

IN THE SUPREME COURT OF IOWA

No. 22-1894

JUSTIN LOEW,

Petitioner-Appellant,

v.

MENARD, INC. and XL INSURANCE AMERICA,

Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD
NO. CVCV063592

RESPONDENTS-APPELLEES' FINAL BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER MENARD AND ITS INSURANCE CARRIER ARE DUE A CREDIT FOR PREVIOUS COMPENSATION OF JUSTIN LOEW'S 2015 LOWER BACK INJURY?

Cases

Bluml v. Dee Jay's Inc., 920 N.W.2d 82 (Iowa 2018)

Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018)

Gumm v. Easter Seal Soc. of Iowa, Inc., 943 N.W.2d 23 (Iowa 2020)

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Statutes

Iowa Code Chapter 17A

Iowa Code Chapter 85

Iowa Code Section 85.34(2)(v)

Iowa Code Section 85.34(7)

Iowa Code Section 85.34(2)(u)

Other Authorities

2004 Iowa Acts 1st Extraordinary Sess. Ch. 1001, § 20

ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(c), (d), Appellees request that the Iowa Supreme Court retain this matter as it related to the obligations under the Workers' Compensation Act. This case involves a matter of first impression in interpreting the July 1, 2017 amendments to the workers' compensation action, including Iowa Code Sections 85.34(2)(v) and 85.34(7), and their application to a pre-July 1, 2017 award for permanent disability benefits for an unscheduled injury.

The amendment to Iowa Code Section 85.34(2)(v), formerly 85.34(2)(u), includes a new provision that an employee is not entitled to industrial disability benefits when that employee returns to work at the same or greater wages compared with at the time of the injury, and instead, the employee's recovery is limited to functional impairment. Industrial disability benefits were awarded in all instances of unscheduled injuries prior to July 1, 2017.

The amendment to Iowa Code Section 85.349(7) removed subsections that specifically discussed how to calculate a credit in the case of successive injuries with the same employer. However, these amendments maintained language preserving an employer's right to a credit for permanent disability benefits paid for a prior injury with that same employer.

A decision from the Iowa Supreme Court would provide necessary and essential guidance on how an employer's credit is calculated and applied when the first unscheduled injury occurred prior to July 1, 2017, and the second unscheduled injury occurred after July 1, 2017.

STATEMENT OF THE CASE

Justin Loew (hereinafter, "Loew") filed a petition seeking workers' compensation benefits from his employer, Menard, Inc. and its insurance carrier, XL Insurance America, (hereinafter, "Menards") for a work injury to his low back occurring on August 13, 2018. Thereafter, Loew filed a second petition for workers' compensation benefits from Menards for another work injury to his low back occurring on March 13, 2019.

These cases proceeded to hearing on August 26, 2021, before Deputy Workers' Compensation Commissioner Heather Palmer, and were deemed fully submitted following the receipt of post-hearing briefs. The issues submitted for resolution at hearing were: (1) whether Loew sustained new, compensable injuries to his low back on August 13, 2018 and/or March 13, 2019; and (2) whether claimant was entitled to additional permanency benefits pursuant to Iowa Code Section 85.34(7) considering his prior award of 30% industrial disability related to his March 2015 work injury to his low back.

On December 15, 2021, Deputy Palmer filed an Arbitration Decision. Therein, Deputy Palmer held Loew met his burden of proving he sustained new, compensable injuries to his low back on August 13, 2018 and March 13, 2019; that Loew sustained functional impairment to the lumbar spine equivalent to 8% whole person impairment due to these injuries; and Loew was not entitled to payment of additional permanent partial disability benefits due to Menards' prior payment of 30% industrial disability for Loew's prior 2015 low back injury. (App. 35-58)

