BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES R. COFFEY, Claimant, vs. MID SEVEN TRANSPORTATION COMPANY, Employer, and GREAT WEST CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 1074160 APPEAL DECISION ON REMAND Head Note Nos.: 2403, 3400

FILED
JUN 9 2015
WORKERS' COMPENSATION

This is an appeal of a remand decision filed February 25, 2014. The litigation history of this case is extensive. On February 8, 1994, claimant was injured. The claim was filed and the original arbitration case went to hearing on September 5, 2002. The arbitration decision was filed on May 20, 2003.

On March 23, 2004, the underlying arbitration decision was affirmed by the workers' compensation commissioner. The defendants appealed to the District Court which upheld the Agency decision on November 17, 2004. The defendants then appealed to the Court of Appeals which issued its decision on October 26, 2005, affirming the District Court. Defendants sought further review from the Iowa Supreme Court which was denied on January 11, 2006. The underlying arbitration decision awarded claimant a 75 percent industrial disability. The employer and insurance carrier were ordered to pay temporary disability, 375 weeks of permanent disability, and medical expenses in the amount of $22,454.11.

On April 1, 2008, claimant filed a petition for review-reopening. The hearing on that petition was held on April 15, 2009. An arbitration decision was filed on August 25, 2009, stating that claimant's petition for review-reopening was barred by the applicable statute of limitations but ordered defendants to pay certain medical expenses. The claimant appealed on September 3, 2009, and defendants filed a cross-appeal on September 14, 2009. On August 31, 2009, the Commissioner affirmed the arbitration decision with a modification that claimant had only proved a portion of the medical expenses were casually related to his work injury, charges from the University of Iowa Hospitals and Clinics for $808 and charges from Lucas County Health Center for $609.

The agency's decision was appealed to the District Court which issued a decision on June 20, 2011. The District Court affirmed the agency decision and modified it further to reduce the mileage reimbursement to reflect the findings of the commissioner. Specifically, the District Court determined that the defendants were liable for mileage to the University of Iowa Hospitals and Clinics in the amount of $174.60 and the Lucas County Health Center for $98.28.

That decision was appealed to the Iowa Supreme Court which issued a decision on May 10, 2013. The Iowa Supreme Court remanded the case to District Court with instructions to remand the case to the workers compensation commissioner to undertake the following three issues:

1. Determine the unpaid amounts under the arbitration award and the review-reopening decisions for medical expenses, mileage, healing period, permanent partial disability, interest, and other amounts due under these decisions.

2. Determine the credit due defendants because of third-party settlements.

3. Identify the date of the last payment of weekly benefits under the award.

    a. If the actual date of the last payment of weekly benefits made under the award is *after* the date of arbitration decision, the three-year limitations commences from the date of that payment.

    b. If the actual date of the last payment of weekly benefits made under the award is *before* the date of the arbitration decision, the three-year limitations period will commence from the date of the arbitration decision.

    c. If all of the weekly benefits have not been paid because the credit from the third-party settlement is inadequate to cover the weekly benefits due under the award, the three-year limitations period shall commence on the date the employer and insurance carrier's weekly obligation is fully paid.

The case was then remanded, first to the District Court and then to the Agency wherein on January 3, 2014, the deputy commissioner issued an "ISSUE ANALYSIS AND ORDER" ordering the parties to calculate the amounts to be deducted for credit with each deduction to be made on the date consistent with its payable date. The calculations were due on February 7, 2014. The deputy commissioner also determined that any future payments cannot be reasonably construed as payments for outstanding weekly benefits that would extend the statute of limitation.

Claimant filed a motion for rehearing on January 22, 2014, and on the same day the defendants filed a document agreeing to "stipulate to the claimant's math as contained in Claimant's Exhibit 1A [to Claimant's Remand Brief] to the extent they comport with the Issue Analysis and Order." (Stipulation of Employer and Carrier to Claimant's Calculations)

On February 5, 2014, the motion for rehearing was denied and claimant then appealed on February 12, 2014. Defendants filed a cross appeal on February 13, 2014. On February 17, 2014, the commissioner deemed the appeal as interlocutory and denied the appeal.

