BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

SCOTT A. KELLY, Claimant, vs. PERFORMANCE CONTRACTORS, INC., Employer, and ARCH INSURANCE GROUP, GALLAGHER BASSETT SERVICES, INC., Insurance Carrier, Defendants.	File No. 5055951 APPEAL DECISION Head Note Nos.: 1108, 1402, 1801, 1801.1, 2500, 4000.2

Defendants Performance Contractors, Inc., employer, and Arch Insurance Group, Gallagher Bassett Services, Inc., insurance carrier, appeal from an arbitration decision filed on October 31, 2017. Claimant Scott A. Kelly cross-appeals.

On April 24, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

In the October 31, 2017 arbitration decision, the deputy commissioner determined claimant's slip and fall at work on February 7, 2016 was the cause of claimant's disc herniation, resulting surgery, and ongoing symptoms. As such, the deputy commissioner awarded claimant current and past medical care including, but not limited to, care provided and recommended by William Samuelson, D.O. The deputy commissioner also awarded temporary total disability (TTD) benefits from February 23, 2016 through August 7, 2016 (per the stipulations of the parties) and running temporary partial disability (TPD) benefits starting August 8, 2016. The deputy commissioner determined these benefits should be paid at a rate of $1,064.02.

The deputy commissioner additionally determined claimant was entitled to an independent medical examination (IME) pursuant to Iowa Code section 85.39. Lastly, the deputy commissioner awarded penalty benefits in the amount of 50 percent of unpaid benefits owed from February 23, 2016 through April 3, 2017.

On appeal, defendants argue claimant's disc herniation was not causally related to his fall at work on February 7, 2016. Defendants alternatively assert the deputy commissioner erred by awarding running TPD benefits because such an award is a violation of defendants' due process rights and claimant did not prove his entitlement to such benefits. Defendants also ague the deputy commissioner erroneously included a "premium" in the rate calculation. Lastly, defendants assert the deputy commissioner erred in awarding penalty benefits.

On cross-appeal, claimant does not allege substantive error but instead asserts the deputy commissioner erred by not referencing claimant's entitlement to an IME in the order portion of the arbitration decision.

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

I performed a de novo review of the evidentiary record before the presiding deputy commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, those portions of the proposed arbitration decision filed on October 31, 2017 that relate to issues properly raised on intra-agency appeal are affirmed in part with my additional findings, conclusions, and analysis, modified in part, and reversed in part.

I adopt the deputy commissioner's summary of this claim (the "Findings of Fact") from pages 2 through 8 in its entirety. I make the following additional findings, analysis, and conclusions as set forth below:

I. Causation

The first issue on appeal is whether claimant's disc herniation and ongoing symptoms are causally related to his work injury on February 7, 2016. I affirm the deputy commissioner's determination that claimant's work injury on February 7, 2016 caused claimant's disc herniation, resulting surgery, and ongoing symptoms. I affirm the deputy commissioner's reliance on Dr. Samuelson's opinion and her rationale for finding Dr. Samuelson's opinion to be most persuasive as set forth on page 9 of the arbitration decision. I add the following analysis:

Defendants argue on appeal that Dr. Samuelson's opinion is faulty because he relied on an inaccurate and incomplete history provided by claimant. More specifically, defendants argue Dr. Samuelson was under the mistaken belief that claimant's radiating leg pain and foot drop began when claimant fell and not weeks after. Even assuming

this to be true, claimant's counsel explained to Dr. Samuelson in his deposition that claimant's onset of foot drop did not begin until weeks after his injury. (Exhibit 24 [Samuelson Depo. Tr., pp. 10-11]) Dr. Samuelson testified that a delayed onset of foot drop is not at all unusual in disc herniation cases, and importantly, did not change his causation opinion after being presented with claimant's delayed onset. (See Ex. 24 [Samuelson Depo. Tr., pp. 10-11, 26-27])

Defendants also argue Dr. Samuelson was unaware of the severe onset of pain claimant experienced at home in late-February of 2016. Dr. Samuelson testified, however, that while he was unaware of claimant's specific onset of pain on February 22, 2016 or February 23, 2016 that led him to the emergency room, he was aware that claimant was experiencing pain that woke him every night: "Well, it woke him up at night every night. That's enough for me." (Ex. 24 [Samuelson Depo. Tr., pp. 42-43]) Notably, Dr. Samuelson did not change his causation opinions during the deposition after being made aware of claimant's emergency room visit on February 23, 2016. (See Ex. 24 [Samuelson Depo. Tr., pp. 26-27])

Thus, even assuming Dr. Samuelson initially had a partially incorrect or incomplete history when he drafted his causation opinions in February of 2017 (Ex. 24, p. 50), Dr. Samuelson maintained his causation opinions even after being presented with a complete and corrected history during his deposition. (Ex. 24 [Samuelson Depo. Tr., pp. 26-27]) For this reason, I do not find defendants' argument convincing.

