

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRANDON EASTON,

Claimant,

vs.

MIKE MCMURRIN TRUCKING,

Employer,

and

WESTERN NATIONAL MUTUAL
INSURANCE CO.,

Insurance Carrier,
Defendants.

FILED

APR 26 2017

WORKERS COMPENSATION

File No. 5056183

ARBITRATION DECISION

Head Note No.: 1801

Claimant Brandon Easton filed a petition in arbitration on February 15, 2016, alleging he sustained an injury to his left leg while working for the defendant, Mike McMurrin Trucking, on August 6, 2015, and also naming Mike McMurrin Trucking's insurer, Western National Mutual Insurance Co. ("Western"), as a defendant. The same date Easton filed a second petition against Mike McMurrin Trucking, Western, and the Second Injury Fund of Iowa ("the Fund"). Mike McMurrin Trucking and Western filed an answer on February 19, 2016. The Fund filed an answer on February 29, 2016. On January 30, 2017, Easton filed a motion to dismiss the Fund without prejudice, which was granted.

An arbitration hearing was held on February 7, 2017, in Cedar Rapids, Iowa. Attorney Nathan Willems represented Easton. Easton appeared and testified. Attorney Maggie Boesen appeared on behalf of Mike McMurrin Trucking and Western. Michael Richard McMurrin and Jennifer Brunssen appeared and testified on behalf of Mike McMurrin Trucking and Western. Exhibits 1 through 6 and A through T were admitted into the record. The record was held open through March 6, 2017, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Mike McMurrin Trucking and Western waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.
2. Easton sustained an injury on August 6, 2015, which arose out of and in the course of his employment with Mike McMurrin Trucking.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The alleged injury is a cause of permanent disability.
5. Although entitlement to temporary disability benefits cannot be stipulated to, the parties agree Easton has been off work since July 9, 2016.
6. At the time of the alleged injury Easton's gross earnings were \$677.00 per week, he was single and entitled to one exemption and the parties believe his weekly rate is \$417.81.
7. Medical benefits are no longer in dispute.
8. Prior to the hearing Easton was paid 6.6 weeks of compensation at the rate of \$429.55 per week.

ISSUES

1. Is Easton entitled to a running award of temporary benefits?
2. Are Mike McMurrin Trucking and Western entitled to a credit for benefits paid?
3. Should costs be assessed against either party?

FINDINGS OF FACT

Mike McMurrin Trucking hired Easton in June 2014, as a full-time shop assistant. (Transcript, pages 19-27; Exhibit, p. 21) Easton washed the trucks, cleaned the shop, ordered parts, performed oil changes, serviced the trucks, adjusted the brakes, replaced radiators, worked on the truck computers, and assisted the mechanics. (Tr., pp. 9, 28-29; Exs. G, p. 47; H, p. 70)

When he was hired Easton informed Mike McMurrin he did not have a valid driver's license. (Tr., p. 9) Easton was able to find his own transportation to and from work prior to his work injury. (Tr., p. 20) Easton typically drove himself to work even though he did not have a license. (Tr., p. 19) On one or two occasions, one of Easton's coworkers drove him to work before his work injury. (Tr., p. 19) At the time of his work injury Easton did not have a valid driver's license. (Tr., p. 9)

On August 6, 2015, Easton was working on a dump truck with a mechanic. (Tr., p. 9) Easton was in the air on a hydraulic hoist hooking up chains to the bed of the dump truck when he lost his footing and slipped into the sloped portion of the dump truck bed, fracturing his tibia and fibula. (Tr., pp. 9-10; Ex. G, pp. 50-51) Easton was taken to St. Luke's Hospital by ambulance for treatment. (Ex. B, p. 32; Ex G, p. 51) The next day James Pape, M.D., an orthopedic surgeon, assessed Easton with a left closed distal tibia and fibula displaced fracture, and performed a locked intramedullary rodding of the left tibia and fibula fracture with a standard tibia Synthes rod. (Ex. F, p. 42) Easton was off work for some time after his injury. (Tr., p. 29)

In September or October 2015, Easton was cleared to return to light duty work. (Tr., p. 29) Mike McMurrin Trucking assigned Easton to clerical work through November 2015, when he underwent a second surgery. (Tr., pp. 20-21, 29)

