

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JIMMY CROSBY,

Claimant,

vs.

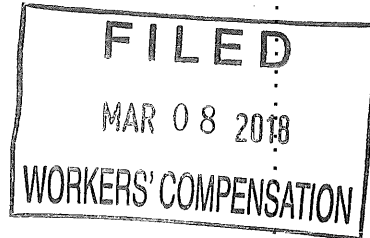
FOODLINER, INC.,

Employer,

and

TRAVELERS,

Insurance Carrier,
Defendants.



File No. 5054955

RULING ON DEFENDANTS'
MOTION FOR REHEARING &
APPLICATION FOR A NUNC
PRO TUNC ORDER

On February 13, 2018, the undersigned filed an arbitration decision in the above-captioned matter awarding benefits to the claimant.

On February 23, 2018, defendants filed a Motion for Rehearing, Clarification and Application for Nunc Pro Tunc Order. There is no resistance on file.

Claimant filed an Application for Nunc Pro Tunc Order on February 19, 2018, with one common issue as set forth below.

The defendants seek reconsideration, or alternatively, clarification, or nunc pro tunc on three issues. These mostly involve some typographical errors in the Issues & Stipulations section of the Arbitration Decision.

First, defendants seek clarification on the commencement date for permanency benefits. Defendants seek reconsideration of the commencement date, which they contend contained a stipulation that if any permanency was owed, the appropriate commencement date was September 25, 2015.

Second, the defendants seek clarification on the credit to which they are entitled.

Third, defendants contend the word "eye" was mistakenly entered in the disputed issues section, where it should have stated "right upper extremity." The claimant agrees that the word "eye" is a mistake, but should be listed as "right shoulder/right upper extremity."

The first two issues are interconnected to some degree. The third issue is an unrelated scrivener's error. Regarding the stipulation on the commencement date, it is true that the undersigned listed a stipulation that if permanency benefits were owed, the commencement date was September 25, 2015. I find this was a mistake. The fact is, there is no stipulation in the hearing report regarding the commencement date. In the hearing report, the commencement date for benefits is listed as disputed. The defendants specifically contended claimant was not at maximum medical improvement, while the claimant alleged the commencement date was the date he returned to work, September 10, 2015. I agree with the defendants that I made a mistake listing a stipulated date for the commencement of permanency as September 25, 2015. At this time, I find there was no stipulation regarding the commencement date. It was a disputed issue.

To clarify, the appropriate date for the commencement of benefits is the date claimant returned to work, September 11, 2015. Claimant sought September 10, 2015, however, according to the records, he was paid temporary disability benefits through September 10, 2015, and did not return until the following day, September 11, 2015. (See Claimant's Exhibit D, page 2) Therefore, based upon the evidence in the record, the claimant returned to work on September 11, 2015.

Pursuant to Iowa Code section 85.34(1) (2015), permanency commences on the date the injured worker "returned to work." Evenson v. Winnebago Industries, 881 N.W.2d 360, 372 (Iowa 2016); see also Iowa Code section 85.34(2) (2015).

Regarding the credit issue, defendants are also correct that I did not specifically mention the credit stipulation in the Issues & Stipulations section of Arbitration Decision. The credit issue was stipulated as follows: "Prior to the hearing, claimant was paid 77 weeks of compensation at the rate of \$* per week." (Hearing Report, p. 2) This stipulation is binding and should have been listed in the Stipulations portion of the decision. This was an apparent oversight.

Defendants further ask that that I enter an order that the defendants are entitled to a credit for the TPD which was paid by defendants against the award of permanency.

7. Iowa Code Section 85.24(4) (2016) [sic] provides if an employee is paid weekly compensation benefits for . . . temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter . . . the excess shall be credited against the liability of the employer for permanent partial disability.

(Def. Motion, para. 7) It appears the defendants are now claiming this stipulation means that they are entitled to a credit for the TPD against the permanency owed.
(Def. Motion, para. 8)

Here, the defendants are incorrect. The parties stipulated that 77 weeks of compensation had been paid. There was no stipulation regarding excess temporary disability payments and there was no mention in the stipulation of what types of benefits were paid. Under the Iowa Supreme Court's ruling in Evenson, it is perfectly possible for an injured worker to receive both permanent disability benefits and temporary partial benefits simultaneously. I am now unsure exactly what the parties meant with this stipulation. If the TPD benefits were paid in error and in good faith, the defendants may be entitled to a credit against the permanency. The stipulation, however, speaks for itself as it was not listed as an issue for me to decide. For purposes of clarification, I understood the parties to have stipulated that these benefits were paid, not that TPD was paid in error to be credited against permanency.

In their motion, defendants further contend that they paid 25 weeks of permanency for which they must be provided a credit. Again, the parties did not ask me to decide this issue in the hearing report and I specifically decline to do so in this Ruling.

Finally, regarding the third issue, the issues and stipulations portion of my arbitration decision contains a scrivener's error that the parties agreed that, if it was found that the issue of permanency was ripe, the disability was to the claimant's "right eye." Based upon the hearing report, the defendants contended there was no permanency at all. The parties agreed, however, that if permanency was owed, the disability is industrial. (Hearing Report, p. 2) This is a typographical or scrivener's error which should be corrected.

THEREFORE, IT IS ORDERED:

Defendants' Motion for Rehearing, Clarification, and Application for Nunc Pro Tunc Order is GRANTED.

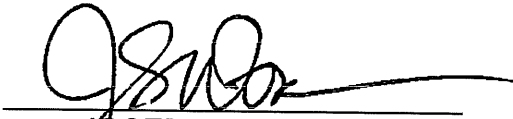
The first paragraph in the ISSUES & STIPULATIONS section of the arbitration decision is amended to read as follows:

The parties entered into a number of stipulations in the Hearing Report and Order. I approved the Hearing Report and Order at the time of hearing. Those stipulations are deemed binding upon the parties.

Through the hearing report, the parties stipulated that there was an employer-employee relationship between the parties. The defendants further stipulated that the claimant sustained an injury on September 2, 2015. The defendants, however, dispute that the injury resulted in any permanent disability. Claimant makes no claim for temporary disability benefits. The claimant alleges the permanent disability is industrial. Defendants deny any permanency, but stipulate if there is permanency, the disability is industrial. If permanency benefits are awarded, the parties dispute the commencement date. Claimant contends the appropriate commencement date is September 10, 2015. Defendants contend the

issue of permanency is not ripe for adjudication. The elements comprising the rate of compensation are stipulated as outlined in the hearing order. Affirmative defenses have been waived. Claimant seeks payment for an independent medical evaluation under section 85.39. The parties further stipulate that prior to hearing, 77 weeks of benefits were paid to the claimant. The parties do not seek any adjudication on the issue of credit.

Signed and filed this 8th day of March, 2018.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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