Furthermore, defendants' criticisms of Dr. Samuelson are equally applicable to their own experts, Chad Abernathey, M.D., and R.L. Broghammer, M.D., who received only a portion of claimant's medical records and excerpts of claimant's deposition before rendering their opinions. (See Ex. 24, pp. 153-186, 201) Dr. Abernathey and Dr. Broghammer were presented with this information and asked for their opinions on March 22, 2017, and both issued opinions one day later on March 23, 2017. (See Ex. 24, pp. 148, 187, 196, 202) Neither expert examined or spoke to claimant. In this scenario, I find the opinions of the treating physician, who was "doing a history and physical the whole time" during his care, to be superior to the records reviews of two defendant-obtained physicians. (See Ex. 24 [Samuelson Depo. Tr., p. 31]) With this additional analysis, the deputy commissioner's reliance on Dr. Samuelson is affirmed, as is the deputy commissioner's determination that claimant's disc herniation is related to his work injury on February 7, 2016.

II. TPD Benefits

The next issue on appeal is whether the deputy commissioner erred in awarding ongoing TPD benefits. Defendants first argue the deputy commissioner's award of running TPD benefits violated their due process rights. They argue they "were never fairly notified of such a claim" because claimant failed to assert a claim for TPD benefits in the hearing report. (Defendants' Appeal Brief, p. 15) Defendants assert the deputy commissioner erroneously ignored the parties' stipulations and "simply blindsided"

defendants with a running award of TPD benefits. As a result, defendants assert they were deprived of the opportunity to present testimony, evidence, and argument regarding "whether the case is more appropriately approached as an intermittent healing period case and/or whether [claimant's] restrictions as of August 2016 were temporary or permanent." (Def. App. Brief, p. 19)

Defendants acknowledge, however, that TPD benefits were listed as a disputed issue in claimant's original notice and petition, which was filed in April of 2016. Further, at claimant's deposition on February 8, 2017, claimant testified he was hired as a security guard after his employment with defendant-employer ended but was making substantially less per hour. (See Ex. 21 [Claimant Depo. Tr., p. 8]) The hearing took place in May of 2017. I find this information and timing gave defendants ample notice of and an opportunity to prepare a defense against a claim for TPD benefits. See Drake University v. Davis, 769 N.W.2d 176, 182 (Iowa 2009) ("As early as November 2004, Drake knew the cause of Davis's September 14 injury was an issue in this case. It was at this time Davis claimed the injury occurred when the trash she was dragging hung up in a doorway. The hearing took place in April 2006. This information and its timing gave Drake ample notice and opportunity to defend the claim. Drake's claim of a due process violation is meritless.")

While I acknowledge the hearing report and colloquy with the deputy commissioner at hearing did not specifically and explicitly refer to the phrase "running award of temporary partial disability benefits," I find the hearing report and discussion with the deputy commissioner put defendants on notice that an award of TPD was a viable outcome. Under the "TTD/HP Entitlement" section, the hearing report states: "Claimant is seeking either temporary total, temporary partial disability or healing period benefits from 2/23/16 through 8/7/16." (Hearing Report, p. 1) Under the "PPD Entitlement" section, it states: "NOT YET AT MMI." When discussing these sections with the deputy commissioner at hearing, the following exchange took place:

> THE COURT: . . . . The Claimant seeks temporary benefits from February 23, 2016, through August 7, 2016. I'm not quite sure. Perhaps you could explain this, Mr. Mahr, how it is that you are asking for - - whether you are asking for a running award? Has the Claimant returned to work?
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> MR. MAHR: Yes, but his current job pays vastly less than his prior job, but he did return to work full-time on 8-8.
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> THE COURT: All right. The parties agree that the Claimant's injury is industrial in nature. The Claimant maintains he is not yet at maximum medical improvement. Is it your position, Mr. Peters, as well that there's no permanency at issue in this case as it is not yet ripe?

> MR. PETERS: I agree that there's no issue of permanency in this case right now, correct. Yes, that's correct.