Loew filed a Notice of Appeal of the adverse findings of Deputy Palmer's Arbitration Decision to the Iowa Workers' Compensation Commissioner, and Menards filed a Cross-Appeal. Loew identified the following issue for appeal: (1) whether the Deputy's finding that Menards was entitled to a credit for a prior award of industrial disability under Iowa Code Section 85.35(7) was correct. Menards identified the following issue on cross-appeal: (1) whether the Deputy erred in concluding Loew sustained compensable injuries on both August 13, 2018 and March 13, 2019. On April 12, 2022, the Iowa Workers' Compensation Commissioner, Joseph S. Cortese II, entered an appeal decision wherein he adopted the analysis, findings, and conclusions of Deputy Palmer and affirmed the Arbitration Decision in its entirety. (App. 60-62)

Loew filed a Petition for Judicial Review, and Menards filed a Cross-Petition for Judicial Review. Loew filed his Judicial Review brief on July 7, 2022.

Therein, Loew identified the following arguments: (1) the Agency erred in concluding Menards was entitled to a credit for their prior payment of 30% industrial disability related to Loew's 2015 low back injury. Menards filed their Judicial Review brief on August 5, 2022, arguing that (1) the Agency erred in concluding Loew met his burden of proof to establish he sustained new, compensable injuries to his low back on August 13, 2018 and March 13, 2019.

On October 27, 2022, the Honorable Samantha Gronewald issued a Ruling on Petition for Judicial Review. Therein, she affirmed the Commissioner's conclusions with regard to all identified issues.

On November 16, 2022, Loew filed a Notice of Appeal to the Iowa Supreme Court.

STATEMENT OF THE FACTS

A. Background Information

At the time of hearing, Loew was 32 years old. (App. 170). He graduated high school in 2007, obtained a two-year degree from Iowa Western, and studied for four years at the University of Northern Iowa without obtaining a degree. (App. 170). Loew began working for Menards in 2008. (App. 170-71). At the time of hearing, Loew was working as the order pickup and delivery manager, a position he secured in July 2020. (App. 171).

In 2015, Loew sustained a work injury to his low back while unloading a semitrailer of patio furniture, which included symptoms of left leg pain. (App. 173-74).¹ Loew underwent surgery in 2016 to fix a herniated disc. (App. 174-75). During Loew's postoperative physical therapy, he sustained further injury to his low back, including radiating pain into the right leg. (App. 175-76). Loew underwent a second low back surgery in February 2017 to fix another herniated disc. (App. 175-76). After recovery from the second surgery, Loew had residual pain in his lower back. (App. 177). Dr. Mouw assigned 10% permanent impairment for Loew's low back condition on May 16, 2017. (App. 105). Dr. Bansal assigned 20% whole person impairment on September 26, 2017. (App. 107). An arbitration hearing was held on January 29, 2018, wherein Loew was awarded 30% industrial disability benefits related to his two low back surgeries, the first at L5-S1 and the second at L4-5. (App. 6-28).

Loew returned to work with Menards after his two surgeries. (App. 177). He continued to have right and left sided low back pain, as well as radiating pain down both legs. (App. 197). When Menards opened the pickup and delivery department in 2018, Loew began working in that department. (App. 178).

¹ A complete summary of Loew's 2015 work injury and subsequent course of medical treatment can be found at App. 8-18.

On August 13, 2018, Loew stated he was bent over wrapping a pallet when he felt shooting pain in his back and down his left leg. (App. 182-83). After this injury incident, Loew treated with Dr. Elwood, who provided steroid injections or epidural shots at L5-S1. (App. 184). Loew missed no time after the August 13, 2018 injury incident. (App. 184).