On November 30, 2015, Dr. Pape performed an ostectomy of Easton's left distal tibia to remove bone fragments in his leg. (Ex. C, p. 38) Dr. Pape ordered restrictions of keeping the wound clean and dry. (Ex. A, p. 18) On December 8, 2015, Easton attended a follow-up appointment with Dr. Pape noting his discomfort had improved considerably, but reporting weakness with weight bearing, and no significant change in the diffuse numbness in his foot. (Ex. A, p. 17) Dr. Pape prescribed oxycodone-acetaminophen for pain. (Ex. A, p. 17)

On January 25, 2016, Dr. Pape performed a third surgery, removing a left tibial distal interlock screw from Easton's leg. (Exs. A, p. 14; C, p. 36) Dr. Pape assessed Easton with a left tibial fracture with delayed union status post IM rod fixation. (Ex. C, p. 36) Dr. Pape prescribed oxycodone-acetaminophen for pain. (Ex. A, p. 14) Easton did not return to work after the second and third surgeries. (Tr., p. 30)

In March 23, 2016, Easton attended a follow-up appointment with Dr. Pape. (Exs. 2, p. 1; A, p. 11) Easton complained of some improvement in his discomfort and that he was slowly progressing with physical therapy and using crutches. (Exs. 2, p. 1; A, p. 11) Dr. Pape prescribed oxycodone-acetaminophen and issued restrictions of "ok for sit down duty, no commercial driving, use crutches as needed for ambulation." (Exs. 2, pp. 1-2; A, pp. 11, 13) Following his appointment on April 21, 2016, Dr. Pape continued Easton's restrictions. (Exs. 2, p. 4; A, p. 10)

Brunssen, an administrative assistant for Mike McMurrin Trucking, testified that after Easton's second surgery Mike McMurrin Trucking did not bring Easton back "[b]ecause it was supposed to be a sterile environment and our shop is not a sterile place." (Tr., p. 34) Mike McMurrin also testified that after Easton's surgery, the physician stated Easton needed to work in a very clean environment, and "[a]s hard as we try and keep things clean, it's a very dirty and dusty environment, so that was probably the deterring (sic) factor bringing him back. We didn't want him to get [sic] infection or have any more problems with it, you know." (Tr., p. 30) Mike McMurrin reported that every week the business had an extra forty hours of clerical work to provide to Easton. (Tr., p. 32)

In April 2016, Mike McMurrin Trucking contracted with ReEmployability, to find Easton suitable temporary work. (Tr., pp. 22, 34-35) ReEmployability arranged for Easton to work at St. Vincent de Paul Thrift Store starting on May 9, 2016. (Ex. 6, pp. 1-2) ReEmployability sent Easton a letter on May 2, 2016, informing him of the position. (Ex. 6, p. 2) Easton's attorney sent the defendants' attorney a letter on May 5, 2016, notifying her Easton did not have transportation to the Thrift Store and he would make every effort to arrive for work on May 9, 2016. (Ex. 6, p. 1) Easton's attorney further advised,

[a]s we previously discussed and as you were already aware, my client is planning to move in the near future. The specific moving date is presently unknown. It will vary based on the availability of friends and/or family to move my client's possessions. Once my client has moved, though, it seems rather unrealistic for him to travel from Manchester to the Thrift Store on a daily basis. As you may know, there is no public transportation connecting Manchester with the city of Cedar Rapids. As it appears now, once my client moves to Manchester, it does not appear that he will be able to continue to work at the Thrift Store if that would require him to arrive at the Thrift Store on a daily basis.

(Ex. 6, p. 1)

At the time of his work injury Easton lived in Cedar Rapids. (Tr., p. 14) Easton informed Brunssen that he was moving. (Tr., pp. 15, 37-38) Brunssen told Easton that Mike McMurrin Trucking would try to accommodate him with something in the vicinity where he was moving to. (Tr., p. 38)

In May 2016 Easton started moving to his uncle's home in Manchester. (Tr., pp. 15, 21) Easton completed his move June 1, 2016. (Tr., p. 21) Easton reported he was falling behind financially and sought out a cheaper place to live. (Ex. G, p. 45) Easton does not pay his uncle rent. (Tr., p. 21)

Brunssen sent Easton a letter on May 16, 2016, notifying him of a second offer of alternative work at Mercy Hospital, beginning on May 23, 2016. (Exs. 6, pp. 8-9; L, pp. 87-88) On May 17, 2016, the defendants' attorney sent a letter notifying Easton and his attorney of the job opportunity at Mercy Hospital, and that Easton was

expected to arrange for his own transportation to and from work just like any other employee. Dr. Pape has indicated that Mr. Easton is capable of riding public transportation. A review of the Cedar Rapids bus schedule indicates that Bus #12 has a stop on his street and Bus #9 connects directly to Mercy Hospital. Per the Cedar Rapids transit website, a 31-day bus pass can be obtained at a cost of \$40.

