BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALLAS BAILEY, Claimant, vs. MID-PLAINS INSULATION CO., INC., Employer, and EMC INSURANCE COMPANIES, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5054523 A P P E A L D E C I S I O N Head Notes: 1402.40; 1403.30, 1801; 1801.1; 1803; 2501; 3202; 4000

Defendants Mid-Plains Insulation, Inc. (MPI), employer, and EMC Insurance Companies, its insurance carrier, appeal from an arbitration decision filed on October 17, 2018. Claimant Dallas Bailey cross-appeals. Defendant Second Injury Fund of Iowa (the Fund) responds to the appeal. The case was heard on June 22, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on July 26, 2018.

The deputy commissioner found claimant is not entitled to receive temporary partial disability benefits from March 26, 2014 through July 21, 2014, because he failed to carry his burden of proof to establish he had a decrease or loss of overtime hours during that time as a result of the stipulated work injury which occurred on March 11, 2014. The deputy commissioner found claimant is not entitled to temporary total disability benefits for the work injury because defendants carried their burden of proof to establish claimant's misconduct and subsequent termination was equivalent to a refusal of suitable work. The deputy commissioner found that because claimant is not entitled to temporary total disability benefits, defendants are not liable for penalty benefits. The deputy commissioner found that the fifteen percent upper extremity impairment rating issued by the treating physician, Caliste Hsu, M.D., had been paid in full, and in fact had been overpaid by $65.50. The deputy commissioner found that because claimant had

not reached maximum medical improvement (MMI) at the time of hearing, due to his most recent surgery in June 2018, he was not entitled to additional permanent partial disability benefits at this time.[1] The deputy commissioner found defendants employer and insurer may be liable for further permanent partial disability benefits following a finding of MMI and permanency following the June 2018 surgery. The deputy commissioner found defendants employer and insurer are liable for charges incurred for medical treatment after June 27, 2017, based on Dr. Hsu's opinions. The deputy commissioner found Dr. Hsu's opinions regarding causation and treatment to be more convincing than any other expert in the case. The deputy commissioner found that because claimant had not yet reached MMI at the time of the hearing, it cannot be determined whether claimant is entitled to receive any Fund benefits until the full extent of the functional loss to his right upper extremity can be determined. The deputy commissioner found defendants employer and insurer are allowed a credit only for overpayments against future benefits for a subsequent injury, and not with respect to the injury in this matter, pursuant to Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010). Finally, the deputy commissioner awarded claimant costs for the filing fee, deposition transcript, and preparation of claimant's vocational report.

Defendants employer and insurer assert on appeal that the deputy commissioner erred in finding that those defendants are responsible for medical treatment after December 14, 2016,[2] and that claimant is entitled to future medical treatment and potential further permanent partial disability. Defendants employer and insurer further assert on appeal that the deputy commissioner erred in failing to find that benefits paid after claimant's termination should be classified as permanent disability benefits, and those defendants assert they are entitled to a credit for those benefits against any future permanent partial disability assessed with respect to this matter.

Claimant asserts on cross-appeal that his conduct which resulted in his termination from employment with defendant-employer was not equal to a refusal of suitable work, and therefore claimant asserts he is entitled to temporary partial, temporary total, and healing period benefits, and claimant asserts defendants employer and insurer are liable for penalty. Claimant asserts the remainder of the deputy commissioner's decision should be affirmed.

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[1] Dr. Hsu initially placed claimant at MMI on December 14, 2016, and later provided an impairment rating. Due to ongoing complaints, claimant received additional treatment and Dr. Hsu opined he was no longer at MMI and needed additional surgery on May 22, 2018. That surgery took place on June 4, 2018, just prior to the arbitration hearing.

[2] Defendants authorized and paid for all of claimant's medical care until June 27, 2017, after which additional care was denied based on the opinions of David Clough, M.D.. However, defendants argue that they are not responsible for any medical treatment or disability after December 14, 2016, despite having authorized and paid for claimant's treatment. I infer from the arbitration decision that in finding defendants liable for medical treatment after June 27, 2017, the deputy intended to include the authorized treatment prior to that date as well. However, to the extent the medical care claimant received between December 14, 2016 and June 27, 2017 remains at issue, I find that defendants are liable for it.

The Fund does not appeal, but asserts in response to the appeal that if claimant is determined to have reached MMI for his March 11, 2014, injury, requiring a determination of Fund liability, claimant failed to prove he sustained substantial industrial loss. The Fund further asserts that if claimant is entitled to Fund benefits, the Fund is entitled to credit for both the first and second injuries prior to commencement of its liability.

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. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on October 17, 2018, that relate to issues properly raised on intra-agency appeal and cross-appeal are affirmed in part without additional comment and reversed in part.

