# AGENCY CASE LAW UPDATE

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## Bolinger v. Trillium Healthcare Group, LLC, File No. 5060856 (Arb. Decision June 17, 2021).

- **Issue:** whether claimant's shoulder injury and revision surgery are considered an injury to the scheduled shoulder or body as a whole
- **Facts:**
  - Claimant underwent left reverse shoulder replacement
  - Dr. Stoken: reverse shoulder replacement reverses natural position of ball and socket joint, involves the scapula and periscapular musculature, and rehabilitation involves strengthening muscles both within and outside the glenohumeral joint
- **Holding:** a reverse shoulder replacement involves the muscles of the back, and without evidence contradicting Dr. Stoken's opinion that the injury extends to the body as a whole, claimant's injury was compensable as an unscheduled injury
- *Also held that voluntary retirement after returning to work earning greater wages than at the time of injury did not render claimant entitled to industrial disability benefits

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## Carter v. Bridgestone Americas, Inc., File No. 1649560.01 (App. Decision July 8, 2021).

- **Issue:** whether the 2017 revisions to Iowa Code Section 85.23 had any impact on the discovery rule.
- **Facts:**
  - Claimant filed a claim for tinnitus asserting a date of injury of August 1, 2017
  - Notice was first provided to defendants in June 2018
  - Claimant relied on discovery rule in asserting he provided timely notice of the injury
- **Holding:** the 2017 legislative changes did not contain any language regarding the discovery rule, while they did amend Iowa Code § 85.23 to provide a definition of "date of occurrence of the injury." As such, by saying nothing, it was presumed the legislature intended to maintain the status quo as developed by years of judicial precedent, and as such, the discovery rule remains in place.

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## Teel v. John Deere Davenport Works, File No. 5067847 (Arb. Decision July 8, 2021).

- **Issue:** whether a claimant can establish permanent partial disability for a scheduled member injury under Iowa Code Section 85.34(2)(x) without an impairment rating issued by a physician pursuant to the AMA Guides, Fifth edition.
- **Facts:**
  - Claimant sustained compensable bilateral carpal tunnel
  - No physician addressed extent of permanent impairment pursuant to the AMA Guides
- **Holding:** Because no doctor used the Fifth Edition of the AMA Guides to determine claimant's extent of functional impairment as a result of his work injury, the Deputy concluded he could not award 17% impairment to each arm as requested by claimant. Without any impairment rating, the Deputy held claimant was not entitled to any permanent partial disability benefits.

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## Tucker v. Colony Heating & Air Conditioning, File No. 1648828.04 (Alt. Med. Decision July 13, 2021).

- **Issue:** should defendant be permitted to select the treating provider for a general referral for an MRI and physical therapy?
- **Facts:**
  - Alt Med seeking trigger point injections, botox injections, an MRI at UnityPoint, orthotic inserts, compounding cream, PT at UnityPoint
  - Defendants wanted to select provider for MRI and PT – further travel distance for MRI and different provider for PT from where claimant had previously attended PT
- **Holding:** transfer of care from a previously authorized physical therapist is an interference of care and is unreasonable; MRI performed at Steindler Clinic is a reasonable offer of care, and claimant failed to present evidence that travel to Steindler Clinic would be medically detrimental to claimant.

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## Freiburger v. John Deere Dubuque Works of Deere & Company, File No. 5066626.01 (Arb. Decision July 15, 2021).

- **Issue:** is claimant entitled to penalty benefits for temporary benefits paid 10 days after the end of the compensation week?
- **Facts:**
  - Claimant sought penalty benefits for untimely payment of temporary disability benefits and delay in payment of permanency benefits after an impairment rating was issued
  - Temporary total disability benefits and temporary partial disability benefits were paid "within 10 days after the end of the week."
- **Holding:** Penalty for an alleged delay of payment was not appropriate. The Deputy even cited to case law that states "Weekly compensation payments are due at the end of the compensation week." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

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## Koeller v. Cardinal Logistics Mgmt. Corp., File No. 5068062 (Arb. Decision July 27, 2021).

- **Issue:** is claimant entitled to penalty benefits for temporary benefits paid 13 days and 4 days late?
- **Facts:**
  - Penalty asserted for benefits paid 13 days after the end of the benefit week
  - Penalty asserted for benefits paid 4 days after the end of the benefit week
- **Holding:** defendants unreasonably delayed temporary partial disability benefits totaling $2,226.81 and issued penalty of $800.00, or approximately 36% penalty.

