BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 07 2018
WORKERS' COMPENSATION

MARTY NOLEN,	:	File No. 5057860
Claimant,	:	
vs.	:	ARBITRATION
MATHESON POSTAL SERVICES, INC.,	:	DECISION
Employer,	:	
XL INSURANCE AMERICA, INC.,	:	Head Note Nos.: 1803, 2907, 4000.2
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Marty Nolen, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Matheson Postal Services, Inc., as the employer and XL Insurance America, Inc., as the insurance carrier. Hearing occurred before the undersigned on December 13, 2017, in Des Moines.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision. No factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 19, which were received without objection. Defendants offered Exhibit A, which was excluded upon an evidentiary objection asserted by claimant. Claimant testified on his own behalf and was the only witness called to testify.

Counsel for the parties requested an opportunity to submit post-hearing briefs. Their request was granted. The parties filed post-hearing briefs. Claimant's brief was filed on January 22, 2018, which represents the date when this case was considered fully submitted to the undersigned.

ISSUES

1. The extent of claimant's entitlement to permanent disability benefits.

2. Whether penalty benefits should be awarded for an alleged unreasonable delay of temporary partial disability benefits.

3. Whether costs should be assessed against either party.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Marty Nolen is a 44-year-old gentleman, who resides in Des Moines, Iowa. Mr. Nolen has a high school diploma and earned an associate's degree in liberal arts in 2000. He continued his education and was approximately 40 credit hours short of obtaining a bachelor's degree.

However, claimant had a family while attending college and was forced to drop out of college to earn a living to support his family. Mr. Nolen has never returned to complete his education, but continues to express an interest in returning to college to obtain his bachelor's degree with a French major. He also expresses interest in becoming an interpreter, or translator.

After leaving college, Mr. Nolen obtained appropriate certifications and became a bus driver. He worked as a bus driver from 2002 until 2007.

Mr. Nolen began working as an over-the-road truck driver and was employed with various employers from 2007 until 2010. In 2010, claimant began employment with Matheson Postal Services, Inc. Having passed pre-employment physical testing, he again started working for Matheson driving a semi over the road. However, in 2015, he transferred to Des Moines and began driving a local route between East Des Moines and Urbandale.

Unfortunately, on February 12, 2016, Mr. Nolen sustained a low back injury. He reported the injury within a few days and the employer accepted the claim.

The employer sent claimant to an occupational medicine physician. He was subsequently referred to an orthopaedic back surgeon, Todd J. Harbach, M.D., and later to a pain specialist, J. Wesley Rayburn, M.D. Numerous conservative treatment options were attempted for claimant, including physical therapy, medications, epidural steroid injections, trigger point injections, medial branch blocks, and radiofrequency ablations. Most of the conservative care provided little to no relief. Some of the more invasive procedures provided temporary relief. However, claimant continues to experience symptoms in his low back and down his left leg. He has been judged to not be a surgical candidate for his injuries.

Mr. Nolen was off work from February 12, 2016 through April 30, 2016. On May 1, 2016, claimant was released to return to work with restrictions. Beginning on

May 1, 2016, the employer assigned Mr. Nolen to perform light duty work at Habitat for Humanity's Restore facility in Des Moines. Mr. Nolen agreed to perform this employment and the employer paid him his regular wages for up to 40 hours of work at the Restore per week. However, Mr. Nolen was working 52 to 54 hours per week prior to his work injury. The employer did not contemporaneously pay Mr. Nolen temporary partial disability benefits during his light duty work at the Restore.

Mr. Nolen worked at the Restore from May 1, 2016 through February 5, 2017. Claimant achieved maximum medical improvement on November 20, 2017. The employer no longer offered temporary, light duty work through the Restore or any other employment opportunities after February 5, 2017. Ultimately, the employer terminated Mr. Nolen's employment in June 2017. Mr. Nolen has not worked since his last day at the Restore in February 2017.

Unfortunately, the employer did not pay Mr. Nolen temporary partial disability benefits during his light duty assignment. Claimant gave notice of his claim for temporary partial disability benefits via counsel's correspondence dated August 19, 2016. (Exhibit 19, page 184) Claimant specifically requested explanation of defendants' basis for delaying, or denying, temporary partial disability benefits. Defendants did not provide a responsive explanation of their basis for delaying, or denying, claimant's request for temporary partial disability benefits.

