

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

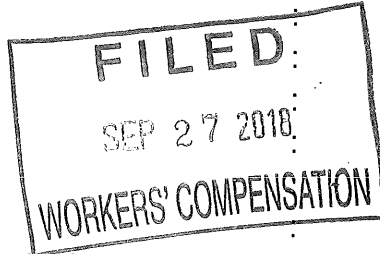
PETER O'CONNOR,

Claimant,

vs.

DVORAK TRUCKING, LLC,

Employer,
Defendant.



File No. 5059654

ARBITRATION

DECISION

Headnotes: 1802, 2501

Claimant Peter O'Connor filed a petition in arbitration on September 18, 2017, seeking workers' compensation benefits from the defendant, Dvorak Trucking, LLC ("Dvorak"), and from the defendant, SFM Risk Solutions. SFM Risk Solutions filed a motion for summary judgment, which was granted on November 30, 2017, dismissing SFM Risk Solutions from the case.

O'Connor filed a motion for default judgment against Dvorak on June 26, 2018, showing Mitchell Dvorak, principal for Dvorak was personally served by the Olmsted County Sheriff on October 3, 2017. Despite being properly served with a copy of the petition and motion for default judgment, Dvorak did not enter an appearance or file an answer or other responsive pleading with this agency to defend O'Connor's claim. A ruling granting motion for default judgment against Dvorak was entered on August 14, 2018.

A hearing was held for consideration and award of appropriate relief on September 17, 2018, by telephone conference call. Attorney Laura Pattermann represented O'Connor. O'Connor appeared and testified. Exhibits 1 through 6 were admitted into the record. The hearing was recorded through digital means pursuant to rule 876 Iowa Administrative Code 4.49. A transcript of the hearing will not be prepared by this agency. If any party wishes to appeal this decision, that party is charged with requesting a copy of the digital audio recording and obtaining a transcript to be prepared and filed by a certified shorthand reporter.

O'Connor submitted a Hearing Report identifying the issues, which was received into the record.

STIPULATIONS

1. O'Connor sustained an injury on July 24, 2017, which arose out of and in the course of his employment with Dvorak.
2. An employer-employee relationship existed between Dvorak and O'Connor at the time of the alleged injury.
3. The alleged injury is a cause of temporary disability.
4. The alleged injury is a cause of permanent disability
5. At the time of the alleged injury, O'Connor's gross earnings were \$1,500.00 per week, he was married and entitled to two exemptions and O'Connor believes his weekly rate is \$915.62.
6. Costs have been paid.

ISSUES

1. Is O'Connor entitled to a running award of healing period benefits from July 24, 2017?
2. Is O'Connor entitled to recover medical expenses?
3. Is O'Connor entitled to alternate medical care?
4. Is O'Connor entitled to an award of penalty benefits?

FINDINGS OF FACT

O'Connor is a high school graduate. (O'Connor Testimony) O'Connor has worked as a truck driver and auto body painter and repairman since graduating from high school. (O'Connor Testimony) At the time of the hearing O'Connor was fifty-two. (O'Connor Testimony)

Dvorak hired O'Connor as an over-the-road truck driver during the summer of 2017. (O'Connor Testimony) O'Connor held a class A commercial driver's license. (O'Connor Testimony) O'Connor testified he had a clean driving record at the time of his hiring by Dvorak. (O'Connor Testimony) O'Connor's father and grandfather also were truck drivers and O'Connor loves driving a truck. (O'Connor Testimony)

The evening of July 24, 2017, O'Connor was involved in a motor vehicle accident in Birmingham, Alabama while he was working for Dvorak. (O'Connor Testimony) O'Connor was traveling at a low rate of speed on the interstate given road construction in the area. (O'Connor Testimony) An Aramark truck driver rear-ended a sport utility

vehicle behind O'Connor's trailer, causing the vehicle to crash into O'Connor's truck. (O'Connor Testimony)

O'Connor exited his truck and saw a family in the sport utility vehicle. (O'Connor Testimony) The driver, a male, was deceased. (O'Connor Testimony) The front female passenger was holding her dead baby and screaming for help. (O'Connor Testimony) A male child was in the rear of the vehicle. (O'Connor Testimony) The vehicle was badly crushed and O'Connor could not remove the female passenger out of the vehicle. (O'Connor Testimony) Emergency personnel and law enforcement arrived on the scene and the woman was cut out of the sport utility vehicle. (O'Connor Testimony) The vehicle had impaled the woman and she died at the scene. (O'Connor Testimony) The male child in the back of the vehicle survived the collision. (O'Connor Testimony)

