BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

WANDA LONG, Claimant, vs. AYM, INC., Employer, Self-Insured, Defendant.	File No. 5048675 APPEAL DECISION Head Note Nos: 1100; 1802; 1803; 2502; 2907; 4000;

Claimant Wanda Long appeals from an arbitration decision filed on August 22, 2016. Defendant AYM, Inc., self-insured employer, cross-appeals from the arbitration decision and from the deemed denial of defendant's application for rehearing filed by defendant on September 1, 2016. The case was heard on April 8, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 3, 2016.

The deputy commissioner found claimant carried her burden of proof that she sustained permanent disability as a result of the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on August 1, 2013. The deputy commissioner found claimant sustained 40 percent industrial disability as a result of the work injury, which entitles claimant to receive 200 weeks of permanent partial disability (PPD) benefits. At page three of the arbitration decision, in the findings of fact, the deputy commissioner finds that the proper commencement date for PPD benefits is September 12, 2014. In the order portion of the arbitration decision, the deputy commissioner states PPD benefits shall commence on August 15, 2015.

The deputy commissioner found claimant is not entitled to receive healing period benefits or temporary partial disability (TPD) benefits for the work injury.

In the reasoning and conclusions of law portion of the arbitration decision, the deputy commissioner found claimant is not entitled to reimbursement from defendant under Iowa Code section 85.39 for the $2,975.00 charge from Sunil Bansal, M.D., for his independent medical evaluation (IME) of claimant performed on July 16, 2015. However, the deputy commissioner did find claimant should be reimbursed by defendant in the amount of $2,625.00 as a cost pursuant to rule 876 IAC 4.33 for Dr. Bansal's portion of his IME charge attributed to "Record Review and Report." The deputy commissioner also ordered defendant to pay claimant's additional costs of the arbitration proceeding in the amount of $100.00 for claimant's filing fee and $273.00 for the cost of Carma Mitchell's vocational assessment and report.

In the arbitration decision, the deputy commissioner completely failed to address the issue of whether claimant is entitled to penalty benefits for alleged unreasonable delays in the payment of healing period benefits and PPD benefits.

In the arbitration decision, the deputy commissioner also completely failed to address the issue of whether defendant must restore claimant's vacation/sick/PTO time for alleged partial days missed from work to attend authorized medical appointments.

Claimant asserts on appeal that the deputy commissioner's finding of permanent disability should be affirmed. However, claimant asserts the deputy commissioner erred in finding claimant sustained 40 percent industrial disability as a result of the work injury because claimant asserts the deputy commissioner erred in failing to award substantially more than 40 percent industrial disability. Claimant asserts the deputy commissioner erred in failing to find the proper commencement date for PPD benefits is October 19, 2013. Claimant asserts the deputy commissioner erred in failing to find claimant is entitled to receive TPD benefits from August 5, 2013, through October 18, 2013. Claimant asserts the deputy commissioner erred in failing to find claimant is entitled to reimbursement from defendant pursuant to Iowa Code section 85.39 for Dr. Bansal's entire IME charge. Claimant asserts the deputy commissioner erred in failing to determine whether claimant is entitled to penalty benefits. Claimant asserts the deputy commissioner erred in failing to determine whether defendant must restore claimant's vacation/sick/PTO time for alleged partial days missed from work to attend authorized medical appointments.

Defendant asserts on cross-appeal that the deputy commissioner erred in finding claimant sustained 40 percent industrial disability as a result of the work injury. Defendant asserts it should be found that claimant's industrial disability resulting from the work injury is substantially less than 40 percent. Defendant asserts the deputy commissioner erred in taxing Carma Mitchell's vocational assessment and report and any portion of Dr. Bansal's IME charge as costs under rule 876 IAC 4.33. Defendant asserts that because claimant did not file an application for rehearing as to the penalty issue and the issue of whether defendant must restore claimant's vacation/sick/PTO time for alleged partial days missed from work to attend authorized medical appointments, those issues are waived on appeal.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having 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, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on August 22, 2016, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant sustained permanent disability as a result of the August 1, 2013 work injury.

I affirm the deputy commissioner's finding that claimant sustained 40 percent industrial disability as a result of the work injury, which entitles claimant to 200 weeks of PPD benefits.

With regard to the proper commencement date for PPD benefits, as noted above, at page three of the arbitration decision, in the findings of fact, the deputy commissioner found that the proper commencement date for PPD benefits is September 12, 2014, and in the order portion of the arbitration decision, the deputy commissioner stated PPD benefits shall commence on August 15, 2015. Because the deputy commissioner made a specific factual finding on page three, I find the deputy commissioner intended that the proper commencement date for PPD benefits is September 12, 2014, and I find the August 15, 2015, date contained in the order portion of the decision is simply a scrivener's error. I affirm the deputy commissioner's finding that September 12, 2014, is the proper commencement date for PPD benefits in this matter.

