IN THE IOWA SUPREME COURT

APPEAL NO. 22-1894

JUSTIN LOEW,

Petitioner-Appellant,

v.

MENARD, INC., and
XL INSURANCE AMERICA,

Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE SAMANTHA GRONEWALD
Polk County No. CVCV063592

PETITIONER-APPELLANT'S FINAL BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

PAUL THUNE AT0007970
THUNE LAW FIRM
pthunelaw@gmail.com
6800 Lake Drive, Suite 210
West Des Moines, Iowa 50266
Telephone: (515) 247-2780
ATTORNEY FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Iowa Workers' Compensation Decisions:

Other Authorities:

STATEMENT OF ISSUE PRESENTED FOR REVIEW

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

Cases:

Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991)
Chavez v. MS Tech, 972 N.W.2d 662 (Iowa 2022)
IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001)
JBS Swift v. Ochoa, 888 N.W.2d 887 (Iowa 2016)
Lithcote Company v. Ballenger, 471 N.W.2d 64 (Iowa Ct. App. 1991)
McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980)
Polaris Indus., Inc., v. Hesby, 881 N.W.2d 471 (Iowa Ct. App. 2016)
Roberts Diary v. Billick, 861 N.W.2d 814 (Iowa 2015)

Statutes:

Iowa Code Section 85.34(2)(v)
Iowa Code Section 85.34(7)

Iowa Workers' Compensation Decisions:

Rife v. P.M. Lattner Manufacturing Co., File No. 1652412.02
(Appeal Decision January 21, 2022)

Other Authorities:

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

ROUTING STATEMENT

The Iowa Supreme Court should retain this matter. It presents a substantial issue of first impression. Iowa R. App. P. 6.1101(2)(c). In addition, this case presents another opportunity to interpret one of the 2017 legislative changes to the Iowa statutory workers' compensation system. Iowa R. App. P. 6.1101(2)(f). Finally, issues of broad public importance are implicated by the decision. Iowa R. App. R. 6.1101(2)(d).

STATEMENT OF THE CASE

The appellant, Justin Loew, filed a petition with the Iowa Workers' Compensation Commissioner on July 1, 2020, for an injury to his lower back that took place on August 13, 2018. (Pet., App. 33) Mr. Loew later filed another petition with the Iowa Workers' Compensation Commissioner on August 19, 2020, for a work injury to his lower back that took place on March 13, 2019. (Pet., App. 34)

Hearing on these two cases was held on August 26, 2021, and Heather Palmer, Deputy Workers' Compensation Commissioner, issued her Arbitration Decision on December 15, 2021. (Arb. Dec., App. 35-58) In that decision, Deputy Palmer found that Mr. Loew had sustained work-related injuries on August 13, 2018, as well as March 13, 2019, and sustained a functional impairment to the lumber spine of 8 percent to the body as a

whole. (Arb. Dec., pp. 17-20, App. 51-54) Deputy Palmer further found that Mr. Loew was not entitled to payment of the 8 percent functional impairment rating since he had previously been awarded 30 percent industrial disability as a result of a March 2015 work injury to his lower back. (Arb. Dec., pp. 20-22, App. 54-56; Arb. Dec. 10/30/2018, p. 22, App. 27; Appeal Dec. 1/31/2020, p. 3, App. 31) Following the Arbitration Decision of Deputy Palmer, Mr. Loew filed his Notice of Appeal on December 29, 2021. (Notice of Appeal, App. 59)

On April 12, 2022, Iowa Workers' Compensation Commissioner Joseph S. Cortese II issued his Appeal Decision affirming the Arbitration Decision of Deputy Palmer in all respects. (Appeal Dec., pp. 1-3, App. 60-62) Mr. Loew thereafter filed his Petition for Judicial Review on May 4, 2022. (Pet. for Jud. Rev., pp. 1-3, App. 63-65)

On October 27, 2022, District Court Judge Samantha Gronewald issued her Ruling on Petition for Judicial Review affirming the decision of Commissioner Cortese in all respects. (Ruling on Pet. for Jud. Rev., App. 84) Mr. Loew filed his Notice of Appeal to the Iowa Supreme Court on November 16, 2022. (Notice of Appeal, App. 86-87)

STATEMENT OF FACTS

Mr. Loew sustained a back injury in March 2015 while working for Menard. (Arb. Dec., 10/30/2018, p. 15, App. 20) He underwent surgeries to repair disc damage at L5-S1 and L4-5. (Arb. Dec., 10/30/2018, pp. 4-6, App. 9-11) He returned to work at Menard. (Arb. Dec., 10/30/2018, p. 13, App. 18) His case went to hearing and it was determined he had a combined 20 percent functional impairment. (Arb. Dec., 10/30/2018, p. 17, App. 22) He was awarded 30 percent industrial disability. (Arbitration Decision, 10/30/2018, pp. 17, 22, App. 22, 27) This award was affirmed on appeal to the Workers' Compensation Commissioner. (Appeal Dec., 1/31/2020, pp. 2-3, App. 29-31)

