

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARWIN SMIDT,

Claimant,

vs.

JKB RESTAURANTS, LC,

Employer,

and

ACCIDENT FUND NATIONAL  
INSURANCE COMPANY,Insurance Carrier,  
Defendants.

File No. 5067766

A P P E A L

D E C I S I O N

Head Notes: 1402.40; 1703; 1803; 1803.01;  
2502; 2907

Defendants JKB Restaurants, LLC, employer, and its insurer, Accident Fund National Insurance Company, appeal from an arbitration decision filed on May 6, 2020. Claimant Darwin Smidt cross-appeals. The case was heard on March 31, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 21, 2020.

This case involves the 2017 legislative changes to Iowa Code Chapter 85 - specifically the addition of the shoulder to the list of scheduled members in Iowa Code section 85.34(2). As such, all references to section 85.34 herein are to the post-July 1, 2017, version of the section unless otherwise stated.

In the arbitration decision, the deputy commissioner found claimant failed to carry his burden of proof to establish he sustained injuries to his right shoulder, neck, and left hip as a result of the April 18, 2018, work injury. The parties stipulated claimant sustained a permanent injury to his left shoulder as a result of the work injury. In determining how claimant's left shoulder injury should be compensated, the deputy commissioner determined the use of the term "shoulder" in Iowa Code section 85.34(2)(n) is ambiguous. Given this finding, the deputy commissioner concluded the statute should be interpreted liberally in favor of the injured worker. In doing so, the deputy commissioner found claimant sustained injuries that were proximal to the glenohumeral joint and should therefore be compensated as unscheduled, whole body injuries. The deputy commissioner accepted the impairment ratings of John D. Kuhnlein, D.O. The deputy commissioner further found the restrictions recommended by Dr. Kuhnlein accurately reflect claimant's functional abilities. The deputy commissioner found claimant is entitled to receive industrial disability benefits as defendant-employer terminated claimant's employment. After considering all industrial

disability factors, the deputy commissioner found claimant sustained 40 percent industrial disability, which entitles claimant to receive 200 weeks of permanent partial disability (PPD) benefits, as a result of the April 18, 2018, work injury. The deputy commissioner found defendants are entitled to receive a credit for the overpayment of temporary disability benefits. The deputy commissioner also found that pursuant to Iowa Code section 85.39, claimant is entitled to receive reimbursement from defendants for the cost of Dr. Kuhnlein's independent medical evaluation (IME). Lastly, the deputy commissioner found claimant is entitled to costs.

On appeal, defendants assert the deputy commissioner erred in finding claimant's disability is compensated as an unscheduled, whole body injury under Iowa Code section 85.34(2)(v). Instead, defendants assert claimant's disability is limited to the shoulder pursuant to Iowa Code section 85.34(2)(n). Defendants further assert the deputy commissioner erred in not addressing defendants' notice defense relating to claimant's right upper extremity, neck, and left hip injuries. Lastly, defendants assert the deputy commissioner erred in finding Dr. Kuhnlein's IME charge to be reasonable.

On cross-appeal, claimant asserts it should be affirmed that the injury is compensable as a whole-body injury under section 85.34(2)(v). However, claimant asserts it should be found his resulting industrial disability is greater than 40 percent. Claimant further asserts the deputy commissioner erred in finding claimant failed to prove he sustained injuries to his neck and left hip as a result of the work injury.

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.15 and 86.24, the arbitration decision filed on May 6, 2020, is affirmed in part, modified in part, and respectfully reversed in part.

I affirm without additional comment the deputy commissioner's finding that claimant failed to prove he sustained injuries to his neck and left hip as a result of the work injury. As such, the issue of whether claimant provided sufficient notice under Iowa Code section 85.23 for the alleged neck and left hip injuries is moot and that issue will not be addressed on appeal.

I affirm the deputy commissioner's finding that the fee charged by Dr. Kuhnlein for his IME is reasonable in the particular locale where his services were rendered. As such, I affirm the deputy commissioner's finding that pursuant to Iowa Code section 85.39 claimant is entitled to receive reimbursement in the amount of \$3,008.00 from defendants for Dr. Kuhnlein's IME fee.