(Hearing Transcript, p. 3) (emphasis added) After reviewing the remainder of the hearing report, the deputy commissioner asked, "Are there any other issues?" to which defendants' counsel responded, "No, thank you." (Hrg. Tr., p. 6)

In a perfect hearing, claimant's counsel would have affirmatively and clearly stated he was seeking a running award, and the parties and deputy commissioner would have explicitly modified the hearing report to reflect the possibility of a running award of temporary benefits. Perfection, however, is not required in this tribunal, which was created to provide "rough justice—speedy, summary, informal, untechnical." Marovec v. PMX Indus., 693 N.W.2d 779, 787 (Iowa 2005) (quotation omitted). Instead, "the full panoply of procedural due process rights is not necessary for an administrative hearing to pass constitutional muster"; what is required is "notice and opportunity to defend." Carr v. Iowa Employment Sec. Comm'n, 256 N.W.2d 211, 214 (Iowa 1977); see Davis, 769 N.W.2d at 181. In this case, I find the combination of the deputy commissioner's question regarding a running award, claimant's counsel's response that claimant had returned to full-time work but was earning "vastly less," and defendants' counsel's agreement that claimant was not at MMI set forth a scenario in which a running award of TPD benefits was a viable outcome and gave defendants notice and an opportunity to defend. The fact that the hearing report did not specifically mention a claim for a running award is not controlling when considered in the context of counsels' colloquy with the deputy commissioner. See Staff Management v. Jiminez, 839 N.W.2d 640, 656-57 (Iowa 2013) (noting the hearing report is not to be considered in a vacuum).

Defendants also argue the deputy commissioner erroneously ignored the parties' stipulations in the hearing report, which are binding so long as they are not erroneous as a matter of law. This case, however, is not analogous to the cases cited by defendants in which the stipulations of the parties were disregarded without notice to the parties.

For example, in Dunlap v. Action Warehouse, File No. 5026306 (Rehearing Dec. Feb. 18, 2015) (2015 WL 1292259), the parties asserted competing commencement dates but agreed that PPD benefits should have commenced, yet the deputy commissioner awarded ongoing healing period benefits. In other words, the deputy commissioner awarded temporary benefits when the parties stipulated to permanency benefits. See id. On rehearing, the deputy commissioner concluded it was error to award ongoing healing period benefits instead of permanency benefits consistent with the parties' stipulations. Id.

Similarly, in Robinson v. City of Des Moines, File No. 5035076 (Appeal Dec. Jan. 25, 2013) (2013 WL 482728), the parties stipulated the work injury was a cause of permanent disability, yet the deputy commissioner, without notice to the parties,

rejected that stipulation and found no causation. In other words, the deputy commissioner awarded no benefits when the parties stipulated that benefits should be awarded. On appeal, the commissioner remanded the case back to the deputy commissioner "for a finding as to the extent of claimant's permanent disability or to provide notice to the parties that the stipulation as to permanent disability is erroneous as a matter of law and provide an opportunity for further evidence and argument." Id.

In this case, however, the parties stipulated claimant's injury was a cause of temporary disability. (Hearing Report, p. 1) The "TTD/HP Entitlement" section then states: "If no longer in dispute check here ( )." The parties left that section blank. In other words, the parties agreed the extent of claimant's entitlement to temporary benefits was in dispute. Consistent with that agreement, the deputy commissioner awarded temporary benefits.

Defendants also stipulated claimant would be entitled to temporary benefits from February 23, 2016 through August 7, 2016 if the deputy commissioner found defendants liable for the alleged injury. The parties, however, did not stipulate this was the only period for which temporary benefits might be awarded. Thus, while defendants take issue with the period and type of temporary benefits the deputy commissioner awarded, the deputy commissioner did not disregard the parties' stipulations.

Regardless, even if the deputy commissioner did err, any prejudice or violation of defendants' due process rights is cured by defendants' opportunity on appeal to present argument regarding the merits of the issue—why they believe claimant is not entitled to TPD benefits. Defendants did so in their appeal brief. They argue claimant failed to produce evidence that finding a full-time job at a lower hourly rate was due to a temporary—not permanent—condition, and as such, the statutory prerequisites of Iowa Code section 85.33 are not met. While not explicitly saying so, defendants essentially argue claimant in the instant case should either be getting permanent partial disability (PPD) benefits or TPD benefits, but not both, and any award of TPD benefits was premature because at the time of the arbitration hearing it was impossible to tell whether claimant's restrictions were temporary or permanent.

First, the Iowa Supreme Court in Evenson v. Winnebago Industries, Inc., unequivocally held that a claimant can simultaneously be entitled to both TPD and PPD benefits because they "compensate for completely different categories of losses." Evenson, 881 N.W.2d 360, 373 (Iowa 2016). TPD benefits are intended to serve as replacement for reduced paychecks during periods of temporary partial loss of actual earnings, while PPD benefits are intended to compensate for permanent functional loss or loss of earning capacity. Id. at 373-74.

