injury to his right lower extremity on July 20, 2018. The parties dispute the extent of disability. For loss of a leg, compensation is limited to 220 weeks. (Iowa Code section 85.34(2)(p) (2018))

For functional loss determinations, Iowa Code Section 85.34(2)(x) states:

. . . when determining functional disability and not loss of earning capacity, 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 impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

The Workers' Compensation Commissioner has adopted the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") for evaluating functional disability. (876 IAC 2.4)

Two expert witnesses have given opinions on the extent of claimant's functional disability resulting from the work injury, Thomas Gorsche, M.D., a treating orthopedic surgeon, and Dr. Manshadi, a physiatrist who performed an independent medical examination (IME) at the request of claimant.

On July 27, 2020, using Table 17-33 of the AMA Guides, Dr. Gorsche assigned claimant two percent right lower extremity impairment. (JE 4, p. 71) Table 17-33 at page 546 of the AMA Guides assigns a two percent lower extremity impairment. The rating is for a partial medial or lateral meniscectomy.

In September 2021, using Table 17-10 of the AMA Guides, Dr. Manshadi assigned claimant 35 percent right lower extremity impairment, finding claimant's flexion was less than 60 degrees and fell into the "severe" category for a knee impairment. (Ex. 1, p. 4-5)

I agree with the deputy commissioner there is no evidence in the case claimant underwent a meniscectomy. Claimant refused surgery. For this reason, I do not find Dr. Gorsche's opinion persuasive.

Defendants assert claimant failed to mitigate damages by refusing to undergo surgery for his meniscus tear, which is responsible for the additional loss of function in his knee when he was examined by Dr. Manshadi. The deputy commissioner found defendants failed to assert failure to mitigate as an affirmative defense in the answer. On de novo review, I find defendants preserved error on their failure to mitigate affirmative defense.

Addressing defendants' failure to mitigate defense would require the use of agency expertise to determine whether the functional rating assigned by Dr. Manshadi should be reduced, given claimant refused to undergo surgery. Iowa Code Section 85.34(2)(x) expressly precludes the use of agency expertise when evaluating functional impairment. Therefore, I find defendants' failure to mitigate argument lacks merit. Claimant has established he sustained 35 percent functional impairment of the right lower extremity.

II. Commencement Date for Permanency

Defendants next assert the deputy commissioner erred in finding the commencement date for permanency is November 19, 2018. In 2017, the Iowa Legislature modified Iowa Code section 85.34(2) governing the commencement date for permanency, as follows:

Compensation for permanent partial disability benefits shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation by rule pursuant to chapter 17A.

Under the plain meaning of the statute, permanent partial disability benefits commence when the claimant has reached maximum medical improvement (MMI) and when the extent of loss can be determined under the AMA Guides. Dr. Gorsche found claimant reached MMI when he issued his opinion on extent of functional impairment on July 27, 2020. Under the statute, the commencement date for permanency is July 27, 2020, the first date an expert witness determined the extent of loss under the AMA Guides.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 19, 2023, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Defendants shall pay claimant 77 weeks of permanent partial disability benefits at the weekly rate of six hundred ninety-six and 06/100 dollars (\$696.06), commencing on July 27, 2020.

Defendant shall pay all accrued benefits in a lump sum. Interest for all weekly benefits payable and not paid when due is 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. Gamble v. AG Leader Tech., 2018 WL 2006435, File No. 5054686 (Iowa Workers' Comp. Comm'n Apr. 24, 2018).

Defendants shall receive credit for the 4.4 weeks of compensation previously paid to claimant at the weekly rate of six hundred ninety-six and 06/100 dollars (\$696.06).

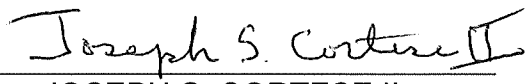
Defendant shall pay claimant one thousand thirty-one and 34/100 dollars (\$1,031.34) in penalty benefits.

Defendants are responsible for the forty-one and 06/100 dollars (\$41.06) cost of the prescriptions and for the \$58.00 cost of crutches.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of three hundred six and 20/100 dollars (\$306.20), 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 June, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Joseph G. Lyons (via WCES)

Aaron T. Oliver (via WCES)