

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRANDON RAYMIE,  
Claimant,

vs.

JB SCHOTT FAMILY FARMS,  
Employer,

and

GRINNELL MUTUAL,  
Insurance Carrier,  
Defendants.

**FILED**

**OCT-7 2016**

WORKERS' COMPENSATION

File No. 5041943

A P P E A L

D E C I S I O N

BRANDON RAYMIE,  
Claimant,

vs.

GLAZER'S DISTRIBUTORS OF IOWA,  
INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE CO.,  
Insurance Carrier,  
Defendants.

File Nos. 5046167, 5046169

A P P E A L

D E C I S I O N

Head Note Nos.: 1402.30, 1802, 1803,  
2501, 4000.2, 4200

This appeal involves three consolidated cases: File No. 5041943 with a stipulated injury date of August 9, 2011, File No. 5046167 with a disputed injury date of July 6, 2012, and File No. 5046169 with a stipulated injury date of July 17, 2012. The

case was heard on November 6, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on January 7, 2015.

Claimant appealed in File No. 5041943, asserting that the deputy commissioner ordered benefits paid at an incorrect weekly rate. Specifically, claimant contends the deputy commissioner made a typographical error that needs to be corrected to ensure benefits are paid at the stipulated and correct weekly rate.

Claimant also appealed in File No. 5046169, asserting that the deputy commissioner erred in terminating claimant's healing period benefits on August 27, 2012. Claimant contends healing period benefits should be awarded from July 18, 2012, through June 24, 2014. In File No. 5046169, defendants appear to concede error on the healing period issue, but argue healing period benefits should terminate on December 9, 2013.

Both employers and both insurance carriers filed cross-appeals in these files. All issues asserted by defendants pertain to reimbursement issues and how benefits should be credited pursuant to Iowa Code section 85.21. Defendants JB Schott and Grinnell Mutual (hereinafter referred to collectively as "Schott") contend Glazer's and New Hampshire Insurance Company (hereinafter referred to collectively as "Glazer's") should be ordered to reimburse all benefits paid by Schott, even if Schott overpaid benefits, to which claimant was entitled on Schott's claim. Schott also contends the deputy commissioner erred because he did not order reimbursement for medical expenses incurred through Neural Watch Texas and Global Infectious Disease.

Glazer's contends any reimbursement ordered pursuant to Iowa Code section 85.21 should be limited to the weekly rate applicable in Glazer's file. Glazer's also contends any medical expenses ordered to be reimbursed should be limited because Schott selected all of the medical providers. Finally, Glazer's contends any order of reimbursement should be credited to Glazer's against any award of permanent partial disability benefits it would otherwise owe.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision the proposed arbitration decision of February 25, 2015, filed in this matter with the following additional analysis:

Claimant asserts error was committed by the deputy commissioner pertaining to the weekly rate at which benefits were awarded for the August 9, 2011, date of injury, File No. 5041943. Defendants do not resist or respond to this appellate challenge. Review of the parties' hearing report and review of the applicable rate book demonstrate the deputy commissioner did make a typographical error. Weekly benefits for the August 9, 2011, injury claim should be awarded at the rate of three hundred ninety-seven and 01/100 dollars (\$397.01).

Claimant asserts healing period benefits should be awarded in File No. 5046169 from July 18, 2012, through June 24, 2014. The dispute in this case revolves around the termination date for healing period benefits. Defendants do not challenge that benefits should commence on July 18, 2012. However, defendants contend claimant's healing period terminated, pursuant to Iowa Code section 85.33(3), on August 23, 2012, because claimant refused to return to work and was terminated as of that date. In the alternative, defendants contend claimant was released to return to work on December 9, 2013, by Dr. Shumaker and claimant's healing period entitlement should terminate on that date.

The initial determination to be made in File No. 5046169 is whether claimant forfeited healing period benefits pursuant to Iowa Code section 85.33(3). Defendants contend claimant was terminated from his employment on August 23, 2012, for personal reasons. (Ex. CC) Specifically, defendants asserted in their answers to interrogatories that claimant was terminated because he stopped going to work. (Ex. DD)

However, the medical evidence demonstrates claimant was on work restrictions pursuant to the directives of Chad Abernathy, M.D.. Claimant was not released to return to work by Dr. Abernathy until August 27, 2012, which was after his termination.

