

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES GERLACH,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	File No. 5065208
EAST SIDE JERSEY DAIRY,	:	
	:	A P P E A L
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
FIDELITY AND GUARANTY,	:	
	:	
Insurance Carrier,	:	Head Notes: 1700; 1703; 1803; 5-9999
Defendants.	:	

Defendant East Side Jersey Dairy appeals from an arbitration decision filed on February 13, 2019. Claimant, James Gerlach, responds to the appeal. The case was heard on May 22, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on July 16, 2018.

In the arbitration decision, the deputy commissioner found claimant sustained 45 percent industrial disability as a result of the stipulated work injury which occurred on December 23, 2009. The deputy commissioner also found defendant was entitled to a credit for overpayment in the amount of \$6,972.45 against any future liability for a subsequent injury.

On appeal, defendant asserts the deputy commissioner's award of 45 percent industrial disability is excessive and should be reduced substantially. Defendant also requests an order establishing the availability of their credit for overpayment pursuant to Iowa Code section 85.34(5).

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and

adopt as the final agency decision those portions of the proposed arbitration decision filed on February 13, 2019, that relate to the issues properly raised on intra-agency appeal with additional findings as set forth below.

I find the deputy commissioner provided a well-reasoned analysis of all the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant sustained 45 percent industrial disability as a result of his work injury without additional comment. I affirm the deputy commissioner's finding that defendant is entitled to a credit under Iowa Code section 85.34(5) with additional analysis.

I affirm the deputy commissioner's findings, conclusions and analysis regarding all of the above issues. I provide the following additional analysis for my decision:

At hearing, the parties stipulated that defendant volunteered 215 weeks of PPD benefits at rate higher than the stipulated rate of \$819.20. On appeal, defendant requests an order "establishing" the availability of its credit for overpayment pursuant to Iowa Code section 85.34(5).

In the arbitration decision, the deputy commissioner cited to Iowa Code section 85.34(5) (2017), when discussing defendant's credit for overpayment. The majority of the 2017 amendments to the Iowa Workers' Compensation Act, including amendments to Iowa Code section 85.34, apply only to injuries occurring on or after July 1, 2017. This case involves an injury that occurred on December 23, 2009. Thus, the new provisions do not apply to the matter at hand. On the date of injury, Iowa Code section 85.34(5) provided as follows:

Recovery of employee overpayment. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee. An overpayment can be established only when the overpayment is recognized in a settlement agreement approved under section 86.13, pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid, or pursuant to final agency action in a contested case for a prior injury to the same employee. The credit shall remain available for eight years after the date the overpayment was established. If an overpayment is established pursuant to this subsection, the employee and employer may enter into a written settlement agreement providing for the repayment by the employee of the overpayment. The agreement is subject to the approval of the workers' compensation commissioner. The employer shall not take any

adverse action against the employee for failing to agree to such a written settlement agreement.

Presumably, defendant is concerned with the language in Iowa Code section 85.34(5), providing, "The credit [for overpayment] shall remain available for eight years after the date the overpayment was established."

Claimant asserts the overpayment was "established" when the indemnity payments began on April 3, 2010.¹ By this logic, defendant's credit for a subsequent injury would have expired prior to the filing of the 2019 arbitration decision. Claimant further asserts that because the parties stipulated that the overpayment was retroactive to April 3, 2010, the deputy commissioner was not required to make a finding establishing the commencement of the overpayment. Essentially, claimant asserts that because there was no dispute as to the existence of an overpayment, the overpayment was "established," for purposes of Iowa Code section 85.34(5), by the parties, not the arbitration decision.

