BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZACHARY MARTINEZ, Claimant, vs. PAVLICH, INC., Employer, and NATIONAL INTERSTATE INSURANCE, Insurance Carrier, Defendants.	File No. 5063900 A P P E A L D E C I S I O N Head Notes: 1111; 1602, 1801; 1803; 2301; 2501; 4000.2

Defendants Pavlich, Inc., employer, and its insurer, National Interstate Insurance, appeal from an arbitration decision filed on November 19, 2019. Claimant Zachary Martinez cross-appeals. The case was heard on May 14, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 27, 2019.

The deputy commissioner found the agency has subject matter jurisdiction over defendants. The deputy commissioner likewise found the agency's exercise of specific personal jurisdiction over defendants is proper. The deputy commissioner found defendants failed to carry their burden of proof to establish claimant's claim is barred by the application of Iowa Code section 85.16(1). The deputy commissioner found he did not err at the hearing in denying defendants' motion to amend the hearing report, but that any such error would be immaterial because claimant satisfied his burden of proof to establish he sustained an injury that arose out of and in the course of his employment with defendant-employer. The deputy commissioner found claimant is entitled to receive temporary benefits from April 16, 2018, through July 16, 2018. The deputy commissioner found claimant is entitled to receive 100 weeks of permanency benefits for combined scheduled member disability pursuant to Iowa Code section 85.34(2)(s) (2016), but that claimant failed to satisfy his burden of proof to establish a body as a whole injury due to his alleged traumatic brain injury and low back injury. The deputy commissioner found claimant is entitled to payment for all causally related medical expenses. The deputy commissioner found claimant is entitled to future medical care at defendants' expense for all treatment causally related to claimant's right upper extremity and bilateral lower extremity injuries. The deputy commissioner found claimant is not

entitled to receive penalty benefits from defendants. Lastly, the deputy commissioner awarded costs to defendants.

On appeal, defendants argue the deputy commissioner erred in finding it was proper for the agency to exercise subject matter jurisdiction and/or personal jurisdiction over them. Defendants argue the deputy commissioner erred in finding claimant's claim is not barred by operation of Iowa Code section 85.16(1). Lastly, defendants argue the deputy commissioner erred by calculating claimant's permanent partial disability benefits under Iowa Code section 85.34(2)(s) (2016). Defendants argue claimant's permanent disability should have been calculated using the industrial disability method and that claimant failed to prove he sustained any such loss.

On cross-appeal, claimant asserts the deputy commissioner erred in finding claimant failed to prove he sustained any permanent disability related to his alleged head and back injuries.

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 86.24 and 17A.15, the arbitration decision filed on November 19, 2019, is affirmed in part and is modified in part.

I affirm the deputy commissioner's findings that this agency has both subject matter jurisdiction and personal jurisdiction over defendants. I affirm the deputy commissioner's finding that defendants failed to carry their burden to prove claimant's claim is barred by the application of Iowa Code section 85.16(1). I affirm the deputy commissioner's finding that claimant is entitled to receive temporary benefits from April 16, 2018, through July 16, 2018. I affirm the deputy commissioner's finding that claimant failed to satisfy his burden to prove he sustained causally related disability to his head or low back. I affirm the deputy commissioner's finding that claimant is entitled to payment for all causally related medical expenses. I affirm the deputy commissioner's finding that claimant is entitled to future medical care at defendants' expense for all treatment causally related to claimant's right upper extremity and bilateral lower extremity injuries. I affirm the deputy commissioner's finding that claimant is not entitled to receive penalty benefits from defendants. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding.

I find the deputy commissioner provided a well-reasoned analysis regarding the above-stated issues, and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

I now turn to the issue of whether the deputy commissioner correctly calculated claimant's entitlement to permanent partial disability benefits. While I affirm the deputy

commissioner's finding that claimant satisfied his burden of proof to establish he sustained permanent injuries to his right upper extremity and bilateral lower extremities, the deputy commissioner's application of Iowa Code section 85.34(2)(s) (2016) must be modified.

The deputy commissioner determined Iowa Code section 85.34(2)(s) (2016) should apply because claimant sustained a loss of two or more scheduled members from a single accident. Claimant's injury, however, occurred on April 16, 2018. This is significant, as the Iowa legislature made extensive modifications to Iowa Code chapter 85 that went into effect in 2017. Thus, the deputy commissioner's reliance on the 2016 version of the Iowa Code was in error.

That said, the language of former section 85.34(2)(s) (2016) was not modified; it was simply renumbered to a new subsection. Section 85.34(2)(t) (2019) provides, in relevant part: "The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such."