Nevertheless, defendants did not pay temporary partial disability benefits between May 1, 2016 and February 5, 2017. In fact, defendants did not pay the temporary partial disability benefits owed until the eve of trial in December 2017. I find that claimant proved a delay in payment of temporary partial disability benefits. I find that defendants did not establish they had a reasonable basis to deny or delay payment of temporary partial disability benefits during the period of claimant's light duty work at the Restore. Similarly, I find that defendants did not contemporaneously convey their basis for delay, or denial, of temporary partial disability benefits to claimant, even though claimant specifically requested such clarification.

The record does not contain evidence of prior penalty awards against this employer or the insurance carrier. However, the record establishes a long period of delay of benefits without reasonable justification or cause.

As noted above, Mr. Nolen achieved maximum medical improvement on March 20, 2017. (Exhibit 7, p. 93) Dr. Harbach opined that Mr. Nolen sustained a five percent permanent impairment of the whole person as a result of this work injury. (Exhibit 7, p. 95) Dr. Harbach also assigned permanent work restrictions, which include limiting lifting to 25 pounds on an occasional basis. (Exhibit 7, p. 93)

Mr. Nolen sought an independent medical evaluation, performed by Jacqueline M. Stoken, D.O. on June 28, 2017. (Exhibit 10) Dr. Stoken opined that claimant sustained an eight percent permanent impairment rating and imposed permanent work

restrictions that are similar to those identified in a functional capacity evaluation and adopted by Dr. Harbach. (Exhibit 10, p. 167)

Dr. Harbach noted some positive Waddell's signs. (Exhibit 7, p. 28) Dr. Harbach also reviewed claimant's surveillance video and indicated that, based on activities demonstrated by claimant in the surveillance, he was capable of more than he reported to Dr. Harbach. (Exhibit 7, p. 36) It does not appear that Dr. Stoken reviewed the surveillance, and she provided no comments to address the prior Waddell's findings or Dr. Harbach's comments about the surveillance. I find Dr. Harbach's opinions to be more convincing for this reason and find that claimant has only proven a five percent permanent impairment rating of the whole person as a result of this work injury.

Despite the Waddell's findings and surveillance evidence, I find that Mr. Nolen credibly testified that he could not return to work as either a bus driver or as a truck driver, and his valid functional capacity evaluation similarly suggests that he could not return to these types of employment. I find that it is not realistic that claimant could return to any of his former employment positions. In spite of losing his prior employment possibilities, claimant remains an optimist about his future employment opportunities and testified about his efforts to find alternate employment.

Mr. Nolen, without assistance from defendants, is investigating and attempting to obtain training to become a CNC operator. He believes he likely could perform this employment task and is excited to perform this type of work. Mr. Nolen has woodworking skills and demonstrated at Restore that he is quite mechanically inclined. Certainly, it appears that Mr. Nolen retains skills for which employment likely remains possible.

Claimant testified that he continues to have significant symptoms in his low back and down his left leg. Claimant's testimony was generally credible. It is noted that some medical providers identified positive Waddell's signs, suggesting potential over-reporting of symptoms. It is also noted that the surveillance report details activities that claimant did not readily concede in his deposition and trial testimony, such as woodworking tasks, bending, and running errands. Claimant may exaggerate his symptoms and downplay his abilities to some extent. However, he was credible and it is accepted that he has ongoing symptoms and that he will suffer increased symptoms when he is physically active.

Defendants point out an incident that occurred during the arbitration hearing in which claimant knocked over a drink he brought to the hearing. After his foot knocked over the drink, claimant bent down very quickly and then squatted to try to pick up the drink and start cleaning the mess. Claimant's quick reactions certainly demonstrate he retains the ability to move, bend, squat, and react quickly, as necessary. However, the incident was perhaps not quite as dramatic or telling as depicted by defendants in their post-hearing brief.

Certainly, the incident demonstrated claimant remains capable of moving quickly, bending, squatting, and taking actions as necessary. On the other hand, claimant was not able to immediately stand back up after the incident. He took an extended period of time to return to a standing position after he had bent down and squatted. Claimant appeared to be in pain after the incident occurred. It appeared that the incident did cause an increase in claimant's low back symptoms. Claimant's reaction appeared to be just a natural physical reaction that a person would have to such an incident. His actions thereafter appeared to be legitimate and appeared to demonstrate an increase in symptoms and difficulties in returning to a standing position.

Therefore, while it was an interesting event that appeared a bit "out of character" for how claimant acted during the initial parts of the hearing, claimant did appear to experience an increase in symptoms after undertaking the quick maneuvers. I place less significance on this event than defendants urge. In fact, the incident occurred because claimant was attempting to stand after sitting during questioning, something he did a few times during the trial, presumably to relieve increasing symptoms in his low back and leg.

