BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MEK BACCAM, Claimant, vs. ACH FOOD COMPANIES, INC., aka TONE'S, Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	File No.: 5045171 APPEAL DECISION Headnote Nos.: 1801.1, 1803, 4000.1

FILED
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WORKERS' COMPENSATION

Claimant, Mek Baccam, appeals from an arbitration decision filed on October 16, 2015. Defendants ACH Food Companies Inc. a/k/a Tone's, employer, and Sentry Insurance, insurer, resisted the appeal. The case was heard on November 17, 2014, and was considered fully submitted in front of the deputy workers' compensation commissioner on December 15, 2014. The matter was then delegated to the undersigned for a final agency decision.

The deputy commissioner found claimant was entitled to temporary partial disability benefits for the period of June 12, 2012, through July 7, 2012, as well as six point six (6.6) weeks of permanent partial disability benefits commencing July 8, 2012, at the rate of five hundred sixty-five and 75/100 dollars ($565.75). Claimant was also awarded penalty benefits for the late payment of temporary partial disability benefits in the amount of forty percent (40%) of the temporary partial disability benefits owed from June 12, 2012, through July 7, 2012.

Claimant argues that the temporary period should include June 13, 2012; that the amount of temporary benefits owed should be specifically ordered with appropriate interest; that the PPD compensation awarded is not adequate; and that a penalty should be imposed for the delay in the payment of PPD compensation.

Defendants assert 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.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, 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 filed in this matter on October 16, 2015, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant chose to take a vacation day instead of reporting to work which bars him from receiving temporary benefits for June 13, 2012.

I affirm the deputy commissioner's finding that claimant sustained six point six weeks of permanent partial disability benefits commencing July 8, 2012, at the weekly benefit rate of five hundred sixty-five and 75/100 dollars ($565.75).

I reverse the deputy commissioner's finding on the amount of temporary disability owed as well as penalty for the late payment of permanent benefits. I decline to calculate the interest owed on the award. I provide the following analysis for this finding:

FINDINGS OF FACT

I adopt the findings of fact in the proposed arbitration decision and add the following clarifications.

Claimant chose to take a vacation day on June 13, 2012. (Trans. p. 48)

Full-time work for the defendant employer, as defined by the claimant, was forty hours per week. (Trans. p. 50)

Prior to his injury, claimant worked four days a week, ten hours a day. (Trans. p. 19) His pre-injury earnings were $20.21 per hour. (Trans. p. 24; Ex.II, p. 21) He would "sometimes" work overtime on Friday and Saturday. (Trans. p. 19; see also Trans. pp. 40, 66) His light-duty earnings were $17 per hour. (Trans. p. 24; Ex. II, p. 21)

After his injury, from June 14 2012, to June 29, 2012, claimant worked five days a week, eight hours a day. (Trans. p. 50)

Claimant's earning statements for the period ending July 7, 2012, included the following: 64 regular hours at 17.7038; 8 holiday hours at 20.2100; 8 vacation hours at 20.2100. (Ex. II, p. 21)

In the week leading up to claimant's injury, he worked Monday through Thursday for 10 hours per day and Friday for 8 hours. (Ex. II, p. 33)

On the week of his injury, claimant worked the following: Mon (06/11) 8 hours; Tues (06/12) 8 hours; Wed (06/13) 8 hours noted as Pers Adds; Thurs (06/14) 8 hours; Friday (06/15) 8 hours noted as Vac add to OT. (Ex II, p. 34)

The week following his injury, claimant worked the following: Mon (06/18) 8 hours; Tues (06/19) 8 hours; Wed (06/20) 8 hours; Thurs (06/21) 8 hours; Friday (06/22) 8 hours. (Ex II, p. 34)

For the week of June 25, claimant worked the following: Mon (06/25) 8 hours; Tues (06/26) 8 hours; Wed (06/27) 8 hours; Thurs (06/28) 8 hours; Friday (06/29) 8 hours. (Ex II, p. 34)