In 2018 and 2019 Mr. Loew sustained new back injuries. (Arb. Dec., 12/15/2021, p. 20, App. 54) He was diagnosed with a herniated disc at L3-4. (Arb. Dec., 12/15/2021, p. 10, App. 44) He returned to work at Menard, at the same job, earning same or greater wages. (Arb. Dec., 12/15/2021, p. 22, App. 56) Deputy Palmer found that the medical evidence supported a finding that Mr. Loew had sustained an 8 percent functional impairment as a result of the 2018 and 2019 injuries. (Arb. Dec., 12/15/2021, p. 21, App. 55) Deputy Palmer then found that Menard and its insurance carrier were entitled to a credit for the prior 30 percent industrial disability award since

the functional impairment of 8 percent was less than the previous 30 percent award. (Arb. Dec., 12/15/2021, p. 22, App. 56)

Whether or not Menard and its insurance carrier are due a credit for the 30 percent industrial disability award resulting from the 2015 work injury is the reason for this appeal.

ARGUMENT

I. MENARD AND ITS INSURANCE CARRIER ARE NOT DUE A CREDIT FOR PREVIOUS COMPENSATION OF MR. LOEW'S 2015 LOWER BACK INJURY.

Determining whether Menard and its insurance carrier are entitled to a credit involves the 2017 amendments to Iowa Code Section 85.34. The court interprets workers' compensation statutes in favor of the worker, although the court must still interpret the statutory scheme to ensure the interpretation is harmonious with the statute as a whole. *Chavez v. MS Tech*, 972 N.W.2d 662, 668 (Iowa 2022). The court reviews the Commissioner's statutory interpretation to correct errors of law on the part of the agency. *Polaris Indus., Inc. v. Hesby*, 881 N.W.2d 471 (Iowa Ct. App. 2016).

There are two changes to Section 85.34 that pertain to this case. The first is subsection 85.34(7) which now reads in part:

> 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.… **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."** (emphasis supplied)

The 2017 amendment replaced the 2004 version of subsection 85.34(7), which provided in relevant part:

> b. If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraphs of section 85.34, subsection 2, as the employee's present injury, the employer is liable for the combined disability that was caused by the injuries …**the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated** by the employer. (emphasis supplied)

In its Ruling on Petition for Judicial Review, the District Court correctly stated the legislative history from the 2004 amendment made it clear that subsection (7) was added in order to prevent double recovery (Ruling on Pet. for Jud. Rev., App. 11-12). The legislative history contains the following statement:

> It is the intent of the general assembly…**this Act will prevent all double recoveries**…for permanent partial disability.…The

> general assembly recognizes that the amount of compensation a person receives for disability is directly related to the person's earnings….
>
> **The general assembly does not intend this division of this Act to change the character of any disability from scheduled to unscheduled…or to combine disabilities** that are not otherwise combined under law…." (emphasis supplied)

2004 Iowa Acts 1st Extraordinary Sess. ch.1001, Section 20

The District Court then noted the 2017 amendment to subsection (7) retained the provision for credit yet made no distinction on the *type* of disability benefits paid – whether such benefits were paid for industrial disability or for functional impairment (Ruling on Pet. for Jud. Rev., pp. 9-12, App. 77-80). As a result, the Court concluded that subsection (7) applied and that Menard and its insurance carrier were owed a credit for past compensation paid for industrial disability against the 8 percent functional impairment sustained as a result of the 2018 and 2018 injuries. (Ruling on Pet. for Jud. Rev., pp. 11-12, App. 79-80). This is the heart of the position taken by Menard in this case.

The error in this approach is that it completely ignores the second amendment to Section 85.34, found in subsection 85.34(2)(v), which states:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs (a) through (u) above, the compensation shall be paid…**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…. (emphasis supplied)

Mr. Loew's permanent partial disability clearly falls within the confines of subsection (v) since it does not involve the type of injury described in paragraphs (a) through (u) – commonly referred to as "scheduled" injuries. Subsection (2)(v) goes on to state:

> A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury.

If the analysis were to stop right there, then Mr. Loew's 2018 and 2019 back injuries would be evaluated on a loss of earning capacity basis, the same as his 2015 injury, and would involve the double recovery issue that 85.34(7) is meant to prevent. However, subsection (2)(v) goes on to state:

> If an employee who is eligible for compensation under this paragraph returns to work…for which the employee receives…the same or greater wages…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.** (emphasis supplied)

Menard, its insurance carrier, and the District Court take the position that subsection (7) does not distinguish between the type of disability paid, whether it be for functional impairment or loss of earning capacity (also referred to as industrial disability), and thus the employer still gets the credit.

