BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD HOUSTON, Claimant, vs. HARDING ENTERPRISES, LLC, d/b/a TUFFY AUTO SERVICE CENTER, Employer, and ACCIDENT FUND NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED MAY 3 2018 WORKERS' COMPENSATION File No. 5052683 A P P E A L D E C I S I O N Head Note Nos.: 1804, 2700, 4000.2 5-9999

Defendants, Harding Enterprises, LLC, employer and Accident Fund National Insurance Company, insurance carrier, appeal from an arbitration decision filed July 15, 2016.

The case was heard on March 17, 2016, in front of the deputy workers' compensation commissioner. On February 1, 2018, the case was delegated to the undersigned to issue the final agency decision of the intra-agency appeal.

The deputy commissioner awarded claimant permanent total disability benefits along with medical expenses. Penalty benefits were also awarded.

Defendants assert on appeal that the deputy commissioner erred in finding that the claimant was entitled to an award of permanent total disability, ordering defendants to pay for unauthorized medical treatment, and awarding penalty benefits. The issue of the appropriate weekly rate was an issue at the time of the arbitration decision. The deputy adopted the rate proposed by the defendants. Claimant's appeal brief states that rate is not an issue on appeal.

Claimant asserts the findings of the deputy commissioner should be affirmed on appeal. The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the arbitration decision filed on July 15, 2016, that relate to issues properly raised on intra-agency appeal with the following additional comments, except for the award of medical expenses which is reversed in part.

I affirm the deputy commissioner's finding that the claimant is entitled to permanent total disability benefits with the following additional comments.

In addition to the opinion of Mark Taylor, M.D., the undersigned notes the expert opinion of Stanley Mathew, M.D. On February 24, 2016, Dr. Mathew stated:

> [I]n regards to my note dated 11/24/2015, I do feel that patient is unable to return to work based on my physical exam, his intractable low back pain, weakness, medication and its sideeffects [sic] that he is taking to control his pain. I do not feel that the patient is capable of maintaining full-time employment given the severity of his back condition.

(Exhibit 3, pages 87-88)

Dr. Mathew's opinion is consistent with claimant's attempt to return to full-time employment. Claimant did try to return to his pre-injury job. He returned to work on November 30, 2015 and worked until the end of December when he sustained a heart attack. Although he was able to return to work as a mechanic, he was unable to work a complete day. Claimant testified that due to the pain levels he was not able to complete full days. Even when the employer permitted claimant to sit as needed he still had to go home early due to his pain. Claimant testified that even prior to his heart attack, his return to work was not going well because being on the concrete surface was difficult for him. Additionally, during the weeks he returned to work following the injury he was unable to earn any commission at a job he had 20 years of experience performing. (Transcript pp. 32-34) The record demonstrates that Houston was not able to return to his pre-injury job on a full-time basis.

Defendants argue that claimant was able to return to work without restrictions following the injury. This argument is disingenuous. While he did return to work, the employer graciously allowed him to sit on an as needed basis. Also, the employer would allow him to leave work before the day was over when his pain was too high.

Additionally, defendants argue that he continued working until the time he suffered his heart attack and then he never worked again. However, a prudent review

of the evidence demonstrates that even before Houston suffered his heart attack, he was not able to perform his pre-injury job on a full-time basis due to his work injury.

Defendants further argue claimant is not permanently and totally disabled because his functional rating amounted to only 8 percent of the body as a whole. However, there are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. Considering Houston's age, educational background, employment history, attempt to return to his prior job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 100 percent loss of earning capacity as a result of his work injury with the defendant employer. I find that the claimant has demonstrated by a preponderance of the evidence that he is entitled as a matter of law to permanent total industrial disability pursuant to Iowa Code section 85.34(3) which entitles him to weekly benefits for life absent a change of condition.

I affirm, with the following additional comments, that the deputy commissioner's finding that penalty in the amount of five thousand and no/100 ($5,000.00) should be awarded.

The first basis for claimant's penalty benefits claim is because 13.714 weeks (May 29, 2015 through September 1, 2015) of healing period benefits were paid late. On April 30, 2015, the insurance carrier sent a letter to claimant's counsel stating that benefits would be terminated on May 26, 2015 because claimant had been noncompliant with Stephen Runde, M.D.'s medical treatment. Claimant's counsel advised the defendants via a May 19 letter that claimant intended to comply with treatment recommendations and requested authorization to return to Dr. Runde. The letter also advised defendants that they were not complying with Auxier notice requirements. Defendants proceeded to terminate weekly benefits on May 28, 2015. Claimant's counsel wrote to the defendants on three more occasions regarding their unlawful termination of benefits and again requesting authorization to see Dr. Runde. The record is void of any evidence demonstrating that defendants authorized any treatment for the next four months. On September 2, 2015 defendants did finally issue a check for the 13.714 weeks of benefits which totaled $8,206.62. (Ex. 6, pp. 1-13; Ex. 10, p. 2)