A full remand decision was filed on February 25, 2014, wherein it was determined that defendants' obligations under the May 20, 2003, arbitration decision were satisfied prior to the remand decision and therefore, the three-year limitation period commenced on May 20, 2003, the date of the arbitration decision. The remand decision held that the review-reopening action filed on April 2, 2008, was barred because it was filed after May 20, 2006, the date the three-year statute of limitation expired.

On April 23, 2014, claimant filed an appeal.

ISSUES IN THIS APPEAL

1. Determine the unpaid amounts under the arbitration award and the review-reopening decisions for medical expenses, mileage, healing period, permanent partial disability, interest, and other amounts due under these decisions.

2. Determine the credit due defendants because of third-party settlements.

3. Identify the date of the last payment of weekly benefits under the arbitration award.

The claimant seeks to litigate the issue of notice of lien, which is not timely, and Claimant also seeks to re-litigate the issue of disputed medical bills which has already been determined by the Iowa Supreme Court. The medical bills that were outstanding following the August 31, 2009, appeal decision included: $808.00 plus $609.00 and mileage of $174.60 plus $98.28.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The pertinent facts in the remand decision include what amounts of benefits were owed and when. The medical bills that were outstanding following the August 31, 2009, appeal decision included: $808.00 plus $609.00 and mileage of $174.60 plus $98.28.

These figures were affirmed on appeal to the Iowa Supreme Court and will not be re-litigated here.

On September 18, 2013, claimant filed a statement of the issues to be decided. Attached to the statement was Exhibit 1A, the claimant's calculations of amount due as of November 2, 2011. Defendants adopted those figures to the extent that they comported with the deputy commissioner's order filed on January 3, 2014.

The following is a timeline of events, amounts owed, amounts paid and balance due. The primary argument stems from the parties' disagreement as to the way in which the credit from two third-party settlements should be calculated.

Claimant argues that the amount available for a credit is the net amount after fees and expenses. Defendants argue Ewing v. Allied Constr. Servs, 592 N.W.2d 689, 691 (Iowa 1999), holds that the gross amount of settlement is to be used in calculating the credit to be afforded the defendants.

The Supreme Court's guidance on the way in which the credit should be calculated would be helpful, however, based on the precedential case law, it appears that the credit afforded an employer and the workers' compensation carrier is reduced by some amount of attorneys' fees and costs expended to obtain the third-party settlement.

There appears to be more than one method of using attorneys' fees and costs to calculate the credit resulting from a third-party settlement. The claimant's calculation is to divide the settlement into thirds, apportioning one third to the employer and workers' compensation carrier and two thirds to the claimant.

The defendants' calculations take the gross less one-third of the attorney fees.

A more favorable option to the claimant is to reduce the entirety of the settlement by the total attorneys fees and costs which is what the court in Ahlers v. EMCASCO Ins. Co., 548 N.W.2d 892, 894 (Iowa 1996) did.

I reject outright claimant's calculations. Under the claimant's calculation, the employer and the insurance carrier are only allotted one-third of the entire settlement less one-third of the fees and costs expended to obtain the third-party settlement. There is no case law that supports this calculation and it provides the Claimant with a double recovery.

The case law supports a finding that the attorneys' fees owed by the defendants in a workers' compensation claim are proportionate to their recovery. In Ahlers, the Supreme Court determined that the insurer was responsible for 100% of the attorneys' fees because it received 100% of the award:

> Fairness of the fee to the lawyer's client is always a primary consideration in deciding apportionment of fees under both section 85.22(1) and section 668.5. Allocation of that fee then depends on those factors that represent a fair apportionment of the total award. In the present case, because the workers' compensation insurance carrier received 100% of the award, we see no reason why it should not be burdened with 100% of a fee that the District Court found to be fair and reasonable between Theresa and her attorney.

Id. at 894.

In Ewing, the award was for $750,000.00 and the attorneys' fees and expenses were $267,945.25. Allied was to pay a proportionate share of the fees and costs. The term "proportionate" appears to indicate what percentage of the award the credit forms.

Based on Ewing, the defendants in this case are responsible for paying the claimant the entirety of the award on a weekly basis, less a proportionate sum for attorney's fees. Id. at 691. The Ewing court specifically rejected a lump sum payment of attorneys' fees and a deferred payment of attorneys' fees. A reading of the underlying case law shows that it is the obligation of the defendant to reimburse the attorneys' fees each week as the employer and insurer obtain the benefit of not being required to pay the weekly workers' compensation benefits. Nekuda v. Waspi Trucking, Inc., 388 NW 2d 438, 443-44 - Neb: Supreme Court 1986.