There are no records that show the daily hours worked for any period after June 29, 2012. (See Ex. II, p. 29) Exhibit II, page 34, appears to show that claimant was paid holiday hours to "OT" on July 4, 2012. (Ex. II, p. 34) There are no vacation hours that appear to be paid during that time period according to the pasted exhibit page. (Ex. II, pp. 34-35) Exhibit II, page 35, identifies that June 13, 2012 was a personal day, consistent with the daily logs of Exhibit II, page 34. Exhibit II, page 35 lists vacation days from February 6, 2012, through May 24, 2012, but no vacation days after May 24, 2012. (Ex. II, p. 35)

CONCLUSIONS OF LAW

First, claimant argues that the deputy commissioner set the temporary benefit period incorrectly by failing to include June 13, 2012. Claimant used vacation hours on June 13, 2012. Upon his return to work the following week, claimant began light duty work. Claimant argues that there was no suitable work offered to him on June 13, 2012, and that he took a vacation day without "any proven knowledge of the consequences" of this action. (See Claimant's Reply Brief, page. 6) Further, claimant argues that the defendants have the burden of proving that there was suitable work offered and in this case the defendants made no such showing. Section 85.33(3) allows for a termination of benefits if the injured worker refuses suitable work and it is the defendant employer's burden to establish the applicability of 85.33(3).

Claimant took vacation on June 13, 2012, and did not present himself to work. There was no evidence that there was not light duty work available. In fact, when claimant arrived to work on Monday, he was placed in a light duty position suitable for his injured status. While there is no direct evidence that the claimant was made a specific offer of suitable work on June 13, 2012, the circumstantial evidence that he took a vacation day of his own volition and was provided suitable work immediately upon his return to employment, is sufficient to satisfy the requirements of 85.33(3). Claimant was not forced to take a vacation day but chose to do so voluntarily.

There was suitable work available for the claimant on June 13, 2012, and he voluntarily elected to take a vacation day instead of presenting himself to his place of employment. Claimant was paid for that vacation day. Wages can be paid in lieu of benefits. Boyd v. Ankeny Comm. Schools, File No. 1225693 (App. June 2003); see also 876 IAC 8.4 which recognizes salary paid in lieu of workers' compensation. In this case, claimant did not go uncompensated for the date of June 13, 2012, by defendant employer. Therefore, claimant is not entitled to an additional payment of temporary partial disability benefits for the date of June 13, 2012.

The parties also disagree as to the amount of the temporary benefit owed. Claimant requests a specific amount be ordered. The proposed arbitration decision ordered the following:

> Therefore, the order with respect to payment of temporary partial disability benefits shall reflect that claimant is entitled to temporary partial disability benefits from June 12, 2012 through July 7, 2012, with the exception of the hours paid on June 13, 2012, as claimant did not present to accept light duty. Claimant is entitled to temporary partial disability benefits based both upon payment of lesser hours and a lesser hourly rate of pay. Claimant's temporary partial disability benefits should therefore be computed at two-thirds the difference between claimant's gross average weekly wage of $932.77 and his actual weekly earnings during the period of June 12, 2012 through July 7, 2012, again with the exception of the hours refused on June 13, 2012.

(Arb Dec. page 14)

However, despite this direct order, the parties find themselves in a dispute. Claimant argues he is entitled to $574.72 in TPD benefits plus interest on unpaid balance after 11-17-14. (Cl. Brief, p. 23) Defendants offer an alternate calculation of $147.07. (Def Reply Brief, p. 9) Claimant maintains that defendants' computations were not preserved in any appeal and therefore their calculations should not be considered. However, in an appeal to the commissioner, the evidence is reviewed de novo. Defendants are not offering new evidence, but rather an argument based on evidence already accepted in the record. A computation or summary of the evidence is not necessarily new evidence (although it can be considered a helpful exhibit).

Claimant's computations include the disallowed date of June 13, 2012, and argue the inclusion of a $20.21/hour workday. Relying on the factual findings, claimant was paid 64 regular hours, 8 holiday hours, and 8 vacation hours for the two week pay period ending on July 7, 2012. The 8 hours of holiday hours are accounted for on the cut and pasted exhibit in Exhibit II, pages 34-35 but the vacation hours are not.

The agency is not comprised of payroll experts that can decipher the excel spreadsheets purported to identify when hours are worked or how an individual is compensated. If any party perceives that there will be a debate over how the amount of benefits are calculated due to a complicated pay scheme, direct testimony should be provided instead of requiring the agency to parse through documents that have no obvious meaning.

