

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS M. MARSHALL,

Claimant,

vs.

CITY OF MAXWELL,

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,
Defendant.

File No. 5255382

A P P E A L

D E C I S I O N

FILED

JUL 31 2018

WORKERS' COMPENSATION

:Head Notes: 1801; 2501; 2502; 2907; 4000.2

Defendants City of Maxwell, employer, and its insurer, EMCASCO Insurance Company, appeal from an arbitration decision filed on December 20, 2017. Claimant Dennis M. Marshall cross-appeals from the arbitration decision and from the rehearing decision filed on January 12, 2018. The case was heard on August 9, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 15, 2017.

In the arbitration decision, the deputy commissioner determined claimant did not achieve maximum medical improvement (MMI) on January 17, 2015, and had not yet achieved MMI as of the date of the arbitration hearing. As a result, the deputy commissioner found claimant was entitled to temporary disability or healing period benefits from December 12, 2013, through the date of the arbitration hearing and continuing into the future until the first of the factors outlined in Iowa Code section 85.33 or Iowa Code section 85.34(1) were met. The deputy commissioner ordered defendants to pay applicable interest pursuant to Iowa Code section 85.30 for all accrued weekly benefits. The deputy commissioner gave the parties the opportunity to file a motion for appointment of an appropriate expert to calculate interest owed if the parties could not reach an amicable resolution on the issue.

With respect to claimant's claim for penalty benefits, the deputy commissioner determined defendants had a reasonable basis for denying payment of temporary disability or healing period benefits during the period of January 17, 2015, through April 17, 2017. The deputy commissioner also determined defendants contemporaneously conveyed to claimant their basis for this denial. Thus, the deputy commissioner found

penalty benefits should not be assessed for defendants' denial of temporary disability or healing period benefits from January 17, 2015, to April 17, 2017.

However, the deputy commissioner determined defendants owed but failed to pay temporary disability or healing period benefits for December 12, 2013. The deputy commissioner also determined defendants paid weekly benefits one day late on two separate occasions. Because the deputy commissioner found defendants failed to put forth a reasonable basis for these denials and delays, the deputy commissioner awarded penalty benefits in the amount of \$500.00.

The deputy commissioner denied claimant's request to enter an order directing defendants to pay claimant's health care providers within 30 days of their billings. The deputy commissioner found no sanctions or costs should be ordered against defendants for defendants' denial of requests for admissions. Finally, the deputy commissioner taxed costs to defendants.

In the rehearing decision, the deputy commissioner denied claimant's application for rehearing regarding his penalty claim. With respect to claimant's request for a specific award of healing period and interest benefits, the deputy commissioner ordered as follows: "[C]laimant shall produce an expert report detailing the expert's calculation of principal and interest due under the December 20, 2017, arbitration decision within 45 days of the entry of this ruling." Defendants were then given 45 days to stipulate to the calculations or submit their own expert report. The deputy specifically stated that "[f]ailure to submit an expert opinion by claimant will be taken as a waiver" of his request to the agency to make specific interest calculations and findings.

On appeal, defendants argue the deputy commissioner erred in deciding claimant was not at MMI as of January 17, 2015. Defendants also argue the deputy commissioner erred in finding defendants failed to pay temporary disability or healing period benefits for December 12, 2013, and as such, they requested a reduction in the \$500.00 penalty award.

On cross-appeal, claimant argues the deputy commissioner misapplied the law when he failed to impose penalties for defendants' failure to pay temporary disability or healing period benefits from January 17, 2015, to April 17, 2017. Claimant also argues the deputy commissioner misapplied the law when he failed to recognize and impose penalties for late payments of weekly benefits in 2014.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on December 20, 2017, and rehearing decision filed on January 12, 2018, relating

to the issues properly raised on intra-agency appeal with additional analysis, as set forth below.

