

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MEGGAN STANTON n/k/a
MEGGAN HEALY,

Claimant,

vs.

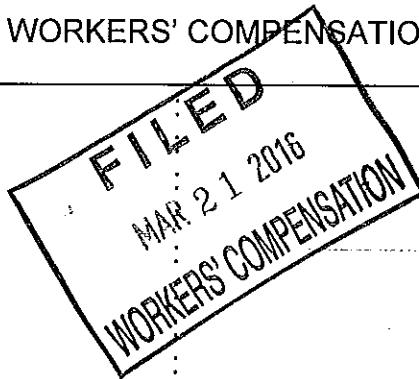
GUTTENBERG CARE CENTER,

Employer,

and

MIDWEST EMPLOYERS CASUALTY
COMPANY,

Insurance Carrier,
Defendants.



File No. 5039363

PENALTY BENEFITS
DECISION

Head Note No.: 4000.2

STATEMENT OF THE CASE

On August 5, 2014, an arbitration decision was issued in this matter by Deputy McGovern, in which the issues to be determined included, but were not limited to, whether the injury caused permanent disability and if so, the extent of the permanent disability. (Exhibit 3, pages 2-3) Deputy McGovern issued the arbitration decision ordering that defendants pay 30 percent industrial disability, or 150 weeks to claimant, less a credit for benefits previously paid. (Ex. 3, p. 22)

The claimant then filed a petition on February 12, 2015, asserting a claim for penalty benefits for late payment of weekly benefits awarded in the August 5, 2014 arbitration decision. The defendants filed an answer denying the claim, and this penalty matter came on for hearing before the undersigned on February 22, 2016. At the time of the hearing, the claimant limited the claim for penalty to late payment of PPD benefits only.

The claimant offered Exhibits 1 through 3, which were admitted without objection. The defendants offered Exhibits A through F. Claimant objected to Exhibit A, consisting of 3 pages. Exhibit A included two single page emails and a third email that indicated it was page 1 of 2. Page 2 of 2 was not included. Claimant's objection was based on the omission of page 2 of 2. Upon the objection being stated, defendants indicated that the additional page could be provided. By agreement of the parties, the record was held

open to allow for the submission of the missing page, which was received by the undersigned on February 24, 2016, and admitted and included in the exhibits without objection as Exhibit A, page 4. Claimant's counsel did not object to Exhibit D, but made a professional statement that claimant had not been provided the exhibit on the date indicated in the letter (August 18, 2014). Claimant stated that the purported facsimile number on Exhibit D was actually the phone number for claimant's counsel, not the fax number. Claimant also pointed out in support of his statement that Exhibit D contains a handwritten question: "Did letter go out?" (Ex. D) Claimant's counsel included in his professional statement that he had not received Exhibit D until he received defendants' exhibits in preparation for the hearing. With that, defendants' exhibits were admitted.

No witnesses testified. Both counsel provided helpful argument.

The parties also submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations.

Counsel for the parties requested an opportunity to submit post-hearing briefs and agreed to a deadline for filing of March 7, 2016, which is the date upon which this matter was considered fully submitted.

ISSUE

Whether claimant is entitled to penalty benefits for a delay in paying PPD benefits following the issuance of the arbitration decision on August 5, 2014.

FINDINGS OF FACTS

This is a petition for penalty benefits following the issuance of an arbitration decision. This is not an appeal or rehearing; therefore, the undersigned is bound by the relevant findings contained in the arbitration decision.

The underlying case originally proceeded to arbitration on January 6, 2014. (Ex. 3, p. 1) The arbitration decision was issued on August 5, 2014, wherein the deputy ordered that defendants pay claimant 30 percent industrial disability (150 weeks of benefits).

