

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES HAMILTON,

Claimant,

vs.

USF HOLLAND MOTOR EXPRESS,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,
Defendants.

FILED

MAY - 5 2015

WORKERS' COMPENSATION

File No. 5045215

APPEAL DECISION

Head Notes: 2501, 2904,
2906, 3002

Upon written delegation of authority by the workers' compensation commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on behalf of the Iowa workers' compensation commissioner.

Claimant, Charles Hamilton, appeals an arbitration decision filed June 3, 2014, on the issue of penalty. Defendants, USF Holland Motor Express (USF) and Old Republic Insurance Company, appeal on the issues of rate, commencement of permanent partial disability benefits, medical bills, and claimant's filing of a late appeal brief.

The undersigned has reviewed the record of evidence de novo. The facts recited by the presiding deputy are detailed and are incorporated herein.

The five issues on appeal are as follows:

- I. Penalty
- II. Rate
- III. Commencement of permanent partial disability benefits
- IV. Payment of medical bills
- V. Untimely filing of appeal brief by claimant

I. PENALTY

In the petition and at hearing, claimant raised the issue of penalty benefits for an alleged unreasonable delay or denial of weekly benefits under Iowa Code section 86.13. Before hearing, defendants moved for a continuance or to compel claimant to answer an interrogatory concerning the specific grounds for the claim of penalty benefits. In a ruling dated April 1, 2014, the presiding deputy denied a continuance, but the claimant was ordered to answer the interrogatory on or before April 15, 2014, fifteen days prior to hearing. At hearing, defendants stated they did not receive claimant's grounds for penalty until hearing and were not prepared to deal with such a claim. Claimant asserted that the grounds should have been obvious to defendants, and that defendants were advised of the grounds at the time of claimant's deposition on April 18, 2014.

The presiding deputy found claimant failed to comply with the order of April 1, 2014, without proper explanation or excuse. The deputy found the response of defendants regarding the rationale for penalty was wholly insufficient and three days late. As a sanction, claimant's claim for penalty benefits, which is a separate and distinct claim under Iowa Rule 876 IAC 4.1(17), was dismissed without prejudice.

In short, claimant was sanctioned for not timely responding to the April 1, 2014, order, and because responses given were insufficient to inform defendants of the nature of the penalty claim.

Claimant indicates the April 18, 2014, date, used in the decision to impose sanctions, is the date claimant was deposed. Claimant contends defendants' Exhibit A actually shows that claimant served his answer to the discovery at issue regarding penalties by mail on March 31, 2014. Claimant contends that not only was the discovery timely served, in compliance with the order, but that the discovery response was sufficient to inform defendants of the nature of the penalty sought. (Claimant's post-hearing brief, pages 4-7)

Exhibit A, page 4, does indicate the discovery responses regarding penalty were served on defendants by mail on March 31, 2014. (Ex. A, p. 3) The interrogatory at issue states as follows:

Please state the basis for your claim of 86.13 penalty benefits and provide a detailed listing of all amounts for which you allege a penalty should be awarded and why.

The answer to the interrogatory indicates:

See request for admissions and the correspondence from Jerry Jackson to Christopher Sievers, dated March 20, 2013, August 7, 2013, December 11, 2013, and December 23, 2013.

At hearing on April 30, 2014, claimant's counsel gave four reasons for the penalty claim. They were:

1. Defendants' failure to exclude a fifth week as unrepresentative of the average weekly wage calculations;
2. Payment of a scheduled member disability upon maximum medical improvement date;
3. Nonpayment of temporary total disability benefits for three days from December 28, 2012, through January 2, 2013;
4. An initial payment calculated based on claimant's tax status of being "single" rather than "married."

(Transcript pp. 7-9)

The answer to interrogatory 28, found at Exhibit A, page 4, does not detail the grounds for the penalty. The letters referenced in Exhibit A, page 4, found at claimant's Exhibit 5, also did not detail three of the four grounds for penalty. The letters do indicate claimant was seeking benefits calculated at a tax status of married, rather than single. (Ex. 5) Claimant testified at hearing, that he actually misrepresented his marital status and claimed he was single to his employer for the purposes of receiving a greater amount of weekly pay on his paycheck. (Tr. pp. 72-74)

Based on this record, it is found claimant did timely comply with the order of April 1, 2014. However, based on the record, claimant's response to the interrogatory, and his responses in deposition taken on April 18, 2014, were wholly insufficient as to give notice to defendants of the grounds for his penalty claim. Defendants are entitled to reasonable notice of what issues are to be claimed at hearing. Gentry v. Mark Albers & Pyle Truck Line, File No. 5001488 (App. April 29, 2004). The record indicates claimant gave little or no detail for the grounds of the penalty claim before the hearing on April 30, 2014. Based on this, the presiding deputy was correct in dismissing claimant's penalty claim without prejudice.

