BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LARRY ROGERS, Claimant, vs. TPI COMPOSITES, INC., Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 19002349.01 A P P E A L D E C I S I O N Head Notes: 1492.30; 1402.40; 1700; 1802; 1803; 2401; 2501; 2502; 2907; 3202; 4000.2

Defendants TPI Composites, Inc., employer, and its insurer, New Hampshire Insurance Company (hereinafter "defendants"), appeal from an arbitration decision filed on July 23, 2021. Claimant Larry Rogers cross-appeals. Defendant Second Injury Fund of Iowa (hereinafter "the Fund") responds to defendants' appeal and claimant's cross-appeal. The case was heard on January 25, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on March 8, 2021.

In the arbitration decision, the deputy commissioner found claimant's stipulated August 6, 2019, foot injury lit up or aggravated claimant's pre-existing degenerative back condition. Because the deputy commissioner found claimant sustained a sequela injury to his body as a whole, the deputy commissioner found claimant is not entitled to receive benefits from the Fund.

The deputy commissioner found defendants failed to prove their affirmative 90-day notice defense. As a result, the deputy commissioner found claimant is entitled to receive benefits from defendants for his sequela back injury. More specifically, the deputy commissioner found claimant sustained 13 percent industrial disability as a result of his back injury. The deputy commissioner found claimant did not sustain any

permanent disability for his right foot injury. With respect to temporary benefits, the deputy commissioner found claimant is owed healing period benefits from August 6, 2019, to October 15, 2019, and from January 29, 2020, to May 5, 2020. The deputy commissioner awarded defendants a credit for short-term disability benefits paid. The deputy commissioner found claimant is entitled to receive penalty benefits in the amount of 25 percent of all late-paid benefits.

The deputy commissioner found claimant is entitled to reimbursement for medical bills for treatment relating to his right foot, right ankle, and low back. The deputy commissioner found claimant is entitled to ongoing medical care for his right foot and ankle and for his back. With respect to his right foot and ankle, the deputy commissioner allowed claimant to direct his own medical care. For claimant's back, the deputy commissioner found defendants are entitled to direct the medical care.

Lastly, the deputy commissioner found claimant is not entitled to reimbursement for his independent medical examination (IME) under Iowa Code section 85.39, but the deputy commissioner awarded the IME report as a cost. The deputy commissioner also awarded claimant's remaining requested costs.

On appeal, defendants assert the deputy commissioner erred in finding a causal relationship between claimant's stipulated foot injury and his alleged sequela back injury. Defendants assert the deputy commissioner should not have awarded healing period benefits until August 21, 2019. Lastly, defendants assert the deputy commissioner erred in awarding claimant penalty benefits.

In his brief, claimant concedes healing period benefits should not commence until August 21, 2019. On cross-appeal, claimant asserts he sustained permanent disability of his foot and he asserts his industrial disability exceeds 13 percent. Claimant also asserts he should be permitted to direct his medical treatment for his back injury, claimant asserts defendants should not receive a credit for short-term disability benefits, and claimant asserts he is entitled to reimbursement for the full amount of his IME under Iowa Code section 85.39.

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 is affirmed in part, modified in part, and reversed in part.

With respect to his right foot, I affirm the deputy commissioner's finding that claimant did not sustain any permanent disability. Regarding his back, I affirm the deputy commissioner's finding that claimant sustained a sequela injury. More specifically, I affirm the deputy commissioner's finding that claimant's foot injury aggravated claimant's pre-existing back condition. I therefore affirm the deputy commissioner's finding that claimant is not entitled to receive benefits from the Fund.

I affirm the deputy commissioner's finding that defendants failed to prove their affirmative 90-day notice defense. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues in their entirety.