The arbitration decision found that:

Claimant has sustained an industrial disability. Previously she was paid 60 weeks of benefits for the April 8, 2010 injury to her lower back, as agreed by the parties. Defendants actually paid 67 weeks and 3 days of benefits. Under Iowa Code section 85.34(7)(b)(1), defendants shall take credit for the 67 weeks and 3 days previously paid to claimant.

(Ex. 3 pp. 15, 16) However, on page 18 of the arbitration decision it states that "defendants shall pay unto claimant 78 weeks and 5 days of permanent partial disability

benefits.” (Ex. 3, p. 18) This would mean that the PPD credit was 71 weeks and 2 days (150 weeks less 78 weeks and 5 days). On page 22 of the decision, the order states that “Defendants shall take credit for all benefits previously paid to claimant.” (Ex. 3, p. 22)

Defendants indicate that, after receiving the arbitration decision, the parties were confused as to the appropriate amount of credit to be applied to the 150 weeks of PPD benefits that claimant was due. (Def. Brief, p. 1)

Following the issuance of the arbitration decision, an email was sent on August 7, 2014, from defense counsel’s office to a representative of CCMSI, the third party administrator, requesting information on the amount of PPD that defendants had paid up to the date of the hearing. That email indicates that defense counsel’s office, at that time, calculated a total of 59 weeks that had been paid. (Ex. A, p. 1)

On August 13, 2014, defense counsel’s office was of the opinion that 60 weeks of PPD benefits had been paid prior to the arbitration hearing. An email was sent by defense counsel’s office to claimant’s counsel on this date confirming defendants’ opinion that the correct PPD credit amount was 60 weeks. The letter also asked claimant’s counsel to let defense counsel know “how you plan to address the calculations.” (Ex. 1, p. 1)

On August 15, 2014, claimant’s counsel responded by sending a letter to defense counsel enclosing a Joint Motion for Rehearing or Application for Entry of Nunc Pro Tunc Order. This document was drafted specifically to address the issue of the credit calculation. (Ex. 1, p. 2) The motion states that, “the parties herein are in agreement that, in fact, the defendants paid just 60 weeks of permanent partial disability benefits.” (Ex. 1, p. 3) The document was signed by claimant’s counsel with a request that it be signed by defense counsel and filed with the commissioner’s office. (*Id.*) (Ex. 1, p. 4) A review of the administrative file in this case by the undersigned, confirms that this document was never filed. Neither did either party file an appeal or any other motion or application seeking to clarify the arbitration decision.

On August 18, 2014, a letter was drafted by defense counsel indicating that although defendants still agreed with their previous position that the PPD credit should be 60 weeks rather than 67 weeks and 3 days, defense counsel believed a motion for rehearing was not needed. Defense counsel asked for a revised joint motion for order nunc pro tunc only, stating that “we will sign it and immediately file it with the commissioner’s office upon receipt.” (Ex. D, p. 1) However, this is the same letter described above in the Statement of the Case, that claimant stated at hearing was not received until it was sent with defendants’ exhibits.

I find that the August 18, 2014, letter was not sent to claimant’s counsel on August 18, 2014. In support of this finding, I note that the letter contains a hand-written note stating “Did letter go out?” (*Id.*) At hearing, claimant’s counsel made a professional statement that he did not receive the letter in August, 2014, and had not

seen it until it was provided with the exhibits prior to the hearing. Claimant's counsel further stated that the fax number contained in the letter is actually his office phone number, not the fax number. Defendants did not offer a fax confirmation document or any corroborating evidence that the letter had, in fact been sent in August, 2014. In a separate email dated November 10, 2014, defense counsel appears to refer to the letter in question and states, "I can't tell if the letter was sent out." (Ex. A, p. 3)

On October 31, 2014, Lynn, a representative of CCMSI, emailed defense counsel and indicated that she failed to document the file and was uncertain of the status of the case, but believed that it was on appeal. (Ex. A, p. 3)

On November 3, 2014, at 9:07 a.m., defense counsel's office responded to CCMSI stating: "No Lynn, we are paying out the award. Claimant's attorney was going to get clarification on the number of weeks we get to take for a credit as the award was confusing." (Id.)