Thus, the threshold question on appeal is whether claimant's permanent injuries to three scheduled members removes him from the provisions of section 85.34(2)(t) and places him instead under the provisions section 85.34(2)(v) (2019), which is considered the "catch-all" section. It states, in relevant part:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

I recently held, consistent with past agency precedent, that the permanent disability of three separate scheduled members occurring in the same incident entitles a claimant to industrial disability benefits under section 85.34(2)(u) (now section 85.34(2)(v)). Sparks v. P&J Equipment Corp., File No. 5058524 (App. Dec., May 18, 2020); see Bruce v. Hydecker Wheatlake Co., File No. 5036473 (Arb. Dec., Jan. 10, 2013); Wallingford v. Atlantic Carriers, File No. 5008405 (Arb. Dec., July 23, 2004). Because claimant's injury in this case involved the permanent loss of use of three scheduled members, i.e., his right upper extremity and his bilateral lower extremities, I therefore conclude application of Iowa Code section 85.34(2)(v) (2019) is appropriate.

Claimant asserts on appeal that this is a distinction without a difference because claimant returned to work for which he received the same or greater salary, which means he is entitled to receive compensation based only on his functional capacity and not his industrial disability. Claimant is referring to the following provision of section 85.34(2)(v) that was added by the legislature in 2017:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

While neither party disputes that claimant at the time of the hearing had returned to work for the same or greater earnings than what he was receiving at the time of the injury, the work he was performing was for a different employer. As noted in the arbitration decision, claimant found work as a lineman building power lines on a full-time and full-duty basis after he voluntarily resigned from defendant-employer in September of 2018. This is relevant, as the remainder of section 85.34(2)(v) states:

> Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Defendants argue that because claimant voluntarily resigned and began working for a different employer his permanent partial disability benefits should be calculated by considering his reduction in earning capacity under the industrial disability method.

It appears this scenario has not been considered by this agency after the legislature made its changes to the statute in 2017. Thus, many of my determinations will turn on the interpretation of the legislature's changes. I recognize the Iowa Supreme Court has repeatedly stated this agency lacks the legislature's expressly vested authority to interpret workers' compensation statutes. See, e.g., Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016), reh'g denied (May 27, 2016). Practically speaking, however, this agency acts as the front-line authority in interpreting statutory workers' compensation provisions, particularly when statutory amendments are enacted. Thus, while the appellate courts have the final say, statutory interpretation by this agency is a necessary inevitability.

When conducting statutory interpretation, the goal is to determine the intent of the legislature. When the plain language of the statute is clear as to its meaning, courts apply the plain language and do not search for legislative intent beyond the express terms of the statute. Denison Municipal Utilities v. Iowa Workers' Compensation Com'r,

857 N.W.2d 230 (Iowa 2014). A statute is only ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015).

Furthermore, statutes should be read as a whole, rather than looking at specific words or phrases in isolation. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015). And when making statutory changes, the legislature is deemed to have known and understood the status of the law, including any interpretations made by this agency and the Iowa Supreme Court as to existing statutes. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (as amended); State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980).

Ultimately, when a statute leaves ambiguity as to its meaning or intent, it has long been the law of Iowa that a statutory provision in the Iowa Workers' Compensation Acts should be interpreted liberally in favor of the injured worker. Bluml v. Dee Jay's, Inc., 920 N.W.2d 82 (Iowa 2018); DART v. Young, 867 N.W.2d 839 (Iowa 2015); Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015); Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014); Ewing v. Allied Const. Services, 592 N.W.2d 689 (Iowa 1999); Myers v. F.C.A. Services, Inc., 592 N.W.2d 354 (Iowa 1999); Danker v. Wilimek, 577 N.W.2d 634 (Iowa 1998); Haverly v. Union Const. Co., 18 N.W.2d 629, 236 Iowa 278 (1945); Conrad v. Midwest Coal Co., 3 N.W.2d 511,231 Iowa 53 (1942); Miranda v. IBP, Inc., File No. 5008521 (Appeal, August 2, 2005). As the Iowa Supreme Court stated, "[t]he primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

In this case, when the two new provisions cited by each party are read together, as they are set forth in the statute, it appears the legislature intended to address only the scenario in which a claimant initially returns to work with the defendant-employer or is offered work by the defendant-employer at the same or greater earnings but is later terminated by the defendant-employer. In other words, I do not accept claimant's interpretation in this case that the new provisions apply when a claimant voluntarily separates his or her employment with the defendant-employer and then initiates employment with a new employer at the same or greater wages than the claimant was earning at the time of the injury.

I recognize the legislature did not make this explicit in its amendments, and I likewise acknowledge that the plain language of the statute arguably supports claimant's interpretation. However, claimant's interpretation would result in unreasonable outcomes. For example, claimant's interpretation would seemingly "reset" claimant's entitlement to benefits and limit them to functional loss any time a claimant returns to work or is offered work at the same or greater wages by any employer. This would make it virtually impossible for defendants to know when to volunteer benefits using the industrial disability method. Furthermore, using claimant's

interpretation, a claimant entitled to benefits under subsection 85.34(2)(v) (2019) might be better off not seeking employment after being terminated by a defendant-employer because he or she would potentially risk entitlement to benefits under the industrial disability analysis should a different employer offer the same or greater earnings than the claimant was receiving at the time of the injury. Certainly the legislature did not intend to discourage claimants from seeking gainful employment after a work injury.