I affirm the deputy commissioner's finding that from the record in this matter it is unknown what work hours or days were actually missed by claimant due to the work injury and, as such, claimant has failed to meet her burden of proof to receive TPD benefits from August 5, 2013, through October 18, 2013.

I affirm the deputy commissioner's order that pursuant to rule 876 IAC 4.33, defendant is taxed with claimant's $100.00 filing fee and the $273.00 charge from Carma Mitchell, M.S., for her vocational assessment and report.

I affirm the deputy commissioner's finding that claimant is not entitled to reimbursement from defendant pursuant to Iowa Code section 85.39 for Dr. Bansal's IME charge. In DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015), the Iowa Supreme Court held that an employee can obtain an IME at the employer's expense only if an evaluation of permanent disability has been made by an employer-retained physician. The record in this case shows there was no impairment rating from any physician chosen by defendant when claimant was evaluated by Dr. Bansal. There also is no evidence claimant obtained defendant's consent to the IME, nor did defendant agree to pay the cost of the IME. As such, claimant cannot recover the cost of Dr. Bansal's IME from defendant under section 85.39.

I reverse the deputy commissioners order that pursuant to rule 876 IAC 4.33, defendant is taxed with $2,625.00 for Dr. Bansal's portion of his IME fee attributed to "Record Review and Report." The deputy commissioner's order in that regard is contrary to the supreme court's literal interpretation of Iowa Code section 85.39 contained in DART. The DART decision holds that only the cost associated with the preparation of a written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. See DART, 867 N.W.2d, at 846-847. Under DART, defendant in this case would only have to pay the cost of preparing the IME report. Dr. Bansal's IME invoice does not qualify for reimbursement under DART because Dr. Bansal did not break down what amount was charged specifically for "record review" and what amount was charged for the written report itself. Therefore, no portion of Dr. Bansal's IME charge can be taxed as a cost under rule 876 IAC 4.33.

With regard to the issues which the deputy commissioner failed to address in the arbitration decision, whether claimant is entitled to penalty benefits and whether defendant must restore claimant's vacation/sick/PTO time for alleged partial days missed from work to attend authorized medical appointments, I provide the following analysis:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant asserts that because claimant did not file an application for rehearing pertaining to the issues of penalties and whether defendant must restore claimant's vacation/sick/PTO time for alleged partial days missed from work to attend authorized medical appointments, those issues are waived on appeal. Defendant cites no legal authority to support its position. I find defendant's contention is without merit. See, e.g., Staff Management v. Jiminez, 839 N.W.2d 640, 647-648 (Iowa 2013) in which it was held the final agency action in a worker's compensation case is not the deputy's decision, but the decision of the workers' compensation commissioner. The court held a party preserves error on an issue before an agency if the party raises the issue in the agency proceeding before the agency issues a final decision and both sides have had an opportunity to address the issue. See also JBS Swift & Company v. Ochoa, 885 N.W.2d 218 (Iowa App. 2016) (Table of Unpublished Decisions), quoting Jiminez and concluding that error is preserved as long as an issue is raised at the agency level before the commissioner issues a final agency decision. In this case, claimant raised these issues at both the hearing level and on appeal to the commissioner. Both sides have had the opportunity to fully address these issues both at hearing and on appeal. Therefore, claimant did not waive these issues by failing to file an application for rehearing and these are properly raised by claimant on appeal.

With regard to the vacation/sick/PTO time issue, claimant testified at hearing that if the deputy commissioner ordered defendant to restore any PTO time used for authorized medical care, she would "be able to sit down with the people in the personnel department and sort out the dates of PTO that were taken for authorized medical care" when claimant should have been compensated pursuant to Iowa Code section 85.27(7) (Hearing Transcript pp. 42-43) Such a request by claimant is entirely speculative in nature and is not based on any facts documented in the record. For claimant to satisfy her burden of proof on this issue, she would need to obtain documentary evidence before the arbitration hearing from defendant through the discovery process to introduce into evidence at the hearing a list of dates and the number of hours she contends she used PTO when she should have been compensated pursuant to section 85.27(7). Because claimant failed to do this, she failed to carry her burden of proof on this issue and her request to "to sit down with the people in the personnel department" to construct the necessary evidence after the hearing to support her claim is specifically rejected.

Claimant asserts she is entitled to penalties for alleged unreasonable delays in the payment of TPD benefits and PPD benefits.

With regard to the claim for a penalty for alleged unreasonable delay in the payment of TPD benefits, because it was found by the deputy commissioner and it has been affirmed on appeal that claimant failed to prove entitlement to TPD benefits, no such penalty can be assessed.

