BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NICHOLAS ROBERTS, Claimant, vs. ANNETTE HOLDINGS, d/b/a TMC TRANSPORTATION, Employer, Self-Insured, Defendant.	:	File No. 5041097 APPEAL DECISION Head Note Nos: 1802; 1803; 2500; 2904; 2907

FILED
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WORKERS' COMPENSATION

Defendant Annette Holdings (d/b/a TMC Transportation), self-insured employer, appeals from a review-reopening decision filed on December 20, 2017. Claimant Nicholas Roberts responds to the appeal. The case was heard on July 24, 2017, and it was considered fully submitted in front of the deputy commissioner on August 7, 2017.

In the underlying arbitration decision, filed on October 30, 2013, the deputy commissioner determined claimant sustained a work-related back injury on November 15, 2010, but had not yet reached maximum medical improvement (MMI), meaning permanency was not yet ripe for determination. The deputy commissioner also awarded claimant temporary benefits from November 21, 2010, through January 25, 2011.

In the review-reopening decision filed on December 20, 2017, which is the subject of this appeal, the deputy commissioner found claimant had achieved MMI after the arbitration decision. As a result, the deputy commissioner considered the extent of claimant's permanent disability and determined claimant sustained 30 percent industrial disability due to the work-related back injury, which entitles claimant to 150 weeks of permanent partial disability (PPD) benefits, commencing on February 25, 2016. In so finding, the deputy commissioner specifically found claimant "to have low credibility." (Review-Reopening Decision, p. 9)

In addition to the extent of claimant's industrial disability, the deputy commissioner also considered whether claimant was entitled to additional temporary benefits and ongoing medication. The deputy commissioner found claimant was not entitled to temporary benefits for the claimed period of January 26, 2011, through March

5, 2012, but was entitled to temporary benefits from July 11, 2015, through December 29, 2015. The deputy commissioner also found claimant was entitled to payment for ongoing medications prescribed by Thomas Tung Tran, M.D.

On appeal, defendants assert the deputy commissioner's industrial disability award was excessive, that claimant is not entitled to an additional period of temporary disability benefits, and that they should not be responsible for payment of Dr. Tran's prescriptions.

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.15 and 86.24, the proposed review-reopening decision filed on December 20, 2017, is affirmed in part without additional comment, affirmed in part with additional analysis, and reversed in part, as set forth below.

First, with respect to the extent of claimant's permanent disability, I affirm without additional comment the deputy commissioner's finding that claimant sustained 30 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's rationale and analysis regarding this issue in full. Part of the deputy commissioner's analysis on this issue involved her finding that claimant has "low credibility." 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, regarding claimant by the deputy commissioner who presided at the review-reopening hearing. I find the deputy commissioner correctly assessed claimant's credibility in this matter. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's finding that claimant was of low credibility.

The next issue to be addressed is claimant's entitlement to temporary benefits. The deputy commissioner found claimant was not entitled to temporary benefits from January 26, 2011, through March 5, 2012. As neither party appealed this finding, I will not disturb it on appeal.

Claimant also sought a second period of temporary benefits from July 11, 2015, through February 24, 2016. The deputy commissioner found claimant was entitled to receive temporary benefits for the period of July 11, 2015, through December 29, 2015. Defendants appealed this finding, asserting claimant is entitled to no additional temporary benefits. Although the deputy commissioner awarded fewer weeks of temporary benefits than what was sought by claimant, claimant did not cross-appeal.