As the defendants state, the calculations have to be backed into by piecing together the earnings statements and comparing them to the cut and pasted print out. Despite the lack of evidence pertaining to the purported vacation day, both parties agree that the 8 hours of holiday pay and 8 hours of vacation pay occurred the week of July 2, 2012. (See Claimant's Brief, p. 21; Defendants' Brief, p. 10)

Claimant's calculations for week one include both the injury date and the disallowed vacation day of June 13, 2012. Defendants' calculations are correct in this regard. Claimant is entitled to only a proportional amount of the AWW of $932.77. (Iowa Workers Compensation Manual) Because clamaint's actual earnings exceed the modified AWW, no temporary benefits are owed for Week 1.

For Week 2, defendants' calculations include that claimant was paid $20.210 on June 22, 2012. Claimant argues that claimant was paid only $17.205 for the entire

week. The earnings statement provides claimant was paid 16 hours at the 20.2100 rate. (Ex. II, p. 20) Those 16 hours were accounted for in the week of June 12, 2012, through June 15, 2012.

Thus, week 2 formula by the claimant is correct. Claimant was paid forty hours at the rate of $17.205. However, claimant uses the incorrect average weekly rate of $932.37 instead of $932.77 in the computation. Therefore, claimant is entitled to $932.77-$688.22=$244.15 x 2/3 = $162.77.

Both parties agree on the hours and wage rates for weeks 3 and 4. Defendants use the correct average weekly wage and therefore their calculations are adopted in full. For week 3, claimant is owed $149.75 and for week 4, claimant is owed $123.01.

The total temporary partial benefit owing to claimant is $435.79. Claimant is entitled to interest on any unpaid amounts.

Claimant takes issue with the PPD awarded. Joshua Kimelman, D.O., a board certified surgeon who served as one of the treating physicians opined that claimant's permanent impairment was 1 percent primarily based on the claimant's claimed discomfort, the scar, and loss of sensation. No permanent restrictions were ordered.

Another treating physician, Nicholas Bingham, M.D., concluded that at maximum, claimant sustained a 1 percent impairment but believed it more likely that there was no impairment and offered no restrictions as well.

Claimant's chosen IME provider, Mark Taylor, M.D., found no evidence of gait derangement or muscle atrophy. Claimant exhibited symmetric strength and full range of motion without evidence of weakness. However, because of numbness, Dr. Taylor assigned a 3 percent lower extremity impairment. Dr. Taylor went on to offer additional work restrictions.

Claimant testified that his physical condition was much worse than the treating physicians had concluded. He testified to burning, itching, constant numbness and intermittent tingling. He treats the symptoms with relaxation and daily intake of Tylenol. He also believed he had less energy and a lower ability to exercise. In his brief, claimant argues that reliance on the Guides is inappropriate because it does not take into account non-ratable elements such as fatigue and loss of pain-free function.

Claimant also argued that the hearing deputy exhibited inappropriate bias.

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, the medical records and the subsequent opinions of the treating doctors are more persuasive than claimant's testimony or opinions from Dr. Taylor. The lay testimony is not consistent with the medical records or the objective findings regarding function. The 3 percent lower extremity rating is affirmed.

Claimant also takes issue with the refusal of the hearing deputy to enumerate a specific amount of PPD benefits and interest. It is not only unnecessary to do this, but could also result in greater errors. A decision is rarely issued the day of its writing. Time is taken to ensure that citations to the record and case law are correct. Further, given staff shortages, a decision submitted for processing may not be completed until weeks after the submission date. Therefore, any specific enumeration would be rendered inaccurate by the delay. It is more appropriate to designate the boundaries for a benefit period. In this case, the hearing deputy identified the starting date of the benefit period as July 8, 2012, to continue for six point six (6.6) weeks at the rate of five hundred sixty-five and 75/100 dollars ($565.75) and interest according to Iowa Code section 85.30. This method of award allows for the fewest errors by the agency.

The parties are charged with following the orders herein along with Iowa Code section 85.30.

Finally, the claimant wishes additional penalty benefits for the late payment or underpayment of PPD.

Claimant was paid only 2.2 weeks of benefits at the rate of 1 percent of the lower extremity—the rating provided by Dr. Kimelman.