The District Court in Ewing ordered a one-third payment each week to represent the attorneys' fees. Ideally, the defendants should have been paying one-third of the weekly benefit rate of $472.18 or $157.39 until such time as the credit was exhausted.

Based on the Ewing case, defendants in this case are responsible for a pro rata share of the attorneys' fees at the time of the settlement. From the 1997 settlement forward, defendants were entitled to a credit balance and therefore no additional interest was outstanding past 1997.

The claimant also argues that the January 30, 2006, check for $51,573.09 was a benefit payment. It appears that the Supreme Court did not accept claimant's argument or that the characterization of the payment should be a factual finding depending on whether there were outstanding benefits owed at the time the payment was made. Because the 1997 settlement covered the entirety of the monies owed to the claimant under the 2003 arbitration decision, the 2001 payment of attorneys' fees is determined to be attorneys' fees and costs and not a benefit payment triggering a new statute of limitation.

There are numerous ways to calculate the credit to be afforded the employer and insurance carrier from the proceeds of the third-party settlement. Under each calculation except for the method urged by claimant, defendants' obligation at the time of each settlement is satisfied by the third-party funds received. The deputy on remand chose to begin with the figure of $204,095.00 which purports to be the amount of the credit following any previous disbursements. The defendants use a similar figure when arguing that the credit should be calculated by taking the gross of the settlement less what carrier had already paid. (See pg. 9 of Employer and Its Insurance Carrier's Cross-Appeal Reply Brief, Filed September 17, 2014) In the following, the calculation most favorable to the claimant is used. The gross settlement is reduced by the entirety of the attorneys' fees and costs before the credit is applied.

The figures are obtained from the Claimant's Exhibit 1A to the Claimant's Brief filed November 25, 2013 which exhibit is attached hereto for easy reference. Defendants stipulated to these figures "to the extent that they comport with the Issue Analysis and Order of Deputy Workers' Compensation Commissioner Helenjean Walleser filed herein on January 3, 2014." (Stipulation of Employer and Carrier to Claimant's Calculations filed January 22, 2014)

Date	Event	Amount Owed	Amount Paid	Balance Due
2/8/94	Date of Injury			
8/15/94	End of temporary benefits. In this case, claimant reached MMI. 26 6/7 weeks of healing period	$12,682.75	$10,536.86[1]	$2,145.89[2]
8/15/94	Interest due on HP underpayment	$290.84		$2,436.73
10/25/95	Defendants' medical and mileage owed and paid as of this date.	$35,753.57	$35,753.57	$2,436.73
10/25/95	Defendants voluntary PPD payments end. 62 3/7 weeks	$29,478.20	$24,492.76	$7,422.17[3]
12/22/97	Settlement with Third Party A. Amount: 275,000.00 less Attys Fees + Costs: $93,394.82[4] is $181,605.18 as a credit[5]		$181,605.18	-$174,183.01

[1] Defendants paid incorrect weekly rate of $392.323 instead of correct weekly rate of $472.18
[2] Claimant asserts underpayment is $2,144.54
[3] Claimant asserts an underpayment of $4,984.95
[4] Defendants are responsible for a pro rata share of the attorneys' fees. Settlement with Third Party A. amount $275,000.00 Attys Fees & Costs: $93,394.82

12/22/97	Amount of PPD owed between 10/25/1995 and 12/22/1997 is 112 5/7 weeks at $472.18	$53,221.43		-$120,961.58
12/22/97	Interested owed on HP underpayment	$1,075.69		-$119,885.89
12/22/97	Interest owed on PPD underpayment	$5,644.34		-$114,241.55
10/28/01	Last date of PPD ordered by the decision (75%) 375 weeks less the 175 1/7 weeks already paid or 199 6/7 weeks	$94,368.55[6]		-$19,873.00
11/30/01	Settlement with Third Party B. Amount: $40,000 less 4Attys Fees + Costs $15,365.86		$24,634.14	-$44,507.14
5/20/03	Arbitration Decision			
1/11/06	Supreme Court			
1/11/06	Unpaid mileage and medical bills	$22,454.11		-$22,053.03
1/30/06	Payment by Great West for attorneys fees		$51,573.09	-$73,626.12
8/31/09	Medical bills and mileage: medical bills $808 + $609 and mileage of $174.60 + $98.28	$1,689.88		-$71,936.24 remaining credit as of 8/31/09