Regarding claimant's claim on cross-appeal that he is entitled to a higher award of industrial disability, the deputy commissioner found claimant sustained 13 percent industrial disability, which also matches the 13 percent whole person impairment rating assigned by Arnold Delbridge, M.D.. I agree with the deputy commissioner that claimant's testimony about his pre-hearing job search was vague. However, the one position claimant worked in after his separation from defendant-employer paid significantly less per hour than what claimant was earning at the time of the injury, and John Kuhnlein, D.O. recommended permanent lifting restrictions that claimant did not have prior to his work-related injuries. (Hearing Transcript, p. 69; Claimant's Exhibit 1, pp. 19-20) I find these facts support a slightly higher award of industrial disability. More specifically, I find claimant sustained 20 percent industrial disability, which entitles claimant to receive 100 weeks of permanent partial disability (PPD) benefits. The deputy commissioner's industrial disability award is therefore modified.

Regarding temporary benefits, both parties agree claimant is not entitled to receive healing period benefits from August 6, 2019, to August 20, 2019. As such, the deputy commissioner's award of temporary benefits is modified to reflect a commencement date of August 21, 2019. The remainder of the deputy commissioner's award of temporary benefits is affirmed. Claimant is therefore entitled to receive healing period benefits from August 21, 2019, to October 15, 2019, and from January 29, 2020, to May 5, 2020.

With respect to defendants' assertion on appeal that claimant is not entitled to receive penalty benefits, the deputy commissioner awarded a 25 percent penalty on "all late paid benefits" awarded based on defendants' failure to continue their investigation of claimant's claimed injuries. However, as of November 20, 2020, defendants had acquired the causation opinion of Peter G. Matos, D.O., in which he opined claimant did not sustain a work-related injury to his low back. Though I agree with the deputy commissioner that Dr. Matos' opinion was less persuasive than the opinions of Dr. Delbridge and Dr. Kuhnlein, I find Dr. Matos' opinion made the causation of claimant's back condition fairly debatable.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the Supreme Court explained Iowa Code section 86.13 as follows:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to

> investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable".

Christensen, 554 N.W.2d at 260.

Given my finding that Dr. Matos' opinion made causation fairly debatable, I find defendants had reasonable cause to deny benefits as of November 20, 2020. Thus, the deputy commissioner's award of penalty benefits is modified; claimant satisfied her burden to prove she is entitled to penalty benefits of twenty-five percent of all owed but late-paid benefits through November 20, 2020.

Regarding claimant's cross-appeal for authorization of ongoing medical care, the deputy commissioner allowed claimant to direct his own care for his right foot and ankle, stating, "He is entitled to seek out the care on his own due to defendants' refusal to provide care and he is entitled to reimbursement of that care." (Arbitration Decision, p. 12) With no explanation, the deputy commissioner then indicated defendants are entitled to direct claimant's treatment for his back claim. (Arb. Dec., p. 13)

Defendants, however, denied liability for claimant's back condition. As has been previously noted in other appeal decisions, the court addressed this scenario in Bell Bros. Heating & Air Conditioning v. Gwinn, in which it held as follows:

> Likewise, the employer has no right to choose the medical care when compensability is contested . . . If the employee establishes the compensability of the injury at a contested case hearing, then the statutory duty of the employer to furnish medical care for compensable injuries emerges to support an award of reasonable medical care the employer should have furnished from the inception of the injury had compensability been acknowledged.

Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010); see Cameron v. Pacifica Health Servs., File No. 5063931 (App. Jan. 21, 2021).

In this case, defendants offered no care for claimant's back injury in light of their denial of compensability. As a result, claimant established a relationship with Dr. Delbridge for treatment of his back condition. Dr. Delbridge performed claimant's back surgery and has directed claimant's back treatment since.

Defendants were not authorizing care at the time of the hearing, nor did defendants indicate what clinic or provider they planned to authorize should the deputy find in claimant's favor.

Thus, under the circumstances presented in this case, I find treatment with Dr. Delbridge is reasonable and the type of care defendants should have provided. Therefore, defendants are ordered to authorize ongoing medical care with Dr. Delbridge for claimant's back condition. See Cameron, File No. 5063931 (App. Jan. 21, 2021). The deputy commissioner's determination that defendants are entitled to control claimant's treatment for his back condition is therefore respectfully reversed.

