BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EVELYN B. ALCORTA,

Claimant,

vs.

BROADLAWNS MEDICAL CENTER,

Employer,
Self-Insured,
Defendant.

File No. 5042157

APPEAL

DECISION

Head Note No.: 1803

Defendant Broadlawns Medical Center appeals from an arbitration decision filed June 9, 2014. Claimant Evelyn B. Alcorta cross-appeals from the arbitration decision. The arbitration hearing was held on September 17, 2013, and this case was considered fully submitted on November 23, 2013, in front of the deputy workers' compensation commissioner.

The deputy commissioner determined that claimant sustained a cumulative injury to her left shoulder arising out of and in the course of her employment with an injury date of November 3, 2011. The deputy commissioner awarded claimant 15 percent industrial disability. The deputy commissioner also awarded Section 86.13 penalty benefits in the amount of $8,250.00. The deputy commissioner also awarded $3,500.00 for the cost of an IME and a report from Jacqueline Stoken, D.O. The deputy commissioner also awarded medical mileage in the amount of $142.84, the filing fee of $100.00 and certified mail expense of $5.75.

On appeal, defendant asserts that claimant alleged only an acute injury and that the deputy commissioner erred in finding that claimant sustained a cumulative injury. Defendant also asserts that the deputy erred in awarding 15 percent industrial disability. Defendant also asserts the deputy erred in awarding the cost of Dr. Stoken's IME and report and in awarding medical mileage.

On cross-appeal, claimant asserts the deputy commissioner erred by not finding claimant sustained a right shoulder injury in addition to the left shoulder injury. Claimant also asserts that the award of 15 percent industrial disability is too low. Claimant also asserts that the deputy commissioner's award of $3,500.00 for Dr. Stoken's IME and report the award of $142.84 for medical mileage should be upheld.

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 of June 9, 2014, filed in this matter that relate to issues properly raised on intra-agency appeal and cross-appeal with the following additional analysis:

The deputy commissioner found Ms. Alcorta sustained a cumulative injury to her left shoulder while working for Broadlawns. At hearing, Ms. Alcorta testified that she reached to put papers in a recycling bin or tray and that this was a repetitive task. (Transcript, p. 24) Defendant argues that claimant's petition filed in this matter did not assert a cumulative injury. Claimant's petition states that the injury occurred when she was "reaching for/lifting items." (Petition, paragraph 4) Based on the face of the pleadings it is not clear if claimant is asserting an acute or cumulative claim. However, the pleadings in this case are sufficient for a cumulative claim.

Rule 876 IAC 4.35 makes the rules of civil procedure applicable to contested cases before the workers' compensation commissioner. Iowa R. Civ. P 1.402(2)(a) states as follows: "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading are required." Iowa R. Civ. P 1.402(2)(b) goes on to allow alternative or hypothetical averments.

Defendants are entitled to only fair notice of the claim and such does not require a pleading of facts. Doerring v. Kramer, 556 N.W.2d 816 (Iowa App. 1996). Specific theories need not be pleaded. Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188 (Iowa App. 1984). Only a short and plain statement of the claim is necessary. Van Meter v. Van Meter, 1983, 328 N.W.2d 338 (Iowa 1983). This is especially true in an administrative agency such as this agency charged with administering a humanitarian compensation system. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 1177, 38 N.W.2d 161, 163 (1949). The key to pleading in an administrative process is nothing more nor less than opportunity to prepare and defend. Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 192 (1968).

Defendant in this case had the opportunity to conduct discovery to determine the specific basis for claimant's assertion as to the date of injury which was pleaded. The defendant could have ascertained the specifics of claimant's claim by conducting discovery either through more thorough interrogatory requests, a deposition, or any other means. Furthermore, there are several places in claimant's medical records where a repetitive injury is specifically mentioned. For example, David Hall, D.O.'s clinical note dated December 2, 2011, states, in pertinent part: "reassessment of her left shoulder injury, due to repetitive work trauma as of November 3, 2011." (Exhibit 4, p. 6) According to this exhibit, defendant's third-party administrator, CCMSI received this record as early as January of 2012; more than nine months before the filing of the arbitration petition. As such, the allegation contained in claimant's petition is found to be sufficient to support the deputy commissioner's finding of a cumulative injury.