Claimant further argues the deputy commissioner was not asked to determine whether an overpayment could be or had been established. While I generally agree the deputy commissioner was not specifically asked to determine whether an overpayment had been established, it is clear from the hearing report and the hearing transcript that the deputy commissioner was asked to address defendant's entitlement to a credit for overpayment. The "Other Issues/Stipulations" section of the Hearing Report provides a dispute as to whether defendant is entitled to a credit under Iowa Code section 85.34(5) for overpayment of PPD "based on number of weeks and/or rate." (Hearing Report, page 2) At hearing, the deputy commissioner provided, "There is an issue as to the credit for an overpayment. [...] There is a claim for credit under 85.34(5) for overpayment of PPD based on both the number of weeks and the rate. That's a disputed issue." (Hearing Transcript, page 5)

Iowa Code section 85.34(5) provides an overpayment can be established "only when the overpayment is recognized," in one of three ways, which in relevant part includes "pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid." It is not necessary for a deputy commissioner to make an express finding as to when a credit for overpayment is established. In most cases, the deputy commissioner confirms that an overpayment exists, and then determines the amount of the credit for overpayment subsequent to an award of PPD benefits. Arguably, such a finding indirectly "establishes" the overpayment, but only after the finding becomes final agency action. See Iowa Code section 85.34(5)

¹ In his appeal brief, claimant contends, "There was neither a dispute over the existence of an overpayment nor the date on which the overpayments began which was April 3, 2010." (Cl. App. Brief, p. 6) However, the evidentiary record is void of any information reflecting the same.

By the clear language of Section 85.34(5), a condition precedent to the establishment of an overpayment is a final agency action in a contested case. At the time the parties completed and signed the Hearing Report, claimant's petition in arbitration was still pending before the deputy commissioner. No award had been made. No settlement documents had been filed or approved. There was no award or settlement in existence to definitively determine the amount of defendant's credit for overpayment under Iowa Code section 85.34(5).

At hearing, the parties stipulated defendant had volunteered 215 weeks of PPD benefits at a rate of \$851.63. (Hrg. Report, p. 2) The parties also agreed to a weekly workers' compensation rate of \$819.20. (Hrg. Report, p. 1) The difference between the amount paid, and the agreed-upon rate, results in an overpayment of \$32.43 per week. At a minimum, this overpayment produces a credit of \$6,972.45. However, the actual or final amount of the overpayment is not definitively established until an award of PPD benefits has been made. Because a determination of PPD benefits had not been made, the amount of credit defendant was entitled to pursuant to Iowa Code section 85.34(5) was not established by the parties' stipulations. The parties' stipulations established an overpayment existed, they did not establish the amount of the overpayment.

For example, in the arbitration decision the deputy commissioner found claimant sustained 45 percent industrial disability as a result of his work injury. This award entitled defendant to an overpayment credit of \$6,972.45. Had the deputy commissioner found claimant sustained 35 percent industrial disability, defendant's credit under Iowa Code section 85.34(5) for overpayment of weekly PPD benefits would have exceeded \$6,972.45. Defendant's credit for overpayment was not fixed prior to the arbitration decision. Similarly, defendant's credit for overpayment, as determined by the deputy commissioner, is not "established" until final agency action.

The deputy commissioner, in the underlying arbitration decision, found that defendant is entitled to a credit of \$6,972.45. This finding is a recognition of defendant's credit and final agency action will "establish" the overpayment for purposes of Iowa Code section 85.34(5). I affirm the deputy commissioner's finding that defendant established entitlement to a credit under Iowa Code section 85.34(5) for an overpayment of PPD in the amount of \$6,972.45 against any future weekly benefits due for a subsequent injury to claimant sustained while still employed by defendant.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 13, 2019, is affirmed in its entirety with the above-stated additional analysis.

Defendant shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing September 10, 2010, at the weekly rate of eight hundred nineteen and 20/100 dollars (\$819.20).

Defendant shall receive credit for two hundred fifteen (215) weeks of permanent partial benefits paid at the weekly rate of eight hundred fifty-one and 63/100 dollars (\$851.63).

Defendant shall have a credit against any new permanent injury indemnity benefits claimant is entitled to receive subsequent to the December 23, 2009, injury in the amount of six thousand nine hundred seventy-two and 45/100 dollars (\$6,972.45).

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of three hundred and no/100 dollars (\$300.00), and defendant shall pay 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 19th day of February, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Nick Avgerinos Via WCES

James M. Peters Via WCES