BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
APR 18 2019
WORKERS' COMPENSATION

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| AZRA SEHIC,<br><br>Claimant,<br><br>vs.<br><br>TYSON FRESH MEATS, INC.,<br><br>Employer,<br>Self-Insured,<br>Defendant. | : | File No. 5050655<br><br>APPEAL<br><br>DECISION<br><br>Head Note Nos: 4000; 4000.2 |

STATEMENT OF THE CASE

Defendant Tyson Fresh Meats, Inc., self-insured employer, appeals from an arbitration decision filed on November 29, 2017. Claimant Azra Sehic responds to the appeal.

Claimant filed a petition in arbitration in this matter on July 25, 2014, alleging she sustained injuries to her bilateral upper extremities, her shoulders, and her neck on April 22, 2013, while working for defendant. Defendant filed an answer on October 14, 2014. An arbitration hearing was held on September 24, 2015.

Prior to the arbitration hearing, the parties entered into an agreement for settlement which covered only claimant's bilateral upper extremities. (Exhibit B) The parties agreed claimant was entitled to receive 30 weeks of compensation for a six percent loss of her bilateral upper extremities. (Ex. B, p.1) The settlement was read into the record at the arbitration hearing and it was approved by this agency on December 9, 2015, before the arbitration decision was issued. (Defendant's Appeal Brief, p. 2)

At the hearing on September 24, 2015, the parties submitted a hearing report. On the hearing report, the parties placed a checkmark in the space next to the wording "Credits Against Any Award. If no longer in dispute, check here." (Ex. 1, p. 2)

The deputy workers' compensation commissioner who presided at the September 24, 2015, arbitration hearing issued a decision on January 19, 2016, finding claimant sustained ten percent industrial disability as a result of the April 22, 2013, work injury, which entitles claimant to receive 50 weeks of permanent partial disability (PPD) benefits. (Arbitration Decision, January 19, 2016, pp. 8-9)

On February 12, 2016, defendant's attorney forwarded correspondence to claimant's attorney asserting a credit against the award of 50 weeks for the 30 weeks of PPD benefits paid pursuant to the agreement for settlement. (Ex. D, p. 1) Defendant's attorney included payment for 20 additional weeks of PPD benefits, plus interest, with the February 12, 2016, letter. (Ex. D, p. 2)

Claimant's attorney responded by forwarding correspondence to defendant's attorney dated February 17, 2016, which indicated claimant believed defendant is not entitled to receive a credit against the award for the PPD paid pursuant to the agreement for settlement. Claimant's attorney indicated a claim for penalty benefits would be asserted if defendant did not pay the full 50 weeks of the award without taking a credit for the 30 weeks of PPD benefits paid pursuant to the agreement for settlement. (Ex. E)

Defendant continued to assert entitlement to a credit against the award for the 30 weeks of PPD benefits paid pursuant to the agreement for settlement. (Ex. F; Ex. H; Ex. L) Claimant continued to assert that defendant was not entitled to receive such a credit. (Ex. G; Ex. K)

On August 29, 2016, claimant filed a petition seeking an award of penalty benefits for the disputed 30 weeks of PPD benefits. Defendant filed an answer on October 5, 2016. Hearing on the penalty claim was scheduled for September 12, 2017. The parties elected to submit the case on the record without a hearing. Exhibits 1 through 3 and A through L were admitted into the record. The record was held open through September 26, 2017, for the receipt of briefs from the parties. The briefs were received and the record was closed. (Arb. Dec., 11/29/17, p. 1)

In the arbitration decision filed on November 29, 2017, the deputy commissioner found defendant waived the issue of any alleged credit. The deputy commissioner stated as follows in the arbitration decision:

> The hearing report must be prepared prior to the commencement of the hearing and must be signed by the parties and the presiding deputy. James R. Lawyer, Iowa Practice Series – Workers' Compensation § 21.24, at 275-76. The parties can stipulate to or dispute issues, including, but not limited to the claimant's entitlement to permanency benefits and credits. Id. at 276.
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> When completing the hearing report, the parties stipulated to a number of issues, and identified the issues to be determined by Deputy Christenson. The hearing report addresses "credits against any award." (Ex. 1, p. 2) The parties checked a box noting credits were "no longer in dispute." (Ex. 1, p. 2) No information was completed concerning any compensation paid or to be paid to Sehic in the credit portion of the hearing report. (Ex. 1, p. 2)

