

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFREY WALL,

Claimant,

vs.

CITY OF DES MOINES,

Self-Insured Employer,
Defendant.

File No. 21701301.01

A P P E A L

D E C I S I O N

Head Notes: 1402.30; 1403.30; 1803; 2209;
2401; 2802; 2803; 2907;
4000.2; 5-9999

Defendant City of Des Moines appeals from an arbitration decision filed on May 3, 2023, and from a ruling on defendant's application for rehearing filed on June 6, 2023. Claimant Jeffrey Wall responds to the appeal. The case was heard on January 12, 2023, and it was considered fully submitted in front of the deputy workers' compensation commissioner on January 27, 2023.

In the arbitration decision, the deputy commissioner found claimant sustained a left knee injury that manifested prior to 2014 under the cumulative injury rule. However, the deputy commissioner found the discovery rule applied and claimant did not know and should not, as a reasonable person, have known the nature, seriousness, and probable compensable character of his injury until October 2, 2019. The deputy commissioner found claimant gave notice of his injury within 90 days of becoming aware of the nature, seriousness, and probable compensable character of his injury. Therefore, the deputy commissioner found defendant failed to prove its affirmative defense of untimely notice pursuant to Iowa Code section 85.23. Having awarded permanent partial disability benefits, the deputy commissioner also found defendant failed to establish a reasonable basis for its delay or denial of benefits and awarded claimant penalty benefits.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant's duty to give notice of the injury was tolled under the discovery rule, or that it was tolled until October 2, 2019. Defendant requests this finding be reversed, and all benefits denied under Iowa Code section 85.23. Defendant further challenges the award of penalty benefits, asserting it had a reasonable basis in its notice defense to dispute and deny benefits.

Claimant asserts on appeal that the deputy commissioner reached appropriate factual findings and conclusions of law. Claimant asserts the arbitration decision should be affirmed in its entirety.

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

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties, and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

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 May 3, 2023, and the June 6, 2023, ruling on defendant's application for rehearing, which relate to the issues properly raised on intra-agency appeal. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues with the following additional analysis:

Claimant alleged an injury date of October 5, 2021. Defendant challenged that alleged injury date. The deputy commissioner found the injury manifested prior to 2014. I affirm that finding.

In a cumulative injury situation, the appropriate legal standard and analysis is to first determine the date on which the work injury manifested. Oscar Mayer Foods Corp., v. Tasler, 483 N.W.2d 824 (Iowa 1992).

[A] cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred.

Herrera v. IBP, Inc., 633 N.W. 2d 284, 288 (Iowa 2001).

In this situation, the deputy commissioner found claimant knew by 2014 he suffered from a left knee condition which was caused by his employment. Arguably, claimant was not aware of the condition he suffered until he went to an orthopedic surgeon and received a more definitive diagnosis. However, I accept the deputy commissioner's findings in this regard, and I accept the deputy commissioner's finding that the injury manifested on or before 2014.

"Although the date of injury is relevant to notice and statute-of-limitations issues, the cumulative injury rule is not to be applied in lieu of the discovery rule." Id. at 287.

Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition. Orr, 298 N.W.2d at 257.

Herrera, 633 N.W.2d at 288.

The discovery rule also applies and tolls claimant's duty to give notice of a work injury. Carter v. Bridgestone Americas, Inc., File No. 1649560.01 (Appeal July 2021).

Under the discovery rule, the 90-day notice window "will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the 'nature, seriousness, and probable compensable character' of his injury or condition."

Id. (quoting Herrera, 633 N.W.2d at 288).

In this case, the deputy commissioner found claimant did not know the nature, seriousness, and probable compensable character of his injury until October 2, 2021, when he voluntarily resigned his employment. Claimant submitted to an evaluation with an orthopedic surgeon on October 5, 2021, which provided a definitive diagnosis and certainly gave claimant notice of the nature, seriousness, and probable compensable character of his injury. Ultimately, I affirm the deputy commissioner's finding that claimant first knew the nature, seriousness, and probable compensable character of his injury no earlier than October 2, 2021.