(Ex. 6, p. 6)

Brunssen testified she called Easton and offered him a full-time facility assistant position at Mercy Hospital in Cedar Rapids, where he would greet patients and perform clerical work within his restrictions, starting on May 23, 2016. (Tr., p. 23, 36) Brunssen relayed Easton was excited about the opportunity to work at Mercy Hospital and he did not inform her he had a transportation problem. (Tr., p. 36)

Easton's attorney sent a letter to the defendants' attorney on May 18, 2016, notifying her Easton anticipated he would complete his move to Manchester before May 23, 2016. (Exs. 6, p. 11; M, p. 93) Easton's attorney reported Easton lacked reliable transportation to commute from Manchester to Mercy Hospital in Cedar Rapids and did not have access to public transportation. (Exs. 6, p. 11; M, p. 93)

Easton did not appear for work at Mercy Hospital on May 23, 2016. (Ex. N, p. 95; Tr., p. 24) Easton testified, "I was in the process of moving when they had set up the job, and by the time that the job date was actually going to start I was already gone." (Tr., p. 17) During his deposition Easton testified he did not accept the position because he did not have transportation from Manchester to Mercy Hospital. (Tr., p. 24) Easton further testified he would not be able to accept a job in Cedar Rapids unless Mike McMurrin Trucking provided him with transportation. (Tr., p. 24) Easton denied he refused the job, but reported, "I was not able to attend to it" because he had already moved to Manchester. (Tr., p. 17) Easton acknowledged that in late May he was restricted to sit-down duty with no commercial driving, and use of crutches as needed for ambulation, with no other driving restriction. (Tr., pp. 22-23)

Brunssen reported she later received a call from her attorney informing her that Easton did not show up for work on May 23, 2016. (Tr., p. 37) Brunssen testified Easton never told her he could not take the Mercy Hospital position because he did not have transportation. (Tr., p. 37)

Defendants' attorney sent Easton's attorney a letter on May 25, 2016, stating that her clients "have offered suitable light-duty work within Mr. Easton's restrictions. Therefore, I believe it is appropriate to terminate benefits pursuant to Iowa Code Section 85.33(3)." (Ex. 6, p. 13) Easton's attorney responded to the letter on June 1, 2016, asserting Mike McMurrin Trucking had not offered suitable work and that his client had moved more than forty-five miles from Cedar Rapids, he had no access to reliable transportation, and there is no public transportation. (Ex. 6, pp. 15-16)

Easton attended an appointment with Dr. Pape on May 26, 2016, and was fitted with an ASO brace for his left ankle. (Exs. 2, p. 7; A, p. 4) Dr. Pape imposed restrictions of "recommend sitdown [*sic*] duty with limited walking; no climbing; okay to drive automatic vehicles." (Exs. 2, p. 6; A, p. 6)

Mike McMurrin Trucking and Western voluntarily paid three percent permanent partial disability benefits, or 6.6 weeks of benefits from May 23, 2015 through July 8, 2015. (Ex. 6, p. 14; H, p. 72)

Defendants' attorney sent Easton's attorney a letter on July 7, 2016, informing him ReEmployability had looked for light duty work for Easton in Manchester, but had not found any light duty work. (Exs. 6, p. 19; Q, p. 100) Defendants offered Easton work at the Salvation Army in Marion, which is forty miles from Easton's home. (Exs. 6, p. 19; Q, p. 100) Easton's attorney responded by letter the next day stating Easton did not have access to transportation, and the offer was not suitable. (Exs. 6, p. 20; R, p. 101)

At the time of the hearing Easton had a car, but he did not have a driver's license. (Tr., pp. 17-18, 20) Easton is eligible to receive a license if he pays his fines. (Tr., p. 20) Easton has driven a car without a driver's license since his August 6, 2015 work injury. (Tr., p. 20) Easton reported his car does not operate on the highway. (Tr., p. 18) Easton testified during his deposition he has extensive auto mechanic skills, including, but not limited to, servicing transmissions, clutches, and interior swaps, and it would only take a few hours of mechanical work to get his car into driving condition. (Tr., p. 20) Easton further reported that even if he had a valid driver's license he could not drive himself to a job each day "[b]ecause with the problems in my left foot I'm not able to tell how far the clutch is to the floor, let alone how fast up the clutch is going to come. At that point I would just be ruining parts on the car." (Tr., p. 18) Easton testified Dr. Pape has not released him to drive a car with a clutch. (Tr., p. 18)

Dr. Pape continued Easton's restrictions on July 19, 2016, and prescribed gabapentin. (Ex. 2, p. 9) During his appointment on September 1, 2016, Dr. Pape referred Easton to a pain clinic, and ordered restrictions of "sit down duty with limited walking" and no commercial driving. (Exs. 2, p. 10; A, p. 3) At the time of the hearing Easton was not at maximum medical improvement.