Thus, though claimant in this case was earning greater wages at the time of the hearing than he was when he was injured, I conclude his earlier voluntary separation from defendant-employer removed claimant from the functional impairment analysis and triggered his entitlement to benefits using the industrial disability analysis.

Before I address the extent of claimant's industrial disability, it is worth mentioning that the positions the parties are taking in this case are the inverse of what might be anticipated in a "normal" scenario—when a claimant's potential entitlement to industrial disability exceeds his or her functional disability. In such "normal" cases, the claimant would be arguing for an interpretation of the statute which would entitle him or her to benefits under the industrial disability analysis and the defendants would be arguing for an interpretation that limited the claimant's benefits to his or her functional disability. In this case, however, defendants want claimant's entitlement to benefits to fall under the industrial disability analysis because they believe claimant's industrial disability is actually less than his functional disability.

The parties in such a "normal" case might offer different arguments than those being pursued in this case. Because the parties in this case did not raise any of those anticipated or hypothetical arguments, however, I decline to address them.

Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted, and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). A determination of the reduction in an employee's earning capacity must additionally consider the employee's permanent partial disability and the number of years in the future it was reasonably anticipated the employee would work at the time of the injury. Iowa Code section 85.34(2)(v) (post-July 2, 2017).

In this case, I affirmed the deputy commissioner's findings regarding claimant's permanent disability to his right wrist and bilateral lower extremities based on the permanent impairment ratings of Jacqueline Stoken, D.O. Combined, these ratings amount to a 20 percent whole-person functional impairment.

As noted by the deputy commissioner, however, claimant was able to return to work in a full-duty capacity for defendant-employer until claimant voluntarily resigned:

> Claimant continued to work in a full-duty capacity until September 2018, when he voluntarily left Pavlich to enroll in an apprenticeship program in the construction industry. (Hr. Tr., pp. 41-42; Ex. G, p. 9, Depo. pp. 31-32). As of the date of deposition, claimant was working as a lineman for Chain Electric, building power lines on a full-duty basis. (See Ex. G, pp. 2-3, Depo. pp. 5-6). As of the date of hearing, claimant was working for Team Fishel. According to claimant, Chain Electric and Team Fishel are part of the same co-op. (Hr. Tr., pp. 76-77). Claimant's job duties involve setting poles, repairing damaged poles, operating a deer truck, a bucket truck, and shoveling. (Ex. G, p. 3, Depo. p. 6). Claimant testified he works an average of 45 hours per week. (Ex. G, p. 3, Depo. p. 6). Claimant lifts up to 50 pounds multiple times per day. (Id.). The employer does not provide accommodations for claimant. (Ex. G, p. 3, Depo. p. 7). At the time of his February 2019 deposition, claimant was earning $24.00 per hour. (Ex. G, p. 3, pp. 8-9). Claimant believes his current job is more physically demanding than the position he held with defendant employer, (Ex. G, p. 9, Depo. p. 32). He has not missed any time as a result of his work injuries. (Ex. G, pp. 9- 10, Depo. pp. 33-34).

(Arbitration Decision, pp. 5-6)

Given claimant's functional disability, I agree with the deputy commissioner's finding that it is likely claimant requires some form of restrictions. However, because claimant demonstrated his current capabilities far exceed the restrictions recommended by Dr. Stoken, I likewise affirm the deputy commissioner's rejection of Dr. Stoken's restrictions.

As discussed, neither party disputes claimant was earning higher wages at the time of the arbitration hearing than he was when he was injured. He was 28 years old at the time of the hearing and working in a physically demanding position without any significant restrictions. Thus, his loss of earnings and his loss of ability to engage in employment for which he is suited are minimal. However, he did sustain permanent injuries to three separate body parts resulting in a combined 20 percent whole-person functional disability. Considering these and all the other relevant factors in the industrial disability analysis, I find claimant sustained 20 percent industrial disability pursuant to Iowa Code section 85.34(2)(v) as a result of the work injury. This entitles claimant to receive 100 weeks of permanent partial disability benefits.

In the end, therefore, claimant's award of permanent partial disability benefits is unchanged. It is the basis for his award that is modified by this decision.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 19, 2019, is affirmed in part and modified in part to reflect the basis for claimant's entitlement to permanent partial disability benefits, as set forth above.

Defendants shall pay temporary benefits from April 16, 2018, through July 16, 2018.

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits commencing on July 17, 2018, at the weekly rate of five hundred ninety-four and 94/100 dollars ($594.94).

Defendants shall receive credit for all benefits previously paid.

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 shall pay all causally related medical expenses.

Defendants shall provide claimant with future medical care for all treatment causally related to his right upper extremity and bilateral lower extremity injuries.

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 July, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Tom Drew (via WCES)

Abigail Wenninghoff (via WCES)