When the parties submitted the hearing report to Deputy Christenson, the parties reported there was no dispute concerning the issue of credits. If Tyson believed there was a dispute concerning credits, or that it was entitled to a credit, Tyson should have raised the issue before Deputy Christenson. Tyson did not raise the issue of credit before Deputy Christenson issued his opinion on January 19, 2016. Deputy Christenson did not address any credit allegedly due to Tyson in the arbitration decision. Neither party filed an application for rehearing or an appeal within twenty days of the date of the decision. The decision became a final decision. 876 IAC 4.24, 4.27.

Tyson's attorney signed the hearing report on September 24, 2015, agreeing there was no dispute regarding credits. This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. Tyson waived the issue of credits by signing the hearing report and by failing to raise the issue of credits with Deputy Christenson at the start of the hearing. See Bos v. Climate Engineers, Inc., File No. 5044761 (App. Dec. Mar. 22, 2016) (concluding the claimant's attorney waived his argument the defendants had admitted the claimant was permanently and totally disabled by signing the hearing report and by failing to raise the purported admission by the defendants with the deputy commissioner at the start of the hearing); Hawkeye Wood Shavings v. Parrish, No. 08-1708, 2009 WL 3337613, at *4 (Iowa Ct. App. 2009) (concluding the defendants waived the issue of whether they were entitled to a credit for benefits already paid for the September 2000 injury because on the hearing report signed by the defendants, the defendants stipulated "0 weeks" of credit); Burtnett v. Webster City Custom Meats, Inc., No. 05-1265, 2007 WL 254722, at *3-4 (Iowa Ct. App. Jan. 31, 2007) (concluding the deputy commissioner did not commit an abuse of discretion by refusing the claimant's request to change dates in the joint hearing report, and noting the agency's approach requiring claimants to list dates prior to hearing in a hearing report "is more than reasonable"). Cf. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 186-87 (Iowa 1980) (concluding claimant's attorney failed to preserve error on foundation objection by failing to object when the deposition was offered into evidence before the deputy, and by failing to afford "his adversary [with the opportunity] to remedy the alleged defect"). Deputy Christenson's decision did not address the issue of credits and is final agency action. The agency lacks jurisdiction to consider the issue of credits. Cf. Norgard v. Dep't of Transp., 555 N.W.2d 226 (Iowa 1996) (affirming district court's dismissal of matter for lack of jurisdiction because the appeal was untimely).

(Arb. Dec., 11/29/17, pp. 6-7)

Defendant asserts on appeal that the deputy commissioner erred in finding claimant is entitled to receive penalty benefits for defendant's alleged unreasonable failure to pay the disputed 30 weeks of PPD benefits.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on November 29, 2017, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues with the following additional analysis:

## ISSUE

Whether claimant is entitled to an award of penalty benefits for defendant's alleged unreasonable failure to pay the disputed 30 weeks of PPD benefits.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant asserts she is entitled to receive an award of penalty benefits because defendant unreasonably refused to pay 30 of the 50 weeks of permanent partial disability benefits awarded to claimant by Deputy Christenson in the January 19, 2016, arbitration decision, at the rate of $412.23 per week, for a total of $12,366.90 allegedly withheld unreasonably. Defendant asserts it had a reasonable basis for refusing to pay the 30 weeks of benefits because it was entitled to a credit of thirty weeks.

Iowa Code section 86.13 governs penalty benefits. 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 section 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 section 86.13(4)(a). 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.

An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

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 section 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 Center 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.

Deputy Christenson did not address the issue of credits in the January 19, 2016, arbitration decision. After receiving Deputy Christenson's decision awarding claimant 50 weeks of permanent partial disability benefits, defendant's attorney sent claimant's attorney a check for 20 weeks of permanent partial disability benefits, alleging defendant was entitled to a credit of 30 weeks. Defendant did not file an application for rehearing or an appeal within 20 days of the arbitration decision. The decision became a final decision. 876 IAC 4.24, 4.27. The deputy commissioner in the November 29, 2017, arbitration decision found the record evidence in this case does not support defendant's claim that it had a reasonable basis for withholding payment of the disputed 30 weeks of PPD benefits. The deputy commissioner found imposition of penalty benefits was warranted and awarded claimant $6,183.45 in penalty benefits.

