

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANDREA McBRIDE,

Claimant,

vs.

CASEY'S MARKETING COMPANY,

Employer,

and

EMPLOYER'S MUTUAL CASUALTY
COMPANY,

Insurance Carrier,
Defendants.

FILED

FEB 9 2015

WORKERS' COMPENSATION

File No. 5037617

REMAND

DECISION

Head Note Nos.: 1700, 1703

This case returns to the Iowa Division of Workers' Compensation via a remand from the Iowa District Court in and for Polk County. The remand was issued on April 8, 2014. For ease of understanding, this acting workers' compensation commissioner will trace the procedural history of the case.

The arbitration case was heard in Dubuque, Iowa by a deputy workers' compensation commissioner on October 9, 2012. The case was deemed fully submitted on the same date. The presiding deputy issued the arbitration decision on January 2, 2013. In the arbitration decision, the deputy ruled, among other matters, claimant was entitled to a permanent partial disability in the amount of 40 percent; claimant was in need of future medical care pursuant to Iowa Code section 85.27; and defendants were only entitled to a credit for the overpayment of healing period benefits against any payments made for future work injuries claimant sustained with the same employer.

Defendants filed a notice of appeal on January 22, 2013. Claimant filed a cross-appeal on January 29, 2013. Defendants filed their appeal brief on March 13, 2013. Claimant filed her cross-appeal brief on May 2, 2013. Defendants filed a reply brief on May 22, 2013.

Defendants listed three issues on appeal:

1. Whether claimant sustained an industrial disability;
2. Whether claimant is entitled to additional medical care;
3. Whether defendants are entitled to a credit for the overpayment of temporary total disability (healing period) benefits pursuant to Iowa Code section 85.34(4).

Claimant, in her cross-appeal listed two issues:

1. Whether claimant sustained an industrial disability;
2. Whether the deputy workers' compensation commissioner erred in failing to award penalty benefits pursuant to Iowa Code section 86.13.

On October 7, 2013, the former workers' compensation commissioner affirmed with limited comments on the issue of credit. The commissioner wrote on page 2 of the appeal decision:

Defendants assert on appeal the division has broadened the Supreme Court's holding in Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) in denying a credit for overpayment of temporary disability benefits. Defendants' assertion has previously been addressed and rejected in the recent remand decision of Elmer v. Clayton County Recycling, File No. 5030948 (Remand Dec., Filed September 27, 2013). Defendants' arguments are noted to be consistent with the division's routine credit allowances prior to the Supreme Court's holding in Swiss Colony, Inc. v. Deutmeyer. The credits awarded to Swiss Colony and its insurer against further liability for permanent partial disability to Mr. Deutmeyer, by the division, were rejected by the Iowa Supreme Court. Therefore, defendants cannot be awarded the form of credits that the Supreme Court has expressly determined the division erred in previously granting in situations where employers and insurers overpaid temporary or permanent partial disability benefits. Defendants' argument would require the division to award a credit against further permanent partial disability liability when the same credit was expressly overturned by the Iowa Supreme Court in Swiss Colony, Inc. v. Deutmeyer. As the Supreme Court has held, defendants are entitled to a credit, but the credit is limited to a credit against liability for any future work injury that claimant may suffer. As such, defendants' argument as to the proper form of its credit is denied.

(Appeal Decision, page 2)

On November 7, 2013, defendants filed a petition for judicial review in the District Court of Iowa in and for Polk County. On April 8, 2014, the Honorable Judge Richard G. Blaine, District Court Judge for the Fifth Judicial District of Iowa, issued a ruling on the petition for judicial review.

Judge Blaine, in his ruling, discussed the differences between Iowa Code section 85.34(4) and Iowa Code section 85.34(5). Initially, Judge Blaine cited the two code provisions.

Iowa Code section 85.34(4) reads:

Credits for excess payments. If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, **the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2**, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated. (Emphasis added.)

Iowa Code section 85.34(5) provides in relevant portion:

(5) *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.