The second basis for the penalty claim is for late payment of 3 weeks of healing period benefits from October 23, 2015 through November 12, 2015. On October 29, 2015, defendants advised that benefits would be terminated in 30 days. However, defendants terminated benefits on October 22, 2015, one week prior to the thirty-day notice letter. When claimant's counsel questioned defendants about this termination, the defendants explained that the benefits had been "accidentally stopped" before the

Auxier notice was sent. On November 16, 2015, defendants issued a check for the late benefits totaling $1,736.85. (Ex. 6, pp. 17-20; Ex. 10, p. 2)

The third basis for claimant's penalty claim is for 6.429 weeks of benefits that were paid late. The benefits for the time frame of October 20, 2014 to October 26, 2014 were not paid until October 20, 2014. The benefits for the time frame of October 27, 2014 to November 9, 2014 were not paid until October 29, 2014. The benefits for the time frame of April 13, 2015 to April 19, 2015 were not paid until April 21, 2015. The benefits for the time frame of September 18, 2015 to October 1, 2015 were not paid until October 1, 2015; this check should have been issued on September 24, 2015. The October 8, 2015 check was not actually mailed until October 10, 2015. (Ex. 10, pp. 1, 5-6) The record is void of any reasonable basis as to why these payments were late. I find that these benefits were unreasonably denied. I find claimant's benefits totaling $3,932.31 were unreasonably delayed.

I find the total amount of benefits that were unreasonably delayed to be $13,708.17 (23.143 weeks). Thus, I find that a penalty in the amount of five thousand and no/100 ($5,000.00) is appropriate.

I affirm the deputy commissioner's finding as to payment of the medical bills detailed in claimant's exhibits 13 and 14 with the following exceptions and additional analysis.

I find that the defendants are responsible for the bills which were incurred shortly after the injury. The treatment claimant sought was for the work-related condition. It is undisputed that defendants were aware of the injury on the very day the injury occurred. Yet, defendants failed to begin directing medical care until November 13, 2014. Defendants never objected to the treatment claimant received prior to their directing care. (Ex. 14, pp. 1-2)

I find defendants are responsible for the December 30, 2014 expenses incurred with Radiology Consultants. These expenses were incurred for imaging ordered by Dr. Runde. Claimant was sent to Dr. Runde by the defendants. (Tr. p. 22; Ex. 3, p. 35)

I find that the defendants are not responsible for payment of the expenses related to the March 19, 2015 Unity Point visit, the April 6, 2015 to January 2, 2016 PCI bills because these expenses are related to the claimant's lipoma removal. (Ex. 14, p. 4 and 12) On February 12, 2015, Dr. Runde clearly stated that the lipomata were a coincidental finding and not related to the work injury. (Ex. S, p. 17) I find Dr. Runde's opinion regarding causation of the lipomata to be persuasive. I find the lipomata were not causally connected to the work injury. Thus, defendants are not responsible for the treatment of the lipomata.

I find that defendants are not responsible for the medical expenses incurred in relation to the May 15, 2015 MRI at Mercy Medical. Claimant was referred here by his personal care physician. This was not authorized treatment and the record is void of any evidence to demonstrate that this was beneficial to the claimant.

I also find that defendants are responsible for the appointments at Progressive Rehab with Dr. Kim from June 1, 2015 to August 3, 2015. As early as May 19, 2015, claimant's counsel advised defendants that claimant intended to comply with treatment recommendations and wanted additional treatment. Defendants' only response was to send claimant back to see Dr. Abernathey who had previously seen the claimant and had no treatment to offer him. (Ex. V) I find that although defendants had not yet formally denied liability, they had abandoned care. Defendants failed to offer prompt or reasonable medical care. Defendants failure to offer prompt medical care is unreasonable and constitutes an abandonment of defendants' obligation to provide claimant medical care under Iowa Code section 85.27. As such, I find that defendants are responsible for the medical treatment provided at Progressive Rehab from June 1, 2015 to August 3, 2015. (Ex. 14, p. 6; Ex. 13, p. 2)

By August 6, 2015 defendants formally denied further liability for claimant's ongoing treatment and thereby waived any authorization defense. Thus, I conclude defendants are responsible for any bills incurred on or after that date.

ORDER

IT IS THEREFORE ORDERED that the decision of July 15, 2016, is AFFIRMED in part and MODIFIED in part, and that the following modification is ordered:

That the defendants pay claimant permanent total disability benefits commencing September 26, 2013 at the rate of five hundred seventy-eight and 95/100 dollars ($578.95), and continuing for all periods of disability.

Defendants shall be responsible for medical expenses as set forth above.

Defendants shall pay/reimburse the three thousand sixty-two and 50/100 dollar ($3,062.50) IME fee of Dr. Taylor.

Defendants shall pay a penalty of five thousand and 00/100 dollars ($5,000.00), all of which is accrued.

Defendants shall receive credit for all benefits previously paid.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 3rd day of May, 2018.

ERIN Q. PALS
DEPUTY WORKERS' COMPENSATION COMMISSIONER

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