With respect to claimant's assertion on cross-appeal that defendants should not be entitled to a credit for short-term disability payments made, the deputy commissioner offered no analysis as to whether the requirements of Iowa Code section 85.38(2)(a) were triggered. That section provides as follows:

> In the event the employee with a disability shall receive any benefits . . . under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A, or chapter 85B, then the amounts so paid to the employee from the group plan shall be credited to or against any compensation payments . . . This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B. . .

Iowa Code § 85.38(2)(a). In other words, to establish entitlement to a credit, the employer must provide evidence that two factors have been triggered: (1) that the claimant received benefits under a group plan that covered only non-occupational injuries (i.e., benefits should not have been payable because there was a right to recovery under chapter 85); and (2) that the employer contributed to the premium either in whole or in part. See id.; Iowa R. App. P. 6.904(3)(e); see also University of Iowa Hospitals and Clinics v. Waters, 705 N.W.2d 507 (Iowa Ct. App. 2005) (table) (noting defendants bear burden of proof to establish credit).

In this case, I find defendant failed to prove the first triggering factor - that the benefits paid to claimant should not have been payable because of a right to recovery under chapter 85. Defendants assert that the records of payments made "confirm[] that the payments were for a non-work related condition." (Def. Brief, p. 7 (citing Def. Ex. F)) While it is true these records provide that the payments were made for a non-occupational injury, there is nothing in the record indicating that these payments would not have been made if the injury was an occupational injury. In other words, there is no evidence, such as language from the plan itself, negating the possibility that payments

would have been made even though there was an injury compensable under chapter 85. As a result, I find defendants failed to prove their entitlement to a credit for sick pay/disability income paid. The deputy commissioner's finding to the contrary is therefore respectfully reversed.

Lastly, regarding claimant's argument on cross-appeal that he is entitled to full reimbursement for his IME, Iowa Code section 85.39 provides as follows:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall . . . be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Iowa Code § 85.39(2) (emphasis added).

Claimant acknowledges that he was evaluated by Dr. Kuhnlein for his IME on September 8, 2020, more than two months before Dr. Matos, the physician retained by defendants, offered his opinion on claimant's permanent disability on November 20, 2020. However, claimant asserts that "[t]here is no requirement in the statute that requires the [IME] *evaluation* take place after the evaluation of the defense." (Cl. Brief, p. 29) Because Dr. Kuhnlein's report was not issued until December 24, 2020, well after Dr. Matos' report, claimant asserts the reimbursement provisions of the statute were triggered.

I have previously referenced the Iowa Supreme Court's literal interpretation of Iowa Code section 85.39 in DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015). As it applies to this case, the literal language section 85.39 references a "subsequent evaluation"—not a subsequent impairment rating. Thus, contrary to claimant's assertion, the statute does require the claimant's independent medical evaluation to take place after defendants have acquired a rating. Thus, with this additional analysis, I affirm the deputy commissioner's finding to limit claimant's reimbursement to the cost of Dr. Kuhnlein's report under 876 IAC 4.33.

ORDER

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

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the weekly rate of five hundred forty-six and 66/100 dollars ($546.66) from May 6, 2020.

Defendants shall pay claimant healing period benefits from August 21, 2019, to October 15, 2019, and from January 29, 2020, to May 5, 2020, at the weekly rate of five hundred forty-six and 66/100 dollars ($546.66).

Defendant-employer 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.

Claimant shall receive reimbursement for all medical bills associated with his foot and ankle injury and with his low back injury.

Claimant shall receive alternate medical care with providers of his choosing for his right foot injury and for his back injury.

Claimant shall receive penalty benefits of twenty-five (25) percent of all benefits owed but paid late through November 20, 2020.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding 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 30th day of November, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Nicholas Platt (via WCES)

Timothy Wegman (via WCES)

Meredith Cooney (via WCES)