

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID LOWELL EVENSON,
Claimant,
vs.
WINNEBAGO INDUSTRIES, INC.,
Employer,
and
SENTRY INSURANCE COMPANY,
Insurance Carrier,
Defendants.

FILED
FEB 3 2017
WORKERS' COMPENSATION

File No. 5038367

REMAND
DECISION

Head Note Nos.: 1802, 4000.2

STATEMENT OF THE CASE

This matter is before the Iowa workers' compensation commissioner on remand from the Iowa Supreme Court following a decision dated June 3, 2016, and amended September 20, 2016.

This matter was initially heard on July 6, 2012. The arbitration decision awarded claimant 50 weeks of permanent partial disability benefits, commencing on November 30, 2011, and healing period benefits from April 14, 2011 through June 14, 2011. The decision found the employer's contribution to claimant's 401K plan was not included in the calculation of claimant's average weekly wage. The decision found claimant's weekly rate to be \$506.42 per week. The decision also penalized defendants 25 percent for the amount of healing period benefits and temporary partial disability benefits that were delayed or denied.

An August 2, 2013, appeal decision affirmed the arbitration decision.

Claimant sought judicial review. On October 22, 2014, the district court issued an order affirming the decision of the commissioner.

The matter was appealed from the district court, and the Iowa Supreme Court retained the appeal.

In a September 20, 2016, amended decision, the Iowa Supreme Court affirmed the commissioner's findings as to claimant's weekly rate and the extent of claimant's industrial disability. The court remanded the case to the commissioner for a redetermination of the date when healing period benefits commenced and ended; when permanent partial disability benefits commenced; and for a recalculation of penalty and interest.

ISSUES

1. What are the proper dates for healing period benefits?
2. What are the proper dates for the commencement of permanent partial disability benefits?
3. Recalculation of penalty due.

FINDINGS OF FACT

Claimant sustained a work-related injury on May 18, 2010.

Claimant first received work restrictions on September 3, 2010. Defendant employer, Winnebago Industries, Inc., (Winnebago) was unable to accommodate the restrictions at that time. (Exhibit 1, pages 20-23) Claimant returned to work on September 20, 2010. (Ex. C, p. 2)

Claimant was off work for surgery beginning April 14, 2011. Claimant did not return to work until June 14, 2011. (Ex. 1, pp. 71, 99; Ex. C, pp. 1-2; Arbitration Decision, p. 6)

CONCLUSIONS OF LAW

The first issue to be determined is the proper dates for healing period benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor

an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant first received work restrictions on September 3, 2010. Defendant employer Winnebago was unable to accommodate those restrictions at that time. Claimant returned to work on September 20, 2010. Claimant is due healing period benefits from September 3, 2010, through September 19, 2010.

Claimant was then off work for surgery beginning on April 14, 2011. Claimant did not return to work until June 14, 2011. Claimant is due healing period benefits from April 14, 2011, through June 14, 2011.

The next issue to be determined is the correct date for commencement of permanent partial disability benefits.

The Supreme Court found the date of claimant's first return to work established the end of healing period and the commencement date of permanent partial disability benefits. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

Consistent with the Supreme Court ruling, claimant is due 50 weeks of permanent partial disability benefits commencing on September 20, 2010, through April 13, 2011. Claimant is then due healing period benefits from April 14, 2011, through June 14, 2011. Claimant is to be paid the remainder of the 50 weeks of permanent partial disability benefits commencing on June 15, 2011.

The next issue to be determined is the amount of penalty owed by defendants.

The arbitration decision awarded a penalty of 25 percent of the amount of benefits delayed or denied. (Arb. Dec., p. 11)

Defendants are liable for payment of healing period benefits from September 3, 2010, through September 6, 2010. This agency initially found defendants did not owe healing period benefits for the period of time from September 3, 2010, through September 6, 2010. (Arb. Dec., p. 6) That decision was affirmed by the district court. Based on this, defendants had a reasonable basis to not pay healing period benefits from September 3, 2010, through September 6, 2010, and penalty is not appropriate for this period of time.

The arbitration decision found claimant was timely paid healing period benefits until his surgery. (Arb. Dec., pp. 6, 9) With the exception of the period of time from September 3, 2010, through September 6, 2010, that finding of fact and conclusion of law was not overruled by the Supreme Court. Based on this, no penalty is owed for healing period benefits paid from September 3, 2010 through September 19, 2010.

Claimant was also due healing period benefits from April 14, 2011, through June 14, 2011, and temporary partial disability benefits. The arbitration decision allowed for a calculation to be submitted for penalty owed for healing period and temporary partial

disability benefits, in a timely application for rehearing. (Arb. Dec., p. 12) In an application for rehearing, claimant submitted calculations for penalties concerning healing period benefits and temporary partial disability benefits owed.

The appeal decision, affirming the arbitration decision, adopted claimant's figures for penalty, noting that:

Defendants shall reimburse claimant healing period benefits, temporary partial disability benefits, principal/interest owed, and penalty benefits as calculated by claimant and as stipulated by defendant upon the affirmance of the award of the presiding deputy commissioner.

(Appeal Decision, p. 2)

In the brief on remand, claimant contends he is due temporary partial disability benefits of \$3,338.48. A 25 percent penalty on this amount results in a penalty of \$834.62. (Claimant's remand brief, p. 5)

Claimant also contends in his brief on remand that he is due \$4,412.94 for healing period benefits. A 25 percent penalty on this amount is \$1,103.19. (Claimant's remand brief, p. 5)

Defendants do not contest the amounts of penalty owed for temporary partial disability benefits or for healing period benefits during this period of time. For this reason, defendants owe \$834.62 in penalty for delayed or unpaid temporary partial disability benefits and \$1,103.19 in delayed or unpaid healing period benefits for the period following claimant's surgery.

The Supreme Court did not offer a remand instruction on penalty for permanent partial disability benefits. (Claimant's remand brief, p. 7; Defendants' remand brief, p. 6)

In the arbitration decision, the deputy workers' compensation commissioner only found that penalty was appropriate for delay or denial of healing period benefits and temporary partial disability benefits. (Arb. Dec., p. 11) There was no finding of fact or conclusion of law that permanent partial disability benefits were unreasonably delayed or denied.

The appeal decision also did not render a penalty for the unreasonable delay or denial of permanent partial disability benefits.

The arbitration decision did not award a penalty for alleged unreasonable delay or denial of permanent partial disability benefits. The agency appeal also did not award penalty for delay or denial of permanent partial disability benefits. The Supreme Court decision remanding this case, gives no remand instructions for penalty on permanent partial disability benefits. For this reason, a penalty on permanent partial disability benefits is not appropriate.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant healing period benefits from September 3, 2010, through September 19, 2010, and from April 14, 2011, through June 14, 2011, at the rate of five hundred six and 42/100 dollars (\$506.42) per week.

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits from September 20, 2010, through April 13, 2011, and commencing again on June 15, 2011, until the fifty (50) weeks are exhausted.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

Defendants shall receive a credit for benefits previously paid.

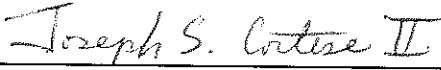
Defendants shall pay a penalty of eight hundred thirty-four and 62/100 dollars (\$834.62) for temporary partial disability benefits unreasonably delayed or denied.

Defendants shall pay a penalty of one thousand one-hundred three and 19/100 dollars (\$1,103.19) for healing period benefits unreasonably denied or delayed.

Defendants shall pay costs.

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

Signed and filed this 3rd day of February, 2017.



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WORKERS' COMPENSATION
COMMISSIONER

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