Iowa Code section 85.13(4)(b) dictates the award of penalty benefits. Defendant has the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty. Defendants plead that they made a timely payment within days of the opinion proffered by Dr. Kimelman.

A reasonable or probable cause or excuse must satisfy the following requirements:

> (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 of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

Dr. Kimelman issued the permanent impairment rating on August 9, 2013. The defendants issued a check for the 2.2 weeks and a letter explaining the reasoning for the payment on August 15, 2013. The payment of 2.2 weeks is not an underpayment. The 2.2 weeks ordered by Dr. Kimelman is a scant 2 percent difference from the 6.6 weeks ordered by claimant's own expert, Dr. Taylor. The payment of 2.2 weeks based on Dr. Kimelman's opinion is not unreasonable.

However, as claimant points out, permanent benefits, if any were due, should have been paid as of July 8, 2012, when claimant was returned to full duty work. Claimant was still treating in July of 2012. He presented to his personal physician, Brandon Madson, M.D., who reassured the claimant that his injury was likely to heal without any long term problems. Dr. Bingham returned claimant to full duty work but also referred him to a course of physical therapy.

Physical therapy discharged claimant on August 20, 2012, recording that claimant had met his goals and had excellent range of motion of the lower leg and that claimant could return to normal functioning of all activities. Claimant denied that he received relief from the treatment.

Claimant returned to Dr. Bingham with further complaints for which Dr. Bingham could find little objective evidence. On September 21, 2012 claimant saw Dr. Kimelman who determined that claimant suffered some nerve damage but that the permanency was "cosmetic and superficial."

During the January 31, 2013, visit, Dr. Kimelman informed the claimant that his injuries would likely take 12 to 18 months to heal. It was not until August 9, 2013, that Dr. Kimelman issued an impairment rating.

During the time period in question, following claimant's return to work, defendants were engaged in a reasonable investigation. At best, claimant was still in a healing period (although he was working full duty without restrictions and therefore not entitled to additional healing period or temporary benefits) and, at worst for the claimant, he was not entitled to any benefits given that Dr. Bingham found him to have normal gait, strength, and function and Dr. Kimelman called the permanent damage cosmetic and superficial.

Thus, the delay was due to a reasonable investigation and evaluation by the employer and were relied upon by the employer to delay the payment. However, there was no contemporaneous communication to the claimant as to why there was no payment of permanent benefits until August 15, 2013, over a year past the end of claimant's entitlement to temporary benefits.

Therefore, claimant is entitled to an additional penalty benefit. Because the primary reason for the penalty benefit is due to the lack of communication rather than a complete dereliction of duty to provide care and treatment, the penalty benefit shall be 5 percent of the late benefits which are the entirety of the permanent benefits owed in this case.

Interest on unpaid penalty benefits is calculated from the final agency decision which is the appeal decision in this case, not the proposed decision by the deputy

workers' compensation commissioner's award. Schadendorf v. Snap On Tools Corp. 757 N.W.2d 330, 339 (Iowa 2008)

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay temporary benefits to claimant in the amount of four hundred thirty-five and 79/100 dollars ($435.79), plus appropriate interest.

Defendants shall pay penalty benefits to the claimant in the amount of 5 percent of the 6.6 weeks of permanent partial disability benefits at the weekly rate of five hundred sixty-five and 75/100 dollars ($565.75).

Defendants shall pay interest on the newly ordered penalty benefits from the date of the appeal decision.

Defendants shall pay unto claimant six point six (6.6) weeks of permanent partial disability benefits commencing July 8, 2012 at the weekly rate of five hundred sixty-five and 75/100 dollars ($565.75).

Defendants shall pay claimant's prior medical mileage expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall reimburse claimant for Dr. Taylor's independent medical evaluation expenses as set forth in the decision.

Defendants shall pay penalty benefits in the amount of forty (40) percent of the temporary partial disability benefits owed from June 12, 2012 through July 7, 2012.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest pursuant to Iowa Code section 85.30 as set forth in the decision.

Defendants shall receive credit for benefits paid.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 in the amount of one hundred fourteen and 74/100 dollars ($114.74) as set forth in the decision.

Signed and filed this 27th day of September, 2017.

JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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