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## Kish v. University of Dubuque, File No. 5066482 (Arb. Decision July 29, 2021).

- **Issue:** is claimant entitled to industrial disability benefits pursuant to Iowa Code § 85.34(2)(v) due to her voluntary choice to transfer to a lower paying position with defendant-employer?
- **Facts:**
  - Back injury on May 30, 2018
  - Returned to work performing same job duties and earning same wages
  - Claimant bid and transferred to different, less physical position with defendants, which paid less
- **Holding:** No physician imposed permanent work restrictions on claimant that medically disqualified her from returning and continuing to perform work as a lead custodian. Therefore, claimant returned to work and was offered ongoing work by the University at a wage rate in which claimant would receive the same or greater wages as those earned on the date of injury. . . . recovery is limited to her functional impairment rating . . . under § 85.34(2)(v).

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## Lutz v. Consolidated Refrigerated Services, File No. 5066804 (Arb. Decision Aug. 2, 2021).

- **Issue:** whether weeks where claimant's pay logs showed a "zero" should be considered customary earnings and included in claimant's rate calculation.
- **Facts:**
  - Claimant paid depending on when trip documents were received by the employer
  - There were weeks when claimant's pay logs showed "zero" due to claimant continuing to haul cargo and not submitting trip documents for that week
  - Defendants included these "zero" earning weeks in the rate calculation
- **Holding:** under Iowa Code § 85.36, weeks in which claimant's pay logs showed "zero" earnings were customary for claimant in the 13 weeks prior to injury and should be included in the rate calculation.

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## McKoy a/k/a Jacobson v. ITA Group, Inc., File No. 5065221.01 (Arb. Decision Aug. 9, 2021). Affirmed on Appeal 12/2/21

- **Issue:** whether the insurance carrier was entitled to reimbursement from claimant's third-party settlement.
- **Facts:**
  - Compensable work injury: insurance carrier was paid $148,501.60 in medical/indemnity benefits
  - Claimant and defendants reached agreement for settlement that left medical open
  - Claimant filed and settled third-party lawsuit for $175,000.00 – insurance carrier consented to settlement and had filed a notice of lien
  - Settlement indicated payment was for pain and suffering, loss of function, and medical bills – nothing payable for lost wages or loss of future earning capacity (compensated under workers' compensation)
- **Holding:** claimant's counsel cannot draft settlement language to prevent indemnification by a workers' compensation insurance carrier; insurance carrier entitled to 2/3 of settlement amount (even though typically insurance carriers are only entitled to indemnification for the settlement award for lost wages but not those amounts awarded for pain and suffering).

10

## Kono v. Royal Plumbing, LLC, File No. 1663131.02 (Alt. Med. Decision Aug. 13, 2021).

- **Issue:** whether claimant is entitled to alternate medical care consisting of authorization to receive an emotional support animal, and payment of all associated costs.
- **Facts:**
  - Claimant "buried alive" when trench collapsed at work
  - PTSD, anxiety, and depression diagnoses related to work injury
  - Treating physician recommended an emotional support animal
  - Defendants selected medical provider offered alternate therapy recommendations
- **Holding:** Claimant's treating physicians were in a better position to assess/understand claimant's mental health treatment; defendants offer of other treatment was not reasonable in that it would disrupt his established care; an emotional support animal is a means to help improve claimant's psychiatric condition and thus falls under Iowa Code § 85.27 – including the costs related to the care of the animal

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## Rife v. P.M. Lattner Mfg. Co., File No. 1652412.02 (Arb. Decision Aug. 20, 2021). Affirmed on Appeal 1/21/22.