O'Connor testified approximately fifteen minutes after the accident his right shoulder, back, and right thumb were hurting. (O'Connor Testimony) O'Connor called the dispatcher for Dvorak and informed him of the accident. (O'Connor Testimony) O'Connor told the dispatcher he was not going to be able to make the delivery because the trailer had been badly damaged and was inoperable. (O'Connor Testimony)

Law enforcement transported O'Connor and the Aramark driver to the University of Alabama Hospital in Birmingham for drug and alcohol testing. (O'Connor Testimony; Exhibit 1, page 3) O'Connor informed the hospital staff he had been injured, but he did not receive any x-rays. (O'Connor Testimony) Courtney Gibson, M.D., diagnosed O'Connor with back pain, a lumbar strain, and a lumbar spasm, and discharged him. (Ex. 1, p. 8)

Law enforcement officers returned O'Connor to the scene around 3:00 a.m. (O'Connor Testimony) O'Connor unhitched the trailer and drove to an exit to sleep. (O'Connor Testimony)

O'Connor called Dvorak the next morning. (O'Connor Testimony) Dvorak inquired about the trailer. (O'Connor Testimony) O'Connor informed Dvorak the trailer as inoperable and it had been hauled away. (O'Connor Testimony) O'Connor inquired when he would be paid, and he was informed he would not be paid because he had not completed the delivery. (O'Connor Testimony)

O'Connor drove the truck back to Iowa and left it in the Dvorak yard. (O'Connor Testimony) O'Connor placed several calls to the owner of Dvorak, but he did not return his calls. (O'Connor Testimony)

O'Connor went to his daughter's home in Illinois following the accident. (O'Connor Testimony) O'Connor did not have health insurance at the time of the accident. (O'Connor Testimony) He sought treatment at Saint Elizabeth Medical Center on July 26, 2017. (O'Connor Testimony) O'Connor complained of loss of strength, dizziness, and balance issues. (O'Connor Testimony; Ex. 2, p. 25) Michael

Craddick, D.O., examined O'Connor, ordered x-rays and listed an impression of a cervical strain, and acute lumbar myofascial strain. (O'Connor Testimony; Ex. 2, pp. 24-25, 28-30)

O'Connor had health insurance briefly, while living in Illinois, and later while living in Tennessee. (O'Connor Testimony) O'Connor lost his home following the accident because he could not afford the rent. (O'Connor Testimony) He lived with his daughter for a period of time, and then with a girlfriend. (O'Connor Testimony) At the time of the hearing O'Connor had reconciled with his wife, and he was living with her in Florida. (O'Connor Testimony)

On August 3, 2017, O'Connor went to the emergency room at Centegra Health System. (Ex. 3, p. 33) O'Connor received a lumbar spine computerized tomography scan. (Ex. 3, p. 34) The reviewing radiologist listed an impression of advanced disk degenerative changes at L5-S1 with severe left and moderate to severe right lateral foraminal stenosis, with vacuum disk phenomena centrally in the disk and at the right upper S1 level, diffuse disk bulging at L4-L5 with left paracentral to lateral broad-based protruding disk with severe left and moderate to severe right lateral foraminal impingement or stenosis. (Ex. 3, pp. 48, 51) Harpreet Ghuman, M.D., listed an impression of acute traumatic lumbar back pain associated with muscle strain, disk herniation in the lumbar spine, lumbar radiculopathy, sciatica on the right, and anxiety. (Ex. 3, p. 49) Hospital staff listed no prior psychiatric history, and noted O'Connor was depressed and having obsessive thoughts. (Ex. 3, p. 55) Dr. Ghuman recommended a referral for outpatient mental health treatment. (Ex. 3, p. 56)

O'Connor received lumbar spine magnetic resonance imaging on October 23, 2017. (Ex. 4, p. 64) The reviewing radiologist listed an impression of "spondylosis of the lumbar spine with central canal stenosis and neural foraminal narrowing." (Ex. 4, p. 65)

On October 25, 2017, O'Connor underwent a mental health assessment with Transitions of Western Illinois. (Ex. 5, p. 66) Staff listed diagnoses of posttraumatic stress disorder and unspecified depressive disorder. (Ex. 5, pp. 74, 77)

O'Connor testified he received a letter indicating he would receive workers' compensation benefits, but later received a letter indicating Dvorak had not paid its workers' compensation premium for the date of the accident and he would not receive benefits. (O'Connor Testimony) O'Connor has received no weekly workers' compensation payments since the accident. (O'Connor Testimony) Dvorak has not paid for any medical treatment for O'Connor since the accident. (O'Connor Testimony)