On November 3, 2014, at 9:09 a.m., defense counsel emailed Lynn at CCMSI stating "We have not heard anything further back from the commissioner's office. We had filed a joint request to have Dep. McGovern clarify the ruling. However, she is now acting commissioner, I expect she is probably swamped and it may take awhile [sic] before we hear anything further on this." (Id.). However, the undersigned finds that the record does not indicate that a request for clarification was ever filed.

On November 3, 2014, at 2:09 p.m. Lynn from CCMSI inquired with defense counsel, "Should I be paying PPD though?" (Id.)

The record before the undersigned indicates that the next communication after November 3, 2014, between defense counsel and CCMSI was on November 10, 2014. At that time defense counsel advised Lynn at CCMSI that after a review of the file, he could not find that any appeal or request for corrective order had been filed. He also stated that the "main point of confusion in the ruling was language indicating that we are entitled to 67 weeks, 3 days of credit for past PPD payments. However, this appears in error as the parties appear to agree we actually paid 60 weeks. In any event, under the ruling we are obligated to pay out the net of the PPD payments, which should actually be an additional 90 weeks. We should go ahead and pay this out, and Carol is working on interest calculations." (Ex. A, p. 3)

The undersigned finds that as of November 10, 2014, defendants understood that there was nothing on file with the commissioner's office seeking any sort of clarification of the credit amount, and defendants' opinion of the proper credit amount of 60 weeks identified on August 13, 2014, had not changed. (Ex. 1, p. 1; Ex. A, p. 3) The undersigned also finds that the defendants recognized at that time that "in any event, under the ruling we are obligated to pay out the net of the PPD payments, which should actually be an additional 90 weeks." (Ex. A, p. 3)

The undersigned also finds that based on the November 10, 2014, email that defendants did not appear to intend to seek a clarification order and intended to "go ahead and pay this out" concerning the "additional 90 weeks" of benefits. (Id.) However, the defendants waited six (6) more weeks to issue the PPD payment. On December 23, 2014, defense counsel sent a letter to claimant's counsel enclosing payment of, among other things, PPD in the amount of \$29,007.37. (Ex. B, p. 1) The check is dated December 16, 2014 and states that the payment is for PPD from "2-25-13 thru 11-08-14 (88.857)". (Ex. B, p. 2) There is no explanation given by defendants why the PPD payment states that it was for only 88.857 weeks rather than the 90 weeks that defendants believed they owed. (Ex. B, p. 2)

The undersigned finds that there was a delay in payment of PPD benefits of more than four (4) months from the date that defendants concluded that they owed 90 weeks of PPD benefits, which was August 13, 2014, (Ex. 1, p. 1; Ex. A, p. 2) until the PPD payment was issued and mailed to claimant's counsel on or about December 23, 2014, and then, it appears that it was not paid in full. (Ex. B, pp. 1, 2)

The undersigned finds that as of August 13, 2014, the defendants had concluded from a review of their payment history that the appropriate credit to be applied to the PPD award was 60 weeks. (Ex. A, p. 2) The undersigned also finds that defendants and claimant were in agreement on or about August 15, 2014, that the actual amount of PPD paid by defendants, and thus the appropriate credit, was 60 weeks. (Ex. 1, pp. 2-3) The claimant prepared the Joint Motion for Re-Hearing or Application for Entry of Nunc Pro Tunc Order, to which the defendants failed to respond. (Ex. 1, p. 3) The undersigned finds that the defendants did not pursue clarification from the commissioner's office concerning the PPD credit amount, nor did defendants pay the award of an additional 90 weeks it believed was due as of August 13, 2014, until December 23, 2014 and then the payment was for 88.857 weeks rather than 90 weeks.