Defendant's acting supervisor acknowledged he knew in August or September of 2021 that claimant had a knee injury and recommended claimant seek care for that injury at the company's medical clinic. The acting supervisor recognized and believed claimant had a work injury prior to October 2, 2021. The employer was arguably on actual notice at that time. However, even if the employer was not on actual notice prior to the discovery date, claimant filed his original notice and petition on December 13, 2021, less than 90 days after the discovery date. The deputy commissioner accurately concluded that the discovery rule tolled claimant's obligation to report his work injury and that claimant timely reported the injury. The deputy commissioner accurately found that the City of Des Moines failed to establish its affirmative defense that claimant failed to give timely notice pursuant to Iowa Code section 85.23.

Having determined the deputy commissioner appropriately decided the notice defense and awarded weekly benefits for permanent partial disability benefits, I must also consider the employer's challenge of the penalty benefit award. Defendant asserts

the deputy commissioner erred in awarding penalty benefits because defendant asserts it had a reasonable basis to deny claimant's claim for benefits.

Defendant accurately asserts that penalty benefits should not be awarded if its denial of benefits is based upon a reasonable basis to challenge entitlement to the benefits. The applicable statutory provision is Iowa Code section 86.13(4)¹, which provides:

a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

¹ The Iowa General Assembly enacted legislation that took effect July 1, 2023, transferring chapter 86 to sections 10A.303 through 10A.333 in the Iowa Code. See 2023 Iowa Acts ch. 19, § 1477. At the filing of this decision, it does not appear the Iowa Code has been published to reflect that change. For clarity, this decision will rely on and cite to prior Iowa Code chapter 86.

- (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
- (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Claimant clearly proved defendant denied or delayed benefits. Therefore, it is incumbent upon defendant to establish the reasonableness of its denial. While defendant acknowledges the requirement that its denial must be based upon a reasonable basis, defendant fails to acknowledge the remainder of the penalty statute. In its appeal brief, defendant does not mention its obligation to conduct a reasonable investigation, does not acknowledge that its denial must be based on the results of that investigation, and fails to acknowledge its obligation to contemporaneously convey the basis for its denial to claimant. Iowa Code section 86.13(4)(c).

In this case, defendant asserts it had a reasonable basis for denial of benefits. However, defendant put forth no evidence to establish it conducted an investigation of the claim, that its denial was actually based on the outcome of the investigation, or that it contemporaneously conveyed the basis for its denial to claimant. In fact, the evidence establishes claimant actually inquired twice of defendant about the reasons defendant was denying him weekly benefits. There is no evidence in this record that defendant actually responded to claimant's inquiries, let alone contemporaneously conveyed its denial, to explain the investigation it conducted, the outcome of that investigation, or the basis for its denial.

At hearing, claimant called a former acting supervisor for defendant, who acknowledged he had actual knowledge of claimant's injury during the period he served as acting supervisor. Given this admission by an acting supervisor of the employer, a reasonable, prompt investigation would have discovered this information and alerted defendant to the probability that its asserted notice defense would fail. Moreover, contemporaneously conveying the results of the investigation and the basis for denial would have permitted claimant to identify the acting supervisor and expedite further investigation and payment of benefits by defendant. Ultimately, I affirm the deputy commissioner's findings and conclusions relative to the penalty benefit claim.

Defendant failed to produce evidence of its investigation, or establish that the basis for its denial was based on the actual results of that investigation, or that defendant contemporaneously conveyed the basis for denial to claimant. Therefore, a penalty in some amount is appropriate. The penalty assessed by the deputy commissioner is reasonable and conforms to the facts of this case as well as the

purposes of the penalty statute. I affirm the deputy commissioner's award of a 25 percent penalty.

I affirm the deputy commissioner's findings, conclusions, and analysis regarding the above-stated issues.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on May 3, 2023, and the ruling on defendant's application for rehearing filed on June 6, 2023, are affirmed in their entirety.

Defendant shall pay claimant 81.4 weeks of permanent partial disability benefits at the weekly rate of one thousand twenty and 82/100 dollars (\$1,020.82) commencing on June 6, 2022.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

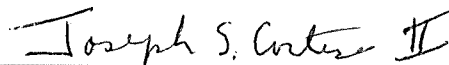
Claimant is entitled to future medical care related to his left knee injury.

Defendant shall pay penalty benefits of 25 percent of all unpaid benefits.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding, and defendant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 24th day of October, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Christopher Spaulding (via WCES)

Molly Tracy (via WCES)