As such, I will only address the period for which temporary benefits were awarded and not the full period for which claimant sought temporary benefits. With the following additional analysis, I affirm the deputy commissioner's award of healing period benefits from July 11, 2015, through December 29, 2015:

As correctly noted by the deputy commissioner, healing period benefits are payable pursuant to Iowa Code section 85.34(1) until (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "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." Iowa Code § 85.34(1). Thus, healing period benefits stop and permanency benefits commence whenever the first factor of Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

In this case, claimant did not return to work with defendant-employer after his injury. (Exhibit A, Deposition Transcript p. 17) Instead, on March 5, 2012, claimant started as a driver with Reliable Transport. (Ex. A, depo. tr. p. 65)

As mentioned above, claimant in the arbitration decision was awarded temporary benefits from November 21, 2010 through January 25, 2011. The deputy commissioner in the review-reopening decision found claimant was not entitled to additional temporary benefits from January 26, 2011 through March 5, 2012, meaning temporary benefits ceased as of January 26, 2011. That finding was not appealed by either party. Thus, claimant's first healing period ended and permanency commenced as of January 26, 2011.[1]

Pursuant to the court's holding in Evenson v. Winnebago, however, claimant may still be entitled to additional intermittent periods of temporary benefits even after the commencement date for PPD benefits. 881 N.W.2d at 372-373 ("Our determination that Evenson's return to work in September 2010 established the commencement date for PPD benefits is not precluded by the fact that he was entitled to TPD benefits for subsequent weeks when he was medically restricted from working his regular hours.")

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[1] Neither party appealed the deputy commissioner's finding that permanency benefits should be suspended during claimant's healing period from July 11, 2015, through December 29, 2015, instead of being paid continuously and concurrently with temporary benefits during that time. As such, I will not disturb this finding on appeal.

Claimant sought an additional period of healing period benefits starting on July 11, 2015. July 11, 2015, is the day after which claimant was terminated from his job with Reliable Transport. (See Ex. D, p. 18) Thus, as of July 11, 2015, claimant was no longer "returned" to work.

I also find that as of July 11, 2015, claimant was unable to return to work substantially similar to his job with defendant-employer. On January 26, 2011, before claimant was hired by Reliable Transport in the spring of 2012, claimant had been given a lifting restriction of 25 pounds by his family physician, Waleed Mahmoud, D.O. (See Arbitration Dec., p. 4). It does not appear that this restriction was ever lifted. Then, shortly after claimant was hired by Reliable Transport, his independent medical examiner, John Kuhnlein, M.D., also assigned lifting restrictions—up to 50 pounds. (Jt. Ex. 4, p. 15) Like Dr. Mahmoud's restriction, it does not appear Dr. Kuhnlein ever rescinded his restrictions. Claimant was later evaluated by Charles Mooney, M.D., at defendants' request in 2013, but Dr. Mooney did not feel it was appropriate to address permanent restrictions because claimant had not yet reached MMI, and he did not address temporary restrictions. (Jt. Ex. 6, p. 29)

It appears in the record that claimant received no additional medical care other than medication management by Dr. Tran until claimant was evaluated by James Hood, M.D., for an independent medical examination at defendants' request on March 9, 2015. In the meantime, claimant underwent two examinations for his commercial driver fitness determinations. In both examinations, one in 2012 and the other in 2014, claimant indicated he could not lift more than 50 pounds. (Ex. D, pp. 12, 14) Claimant was not required to lift more than 50 pounds in his driving job with Reliant Transport. (Hearing Transcript, p. 19)

While Dr. Hood opined that claimant's injury had "resolved" (Jt. Ex. 8, p. 35), I do not find his opinion persuasive, particularly in light of claimant's subsequent evaluations with Jose Fuentes, M.D., and G. Peter Foox, M.D., just a few months later. Defendants authorized care with Dr. Fuentes and Dr. Foox, who ultimately released claimant from care in December of 2015 with "light duty" restrictions and a nine percent whole body impairment rating. (Jt. E 12, p. 52; Jt. Ex. 13, p. 54)

Thus, based on the opinions of Dr. Mahmoud, Dr. Kuhnlein, and Dr. Fuentes, along with claimant's certifications in his driver fitness determinations that he could not lift more than 50 pounds, I find claimant was under a 50-pound lifting restriction at the time of his termination from Reliable Transport and that the 50-pound lifting restriction is permanent.