Under the above analysis, the entirety of the obligation for benefits owed to the claimant pursuant to the arbitration decision was either paid by defendants, or was satisfied by the credit afforded the defendants, as of October 30, 2001, approximately 19 months before the arbitration decision was issued on May 20, 2003. Because defendants' obligation to claimant in this case was satisfied before the arbitration decision was issued, the three-year statute of limitation began to run on May 20, 2003, the date the arbitration decision was issued. Therefore, the three-year statute of limitation for weekly benefits ran as of May 20, 2006. Because the review-reopening petition was not filed until April 1, 2008, the claim for additional weekly benefits asserted in the review-reopening action was barred by the three-year statute of limitation.

However, additional causally-related medical expenses in the total amount of $1,689.88 did accrue between the arbitration decision and the filing of the review-reopening petition on April 1, 2008. That amount was awarded to claimant because

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[5] As previously stated, this is the most generous calculation of the credit as it reduces the amount of settlement to be apportioned to the defendants by the entirety of the attorneys' fees and costs rather than the pro rata share of fees and costs.

[6] 199 6/7 weeks at $472.18

claimant's entitlement to medical benefits was not affected by the running of the three-year statute of limitation on weekly benefits.

ORDER

THEREFORE, IT IS ORDERED THAT:

The remand decision filed in this matter on February 25, 2014, is affirmed and is modified to substitute the above calculation for the calculation contained in the remand decision.

Claimant's claim in review-reopening is dismissed as untimely filed.

Claimant takes nothing from these proceedings.

Claimant pays the costs of these remand proceedings pursuant to rule 876 IAC 4.33.

Signed and filed on this 9th day of June, 2015.

Joseph S. Cortese II

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CLAIMANT'S EXHIBIT 1A – CORRECTED & MODIFIED TO CURRENT DATE

Claimant's Calculation of Amount Due as of November 2, 2011 on Original Arbitration Decision after Credits for Third Party Settlements and Prior Voluntary Payments

Important dates to consider are as follows:

2/08/94	Date of Accident
8/15/94	Claimant reaches MMI
10/25/95	Defendants voluntary PPD payments end
12/22/97	Settlement with Schnucks (Ex. 3)
10/28/01	MMI
11/30/01	Settlement with Midway (Ex. 3)
5/20/03	Date of original Arbitration Decision (Ex. 3)
5/23/04	Date of Commissioner's Appeal Decision
1/11/06	Date of Supreme Court Decision (Ex. 4)
1/30/06	Date of payment by Great West (Ex. 6)

I. **Amount due as of November 2, 2011 – Including Credit (Supporting Calculations in Part II)**

A. Totals Due by Category of Benefits as of 1/30/06
(Date the Defendants paid on the original Arbitration Decision)

1. Weekly Benefits:

HP Remaining Due (Exhibit 3, p. 3):	$ 2,144.54	
PPD Remaining Due (Exhibit 3, p. 3):	$152,574.92	
Total:	$154,719.46	
1/3 of Total:	$51,573.15	

2. Interest:

Interest on HP (See, Part IIA2):	$1,351.45	
Interest on PPD (See, Part II B1b + II B2b + II B3b):	$42,140.78	
	$43,492.23	

3. 85.27 Expenses:

1/3 of Medical (See, Part II C1):	$6,174.14	
1/3 of Mileage (See, Part II C2):	$1,310.56	
	$7,484.70	
	Total:	$102,550.08

B. Less Payment of $51,573.09 by Great West on 1/30/06 (Exhibit 6)

1. How to Attribute Payment made by Great West on 1/30/06
   $43,492.23 for interest due
   $7,484.70 for 1/3 unpaid medical and mileage
   $596.16 for weekly benefits