In his post-hearing brief, claimant concedes that he is not permanently and totally disabled. Nevertheless, claimant has lost his employment with this employer. He has lost the ability to return to his former employment opportunities and is forced to investigate and pursue other lines of work. I find that claimant has proven he sustained a moderate loss of future earning capacity as a result of the February 12, 2016 low back injury at work.

Considering claimant's age, the situs and severity of his injuries, his permanent impairment rating, permanent restrictions, inability to return to past relevant employment, opportunities for future training and employment, his educational background, motivation, and all other factors of industrial disability, I find that Mr. Nolen has proven he sustained a 45 percent loss of future earning capacity as a result of his February 12, 2016 work injury.

CONCLUSIONS OF LAW

The parties stipulate that claimant sustained an injury that arose out of and in the course of his employment on February 12, 2016. The parties stipulate that the injury caused permanent disability and that the permanent disability should be compensated as an industrial disability. (Hearing Report)

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Having considered claimant's age, the situs and severity of his injuries, his permanent impairment, permanent restrictions, ability to return to gainful employment, his motivation level, educational background, employment history, and all other industrial disability factors identified by the Iowa Supreme Court, I found that claimant sustained a 45 percent loss of future earning capacity. This entitles claimant to a 45 percent industrial disability award, or 225 weeks of permanent disability benefits. Iowa Code section 85.34(2)(u). Pursuant to the parties' stipulations, permanent partial disability benefits shall commence on March 21, 2017. (Hearing Report)

The second disputed issue is whether penalty benefits should be assessed against defendants for their allegedly unreasonable delay in payment of temporary partial disability benefits. If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount

unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

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. 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. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In this case, the parties ultimately agreed that claimant was entitled to temporary partial disability benefits from May 1, 2016 through February 10, 2017. However, defendants did not pay those temporary partial disability benefits until the eve of trial in December 2017. Therefore, I found that claimant proved a delay in payment of benefits.

I found that defendants did not offer a reasonable excuse for the delay in payment of temporary partial disability benefits. Iowa Code section 86.13(4)(b)(2). Defendants did not contemporaneously convey their bases for delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). In this case, defendants clearly had the information necessary to calculate and pay temporary partial disability benefits as they accrued. Defendants assigned claimant to the light duty position and knew that they were paying claimant for 40 hours per week, rather than his typical 52-54 hours per week in his regular position.

Moreover, claimant gave notice of his right to temporary partial disability benefits and inquired about defendants' basis for delaying, or denying, those benefits. There is no evidence in this record that defendants offered any basis, or justification, for their

delay in payment of these benefits. There is no evidence of past penalty benefits in this record. Nevertheless, the lengthy delay beginning in May 2016 and continuing until December 2017 justifies a significant penalty.

The total amount of temporary partial disability benefits delayed by defendants was $11,393.00. Iowa Code section 86.13 permits assessment of a penalty up to 50 percent of the amount delayed. Having considered the purposes of the penalty benefit statute, I conclude that a penalty in the amount of $5,500.00 is justified under this set of facts.

Finally, claimant also seeks assessment of his costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant has prevailed on all disputed issues. Therefore, I conclude that it is appropriate to assess his costs in some amount.

Claimant seeks assessment of his filing fee ($100.00). This is a reasonable request and is assessed pursuant to 876 IAC 4.33(7).

Claimant seeks assessment for the cost of service of his original notice and petition. Again, this is a reasonable request. Claimant's service cost ($12.72) is assessed pursuant to 876 IAC 4.33(3).

Finally, claimant seeks the cost ($197.43) of his deposition transcript. Claimant's deposition transcript was submitted as a joint exhibit. Therefore, I conclude that the claimant's cost is taxable and is taxed pursuant to 876 IAC 4.33(2). In totality, I conclude it is appropriate to tax claimant's costs totaling $310.15.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing on March 21, 2017, at the rate of eight hundred fifty and 90/100 dollars ($850.90) per week.

Defendants shall pay all accrued benefits in lump sum with interest pursuant to Iowa Code section 85.30.

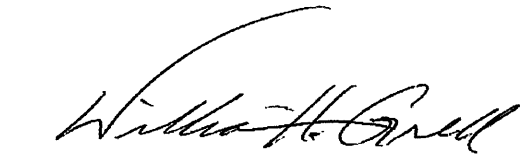
Defendants shall be entitled to credit for all benefits paid to date.

Defendants shall pay claimant five thousand five hundred dollars ($5,500.00) in penalty benefits.

Defendants shall reimburse claimant's costs totaling three hundred ten and 15/100 dollars ($310.15).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 7th day of March, 2018.



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WHG/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.