

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARREL D. KRAMER,

Claimant,

vs.

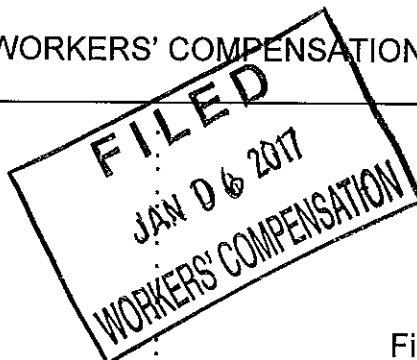
DOHRN TRANSFER COMPANY, INC.,

Employer,

and

AMERICAN ZURICH INS. COMPANY,

Insurance Carrier,
Defendants.



File No. 5052289

REHEARING

DECISION

Claimant filed a 31-page rehearing application (application). On December 29, 2016 the application was accepted with a decision on the merits to follow. This rehearing decision is the decision on the merits.

Claimant raises several issues on rehearing. Those issues are:

1. Claimant's entitlement to temporary total disability benefits and temporary partial disability benefits;
2. Whether claimant is entitled to permanent partial disability benefits;
3. The extent of penalty in this case, and;
4. Rate.

Temporary Partial Disability Benefits and Temporary Total Disability Benefits

As noted in the arbitration decision, claimant sought temporary partial disability benefits for a number of dates spanning between October 6, 2014 through January 15, 2015. Claimant also sought temporary total disability benefits for a number of periods of time spanning from May 24, 2014 through January 2, 2015. Those individual dates are not repeated in this ruling and are sufficiently detailed in the arbitration decision. (Arbitration decision, page 10)

As noted in the arbitration decision, claimant was evaluated by Bruce Feldman, M.D. on several occasions. On September 25, 2014 Dr. Feldman found claimant was able to drive. (Exhibit 1, pages 30-32) Claimant was evaluated a number of times by David Robison, D.O. Dr. Robison is claimant's family doctor. On October 2, 2014 Dr. Robison found claimant could drive, but limited claimant to driving from 8:00 a.m. to 6:00 p.m. (Ex. 1, pp. 42-43)

Claimant also treated with John Hilsabeck, M.D., Deon Wynia, LMHC, Mark Davis, PA-C, and Mia Hegarty-Roach, Ph.D. The record at hearing indicates claimant's daughter requested and had defendant-insurance carrier authorize treatment with Physician's Assistant Davis. The record also indicates claimant and his daughter believe Mr. Wynia was providing good counseling services for claimant. None of these providers, including Drs. Feldman and Robison, took claimant off work, until claimant terminated his employment, for the periods that claimant now seeks temporary partial disability benefits and temporary total disability benefits. None of the six providers opine claimant was unable to work for the periods claimant sought temporary partial disability benefits or temporary total disability benefits.

As noted in the arbitration decision, claimant carries the burden of proof to prove he is entitled to temporary partial disability benefits or temporary total disability benefits. Given the record above, and as detailed in the arbitration decision, claimant has failed to carry his burden of proof he is entitled to temporary partial disability benefits for the periods spanning October 6, 2014 through January 15, 2015, or temporary total disability benefits for the period from May 24, 2014 until January 2, 2015. Claimant's application is denied as to these grounds.

Permanent Partial Disability Benefits

Claimant contends he is permanently and totally disabled.

James Gallagher, M.D., claimant's expert, opined claimant had not yet reached maximum medical improvement (MMI). (Ex. 1, p. 163) Matthew Cooper, Psy.D, PLLC, defendants' expert, also opined claimant had yet to reach MMI. (Ex. B, pp. 16-18)

Dr. Robison is claimant's family doctor and is a general practitioner. While Dr. Robison did opine he believed claimant had a permanent impairment, he also noted that with therapy and medication, only time would tell if claimant's condition would improve. (Ex. 1, p. 69)

Claimant's own expert found claimant was not at MMI. Defendants' expert found claimant was not at MMI. Claimant's family doctor is unclear if he believes claimant is at MMI. Based on this record, and that detailed in the arbitration decision, claimant has failed to carry his burden of proof he is entitled to any permanent partial disability benefits at this time. As a result, the issue of permanent partial impairment benefits due to the May of 2014 injury is not ripe for adjudication. Claimant's application is denied as to this ground.

