BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANTHONY BORKOVEC, Claimant, vs. DISH NETWORK CORPORATION, Employer, and ACE AMERICAN INSURANCE CO. Insurance Carrier, Defendants.	File No. 5042514 APPEAL DECISION RE: MOTION TO DISMISS PARTIAL COMMUTATION Head Note No.: 3303.20

FILED
MAY - 3 2019
WORKERS' COMPENSATION

STATEMENT OF THE CASE

On April 18, 2019, the Iowa Workers' Compensation Commissioner entered an order delegating authority to the undersigned to issue the intra-agency appeal decision in this matter as final agency action pursuant to Iowa Code section 86.3. Therefore, I performed a de novo review on this intra-agency appeal.

Another deputy workers' compensation commissioner entered an arbitration decision in the underlying case on February 5, 2015. The arbitration decision awarded claimant permanent total disability benefits. On August 24, 2016, a different deputy workers' compensation commissioner, having been delegated final agency appellate authority, filed an appeal decision in the underlying arbitration proceeding. The deputy commissioner on appeal reversed the permanent total disability award and concluded that claimant was not yet at maximum medical improvement. On intra-agency appeal, a running healing period was awarded. The appellate deputy denied a request for rehearing filed by claimant and final agency action was taken on the underlying arbitration proceeding on September 19, 2016.

Claimant sought timely judicial review of the appeal decision and ruling on rehearing. On June 30, 2017, while the case was pending on judicial review, claimant filed an original notice and petition seeking partial commutation. Defendants filed a motion to dismiss the petition for partial commutation because the period of entitlement was not definitely determinable, as required by Iowa Code section 85.45(1)(a).

A third deputy commissioner considered the motion to dismiss and entered a ruling denying the motion to dismiss on November 1, 2017. Defendants sought rehearing of that ruling and the deputy commissioner denied the rehearing request in a ruling dated December 11, 2017.

Defendants filed a timely intra-agency appeal of the denial of their motion to dismiss the petition for partial commutation. Defendants' appeal is considered interlocutory in nature, given that the underlying ruling did not dispose of the entirety of the case. 876 IAC 4.27. Nevertheless, the issue appears ripe at this time, the dispute is fully briefed, and this case is accepted as an interlocutory appeal. The parties filed appellate briefs with the commissioner while the case was pending on judicial review.

While this case was pending on intra-agency appeal, the Iowa District Court for Polk County issued a judicial review decision in the underlying arbitration proceeding. The Iowa District Court reversed the agency's appeal decision in the underlying arbitration proceeding. However, defendants sought further judicial review and the case was assigned to the Iowa Court of Appeals.

On May 16, 2018, the Iowa Court of Appeals filed a decision reversing the District Court. The Iowa Court of Appeals affirmed the appeal decision issued by this agency, which awarded a running healing period and concluded that the claim for permanent disability benefits was not yet ripe. The Iowa Supreme Court denied further review via an order filed July 17, 2018.

Therefore, as this case is currently postured, all judicial review of the underlying arbitration proceeding has been completed. Claimant has been awarded a running healing period and it has been concluded that the underlying proceeding is not yet ripe for an award of permanent disability.

Following completion of the judicial review process, the parties requested and filed supplemental intra-agency appeal briefs regarding the pending petition for partial commutation. All intra-agency appeal briefs and all supplemental appeal briefs are accepted and considered. The case is fully briefed and submitted for determination on appeal.

ISSUES

Defendants present the following issues on appeal:

1) Whether the petition for partial commutation should be dismissed because the period of disability to be commuted cannot be definitely determined at this time.

2) Whether costs of this action should be assessed against claimant.

Defendants raised additional disputed issues in their initial appellate brief, including a jurisdictional challenge. However, in their supplemental briefing, defendants concede those disputes are rendered moot by the issuance of the Iowa Court of Appeals' decision and subsequent order by the Iowa Supreme Court denying further review. Defendants now concede this agency has jurisdiction to decide the above stated issues.

