BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS R. BRUNING, Claimant, vs. FARNER-BOCKEN COMPANY, Employer, and AMERICAN ZURICH INSURANCE COMPANY, and SENTRY INSURANCE, Insurance Carriers, Defendants.	File Nos. 5062213 5062214 5062215 APPEAL DECISION Head Note Nos.: 1803; 1100; 1801; 3000

Farner-Bocken Company, employer, and American Zurich Insurance Company, insurer (hereinafter "defendants"), appeal from an arbitration decision filed on December 29, 2017. Claimant, Dennis R. Bruning, cross-appeals. Defendant-insurer Sentry Insurance, who insured defendant-employer for claimant's August 12, 2010 date of injury (file number 5062213), did not appeal.

On June 24, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

In the arbitration decision, the deputy commissioner found claimant sustained a 20 percent industrial disability due to his August 12, 2010 work injury (file number 5062213) and an additional 70 percent industrial disability due to his subsequent work injury on July 13, 2015 (file number 5062215). The deputy commissioner found claimant sustained a work-related injury on March 1, 2015 (file number 5062214) but sustained no resulting disability.

On appeal, defendants argue the deputy commissioner's industrial disability award was excessive.

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 29, 2017 that relate to the issues properly raised on intra-agency appeal with the following additional analysis:

Defendants on appeal assert the deputy commissioner's industrial disability findings were excessive because claimant's treating surgeon, Lynn Nelson, M.D., released claimant to return to truck driving but claimant failed to make any attempt to return to work after his surgery. Claimant on cross-appeal asserts the deputy erred in failing to find claimant permanently and totally disabled.

When claimant was released from Dr. Nelson's care, Dr. Nelson recommended a "lifting limit of 30 pounds with no limitations regarding driving." (Joint Exhibit 9, p. 148) In those same visit notes, however, Dr. Nelson also indicated that claimant was "not allowed to drive and therefore has not been working" due to his oxycodone use. (JE 9, p. 148) At the time of the hearing, claimant was continuing to take oxycodone six times per day and had been consistently using pain medication since his surgery in February of 2016. (See Hearing Transcript, pp. 44, 48) Claimant also confirmed that he would not be allowed to perform his driving job with defendant-employer while taking oxycodone. (Hrg. Tr., p. 45) In light of claimant's chronic and ongoing use of narcotic pain medications that prohibited him from driving, I do not find Dr. Nelson's opinion that claimant had "no limitations regarding driving" to be persuasive.

I acknowledge claimant made no attempt to return to work in any capacity after his second surgery in February of 2016. As is evidenced in the cases cited by defendants in their appeal brief, claimants' industrial disability awards are often reduced upon a failure to demonstrate any attempt to return to work.

In this case, however, claimant credibly testified that his use of pain medication made it impossible to return to driving work with defendant-employer—work he performed since 1998. (See Hrg. Tr., p. 47) Claimant's testimony was supported by the opinion of Mark Taylor, M.D., claimant's expert, who explained that due to his medication, claimant "should avoid safety-sensitive-type work duties and he should not operate any vehicles or equipment where sedation could compromise safety, including the use of vibratory or power tools." (JE 10, p. 168) Thus, while I acknowledge claimant in this case failed to put forth a good faith effort to return to the work force, I find any attempt to do so would have been largely unsuccessful due to his chronic and ongoing use of narcotic pain medication.

That said, claimant's failure to make any attempt to return to work made it difficult to evaluate his true loss of earnings, which is why I find the deputy commissioner did not err in her determination that claimant was not permanently and totally disabled.

With this additional analysis, I affirm the deputy commissioner's finding that claimant sustained a 20 percent industrial disability due to his August 12, 2010 work injury (file number 5062213) and an additional 70 percent industrial disability due to his subsequent work injury on July 13, 2015 (file number 5062215).

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 29, 2017, is affirmed in its entirety.

File No. 5062213, Date of Injury: August 12, 2010:

Defendants are to pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of five hundred sixty-two and 52/100 dollars ($562.52) per week from March 3, 2012.

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 are to be given credit for benefits previously paid.

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 of this matter pursuant to rule 876 IAC 4.33.

File No. 5062214; Date of alleged injury: March 1, 2015:

Claimant sustained an injury arising out of a March 1, 2015, work incident, but that the injury was neither the cause of any temporary or permanent disability.

Therefore, claimant shall take nothing from this claim.

File No. 5062215; Date of injury: July 13, 2015:

Defendants are to pay unto claimant three hundred fifty (350) weeks of permanent partial disability benefits at the rate of six hundred seventy-five and 08/100 dollars ($675.08) per week from November 15, 2016.

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 are to be given credit for benefits previously paid.

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 of this matter pursuant to rule 876 IAC 4.33.

Defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 26th day of June, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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