BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAY 17 2019
WORKERS' COMPENSATION

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| NGAN PHU,<br><br>Claimant,<br><br>vs.<br><br>TENSION ENVELOPE CORP.,<br><br>Employer,<br><br>and<br><br>LIBERTY MUTUAL GROUP,<br><br>Insurance Carrier,<br>Defendants. | File No. 5035804<br><br>APPEAL<br><br>DECISION<br><br>Head Note Nos.: 1801.1, 1802, 1803 |

On May 8, 2019, 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.

On October 4, 2017, the presiding deputy commissioner issued a review-reopening decision in which she found claimant was entitled to healing period benefits through her date of maximum medical improvement (MMI) on September 29, 2015. As part of this determination, the deputy commissioner found claimant's ongoing symptoms were related to her February 24, 2010 work injury. With respect to permanency, the deputy commissioner found claimant sustained a 60 percent industrial disability as a result of her work-related injury, entitling her to 300 weeks of permanent partial disability (PPD) benefits. The deputy commissioner determined these benefits were to commence on September 30, 2015, "the date following conclusion of claimant's healing period." (Review-Reopening Decision, p. 21) Lastly, the deputy commissioner determined claimant was not entitled to reimbursement for her second IME with Sunil Bansal, M.D., under Iowa Code section 85.39.

On appeal, defendants assert the deputy commissioner erred in her determination that claimant's healing period benefits extended through September 29,

2015. Defendants also appeal the deputy commissioner's assessment of industrial disability.

On cross-appeal, claimant asserts the deputy commissioner erred by not finding claimant to be permanently and totally disabled. Claimant also argues she is entitled to reimbursement for her second IME with Dr. Bansal.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed review-reopening decision filed on October 4, 2017 that relate to issues properly raised on intra-agency appeal are affirmed in part without further analysis, modified in part, and reversed in part, as explained below.

I affirm the deputy commissioner's finding that claimant's ongoing complaints at the time of the review-reopening decision were causally related to the work injury of February 24, 2010. In doing so, I affirm the deputy commissioner's reliance on the opinion of Dr. Bansal, including his opinion that claimant did not reach MMI until September 29, 2015. I also affirm the deputy commissioner's determination that claimant sustained a 60 percent industrial disability as a result of her February 24, 2010 work injury. The deputy commissioner's findings with respect to these issues are well-reasoned and supported by the greater weight of the evidence, and they are affirmed in their entirety without additional comment or analysis.

Defendants on appeal also challenge claimant's credibility. The presiding deputy commissioner found claimant to be credible. While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the review-reopening hearing. I find the deputy commissioner correctly assessed claimant's credibility in this matter. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's finding that claimant was credible.

For the reasons set forth below, however, the deputy commissioner's findings regarding the termination date for claimant's healing benefits (and in turn the commencement date for claimant's PPD benefits) and claimant's entitlement to ongoing temporary benefits are modified.

I will first address the termination date for claimant's healing period benefits/commencement date for claimant's PPD benefits. The arbitration decision

awarded claimant a running award of healing period benefits starting on February 25, 2010.[1]

At the time of the arbitration hearing, which occurred on February 17, 2012, claimant was not working, and she received no paychecks after the arbitration hearing until July 1, 2012. (Claimant's Exhibit 9, p. 249 (indicating no paychecks after September 22, 2011 until July 1, 2012); Hearing Transcript, p. 60) The paycheck from July 1, 2012 was for work performed at Kody Tony Nails. (Cl. Ex. 9, p. 249; Hrg. Tr., p. 60) Based on the paycheck received on July 1, 2012, I find claimant had returned to work after the arbitration hearing by July 1, 2012.