Loew alleged a repetitive or cumulative injury to his low back occurring on or about March 13, 2019. (App. 184). He stated, “somewhere beginning of the year I started having – the pain on my right side started getting worse and worse and worse.” (App. 185). Loew described this as right-sided back pain and right leg pain, as well as problems walking in early 2019. (App. 186). Then, one night after work, Loew attempted to stand up and fell to the floor. (App. 187). He was transported to the hospital via ambulance. (App. 187). Loew missed no work after this injury incident. (App. 190). Loew attended physical therapy for several months, which took away some of his right-sided pain. (App. 190-91). His physical therapy notes from late 2019 and early 2020 document no ongoing back pain. (App. 203-05). Loew eventually underwent an MRI in November 2019, which revealed a new herniated disc at L3-4. (App. 192). Surgery was not recommended at that time. (App. 192).

Loew has never asked for any restrictions, and no physician has recommended restrictions. (App. 193). He is able to perform all job duties without

restrictions, including lifting between 100 and 150 pounds. (App. 205, 207). Loew has no issues with his activities of daily living. (App. 205-07; App. 143, Depo. Tr. p. 29). He has left-sided leg pain once every couple of weeks, and right leg pain once a month. (App. 206-07; App. 143, Depo. Tr. p. 28). Loew continues to shoot handguns, play videogames for an hour twice per week, and engage in the same activities he did prior to January 2018. (App. 212-13; App. 144, Depo. Tr. p. 31). He even drove to Nashville, Tennessee in September 2020 and did a lot of walking and sightseeing. (App. 185).

B. Summary of Medical Treatment After January 29, 2018

On August 22, 2018, Loew presented to Covenant Clinic Occupational Medicine and Wellness reporting low back pain after wrapping a pallet on August 13, 2018. (App. 88). Dr. Kirkle assessed sprain of the ligaments of the lumbar spine. (App. 89).

An MRI of Loew's lumbar spine on August 27, 2018 demonstrated degenerative changes, left lateralizing disc bulge at L5-S1 with disc contacting the descending S1 nerve root, moderate left neural foraminal narrowing L4-5 and L5-S1, and right paracentral disc protrusion at L3-4 resulting in minimal spinal canal narrowing. (App. 108-09).

Loew was referred to pain management, where he treated with Dr. Justin Elwood at Covenant Medical Center Pain Management Clinic on September 13,

2018. (App. 90). Dr. Elwood assessed lumbar radiculopathy and degenerative disc disease. (App. 91).

Dr. Elwood performed a left L5-S1 epidural steroid injection on October 9, 2018. (App. 92). Loew reported 50% improvement with the injection. (App. 92).

A second left sided L5-S1 transforaminal epidural steroid injection was performed on December 14, 2018. (App. 94). Loew reported the second injection was more beneficial than the first injection. (App. 93).

Loew underwent a third left sided L5-S1 transforaminal epidural steroid injection on February 1, 2019. (App. 95).

Loew reported dramatic improvement with his left-sided pain on March 27, 2019, but he complained of pain on the right side from the buttock, down the thigh, into the top of the foot, and into the first and second toes over the last couple weeks. (App. 95). Dr. Elwood recommended a right sided L5-S1 transforaminal epidural steroid injection and prescribed a short course of hydrocodone-acetaminophen and cyclobenzaprine. (App. 96).

On March 28, 2019, Loew was transported via ambulance to the Grundy County Memorial Hospital emergency room due to back pain. (App. 97). He denied any new injury incident. (App. 97). Dr. Hagedorn assessed lumbosacral radiculopathy at L5 and low back pain radiating to the right lower extremity. (App.

98). Loew was prescribed diazepam and prednisone and discharged home. (App. 98-99).

Loew initiated physical therapy at Agape Therapy on April 26, 2019, and he was to be seen two times per week for eight weeks. (App. 100-01).

An MRI of Loew's lumbar spine on November 13, 2019 demonstrated L3-4 right posterior disc herniation with protruding disc flattening the right side of the thecal sac and origin of right L4 nerve sleeve; moderate disc space narrowing, symmetric disc bulge, and small end plate osteophytes at L4-5; and mild disc space narrowing at L5-S1. (App. 110-11).