Claimant's job with defendant-employer required "tarping" his loads with tarps that weighed more than 100 pounds. (See Ex. A, depo. tr. p. 12) Thus, with a lifting restriction of 50 pounds, claimant could not return to work substantially similar to his job with defendant-employer. I therefore affirm the deputy commissioner's finding that "[c]laimant did not return to substantially similar employment after leaving Reliable Transport." (Rev.-Reop. Dec., p. 11)

Claimant also had not yet reached MMI as of July 11, 2015. The two MMI dates in the record are from Dr. Kuhnlein, who placed claimant at MMI as of January 26, 2011, and Dr. Foox, who placed claimant at MMI as of the date of his examination. (Jt. Ex. 4, p. 15; Jt. Ex. 13, p. 54) The deputy commissioner adopted an MMI date of December 29, 2015, which was when Dr. Fuentes released claimant from his care. (Jt. Ex. 12, pp. 49-52) In doing so, the deputy commissioner noted claimant's care since his release from Dr. Fuentes has been "primarily medical management." (Rev.-Reop. Dec., p. 11)

In light of the 2013 arbitration decision, which was affirmed on appeal by the Commissioner and then affirmed again on judicial review by the District Court, which found claimant had not yet reached MMI, I do not find Dr. Kuhnlein's MMI date in 2011 persuasive. Thus, I find claimant reached MMI no earlier than December 29, 2015.

Thus, between July 11, 2015 and December 29, 2015, claimant was no longer working, was not medically capable of returning to work substantially similar to his job with defendant-employer, and was not at MMI. For these reasons, I affirm the deputy commissioner's award of healing period benefits during this time. See Iowa Code § 85.34(1).

Defendants argue claimant should not be entitled to receive healing period benefits upon his termination from Reliable Transport because the termination was not due to his work injury. I agree with the deputy commissioner's finding that claimant's termination was due to conflicts with his employer over work performance and not because of a physical inability to perform the work, but contrary to defendants' arguments, this finding is immaterial to whether claimant was entitled to receive additional healing period benefits. To the extent defendants are suggesting claimant's termination with Reliable Transport amounted to a refusal of suitable work, such an argument is inapplicable here because claimant found work consistent with his restrictions through a different employer—not defendant-employer. See Iowa Code § 85.33(3) (noting temporary partial disability compensation is not payable when a claimant refuses suitable work "with the employer for whom the employee was working at the time of the injury" (emphasis added)).

Ultimately, had claimant not been motivated to find work with a different employer, none of the factors ending claimant's healing period in Iowa Code section 85.34(1) would have been triggered, and defendants would have been responsible for a longer duration of healing period benefits. As a result, claimant's decision to seek and secure work consistent with his disability through a different employer was beneficial to defendants because it suspended their obligation to pay healing period benefits. Upon claimant's termination from that different employer, however, defendants should not be allowed to skirt their responsibility to pay healing period benefits. If that were the case, claimants would be better off not seeking subsequent employment at the risk of being terminated and extinguishing their former employer's liability for temporary benefits. Thus, the reason for claimant's termination from Reliant Transport is irrelevant to the issue of claimant's entitlement to additional healing period benefits.

Instead, the only relevant factors are those set out in Iowa Code section 85.34(1): whether claimant had returned to work; was medically capable of returning to substantially similar work; or was at MMI. As discussed, from July 11, 2015 to December 29, 2015, none of these factors were met. Thus, with this additional analysis, the deputy commissioner's award of healing period benefits during this time is affirmed.

The final issue on appeal is claimant's entitlement to medications. For the reasons that follow, I respectfully reverse the deputy commissioner's finding that defendants are responsible for the costs of the medications prescribed by Dr. Tran:

The deputy commissioner found the medical treatment being provided by defendants was "essentially no care," and prescription medication was more beneficial than no care. (Rev.-Reop. Dec., p. 14) I acknowledge defendants provided very little medical care after the arbitration decision despite claimant's attempts to obtain treatment. However, I respectfully disagree with the deputy commissioner's finding that the medications being prescribed by Dr. Tran were reasonable.

