

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRANDEE PETTENGILL,

Claimant,

vs.

AMERICAN BLUE RIBBON
HOLDINGS, L.L.C.,

Employer,

and

ARCH INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

MAR 29 2016

WORKERS' COMPENSATION

File No. 5038352

REMAND

DECISION

Head Note Nos.: 1801; 4000.2

This matter comes back to this agency on remand from the Court of Appeals and from the District Court directing this agency to award penalty benefits against defendants for terminating claimant's weekly temporary total disability (TTD) benefits on April 19, 2011, without notice and without reasonable cause or excuse. This agency is also directed to review the medical information available at the time benefits were terminated for the purpose of determining whether additional TTD benefits are owed to claimant.

FINDINGS OF FACT

In this case, the parties agreed in the hearing report submitted at the arbitration hearing that claimant suffered a work-related injury on October 23, 2010. The work injury was to claimant's back from a slip and fall while she was employed as a cook at Village Inn, a restaurant owned by defendant-employer. Defendants authorized treatment by providers at Mercy North upon complaints by claimant of low back pain radiating into the buttocks and thighs with numbness and tingling. Claimant was evaluated by Stephen Runde, M.D., on October 24, 2010, the day after the injury. (Exhibit 1, page 10) Dr. Runde's initial diagnosis was acute lumbosacral strain with spasm. Dr. Runde prescribed medications. At the request of claimant, Dr. Runde released claimant to return to work on October 27, 2010, the next day claimant was

scheduled to work, but Dr. Runde told claimant she was to notify him if she needed additional time off work to recover. (Id.)

Claimant, who was 24 years of age at the time of the work injury, had worked for defendant-employer since 2008. (Hearing Transcript, p. 15-) She had a history of previous back complaints, the most recent being on October 4, 2010, three weeks prior to the accident, when she experienced the onset of low back pain without injury radiating down to the buttocks and legs. Claimant was treated for those earlier symptoms by Dr. Runde. His diagnosis at that time was also back strain and claimant was prescribed medications. (Ex. 1, p. 6) Those medications apparently were discontinued prior to the October 23, 2010, work incident according to Dr. Runde's October 24, 2010, clinical note. (Ex. 1, p. 11) There was no further treatment after October 4, 2010, for back or leg symptoms in this record until the October 23, 2010, work injury. There is no evidence claimant missed work as a result of the October 4, 2010, back and leg symptoms.

Following the October 23, 2010, injury, claimant attempted to return to work on October 27, 2010, but was only there a couple of hours before leaving due to her back and leg symptoms. (Tr. p. 28) Claimant returned to Dr. Runde the next day and he then took her off work. (Ex. 1, p. 15A) Claimant has not returned to work at Village Inn after October 27, 2010. (Tr. p. 29)

Defendants began paying weekly benefits for temporary total disability after claimant was taken off work by Dr. Runde and those weekly benefits continued until July 18, 2011. (Ex. H, p. 1) Weekly benefits then ended without claimant being notified 30 days in advance of their termination and without claimant being notified of the reason for the termination as required by Iowa Code section 86.13(2).

Authorized treatment for the injury was suspended after June 13, 2011, without explanation to claimant or to Dr. Runde. (Ex. 1, p. 14) Defendants later authorized a couple of epidural steroid injections in October 2011, but only after claimant initiated alternate care proceedings with this agency.

Defendants directed claimant to attend a medical examination on January 9, 2012, by Robert Broghammer, M.D., an occupational medicine physician. (Ex. E, pp. 1-6) Following that examination, Dr. Broghammer recommended claimant undergo an EMG/nerve conduction study to determine whether claimant had a chronic radiculopathy. (Ex. E, p. 5) If the study showed a chronic radiculopathy, then Dr. Broghammer would opine claimant's symptoms at that time would be likely related to her work injury. If the study showed an acute radiculopathy or no radiculopathy, then Dr. Broghammer would not relate claimant's symptoms to the injury. (Ex. E, p. 5) That study was performed by Sunny Kim, M.D. on January 30, 2012. (Ex. D) Dr. Broghammer reported on February 15, 2012, to defendants' attorney that Dr. Kim found no radiculopathy and therefore Dr. Broghammer opined that claimant's ongoing pain

was unexplained by her remote injury and that further treatment should occur outside of the workers' compensation system. (Ex. E, p. 7)