- **Issue:** whether defendants were entitled to a credit for 29.6% industrial disability paid for a prior injury to the right shoulder from 2009.
- **Facts:**
  - 2009 work injury resulted in functional impairment of 14% to the right arm or 8% to the body as a whole (Dr. Pilcher); 12% to the right shoulder or 7% to the body as a whole (Dr. Buck); 15% to the right arm or 9% to the body as a whole (Dr. Kim) – full commutation settlement for permanent disability of 29.6% to the body as a whole.
  - August 2018 injury: Dr. Kim assessed 19% right upper extremity impairment or 11% whole person impairment – did not distinguish between the 2009 and 2018 right shoulder injuries when assessing permanent impairment
- **Holding:** § 85.34 provides no mechanism for apportioning the loss between the present injury and the prior injury and provides no guidance on apportioning prior industrial award from a current scheduled member rating – coupled with unclear evidence regarding which rating the parties adopted in the prior settlement – rendered defendants responsible for the full impairment rating

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## Ahrens v. Earwood Family Properties, LLC, File No. 5066611 (App. Decision Aug. 31, 2021).

- **Issue:** whether claimant is entitled to recover benefits pursuant to Iowa Code § 85.34(2)(x) when no physician has opined as to impairment pursuant to the AMA Guides.
- **Facts:**
  - Injury to little finger
  - Deputy awarded 10% impairment to the hand, despite no physician opinion as to extent of impairment
- **Holding:** there is no language in the statute that requires a physician to set impairment, and in this case, because the impairment rating was not dependent on measurements of strength or sensory deficits, clinical findings or observations, interpretation of imaging studies, or claimant's subjective complaints, the Guides specifically dictate impairment ratings for amputations, there was no "agency expertise" required to ascertain the impairment rating in this case
  - Commissioner awarded 80% functional impairment to the little finger
  - **Narrow holding based on these specific circumstances

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## Anderson v. Bridgestone Americas Inc., File No. 5067475 (Arb. Decision Sept. 2, 2021).

- **Issue:** is the shoulder considered a scheduled member for purposes of evaluating an injury to two scheduled members under Iowa Code § 85.34(2)(t)?
- **Facts:**
  - Injury to both the right arm and right shoulder
- **Holding:** Because "shoulder" was not included within § 85.34(2)(t) as part of the 2017 amendments, § 85.34(2)(t) is not the appropriate section to evaluate an injury to the right arm and right shoulder caused by a single accident; injury was compensable under § 85.34(v) as an unscheduled injury
  - Additionally: Deputy considered that given claimant's age, he was likely to retire within 8 years, which was a factor taken into consideration in determining industrial disability. However, the Deputy did not provide any guidance on how this factored into his award of 50% industrial disability, i.e., whether it increased or decreased the award.

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## Goede v. US Xpress, Inc., File No. 20006651.01 (Arb. Decision Sept. 15, 2021).

- **Issue:** was claimant's claim barred due to violation of a company rule and/or intoxication?
- **Facts:**
  - Claimant was injured in motor vehicle accident while passenger in a semi truck
  - Claimant was in sleeper, had drank vodka, and was not restrained in the bunk restraint
  - Violated company policies re: alcohol and sleeping berth restraint
- **Holding:** company did not strictly enforce its bunk restrain rules/alcohol rules, so those violations did not expose her to new and added perils that semi-truck driving did not, and likewise did not remove her from the course of her employment; claimant overcame intoxication defense by showing her intoxication was not a substantial factor in causing her injuries – Deputy noted claimant's intoxication did not impact her decision to use the restraint or impact how the accident occurred

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## Martinez-Rivera v. Signet Builders, Inc., File No. 5064517.01 (Arb. Dec. Sept. 16, 2021).

- **Issue:** whether claimant is entitled to benefits from the Second Injury Fund of Iowa when the work injury is an injury to the shoulder.
- **Holding:** Iowa Code Section 85.64(1) does not provide for the shoulder as one of the enumerated body parts that might trigger Fund liability, he was not entitled to benefits from the Fund.

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## Brownrigg v. GITS Manufacturing Co., LLC, File No. 5042388.01 (Rev.-Reopen. Sept. 20, 2021).

- Issue: whether claimant was entitled to additional permanent partial disability benefits under a review-reopening proceeding.
- Facts:
  - 2014 decision: claimant had a 75% loss of earning capacity or industrial disability due to work-related lung cancer; multiple doctors opined claimant had 60% permanent impairment; claimant was retired, was doing some housework, but was limited to sedentary work only.
  - Since 2014: recommended for lifetime oxygen therapy; Dr. Bansal assigned 80% impairment and opined claimant was unable to work in any capacity; Dr. Gerdes agreed her condition worsened and she was unable to work; claimant had not applied for work since 2014
- Holding: Claimant met burden to show condition had worsened but not that the worsening resulted in a reduction in her earning capacity – she remained retired, had not applied for work, and had the same income between 2014 and review-reopening hearing

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## Hefley v. Fevold Farm Service, File No. 20700470.01 (Arb. Dec. Oct. 8, 2021). Affirmed on Appeal 4/26/22.

