BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| RANDY BONDE,<br><br>Claimant,<br><br>vs.<br><br>PRO COOPERATIVE,<br><br>Employer,<br><br>and<br><br>NATIONWIDE AGRIBUSINESS,<br><br>Insurance Carrier,<br>Defendants. | File No. 5054089<br><br>APPEAL<br><br>DECISION<br><br>Head Note Nos.: 1100, 1108, 1802, 2500, 4000 |

FILED
FEB 14 2019
WORKERS' COMPENSATION

Defendants Pro Cooperative, employer, and Nationwide Agribusiness, insurer, appeal from an arbitration decision filed on August 24, 2017.

On February 6, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

This case originally proceeded to hearing on May 24, 2016, and it was considered fully submitted in front of the deputy commissioner on July 18, 2016. In the resulting August 24, 2017 arbitration decision, the deputy commissioner determined claimant sustained an injury that arose out of and in the course of his employment with defendant-employer on February 19, 2015. In doing so, the deputy commissioner relied, in part, on the testimony of claimant, who the deputy commissioner found to be a credible witness. The deputy commissioner also determined claimant's ongoing back pain and resulting treatment were related to the February 19, 2015 work injury.

The deputy commissioner found claimant had been in a healing period since February 23, 2015, and remained in a healing period at the time of the hearing.

Lastly, the deputy commissioner determined claimant was entitled to penalty benefits in the amount of $10,000 for defendants' failure to perform a reasonable investigation or demonstrate reasonable excuse for their denial of claimant's claim.

On appeal, defendants argue the deputy erred in determining claimant sustained an injury that arose out of and in the course of his employment. In the alternative, defendants argue claimant is not entitled to any temporary total disability (TTD) or healing period (HP) benefits, that claimant's back surgery was not reasonable and necessary or causally connected to claimant's work injury, and that claimant is not entitled to penalty benefits.

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

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, the proposed arbitration decision filed on August 24, 2017 is affirmed in its entirety with additional findings and analysis.

The threshold issue to be addressed on appeal is whether claimant sustained an injury on February 19, 2015 that arose out of and in the course of his employment with defendant-employer. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in their entirety. More specifically, some of the findings by the deputy commissioner regarding whether claimant sustained a work-related injury involved claimant's credibility, particularly because claimant's injury was unwitnessed. The deputy commissioner found claimant to be credible. While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly made, of the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed claimant's credibility in this matter.

Having decided claimant sustained an injury that arose out of and in the course of his employment on February 19, 2015, the next issue to be addressed on appeal is whether claimant is entitled to TTD/HP benefits. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue with the following additional findings and analysis:

Defendants argue claimant is not entitled to TTD/HP benefits because he had no doctor-imposed restrictions for most of the period during which benefits were sought. Defendants also argue claimant could have performed substantially similar work when he had doctor-imposed restrictions and that he refused offers of suitable work.

Defendants are correct that the only period during which claimant had explicit doctor-imposed work restrictions from a treating physician was from April 27, 2015 through June 2, 2015, when claimant was treating with Jeffrey T. Luna, M.D. (Exhibit 4) However, a closer review of the record reveals claimant's treating physicians believed claimant was not medically capable of working.

When claimant presented to the chiropractor on February 23, 2015, which was also the first day he missed work, he reported 10/10 pain, which was labeled as "excruciating pain." (Ex. 1, p. 1) Claimant reported "very high" pain two days later. (Ex. 1, p. 3)

The notes from claimant's February 25, 2015 appointment with Dustin Smith, M.D., state, "He fell on 2/19 [a]nd has hurt since then with sciatica pain on the left. Not sleeping. Can't work." (Ex. 2, p. 3) (emphasis added) Dr. Smith's notes do not specifically impose formal work restrictions, but there is nothing in his record to suggest he doubted claimant's statement that he could not work.