At the request of claimant's attorney, claimant was examined by Richard Neiman, M.D., a neurologist, on March 28, 2012. In his report bearing the same date, Dr. Neiman opined that claimant had a large disc herniation and likely required surgery. (Ex. 4, p. 3) Dr. Neiman recommended a new MRI and an evaluation by a neurosurgeon such as Chad Abernathy, M.D. (Id.) Dr. Neiman also provided a permanency rating and permanent restrictions in the event there was no further treatment. (Ex. 4, pp. 4-5)

Claimant's attorney then asked Dr. Neiman on April 13, 2012, to more specifically respond to Dr. Broghammer's report. Dr. Neiman replied he did not believe the negative EMG study was determinative and he opined that an MRI scan was the more "definitive test." (Ex. 4, p. 7)

Upon referral by Dr. Runde, claimant was evaluated by Chad Abernathy, M.D., on April 18, 2012. Dr. Abernathy ordered a new MRI. (Ex. 6, p. 1) On May 7, 2012, after reviewing the new MRI, Dr. Abernathy noted a finding of mild degenerative changes at the L5-S1 vertebral level with a small annular tear. However, he did not recommend surgery and he favored continued conservative care. (Ex. 6, p. 2-3)

In a letter report to defense counsel dated June 6, 2012, Dr. Broghammer responded to Dr. Neiman's opinion by stating the first MRI scan did not show an acute, but a chronic (pre-existing) disc extrusion. Dr. Broghammer felt that even though claimant may have suffered an acute onset of symptoms, the EMG/nerve conduction study did not show a radiculopathy so the disc extrusion was not likely accounting for claimant's current symptoms. (Ex. E, pp. 8-9)

In a letter report dated July 12, 2012, prepared by defense counsel, Dr. Abernathy was requested to agree or disagree with several statements. In that document signed by Dr. Abernathy on July 16, 2012, he agreed the MRI revealed only a small disc extrusion which did not require surgery, he recommended no further treatment, he did relate by history claimant's back pain to the October 23, 2010, work incident, and he opined claimant should have recovered from the October 23, 2010, work incident within 6 to 12 weeks and, within that amount of time, claimant should be considered to have reached maximum medical improvement (MMI). (Ex. 6 pp. 4-5)

Dr. Abernathy later opined to claimant's counsel on September 14, 2012, that if claimant's low back was asymptomatic when she fell on October 23, 2010, then the fall at work caused the low back pain she has suffered since October 23, 2010. (Ex. 6, p. 15) Dr. Abernathy also agreed that if claimant's back symptoms from her injury did not resolve after finishing all recommended treatment 22 months after the injury, despite treatment including physical therapy and epidural steroid injections, claimant's level of

pain would not significantly improve beyond that point and she should be considered at MMI at that time. (Id.)

On her own, claimant resumed physical therapy in the summer of 2012 with a Mercy provider. (Ex. 8) In a "To Whom It May Concern" document dated August 13, 2012, Dr. Runde recommended permanent activity restrictions. (Ex. 1, p. 32) In a report to claimant's counsel dated August 31, 2012, Dr. Runde stated he would defer to the expert views of Chad Abernathy, M.D. regarding claimant's back condition. (Ex. 1, p. 33)

CONCLUSIONS OF LAW

The District Court and the Court of Appeals rejected the analysis contained in this agency's final agency appeal decision which fully adopted a proposed arbitration decision. In that analysis, the agency essentially adopted Dr. Abernathy's opinion that claimant should have recovered and reached MMI 6 to 12 weeks after the injury and the agency then found ongoing complaints after than time are not related to the injury. The agency rejected Dr. Abernathy's opinion regarding the MMI date because claimant was symptomatic with similar complaints on October 4, 2010. There was no further discussion in the agency's decisions of claimant's entitlement to additional healing period benefits because claimant was found to have reached maximum medical improvement before her weekly TTD benefits ended and it was found claimant was not entitled to penalty benefits because no weekly benefits were denied or terminated prior to achieving MMI.