- **Issue:** was there an employer-employee relationship between claimant and Fevold Farm Service on October 23, 2018.
- **Facts:**
- Claimant was initially a truck driver for Fevold Farms
- Fevold Farms ceased its business in 2018 and the trucks were transferred to ECF Trucking, new signage was placed on the trucks, the sole owner of ECF Trucking was Elaine Fevold, and claimant received some payments from ECF Trucking, his W-2 came from ECF Trucking, and claimant no longer reported to Joel Fevold
- **Holding:** claimant was an employee of ECF Trucking at the time of injury based on the following 5 factors to consider when determining whether an employer-employee relationship exists: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed.

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## Tony Pazzi v. EFCO/CPI, File Nos. 5063852.01 and 5053306.01 (App. Dec. Nov. 3, 2021).

- **Issue:** which insurer is responsible for payment of claimant's permanent total disability benefits, when there were two separate injuries giving rise to the award?
- **Facts:**
  - Underlying review-reopening decision: claimant sustained a physical change in condition in both file numbers, and that he was permanently and totally disabled; Deputy found it impossible to delineate or separate the disability attributable to each injury date, and held that Travelers (insured defendant-employer for claimant's back injury on February 24, 2012) should be responsible for paying $302.00 per week and Sentry (insured defendant-employer for claimant's neck injury on June 13, 2017) paying $267.82 per week – as an equitable division of the overall rate in proportion to their potential risk and weekly rate.
- **Holding:** permanent total disability benefits are not subject to apportionment under Iowa Code § 85.34(2); there needs to be a separate award of permanent disability for each date of injury; 2012 back injury rendered claimant permanently and totally disabled (Travelers); 40% industrial disability awarded due to worsening of claimant's neck condition due to the 2017 injury (Sentry); no double recovery as they are two separate injuries

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## Stephen III v. A Touch of Class Banquet & Convention Centre, File No. 1588289.01 (Arb. Dec. Nov. 4, 2021). Affirmed on Appeal 3/28/22.

- **Issue:** did claimant's decision to sell his business constitute refusal to accept suitable work such that his entitlement to temporary total disability benefits should terminate? What is the proper weekly rate?
- **Facts:**
  - Low back/right shoulder injuries in March 2014
  - Claimant was operations manager for his own business
  - Sold his business in March 2018; continued to manage his real estate properties
  - Did not work between March 1, 2018, and date of MMI – defendants disputed liability for temporary benefits during this time asserting selling business was akin to voluntary quit
- **Holding:** sale of business was reasonable business decision given claimant's condition and inability to perform all aspects of his position; once the business was sold there was no ongoing offer of light duty – therefore, claimant was entitled to healing period benefits between March 1, 2018, and date of MMI; commissions are to be included in claimant's rate calculation

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## Markley v. J. Rettenmaier USA LP, File No. 1657411.01 (Arb. Dec. Nov. 4, 2021). Affirmed on Appeal 2/14/22.

- **Issue:** should medical insurance opt-out pay be included in claimant's gross wages calculation?
- **Facts:**
  - Claimant was paid hourly, including overtime, on-call pay, regular bonuses, and insurance opt-out pay for not enrolling in the employer's medical insurance - "Presumably this saves the employer money on health insurance premiums and allows workers to have access to other health insurance to receive additional cash compensation in their paychecks."
- **Holding:** medical insurance opt-out pay is to be included in the rate calculation as it is paid to claimant in his regular paychecks and can be spent any way claimant sees fit; not a "benefit" similar to employer payments to a 401(k), but rather, compensation paid instead of a benefit

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## Evilsizor v. Northern Ag Services, Inc., File No. 5030278.02 (Alt. Med. Dec. Nov. 9, 2021).

