

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOE LAWSON,
Claimant,

vs.

LEHIGH CEMENT COMPANY LLC,
Employer,

and

LIBERTY INSURANCE CORPORATION
Insurance Carrier,
Defendants.

File No. 5043655

APPEAL
DECISION

FILED

APR - 7 2015

WORKERS' COMPENSATION

Head Note Nos: 1803, 4000.2

Claimant Joe Lawson filed a notice of appeal on August 1, 2014, and LeHigh Cement Company, LLC, employer, and Liberty Insurance Corporation, insurer, both as defendants, filed a notice of cross-appeal on August 18, 2014.

The case was heard on May 6, 2014, in front of the deputy workers' compensation commissioner and considered fully submitted on May 28, 2014. An arbitration decision was rendered on August 1, 2014, awarding the claimant 20 percent industrial disability benefits. On March 19, 2015, the case was delegated to the undersigned to issue the final agency decision of the intra-agency appeal.

Claimant Lawson asserts on appeal that the deputy commissioner erred in failing to award penalty benefits on two grounds: first, failure to communicate a reason for denial of benefits and second, failure to pay a sufficient industrial disability award.

Defendants LeHigh Cement Company, LLC, employer, and Liberty Insurance Corporation, insurer, cross-appeal asserting that the deputy commissioner erred in awarding any industrial disability but that the lack of penalty awarded should be affirmed.

The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo.

The first issue is one of penalty. The claimant proposes two different theories of recovery for penalty benefits. The first is that defendants did not provide a timely notice of denial. The timeline of events is as follows:

- January 5, 2011: claimant was injured
- January 25, 2011: claimant undergoes left inguinal hernia repair
- June 1, 2012: L4-5 laminectomy and discectomy on the left
- February 27, 2013: claimant is placed at maximum medical improvement and returned to work without restriction
- February 28, 2013: claimant is paid 356 days at the rate of \$659.30 for a total of \$24,477.65
- March 4, 2013: Dr. Beck opines claimant has sustained a ten percent whole person impairment.
- March 4, 2013: claimant is paid 85 days and weekly rate of \$675.13 for a total of \$8,101.56
- May 2, 2013: claimant files a petition for arbitration
- May 22, 2013: defendants file an answer disputing whether the January 5, 2011, injury was a cause of any permanent injury or permanent impairment
- July 11, 2013: letter from defendants' counsel to claimant's counsel asserting that claimant has not sustained any industrial disability.

In Keystone Nursing Care Center. v. Craddock, 705 N.W.2d 299 (Iowa 2005), the Supreme Court of Iowa held that failure to provide notice of a denial cannot be the sole basis for imposing a penalty. However, Iowa Code section 86.13 was amended in 2009, four years following the Keystone case. Since the amendment, the law requires the defendant to prove that it satisfied the statutory requirement of section 86.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

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;
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 of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits. (Iowa Code section 86.13(4)(c))

Once the claimant has shown that there is a delay in commencement or termination of benefits, it is the defendants' burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty. Susan Cofland v. Walgreens, File No. 5040072 (Appeal Decision July 21, 2014).

In the present case, defendants did not contemporaneously convey the basis of the denial or termination of benefits from March 4, 2013, and July 11, 2014. Therefore

the defendants failed to comply with all the statutory provisions of Iowa Code section 86.13(4)(c). Claimant would be entitled to some penalty as a result of the lack of contemporaneous communication about the denial and/or termination of benefits.

However, given that the defendants did voluntarily pay permanent benefits in a prompt manner, that there is no evidence of repeated violations, and that the time of delay was short, the penalty shall be ten percent of the amount accrued between March 4, 2013, and July 11, 2013, that was not voluntarily paid.

The second issue of penalty pertained to the claimant not being paid the full amount of Dr. Beck's ten percent impairment rating. The evidence shows that claimant was returned to work full time and without restrictions and at a higher wage. During the hearing, the claimant admitted that he did the same work activities and leisure activities as he did prior to the injury. (Transcript, page 45 to 46)

Q. And as a general matter, you are still doing the same tasks you did before this claimed injury. It's just that if you are doing a lot of it, at the end of the day, you are more sore than you would be otherwise. Would that be a fair characterization of what your current condition is?

A. Yes.

(Tr., p. 46)

The defendants had a reasonable basis upon which to deny further disability benefits other than that which they had voluntarily paid. Claimant's pursuit of penalty benefits as it relates to failure to pay the ten percent impairment rating is not supported by the testimony or written evidence.

The defendants assert that the 20 percent industrial disability award from the deputy commissioner was an error, however a de novo review of the evidence supports the deputy's findings and I affirm the industrial disability award without further comment.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of August 1, 2014, is REVERSED in part and MODIFIED as set forth herein and that:

Claimant is entitled to penalty benefits in the amount of ten percent of the total permanent partial disability benefit that accrued between March 4, 2013, and July 11, 2013, less the amount voluntarily paid by the defendants on February 28, 2013, and March 4, 2013.

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

Defendants shall pay the costs awarded in the arbitration decision and the parties shall each pay one half of the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 7th day of April, 2015.



JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Mr. Nathaniel R. Boulton
Attorney at Law
100 Court Ave., Ste. 425
Des Moines, IA 50309
nboulton@hedberglaw.com

Mr. Chris J. Scheldrup
Attorney at Law
PO Box 36
Cedar Rapids, IA 52406-0036
cscheldrup@scheldruplaw.com