

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LOREN LEE PESICKA, JR.,

Claimant,

vs.

SNAP-ON LOGISTICS COMPANY  
a/k/a SNAP-ON TOOLS  
MANUFACTURING COMPANY,

Employer,  
Defendant.

File No. 5018910

REHEARING DECISION



On January 20, 2017, the undersigned issued a Review-Reopening Decision in this file. On February 9, 2017, claimant filed a rehearing application. Defendant employer filed a resistance on February 17, 2017.

The rehearing application is granted and now considered.

Claimant first asserts that the undersigned deputy miscalculated the healing periods in arriving at a total healing period of 49 weeks. Claimant asserts that the total healing period in question is 49.428 weeks. (Rehearing Application, p. 3) The healing periods in question are: (1) April 22, 2009 – August 4, 2009; (2) April 21, 2010 – June 6, 2010; (3) July 1, 2010 - July 18, 2010; (4) October 19, 2011 – February 12, 2012; and, (5) October 21, 2015 – December 15, 2015. (Hearing Report, p. 1)

In claimant's calculation of 49.428 weeks, he inadvertently includes an extra .143 weeks (1 day) in period number one above (April 22, 2009 – August 4, 2009) by including August 5, 2009. (Rehearing Application p. 2) In period number two above (April 21, 2010 – June 6, 2010), claimant miscalculates the period of June 2, 2010 to June 6, 2010 as .857 weeks (or 6 days) when it is actually .714 weeks (or 5 days). This error increases his calculation by .143 weeks. (Rehearing Application, p. 2) Next, in period five (October 21, 2015 – December 15, 2015), claimant includes into his calculation an additional .143 weeks (1 day) by including November 30, 2015, into his calculations. However, November has only 30 days. (Rehearing Application, p. 2) Therefore, when the additional three days added into the calculation by claimant in error are excluded, I find that the undersigned's conclusion as stated in the Review-Reopening Decision that the healing period is 49 weeks is accurate and claimant's assertion that the healing period is 49.428 weeks is rejected.

Claimant next alleges that he is entitled to healing period compensation in the amount of \$6,894.30 as of May 18, 2016, plus accruing interest at the rate of 10 percent per year on the accrued principal, and provides multiple pages of calculations. (Rehearing Application, pp. 4-9) Claimant states that he relied upon defendant's exhibit C, pages 10-18, to establish the dates that payments were made by defendant. (Rehearing Application, p. 5) At page 7 of his rehearing application, claimant asserts that defendant's did not begin to pay benefits for the healing period of October 19, 2011 to February 12, 2012, until December 28, 2011. However, the evidence submitted at hearing shows that weekly benefits were in fact paid for the period of October 19, 2011 to December 28, 2011. (Ex. C, p. 10) Also, at hearing, claimant testified that he received weekly benefits while he was off work when the doctor took him off work. (Tr. pp. 87-88) Therefore, it appears that the claim as set forth by claimant for additional healing period benefits excludes a significant period of time in which payment was, in fact, paid.

I cannot find that claimant is owed additional healing period in the sum that he has alleged.

However, I agree that the calculation of benefits for the underpayment of healing period as set forth in the Review-Reopening Decision, did not take into consideration the impact of accruing interest and the application of payments, being first applied to interest and then principle. Therefore a recalculation of the accrued underpayment is appropriate and is addressed below.

Claimant next argues that the permanent impairment associated with his injury should be based on an accumulation of multiple scheduled members, his toes. Or, in the alternative, the injury should be considered an industrial disability based on an accumulation of impairment to his toes, rather than the right leg.

Upon review of the file, the undersigned notes that the petition filed in this matter on February 12, 2015, stated that the body part affected was claimant's right leg, which is Iowa Code section 85.34(2)(o). The petition was amended on April 17, 2015, to include a claim against the Second Injury Fund of Iowa, again asserting that this injury was to claimant's right leg. At the outset of the hearing on May 18, 2016, the undersigned was presented with a hearing report, which stated the parties' stipulation that the disability was "a scheduled member disability to the right leg." (Hearing Report, p. 1) Claimant further asserted his position in the Hearing Report, specifically claiming "permanent disability benefits for 132 weeks for a 60% loss of use of the right leg." (Hearing Report, p. 1) Claimant's counsel did state at the commencement of the hearing, that the claim "is not based on impairment ratings alone," and referenced the individual ratings applicable to "all five toes having been amputated." (Tr. p. 13) However, at no time did claimant move to amend the petition to assert multiple scheduled member claims to claimant's toes, nor was there any request to amend the hearing report to change the above noted stipulation that the injury was to claimant's right leg. Claimant's argument that the undersigned should now disregard the parties' stipulation that the permanent impairment is to claimant's right leg is rejected by the

undersigned. Claimant cannot now convert the stipulated single right leg claim to a claim for multiple scheduled member injuries or an industrial disability, and go beyond the scope of the parties' stipulation.