The applicable rate of three hundred twenty-six and 45/100 dollars (\$326.45) was stipulated by the parties and contained within the arbitration decision. (Ex. 3, p. 2)

CONCLUSIONS OF LAW

The claimant contends that the defendants delayed payment of the PPD benefits without a reasonable or probable cause or excuse for the delay. The defendants admit that the PPD payment was delayed, but asserts that the delay was reasonable, most significantly due to the confusion of the parties as to the appropriate credit to be applied.

Iowa Code section 86.13(4) provides that:

(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 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 of 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.

The first question for consideration is whether the claimant has shown a delay in payment of PPD benefits.

The claimant introduced exhibits, including the arbitration decision dated August 5, 2014, in which the defendants were ordered to pay 150 weeks of PPD benefits, less a credit for amounts previously paid. (Ex. 3, p. 22) The claimant further introduced documents confirming that the defendants believed that it owed 90 weeks of PPD, in light of the 60 weeks credit as of August 13, 2014. (Ex. 1, p. 1) Also, claimant provided documents showing that PPD benefits for the period of February 25, 2013, through November 8, 2014, were paid via a check issued December 16, 2014. (Ex. 2, p. 2) The defendants confirmed that this payment was not mailed to the claimant until December 23, 2014. (Ex. B, p. 1) The defendants, through counsel, agreed at hearing that the PPD payment was delayed following the issuance of the August 5, 2014, arbitration decision, but that the delay was due to a reasonable cause.

Claimant has shown a delay in PPD benefits from August 13, 2014, the date that defendants knew they owed 90 weeks of PPD, until payment was mailed on December 23, 2014.

Having found that the PPD payment was delayed, the second question is whether the employer has proven a reasonable or probable cause or excuse for the delay. The defendants must show that the delay was reasonable by proving all of the following:

(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 for 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 86.13(4)(c)(1)-(3).

The first question is whether or not defendants conducted a reasonable investigation prior to the excuse under Iowa Code 86.13(4)(c)(1).

The defendants argue that complicating factors that included obtaining records to properly calculate TPD, affected the delay of PPD benefits. Defendants argued at hearing that a key employee of the defendants who was involved in the process of calculating TPD benefits was unavailable for a period of approximately three months following the issuance of the arbitration decision. However, this argument does not provide an explanation concerning a delay in payment of PPD.

Defendants further argued that the delay in PPD payment was not intentional and did not represent any bad motives on the part of the defendants. Although this may be true, this does not amount to a reasonable investigation under the law. The Iowa Supreme Court has stated that "in the absence of a reasonable excuse for a delay, penalty benefits are mandatory. Only the amount is within the discretion of the commissioner. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbenolt, 555 N.W.2d at 238.

The defendants also point to confusion as to the correct credit to be applied to the 150 weeks of PPD that was ordered to be paid to claimant as a basis for the delay. In this case the defendants were presented with an arbitration decision ordering the payment of PPD benefits of 150 weeks. The arbitration decision found that defendants previously paid 67 weeks and 3 days of PPD benefits and a credit of that amount was to apply to the 150 weeks ordered to be paid. (Ex. 3, p. 16) The decision also stated that defendants were to "pay unto claimant 78 weeks and 5 days of permanent partial disability benefits . . ." (Ex. 3, p. 18) Finally, the decision stated that, "defendants shall take credit for all benefits previously paid to claimant." (Ex. 3, p. 22) The defendants were initially uncertain as to the appropriate credit to be applied.

The conversation between defendants and claimant after the arbitration decision was issued focused on the question of whether the appropriate credit was 60 weeks or 67 weeks and 3 days, to the exclusion of the language concerning a possible credit of 71 weeks and 2 days (150 weeks less an amount owed of 78 weeks and 5 days). (Ex. 3, p. 18) On August 13, 2014, defendants advised claimant that they believed the correct amount of PPD credit was 60 weeks, which means that claimant was due 90 weeks of PPD. (Ex. 1, p. 1)

The defendants did not file an appeal of the arbitration decision. Neither did the defendants file a request for rehearing or application for order nunc pro tunc. The claimant, prepared a Joint Motion for Rehearing or Application for Entry of Nunc Pro Tunc Order. (Ex. 1, p. 3) Having found above that the August 18, 2014, letter was not sent to claimant, defendants failed to respond to the joint motion.