I affirm the deputy commissioner's finding that claimant is not entitled to temporary partial disability benefits from March 26, 2014, through July 21, 2014, because he failed to carry his burden of proof to establish he had a decrease or loss of overtime hours during that time as a result of his work injury. I affirm the deputy commissioner's finding that claimant is not entitled to temporary total disability benefits, because defendants carried their burden of proof to establish claimant's misconduct and subsequent termination was equivalent to a refusal of suitable work. I affirm the deputy commissioner's finding that because claimant is not entitled to temporary total disability benefits, defendants are not liable for penalty benefits. I affirm the deputy commissioner's finding that that Dr. Hsu's 15 percent upper extremity impairment rating has been paid in full, with an overpayment of sixty-five dollars and fifty cents ($65.50). I affirm the deputy commissioner's finding that claimant was not entitled to further permanent partial disability benefits at the time of hearing, as claimant had not reached MMI following his June 2018 surgery. I affirm the deputy commissioner's finding that that defendants employer and insurer may be liable for further permanent partial disability benefits following a finding of MMI and permanency following the June 2018 surgery. I affirm the deputy commissioner's finding that defendants are liable for charges incurred for medical treatment after June 27, 2017, based on Dr. Hsu's opinions, which I agree are more convincing than any other expert in the case. I affirm the deputy commissioner's finding that because claimant had not yet reached MMI following his June 2018 surgery at the time of hearing, it cannot be determined whether claimant is entitled to any Fund benefits until the full extent of his functional loss to his right upper extremity can be determined. Finally, I affirm the deputy commissioner's award of costs to the claimant for the filing fee, deposition transcript, and preparation of claimant's vocational report.

I find the deputy commissioner provided a well-reasoned analysis of the issues noted above and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

For the reasons that follow, the deputy commissioner's determination regarding credit for overpayments is respectfully reversed in part with the following additional findings, analysis, and conclusions:

At hearing, the parties agreed that total indemnity benefits paid to claimant amounted to $84,816.46. (Hearing transcript, p. 10; Exhibit 12, p. 38; Ex. M, p. 1) Defendants voluntarily paid healing period benefits from January 25, 2015, through January 31, 2015 (1 week), at the rate of $975.74 per week; December 24, 2015, through September 28, 2016 (40 weeks) at the rate of $975.74 per week; and September 29, 2016, through December 14, 2016 (11 weeks), at the agreed rate of $922.59 per week, for a grand total of $50,153.83. (Exhibit M, p. 1)

Defendants also paid permanent partial disability benefits from December 15, 2016, through September 3, 2017 (37.5714 weeks), at the rate of $922.59 per week, for a total of $34,662.63. Id. As the deputy commissioner correctly noted, with respect to permanent partial disability benefits, the fifteen percent upper extremity rating is equal to thirty-seven point five (37.5) weeks of benefits (250 x 15%). (Arbitration Decision, p. 14) At the stipulated weekly benefit rate of $922.59, the total owed was $34,597.13, meaning defendants overpaid the rating by $65.50.

The deputy commissioner, in addressing the issue of credit, cited to Iowa Code section 85.34(5) and Deutmeyer, 789 N.W.2d at 136-37. The deputy commissioner found that under Deutmeyer, "defendants are only allowed a credit for the overpayments against future benefits for a subsequent injury and not with respect to the injury under File No. 5054523." I agree that this analysis and conclusion is correct with respect to the overpayment of permanent partial disability benefits. As such, I find that defendants' overpayment of permanent partial disability benefits in the amount of $65.50 can only be credited against a subsequent injury, and not with respect to the injury in this matter.

However, the deputy commissioner did not specifically address the 52 weeks of healing period benefits defendants paid after claimant was terminated from employment, but before he initially reached MMI on December 14, 2016. To the extent the word "overpayments" in the arbitration decision is plural, it can be inferred that the credit decision is intended to relate to both the overpayment of permanent partial disability benefits in the amount of $65.50, as well as the overpayment of healing period benefits in the amount of $50,153.83.

On appeal, defendants employer and insurer assert the holding in Swiss Colony is not applicable to the factual scenario present in this case. Rather, those defendants cite to Reynolds v. Hy-Vee, File No. 5046203 (App. Dec. October 31, 2017) Claimant argues that Swiss Colony is applicable, that Reynolds is not controlling law, and that the deputy commissioner's ruling is correct. I agree with defendants that Swiss Colony is not applicable to the overpayment of healing period benefits, although for slightly different reasons.

In Swiss Colony, the court held "[t]he plain language of Iowa Code section 85.34(5) directs that the overpayment of *any* weekly benefits" is to be credited against a subsequent injury with the same employer. Id. at 137. However, the overpayment of healing period benefits is not controlled by Iowa Code section 85.34(5). Instead, section 85.34(4) applies. It states:

> 4. *Credits for excess payments.* If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

Iowa Code section 85.34(4) (2013) (emphasis added).