I note that Dr. Kuhnlein, when assessing functional impairment for this injury determined after reviewing "Table 17-32, Page 545, impairment would be assigned for the amputation of all toes at the metatarsophalangeal joint. This would be a 31% foot impairment." (Cl. Ex. II, part 2, p. 384) This rating was combined with other ratings to the foot and converted to a right lower extremity rating of 25 percent, which is 55 weeks. Therefore, the impairment for the amputation of the toes was considered according to the body part pled and stipulated to by the parties, which was the right leg. Claimant chose his path of recovery by asserting a claim to the right leg, and the parties are bound by their stipulation. Permanent partial disability (PPD) of the right leg was properly assessed by Dr. Kuhnlein under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and adopted by the undersigned.

I am unable to find that claimant is entitled to permanent partial disability beyond the finding of 25 percent of the right leg (55 weeks) as provided in the Review-Reopening Decision.

Claimant next argues that the undersigned miscalculated the 2.5 weeks of PPD overpayment as stated in the Review-Reopening Decision. Claimant argues that the extent of permanency should exceed 25 percent to the right leg. This argument is rejected as stated above. Claimant also argues that the overpayment is inaccurate because of the failure to consider the impact of accruing interest and payments being applied first to interest and then to principle.

The undersigned found claimant sustained a 25 percent permanent partial disability to the right leg. (Review-Reopening, January 20, 2017, pp. 12-13) Twenty five percent of the right leg is 55 weeks. The Agreement for Settlement approved on December 26, 2006, set forth that claimant had sustained a 13 percent impairment, which was equal to 28.6 weeks. Therefore, the undersigned's award of 55 weeks of PPD, less the previously paid 28.6 weeks, resulted in a new award of 26.4 additional weeks of PPD, which was due beginning on the stipulated commencement date of February 13, 2015. (Review-Reopening, January 20, 2017, p. 13) The undersigned then determined that claimant had been paid an additional 57.5 weeks of PPD benefits after the date of the Agreement for Settlement, beginning on May 1, 2013, and continuing thereafter as set forth in the table at page 13 of the Review-Reopening Decision. (Id.) However, the previously paid 28.6 weeks minus the 57.5 weeks paid by defendants after the 2006 Agreement for Settlement, creates an overpayment of 28.9 weeks. Therefore, the undersigned incorrectly concluded in the Review-Reopening Decision that defendant was overpaid by 2.5 weeks, in reality defendant overpaid by approximately 28.9 weeks. However, as with the healing period benefits, the undersigned agrees with claimant that payments must first be applied to interest and then to principal to determine the appropriate overpayment of PPD benefits. The final number of weeks of overpayment is addressed below.

Claimant has requested a specific award of interest. Pursuant to Iowa Code section 85.30 and applicable case law including Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261-262 (Iowa 1996) and Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 234-236 (Iowa 1996), defendant(s) shall pay interest at the rate of 10 percent per annum upon unpaid weekly healing period and permanent partial disability benefits awarded herein as follows:

All payments shall first be applied to interest due and any excess on the principal amount.

For purposes of calculating healing period the following data shall be used:

- (1) The stipulated weekly rate of \$435.40
- (2) Time periods when weekly healing period benefits are payable (at the stipulated weekly rate):
  - (a) April 22, 2009 – August 4, 2009
  - (b) April 21, 2010 – June 6, 2010
  - (c) July 1, 2010 – July 18, 2010
  - (d) October 19, 2011 – February 12, 2012
  - (e) October 21, 2015 – December 15, 2015
- (3) The weekly rate shall be due for each period in paragraph 2 above, beginning on the following dates and continuing each week thereafter through the conclusion of the time period identified.
  - (a) April 29, 2009
  - (b) April 28, 2010
  - (c) July 8, 2010
  - (d) October 26, 2011
  - (e) October 28, 2015
- (4) Weekly benefits shall accrue interest at the rate of 10 percent per annum. Interest on unpaid amounts for each compensation payment week begins on the first day following the expiration of that compensation payment week and continues until full payment.
- (5) Credit shall be applied against the accruing healing period by applying the payments made by defendant found in Exhibit C, pages 10-11, beginning with the

payment dated April 27, 2009 in the sum of \$423.36 (no. 1001331290) and including each payment made thereafter through the payment dated December 16, 2015 in the sum of \$423.36 (no. 0124189540), excluding any entry referencing May 1, 2013 and the sum of \$15,876.00, which the undersigned previously determined to be a payment of permanent partial disability and not healing period. (Review-Reopening, January 20, 2017, p. 13) The date that each payment is made, shall be the date in the far left column of Exhibit C, pages 10-11.