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001). In this case the issue was resolved by defendants on August 13, 2014, when they concluded that 60 weeks was the appropriate PPD credit and 90 weeks was owed. (Ex. 1, p. 1; Ex. A, p. 2)

As stated above, the defendants were of the opinion on August 13, 2014, that 60 weeks was the proper credit amount and that position did not waiver with the passage of time. Further, the defendants believed that an application for an order nunc pro tunc was the appropriate method to address the matter with the commissioner as of August 18, 2014, rather than a request for re-hearing, although no such application was filed. (Ex. D, p. 1) A re-hearing under Rule 876 IAC 4.24, provides for a reexamination of a decision, such that a decision may be modified or changed from the original. Whereas, an order nunc pro tunc is limited in scope to situations where there is an obvious error that needs correction or where it is necessary to conform to the court's original intent. State v. Johnson, 744 N.W.2d 646, 648 (Iowa 2008). Graber v. Iowa Dist. Ct., 410 N.W.2d 224, 229 (Iowa 1987). An order nunc pro tunc "is not for the purpose of correcting judicial thinking, a judicial conclusion, or mistake of law." Headley v. Headley, 172 N.W.2d 104, 108 (Iowa 1969). Thus, from the evidence before the undersigned, it appears that defendants, believed that an order nunc pro tunc was the appropriate vehicle to remedy the apparent conflict, and therefore likened the matter to a scrivener's error and not appropriate for reexamination.

The defendants did not sign and file the Joint Motion for Rehearing of Application for Entry of Nunc Pro Tunc Order that was drafted by claimant and sent to defendants on August 15, 2014. The defendants did not respond to claimant concerning the joint motion. The defendants did not file their own application for order nunc pro tunc. The defendants calculated the PPD previously paid to claimant as 60 weeks and communicated that number to claimant on August 13, 2014. (Ex. 1, p. 1) The defendants understood as of August 13, 2014, that they owed 90 weeks of PPD.

The undersigned finds that the defendants did not take steps necessary to either (1) obtain clarification from the commissioner concerning the PPD credit, or (2) pay the award that they believed was due on August 13, 2014, until December 23, 2014. Further, the evidence does not indicate that there was any change in defendants' position or rationale from August 13, 2014 to December 23, 2014.

Based upon the above, including the apparent lack of attention given to the matter as evidenced by the adjuster's failure to document her file following the arbitration decision (Ex. A, p. 3) the undersigned cannot say that the defendants conducted a reasonable investigation. Even if the above is characterized as a reasonable investigation, the conclusion of the investigation on August 13, 2014, was that defendants owed 90 weeks of PPD benefits. Defendants could not then reasonably rely on the results of the investigation to delay payment until December 23, 2014.


Claimant's rate is three hundred twenty six and 45/100 dollars (\$326.45). The rate multiplied by 90 weeks is \$29,380.50. This is the amount of PPD that has been unreasonably delayed. The undersigned concludes that based upon the length of the delay, the information known to the parties during the period of delay, and the employer's limited record of past penalties, a penalty in the range of 35 percent is appropriate. But for the defendants' limited history of penalty benefits, this would rise to the level of 50 percent.

ORDER

1) Defendants shall pay to claimant the sum of ten thousand two hundred and 00/100 dollars (\$10,200.00) in penalty benefits, which is in the range of thirty-five (35) percent penalty for the ninety (90) weeks unreasonably delayed.

2) Defendants shall pay the costs of this action.

Signed and filed this 21st day of March, 2016.



TOBY J. GORDON
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TJG/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.