Defendants in the instant case suggest this case is distinguishable from Evenson, however, because claimant at the time of the hearing had returned to work, had an ongoing 40-pound lifting restriction, and his condition was "stable." In essence, they argue claimant was no longer experiencing a "temporary partial reduction in

earning ability" but instead was experiencing a "permanent partial loss of . . . earning capacity." Iowa Code § 85.33(2) (2016) (emphasis added) ("'*Temporary partial benefits'* means benefits payable . . . to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability."); Evenson, 881 N.W.2d at 373 (emphasis added) ("Other categories of workers' compensation benefits [referring to PPD benefits] serve distinctly different purposes and are owed when an employee sustains an injury that causes a *permanent* partial loss of either bodily function . . . or earning capacity.") At the very least, defendants contend an award of TPD was premature because only the power of hindsight will allow the agency to determine whether claimant's condition at the time of the arbitration hearing was temporary or permanent.

From a medical perspective, defendants' argument is compelling. The evidence highlighted by defendants suggests claimant's condition may be permanent and not temporary. As discussed in Evenson, however, "unlike in the medical world in which an injury is ultimately either temporary *or* permanent, in the workers' compensation world, a single injury can result in an employer's liability for both temporary and permanent disability benefits." 881 N.W.2d at 373.

The problem with defendants' argument as applied in the workers' compensation world is that they stipulated claimant had not yet reached MMI at the time of the hearing and that permanency was not ripe for determination. (Hearing Report, p. 1; Hrg. Tr., p. 3) Through this stipulation, defendants agreed that claimant's condition had not yet stabilized to the point where it was medically indicated that significant improvement was not anticipated. See Iowa Code § 85.34(1) (2016); Broadlawns Medical Center v. Sanders, 792 N.W.2d 302, 307 (Iowa 2010); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201-02 (Iowa 2010). In essence, by agreeing claimant had not yet reached MMI, defendants were acknowledging claimant was still in a temporary period of healing or recovery.

I recognize claimant's technical "healing period" pursuant to Iowa Code section 85.34(1) terminated upon claimant's return to work on August 8, 2016, at which point claimant's entitlement to PPD benefits was triggered. See Iowa Code § 85.34(1), (2); Evenson, 881 N.W.2d at 372. However, as addressed in Evenson, the termination of claimant's entitlement to healing period benefits under Iowa Code section 85.34(1) does not necessarily equate to a termination of claimant's period of recovery.[1] 881 N.W.2d at 372-74.

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[1] In Evenson, claimant's healing period ended when claimant returned to work on September 20, 2010, but claimant was not found to have reached MMI until November 29, 2011. 881 N.W.2d at 370, 372. In the interim, claimant was paid several periods of TPD benefits. Id. at 365 n. 3, 374.

I acknowledge claimant's 40-pound lifting restriction, or some variable of that restriction, will likely become permanent at some point. However, because claimant was not at MMI at the time of the hearing, I find claimant was still experiencing a temporary partial disability and a temporary partial reduction in earning ability.

I conclude defendants' argument is not supported by Iowa Code section 85.33, Iowa Code section 85.34, or the Iowa Supreme Court's decision in Evenson. Thus, because I am not persuaded by defendants' legal argument, even if the deputy commissioner erroneously deprived defendants the opportunity to present evidence regarding the permanency of claimant's restrictions, no such evidence would have altered my analysis or conclusions.

Defendants also argue claimant's return to a "permanent" full-time job precluded him from obtaining TPD benefits. I acknowledge claimant's job as a security guard is not a temporary light duty job or an accommodated job. However, Iowa Code section 85.33 provides for TPD benefits when a claimant "is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability" and has sustained a temporary partial reduction in earning capacity as a result of the injury. Iowa Code § 85.33(2) (emphasis added). The deputy commissioner found claimant's new job was not substantially similar to his work with defendant-employer, and I agree. Thus, despite the fact that claimant's new job is full time and "permanent," I conclude claimant is still entitled to TPD benefits under Iowa Code section 85.33. See Menard, Inc. v. Bahic, 860 N.W.2d 342, 2014 WL 6681731 at *8 (Iowa Ct. App. 2014) (table) (awarding TPD benefits for reduced wages despite acquiring a "new permanent job")

Defendants do not seriously dispute the deputy commissioner's finding that claimant's security guard work was not substantially similar. Instead, defendants assert claimant is not automatically entitled to TPD benefits "[j]ust because an employee has restrictions and can't find a new job at the same wages." (Def. App. Brief, p. 21) Defendants cite to the last sentence of Iowa Code section 85.33(2) as support for their assertion. It provides that TPD benefits "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Iowa Code § 85.33(2).

