

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DIANA WINN,

Claimant,

vs.

PELLA CORPORATION,

Employer,
Self-Insured,
Defendant.

FILED

OCT 19 2016

File No. 5027519

WORKERS' COMPENSATION

A P P E A L

D E C I S I O N

Head Note Nos: 1804; 1806; 2403
2502; 2905; 4000.2

Defendant Pella Corporation, self-insured employer, appeals from a review-reopening decision filed on March 26, 2015, and from a Ruling on Application for Rehearing filed on May 4, 2015. Claimant Diana Winn responds to the appeal. The case was heard on January 21, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on February 27, 2015.

The deputy commissioner found claimant is entitled to review-reopening in this matter because claimant carried her burden of proof that she sustained an economic change of condition and a physical change of condition following an arbitration decision which was filed in this matter on May 21, 2010, for an injury which occurred on August 11, 2008, which arose out of and in the course of claimant's employment with defendant. Based on the finding of a change of condition, the deputy commissioner awarded claimant permanent total disability benefits commencing on September 9, 2013. The deputy commissioner found claimant's claim for weekly compensation benefits is not barred by equitable estoppel, or by judicial estoppel, or by Iowa Code section 85.26(2), or by Iowa Code section 86.14(2). The deputy commissioner also awarded claimant penalty benefits in the amount of \$1,707.61 for an unreasonable failure by defendant to pay weekly benefits from September 9, 2014, through January 21, 2015, the date of the review-reopening hearing. The deputy commissioner ordered defendant to provide medical treatment for claimant's left shoulder. The deputy commissioner also ordered defendant to pay claimant's costs of the review-reopening proceeding.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant is entitled to review-reopening in this matter because defendant asserts the deputy commissioner erred in finding claimant carried her burden of proof that she sustained an economic change of condition and a physical change of condition following the May 21, 2010, arbitration decision. Defendant asserts the deputy commissioner erred in awarding claimant permanent total disability benefits. Defendant asserts the

deputy commissioner erred in finding claimant's claim for weekly compensation benefits is not barred by equitable estoppel, or by judicial estoppel, or by Iowa Code section 85.26(2), or by Iowa Code section 86.14(2). Defendant also asserts the deputy commissioner erred in awarding penalty benefits.

Claimant asserts on appeal that the review-reopening decision should be affirmed in its entirety.

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

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

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed review-reopening decision filed on March 26, 2015, and the Ruling on Application for Rehearing filed on May 4, 2015, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided sufficient analysis of the issues raised in the review-reopening proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant is entitled to review-reopening in this matter because I affirm the deputy commissioner's finding that claimant carried her burden of proof that she sustained an economic change of condition and a physical change of condition following the May 21, 2010, arbitration decision. I affirm the deputy commissioner's award of permanent total disability benefits. I affirm the deputy commissioner's finding that claimant's claim for weekly compensation benefits is not barred by equitable estoppel, or by judicial estoppel, or by Iowa Code section 85.26(2), or by Iowa Code section 86.14(2). I affirm the deputy commissioner's award of penalty benefits in the amount of \$1,707.61 for defendant's unreasonable failure to pay claimant weekly benefits from September 9, 2014, through January 21, 2014. I affirm the deputy commissioner's order for defendant to provide medical treatment for claimant's left shoulder. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues with the following additional analysis:

It is clear the deputy commissioner found claimant credible and the deputy commissioner based numerous findings on claimant's testimony along with supporting evidence. While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings expressly or impliedly made by the deputy commissioner who presided at the hearing. The deputy commissioner who presided at the hearing had the best opportunity to evaluate the demeanor of the persons who testified at the hearing.

The deputy commissioner correctly found claimant sustained an economic change of condition and a physical change of condition after the final agency decision in the prior arbitration proceeding was filed on May 21, 2010. At the time of the arbitration hearing on January 12, 2010, claimant had not achieved maximum medical improvement (MMI) for her left shoulder injury. Although Jacqueline Stoken, D.O., claimant's independent medical evaluation (IME) physician in the arbitration proceeding, provided a permanent impairment rating along with restrictions, this was only done assuming no further treatment would be provided. However, Dr. Stoken did not believe claimant was at MMI because Dr. Stoken agreed with the uncontroverted views of treating orthopedists, Scott Neff, D.O, and Ian Linn, M.D., that claimant required left shoulder surgery. (Exhibit 3, page 8; Ex. 2, p. 2; Ex. L, p. 112)

At the time of the review-reopening hearing on January 21, 2015, claimant quite likely might not improve with surgery because of the delay in treatment since 2010. Only two physicians have opined as to whether left shoulder surgery remains a viable treatment option. On January 13, 2012, John Kuhnlein, D.O. stated as follows:

Given the length of time since the left shoulder rotator cuff tear, it is doubtful that surgery would be of any significant benefit.

(Ex. A, p. 17)

On September 9, 2014, Sunil Bansal, M.D. opined as follows:

Secondary to the marked delay in treatment, surgery though recommended, would be extremely challenging. I would recommend a surgical evaluation by a shoulder specialist at the University of Iowa or Mayo Clinic . . .

(Ex. 12, p. 84)

Given these uncontroverted views, I find it likely claimant has achieved MMI and current treatment likely is limited to pain management. Unlike at the time of the arbitration hearing, the restrictions on claimant's work activity are now permanent. This clearly has changed claimant's employability and prospects for earnings from employment. However, a re-evaluation by an orthopedic shoulder specialist, which was agreed to at hearing by defense counsel, would appear reasonable in an attempt to improve claimant's condition. Indeed, if surgery is done, and if it does successfully improve claimant's condition, this agency is available to review the permanent total disability award.

I affirm the deputy commissioner's finding that claimant has made a reasonable, but unsuccessful effort to return to the work force. Claimant remains unable to return to any of her past employments given the severity of her permanent restrictions. The likelihood of claimant returning to gainful employment appears slim. Claimant's restriction of no lifting greater than five pounds occasionally does not even qualify her

for sedentary physical demand level jobs under standards published by the U.S. Department of Labor's Dictionary of Occupational Titles (DOT).

Regarding penalty benefits, the only notice to claimant from defendant as to the grounds for the denial of weekly benefits following the Court of Appeals affirmance of the arbitration decision, is defendant's disagreement with the Iowa Supreme Court's decision in Beier Glass Company v. Brundige, 329 N.W.2d 280 (Iowa 1983). The deputy commissioner correctly stated that this agency does not have authority to overrule a binding court precedent. The deputy commissioner correctly imposed the penalty because the only stated basis for the denial of weekly benefits was unreasonable. Employers are certainly free to argue the impropriety of long-standing legal precedent in hopes of changing that precedent, but they cannot withhold benefits from an otherwise deserving injured worker while doing so.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on March 26, 2015, and the Ruling on Application for Rehearing filed on May 4, 2015, are affirmed in their entirety.

Defendant shall pay claimant permanent total disability benefits at the weekly rate of four hundred forty-nine and 37/100 dollars (\$449.37) commencing on September 9, 2013.

Defendant shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendant shall pay claimant a penalty in the amount of one thousand seven hundred seven and 61/100 dollars (\$1,707.61).

Defendant shall pay for medical care for claimant's left shoulder injury.

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

Defendant 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 this 19th day of October, 2016.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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