As of July 1, 2012, however, claimant had not yet reached MMI. I also find that as of July 1, 2012, claimant was not medically capable of returning to employment substantially similar to her work with defendant-employer. While defendants argue claimant had no physician-imposed restrictions until claimant was seen by Dr. Bansal in 2016, defendants overlook claimant's first IME with Dr. Bansal in 2011. After his examination in 2011, Dr. Bansal recommended avoiding lifting more than 20 pounds and lifting over shoulder level. (Cl. Ex. 1, p. 9) As noted in the arbitration decision, "Claimant did repetitive lifting and stacking of boxes at Tension. A lot of that work was done at head level. She was required to frequently lift 25 pounds." (Arbitration Dec., p. 8) I find Dr. Bansal's restrictions from 2011 would have precluded claimant from returning to her job with defendant-employer or substantially similar work. I also find these restrictions were never lifted or modified by Dr. Bansal until his second IME in 2016, when he recommended more severe restrictions. (See Cl. Ex. 4, p. 181) Based on Dr. Bansal's 2011 restrictions, claimant could not return to substantially similar employment.

The Iowa Supreme Court has specifically held that healing period benefits end and PPD benefits commence whenever the first factor of Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016). In other words, the commencement date for PPD benefits is the earliest date on which claimant achieves one of the factors outlined in Iowa Code section 85.34(1).

The three factors of Iowa Code section 85.34(1) are whether (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "the employee is medically capable of returning to

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[1] The arbitration decision awarded claimant running healing period benefits starting on February 25, 2010. Regardless of whether this running award was appropriate, the decision was not appealed and became final agency action.

employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code § 85.34(1).

I found claimant returned to work by July 1, 2012, and as of that date claimant had not yet reached MMI and was not medically capable of returning to work substantially similar to her work with defendant-employer. I therefore conclude claimant's return to work was the first factor in Iowa Code section 85.34(1) to occur. As such, claimant's first phase of healing period benefits terminated upon her return to work on July 1, 2012, meaning her PPD benefits commenced on July 2, 2012. See Iowa Code § 85.34(1); Evenson, 881 N.W.2d at 372.

The deputy commissioner's finding that claimant's entitlement to healing period benefits continued through September 29, 2015 is therefore modified, as is the deputy commissioner's finding that claimant's PPD benefits commence on September 30, 2015.

Pursuant to the court's holding in Evenson, however, claimant may still be entitled to additional intermittent periods of healing period benefits or temporary partial disability (TPD) benefits even after the commencement date for her PPD benefits. Evenson, 881 N.W.2d at 372-73 ("Our determination that Evenson's return to work in September 2010 established the commencement date for PPD benefits is not precluded by the fact that he was entitled to TPD benefits for subsequent weeks when he was medically restricted from working his regular hours.")

As noted above, I found claimant did not reach MMI until September 29, 2015. Thus, until that date, claimant was still in a temporary period of recovery. While I recognize claimant's first technical "healing period" terminated upon claimant's return to work on July 1, 2012 (at which point claimant's entitlement to PPD benefits was triggered), the termination of claimant's entitlement to healing period benefits under Iowa Code section 85.34(1) does not necessarily equate to a termination of claimant's period of recovery.[2] Evenson, 881 N.W.2d at 372-74.

As discussed above, Dr. Bansal's restrictions precluded claimant from being medically capable of returning to work substantially similar to her work with defendant-employer. Claimant did, however, return to part-time work at nail salons that was

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[2] In Evenson, claimant's healing period ended when claimant returned to work on September 20, 2010, but claimant was not found to have reached MMI until November 29, 2011. 881 N.W.2d at 370, 372. In the interim, claimant was paid several periods of TPD benefits. Id. at 365 n. 3, 374.

consistent with her disability, though she was earning less than what she earned with defendant-employer. (See Ex. 9; Hrg. Tr. pp. 61-65)

Iowa Code section 85.33 provides for TPD benefits when a claimant "is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability" and has sustained a temporary partial reduction in earning capacity as a result of the injury. Iowa Code § 85.33(2). Because claimant in this case returned to work but at a partial reduction in earnings, I conclude claimant is entitled to TPD benefits for the weeks during which she worked but earned reduced wages after July 1, 2012 through her MMI date of September 29, 2015. See Iowa Code § 85.33(2); Evenson, 881 N.W.2d at 373 (noting TPD benefits compensate for a "partial loss of actual earnings")