I agree with defendants that pursuant to the final sentence of Iowa Code section 85.33(2), claimant is not entitled to lifetime TPD benefits. Claimant's temporary inability to find equally paying work will eventually become a permanent loss of earning capacity. See Bell Bros., 779 N.W.2d at 200 (Iowa 2010) ("Any disability that remains after stabilization of the condition gives rise to 'either a permanent partial or a permanent total award.' In other words, maximum physical recovery marks the end of the

temporary disability benefits, and at that point, any permanent disability benefits can be considered." (citation omitted)); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440, 447 (Iowa 1999) (noting once it is determined that claimant has reached MMI, temporary benefits are terminated to be replaced by permanency benefits). Per defendants' stipulation that permanency is not yet ripe in this case, however, that transition has not yet occurred in this case. Thus, I conclude claimant is still entitled to temporary benefits for his inability to secure work that pays weekly earnings equal to his earnings at the time of the injury.

Higher courts have previously considered the final sentence of Iowa Code section 85.33(2) in the context of scenarios in which a claimant's inability to secure equally paying work is due to something other than the consequences of claimant's work injury. See Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 860 (Iowa 2009) (rejecting claimant's contention that she had no burden to produce evidence of a causal connection between her injury and the claimed diminution of earnings to support an award of TPD). In Broadlawns Medical Center v. Sanders, for example, claimant's income as a CNA was reduced after her injury when she was transferred to a different facility that did not offer overtime hours. 772 N.W.2d 15, 2009 WL 1677003 at *3 (2009) (table). The Iowa Court of Appeals noted, however, that claimant was able to secure equivalent work to what she was doing prior to the injury; in fact, the work she performed after the injury was identical to the work she performed prior to the injury. Id. Claimant still "had the skills, ability, and capability of performing all of her duties" as a CNA. Id. Thus, the court held the agency's award of TPD was erroneous.

In the instant case, unlike in Sanders, I find claimant's inability to secure equally paying or substantially similar work was a direct result of claimant's work restrictions. Claimant was under a 40-pound lifting restriction per Dr. Samuelson at the time of the hearing. (Ex. 24, p. 36; Hrg. Tr., p. 71) Claimant's work with defendant-employer was physical work that required lifting 100 pounds or more. (Hrg. Tr., pp. 12, 47) Thus, while defendants are correct that an inability to find equally paying work does not automatically entitle a claimant to TPD benefits, I conclude claimant in the instant case satisfied his burden to prove a causal connection between his injury and his diminution of earnings to support an award of TPD.

Lastly, not awarding TPD benefits in this scenario would penalize a claimant for being motivated to seek out and find work. See Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992) (indicating policy to avoid penalizing employees who return to work despite work-related injuries). Without TPD benefits, claimant would be better off not returning to work and thereby not ending his entitlement to TTD/healing period benefits.

Instead, awarding TPD benefits in this case is beneficial to both parties. TPD benefits are calculated as "sixty-six and two-thirds percent of the difference between the employee's weekly earnings at the time of injury . . . and the employee's actual gross

weekly income from employment during the period of temporary partial disability." Iowa Code § 85.33(4). TTD/healing period benefits, on the other hand, are calculated as "eighty percent of the employee's weekly spendable earnings." Iowa Code § 85.37. Thus, by awarding TPD, defendants benefit by only paying a portion of the difference between the employer's former earnings and his current reduced earnings versus paying claimant's full weekly compensation rate. Claimant benefits as well, because claimant receives slightly more per week while receiving TPD benefits combined with his current reduced gross weekly income than while receiving TTD benefits alone.[2]

While it is true that claimant's return to work in this case triggered an earlier entitlement to PPD benefits, it did not change the extent of claimant's permanent disability for which defendants will eventually be responsible. In other words, while defendants may be responsible for concurrent PPD/TPD payments, defendants are still better off because they are paying less temporary benefits (TPD versus TTD/healing period) and the same amount of PPD (just earlier in the life of the claim). Ultimately, therefore, awarding TPD benefits in this scenario is beneficial to both parties.

With this additional analysis, the deputy commissioner's running award of TPD benefits is affirmed.

III. Rate

The next issue to be decided on appeal is whether a $2.00 per hour "winter wage incentive" should be included in his claimant's calculation. The deputy commissioner deemed this incentive to be a regular bonus and included it in the calculation. For the reasons that follow, I respectfully disagree.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The parties in this case agree claimant's rate should be determined by using the last thirteen consecutive calendar weeks immediately preceding the injury under Iowa Code § 85.36(6). That section provides:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means 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

[2] By way of example, assume claimant's weekly spendable earnings were $1,000.00 per week at the time of his injury but are now only $500.00. Eighty percent of the claimant's weekly spendable earnings (TTD) is $800.00. Claimant's current weekly spendable earnings ($500.00) plus sixty-six and two-thirds percent of the difference between his weekly earnings at the time of the injury and his current weekly spendable earnings (TPD; $333.35), however, amounts to $833.35.