On November 19, 2019, Loew presented to Dr. Mouw, who assessed lumbar spondylosis, lumbosacral radiculopathy, degeneration of lumbar disc with acute herniation, other intervertebral disc degeneration, and other intervertebral disc displacement. (App. 106). Dr. Mouw opined that if Loew's symptoms began to inhibit his daily activities, he would recommend surgery for the L3-4 herniation. (App. 106).

At physical therapy on December 11, 2019, Loew reported no back pain and ongoing right foot numbness/tingling. (App. 102).

On February 10, 2020, Loew reported no back pain but that his right toe was still numb. (App. 103). He felt 90% improved. (App. 103). Loew's Oswestry Questionnaire indicated he was: able to tolerate his pain without pain medication;

he can take care of himself without increased pain; he can lift heavy weights without increased pain; pain does not prevent him from walking any distance; he can sit in his favorite chair for as long as he likes; he can stand as long as he wants without increased pain; pain does not prevent him from sleeping well; his social life is normal and does not increase his pain; he can travel anywhere without pain; and his normal homemaking/job activities do not cause. (App. 104).

C. Expert Opinions

On March 5, 2020, Dr. Mouw opined that the November 2019 MRI showed a new HIVD at L3-4 on the right. (App. 121).

On May 23, 2019, Dr. Todd Harbach issued a medical records review report at Menards' request. (App. 148). Dr. Harbach opined that Loew reached MMI after the August 13, 2018 injury on March 27, 2019. (App. 148). He assigned no additional impairment due to the August 13, 2018 aggravation injury. (App. 149). He recommended no permanent restrictions or additional medical treatment. (App. 149).

Dr. Sunil Bansal performed an IME on February 18, 2021 at the request of Loew's attorney. (App. 112). Dr. Bansal diagnosed aggravation of L3-4 disc protrusion on August 13, 2018. (App. 117). Dr. Bansal assigned 8% whole person impairment attributable to the August 13, 2018 injury. (App. 119). He further opined that Loew's continued lifting at work most likely contributed to the

continued extravasation of the L3-4 disc, resulting in the herniation noted on the November 13, 2019 MRI. (App. 119-20). Dr. Bansal assigned no additional impairment as a result of the March 13, 2019 injury. (App. 120).

Loew underwent an IME with Dr. Trevor Schmitz on June 15, 2021 at Menards' behest. (App. 152-54). Dr. Schmitz opined that Loew's right L3-4 disc herniation was new appearing on the November 13, 2019 MRI, and was different than Loew's August 27, 2018 MRI. (App. 152). Dr. Schmitz assigned 10% whole person impairment; the same rating Loew had in January 2018. (App. 152). Dr. Schmitz opined that Loew does not require permanent restrictions. (App. 152). With regard to the March 13, 2019 work injury, Dr. Schmitz assigned no permanent impairment, and opined Loew required no permanent restrictions. (App. 154).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT MENARDS WAS DUE A CREDIT FOR ITS PREVIOUS COMPENSATION OF LOEW'S 2015 LOWER BACK INJURY

A. Preservation of Error

Menards states that Loew properly preserved error on this issue at both the Agency and the District Court level. This issue was raised and adjudicated in final Agency action on April 12, 2022, and ruled on by the District Court on Judicial Review appeal on October 27, 2022. (App. 60-62; App. 69-85).

B. Scope and Standard of Review

Iowa Code Chapter 17A standards guide the Court’s “judicial review of agency decision-making to determine whether [the Appellate Court’s] conclusion is the same as the district court.” *Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 242 (Iowa 2018). The Appellate Court “review[s] the commissioner’s interpretation of Iowa Code Chapter 85 for correction of errors at law instead of deferring to the agency’s interpretation” because the commissioner has not been clearly given authority to interpret this chapter by the legislature. *Id.* However, the Appellate Court “accept[s] the commissioner’s factual findings when supported by substantial evidence.” *Gumm v. Easter Seal Soc. of Iowa, Inc.*, 943 N.W.2d 23, 28 (Iowa 2020) (quoting *Bluml v. Dee Jay’s Inc.*, 920 N.W.2d 82, 84 (Iowa 2018)).