2. $50,976.99 remains due on weekly benefits as of 1/30/06

C. Total Due as of November 2, 2011 which is amount unpaid 1/30/06 plus interest to 11/2/11

Weekly Benefits:	$50,976.99		
Interest 1/31/06 – 11/2/11=299 weeks			
50,976.99 x .1 ÷ 52 = $98.03/weeks	$29,310.97		
		Total Due:	**$80,287.96**

D. Future Interest Obligations accrue at $98.03 per week

II. Total Amount Remaining Due on Arbitration Decision as of January 30, 2006 (The date the Defendant made payment on the Arbitration Decision)

A. Healing Period

1. Healing Period Due on Rate Difference:
   (HP was volunteered from 2/8/94 to 8/15/94 at incorrect rate)
   26 6/7 weeks @ $79.85 (rate difference) $2,144.53

2. Interest:
   - *2/8/94 – 8/15/94 = 26 6/7 weeks =
     .6750 x $79.85 = $ 53.89
   - *8/16/94 – 12/22/97 = 174 5/7 weeks =
     $2,144.53 x .1 ÷ 52 = $4.12/week = $719.82
   - **12/23/97 – 1/30/06 = 421 5/7 weeks
     $2,144.53 ÷ 3 x .1 ÷ 52 = $1.37/week = $577.74

   $1,351.45

Total HP and Interest Due as of January 30, 2006: $3,495.98

* Interest and PPD at full rate prior to settlement with Schnucks.
** Interest and PPD figured on 1/3 due after civil settlement with Schnucks.

B. Permanent Disability

1. Rate Difference and Interest on Voluntary PPD
(PPD was volunteered from 8/15/94 to 10/25/95 at the incorrect rate)

a) Rate Difference:
62 3/7 weeks @ $79.85 (rate difference) $4,984.95

b) Interest:
- *8/15/94 – 10/25/95 = 62 3/7 weeks =
  3.6365 x $79.85 = $ 290.84
- *10/26/95 – 12/22/97 = 112 2/7 weeks =
  $4,984.95 x .1 ÷ 52 = $9.58/week = $1,075.69
- **12/23/97 – 1/30/06 = 421 5/7 weeks =
  $4,984.95 ÷ 3 x .1 ÷ 52 = $3.19/week $1,345.26

$2,711.79
$7,696.74

2. Unpaid PPD and Interest on Benefits Accruing Before 12/22/97
(This represents the PPD accruing before the third party settlement)

a) PPD Due: 112 2/7 weeks @ $472.18 $53,019.20
- 10/26/95 – 12/22/97

b) Interest:
- *10/26/95 – 12/22/97 = 112 weeks =
  11.9538 x $472.18 = $5,644.34
- **12/23/97 – 1/30/06 = 421 5/7 weeks =
  $53,019.20 ÷ 3 x .1 ÷ 52 = $33.98/week= $14,329.84

$19,974.18
$72,993.38

3. Unpaid PPD and Interest on Benefits Accruing After 12/22/97*
(This represents PPD accruing after the third party settlement)

a) PPD Due and Unpaid (12/23/97 – 10/28/01)
Prior to credit – 200 2/7 x $472.18 $94,570.77
After credit - 200 2/7 weeks @ $157.39 ($472.18 ÷ 3) $31,523.01

* Interest and PPD at full rate prior to settlement with Schnucks.
** Interest and PPD figured on 1/3 due after civil settlement with Schnucks.

b) Interest:

- *12/23/97 – 10/28/01 = 200 2/7 weeks =
  38.2692 x $157.39 = $ 6,023.18
- **10/28/01 – 1/30/06 = 221 3/7 weeks =
  $31,523.01 x .1 ÷ 52 = $60.62/week= $13,431.63

	$19,454.81
	$50,974.82
Total PPD and Interest Due as of 1/30/06, including Credit/Offset For Civil Settlement:	**$131,667.94**

C. Unpaid Medical and Mileage (Exhibit 5):

1.	Unpaid Medical = $18,522.42 (Defendant owes 1/3)	$6,174.14
2.	Unpaid Mileage = $ 3,931.69 (Defendant owes 1/3)	$1,310.56
	Total Medical and Mileage Due on Decision:	**$7,484.70**

* Interest and PPD at full rate prior to settlement with Schnucks.
** Interest and PPD figured on 1/3 due after civil settlement with Schnucks.