Maximum Medical Improvement

I affirm the deputy commissioner's finding that claimant did not achieve MMI on January 17, 2015. I affirm the deputy commissioner's finding that claimant had not yet achieved MMI as of the date of the arbitration hearing. I affirm the deputy commissioner's conclusion that claimant is entitled to temporary disability or healing period benefits from December 12, 2014, through the date of the arbitration hearing and continuing into the future until the first of the factors outlined in Iowa Code section 85.33 or Iowa Code section 85.34(1) are met. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

Because claimant did not produce an expert report detailing the expert's calculation of principal and interest due under the December 20, 2017, arbitration decision within 45 days of the ruling on claimant's rehearing application (as required in the deputy commissioner's rehearing decision), I find claimant waived his request to the agency to make specific interest calculations and findings. Thus, with this additional analysis, I affirm the deputy commissioner's order that defendants shall pay applicable interest pursuant to Iowa Code section 85.30 for all accrued weekly benefits.

Penalty

I affirm the deputy commissioner's finding that defendants, relying on the opinions of Lynn Nelson, M.D., and David Boarini, M.D., had a reasonable basis for denying payment of temporary disability or healing period benefits from January 17, 2015, through April 17, 2017. I affirm the deputy commissioner's finding that defendants contemporaneously relayed this denial to claimant when they gave timely notice of their intent to convert benefits from temporary to permanent disability benefits and the expected termination date for these benefits. I affirm the deputy commissioner's conclusion that no penalty benefits should be awarded for defendants' denial of temporary disability or healing period benefits from January 17, 2015, through April 17, 2017. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues with the following additional analysis:

Claimant argues on appeal the deputy commissioner failed to specifically consider whether defendants had a reasonable basis for denying temporary disability or healing period benefits from October 2, 2015, (when Robin Sassman, M.D., opined claimant was not at MMI) through June 17, 2016, (when Dr. Boarini issued his report), and from February 10, 2017, (when claimant's request for alternate care was granted) through April 10, 2017, (when David Strothman, M.D., performed surgery).

However, from October 2, 2015, through June 17, 2016, defendants continued to rely on the opinion of Dr. Nelson that no additional treatment or intervention was necessary. While claimant is correct that defendants have an ongoing duty to

investigate, claimant received no additional care and continued to be off work between his last appointment with Dr. Nelson and his examination with Dr. Sassman, so claimant's circumstances were essentially unchanged from the time defendants initially decided to convert payments from temporary to permanent disability benefits. Thus, I find Dr. Nelson's opinion continued to make the claim fairly debatable even after Dr. Sassman issued her report. I therefore conclude defendants had a reasonable basis for their denial of temporary disability or healing period benefits during the span of time between Dr. Sassman's report and Dr. Boarini's report.

With respect to the timeframe between the order for alternate care and Dr. Strothman's surgery, it was defendants' position that claimant was at MMI and remained there until Dr. Strothman's surgery, when claimant entered another intermittent healing period. While that is ultimately not what was decided either by the deputy commissioner or on appeal, the standard is whether defendants had a reasonable basis for their position. Factually, defendants were relying on Dr. Nelson's opinion that claimant reached MMI, and legally, defendants were relying on the proposition that claimant's achievement of MMI and need for additional treatment are not mutually exclusive states. Considering this good faith factual and legal dispute, I find the claim was fairly debatable. Thus, I conclude defendants had a reasonable basis for their denial of temporary disability or healing period benefits during the span of time between the order for alternate care and Dr. Strothman's surgery.

With this additional analysis, I affirm the deputy commissioner's finding that defendants had a reasonable basis for denying payment of temporary disability or healing period benefits from January 17, 2015, through April 17, 2017, and that no penalty benefits should be assessed.

I affirm the deputy commissioner's finding that defendants owed but failed to pay temporary disability or healing period benefits for December 12, 2013. I affirm the deputy commissioner's finding that defendants paid weekly benefits one day late on two separate occasions (weeks ending January 18, 2014, and February 16, 2014). I affirm the deputy commissioner's finding that defendants were attempting to pay claimant promptly and appropriately and only a minimal penalty is necessary in this case to achieve the goals of punishment and deterrence. I affirm the deputy commissioner's finding that a penalty of \$500.00 is appropriate. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues with the following additional analysis:

Claimant argues on appeal that the deputy erred and misapplied Iowa Code section 85.30 when he decided only two of defendants' weekly payments were late. Both parties agree that pursuant to the eleven-day grace period in Iowa Code section 85.30, the first payment in the instant case was due on December 22, 2013. The dispute, however, centers around when the next payment was due based on the phrase "each week thereafter" in the same code section.