C. Argument

The Deputy, Commissioner, and District Court all correctly concluded that Menards was entitled to a credit for their payment of 30% industrial disability benefits to Loew related to his 2015 work-related low back injury. (App. 35-58; App. 60-62; App. 69-85).

i. Iowa Code Sections Central to this Dispute

Iowa Code Section 85.34(2)(v), which went into effect on July 1, 2017, states in relevant part:

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.

Iowa Code Section 85.34(7) states:

An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter"

When interpreting the statutory provisions contained in chapter 85 of the Iowa code, the Court is to "assess the statute in its entirety rather than isolated words or phrases to ensure [its] interpretation is harmonious with the statute as a whole." *Brewer-Strong*, 913 N.W.2d at 249 (quoting *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016)). The Court also "look[s] for 'an interpretation that is reasonable, best achieves the statute's purpose, and avoids absurd results.'" *Holstein Elec. v. Breyfogle*, 756 N.W.2d 812, 815 (Iowa 2008) (quoting *State v. Bower*, 725 N.W.2d 435, 442 (Iowa 2006)). The Court "must interpret the provisions within the workers' compensation statutory scheme 'to ensure [the Court's] interpretation is harmonious with the statute as a whole.'" *Id.* at 253 (quoting *Ramirez-Trujillo*, 878 N.W.2d at 770).

The District Court provided a thorough analysis of the intent and language of the amendments to Iowa Code § 85.34(7) in its Ruling, which is helpful for this Court to review in the present appeal. (App. 77-79). The initial purpose of adding Iowa Code § 85.34(7) in 2004 was to “prevent all double recoveries and all double reductions in workers’ compensation benefits for permanent partial disability.” (2004 Iowa Acts 1st Extraordinary Sess. Ch. 1001, § 20). As the District Court properly held, “it is clear subsection 7 was added with the intent to extinguish opportunities for double recovery, specifically in cases where a claimant had previously been compensated for the injury by the same employer.” (App. 78). As part of that goal to prevent double recovery, the original language of subsection 7 included, “to the extent of the percentage . . . for which the employee was previously compensated by the employer.” Iowa Code § 85.34(7) (pre-2017 amendments).

Although this subsection was amended in 2017, the language remains that “An employer is not liable for compensating an employee’s preexisting disability . . . to the extent that the employee’s preexisting disability has already been compensated under this chapter” Iowa Code § 85.34(7) (post-2017 amendments). While the legislature removed specific language regarding how to calculate a credit, the language that was retained continues to demonstrate the legislatures intent to ensure defendants are entitled to a credit to the extent they have already compensated an employee’s preexisting disability from a prior injury with

that same employer. *Id.* Finally, as the District Court aptly noted, “the amendments [in 2017] contain no supplemental language frustrating, removing, or prohibiting apportionment or credit for successive injuries with the same employer.” (App. 78).

ii. Application of Iowa Code § 85.34(2)(v) and Iowa Code § 85.34(7) to Loew’s 2015 Award and Current Low Back Condition

It is undisputed that Loew sustained a work-related injury to his low back on March 13, 2015, and that he was awarded 30% industrial disability benefits related to that injury. Loew’s low back injury sustained in 2015 was compensated pursuant to Iowa Code Section 85.34(2)(u), which was amended, and is now codified as Iowa Code Section 85.34(2)(v). This code section applies to all injuries that result in “permanent partial disability other than those hereinabove described or referred to in paragraphs “a” through “t” hereof” Iowa Code § 85.34(2)(v). Paragraphs “a” through “t” of Iowa Code § 85.34(2) set forth the compensation owed for permanent disability when specific body parts are injured.

