

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SUSAN MCEACHRON,

Claimant,

vs.

THE HOME DEPOT U.S.A., INC.,

Employer,

And

NEW HAMPSHIRE INSURANCE CO.

Defendants.

File No. 5041339

**FILED**

JUN 8 2017

WORKERS' COMPENSATION

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

On May 18, 2017, Joseph S. Cortese II, Iowa Workers' Compensation Commissioner, delegated the authority to the undersigned to issue the final agency decision on the intra-agency appeal currently pending before this agency. The decision in this matter shall be the final agency action.

This arbitration hearing was held on March 27, 2015, in Cedar Rapids, Iowa. The parties filed post-hearing briefs. The case was deemed fully submitted on May 2, 2015. The deputy issued the arbitration decision on October 19, 2015.

The deputy commissioner determined claimant was entitled to: (1) Two hundred (200) weeks of permanent partial disability benefits at the weekly benefit rate of three hundred eighty and 89/100 dollars (\$380.89) and commencing on October 7, 2014; (2) two thousand and 00/100 dollars (\$2,000.00) in penalty benefits; (3) Defendants were entitled to take credit for benefits previously paid; and, (3) Defendants were ordered to pay the costs of the independent medical examination as set forth in the decision.

On November 9, 2015, defendants filed an application for rehearing. Defendants requested two items to be reconsidered. In paragraph 6 of the application, defendants stated:

6. It is necessary for the deputy commissioner to make findings of fact and conclusions of law as to Claimant's entitlement to temporary total disability and temporary partial disability benefits so the amount of Defendants' overpayment of benefits to be credited per Iowa Code section

85.34(4) against the liability of Defendants for permanent partial disability benefits can be determined unless Claimant by withdrawing the issue of her entitlement to temporary total disability and temporary partial disability benefits from consideration is also stipulating to the amount of the credit for overpayment of temporary total disability and temporary partial disability benefits from consideration is also stipulating to the amount of the credit for overpayment of temporary total disability benefits previously claimed by Defendants in Exhibit 5 page 13. Defendants request that the deputy commissioner grant this application for rehearing and make findings of fact and conclusions of law with regard to the issue of the extent of Claimant's entitlement to temporary total disability and temporary partial disability so any excess temporary total disability benefits can be properly credited against the liability of the Defendants for permanent partial disability benefits.

(Defendants' Application for Rehearing, page 2)

The second item defendants requested to be reconsidered was:

7. Defendants further requests [sic] that the award of penalty benefits for delay in payment of temporary total disability benefits be reversed on rehearing in that said award is an abuse of discretion, unreasonable, arbitrary and capricious and in error as a matter of law where no specific findings of fact and conclusions of law have been made by the presiding deputy as to when temporary total disability benefits are due and payable. Claimant withdrew the issue of entitlement of temporary total disability benefits and accepted the amounts paid. Without any findings as to the period time Claimant is entitled to temporary total disability benefits there can be no delay or denial of the benefits and a claim under Iowa Code section 86.13 for penalty benefits fails as a matter of law.

(Defendants' Application for Rehearing, p.2)

The hearing deputy issued a ruling on the application for rehearing. The ruling was filed on November 12, 2015. In response to paragraph six, the deputy determined:

At the beginning of the hearing the undersigned informed the parties that if an item was not identified in the hearing report as in dispute no decision would be made on an issue.

I've been given the hearing report. I want to go over it to make sure I understand all of the issues that the parties wish for me to decide in this case. And if the item is not listed as a disputed issue, then I won't be making a decision on that particular item.

(Transcript, page 3)

The extent of credit for temporary partial disability (TPD) benefits under Iowa Code 85.34(4) was not identified in the hearing report as an issue that needed to be determined in this case. The parties stipulated defendants are entitled to credit for benefits identified in Exhibit 8. As the parties did not identify the credit for TPD as an issue, the defendants' motion for rehearing was denied on this issue.

