

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CRAIG AHLGREN,

Claimant,

vs.

BBU, INC.,

Employer,

and

ACE AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

FILED

MAY 17 2019

WORKERS' COMPENSAT

File No. 5054860

A P P E A L

D E C I S I O N

Head Note Nos: 1108.50, 1402.40
1703, 1803

On May 16, 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.

Defendants assert on appeal that the deputy commissioner's award of 25 percent industrial disability is too high. They additionally assert the deputy commissioner erred by finding defendants are not entitled to a credit against permanent partial disability (PPD) benefits owed in this case for their overpayment of healing period benefits.

On cross-appeal, claimant asserts his industrial disability is higher than 25 percent.

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 arbitration decision filed on June 15, 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.

The deputy commissioner's determination that claimant sustained a 25 percent industrial disability as a result of his stipulated work injury is affirmed without additional comment.

However, for the reasons that follow, the deputy commissioner's determination regarding defendants' credit against PPD benefits owed in this case is respectfully reversed.

At hearing, defendants asserted entitlement to a credit against PPD benefits in this case in the amount of \$2,148.12 based on an overpayment of healing period benefits. (Hearing Report, page 2) Defendants, however, failed to address this issue in their post-hearing brief. As a result, the deputy commissioner relied on Swiss Colony, Inc. v. Deutmeyer, the case cited by claimant, for the proposition that defendants are only entitled to a credit against benefits owed for a future work injury. See Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 136-37 (Iowa 2010).

On appeal, defendants assert the holding in Swiss Colony is not applicable to the factual scenario present in this case. I agree.

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. The overpayment at issue in the instant case, however, 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 paid by the employer 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 § 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 their 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 the 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.

(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).

In accordance with Iowa Code section 85.34(4) and the decisions in Love and McBride, I find defendants are entitled to a credit against the PPD benefits owed in this case for their overpayment of healing period benefits. More specifically, defendants are entitled to a credit of \$2,148.12 against their liability for PPD benefits in this case. The deputy commissioner's determination regarding defendants' credit is therefore reversed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 15, 2018 is affirmed in part and reversed in part.

All weekly benefits shall be paid at the stipulated rate of six hundred forty-seven and 97/100 dollars (\$647.97).

Defendants shall pay one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on the stipulated commencement date of January 5, 2015.

Defendants shall receive credit for benefits paid, including a credit in the amount of two thousand one hundred forty-eight and 12/100 dollars (\$2,148.12) for the overpayment of healing period benefits to be applied against the permanent partial disability benefits awarded herein.

Defendants shall be entitled to credit for all permanent partial disability benefits paid to date.

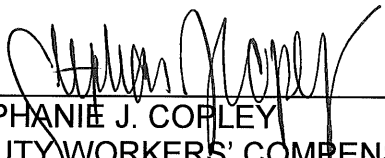
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 reimburse claimant's costs as set forth in the arbitration decision.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

The parties shall share equally the costs of the appeal, including the costs of preparation of the hearing transcript.

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



STEPHANIE J. COPLEY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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