Refusal of suitable work by an employee results in forfeiture of any temporary disability or healing period benefits pursuant to Iowa Code section 85.33(3). Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). Voluntarily quitting employment can be considered a refusal of suitable work disqualifying an employee from benefits pursuant to Iowa Code section 85.33(3). Id.

However, the employer bears the burden to establish the prerequisites of Iowa Code section 85.33(3). Koehler v. American Color Graphics, File No. 1248489 (Appeal February 2005) Specifically, the employer must establish by a preponderance of the evidence that work was offered to the claimant, that the work was suitable, and that claimant intentionally refused the offered work. Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012); Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (Appeal April 2004); Woods v. Siemens Furnas Control, File Nos. 1303082, 1273249 (Arbitration July 2002) (Final agency action by Commissioner Trier).

Iowa Code section 85.33(3) only applies if the employer offers suitable work to the employee. Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). In this instance, the employer terminated claimant's employment before he was released by the treating surgeon to return to work. Termination by itself is not sufficient grounds to disqualify an employee from healing period benefits under Iowa Code section 85.33(3). Terhark v. Hope Haven, File No. 5031853 (Appeal February 2013); Alonzo v. IBP, Inc., File No. 5009878 (Appeal October 2006); Franco v. IBP, Inc., File No. 5004766 (Appeal February 2005).

The employer could not feasibly offer suitable work to claimant before the surgeon released claimant to return to work. Claimant testified he had no further contact from the employer after July 2012. (Ex. D, deposition transcript p. 75) The employer offered no evidence that it offered suitable work to claimant after Dr. Abernathy's release on August 27, 2012. Therefore, I find the employer failed to establish it offered suitable work to claimant or that claimant intentionally refused suitable work. The employer failed to establish that the provisions of Iowa Code section 85.33(3) apply or that they disqualify claimant from receiving healing period benefits after August 23, 2012. Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010).

Having reached these findings and conclusions, I must determine when claimant's healing period ended for the July 17, 2012, injury in File No. 5046169. Iowa Code section 85.34(1) provides that healing period terminates upon the earliest of three occurrences: (1) claimant returns to work; (2) claimant becomes medically capable of performing substantially similar employment; (3) claimant achieves maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

Claimant asserts he did not return to work and never received medical clearance to return to substantially similar employment. Therefore, claimant contends his healing period continued from July 18, 2012, through the date of maximum medical improvement (MMI), which claimant asserts occurred on June 24, 2013. Claimant's assertion is based on the opinions of his independent medical evaluator, Robin Sassman, M.D. Dr. Sassman declared MMI to be the date of her evaluation, June 24, 2014.

Defendants concede claimant did not return to work after the date of injury. However, defendants contend claimant was released to return to work on December 9, 2013, and that such medical release terminated claimant's healing period entitlement. Defendants' assertion relies upon the opinions of the treating neurosurgeon, Grant Shumaker, M.D. Dr. Schumaker released claimant to return to work on December 9, 2013. However, the release to return to work was a qualified release that included work restrictions and a recommendation for a functional capacity evaluation (FCE). (Ex. 2, pp. 113, 116)

The FCE was completed on January 14, 2014, and recommended permanent physical restrictions. (Ex. 2, pp. 119-142) Claimant clearly did not return to work and was not medically capable of performing substantially similar employment even at the time of the FCE.

However, upon completion of the FCE, Dr. Shumaker issued a permanent impairment rating on March 21, 2014. By definition, a permanent impairment rating requires claimant to be at maximum medical improvement. See AMA Guides to the

Evaluation of Permanent Impairment, Fifth Edition, § 1.2, p. 2 ("An impairment is considered permanent when it has reached maximum medical improvement (MMI)."); AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, § 2.4, p. 19 ("An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximum medical improvement (MMI)**." (emphasis in original)).