- **Issue:** is claimant entitled to alternate medical care in the form of a replacement recliner?
- **Facts:**
  - Left hip injury requiring a recliner in which to sit, as recommended by a doctor
  - Doctor recommended the recliner be replaced every 9-12 months
  - Current recliner bought at end of February 2021, which now has a significant depression but functions
  - Defendants assert recliner is not an appliance, and prior alt med order awarding a new recliner 9-12 months was not reasonable and necessary
- **Holding:** a recliner can be an appliance as it falls under "any other artificial device used to provide function or for therapeutic purposes." 876 IAC 8.5; however, because claimant had not yet reached the 9-12 month window for replacement, claimant did not establish defendants' actions were unreasonable at that time in declining to replace the recliner

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## Clark v. Arconic, Inc., File No. 5061553.01 (Arb. Dec. Nov. 15, 2021).

- **Issue:** how should claimant's industrial disability should be measured pursuant to Iowa Code § 85.34(2)(v)?
- **Facts:**
  - Physical injury to the ribs and mental injury
  - Parties agreed the injury was compensable under Iowa Code § 85.34(2)(v)
- **Holding:** Claimant earning more than at the time of the work injury, thus functional impairment method was used; only medical opinion as to extent of impairment was an opinion that claimant was 100% disabled from heavy duty machinery work; claimant was entitled to 500 weeks of benefits (not permanent total disability benefits)

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## IME Reimbursements

24

## Benson v. John Deere Dubuque Works, File No. 20014076.01 (Phillips Arb. Dec 12/30/21)Affirmed on Appeal 4/6/22

- Issue: Is a finding of a lack of causation tantamount to a zero percent impairment rating?
- The Commissioner holds that in light of the Kern decision, it is appropriate to award the costs of the IME.

25

## Parsons v. Hy-Vee Algona, File No. 5066686 (Humphrey Arb. Dec. 1/4/22)

- Issue: Is Claimant's IME reimbursable when Defendants do not get an impairment rating for an admitted injury?
- The Deputy held that Kern, controls in this instance and Claimant's IME was reimbursable.
- "Here, as in Kern, the clear effect of the defendants' choice not to obtain a permanent impairment rating regarding Parsons's injury is a zero percent impairment rating. Had Parsons not obtained an IME in this case, there would be no expert opinion in the record on permanent disability. The fact that the defendants chose not to get an impairment rating and now argue the agency should use the impairment rating in Dr. Bansal's IME report as the basis for a finding of permanent disability to the right foot, while also arguing Parsons is not entitled to reimbursement for Dr. Bansal's IME, shows the practical impact of the agency's prior interpretation of section 85.39, which the Kern court found contrary to the legislative intent underpinning the statute and the caselaw construing it."

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## Swanson v. Pella Corp., File No. 19700687.01 (Arb. Dec. 2/10/22)

- Issue: Is Claimant's IME reimbursable when the Employer's IME and Claimant's IME are dated the same day?
- The Deputy held that Claimant's IME is not reimbursable because the expert reports were dated the same day.

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## Bior v. Hormel, File No. 20003216.01 (Christenson Arb. Dec. 12/29/21)

- Issue: Is Claimant's IME reimbursable even though the Agency found Claimant did not meet her burden of proof that the injury was related to her work?
- Claimant alleges an injury date in November 2019.
- Defendants obtain a rating denying causation and any permanent impairment.
- Claimant's IME report was issued 4 days after Defendant's report.
- Claimant was ultimately unsuccessful in proving causation between work and her injuries.
- The Deputy held that given the chronology of the reports, Claimant was entitled to reimbursement for her IME.

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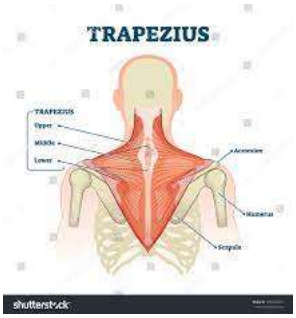
# When is a Shoulder injury more than a shoulder injury?




29

## Dunbar v. Menard Inc., File Nos. 200008907.02, 1657325.02 (Copley Arb. Dec. 12/2/21); (Affirmed on App. 3/30/22)

- Issue: Did Claimant's shoulder injury extend into her BAW due to trapezius pain?
- Admitted injury. Claimant undergoes right shoulder arthroscopy with rotator cuff repair, capsular release, extensive debridement, arthroscopic biceps tenodesis, subacromial decompression, and distal clavicle excision
- Claimant argues that her injury extends into her BAW due to persistent pain in her trapezius.
- The expert reports of all parties only dealt with range of motion deficits related to Claimant's shoulder and for the distal clavicle
- The Deputy held that Claimant did not meet their burden that the injury extended into the BAW.