This overlooks one critical fact - the distinction between the two types of disability *is* made in subsection (2)(v). Each provision of a statute must be read together, without according undue importance to any single provision. *IBP, Inc. v. Harker,* 633 N.W.2d 322 (Iowa 2001).

Not only does the statute provide that the employee shall be compensated for functional impairment, but it also provides the employee's compensation is not based in relation to earning capacity. By applying subsection (7) to give the employer credit based on an earlier payment of 30 percent for loss of earning capacity, the District Court's decision contravenes both of these provisions. In other words, the District Court has taken away the functional impairment compensation Mr. Loew shall receive by applying a credit based on the one factor it cannot consider - a prior payment for loss of earning capacity.

The purpose of subsection (7) is to prevent double recovery. There is no double recovery here. The 2018 award was for Mr. Loew's industrial disability/loss of earning capacity due to the 2015 back injury. The 2018 and 2019 injuries resulted in a functional impairment of 8 percent. Mr. Loew seeks only compensation for his functional impairment, and not in relation to his earning capacity, as per the statute. This court has long recognized the

difference between functional disability or impairment and industrial disability:

> "Impairment" is what is wrong with the health of an individual; "disability" is the gap between what the individual can do and what the individual needs or wants to do.

Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991).

The Legislature was careful to ensure in subsection (2)(v) that workers like Mr. Loew, who sustain an injury yet return to work at same wages, are paid the functional impairment resulting from the injury. If the Legislature intended the credit provided for in subsection (7) to apply to these cases or, for that matter, the subsection 2(a) – (u) cases, which also limit compensation to functional impairment, then the statute would have drawn the same distinction between "disability" and "functional impairment" as contained in subsection 2(v).

Context is important and this amendment came about shortly after *JBS Swift v. Ochoa*, 888 N.W.2d 887 (Iowa 2016), was decided. The court in that case held an injured worker could receive both permanent partial disability (PPD) and permanent total disability (PTD) benefits concurrently despite the language of (the 2004 version) subsection (7). This produced a firestorm of controversy, and it is no coincidence that the Legislature amended the credit section in its next session.

JBS Swift, however, only involved industrial disability/loss of earning capacity injuries. The language used by the Legislature in the 2017 amendment may further limit recovery by an injured worker for successive industrial disability injuries. But the Legislature was careful, as evidenced by the language in subsection (2)(v), to preserve the distinction between scheduled and unscheduled injuries, as well as preserve an injured worker's entitlement to payment of functional impairment for work injuries.

The other problem that the District Court decision did not address is that there is no method in subsection (7) to credit past compensation for industrial disability against Mr. Loew's 8 percent functional impairment. In *Roberts Diary v. Billick,* 861 N.W.2d 814 (Iowa 2015), the Court noted that if the Legislature had intended (in the 2004 amendment) to require a credit of disability benefits in cases of successive unscheduled injuries with different employers, it would have set out the method by which the credit would be determined. *Id*. at 822.

The same rationale should apply here. Yet no method is prescribed in subsection (7) to determine the credit for workers who, like Mr. Loew, have successive injuries, sustain a functional impairment, and return to work at same wages for the same employer - nor could there be since this case

involves two different types of disability – loss of earning capacity and functional impairment.

An award of loss of earning capacity is based on many factors, including but not limited to functional impairment. See, e.g., *McSpadden v. Big Ben Coal Co.,* 288 N.W.2d 181 (Iowa 1980). There are no guidelines as to the weight to be given each of the factors. *Lithcote Company v. Ballenger,* 471 N.W.2d 64 (Iowa Ct. App. 1991). By contrast, Mr. Loew's 2018 and 2019 injuries are presently limited to functional impairment. The Commissioner's decision in *Rife v. P. M. Lattner Manufacturing Co.,* File No. 1652412.02 (Appeal Decision, January 21, 2022) provides helpful analysis.

In *Rife*, the credit issue involved a prior settlement for industrial disability and a later injury to a shoulder, which is now a scheduled member for which compensation is limited to functional impairment. The Commissioner determined the employer was not entitled to a credit:

> [I]f defendants in this case were entitled to a credit for the entirety of their settlement, which was for industrial disability, against claimant's current scheduled member injury, they would receive an unfair excess credit for considerations and factors that are not applicable to claimant's current injury. Put differently, their credit would be for apples against an award for oranges. *Id*. at 3.

There are only two possible outcomes here. The first is the credit can apply to any disability incurred after July 2017. The second is that credit only applies to those workers who, like Mr. Loew, sustain an unscheduled injury yet return to work for the same employer at the same wages.