> the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
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> . . . .
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> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, <u>including shift differential pay but not including overtime or premium pay</u>, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Iowa Code § 85.36(6) (emphasis added).

Gross earnings is later defined in the statute as "recurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, <u>excluding irregular bonuses</u>, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits," and "pay period" as "that period of employment for which the employer customarily or regularly makes payments to employees for work performed or services rendered." Iowa Code § 85.61(3)(5) (emphasis added).

Thus, the fighting issue in this case is whether the winter wage incentive should be included as a regular bonus or shift differential or should be excluded as premium pay.[3]

Defendant-employer's winter wage incentive is paid for work "starting December 7, 2015 through March 6, 2016." (Ex. K, p. 122) It is available to "all performance direct

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[3] Defendant-employer admits its "retention incentive bonus," which is paid for every hour worked for employees who stay until they are transferred or laid off, should be included as a regular bonus in claimant's rate calculation.

hire employees." (Ex. K, p. 122) Claimant at hearing confirmed that all workers in his area received the incentive. (Hrg. Tr., p. 73) In other words, all performance direct hire employees received an increased hourly rate throughout the winter months.

This type of increased hourly pay is distinguishable from shift differential pay. In a typical shift differential scenario, an employee who works the night shift is paid more per hour than a co-worker who works the same job with the same duties during the day. In this case, however, there is no distinction between shifts; all employees who work during the winter months receive the increased hourly rate. Thus, I conclude the winter wage incentive is not shift differential pay and should not be included in claimant's rate calculation as such.

While neither "premium pay" nor "bonus" is defined by statute and there is scant case law addressing premium pay, defendant-employer's winter wage incentive is not consistent with the types of payments that are generally presented to this agency as bonuses. See Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 266 (Iowa 2012) (considering claimant's year-end bonus); Noel v. Rolscreen Co., 475 N.W.2d 666, 667 (Iowa Ct. App. 1991) (considering claimant's Christmas bonuses that ranged from 7.5% to 15% of her annual wages); Ramsey v. John Deere Dubuque Works, File No. 5056671 (Appeal Dec. Oct. 22, 2018) (considering claimant's profit-sharing bonus).

Further, if defendant-employer's winter wage incentive were deemed a regular bonus, it would essentially nullify the exclusion of "premium pay" in Iowa Code section 85.36(6). Taken to its extreme, anything paid in excess of claimant's base rate could be argued as a bonus.

For these reasons, I find defendant-employer's winter wage incentive is premium pay, not a regular bonus, and should therefore be excluded from claimant's rate calculation. The deputy commissioner's inclusion of the winter wage incentive is therefore reversed. I adopt defendants' first rate calculation in the amount of $1,038.55. (Ex. K, p. 95)

IV. Penalty

The next issue to be decided on appeal is whether claimant is entitled to penalty benefits. The deputy commissioner awarded penalty benefits for all benefits owed through defendants' denial of the claim on April 3, 2017. The deputy commissioner found defendants' investigation was not reasonable and there was no reasonable basis for the denial up until that point. For the reasons that follow, the deputy commissioner's award of penalty benefits is modified.

Defendants assert they were not aware until sometime around March 14, 2016, after claimant's appointment with Dr. Samuelson during which he recommended surgery, that claimant was claiming a work-related injury. This assertion is consistent with the evidence in this case. While claimant immediately reported the injury, he

initially declined medical treatment. (Hrg. Tr., pp. 48-49) Claimant then sought out treatment on his own but did not inform defendants that the treatment he was seeking was for what he believed to be a work-related injury. (See Hrg. Tr., pp. 53, 57-58, 82) It was not until claimant "found out [he] had to have surgery" around March 14, 2016 that he called defendant-employer and informed them he needed to file a workers' compensation claim. (See Hrg. Tr., pp. 57-58, 82-83) Claimant acknowledged at hearing that defendants would not have known he was claiming a work-related injury until roughly March 14, 2016. (Hrg. Tr., p. 83)

Defendant-insurer took a recorded statement from claimant on or about March 17, 2016. (Hrg. Tr., p. 84) Claimant also faxed an e-mail with his explanation of the injury and some medical records to defendant-employer around this same date. (See Ex. 21, Depo. Ex. 13)

Claimant filed his original notice and petition on April 27, 2016. Defendants filed their answer on May 11, 2016, in which they denied claimant's injury "pending further investigation." Between March 17, 2016, when defendant-insurer took claimant's recorded statement, and May 11, 2016, when defendants filed their answer, there is no evidence that defendants were actively investigating claimant's claim.