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## Paric v. Des Moines Public Schools, File No. 1649535.01 (Palmer Arb. Dec. 1/24/22)

- Issue: Did Claimant sustain a sequela injury to his trapezius and neck as a result of an injury to the shoulder?
- Claimant suffered a full thickness left rotator cuff tearing involving the supraspinatus tendon, dislocation and tearing of the biceps tendon, and partial thickness into substance tearing of the left subscapularis.
  - Claimant unable to have surgery due to being unable to be cleared by a cardiologist.
- Claimant obtained an IME with Dr. Kuhnlein.
  - This is a significant left rotator cuff injury that has limited Mr. Paric's ability to use the arm, as the muscles' function has been affected. To compensate for this pathology, Mr. Paric uses the trapezius muscle in a compensatory fashion to move the arm. The trapezius muscle originates at the neck and inserts at the shoulder joint area. It is more likely than not that the neck and trapezius muscle pain developed as a sequela to the left shoulder area injury as he uses this musculature to compensate for the significant left rotator cuff injury.
- The employer's expert did not opine as to the injury being limited to the shoulder nor challenging Dr. Kuhnlein's opinion that Claimant sustained a sequela injury to his trapezius and neck.
- As such, the Deputy found that Claimant had met his burden and was compensated industrial.

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## Credit For Benefits paid under Iowa Code Section 85.38(2)(a) (Credit for Short Term and Long Term Disability)

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## Hines v. Tyson Foods, Inc., File No. 20700462.01 (Palmer, Arb. Dec. 1/18/22)

- Issue: Are Defendants entitled to a credit for LTD and STD benefits received by Claimant?
- The Deputy held that in this case Defendants were not entitled to a credit for LTD and STD benefits because they did not produce a copy of the plan documents at hearing.
- The plan documents are necessary to show:
  - 1. The benefits were received under a group plan;
  - 2. Contribution to the plan was made by the employer;
  - 3. The benefits should not have been paid if workers' compensation benefits were received; &
  - 4. The amount to be credited or deducted from payments made or owed under Chapter 85.
- In this instance, the Deputy was unable to determine whether the benefits should not have been paid if workers' compensation benefits were received and thus the Defendants did not meet their burden to establish a credit.

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## Himmelsbach v. Quaker Oats Company, File Nos. 5066732, 5066867 (App. 12/8/21)

- Issue: Should an award for penalty benefits be based off of the cumulative amount of temporary benefits during the period of unreasonable denial or the amount of underpayment amount when Defendants have a credit for short term and long term disability payments?
- Claimant was receiving short term and long term disability benefits during a period of unreasonable denial by the employer. Penalty benefits were awarded based on the cumulative total of healing and PPD benefits she would have received but for the unreasonable delay.
- The Commissioner overruled the Deputy and held that penalty benefits should be based on the difference in disability benefits received and what they would have been paid in healing period and PPD and not the cumulative total of healing period and PPD benefits.

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# Functional Loss or Industrial Loss

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## Garcia v. Smithfield Foods, Inc., File No. 1657969.01 (Humphrey Arb Dec. 2/16/22)

- Issue: Is Claimant able to receive permanency benefits for a mental injury when she has returned to work making the same or greater wages?
- The Deputy held that Claimant is unable to receive permanency benefits for a mental injury when they return to work making the same or greater wages.
- This is due to the AMA Guides 5th edition expressly rejecting mental impairment ratings in percentage terms.
- "Consequently, the statutory requirement that the determination of functional disability must be made "solely by utilizing" the Guides effectively forecloses the possibility of an employee with a mental injury related to the employee's work from obtaining permanent disability benefits for the injury if the employee, like Garcia in this case, is earning the same or more from the employer after the injury."