It is further undisputed that Loew’s August 13, 2018 and March 13, 2019 work injuries to his lower back are compensable pursuant to Iowa Code § 85.34(2)(v), and that he is not entitled to an assessment of industrial disability due to his continued employment with Menards with increased earnings at the time of hearing. (App. 75).

The only physician in this case to provide an opinion regarding the overall permanent impairment that Loew has sustained to his back as a result of all work-related injuries, including 2015, 2018, and 2019, is Dr. Bansal. (App. 112-20). Dr.

Bansal opined that Loew's total impairment rating for his lower back is 28% whole person impairment. (App. 119). This impairment rating does not exceed the prior 30% permanent impairment award that Loew received as a result of his 2015 work injury, and therefore Menards cannot be responsible for issuing additional permanent partial disability benefits pursuant to Iowa Code § 85.34(7). If Menards were required to issue additional permanent disability benefits, Loew would receive double recovery, as he has already been compensated for a 30% permanent partial disability to his low back. Allowing a credit in this case is not contrary to the language set forth in Iowa Code § 85.34(7).

As the Iowa Court of Appeals set forth in *Polaris Industries, Inc. v. Hesby*, an employer is entitled to a credit for past permanent partial disability payments made to a claimant for a prior injury with the same employer. *Polaris Industries, Inc. v. Hesby*, 881 N.W.1d 471 (Table), 2016 WL 541081 at *3, *7 (Iowa Ct. App. 2016). Although the *Hesby* decision analyzed the pre-2017 version of Iowa Code § 85.34(7), its' holding should extend to apply to the post-2017 version of Iowa Code § 85.34(7), such that employers maintain their credits for past permanent partial disability payments made to injured workers against subsequent injuries to the same body parts.

This holding should extend to the current version of Iowa Code § 85.34(7), as the legislature's amendment in 2017 did not remove the language that preserves an

employer's right to a credit or apportionment for compensation paid for permanent disability due to a prior injury with the same employer. The legislature's original objective in implementing and codifying this subsection, to prevent double recovery, is preserved by the Agency's application of Iowa Code § 85.34(7) and Iowa Code § 85.34(2)(v) in Loew's case.

Loew was previously compensated for 30% permanent disability to his low back due to his 2015 work injury. His current permanent disability to his low back due to all compensable work injuries, as determined by the Agency, is only 28% permanent disability. (App. 119). Therefore, if Loew were awarded an additional 8% permanent disability, he would be receiving a double recovery under the provisions of Iowa Code § 85.34(2)(v). There is no distinction between industrial disability benefits and functional impairment benefits in Iowa Code § 85.34(7), and it would be impermissible for the Court to go beyond the language of the statute to read in such a distinction.

CONCLUSION

The Court should affirm the Agency and District Court's rulings that Loew is not entitled to additional permanent disability benefits related to his August 13, 2018 and March 13, 2019 work injuries due to his prior award of 30% industrial disability due to his 2015 low back injury with Menards. The language of Iowa Code § 85.34(7) is unambiguous in providing for a credit or apportionment for

permanent disability benefits paid to an injured worker due to a prior injury with the same employer. Because Loew's functional impairment to his low back did not exceed 30% impairment at the time of the August 26, 2021 arbitration decision, the Agency and District Court properly held that he is not entitled to additional permanent partial disability benefits from Menards.

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REQUEST FOR ORAL ARGUMENT

Notice is hereby given that Appellees desire to be heard orally upon submission of this case to the Iowa Supreme Court.

CERTIFICATE OF FILING/SERVICE

I hereby certify that a true and accurate copy of this instrument has been and will be filed electronically with the Clerk of the Iowa Supreme Court and forwarded to all counsel via the electronic filing system on this 27th day of February 2023, and by U.S. Mail for any party not registered to receive notice of filings via the ECF process.

/s/ Rachael D. Neff

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 3,959 words, excluding the parts of the brief exempted.
2. This brief complies with the typeface requirement of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14 point type.

/s/ Rachael D. Neff