With regard to whether a penalty should be assessed for late payment of PPD benefits in this case, in Christensen v. Snap-on Tools Corp., and Robbennolt v. Snap-on Tools Corp, the Supreme Court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. [Iowa Code § 86.13 (2015).] A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen, 554 N.W.2d at 260.
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> The Supreme Court has stated:
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> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13 [2015]. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
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> (4) For the purpose of applying section 86.13, the benefits that are under paid as well as late-paid benefits are subject to penalties, unless the

> employer establishes reasonable and probable cause or excuse. [Iowa Code § 86.13 (2015);] Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).
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> If we were to construe [Iowa Code § 8 Iowa Code § 86.13 (2015)] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid. Id.
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> (5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.
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> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
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> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502, 504-5 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d at 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa App. 1999); Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Gilbert v. USF Holland, Inc., 637 N.W.2d 194, 199 (Iowa 2001). Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Id.

In this case, claimant contends that establishment of an MMI date may have some impact as to when PPD benefits may have been owed. (Claimant's Appeal Brief, p. 36) However, the first physician to address MMI was Dr. Bansal. His report is dated August 31, 2015, and it was served just before the case preparation completion date for the initially scheduled hearing date of October 7, 2015. (Ex. R, p. 99) This case was then continued and the hearing was rescheduled for April 8, 2016.

In July 2015 claimant was still receiving treatment from Dr. Spellman. Claimant was also working and she was earning her usual hourly wage. Dr. Spellman's treatment included changes in medication, including some to address symptoms that appeared unrelated to the low back and right leg pain symptoms which claimant had been consistently reporting. (Ex. 7, p. 97) Claimant also amended her petition to allege that her left leg and foot were affected by the work injury. Defendant investigated that issue. (Ex. 7, pp. 100-101)

On September 16, 2015, Dr. Spellman issued a report advising claimant had reached MMI as of Dr. Spellman's most recent evaluation of claimant on September 9, 2015, but Dr. Spellman advised he would not provide a permanent impairment rating. (Ex. 7, p. 105, Ex. D, p. 49)

However, Dr. Spellman did opine that he did not believe any new permanent restrictions were required beyond those in place prior the injury, which occurred on August 1, 2013. That opinion created the argument as to whether the addition of functional impairment alone provides a basis for entitlement to industrial disability benefits.

Defendant then had claimant undergo an IME with Dr. Kuhnlein on November 23, 2015. (Ex. A) Dr. Kuhnlein's report was issued on December 30, 2015, and that report was forwarded to claimant's attorney on January 13, 2016. (Ex. N, p. 85) In that report, Dr. Kuhnlein provided an impairment rating. While his opinion with regard to restrictions was different than Dr. Spellman's opinion, (Ex. A, pp. 20-22) it left open a fairly debatable issue as to whether claimant's level of functioning had changed as a result of the work injury.

On January 13, 2016, in the letter to claimant's attorney that was sent with Dr. Kuhnlein's report, defense counsel referenced the issue of whether claimant's level of physical functioning had changed as a result of the work injury. Defense counsel indicated defendant would make a voluntary payment of 25 weeks of PPD benefits if claimant would agree that such a payment would not constitute an admission that claimant sustained industrial disability as a result of the work injury. (Ex. N, p. 85) When claimant's attorney did not respond to defendant's proposal, defendant went ahead on January 25, 2016, and issued a voluntarily payment of 25 weeks of PPD benefits, with interest in the amount of $1,434.00 through January 28, 2016, with the commencement date for the payment being September 12, 2014, which was the last day claimant was medically excused from work. (Ex. N, p. 87)

Because Dr. Spellman, the authorized treating physician did not indicate claimant was at MMI until September 9, 2015, and he indicated there were no additional work restrictions caused by the work injury, defendant had a good faith basis for not paying PPD benefits until they received Dr. Kuhnlein's IME report. That report was issued on December 30, 2015, and it was forwarded to claimant's attorney on January 13, 2016. Defendant then offered a concession of PPD payments to claimant's attorney on January 13, 2016. When claimant's attorney did not respond to the offer, defendant went ahead and issued the voluntary payment of PPD benefits, with interest, on January 25, 2016. Based on this chronology, I find defendant did not unreasonably delay payment of PPD benefits and I find claimant is not entitled to a penalty for an unreasonable delay of PPD benefits.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 22, 2016, is MODIFIED as follows:

Defendant shall pay the claimant two hundred (200) weeks of permanent partial disability benefits commencing September 12, 2014, at the weekly rate of five hundred thirty-eight and 14/100 dollars ($538.14).

Defendant shall receive a credit for all benefits previously paid.

Defendant shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of three hundred seventy-three and no/100 dollars ($373.00), 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), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 13th day of April, 2018.

Joseph S. Cortese II

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WORKERS' COMPENSATION
COMMISSIONER

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