FINDINGS OF FACT

As noted above, I find that the agency issued final agency action via an appeal decision on August 24, 2016 and ruling on rehearing filed September 19, 2016. In the appeal decision, the agency stated:

> Both doctors have emphasized the importance of Anthony's opioid addiction. Both medical experts have indicated that treating his addiction should improve his ability to function. I find that claimant has not yet reached MMI with regard to his opioid addiction. I further find that treatment for his opioid addiction is likely to improve his ability to function. I find that at the time of the arbitration hearing claimant had not reached the end of his healing period and therefore the issue of permanent impairment or industrial disability was not ripe for determination. Because claimant has not reached the end of his healing period, defendants shall pay claimant running healing period benefits from July 26, 2009, until the requirements for termination of healing period under Iowa Code section 85.34(1) are met.
>
> Because permanency was not yet ripe for determination the remaining appeal issues regarding permanency are moot.

(Appeal Decision, page 4) This is final agency finding of fact and binding in this partial commutation contested case proceeding.

The agency appeal decision entered conclusions of law that include, "A claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved." (Appeal Decision, p. 4) This conclusion of law was ultimately affirmed by the Court of Appeals on judicial review and is the law of the case.

The appeal decision ordered, "Defendants shall pay to claimant running healing period benefits from July 26, 2009, until the requirements for termination of healing period under Iowa Code section 85.34(1) are met." (Appeal Decision, page 5) Again, this order is the law of the case and binding in this proceeding.

A review-reopening proceeding has not been filed seeking amendment of the underlying running healing period award. No further findings of fact or conclusions of law pertaining to claimant's entitlement to permanent disability benefits has been entered since the appeal decision and ruling on rehearing filed on August 24, 2016 and September 19, 2016, respectively.

I find that the claimant's period of permanent disability cannot be definitely determined at this time. I find that claimant must achieve maximum medical improvement before the entitlement to and period of permanent disability benefit entitlement can be determined.

The deputy workers' compensation commissioner that considered and ruled upon the motion to dismiss the petition for partial commutation concluded, "The underlying, arbitration decision did determine a period during which compensation could definitely be determined. The underlying arbitration decision meets the requirement of Iowa Code section 85.45(1)(a) and the ruling in Sloan, that there be either a settlement or an arbitration award." (Ruling on Motion to Dismiss Petition for Partial Commutation, page 3)

CONCLUSIONS OF LAW

Defendants challenge the ruling on their motion to dismiss the petition for partial commutation, asserting that Iowa Code section 85.45 requires that the period of time for benefits being commuted be definitely determined before a commutation can be ordered. Defendants contend that the period of claimant's entitlement to weekly benefits cannot be definitely determined because, on appeal, the agency reversed the permanent total disability award and entered a running healing period that will persist for an unspecified period of time. Therefore, defendants contend that there is no existing state of facts found on the face of the petition for partial commutation upon which relief could be granted. Defendants request dismissal of claimant's petition for partial commutation.

Claimant resists the motion to dismiss, asserting in his initial intra-agency brief that the case remained on judicial review and that, if reversed, the permanent total disability award would be a period of time that could be definitely determined given the agency's adoption of life expectancy tables for use in commutations. See 876 IAC 6.3(1). Claimant's contention was that, if the agency appeal decision was reversed and the arbitration decision award was reinstated by the courts, the period of benefits would be definitely determinable and the commutation request should be heard.

Of course, the Iowa Court of Appeals ultimately rejected the claimant's judicial review action. The agency appeal decision was ultimately affirmed and became binding. As such, the permanent total disability award in the arbitration decision has no legally binding effect. Only the final agency action rendered in the appeal decision and

ruling on rehearing have binding effect. Iowa Code section 17A.15(3); Iowa Code section 86.24(5).

As noted in the findings of fact, the appeal decision found that Mr. Borkovec has not achieved maximum medical improvement and that any claim for permanent disability has not yet ripened. The agency ultimately awarded a running healing period, which is subject to further review and which will terminate at some unspecified future date when claimant achieves maximum medical improvement or achieves one of the other factors outlined in Iowa Code section 85.34(1).

