

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTINA HYTEN,

Claimant,

vs.

THE HON COMPANY, L.L.C.,

Employer,

and

ACE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

APR 26 2018

WORKERS' COMPENSATION

File No. 5051067

A P P E A L

D E C I S I O N

Head Note Nos.: 4000, 5-999

Defendants, The Hon Company, L.L.C., employer, and its insurer, Ace Insurance Company, timely appeal from an arbitration decision filed on November 1, 2016. On March 30, 2018, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

Defendants challenge only one aspect of the arbitration decision. Specifically, defendants contest the award of penalty benefits by the presiding deputy commissioner. Claimant contends that the penalty benefit award should be affirmed.

Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, I have performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner. I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on November 1, 2016, that relate to issues properly raised on intra-agency appeal. I add the following findings and analysis to the arbitration decision.

In his arbitration decision and a ruling on a motion for order nunc pro tunc, the presiding deputy commissioner awarded claimant 62.5 weeks of permanent partial disability benefits. This represents a finding and award consistent with 25 percent of the right arm. No challenge is made to this award.

However, defendants did not immediately commence or pay permanent partial disability benefits after claimant reached maximum medical improvement. On May 14, 2014, defendants sent correspondence to the treating surgeon Phyllis Chang, M.D., noting that claimant "may have sustained some degree of permanent partial

impairment” and requesting a permanent impairment rating be assigned by the surgeon. (Defendants’ Exhibit C) There is no evidence that Dr. Chang responded timely to this inquiry or that defendants furthered their investigation by repeating their request of Dr. Chang or securing an impairment rating from another physician over the next several months.

On May 1, 2015, claimant obtained an independent medical evaluation report from Mark C. Taylor, M.D., which contained an impairment rating of 14 percent of the right upper extremity. (Claimant’s Ex. 3) Claimant served that report and impairment rating on defendants on May 11, 2015. (Claimant’s Ex. 10) On May 13, 2015, defendants denied any claim for permanent disability but provided no factual or legal explanation of their investigation or the basis for their denial. (Claimant’s Ex. 11)

On July 6, 2015, defendants obtained an impairment rating from Dr. Chang. Dr. Chang opined that claimant sustained 39 percent permanent impairment of the right arm. (Claimant’s Ex. 1; Defendants’ Ex. B) Despite two physicians rendering permanent impairment ratings, defendants paid no voluntary permanent disability benefits until October 22, 2015, at which time they paid the impairment rating from Dr. Taylor, or an amount equal to 14 percent of the right arm. (Claimant’s Ex. 18)

Defendants produced no evidence that they conducted an ongoing investigation between July 6, 2015 and October 22, 2015. Defendants produced no evidence that they ever produced a written explanation for their delay in payment of permanent partial disability benefits between their admission that claimant may have permanent impairment in May 2014 and their ultimate payment of permanent partial disability benefits in October 2015.

The presiding deputy commissioner awarded an amount equivalent to 50 percent of the 62.5 weeks of benefits that would have been due and payable under Dr. Taylor’s impairment rating. Defendants contend that the ultimate permanent disability award could have been less than the 14 percent permanent impairment rating offered by Dr. Taylor. They urge that they could have paid 5 or 10 percent permanent impairment of the right arm and likely not been penalized. A similar argument has been advanced and rejected by the Iowa Court of Appeals. Welded Const. v. Finnerty, 743 N.W.2d 870 (Iowa App. 2007) (holding that a penalty benefit should not be reduced based upon a hypothetical “reasonable award” when the defendants paid no permanent disability benefits when owed).

In this instance, defendants paid no permanent partial disability benefits between May 2014 and October 21, 2015. Claimant clearly met his burden under Iowa Code section 86.13(4) to establish a delay in payment of benefits. Defendants did not meet their burden to establish a reasonable investigation or an ongoing investigation once additional information was presented to them. Defendants did not meet their burden to establish that they contemporaneously conveyed the basis of their denial to claimant. Iowa Code section 86.13(4).


I find no error in the presiding deputy commissioner's penalty benefit analysis. I reach the same result that penalty benefits are owed pursuant to Iowa Code section 86.13. The presiding deputy weighed the appropriate penalty factors and purposes to reach his penalty award. I concur with his analysis, findings, and ultimate penalty benefit award.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of November 1, 2016, is affirmed in its entirety.

Defendants shall bear the costs of this appeal, including the cost of the hearing transcript, pursuant to rule 876 IAC 4.33.

Signed and filed this 26th day of April, 2018.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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