The record does not contain any reference to additional treatment by Dr. Shumaker or to any treatment by any other physician after March 21, 2014. Neither Dr. Sassman nor Douglas Martin, M.D., recommended ongoing medical treatment for claimant after March 21, 2014. Therefore, I find claimant achieved MMI by the date of Dr. Shumaker's permanent impairment rating. I conclude claimant's entitlement to healing period benefits for the July 17, 2012, injury in File No. 5046169 terminated on March 21, 2014, and his entitlement to permanent partial disability benefits for that injury commenced on March 22, 2014. Iowa Code section 85.34(1).

The remaining issues on appeal pertain to the reimbursement action pursuant to Iowa code section 85.21. Schott paid benefits in excess of those owed, including medical and weekly benefits. Glazer's contends that the commissioner should not order all medical benefits paid or all weekly benefits paid by Schott to be reimbursed.

Glazer's contends Schott and its insurance carrier selected and directed the medical care offered to claimant in this case. Glazer's contends two surgeons recommended against a fusion surgery. Nevertheless, Schott sent claimant to Dr. Shumaker and authorized the fusion surgery. Given the recommendations against the fusion and the fact that Glazer's offered alternate medical care that was rejected by claimant, Glazer's contends it should not be ordered to reimburse Schott for the medical care Schott selected.

Ultimately, I find the lumbar fusion surgery was beneficial to claimant. Although there were contrary medical recommendations, the fusion surgery was a reasonable option recommended by a treating neurosurgeon. Claimant experienced a significant resolution of symptoms, despite the post-operative complications. I conclude the fusion surgery was causally related to the July 17, 2012, injury. It was equitable and appropriate for the deputy commissioner to order reimbursement of those medical expenses pursuant to Iowa Code section 85.21.

Schott contends the deputy commissioner erred in not ordering reimbursement of medical expenses incurred through Neural Watch Texas and Global Infectious Disease. The deputy commissioner concluded:

Exhibit C indicates that defendants Schott and Grinnell also paid fees to a Global Infectious Disease, and a Neural Watch. Defendants Glazer's/New

Hampshire indicate there have been no records exchanged for either entity. No records for Global Infectious Disease or Neural Watch are in the record. Based on this, defendants Glazer's/New Hampshire, shall reimburse Grinnell for all medical costs associated with the July 17, 2012, injury, less bills associated with Alaris, Global Infectious Disease, and Neural Watch.

(Arbitration Decision, p. 21)

In response to the deputy commissioner's analysis, Schott cites to the September 11, 2013, operative report at Exhibit 2, page 89 as a basis for awarding the additional expenses. That operative report does not demonstrate or record the specific medical services provided by Global Infectious Disease or Neural Watch. Schott, in its appeal brief, also cites to websites and evidence outside the evidentiary record in this case in an effort to support its claim. Only evidence contained within this evidentiary record was considered by the deputy commissioner and it is not appropriate to cite to, or rely upon, evidence outside the evidentiary record to support a claim on appeal.

I conclude the deputy commissioner's analysis was accurate and legally correct with respect to his denial of any claim for medical expenses incurred through Global Infectious Disease and Neural Watch. The deputy commissioner's order pursuant to Iowa Code section 85.21 pertaining to medical benefits is affirmed.

Schott also contends it should be reimbursed for overlapping benefits paid to claimant by both employers. Specifically, Schott contends on appeal that both employers paid healing period benefits between July 18, 2012, and August 17, 2012. Schott paid at a higher weekly rate than is owed by Glazer's. Schott contends it should receive full reimbursement of all weekly benefits paid beyond those it was ultimately determined to owe. Schott then contends Glazer's should be permitted to take credit for any overpayment of benefits toward its obligations to pay permanent partial disability benefits.

Schott's proposed result would fully reimburse Schott for all benefits it paid above and beyond its obligations. Schott's proposed result would permit Glazer's to take credit for all benefits paid to claimant against its permanent partial disability obligations. Such a result would ensure claimant was fully paid all benefits he is owed but claimant would not receive a windfall.

Glazer's contends it owed benefits to claimant at the weekly rate of \$376.29. Glazer's contends it should not be ordered to reimburse Schott at Schott's higher weekly rate. Instead, Glazer's contends this difference in the weekly rate should be treated as an overpayment of weekly benefits by Schott pursuant to Iowa Code section 85.34(5).