With respect to the second item in the application for rehearing, the deputy reiterated portions of the arbitration decision to illustrate why there was no need for a rehearing. The deputy explained:

The arbitration decision Findings of Fact found in part:

On May 16, 2013 claimant's attorney wrote the claimant's adjuster requesting that claimant's temporary partial disability (TPD) should be converted to temporary total disability (TTD) on May 28, 2013. (Ex. 5, p.1) Follow up letters were sent June 26, 2013 by claimant's attorney requesting payment of TTD. (Ex. 5, pp. 2-4) Claimant's TPD benefits were terminated in December 2013. They were reinstated in February 2014. (Ex. 5, p. 6) Claimant notified defendants that her benefits were to transition from TPD to TTD effective June 5, 2014 on May 2, 2014. (Ex. 5, p. 7) On July 11, 2014 defendants stated that they were paying the TTD. (Ex. 5, p. 11)

(Arbitration Decision, p. 6)

The arbitration decision found in the Conclusions of Law in part:

In this case claimant submitted evidence that payments were late and terminated and that there was a delay in starting TTD benefits in two separate summers. The defendants offered no proof as to why payments were late, terminated and why there was a delay in starting TTD benefits in 2013 and 2014. The only attempt to address the issue of penalty is in defendants' brief. Argument of counsel is not evidence. No attempt was made to show compliance with Iowa Code 86.13(4) c (1), (2) and (3). I do not have evidence as to why there was a delay or termination of benefits in December of 2013 and the delay in starting TTD benefits. There is no evidence from the defendants to explain why payments were postmarked

the day after they were due. Claimant notified defendants in advance of the transition from TPD to TTD.

While a delay of even one day can be serious, I do not find delayed payments in this case warrants a 50 percent penalty. Exhibit 9 shows the postmark showing that checks were mailed one day after they were due. Exhibit 8 shows delayed payments made of 46 and 56 days. These are more serious infractions about paying benefits. The time it took defendants to pay for TTD for two different summers is also a more serious violation of the employer's obligation to pay benefits.

Considering the record before me I find that the defendants shall pay \$2,000.00 in penalty benefits.

(Arb. Dec. pp.10-11)

The above findings of fact and conclusions of law provide sufficient information as to the time periods and benefits that were delayed or terminated. The findings in the decision identified the delay in temporary total benefits. The payment record found in Exhibit 9, pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 17 itemized the late payments of temporary benefits.

(Ruling on Application for Rehearing, p.3)

On December 1, 2015, defendants filed their notice of appeal of all adverse rulings in the arbitration decision and in the application for rehearing. In the appeal brief, defendants listed the issues as:

1. The extent of temporary partial disability, temporary total disability, and healing period benefits is an issue that should be decided;
2. Defendants exhibits B and C should have been admitted into evidence as there was no showing or finding that the receipt of the exhibits would be unfairly prejudicial to claimant;
3. The award of permanent disability benefits is contrary to the greater weight of the evidence; and
4. The award of a penalty was in error as a matter of law.

Claimant filed her brief on March 10, 2016. Defendants filed a reply brief on March 24, 2016.

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

The record in this case was reviewed de novo. Both sides dictated the issues to be determined on appeal. See Iowa Code section 17A.15; and Rule 876 IAC 4.28(7). The party who would suffer a loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule App. P. 6.14(6).

Pursuant to Iowa Code sections 17A.15 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on October 19, 2015, and the ruling on application for rehearing filed on November 12, 2015, which relate to the issues properly raised on intra-agency appeal.

I find the deputy workers' compensation commissioner provided sufficient analysis of the issues raised during the arbitration proceedings. I affirm the deputy's findings of fact, rationale, and conclusions of law pertaining to those issues, as well as the determinations made in the ruling on application for rehearing.

#### ORDER

THEREFORE, IT IS ORDERED: The arbitration decision filed on October 19, 2015, and the ruling on application for rehearing filed on November 12, 2015, are AFFIRMED in their entirety.

IT IS FURTHER ORDERED: Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 8th day of June, 2017.



MICHELLE A. MCGOVERN  
DEPUTY WORKERS' COMPENSATION  
COMMISSIONER

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