The judge also quoted the Iowa Supreme Court case, Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010). Judge Blaine noted in Swiss Colony, Inc. v. Deutmeyer, that Justice Appel wrote:

The plain language of section 85.34(5) directs that the overpayment of any weekly benefits be credited to payments for subsequent injuries...By using a word with an expansive import, we conclude that section 85.34(5) must be interpreted to apply to all overpayments of benefits, including an overpayment of weekly benefits and not simply an overpayment of the entire benefit award. Id. at 137.

(Ruling, p. 14)

Judge Blaine explained why he did not affirm the former workers' compensation commissioner's appeal decision with respect to the issue of credit. Judge Blaine was persuaded by an earlier district court decision issued by the Honorable Judge Douglas Staskal, a district court judge in and for the Fifth Judicial District of Iowa. Judge Staskal authored the case of Clayton County Recycling v. Elmer, No. CVCV009431 *5 (Iowa District Court 2013); File No. 5030948 (Remand Dec., Filed September 27, 2013). Judge Blaine wrote in in his ruling:

Judge Staskal's reasoning began by recognizing that the holding of Swiss Colony "could be reasonably interpreted narrowly as only meaning that an overpayment permanent disability benefits that are being paid on a weekly basis cannot be recovered by reducing future permanency payments for the same injury." Clayton County Recycling v. Elmer, CVCV009431 * 5 (IA Dist. Ct. 2013). Second, Judge Staskal said that Swiss Colony does not even mention section 4, therefore, the decision cannot be taken as an adjudication of the meaning or application of that subsection. Id. Third, Judge Staskal said that the language of subsection 4 "applies exactly and precisely to the circumstances present in this case. That language is more specific than the 'all' payments language of section 5 and, therefore, to the extent there is a conflict between the two provisions, the more specific provision should control." Id. Fourth, Judge Staskal said that the Swiss Colony case being applied to temporary benefits would make subsection 4 meaningless. Id.

For these same reasons, the Court finds that Iowa Code section 85.34(5) and Swiss Colony do not apply to the overpayment of temporary total disability. Rather Iowa Code section 85.34(4) applies to the overpayment of temporary total disability.

(Ruling, pp. 15-16)

The ruling on the petition for judicial review ordered:

IT IS THEREFORE ORDERED that the Petitioners' Application for Judicial Review is DENIED in part regarding the issues raised concerning industrial disability and additional medical care, and GRANTED in part regarding the interpretation and application of Iowa Code section 85.34.

IT IS FURTHER ORDERED that the Iowa Workers' Compensation Appeal Decision is AFFIRMED as to its award of industrial disability to the Claimant and additional medical care and REVERSED as to its interpretation and application of Iowa Code section 85.34 and

REMANDED to the Agency to make a decision consistent with this Ruling and Order.

IT IS FURTHER ORDERED that the costs of this action are assessed two-thirds to the Petitioners and one-third to the Respondent.

(Ruling on Petition for Judicial Review, p. 16)

In light of the order of Judge Blaine, it is the determination of this acting workers' compensation commissioner; defendants shall take credit against any permanent partial disability benefits for all overpayments defendants made to claimant in the form of healing period benefits. Such a remedy for the credit is provided by Iowa Code section 85.34(4) which specifically addresses healing period benefits. To hold otherwise, would render Iowa Code section 85.34(4) utterly meaningless. Section 85.34(4) is a specific section. It is the section that governs in the present case.

ORDER

IT IS THEREFORE ORDERED that the Remand Decision from the Iowa District Court on the Petition for Judicial Review of April 8, 2014 is as follows:

Defendants shall take credit against any permanent partial disability benefits for all overpayments defendants made to claimant in the form of healing period benefits.

The parties shall pay equally the costs of the remand, if any.

Signed and filed this 9th day of February, 2015.



MICHELLE A. McGOVERN
ACTING WORKERS' COMPENSATION
COMMISSIONER

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