Having finalized judicial review of the underlying award, claimant modifies his argument in his supplemental appeal brief. Claimant now urges, "[t]hat there is substantial likelihood Mr. Borkovec will be found permanently and totally disabled in a future review-reopening action." (Claimant's Supplemental Brief on Intra-Agency Appeal, page 2) Claimant contends this distinguishes his case from prior agency precedent in Sloan v. Mark D. Sloan, D.D.S., P.C. d/b/a Sloan Family Dentistry, P.C., File No. 5065386 (Ruling on Motion to Dismiss June 12, 2017).

This intra-agency appeal involves a ruling on a motion to dismiss. Rule 876 IAC 4.35 makes Iowa Rule of Civil Procedure 1.421, regarding motions to dismiss, applicable to this agency. Iowa Rule of Civil Procedure 1.421 permits an attack upon a petition when the facts alleged within that petition fail to state a claim upon which any relief may be granted.

A motion to dismiss should only be granted if there are no stated facts conceivable, under which a claimant might show a right of recovery. Nixon v. State, 704 N.W.2d 643, 644, (Iowa 2005). A motion to dismiss is sustainable only when it appears to a certainty that claimant is not entitled to any relief under any stated facts that could be proved to support a claim. Bindel v. Iowa Manufacturing Co. of Cedar Rapids, 197 N.W.2d 552, 553 (Iowa 1972). To prevail on a motion to dismiss, a movant must show that there are no stated facts conceivable that claimant might show a right of recovery. State Ex Rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401, 403 (Iowa 1998).

When a motion to dismiss tests the legal sufficiency of the petition, the allegations pled by the claimant are admitted as true and all inferences which may be drawn from those facts are construed in a light most favorable to the claimant. The motion to dismiss also waives any ambiguity or uncertainty in the petition. Leuchtenmacher v. Farm Bureau Mut. Ins., 460 N.W.2d 858, 861 (Iowa 1990); Curtis v. Bd. of Sup'rs of Clinton County, 270 N.W.2d 447, 448 (Iowa 1978).

When interpreting workers' compensation provisions, the law is construed liberally in favor of the claimant. Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990); Teel v. McCord, 394 N.W.2d 405, 406-407 (Iowa 1986); Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). The beneficial purposes of the law

will not be frustrated by reading something into it which is not there or by adopting a strained or narrow construction. Thomas, 349 N.W.2d at 126.

On the other hand, the plain meaning of the statute must also be enforced. Carolan v. Hill, 553 N.W.2d 882, 887 (Iowa 1996). Unambiguous language in a statute should be given its plain and rational meaning and applied as written. Id. Therefore, a motion to dismiss is only sustained when it appears to a legal certainty that claimant would not be entitled to any relief under any state of facts which could be resolved in support of the claims asserted. Halvorson v. City of Decorah, 258 Iowa 314; 138 N.W.2d 856, 860 (1965).

Iowa Code section 85.45 requires that "the period during which compensation is payable can be definitely determined" before commutation is granted. The Iowa Workers' Compensation Commissioner provided guidance on the interpretation of Iowa Code section 85.45(1)(a). See Sloan v. Mark D. Sloan, D.D.S. d/b a Sloan Family Dentistry, P.C., File No. 5065386 (Commissioner's Ruling on Motion to Dismiss Petition for Partial Commutation June 12, 2017). The Commissioner's ruling was affirmed on judicial review by the Iowa District Court for Polk County. Accordingly, this agency level decision is binding precedent on the undersigned.

In his ruling in Sloan, the commissioner noted, "[g]iven that there has been neither a settlement nor an arbitration award in this matter, there is nothing to be commuted at this point in time." Sloan v. Mark D. Sloan, D.D.S. d/b a Sloan Family Dentistry, P.C., File No. 5065386 (Commissioner's Ruling on Motion to Dismiss Petition for Partial Commutation June 12, 2017).

Claimant seeks to distinguish Sloan because an arbitration decision has been entered in the underlying arbitration case. However, the arbitration decision is no longer binding or legally effective. Rather, it was a proposed decision that was superseded by the intra-agency appeal decision. Iowa Code section 17A.15(3); Iowa Code section 86.24. The arbitration decision no longer has any legal effect in the underlying claim or this partial commutation proceeding.