With regard to the claim for penalty benefits, defendant argues that liability was fairly debatable and the deputy commissioner's award of penalty benefits was not proper. 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.

Iowa Code 86.13(4), as amended effective July 1, 2009, states:

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
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> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Stephen A. Ash, M.D., defendant's authorized physician, found claimant at MMI on September 7, 2012, for claimant's left shoulder injury. Ex. 2, p. 19. The FCE report was issued on September 25, 2012. Ex. 5, pp.1-9. Dr. Ash adopted the FCE as permanent restriction on March 15, 2013. Ex. 2, pp. 23-25.

Claimant proved she sustained a permanent disability as a result of the November 3, 2011, work injury. Defendant has not paid any permanent disability benefits, and accordingly, claimant has proven a delay in payment of those benefits.

The burden therefore shifts to defendant to establish reasonable or probable cause or excuse for the delay. In order for defendant to establish a reasonable or probable cause or excuse, three criteria must be met. Pursuant to section 86.13(4)(c)(1), defendant, 1) must demonstrate an investigation or evaluation into whether claimant was owed benefits; 2) show the results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits; and, 3) contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Defendant had knowledge that claimant was at MMI as of September 7, 2012. The FCE limited the claimant to light work. Permanent restrictions were recommended by Dr. Ash on March 15, 2013.

The defendant has failed to show it complied with items 2 and 3 above. While claimant has a number of preexisting conditions and was released to return to work at Broadlawns, there is an absence of evidence produced by defendant as to what

reason(s) defendant relied upon to deny benefits. Notably absent from this record is any evidence that defendant contemporaneously conveyed the basis for the denial to the claimant.

No evidence was introduced by claimant to show that defendant has had penalty benefits repeatedly assessed against it. For that reason, I agree with the deputy commissioner that an award of 50 percent of past due benefits is not appropriate. Considering the conduct of the defendant in this case, I agree with the deputy commissioner's finding that a penalty of approximately 25 percent of past due benefits is appropriate. Defendant shall pay a penalty of $8,250.00 [448.26 x 75 = 33,619.50 X 25% = 8,404.87].

Defendant also asserts on appeal that the deputy commissioner erred in awarding reimbursement for Jacqueline Stoken, D.O.'s independent medical examination as a cost. In the arbitration decision the deputy commissioner found that the prerequisites of Iowa Code section 85.39 had not been met and therefore, the expense of Dr. Stoken's IME could not be reimbursed pursuant to section 85.39. However, the deputy ordered the defendant to reimburse the entire amount of the IME as a cost under 876 IAC 4.33. This issue was recently addressed by the Iowa Supreme Court. See Des Moines Area Regional Transit Authority & United Heartland v. Young, No. 14-0231 (Iowa filed June 5, 2015). The DART case is very similar to the present case. In both cases, the claimant obtained an IME report from Dr. Stoken before the prerequisites of Iowa Code section 85.39 were met. The court determined that Iowa Code section 85.39 "is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report." Id. at 14. The court concluded that when the requirements of section 85.39 have not been met "[o]nly the costs associated with the preparation of the written report of Dr. Stoken can be assessed as costs of the hearing." Id. at 16. Therefore, in this case, Ms. Alcorta is only able to recover the costs associated with the preparation of Dr. Stoken's written report. According to Dr. Stoken's invoice, that specific amount is $1,200.00. (Ex. 7, p. 3) Therefore, pursuant to 876 IAC 4.33(6) defendant shall reimburse claimant in the amount of $1,200.00 for the written report of Dr. Stoken.

ORDER

IT IS THEREFORE ORDERED that the June 9, 2014, arbitration decision is AFFIRMED in part and MODIFIED in part as follows:

Defendant shall pay claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of four-hundred forty-eight and 26/100 dollars ($448.26) per week commencing September 7, 2012.

Defendant shall pay a penalty of eight thousand two-hundred fifty and 00/100 dollars ($8,250.00).

Defendant shall pay one thousand two hundred and 00/100 dollars ($1,200.00) of the cost of the medical report prepared by Dr. Stoken.

Defendant shall pay claimant medical mileage of one-hundred forty-two and 84/100 dollars ($142.84).

Defendant shall pay the other costs assessed in the arbitration decision.

Defendant shall pay any past due amounts in a lump sum with interest as provided by law.

Defendant 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.

Defendant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 1st day of July, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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