First, several of the physicians in this case have indicated claimant should discontinue the medications prescribed by Dr. Tran because they are both dangerous and unnecessary. Dr. Hood noted claimant, who reported taking a combination of Soma, hydrocodone, and Valium through his prescriptions from Dr. Tran, was "on a dangerous and unacceptable pharmological program . . . known as the deadly 'trio.'" (Jt. Ex 8, p. 35) Dr. Fuentes subsequently noted claimant was taking "a hazardous combination of hydrocodone, carisoprodol, and a benzodiazepine, all of which are not indicated based on EMG/NCV, MRI studies, and now clinical examination." (Jt. Ex. 12, p. 50) Dr. Fuentes felt claimant needed to be "detoxified."

While claimant testified he "got off" the Valium, he also testified he continued to take hydrocodone four to six times a day and Soma four to six times a day. (Tr., p. 33) Dr. Tran offered no explanation as to why claimant continues to be prescribed these medications on a monthly basis despite the risks or whether he will eventually be weaned. (See Jt. Ex. 17) Without additional clarification from Dr. Tran, I find the warnings and opinions of Dr. Hood and Dr. Fuentes compelling.

A comparison of claimant's testimony regarding his medication use against actual evidence of his medication use also raises questions about the reasonableness of Dr. Tran's opinion regarding his prescriptions. Claimant testified in 2015 he was taking hydrocodone, Soma, paroxetine, and Valium, yet two drug screens in 2015—one in April and one in September—were negative for such medications. (See Tr., p. 24; Ex. D, p. 9; JE 9, pp. 40-42) When claimant suggested on re-direct examination that his tests may have been negative because he was financially unable to purchase and therefore take his medications, the records reveal claimant filled his prescriptions for hydrocodone, carisoprodol (Soma), and diazepam (Valium), in both March and April of 2015. (See Tr., p. 111; Jt. Ex. 14, p. 4) Furthermore, it does not appear from the record that Dr. Tran has ever seriously monitored claimant's medication usage. (See Jt. Ex. 17) These discrepancies undercut claimant's assertion that Dr. Tran's ongoing prescriptions are appropriate, reasonable, or necessary for claimant's work-related condition.

Like the deputy commissioner, I am critical of defendants' provision of medical care in this case. However, Iowa Code section 85.27 only requires defendants to provide "reasonable" care. Iowa Code § 85.27; see Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 202-203 (Iowa 2010). Because at least two doctors have warned against claimant's ongoing use of the medications being prescribed by Dr. Tran, because there is some question as to whether claimant is actually using his medication appropriately, and because Dr. Tran offered no clarification as to why he continues to regularly prescribe opioid medication with no end in sight, I find insufficient evidence that the medication being prescribed by Dr. Tran is reasonable. I therefore conclude defendants are not responsible for those medical costs in the future. See Iowa Code § 85.27. For these reasons, the deputy commissioner's finding regarding defendants' responsibility for claimant's ongoing care with Dr. Tran is respectfully reversed.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on December 20 2017, is affirmed in part without comment, affirmed in part with additional analysis, and reversed in part.

Defendants shall pay claimant healing period benefits from July 11, 2015, through December 29, 2015, at the weekly rate of five hundred thirty-eight and 87/100 dollars ($538.87).

Defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the weekly rate of five hundred thirty-eight and 87/100 dollars ($538.87) commencing on February 25, 2016.

Defendants shall receive credit for all benefits previously paid. Benefits paid during the period of time claimant was entitled to receive temporary benefits shall be applied against the temporary benefits owed. If there were any additional benefits paid, the remainder shall be applied against permanent benefits owed.

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 Technology, File No. 5054686 (App. Apr. 24, 2018).

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

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

Signed and filed on this 28th day of June, 2019.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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