There is no suggestion in this case that defendants failed to act in good faith. I therefore conclude Iowa Code section 85.34(4) governs defendants' credit for the overpayment of healing period benefits.

This determination is consistent with the Commissioner's decision in Love v. Agri Zone, File No. 5048328 (App. June 14, 2017) in which he affirmed the presiding deputy commissioner's application of Iowa Code section 85.34(4) and finding that defendants were entitled to a credit against PPD benefits owed due to their overpayment of temporary total disability benefits. In Love, the presiding deputy commissioner offered the following analysis, which was affirmed by the Commissioner without additional comment:

> As section 85.34(4) governs claimant's credit for the excess of temporary disability benefits paid, it is determined defendants are entitled to a credit in the amount of $13,477.94. This determination is consistent with the case of McBride v. Casey's Marketing Co., File No. 5037617 (Remand February 9, 2015). In McBride, the presiding deputy found defendants were only entitled to a credit for an overpayment of healing period benefits against payments made for future work injuries claimant sustained with the same employer. On appeal, the former workers' compensation commissioner applied the Swiss Colony case and denied defendants' credit argument. Defendants filed a petition for judicial review and the district court judge authored a ruling reversing the commissioner's decision with respect to this issue, concluding section 85.34(5) and the Swiss Colony case did not apply to the overpayment of temporary total disability. Rather, the judge ruled section 85.34(4) applied and remanded the case to the commissioner to apply section 85.34. On remand, the

acting workers' compensation commissioner made the following determination:

> In light of the order of Judge Blaine, it is the determination of this acting workers' compensation commissioner; defendants shall take credit against any permanent partial disability benefits for all overpayments defendants made to claimant in the form of healing period benefits. Such a remedy for the credit is provided by Iowa Code section 85.34(4) which specifically addresses healing period benefits. To hold otherwise, would render Iowa Code section 85.34(4) utterly meaningless. Section 85.34(4) is a specific section. It is the section that governs in the present case.
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> (McBride at page 5)

The undersigned finds defendants are entitled to a credit against permanency benefits ordered in this case in the amount of $13,477.94, in accordance with section 85.34(4) and as applied in McBride. (*See also* Kreb v. Hometown Restyling, Inc., File No. 5048685 (Arb. August 6, 2015); Rover v. Cambrex Corp., File No. 5046945 (Arb. December 18, 2015).)

Love (Arb. Dec. Jan. 26, 2016).

This is also consistent with the Commissioner's decision in Reynolds, File No. 5046203, as argued by defendants. The facts in Reynolds are nearly identical to this case, and the claimant was similarly disqualified from receiving temporary disability benefits following his termination from employment but prior to reaching MMI. While the Reynolds decision does not specifically state that credit for the overpayment of temporary benefits paid was based on Iowa Code section 85.34(4), that section still applies.

In accordance with Iowa Code section 85.34(4) and the decisions in Love, McBride, and Reynolds, I find defendants are entitled to a credit against any potential additional permanent benefits owed in this case for their overpayment of healing period benefits. See also Ahlgren v. BBU, Inc., File No. 5054860 (App. Dec. May 17, 2019). More specifically, defendants are entitled to a credit of $50,153.83 against their liability for permanent partial disability benefits in this case, in addition to the $34,597.13 previously paid for Dr. Hsu's fifteen percent impairment rating. The deputy commissioner's determination regarding defendants' credit for overpayment of benefits is therefore reversed in part.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 17, 2018, is affirmed in part and reversed in part.

Defendants employer and insurer shall pay claimant's medical costs for treatment received after June 27, 2017, as detailed in the arbitration decision, and those defendants remain liable for the authorized care claimant received prior to that date.

Defendants employer and insurer are entitled to a credit in the amount of eighty-four thousand seven hundred fifty and 96/100 dollars ($84,750.96) for permanent partial disability benefits related to the work injury claimant sustained on March 11, 2014, in this matter. This total amount includes credit for the overpayment of healing period benefits in the amount of fifty thousand one hundred fifty-three and 83/100 dollars ($50,153.83), and thirty-four thousand five hundred ninety-seven and 13/100 dollars ($34,597.13) of permanent partial disability benefits paid in response to Dr. Hsu's fifteen percent impairment rating.

Defendants employer and insurer are entitled to a credit in the amount of sixty-five and 50/100 dollars ($65.50) against any liability for future permanent disability benefits for a subsequent injury, due to the overpayment of permanent partial disability benefits in this case.

Pursuant to rule 876 IAC 4.33, defendants employer and insurer shall pay claimant's costs of the arbitration proceeding as set forth in the arbitration decision, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants employer and insurer shall file subsequent reports of injury as required by this agency.

Signed and filed on this 21st day of February, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Brian S. Rhoten

Paul Thomas Barta

Sarah Timko