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## Ocampo v. New Fashion Pork, LLP, File No. 20012252.01 (Humphrey Arb. Dec. 3/4/22)

- Issue: Is Claimant to be compensated by functional or industrial loss when they are terminated by Defendants prior to hearing?
- Claimant injured his back on June 3, 2019, and was terminated on June 18, 2019, for undetermined reasons.
- At the time of hearing, Claimant was working for a different employer making less money than at the time of injury. Defendants' argue that they had offered Claimant suitable work making the same money after his injury and therefore Claimant would only be limited to functional loss.
- The Deputy held that "…the text of section 85.34(2)(v) does not limit the determination of permanent disability to that based only on functional impairment when the defendant- employer terminates the claimant's employment before the hearing. In such circumstances, the statute does not require a bifurcated litigation process. Because New Fashion Pork discharged Ocampo before the hearing in this case, this decision will determine what, if any, industrial disability he sustained because of the stipulated work injury."

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## Dague v. Unisys Corp., File No. 1645503.02 (Grell Arb. Dec 3/28/22)

- Issue: Is Claimant to be compensated functionally or industrially when he is terminated by employer and is subsequently making the same or greater wages at the time of hearing with a new employer?
- The Deputy held that Claimant was to be compensated industrially, at least for now.
- The Deputy uses the Martinez Agency decision as his framework.
  - In Martinez v. Pavlich, Inc., File No. 5063900 (Appeal July 2020), the Commissioner held, "Thus, though claimant in this case was earning greater wages at the time of 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."
- The Defendants argue that the District Court disagreed with the Agency's interpretation of Iowa Code Section 85.34(2)(v) in Martinez and that Claimant should have been compensated functionally.
- The Deputy held that until a definitive interpretation is provided by the Iowa appellate courts, that he was bound by the precedent of the Agency and that Claimant should be interpreted industrially.

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## Carte v. Whirlpool, File Nos. 1643167.01, 1656980.01,19700417.01 (Walsh Arb. Dec. 1/25/22)

- Issue: Whether Claimant was entitled to industrial loss analysis when he voluntarily retired from employer due to a combination of his disabilities
- Claimant alleges left shoulder injury on January 11, 2018, a right shoulder injury on October 12, 2018, and tinnitus with a manifestation date of May 1, 2019.
- Claimant voluntarily retired on March 13, 2019, which was effective on May 1, 2019.
- Claimant testified at hearing that, "his body was telling him it was time to go".
- The Deputy held that Claimant retired due to a combination of his disabilities, including his tinnitus and therefore an industrial loss analysis was appropriate.

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## Pajazetovic v. Tyson Fresh Meats, Inc., File No. 5068770 (Christenson Arb. Dec. 4/5/22)

- Issue: Is Claimant to be compensated functionally or industrially when he remains an employee of Defendant but has not returned to work by the time of hearing?
- Claimant suffered an admitted injury to his back on October 22, 2018. Claimant was still an employee of Defendant at the time of hearing but had not yet returned to work due to his family doctor not releasing him. The Deputy held that Claimant was to be compensated industrially since he had not returned to work. Since he had not returned to work, Iowa Code Section 85.34(2)(v) did not apply.

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# Potpourri

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# Yanez v. Vazquez, File No. 5066714 (Lunn Arb. Dec. 12/6/2021)

- Issue: In light of the changes to Iowa Code Section 85.34(2)(x), can the Agency award PPD benefits for total loss of a schedule member when no impairment rating has been obtained?
- Claimant was a roofer who had a nail ricochet into his left eye causing blindness that his doctor stated was unlikely to improve.
- Neither party obtained an impairment rating.
- The Deputy Commissioner held that "While the undersigned is not a medical doctor, it stands to reason that a total loss of the left eye would garner a 100% impairment rating under the AMA Guides. A finding that claimant receives nothing simply because he did not obtain an impairment rating for what is clearly a total loss, would be a harsh and unjust result. As such, I find claimant sustained a total loss of the left eye, or 100% left eye impairment."

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## Donna Bolton, Surviving Spouse of Steve Bolton, Deceased, v. Marcus Lumber, File No. 20015335.01 (Palmer Arb. Dec. 3/24/22)

- Issue: Did Claimant's Covid-19 arise out of and in the course of his employment?
- The Deputy held that Claimant did not meet his burden of proof.
- Factors considered by the Deputy:
  - 1. The type of job Claimant performs;
    - This was not a situation where Claimant worked in a packing plant or factory in close proximity to unmasked coworkers. Nor was he a healthcare professional taking care of Covid-19 patients.
  - 2. The mask and social distancing policies of the employer;
  - 3. Whether Claimant follow CDC guidelines in their personal life; &
  - 4. Evidence of contract tracing

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