Claimant's belief that he could not work is also substantiated by Dr. Luna's note from claimant's April 27, 2015 appointment: "The patient has been off of work for 9 weeks now. With regards to work restrictions, I'm allowing the patient to return to work on modified restrictions." (Ex. 4, p. 3) (emphasis added) This suggests Dr. Luna believed it was appropriate for claimant to be off work prior to the April 27, 2015 appointment.

Claimant was under Dr. Luna's restrictions (which will be addressed below) until he began treating with David Beck, M.D., on June 3, 2015. In his notes from that initial appointment, Dr. Beck noted claimant had "excruciating left leg pain" that was "to the point that he can't work." (Ex. 7, p. 1) In a chart note dated October 21, 2015, Dr. Beck noted claimant "continues to be off work because of severe pain." (Ex. 7, p. 3) Then, on November 18, 2015, he indicated claimant "is unable to work," and surgery was scheduled. (Ex. 7, p. 4)

However, due to insurance issues, claimant never pursued the surgery recommended by Dr. Beck. Instead, claimant began treatment with Lynn Nelson, M.D., in February of 2016, where claimant continued to report "severe pain." (Ex. 9, p. 1) While Dr. Nelson did not specifically address work restrictions, he knew claimant was unemployed, and he was hesitant to get involved with claimant's workers' compensation claim. (See Ex. 9, p. 10) Thus, I find the absence of explicit work restrictions in Dr. Nelson's note does not equate to a full-duty release without restrictions.

In fact, during claimant's course of treatment with Dr. Nelson, claimant was evaluated by Jacqueline Stoken, D.O., for purposes of an independent medical examination (IME), and Dr. Stoken opined claimant was "unable to work." (Ex. 10, p. 8) This is consistent with Dr. Beck's comment from his November 18, 2015 chart update, claimant's persistent complaints of severe pain from February 23, 2015 through the date of hearing, and claimant's testimony that he is not capable of working. (See Tr., pp. 50, 112)

Through their actions (or, more appropriately, inaction), claimant's supervisors also assented to claimant's inability to work after February 23, 2015. Claimant called defendant-employer on February 23, 2015 to inform them that he had injured himself, was unable to work, and was going to go to the chiropractor. (Ex. 18, p. 8; Tr., pp. 65-

66) From that point on through his termination, claimant regularly called defendant-employer to update them on his treatment. (Tr., pp. 67-68, 72) Although claimant was off work without a doctor's note, defendant-employer never requested a doctor's note, offered to send claimant to an employer-retained physician, or told claimant his job was in jeopardy by not coming in to work without work restrictions. (Tr. pp. 69, 72, 136; Ex. 18, p. 3 [Schall Deposition Tr., p. 12]) I also find no evidence in the record to substantiate defendants' claims that they offered claimant any work after February 23, 2015. By allowing claimant to continue to remain off work without submitting doctors' notes and without any warning or threat of punishment (until his sudden termination), it appears defendant-employer also believed claimant was incapable of working after February 23, 2015.

For these reasons, I agree with the deputy commissioner that claimant was unable to work at the time of hearing and had been continuously incapable of working since February 23, 2015. I acknowledge William Boulden, M.D., opined otherwise, but for the reasons set out by the deputy commissioner, I reject the opinions of Dr. Boulden. I also acknowledge that on April 27, 2015, Dr. Luna indicated claimant was capable of working in a modified capacity. Claimant, however, has consistently and continuously reported severe pain and his inability to work to his treating physicians, but Dr. Luna was the only physician to affirmatively recommend a return to work. Dr. Luna's opinion is the outlier. Dr. Beck, who was the first physician to treat claimant after Dr. Luna, noted claimant's pain was to the point that he could not work. This is consistent with the notes of Dr. Smith, who treated claimant just before he was transferred to Dr. Luna's care. For these reasons, despite Dr. Luna's recommendation for claimant to return to modified work from April 27 to June 2, 2015, I rely instead on Dr. Beck and Dr. Stoken who indicated claimant was unable to work due to his pain.