Penalty

As noted in the arbitration decision, claimant told his employer he quit his employment with Dohrn on January 14, 2015 because he was not given additional vacation. (Ex. C, p. 2)

The first time defendants were given notice that claimant had a claim for temporary benefits for a mental/mental injury, was in a November 2, 2015 report from Dr. Gallagher. (Ex. 1, p. 163) Defendants began making voluntary temporary total disability payments on March 1, 2016. As noted in the arbitration decision, the period between November 2, 2015 through March 1, 2016 is approximately 17 weeks.

Based on the record detailed in the arbitration decision, a penalty of 10 percent is appropriate. Defendants are liable for a penalty of \$1,061.67. Claimant's application is denied as to this ground.

Rate

Claimant contends the rate was incorrectly calculated in the arbitration decision. Claimant argues, among other issues, that a finding should be made that the week ending on April 19, 2014 was not a customary earning week and should be excluded from the calculation. (Application, p. 3)

Iowa Code section 85.36 "describes the basis for calculating a disabled employee's compensation rate." *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 197 (Iowa 2010). "The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. "Weekly earnings" are defined as "gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required" by the employer. *Id.*

Section 85.36 does not define weekly earnings as the number of hours actually worked in the preceding thirteen weeks. Rather, weekly earnings are "earnings . . . to which such employee would have been entitled had the employee worked the customary hours . . . regularly required" by the employer. *Id.*

The focus of section 85.36 is on whether the employee's "earnings" are "customary." As the court in *Jacobson* explained:

"Customary" means "based on or established by custom"; "commonly practiced, used or observed"; or "usual." *Merriam-Webster's Collegiate Dictionary* 285 (10th ed. 2002). We have previously defined "customary" as "typical." Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or typical for that employee.

778 N.W.2d at 199 (citation omitted).

It is not error to include weeks where an employee took vacation if those weeks are representative of a customary full week of work for an employee. Mercy Medical Center v. Healy, 801 N.W. 2d 865, 872-873 (Iowa App. 2011).

Given the direction given in the Healy case, the week ending April 19, 2014, where claimant worked 41.75 hours, should be excluded. This is because the weeks used in the calculation indicate claimant worked in excess of 50 hours for most of the 13 weeks preceding the date of injury. The week ending March 8, 2014 should replace that excluded week, where claimant worked 50.75 hours for that week.

The 13 weeks that should be used in calculating claimant's rate should include the following weeks:

Week #	Week Ending	Hourly Pay	Hours Worked	Gross Wage
1	5/10/2014	\$18.50	60.75	\$1,123.88
2	5/3/2014	\$18.50	44.25	\$818.63
3	4/26/2014	\$18.00	56.25	\$1,012.50
4	4/12/2014	\$18.00	54.75	\$985.50
5	4/5/2014	\$18.00	59.5	\$1,071.00
6	3/29/2014	\$18.00	55.25	\$994.50
7	3/22/2014	\$18.00	53.75	\$967.50
8	3/15/2014	\$18.00	56	\$1,008.00
9	3/8/2014	\$18.00	50.75	\$913.50
10	2/22/2014	\$18.00	56.5	\$1,017.00
11	2/15/2014	\$18.00	63.5	\$1,143.00
12	2/8/2014	\$18.00	55.75	\$1,003.50
13	2/1/2014	\$18.00	51.5	\$927.00

This results in a total earnings for the 13 weeks used in the calculation (excluding the weeks ending in March 1, 2014, April 19, 2014, and May 17, 2014) of \$12,984.50. This results in an average weekly wage of \$998.81. Claimant was married with two exemptions. Claimant's rate is \$631.86 per week.

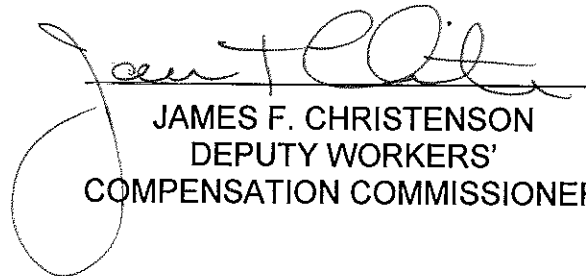
ORDER

Claimant's application is granted in part, and denied in part.

The arbitration decision should be changed to reflect that claimant's weekly rate is six hundred thirty-one and 86/100 dollars (\$631.86) per week.

The decision remains the same in all other respects.

Signed and filed this 6th day of January, 2017.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.