CONCLUSIONS OF LAW

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.

The Iowa Supreme Court that the healing period lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first." Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 372-74 (Iowa 2016). Easton has not returned to work and he has not reached maximum medical

improvement. Easton seeks a running award of temporary total disability benefits from July 9, 2016. Mike McMurrin Trucking and Western aver Easton is not entitled to temporary total disability benefits under Iowa Code section 85.33(3) because he refused suitable work. The statute provides,

[i]f an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

Iowa Code § 85.33(3) (2015). The statute precludes an employee who refuses suitable work offered by the employer, consistent with the employee's disability, from receiving temporary or healing period benefits during the period of refusal. Id.; Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 520 (Iowa 2012). The employer bears the burden of providing the affirmative defense. Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 559 (Iowa 2010).

It is undisputed that the work offered through Mercy Hospital was consistent with Easton's restrictions. Easton testified he refused the work because Mike McMurrin Trucking did not offer transportation from Manchester to Mercy Hospital. Easton has not held a driver's license since Mike McMurrin Trucking hired him through the date of the hearing. Easton lost his license due to nonpayment of fines. Easton contends Mike McMurrin Trucking did not offer suitable work because the work was more than forty miles from his home, his car was not functioning properly, and even if it were, he cannot operate a manual transmission due to his restrictions.

Easton relies on Neal, and cases cited by the Iowa Supreme Court in Neal to support his contention the work at Mercy Hospital was not suitable work. In Neal, the plaintiff was an over-the-road truck driver. At the time of his work injury Neal resided with his family 387 miles from Des Moines. Neal's physician imposed work restrictions. Annett Holdings offered Neal light duty work in Des Moines, Iowa, and offered to provide Neal with a motel room and transportation costs to return home every other weekend. Neal declined Annett Holdings' offer of light duty work, and argued Annett Holdings had not offered suitable work. Annett Holdings suspended payment of temporary benefits to Neal.

The case proceeded to hearing. The deputy commissioner found Neal had refused suitable work and found Annett Holdings properly suspended his temporary

disability benefits. The commissioner reversed, finding Annett Holdings had failed to offer suitable work because the job was a great distance from his home, prior to the work injury he could return home every weekend, and Neal should not be required to uproot and move to a different location apart from his family. The district court reversed, finding because Annett Holdings offered light duty work consistent with Neal's disability, Neal refused suitable work, and he forfeited his right to temporary disability benefits. The Iowa Supreme Court reversed, finding under the statute, the commissioner may consider the distance of available work from the claimant's home in determining whether the employer has offered suitable work for purposes of Iowa Code section 85.33, and concluding the commissioner's finding was supported by substantial evidence. Neal, 814 N.W.2d at 524.

The facts of this case differ from Neal. Easton lived in Cedar Rapids and worked for Mike McMurrin in Cedar Rapids at the time of his work injury. Easton was struggling financially, and he chose to move to his uncle's home in Manchester, forty-five miles away. Mike McMurrin Trucking is not responsible for Easton losing his driver's license. Easton did not have a driver's license at the time he commenced his employment with Mike McMurrin Trucking, due to nonpayment of fines. Easton did not experience difficulty finding transportation to work before his work injury. Mike McMurrin offered Easton work at Mercy Hospital, in Cedar Rapids. If Easton had remained in Cedar Rapids he could have taken the city bus to and from work. Mike McMurrin Trucking has established Easton was offered suitable work, consistent with his restrictions, which he refused. Easton is not entitled to a running award of temporary total disability benefits.

Given Easton is not entitled to a running award of temporary total disability benefits, the issue of credits is not ripe for adjudication. Given Easton has not prevailed on the merits, I find the parties should pay their own costs.

ORDER

IT IS THEREFORE ORDERED, that:

Claimant shall take nothing in this case.

Each party shall pay their own costs.

Signed and filed this 26th day of April, 2017.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.