Claimant also weighs in on this issue. Claimant acknowledges some duplication of payments from defendants. Of course, claimant appropriately points out he did nothing wrong in accepting the voluntary benefits. Claimant contends any overpayment made by Schott should be governed by Iowa Code section 85.34(4) and that Schott should be the only entity entitled to a credit against a future injury. Claimant contends "[n]either 85.34(4) nor any other statute permits the transfer of credit for an overpayment to a different, or unrelated, employer." (Claimant's reply brief, p. 3)

Iowa Code section 85.21 grants this agency an equitable power of apportionment not generally contained within other worker's compensation statutes. Specifically, Iowa Code section 85.21(3) provides:

When liability is finally determined by the workers' compensation commissioner, the commissioner shall order the carriers or employers liable to the employee or to the employee's dependent or legal representative to reimburse the carriers or employers which are not liable but were required to pay benefits.

The purpose of section 85.21 is to encourage employers to make voluntary payments to injured workers and to determine liability for those payments at a later date. Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543, 549 (Iowa 1995). In this case, the most equitable result and the result that best serves the purpose of Iowa Code section 85.21 is to grant Schott's request for reimbursement and to permit Glazer's to take a credit against all benefits paid in reimbursement against their permanent partial disability liability. Such a result guarantees that an employer paying voluntary benefits is fully reimbursed, guarantees that the injured worker gets timely payment of benefits, yet ensures the claimant receives only those benefits to which he or she is entitled without a windfall.

Therefore, Glazer's will be ordered to reimburse Schott for all overpayments it voluntarily made above its ultimately determined liability and Glazer's shall be given a credit for all such reimbursements against its liability for permanent partial disability benefits.

#### ORDER

IT IS THEREFORE ORDERED as follows:

#### **Regarding File No. 5041943 (injury date August 9, 2011):**

The arbitration decision is modified with respect to the issue of weekly benefit rate and affirmed in all other respects.

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of three-hundred ninety-seven and 01/100 dollars (\$397.01) per week commencing on January 23, 2012.

Defendants shall pay accrued benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits as ordered in the arbitration decision as set forth in Iowa Code section 85.30.

Defendants shall receive a credit for benefits previously paid.

Defendants shall pay claimant \$930.12 in penalty, as detailed in the arbitration decision.

Defendants shall pay claimant's medical mileage as it pertains only to File No. 5041943.

**Regarding File No. 5046167 (injury date July 6, 2012):**

The arbitration decision is affirmed in all respects as to File No. 5046167.

Claimant shall take nothing in the way of benefits from this file.

Both parties shall pay their own costs regarding this file.

**Regarding File No. 5046169 (injury date July 17, 2012):**

The arbitration decision is modified as to the applicable healing period and commencement date for permanent partial disability benefits in File No. 5046169 and affirmed in all other respects.

Defendants shall pay claimant healing period benefits at the rate of three-hundred seventy-six and 29/100 dollars (\$376.29) per week from July 18, 2012, through March 21, 2014.

Defendants shall pay claimant one-hundred fifty (150) weeks of permanent partial disability benefits at the rate of three-hundred seventy-six and 29/100 dollars (\$376.29) per week commencing on March 22, 2014.

Defendants shall pay accrued 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 pay claimant's medical expenses.



Defendants shall reimburse Schott/Grinnell for medical expenses as set forth in the arbitration decision and herein.

Defendants shall reimburse Schott/Grinnell for temporary benefits as detailed in the arbitration decision and herein.

Defendants shall have a credit for all benefits reimbursed to Schott/Grinnell against their permanent partial disability liability in this file.

Defendants shall pay claimant's mileage only as it pertains to File No. 5046169.

Defendants shall pay claimant for one half of the costs associated with Dr. Sassman's IME.

**Regarding both File Nos. 5041943 and 5046169:**

Defendants shall pay the costs of these matters as ordered in the arbitration decision.

Defendants shall equally bear the costs of this appeal.  
Defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Signed and filed this 7<sup>th</sup> day of October, 2016.



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WORKERS' COMPENSATION  
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