

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK SIMMONS,

Claimant,

VS.

DUBUQUE AUTO PLAZA,

Employer,

and

WESTFIELD NATIONAL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5061978

APPEAL

DECISION

Head Notes: 1402.40; 1803; 2907; 4000
5-9999

Claimant Mark Simmons appeals from an arbitration decision filed on April 15, 2021, and from a ruling on motion for rehearing filed on May 11, 2021. Defendants Dubuque Auto Plaza, employer, and its insurer, Westfield National Insurance Company, cross-appeal. The case was heard on February 13, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on March 27, 2020.

In the arbitration decision, the deputy commissioner found claimant sustained ten percent industrial disability as a result of the stipulated work injury, which occurred on July 21, 2016. The deputy commissioner found claimant failed to prove entitlement to penalty benefits for defendants' underpayment of claimant's weekly benefit rate. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$152.50.

On appeal, claimant asserts the award for industrial disability should be increased. Claimant also asserts he is entitled to receive penalty benefits.

On cross-appeal, defendants assert the award for industrial disability is excessive.

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

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on April 15, 2021, and the ruling on rehearing filed on May 11, 2021, that relate to the issues properly raised on intra-agency appeal. I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner with some brief additional analysis regarding the penalty issue.

With respect to the extent of claimant's permanent disability, I affirm the deputy commissioner's finding that claimant sustained ten percent industrial disability. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

Regarding claimant's claim for penalty benefits, claimant asserts defendants were in the best position to calculate claimant's weekly benefit rate. In this case, however, claimant included in his rate calculation payments that came directly from car manufacturers. Those checks were separate from those paid by defendant-employer, those payments were not lumped into claimant's commissions, and those payments did not appear on claimant's pay stubs from defendant-employer. (Hearing Transcript, p. 70; Defendants' Ex. H [Deposition Transcript, pp. 16-19]) Instead, the checks came directly from either BMW or Nissan and were direct-deposited into claimant's checking account. (Def. Ex. H [Tr., p. 19]) Those bonuses from the manufacturers appeared on claimant's tax returns as "miscellaneous." (Def. Ex. H [Tr., p. 17]) Therefore, in this case, defendants did not have access to, or control over, all of the information needed to calculate claimant's weekly benefit rate.

Defendants requested such information via proper discovery channels, but despite their requests, claimant's tax returns were not exchanged until claimant's deposition was taken on January 22, 2020, less than a month before the arbitration hearing (See Def. Ex. H [Tr., p. 5]). Therefore, as did the deputy commissioner, I find there was a reasonable basis for defendants' underpayment of the weekly benefit rate through January 22, 2020.

Upon receipt of claimant's tax returns and his explanation regarding the bonus payments from the manufacturers, defendants and claimant came to an agreement on claimant's weekly rate and defendants issued payment to correct the underpayment. This agreement regarding claimant's rate was reached promptly by the time of the arbitration hearing (roughly 21 days). This short delay to review claimant's tax returns and testimony, reach the agreement and issue the underpayment, was reasonable. Like the deputy commissioner, therefore, I find no penalty is warranted. Therefore, with this additional analysis, I affirm the deputy commissioner's finding that claimant failed to prove entitlement to penalty benefits.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on April 15, 2021, and the ruling on motion for rehearing filed on May 11, 2021, are affirmed in their entirety with the above-stated additional analysis.

Defendants shall pay claimant 50 weeks of permanent partial disability benefits at the weekly rate of six hundred forty-four and 76/100 dollars (\$644.76) starting on the stipulated commencement date of July 25, 2016.

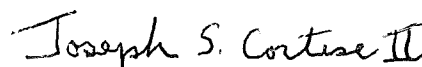
Defendants shall receive credit for 25 weeks of benefits previously paid at the weekly rate of five hundred forty-five and 30/100 dollars (\$545.30).

Defendant 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).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of \$152.50, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 27th day of September, 2021.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Mark Sullivan (via WCES)

Mark Woollums (via WCES)

Lori Scardina Utsinger (via WCES)