I respectfully reverse the deputy commissioner's finding that claimant is entitled to benefits under Iowa Code section 85.34(2)(v) for his left shoulder injury. I provide the following additional analysis:

On September 29, 2020, I issued an appeal decision in Deng v. Farmland Foods, File No. 5061883, in which I addressed for the first time what constitutes a shoulder under the Legislature's 2017 amendments to section 85.34(2). Like the deputy commissioner in this case, I determined the Legislature's use of the generic term "shoulder" rendered the statute ambiguous. Using principles of statutory interpretation, I ultimately determined "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint. I also rejected the deputy commissioner's strict application of the bright line rule that whatever is proximal to the joint should be treated as an unscheduled injury under section 85.34(2)(v).

The injury at issue in Deng was to claimant's rotator cuff - specifically the infraspinatus tendon.<sup>1</sup> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff and the importance of the rotator cuff to the function of the joint, I determined the muscles of the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I found the claimant's injury in Deng should be compensated as a shoulder under section 85.34(2)(n).

In Deng, I also recognized the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purpose is to benefit the worker. See DART v. Young, 867 N.W.2d 839, 842 (Iowa 2015)(citations omitted); see also Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010) ("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective ..."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003) ("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). However, I noted that liberal construction cannot be performed in a vacuum. As discussed in Deng, several of the principles of statutory construction indicate the Legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I concluded "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.

All of the findings, analysis, and conclusions in Deng are incorporated herein.

In this case, the parties stipulate claimant sustained a material aggravation and injury to the left shoulder area on April 18, 2018. The evidentiary record reveals claimant sustained tears to, or material aggravations of, several of the muscles in his rotator cuff, including the supraspinatus and infraspinatus tendons. (Joint Exhibit 1, pages 25-26)

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<sup>1</sup> On September 30, 2020, I issued an appeal decision in Chavez v. MS Technology, LLC, File No. 5066270, in which I extended the Deng findings, analysis, and conclusions to a rotator cuff tear involving the infraspinatus and supraspinatus tendons.

With respect to claimant's rotator cuff tear injury, I rely on my findings, conclusions, and analysis as set forth in Deng. Thus, for the reasons set forth in Deng, I find claimant's rotator cuff injury should be compensated as a shoulder under Iowa Code section 85.34(2)(n). The deputy commissioner's determination that claimant's rotator cuff injury is a whole body injury that should be compensated industrially under Iowa Code section 85.34(2)(v) is therefore respectfully reversed.

Having found claimant's injuries must be compensated as a shoulder under section 85.34(2), the next question on appeal is the extent of his disability. I affirm the deputy commissioner's finding that Dr. Kuhnlein's impairment ratings are more persuasive than those offered by David Sneller, M.D. I further affirm the deputy commissioner's finding that Dr. Kuhnlein's impairment ratings are the most convincing and accurate. I therefore affirm the deputy commissioner's finding that claimant sustained twenty percent permanent functional impairment of the upper extremity, which equates to a twelve percent impairment of the body as a whole. (Ex. 5, p. 91)

For a single, scheduled member injury, this agency has historically not utilized a whole person impairment rating to determine claimant's entitlement to PPD benefits. (See Deng, at pp. 11-12) Thus, as in Deng, I conclude it is appropriate in this case to apply Dr. Kuhnlein's upper extremity impairment rating for claimant's left shoulder injury.

Permanent partial disability compensation for the shoulder shall be paid based on a maximum of 400 weeks. Iowa Code section 85.34(2)(n) Having adopted Dr. Kuhnlein's 20 percent upper extremity impairment rating, I find claimant has shown by a preponderance of the evidence that he is entitled to receive 80 weeks of PPD benefits. The deputy commissioner's award of 200 weeks of PPD benefits is therefore modified.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on May 6, 2020, is affirmed in part, modified in part, and reversed in part.

Defendants shall pay claimant eighty (80) weeks of permanent partial disability benefits commencing on April 18, 2019, payable at the weekly rate of two hundred fifty-nine and 70/100 dollars (\$259.70).

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.

Defendants are entitled to a credit, pursuant to Iowa Code section 85.34(4) against the award of permanent partial disability benefits for all overpayments of temporary total, or healing period, benefits established by Defendants' Exhibit A.

Defendants shall reimburse claimant for the entirety of Dr. Kuhnlein's IME fee of three thousand eight and 00/100 dollars (\$3,008.00) as documented in Claimant's Exhibit 7.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant's costs as detailed in the body of the arbitration decision. 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 11<sup>th</sup> day of December, 2020.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Corey Walker (via WCES)

Laura Ostrander (via WCES)