(6) The calculation shall be run through the date of May 18, 2016, the date of the hearing of this matter.

(7) The final sum shall be the amount of healing period owed to claimant.

The undersigned agrees that penalty of 50 percent of the final sum owed by defendant to claimant as of May 18, 2016, should be applied.

For purposes of calculating the overpayment of PPD benefits the following data shall be used:

(1) The stipulated weekly rate of \$435.40

(2) The time period commencing February 13, 2015 for a period of 26.4 weeks thereafter.

(3) The weekly PPD benefit, payable at the weekly rate of \$435.40, shall be due beginning February 20, 2015, and continuing each week thereafter through the conclusion of the 26.4 weeks.

(4) Weekly benefits shall accrue interest at the rate of 10 percent per annum. Interest on unpaid amounts for each compensation payment week begins on the first day following the expiration of that compensation payment week and continues until full payment.

(5) Credit shall be applied against the accruing permanency benefits by applying the payments made by defendant as set forth in the table on page 13 of the Review-Reopening Decision. The date of each payment shall be the date set forth in said table.

(6) The calculation shall be run through the date of May 18, 2016, the date of the hearing of this matter.

(7) The final dollar amount of the overpayment by defendant shall be divided by the rate of \$435.40 to determine the number of weeks of overpayment.

There shall be no penalty assessment concerning PPD. Although weekly PPD benefits were underpaid by \$12.04, the evidence shows that claimant received an initial lump sum payment of \$15,876.00 on May 1, 2013. (Review-Reopening, January 20, 2017, p. 13) The parties have stipulated to the weekly rate of \$435.40. (Hearing

Report, p. 1) The parties have also stipulated that the commencement date for payment of PPD benefits is February 13, 2015. (Hearing Report, p. 1) The lump sum payment of \$15,876.00 divided by the weekly rate of \$435.40 produces an initial payment of 36.46 weeks, which was paid before the date upon which the parties agree that any benefits were due. I have found that claimant was owed an additional 26.4 weeks of PPD benefits. Because claimant was paid more than the amount found to be owed, and the same was paid prior to the date the parties agreed it was due, there can be no penalty, because there was no underpayment.

Under Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 at 136-137 (Iowa 2010) the PPD overpayment cannot be applied to correct the healing period underpayment.

If, following this Rehearing Decision, the parties remain in disagreement as to the principle and interest amounts due concerning healing period and the precise overpayment of PPD, and unless otherwise agreed, the parties shall jointly retain a certified public accountant who shall calculate the principle and interest to a specified date in the manner provided above. This accountant's calculations shall then be submitted to the undersigned for consideration within 14 days of the date of this order, if the parties are unable to reach agreement concerning the correct underpayment and interest. If said CPA calculations are submitted to be considered by the undersigned, any time requirement for filing a Notice of Appeal or any other time requirement or deadline placed on the parties by rule or by statute shall be tolled for the same number of days as exist between the filing of the CPA calculation and the date of the issuance of the undersigned's Supplemental Order.

Issues raised by defendant in their resistance concerning Dr. Kuhnlein's IME expense and the award of payments to claimant's spouse are rejected by the undersigned.

All portions of the Review-Reopening Decision unaffected by this Rehearing Decision, remain in full force and effect.

#### ORDER

##### IT IS THEREFORE ORDERED:

- 1) The total number of weeks of healing period is forty-nine (49).
- 2) Claimant was underpaid healing period benefits in the amount determined by following the calculations described above.
- 3) Defendant shall pay claimant penalty for underpayment of healing period of fifty (50) percent of the amount determined by following the calculations described above.
- 4) Claimant's permanent partial disability is confirmed as twenty-five (25) percent of the right leg.

- 5) Claimant was overpaid permanent partial disability benefits in the number of weeks determined by following the calculations described above.
- 6) There is no penalty concerning permanent partial disability payments.
- 7) Claimant and defendant shall agree upon the accrued principal and interest concerning healing period benefits and the overpayment of permanent partial disability benefits pursuant to the calculations described above. However, if the parties cannot agree, the parties shall jointly retain a certified public accountant (CPA) to calculate healing period owed and the overpayment of permanency benefits according to the findings, conclusions and calculation method described above in this order and file the same with this agency within 14 days of the date of this order.
- 8) If the CPA calculations are filed, any time requirement for filing a Notice of Appeal or any other time requirement or deadline placed on the parties by rule, statute or otherwise, shall be tolled for the same number of days as exist between the filing of the CPA calculations and the date of the issuance of the undersigned's Supplemental Order.
- 9) The remaining unaffected portions of the Review-Reopening Decision remain in full force and effect.

Signed and filed this 1<sup>st</sup> day of March, 2017.



TOBY J. GORDON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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