The Court of Appeals explained that the above analysis is not the proper method to apply the penalty provisions contained in Iowa Code section 86.13 because the agency based its findings on medical information which was not obtained by defendants until well after terminating claimant's weekly benefits. The Court specified that Iowa Code section 86.13(4)(c) creates a mandatory timeline for the employer to follow in showing it had reasonable or probable cause or excuse for terminating benefits. First, the employer's excuse for termination must be preceded by an investigation. Second, the results of the investigation must be the actual basis contemporaneously relied on by the employer in terminating the benefits. Third, the employer must contemporaneously convey to the claimant the basis for the termination of benefits at the time of the termination. Because defendants in this case failed to show they performed any of these pre-termination requirements of 86.13(4)(c), the Court of Appeals held that claimant is entitled to an award of penalty benefits and directed this agency to calculate the amount of the penalty.

Also, on remand, this agency was directed to review the medical information available at the time the benefits were terminated to determine whether any additional healing period benefits are owed.

It is obvious the Court of Appeals concluded that claimant is owed additional weekly TTD benefits because the penalty under Iowa Code section 86.13 is limited to 50 percent of the weekly benefits delayed or denied. If claimant is not entitled to further weekly benefits beyond April 19, 2011, the date defendants terminated these benefits, there could be no penalty.

The fact that benefits were terminated without the 30-day notice required by Iowa Code section 86.13(2) shows that weekly benefits should continue beyond April 19, 2011. Also, the Court directed that weekly benefits cannot be reasonably terminated until after an investigation and contemporaneous notice of the results of that investigation is provided to claimant.

Turning to the facts of this case, as stated in the arbitration decision, claimant's temporary total disability benefits were terminated on April 19, 2011. Defendants did not begin their investigation of this claim until November 29, 2011, when they inquired why claimant was not capable of work and then took claimant's deposition on January 26, 2012. Defendants did not initiate an investigation concerning medical causation and treatment until they referred claimant to Dr. Broghammer for an IME in early January 2012. (Ex. E, p. 1) Before that time, the primary care provider, Dr. Runde, clearly felt claimant's back and leg symptoms were related to the work injury and Dr. Runde expressed frustration that defendants would not authorize further treatment by him after June 13, 2011. (Ex. 1, p. 29) Defendants did not receive Dr. Broghammer's final causation opinion until February 15, 2012. (Ex. E, p. 7) This report apparently was provided to claimant sometime before Dr. Neiman's examination on March 28, 2012, because Dr. Neiman mentions Dr. Broghammer's views in his report. (Ex. 4, p. 5) The date when Dr. Broghammer's report was actually served upon claimant's attorney is not indicated in the record. There was no allegation in this record that defendants failed to serve Dr. Broghammer's report upon claimant's counsel within 10 days after it was received by defendants as required by our rule 876 IAC 4.17. Consequently, I find claimant received a copy of Dr. Broghammer's report on or before February 25, 2012.

I find that it was not until February 15, 2012, that defendants completed an investigation as to medical causation and obtained grounds to terminate weekly TTD benefits based on the report by Dr. Broghammer. This was not communicated to claimant until February 25, 2012. Defendants should have then given claimant the 30-day notice of termination required by Iowa Code section 86.13(2). Therefore, the entire period of claimant's entitlement to temporary total disability in this matter extends from October 27, 2010, through March 25, 2012. Claimant was paid benefits only through April 19, 2011.

Therefore, I find claimant is entitled to additional temporary total disability benefits from April 20, 2011, through March 25, 2012, a total of 48 weeks and five days, or \$10,762.87, at the weekly benefit rate found in the arbitration decision of \$220.94 per week.

This agency must next calculate the penalty. Penalty benefits cannot exceed 50 percent of the weekly benefits delayed or denied pursuant to Iowa Code section 85.13(4)(a). Although the amount of the denied benefits is quite large and defendants apparently acted without regard to the notice and investigation provisions of Iowa Code section 86.13, there has been no showing that either of the defendants have previously been assessed a penalty for unreasonable conduct or have undergone any disciplinary action by the insurance commissioner for unfair claims practices. Also, the inability to use a subsequent investigation to justify a prior denial of benefits is a new concept to the Iowa Workers' compensation system. Therefore, I find a 25 percent penalty in the amount of \$2,690.72 is the most appropriate penalty in this case.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Defendants shall pay claimant temporary total disability benefits from August 27, 2010, through March 25, 2012, at the rate of \$220.94. Defendants may take a credit for the weekly benefits previously paid.
2. Defendants shall pay claimant the sum of \$2,690.72 as a penalty for their unreasonable termination of weekly TTD benefits.
3. Defendants shall pay accrued weekly benefits in a lump sum.
4. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.
5. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.
6. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 29th day of March, 2016.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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