Iowa Code section 85.30 states, "Compensation payments shall be made each week beginning on the eleventh day after the injury, and each week thereafter during the period for which compensation is payable"

It is defendants' position that "each week thereafter" means every week after the eleventh day of the eleven-day grace period. In other words, because the first payment was due eleven days after the injury on December 22, 2013, it is defendants' position that the second payment was due on December 29, 2013.

It is claimant's position that "each week thereafter" means every week after the work injury, as if the eleven-day grace period did not exist. Using claimant's argument, the first compensation week was December 12 through December 18, meaning the second compensation week was December 19 through December 25, with a due date of December 26, 2016. Claimant argues his position must be adopted pursuant to the Iowa Supreme Court's holding in Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996). The court in Robbennolt held as follows:

We conclude section 85.30 provides for an eleven-day grace period following the injury to allow an evaluation and investigation of the injury and a determination of the correct weekly compensation rate before the first compensation payment is due. If the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed. Likewise, if full payment of the weekly compensation is not made at the end of the compensation period, interest will be imposed. As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.

Id. at 235.

The court, however, did not clarify whether this "compensation week" begins the day after the 11-day grace period or the day immediately after the injury. In other words, Robbennolt did not specify whether the due dates are eleven days after the injury and then every seven days thereafter or the day after the injury followed by every seven days thereafter. Thus, Robbennolt does not mandate acceptance of claimant's position.

I affirm the deputy commissioner and I conclude compensation due dates are eleven days after the injury and every seven days thereafter. See e.g., Ball v. Fleetguard, Inc., File No. 1281646 (App. December 20, 2002). Accordingly, I affirm the deputy commissioner's conclusion that claimant's analysis of the commencement of benefits is legally inaccurate.

Based on my conclusion that compensation is due eleven days after the injury and every seven days thereafter, the only checks that were late were the two identified by the deputy commissioner—not the 44 identified by claimant. Because there is no basis for penalty benefits for the weeks timely paid, claimant's argument that

defendants failed to prove a reasonable or probable cause or excuse for delays in payment is rendered moot.

With this additional analysis, I affirm the deputy commissioner's finding and conclusion that a \$500.00 penalty should be assessed for defendants' failure to pay benefits for December 12, 2013 and two instances of delayed payments.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision, filed on December 20, 2017, and the rehearing decision, filed January 12, 2018, are affirmed in their entirety with my additional analysis.

Defendants shall pay claimant healing period benefits from December 12, 2013, through the date of the arbitration hearing and into the future until such time as the first qualifying factor outlined in Iowa Code section 85.33 or Iowa Code section 85.34 shall be achieved.

All weekly benefits in this case shall be paid at the rate of one thousand seventy-nine and 79/100 dollars (\$1,079.79) per week.

Defendants shall pay all accrued weekly benefits in lump sum. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant for any out-of-pocket medical expenses, including medical mileage, incurred to date, as well as pay or otherwise satisfy any past and outstanding medical expenses contained in Joint Exhibit II and the Itemized List of Disputed Medical Expenses attached to the hearing report, such that defendants may dispute the reasonableness of any charges with the medical providers but must ultimately hold claimant harmless for any such expenses.

If previously paid by claimant, defendants shall reimburse claimant's independent medical evaluation fee charges totaling two thousand two hundred thirty-two and 50/100 dollars (\$2,232.50) pursuant to Iowa Code section 85.39.


If the independent medical evaluation fee remains outstanding, defendants shall pay the above amount directly to Dr. Sassman to satisfy their stipulated obligation under Iowa Code section 85.39.

Defendants shall pay claimant penalty benefits pursuant to Iowa Code section 86.13 totaling five hundred and 00/100 dollars (\$500.00).

Defendants shall pay claimant's costs of the arbitration proceeding totaling one hundred thirteen and 92/100 dollars (\$113.92), and the parties shall split the costs of the appeal, including the hearing transcript.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed on this 31st day of July, 2018.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Amanda Green
Attorney at Law
408 S.W. 3rd St.
Ankeny, IA 50023
Amanda@nadinglaw.com

Mark S. Soldat
Attorney at Law
3408 Woodland Ave., Ste. 302
West Des Moines, IA 50266
markspslaw@aol.com

D. Brian Scieszinski
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309-2727
scieszinski.brian@bradshawlaw.com