I therefore find claimant's first day of disability was February 23, 2015, and that claimant never returned to work and was never medically capable of returning to substantially similar employment after that point through the date of hearing. Given that claimant underwent surgery just after the hearing, I also find claimant was not yet at maximum medical improvement (MMI) at the time of the hearing.

Healing period benefits are owed from the first day of disability until the first factor of Iowa Code section 85.34(1) is met. The factors are whether (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code § 85.34(1).

Similarly, temporary total disability benefits are owed until an employee returns to work or is medically capable of returning to substantially similar employment. Iowa Code § 85.33(1).

In this case, the parties do not dispute the fact that claimant never returned to work, and I found claimant had not reached MMI at the time of the hearing. The real

fighting issue is whether claimant was medically capable of returning to substantially similar work after February 23, 2015.

Generally, without explicit doctor-imposed restrictions, it is difficult for a claimant to satisfy his burden to prove his continued entitlement to TTD/HP benefits. The facts of this case, however, are an exception. Claimant credibly and consistently reported to his doctors that he had severe pain that left him unable to work, but with the exception of Dr. Luna, none of those doctors suggested that he return to work. In fact, Dr. Beck and Dr. Stoken opined that claimant could not return to work. Further, based on defendant-employer's acquiescence, claimant believed he could remain off work without doctor-imposed restrictions so long as he continued to keep his supervisors updated. In fact, up until claimant's sudden termination, defendants' actions suggested they also believed claimant was incapable of working. For these reasons, I found claimant was not medically capable of returning to substantially similar employment starting on February 23, 2015 and extending through the date of hearing. Thus, like the deputy commissioner, I conclude claimant is entitled to a running award of TTD/HP benefits starting on February 23, 2015.

Iowa Code section 85.33 also provides that a claimant shall not be compensated with TTD/HP benefits if he refuses an offer of suitable work. Iowa Code § 85.33(3). Like the deputy commissioner, I found defendants never offered claimant suitable work, meaning there could have been no refusal. Instead, defendants acquiesced to claimant being off work without doctor-imposed restrictions. I therefore conclude claimant was not precluded from receiving temporary benefits due to a refusal of suitable work.

The deputy commissioner's findings, conclusions and analysis regarding claimant's entitlement to a running award of TTD/HP benefits are therefore affirmed with my additional findings and analysis.

The next issue to be addressed is whether defendants are responsible for claimant's surgery with Dr. Nelson, which was performed just days after the hearing. Defendants argue the surgery was not reasonable and necessary and not causally related to claimant's work injury.

On June 6, 2016, Dr. Nelson performed an L3-L4 central and lateral decompression with foraminotomies for purposes of treating claimant's spinal stenosis. (See Ex. J) Defendants rely on Dr. Bouldon, who opined that claimant's spinal stenosis was not caused by or substantially aggravated by claimant's work injury. (Ex. J) Because Dr. Bouldon believed claimant's spinal stenosis was not caused by or substantially aggravated by the work injury, Dr. Bouldon also opined Dr. Nelson's surgery was not due to the work injury. (Ex. J)

Dr. Stoken, on the other hand, opined claimant's work injury materially aggravated claimant's underlying spinal stenosis condition. (Ex. 10, p. 8) For the reasons stated by the deputy commissioner, I reject Dr. Bouldon's opinions and find Dr. Stoken's opinions more persuasive. I therefore find claimant's spinal stenosis condition

was materially aggravated by claimant's work injury. Because Dr. Nelson's surgery was performed to treat claimant's spinal stenosis, I find the surgery was also causally related to claimant's work injury.