Rather, similar to Sloan, claimant has a remaining claim for permanent disability that may be asserted and pursued at some point in the future. Claimant asserts a high probability that he will recover a permanent total disability in the future. He may well do so, but that claim is not ripe for determination at this time. Moreover, the final factual findings of this agency were that "treatment for [claimant's] opioid addiction is likely to improve his ability to function." (Appeal Decision, p. 4)

Claimant has a potential, yet not ripe, claim for permanent disability. The extent of that disability will have to be determined at some future, unknown date. Presently, Mr. Borkovec is receiving a running healing period. That healing period will likely end at some unspecified point in the future. Determining when the healing period will end would require conjecture and speculation. Determining the future award of permanent

disability, if any, also would require conjecture and speculation. The Iowa Supreme Court has indicated that this agency cannot speculate as to the permanent disability before maximum medical improvement has been achieved. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010).

Given the running healing period and the finding of this agency that claimant has not yet achieved maximum medical improvement, it certainly cannot be said that claimant's entitlement to future weekly benefits can be "definitely determined" as of this date. Iowa Code section 85.45(1)(a). In fact, it would be inappropriate for this agency to render a decision at this juncture that definitely determines claimant's future entitlement to benefits. Gwinn, 779 N.W.2d at 201.

Therefore, I conclude that the analysis and conclusion drawn by the Iowa Workers' Compensation Commissioner in Sloan is applicable in this situation. Claimant's entitlement to future weekly benefits cannot be definitely determined. Therefore, claimant cannot maintain a claim for partial commutation. Iowa Code section 85.45(1); Sloan v. Mark D. Sloan, D.D.S. d/b a Sloan Family Dentistry, P.C., File No. 5065386 (Commissioner's Ruling on Motion to Dismiss Petition for Partial Commutation June 12, 2017).

While I agree with the deputy commissioner that it was inappropriate to dismiss the petition for partial commutation while the judicial review process ran its course, that analysis is no longer relevant. Judicial review has been completed. The underlying arbitration decision no longer has any legal effect. Rather, the final agency action in this case demonstrates conclusively that claimant's future entitlement to weekly benefits cannot be definitely determined at this time. Therefore, I conclude that the petition for partial commutation should be dismissed.

The final issue raised by defendants in this appeal is assessment of costs. Assessment of costs is within the discretion of this agency. Iowa Code section 86.40.

Claimant filed the petition for partial commutation on June 30, 2017. Following a statutory amendment in 2017, the claimant's right to seek a partial commutation was amended as of July 1, 2017. Therefore, it was proper and understandable why claimant filed the petition for partial commutation on June 30, 2017.

Claimant prevailed on the initial motion to dismiss the petition for partial commutation. Claimant prevailed at the arbitration level, on judicial review before the district court, and the Chief Judge of the Iowa Court of Appeals expressed hesitation in affirming the agency's appeal decision. Claimant had legitimate reasons and bases to file the petition for partial commutation.

While defendants prevailed in this intra-agency appeal, they prevailed because the posture of the case and the underlying facts changed during the pending appeal. If the facts had been the same as the time the motion to dismiss was ruled upon, I would

have entered the same ruling as the deputy commissioner. Under this unique set of circumstances, I conclude that all parties had legitimate bases for their positions and that it would not be equitable to tax all costs against either party. Exercising my discretion, I conclude that all parties should bear their own costs both in the underlying partial commutation action and in this intra-agency appeal.

ORDER

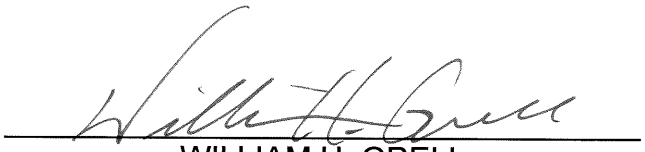
IT IS THEREFORE ORDERED:

Claimant's original notice and petition for partial commutation is dismissed without prejudice.

All parties shall bear their own costs both in the underlying partial commutation action and in this intra-agency appeal.

This decision is entered as final agency action pursuant to the Commissioner's delegation of authority filed on April 18, 2019 and Iowa Code section 86.3.

Signed and filed this 3rd day of May, 2019.



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