II. RATE

In the arbitration decision, the presiding deputy found claimant's customary average gross weekly earnings to be \$1,135.36 per week. (Arbitration decision, p. 4) The arbitration decision indicates the presiding deputy accepted claimant's rate calculation found at Exhibit 10, page 1.

Defendants contend it was error to discard the week of September 28, 2012. Defendants also contend that claimant misstated this week as a 24-hour week, when claimant actually worked 36.44 hours when adding the 12.44 hours worked of overtime. (Defendants' post-hearing brief, pp. 7-8)

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

A review of the record indicates that despite defendants' contentions, claimant's Exhibit 10, page 1, clearly shows, for the week of September 28, 2012, claimant worked 24 hours straight time and 12.44 hours overtime. The record also indicates, for the week of September 28, 2012, claimant earned approximately \$100.00 less than the next lowest week used in the 13 weeks to calculate claimant's average weekly wage. Based on this, it was not error to exclude the week of September 28, 2012, in the calculation of claimant's average weekly wage. The findings of the presiding deputy regarding the issue of rate are upheld on this matter.

III. COMMENCEMENT OF PERMANENT PARTIAL DISABILITY BENEFITS

In the arbitration decision, the presiding deputy found the commencement date for the payment of permanent partial disability benefits was to begin on January 8, 2013. (Arb., pp. 4, 7)

The record indicates claimant was found to be at maximum medical improvement (MMI) on December 15, 2013. (Ex. 2, p. 5) Based on this record, permanent partial disability benefits should commence on this date.

IV. MEDICAL BILLS

Defendants contend that bills incurred with the Iowa Clinic on April 29, 2013, May 8, 2013, and May 13, 2013, are bills related to treatment of claimant's diabetes and are not work related. (Ex. 4, pp. 1-8)

According to the record, the bills do appear to be for the treatment of claimant's diabetes and are not related to claimant's knee injury. Claimant does not dispute that these bills were for the treatment of his diabetes. Based on this record, defendants should not be liable for the costs incurred with the Iowa Clinic for April 29, 2013, May 8, 2013, and May 13, 2013.

V. EXTENSION GRANTED FOR THE FILING OF CLAIMANT'S BRIEF.

On page seven of defendants' appeal brief, defendants indicate one of the issues on appeal is that the agency granted claimant additional time to file an appeal brief. This matter has been ruled on by a September 23, 2014, ruling and an October 7, 2014, ruling finding that defendant failed to show prejudice resulted in allowing claimant an extension to file his appeal brief on September 22, 2014.

Defendants give no argument in the post-hearing brief why defendants were prejudiced by allowing an extension of time for claimant to file his brief. The record also does not indicate that defendants sustained any prejudice by granting an extension for

claimant to file an appeal brief. Based on this, defendants' objections to the extension for claimant's appeal brief are again denied.

ORDER

IT IS THEREFORE ORDERED:

That the arbitration decision of June 3, 2014, is modified, in part, and affirmed in part.

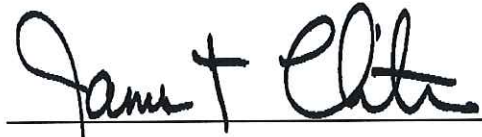
Defendants shall pay claimant eighty-one point four (81.4) weeks of permanent partial disability benefits at the rate of seven-hundred twenty-five and 14/100 dollars (\$725.14) per week commencing on December 15, 2013.

That defendants shall not be liable for medical expenses with the Iowa Clinic on April 29, 2013, May 8, 2013, and May 13, 2013.

That the parties shall each be responsible for their own costs of appeal, with the defendants responsible for the preparation of the transcript.

That the arbitration decision, filed June 3, 2014, shall remain the same in all other respects.

Signed and filed this 5th day of May, 2015.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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