Defendants also argue Dr. Nelson's surgery was not reasonable or necessary. Dr. Bouldon opined Dr. Nelson's surgery was not reasonable or necessary because claimant's symptoms did not correlate with objective findings. (Ex. J) Dr. Nelson, however, stated his surgery was "reasonably likely to help a portion of the patient's complaints, but certainly no guarantees could be made." (Ex. 9, p. 10) (emphasis added) Defendants suggest Dr. Nelson's refusal to offer a guarantee negates the reasonableness of the surgery, but I find no merit in this argument. Surgical outcomes are never guaranteed, and Dr. Nelson offered a reasonable likelihood of success. Defendants additionally suggest the fact that this surgery might only help a portion of claimant's symptoms renders it unreasonable. I also find this argument unpersuasive. Claimant has complained of severe pain since February 23, 2015, and his treatment was delayed or derailed several times because claimant was left to pursue the care through his personal insurance. A surgery that alleviated a portion of his symptoms would put claimant in a better position than he was prior to the surgery, and for that reason I find the surgery to be both reasonable and necessary.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. Iowa Code § 85.27. Because I found Dr. Nelson's surgery was to relieve a work-related condition and that the surgery was reasonable and necessary, I conclude defendants are responsible for Dr. Nelson's surgery.

The last issue to be addressed on appeal is whether claimant is entitled to penalty benefits. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in their entirety with the following additional findings and analysis:

It appears defendant-employer actually acknowledged claimant sustained an injury but expected or hoped the claim would go away quickly. (See Tr., p. 139) When it became apparent that claimant's injury would not go away with a few visits to the chiropractor, defendant-employer did nothing further to investigate the claim; instead, they terminated claimant. I agree with the deputy commissioner that defendants failed to demonstrate a reasonable cause or excuse for their denial of the claim.

Defendants argue that even if they had no reasonable basis to deny the claim, they had a reasonable basis to argue no TTD/HP benefits were owed because claimant did not have any explicit doctor-imposed restrictions. However, as mentioned above, defendants essentially consented to claimant being off work without doctor-imposed restrictions. Without a warning or an instruction to the contrary, claimant had no reason to ask his physicians about restrictions. Further, defendants put claimant in the position he was in—seeking treatment with his own doctors through his personal insurance—through their unreasonable denial of the claim. Had defendants accepted the claim,

they could have chosen physicians who were familiar and willing to be involved in the workers' compensation process, and they could have addressed the need for work restrictions. Thus, while I would generally find that defendants' liability for TTD/HP benefits is fairly debatable when a claimant does not have explicit, doctor-imposed restrictions, this case is an exception. Defendants put claimant in an unfortunate position through their unreasonable denial of his claim, and their actions (or inaction) should not be the basis on which they avoid penalty benefits.

65 weeks of TTD/HP benefits accrued between February 23, 2015 and the date of hearing. At the rate of $424.27, this amounts to accrued benefits of $27,577.55. The deputy commissioner's award of $10,000 is roughly 35 percent of the accrued benefits. I conclude this amount is appropriate for both punishment and deterrence. The deputy commissioner's penalty award is therefore affirmed with my additional findings and analysis.

## ORDER

IT IS THEREFORE ORDERED that the arbitration decision of August 24, 2017 is affirmed with my additional findings and analysis.

All weekly benefits shall be paid at the stipulated rate of four hundred and twenty-seven and 27/100 dollars ($427.27).

Defendants shall pay the claimant temporary total or healing period benefits from February 23, 2015, through the date of hearing and continuing until such time as there is a basis for ending such benefits by law.

Defendants shall pay accrued weekly benefits in a lump sum, together with interest from the date of this appeal decision, at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the October 21, 2015, date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay a penalty of ten thousand and 00/100 dollars ($10,000.00).

Defendants shall pay the reasonable medical expenses as set forth in Claimant's Exhibit 24 and 25, subject to the limitations set forth in the arbitration decision.

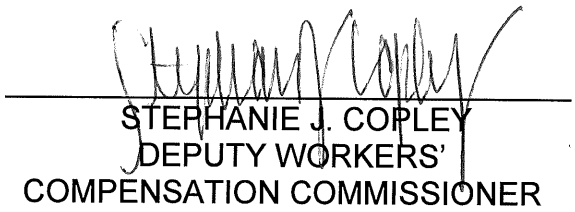
Defendants are responsible for the cost of Dr. Nelson's surgery.

Claimant is entitled to ongoing medical treatment.

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

Defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 14th day of February, 2019.



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