Although claimant returned to work on July 1, 2012, there were some weeks after that point during which claimant did not work or earn any wages. (Cl. Ex. 9; see Hrg. Tr., p. 72) Because I found she was and remains incapable of returning to substantially similar work, I conclude claimant is entitled to healing period benefits under Iowa Code § 85.34(1) for any weeks after July 1, 2012 through her MMI date of September 29, 2015 during which she did not work and earned no wages. See Iowa Code § 85.34(1); Evenson, 881 N.W.2d at 373 (noting healing period benefits compensate "for time lost from work for an injury that results in permanent partial disability").

In other words, claimant is entitled to either TPD or healing period benefits after July 1, 2012 through her MMI date of September 29, 2015 because she remained in a temporary period of recovery and was either earning no wages or experiencing a partial loss of actual earnings.

I recognize this results in a concurrent payment of PPD benefits and either TPD or healing period benefits. However, the court in Evenson was not bothered by overlapping payments of temporary and permanency benefits based on the "distinct purposes" they serve:

> Some categories of compensation authorized under Iowa Code chapter 85 are for the purpose of compensating injured employees during weeks when they experience a temporary total or partial loss of actual earnings (reduced or eliminated paychecks) caused by the injury. *See* Iowa Code § 85.33(1) (providing for temporary total disability (TTD) benefits for time lost from work for an injury that does not result in a permanent disability); *id.* § 85.33(2) (providing for TPD benefits during periods when the employee cannot return to work substantially similar to

> the job performed at the time of the injury, but is able to perform other work consistent with the injury); *id.* § 85.34(1) (providing for healing period benefits for time lost from work for an injury that results in permanent partial disability). Other categories of workers' compensation benefits serve distinctly different purposes and are owed when an employee sustains an injury that causes a *permanent* partial loss of either bodily function (scheduled member injuries compensated under section 85.34(2)(*a*)–(*t*)), or earning capacity (body-as-a-whole injuries compensated under section 85.34(2)(*u*)), or when the employee sustains a permanent total loss of earning capacity under section 85.34(3). *Id.* § 85.34. So, unlike in the medical world in which an injury is ultimately either temporary *or* permanent, in the workers' compensation world, a single injury can result in an employer's liability for both temporary and permanent disability benefits.

881 N.W.2d at 373–74. Relying on Evenson and the court's emphasis on the notion that TPD/healing period benefits compensate for completely different categories of losses than PPD benefits, I conclude claimant's receipt of concurrent and overlapping TPD/healing period benefits and PPD benefits in this case is appropriate and no duplication occurs. See id. ("Thus, although we conclude today that PPD payments can be owed for periods during which a claimant was paid temporary partial disability, no duplication of benefits arises.")

I also recognize that in this case claimant's entitlement to permanency benefits was triggered more than three years before she reached MMI. While this may seem like an odd result, it appears to be the result mandated by Iowa Code section 85.34(1) and the framework set forth in Evenson. For these reasons, the deputy commissioner's findings regarding the commencement date for PPD and claimant's entitlement to temporary benefits are modified. In summary, claimant's running award of healing period benefits terminated on July 1, 2012, and her entitlement to PPD benefits commenced on July 2, 2012. Claimant is also entitled to either TPD or healing period benefits after July 1, 2012 through her MMI date of September 29, 2015 depending on whether she was experiencing a partial or total reduction in actual earnings.

The final issue on appeal is whether claimant is entitled to reimbursement for her second IME with Dr. Bansal and Dr. Bansal's supplemental report. The deputy commissioner determined that Iowa Code section 85.39 limits reimbursement to a single IME "regardless of the number of legal proceedings associated with the workers' compensation claim." (Rev.-Reop. Dec., p. 22) For the reasons that follow, I respectfully disagree.

In Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court examined the reimbursement provisions of Iowa Code section 85.39. 867 N.W.2d 839, 843–44 (Iowa 2015) In doing so, the court commented that the process of obtaining a reimbursable IME "can apply, subject to approval by the commissioner, each time an employer requires the employee to submit to an evaluation of permanent disability by a new physician selected by the employer." Id. at 844 (emphasis added). Under the circumstances presented in this case, I therefore reverse the deputy commissioner's determination that claimant is only entitled to one IME.

On July 26, 2016, William Boulden issued an IME report at defendants' request. (Def. Ex. E) In his report, Dr. Boulden opined claimant had no permanent impairment due to her work-related injury. (Def. Ex. E, p. 60) This evaluation by a defendant-retained physician occurred before claimant's IME with Dr. Bansal on August 5, 2016. (Cl. Ex. 4)

Iowa Code section 85.39 allows a claimant to request reimbursement for an IME "[i]f an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low." Iowa Code § 85.39(2). In this case, I find Dr. Boulden, a physician retained by defendant-employer, performed an evaluation of permanent disability before Dr. Bansal's second IME. I therefore find Dr. Boulden's IME triggered the reimbursement provisions of Iowa Code section 85.39, meaning defendants are required to reimburse claimant for Dr. Bansal's IME in the amount of $2,985.00. (See Cl. Ex. 14, pp. 310-311)

Claimant also seeks an assessment for Dr. Bansal's supplemental report. Assessment of costs is a discretionary function of the agency. Iowa Code § 86.40. Iowa Administrative Code rule 876-4.33 subsection (6) allows for an assessment of no more than two doctors' reports. 876 IAC 4.33(6). Having found Dr. Bansal's opinions to be most persuasive, I conclude it is appropriate to assess costs to defendants in the amount of $290.00 for Dr. Bansal's supplemental report. (Cl. Ex. 14, p. 311a) The deputy commissioner's costs assessment is therefore modified. Defendants are taxed with costs in the amount of $602.73 (filing fee ($100.00), service fees ($13.48), transcription costs ($36.75), Carma Mitchell's report in the amount of ($162.50), and Dr. Bansal's supplemental report ($290.00)).

## ORDER

The review-reopening decision filed on October 4, 2017 is affirmed in part, modified in part, and reversed in part.

Defendants shall pay unto claimant healing period benefits at the weekly rate of three hundred sixty-seven and 67/100 dollars ($367.67) for the period of February 25, 2010 through July 1, 2012

Defendants shall pay unto claimant three hundred (300) weeks of permanent partial disability benefits commencing July 2, 2012 at the weekly rate of three hundred sixty-seven and 67/100 dollars ($367.67).

Defendants shall pay unto claimant temporary partial disability benefits based on a weekly benefit rate of three hundred sixty-seven and 67/100 dollars ($367.67) or healing period benefits at the weekly rate of three hundred sixty-seven and 67/100 dollars ($367.67) commencing July 2, 2012 through September 29, 2015 as set forth in this decision.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

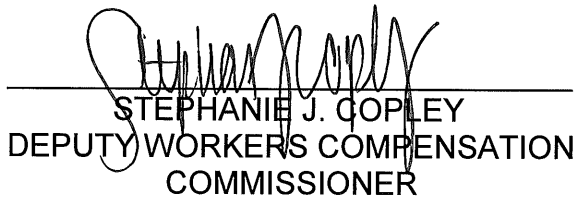
Defendants shall reimburse claimant for Dr. Bansal's IME in the amount of two thousand nine hundred eighty-five and 00/100 dollars ($2,985.00).

Costs are taxed to defendants in the amount of six hundred two and 73/00 dollars ($602.73) pursuant to 876 IAC 4.33 as set forth in the decision.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

The parties shall split the cost of the appeal, including preparation of the hearing transcript.

Signed and filed this 17th day of May, 2019.



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