On June 1, 2016, defendants' counsel sent a letter to claimant's counsel indicating they were "trying to collect all the pertinent medical information" for claimant. (Ex. J, p. 93) Defendants' counsel also indicated he wanted to take claimant's deposition "as soon as possible once you have responded to the paper discovery." (Ex. J, p. 93) Claimant's deposition, however, was not taken until February 8, 2017. (Ex. 21) While claimant's deposition was delayed for two months from October of 2016 through December of 2016 due to claimant's counsel's personal health condition (Tr., pp. 107-108), defendants offer no explanation as to why the deposition was again delayed until February of 2017.

The delay in claimant's deposition aside, defendant-employer at no point sent claimant for an evaluation with a doctor of their choosing, nor did they send claimant's records to a physician for a records review until March 22, 2017. (See Hrg. Tr., p. 60; Ex. 24, pp. 148, 196). Other than defendants' answer, claimant received no communication from defendants relaying whether they were accepting or denying the claim or any rationale for a denial of the claim until April 3, 2017. Defendants' April 3, 2017 letter to claimant's counsel indicates defendants "deny that [claimant's] need for low back surgery is causally related to any claimed fall on February 7, 2016." (Ex. J, p. 94)

After defendant-insurer took claimant's recorded statement, defendants provided no evidence of any active investigation of claimant's claim other than medical records retrieval and paper discovery responses (in which they indicated no experts had been retained (Ex. 12, p. 8)) until claimant's deposition on February 8, 2017. Defendants in their appeal brief argue claimant identified previously unknown facts, which were then

turned over to Dr. Abernathey and Dr. Broghammer, who "promptly provided 'no causal connection.'" (Def. App. Brief, p. 24) Again, however, this did not occur until late-March of 2016, and was not communicated to claimant until April 3, 2017, roughly one month before hearing. No benefits of any kind were paid to claimant prior to defendants' April 3, 2017 denial letter.

I find defendants did not reasonably investigate claimant's claim after March 17, 2016 until they took claimant's deposition on February 8, 2017. Without an investigation, including any medical opinions or evidence to support their denial, I find defendants had no reasonable cause or excuse for the denial of payment of benefits through February 8, 2017, when they re-commenced their investigation.

Even if defendants were relying on claimant's decision to seek his own treatment during this time as a reasonable excuse for their delay or denial of benefits, they failed to communicate this basis to claimant.

Defendants' deposition testimony, in which he provided new details about his significant increase in pain at home on February 22, 2016 and February 23, 2017, may have provided defendants a basis to challenge claimant's entitlement to weekly benefits. However, I find defendants failed to contemporaneously convey any basis for their denial of payment of benefits until April 3, 2017.

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. Iowa Code § 86.13; 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).

In the instant case, I found defendants were not reasonably investigating claimant's claim from March 18, 2016 through February 7, 2016, I conclude defendants cannot attribute their delay in their denial of benefits during this time period to a reasonable investigation. See Iowa Code § 86.13(4).

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).

Even when defendants have a basis for delaying or denying a claimant's benefits, defendants must "contemporaneously" convey that basis "at the time" of the delay or denial. See Iowa Code § 86.13(4)(c)(3).

I found defendants in this case did not have a reasonable basis for their denial after March 18, 2016 through February 7, 2017, and even if they had such a basis, none was communicated to claimant. Thus, I conclude penalty benefits are appropriate from March 18, 2016 through February 7, 2017. See Iowa Code § 86.13(4).

While I found defendants may have possessed a basis for denying claimant's claim on and after February 8, 2016, I also found they did not contemporaneously convey any basis for the denial to claimant until April 3, 2017. Thus, I conclude additional penalty benefits are appropriate from February 8, 2016 through April 3, 2017. See Iowa Code § 86.13(4).

In summary, I modify the deputy commissioner's determination and conclude penalty benefits are appropriate from March 18, 2016 through April 3, 2017.

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.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen, 554 N.W.2d at 261.

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996).

Having considered the relevant factors and the purposes of the penalty statute, I agree with the deputy commissioner that the maximum penalty is warranted. The deputy commissioner correctly noted defendants did not attempt to obtain any medical opinions to support their denial of the claim until just before the arbitration hearing. I also add defendants offered no explanation of their denial of the claim until one month before the arbitration hearing. I conclude defendants are responsible for a 50 percent penalty on all benefits unpaid from March 18, 2016 through April 3, 2017.

V. IME

The final issue to be decided on appeal is claimant's entitlement to an IME pursuant to Iowa Code section 85.39. In the arbitration decision, the deputy commissioner decided claimant was entitled to an 85.39 examination, which was

"triggered by the opinions of Dr. Abernathey and Dr. Broghammer and the finding therein that the injury was work related." (Arbitration Decision, p. 10) Defendants did not appeal this finding on appeal.