O'Connor was approved for Social Security Disability Insurance benefits three months ago. (O'Connor Testimony) O'Connor receives \$1,888.00 per month. Prior to his first check O'Connor received no income. (O'Connor Testimony) O'Connor testified the date of disability determined by the Social Security Administration was July 24,

2017. (O'Connor Testimony) O'Connor would like to receive medical treatment and weekly workers' compensation benefits. (O'Connor Testimony)

O'Connor testified his medical card is not valid for his commercial driver's license as a result of the accident. (O'Connor Testimony) O'Connor has not worked since the accident. (O'Connor Testimony) O'Connor testified he feels worthless because he cannot work. (O'Connor Testimony) O'Connor reported he feels nervous when driving and he does not trust himself to drive a truck at this time. (O'Connor Testimony) O'Connor relayed he has trouble sleeping and frequently sees the dead family members in the vehicle at the time of the accident. (O'Connor Testimony)

CONCLUSIONS OF LAW

I. Healing Period Benefits

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id.

"[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). "Stabilization of the employee's condition 'is the event that allows a physician to make the determination that a particular medical condition is permanent.'" Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57. The record supports O'Connor sustained a permanent impairment as a result of the work injury. Therefore, if he is entitled to receive temporary benefits, the benefits are healing period benefits.

Iowa Code section 85.34(1) (2017) governs healing period benefits, as follows:

[i]f an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it

is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

O'Connor has not worked since he returned the truck to Dvorak on July 25, 2017. (O'Connor Testimony) There was no evidence presented at hearing O'Connor is at maximum medical improvement, or that he is medically capable of returning to employment substantially similar to the employment in which he was engaged in at the time of the work injury. (O'Connor Testimony) O'Connor is entitled to a running award of healing period benefits from July 26, 2017, at the weekly rate of \$915.62, until O'Connor has returned to work, has reached maximum medical improvement, or is medically capable of returning to employment substantially similar to the employment in which he was engaged in at the time of the work injury.

II. Alternate Medical Care and Medical Expenses

O'Connor seeks to recover the medical expenses and medical mileage set forth in Exhibit 6, totaling \$4,309.11. O'Connor also requests alternate medical care.

"An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

O'Connor promptly reported his work injury to Dvorak on July 24, 2017. Dvorak has provided no medical care for O'Connor. To date Dvorak has refused to provide care to O'Connor and is acting unreasonably. Pirelli-Armstrong Tire Co., 562 N.W.2d at 436.

O'Connor was injured over a year ago. He testified he has been experiencing right shoulder pain, lumbar spine pain, right thumb pain, and problems with posttraumatic stress disorder since the accident. (O'Connor Testimony) O'Connor

denied receiving treatment for any of these conditions prior to the accident. (O'Connor Testimony) Dvorak is responsible for O'Connor's medical expenses set forth in Exhibit 6, totaling \$4,309.11 and for O'Connor's ongoing medical care causally related to the work injury. Given Dvorak's unreasonable refusal to authorize care, O'Connor is entitled to direct his own care.

III. Penalty

O'Connor seeks an award of penalty benefits. Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant.

Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

O'Connor has not worked since the work injury. (O'Connor Testimony) Dvorak has paid no weekly benefits to O'Connor for sixty weeks. (O'Connor Testimony) Dvorak did not convey any reason to O'Connor why it has refused to pay weekly benefits. (O'Connor Testimony) Imposition of a penalty is warranted. O'Connor is awarded \$25,000.00 in penalty benefits.

IV. Costs

O'Connor seeks an award of costs. No evidence was presented at hearing concerning costs. I decline to award costs in this case.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant a running award of healing period benefits from July 26, 2017, at the weekly rate of nine hundred fifteen and 62/100 dollars (\$915.62), until the claimant has returned to work, has reached maximum medical improvement, or until he is medically capable of returning to employment substantially similar to the employment in which he was engaged in at the time of the work injury.

Defendant 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 Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendant is responsible for all medical bills set forth in Exhibit 6, totaling four thousand three hundred nine and 11/100 dollars (\$4,309.11), and for all causally related medical care.

Defendant shall pay the claimant twenty-five thousand and 00/100 dollars (\$25,000.00) in penalty benefits.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

A copy of this decision is being provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

Signed and filed this 27th day of September, 2018.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/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.