Defendant argues on appeal that claimant cannot be awarded penalty benefits because defendant had a reasonable basis to assert entitlement to a credit of 30 weeks of PPD benefits by virtue of the agreement for settlement. In its appeal brief, defendant states the following, in pertinent part:

> The factual basis for Defendant's assertion of credit is that Deputy Christenson considered Claimant's bilateral upper extremity injury and the parties' settlement in his arbitration decision. Deputy Christenson referenced Claimant's treatment for carpal tunnel syndrome throughout his decision. Further he considered a restriction – no use of vibratory tools – that was placed on Claimant due to her bilateral upper extremity condition in his decision. Deputy Christenson was also clearly aware of the settlement agreement between the parties as the settlement terms were read into the record at Hearing.

(Defendant's appeal brief, p. 8)

However, defendant's own expert witness in this matter, former deputy workers' compensation commissioner and currently practicing workers' compensation attorney Ronald R. Pohlman, made a completely different observation in his report dated August 4, 2017:

> There is one final consideration that might support an argument that credit in this case does not apply. The deputy's decision does not set out as a factor in assessing the industrial disability that the injury had also caused carpal tunnel syndrome and impairment. He references those conditions in the findings of fact portion of the decision, but makes no mention of them in the reasoning before he announced the industrial award. Arguably, the deputy solely focused on the question of causation of a

> cervical injury and once he found that causation he assigned an industrial disability percentage. The solution to this problem was for claimant to file a request for rehearing and asked [sic] the deputy to clarify whether the carpal tunnel syndrome was considered in the award.

(Ex. A, p. 2)

The paragraph from the January 19, 2016, arbitration decision which Mr. Pohlman referred to in the quotation above states as follows:

> Claimant was 44 years old at the time of hearing. She speaks and understands a little English. Claimant's native language is Bosnian. Claimant has been employed at Tyson since 1999. At the time of hearing, claimant was still working at Tyson doing labeling. At the time of hearing, claimant was restricted from using vibratory tools. There is little evidence to suggest that claimant required any other restrictions as recommended by Dr. Bansal. Claimant has not had surgery. At the time of hearing, no physician has recommended claimant undergo surgery for her neck condition. Claimant testified she has not missed work for reasons related to her neck injury. When all relevant factors are considered, it is found claimant has a 10 percent loss of earning capacity or industrial disability

(Arb. Dec., 01/19/16, p. 8)

Even though the paragraph quoted above from deputy commissioner Christenson's January 19, 2016, arbitration decision does make mention of the fact that claimant was restricted from using vibratory tools at the time of the September 24, 2015, arbitration hearing, a restriction necessitated by claimant's carpal tunnel condition, I find that the only reasonable interpretation of that paragraph is to conclude that deputy commissioner Christenson considered only claimant's cervical condition in arriving at the ten percent industrial disability award, without considering claimant's carpal tunnel condition which was the subject of the agreement for settlement. My finding in this regard is supported by Mr. Pohlman's observation quoted above.

I therefore find it was unreasonable for defendant to assert entitlement to a credit against the award for the 30 weeks of PPD benefits paid pursuant to the agreement for settlement.

I affirm the deputy commissioner's finding that defendant waived the issue of the credit when the hearing report was submitted at the arbitration hearing on September 24, 2015, with the box checked indicating the issue of credit against the award was no longer in dispute. I affirm the deputy commissioner's finding that the issue of the credit could have been resurrected if one or both of the parties had timely filed an application for rehearing after the arbitration decision was filed on January 19, 2016.

I therefore affirm the deputy commissioner's finding that claimant is entitled to receive $6,183.45 in penalty benefits from defendant.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 29, 2017, is affirmed in its entirety.

Defendant shall pay claimant six thousand one hundred eighty-three and 45/100 dollars ($6,183.45) in penalty benefits.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the appeal, if any.

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 18th day of April, 2019.

Joseph S. Cortese II

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