Let's analyze the first outcome – that the credit may apply to any disability. If the position taken by Menard is taken to its logical conclusion, then the employer could claim a credit against *any* scheduled injury after July 1, 2017, resulting in functional impairment, including those scheduled injuries listed in (2)(a) – (u). For instance, a worker with a 30 percent award of industrial disability (which equals 150 weeks of compensation) prior to 2017 would not receive any compensation for the functional impairment resulting from the loss of an eye (the schedule provides for 140 weeks of compensation for the loss of an eye). This would be unfair and illogical since subsection (7) provides for a credit "to the extent" that the employee's preexisting disability has already been compensated. Certainly there is no threat of a double recovery in that scenario.

However, if the credit only applies to injured workers like Mr. Loew, then he stands alone among injured workers in not receiving compensation for functional impairment. Those workers with scheduled injuries receive compensation for functional impairment. Those workers with unscheduled

injuries who do not return to work for the same employer receive compensation for functional impairment. But Mr. Loew does not.

We cannot guess at the Legislature's intent in deciding on the wording of these amendments to 85.34. Perhaps the Legislature intended a dramatic change in the credit to be given employers. Perhaps the Legislature intended that someone like Mr. Loew receive compensation for functional impairment as a way of encouraging injured workers to return to their job. We cannot know and cannot guess.

What we *do* know, however, is that the Legislature provided that those injured workers who return to work for the same employer at the same pay "shall" be compensated for functional impairment. This language should not and cannot be discarded in resolving the issue in this case.

Finally, in her ruling on the Petition for Judicial Review, Judge Gronewald ruled that the credit would apply since the total functional impairment of 28 percent (2015 injury 20 percent plus the 2018 injury 8 percent) did not equal the prior loss of earning capacity award of 30 percent. (Ruling on Pet. For Jud. Rev., p. 11, App. 78) This analysis actually highlights the several flaws in attempting to apply a credit in Mr. Loew's situation and, in doing so, supports Mr. Loew's position in this appeal.

First, the District Court's analysis conflates functional impairment and industrial disability. As noted in the *Bearce* case, impairment is not the same as industrial disability. Second, the 30 percent award in 2015 took into account the 20 percent functional impairment, as well as other factors. Third, Mr. Loew was compensated for the 20 percent functional impairment in the 2015 award of 30 percent industrial disability. He has not been compensated for the 8 percent functional impairment he sustained as a result of the new injury to a different body part. Menard may point out that if Mr. Loew is terminated from his job, then he would be eligible to receive compensation for industrial disability, which presumably would include the 8 percent functional loss. The problem with this is that a worker in Mr. Loew's position may never be fired or otherwise leave his job. In that instance he would never receive payment for the functional impairment resulting from the injury. On the other hand, if he was fired at some point, then any award for industrial disability would be subject to a credit for the previous 2015 award for industrial disability – and the threat of double recovery would be properly addressed at that time, by a method that is logical as well as easily ascertainable. To attempt to apply a credit now, however, would not only be impossible since there is no method by which to determine the credit, but would be contrary to the terms and provisions contained in subsection (2)(v).

CONCLUSION

Allowing the credit would be contrary to the purpose of the statute, the legislative history of a comparable prior statute, and subsection 2(v) – it would combine disabilities that are not otherwise combined under Section 34. The District Court incorrectly determined that if Mr. Loew was compensated for his functional impairment caused by a separate injury to a different body part he would be compensated twice for the same disability. The ruling of the District Court should be reversed and this Court should enter an order that Menard is to pay Loew for the 8 percent functional impairment resulting from his 2018 and 2019 injuries.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Petitioner-Appellant requests that this matter be set for oral argument before the Court.

Respectfully Submitted,

THUNE LAW FIRM

Paul Thune AT0007970
pthunelaw@gmail.com
6800 Lake Drive, Suite 200
West Des Moines, IA 50266
Phone: (515) 249-2780
ATTORNEY FOR PETITIONER

CERTIFICATE OF COSTS

Appellant certifies that no costs were incurred in printing or duplicating paper copies of briefs.

Paul Thune

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. 6.903(1)(d) and (1)(g)(1) and (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 and contains 3,190 words, excluding the parts of the brief exempted by Iowa. R. App. P. 6.903(1)(g)(1).

Paul Thune

February 27, 2023

CERTIFICATE OF SERVICE

I, Paul Thune, member of the Bar of Iowa, hereby certify that on February 27, 2023, I or a person acting on my behalf served the above Petitioner-Appellant's Final Brief and Conditional Request for Oral Argument to Respondents-Appellees' attorneys of record, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.

Paul Thune

CERTIFICATE OF FILING

I, Paul Thune, hereby certify that I, or a person acting in my direction, did file the attached Petitioner-Appellant's Final Brief and Conditional Request for Oral Argument upon the Clerk of the Iowa Supreme Court via EDMS on this 27th day of February, 2023.

Paul Thune