On cross-appeal, however, claimant raised the IME issue by asserting the deputy commissioner erred in not referencing claimant's right to an IME in the order portion of her arbitration decision. Then, in defendants' responsive reply brief to claimant's cross-appeal, defendants asserted claimant is not entitled to an IME because neither Dr. Abernathey nor Dr. Broghammer provided an evaluation of impairment, meaning the prerequisites of Iowa Code section 85.39 were not met.

Claimant's cross-appeal is more an application for order nunc pro tunc than it is an appeal of the merits of the deputy commissioner's decision. However, this agency's administrative rules provide that issues on appeal are to be viewed "broadly." Iowa Administrative Code rule 876-4.28(7) provides:

> The appeal will consider the issues presented for review by the appellant and cross-appellant in their briefs and <u>any issues necessarily incident to or dependent upon the issues that are expressly raised</u>, except as provided in 876-4.29(86,17A). . . . An issue raised on appeal is decided de novo and the <u>scope of the issue is viewed broadly.</u>

876 IAC 4.28(7) (emphasis added). Thus, I conclude that by raising the issue on cross-appeal, claimant opened the door to the merits of the issue. For the reasons that follow, the deputy commissioner's determination that claimant is entitled to an IME is respectfully reversed.

The Commissioner has noted the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in <u>Des Moines Area Regional Transit Authority v. Young</u>, 867 N.W.2d 839 (Iowa 2015). <u>See</u> <u>Cortez v. Tyson Fresh Meats, Inc.</u>, File No. 5044716 (Appeal Decision Dec. 22, 2015) The Commissioner has since taken a similar strict interpretation of the prerequisites set forth in Iowa Code section 85.39. <u>Reh v. Tyson Foods, Inc.</u>, File No. 5053428 (Appeal Dec. Mar. 26, 2018).

The Iowa Supreme Court in <u>DART</u> held that reimbursement for IMEs under Iowa Code section 85.39 is only available if an evaluation of <u>permanent disability</u> has been made by an employer-retained physician. <u>DART</u>, 867 N.W.2d at 844. In <u>Reh</u>, the commissioner concluded there is a "distinct" difference between evaluations of permanent impairment and evaluations to determine causation. <u>See Reh v. Tyson Foods, Inc.</u>, File No. 5053428 (Appeal Dec. Mar. 26, 2018).

In this case, the evaluations performed by Dr. Abernathey and Dr. Broghammer were not evaluations of permanent impairment, but evaluations to determine causation. Further, there was no impairment rating from any physicians chosen by defendants because it is defendants' position that claimant did not sustain any work-related

impairment, and even if he did, he was not at MMI. For these reasons, I conclude the reimbursement provisions of Iowa Code section 85.39 were not triggered. The deputy commissioner's determination is therefore reversed.

Of note, it appears claimant has filed a review-reopening petition, which has been stayed during the pendency of this appeal. It is likely, therefore, that at some point a physician chosen by defendants will issue an opinion on impairment, which would then trigger the reimbursement provisions of Iowa Code section 85.39. For purposes of this appeal, however, claimant's section 85.39 rights had not yet been triggered at the time of the arbitration hearing.

ORDER

THEREFORE, IT IS ORDERED:

The arbitration decision filed on October 31, 2017 is affirmed in part with my additional findings, conclusions, and analysis, modified in part, and reversed in part.

That defendants are to pay unto claimant temporary total disability benefits at the rate of one thousand thirty-eight and 55/100 dollars ($1,038.55) per week from February 23, 2016, through August 7, 2016.

That defendants are to pay unto claimant temporary partial disability benefits based on a weekly benefit rate of one thousand thirty-eight and 55/100 dollars ($1,038.55) commencing August 8, 2016, and continuing until such time as Iowa Code section 85.33 is met.

That defendants are to pay unto claimant a penalty of fifty (50) percent of the benefits owed from March 18, 2016, through April 3, 2017.

That claimant is entitled to ongoing medical care including, but not limited to, care and treatment and recommendations provided by Dr. Samuelson.

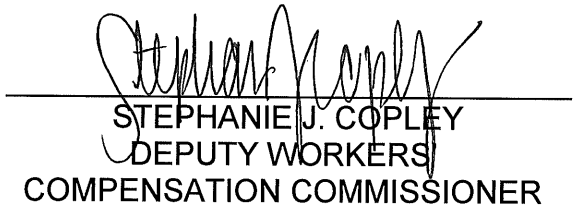
That defendants shall pay medical expenses associated with claimant's compensable back injury.

Defendants 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).

That defendants shall pay the costs of the arbitration proceeding pursuant to rule 876 IAC 4.33 as identified in the decision above.

The parties shall split the cost of the appeal, including the hearing transcript.

Signed and filed this 13th day of May, 2019.



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