BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUL 13 2017
WORKERS COMPENSATION

THADDEUS EDWARDS,	:	
Claimant,	:	File Nos. 5062891, 5062892
vs.	:	ARBITRATION
ATCHISON SERVICES, LLC d/b/a IOWA PILOT CAR,	:	DECISION
Employer, Defendant.	:	Head Note Nos.: 1802, 1803, 3003, 4000.2

STATEMENT OF THE CASE

Claimant, Thaddeus Edwards, filed petitions in arbitration seeking workers' compensation benefits from Atchinson Services LLC, d/b/a Iowa Pilot Car (Atchison), defendant employer, insurer unknown, as a result of injuries he sustained on July 2, 2016 and October 30, 2016 that arose out of and in the course of employment.

On March 15, 2017, claimant filed an entry of default against defendant for failure to timely answer the petition. On March 21, 2017, an entry of default was entered against defendant, and a hearing was scheduled for May 3, 2017 by telephone. The hearing took place as scheduled. The proceedings were recorded digitally, and constitute the official record of the proceeding. The record consists of claimant's Exhibits 1 – 5.

At hearing claimant's attorney made a motion to dismiss File No. 5062891 (date of injury July 2, 2016) without prejudice. That motion was granted and File No. 5062891 was dismissed without prejudice.

ISSUES

1. The extent of claimant's entitlement to healing period benefits.
2. The extent of claimant's entitlement to permanent partial disability benefits
3. Rate.
4. Whether the defendant is liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was employed with Atchinson and drove an escort truck.

Claimant's medical history is relevant. Claimant had a meniscal repair to the right knee in July of 2016. Claimant returned to work following surgery. There is no evidence claimant had any permanent impairment or permanent restrictions regarding this surgery. (Exhibit 1, page 5; Ex. 3, p. 1)

Claimant was driving an escort truck from Iowa to Texas. Claimant was climbing on truck stairs when he slipped and hit the anterior portion of his right knee on the step.

On October 30, 2016, claimant was evaluated by Amanda Williams, N.P. with Augusta Health in Fishersville, Virginia. Claimant had right knee pain. Claimant was given pain medication and told to use crutches and bear weight on the right as tolerated. (Ex. 3)

On November 8, 2016, claimant was evaluated by Aubrey Barton, PA-C. He had continued knee pain. Claimant had difficulty walking and bearing weight. Claimant was given a cortisone injection and told to use over the counter anti-inflammatory medications. (Ex. 1, pp. 5-7)

On November 28, 2016, claimant was seen by Physician's Assistant Barton. Claimant was assessed as having chondral defects in the right knee and possible micro fracture. Surgery was discussed and chosen as a treatment option. (Ex. 1, pp. 11-12)

On December 19, 2016, claimant underwent right knee surgery performed by Matthew White, M.D. Surgery consisted of a chondroplasty of the medial femoral condyle and removal of loose bodies. (Ex. 1, pp. 15-17)

In an April 28, 2017 note, Dr. White opined claimant's surgery was necessitated by the October 30, 2016 work injury. He opined claimant could return to work one month after the December 19, 2016 surgery. He found claimant had a five percent permanent impairment to the right lower extremity. (Ex. 5)

Claimant's average weekly wage was $1,541.00 per week. Claimant was married with 2 exemptions.

In a professional statement, claimant's counsel indicated his office had made an on-line search of defendant employer. Claimant's counsel indicated the search indicated defendant employer did not carry workers' compensation insurance on the date of claimant's injury.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The first issue to be determined is the extent of claimant's entitlement to healing period benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant was off work from October 31, 2016 through January 22, 2017. (Ex. 3, pp 1-4; Ex. 5) Claimant is due healing period benefits for this period of time.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an

"industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921).

Dr. White found claimant had a 5 percent permanent impairment to the right lower extremity from the October of 2016 work injury. Claimant is due 11.25 weeks of permanent partial disability benefits (225 weeks x 5%).

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Claimant had an average weekly wage of $1,541.00 per week. He was married with 2 exemptions. Claimant's rate is $938.00 per week.

The final issue to be determined is whether defendant is liable for a penalty under Iowa Code section 86.13.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
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> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant is due 11.25 weeks of permanent partial disability benefits. Defendant gave no reason why claimant's permanent partial disability benefits have not been paid. A penalty of 50 percent is appropriate. Defendant is liable for a penalty of $5,276.25 in penalty for failure to pay permanent partial disability benefits. (12 weeks x $938.00 x 50%)

Claimant is also due approximately 12 weeks of healing period benefits. Defendant gave no reason why healing benefits were not paid. Defendant is liable for a penalty of $5,628.00 for failure to pay healing period benefits. (12 weeks x $938.00 x 50%)

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant healing period benefits from October 31, 2016 to January 22, 2017 at the rate of nine hundred and thirty-eight dollars ($938.00) per week.

That defendant shall pay claimant eleven point twenty-five (11.25) weeks of permanent partial disability benefits at the rate of nine hundred thirty-eight and 00/100 dollars ($938.00) per week commencing on January 23, 2017.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits awarded above as set forth in Iowa Code section 85.30.

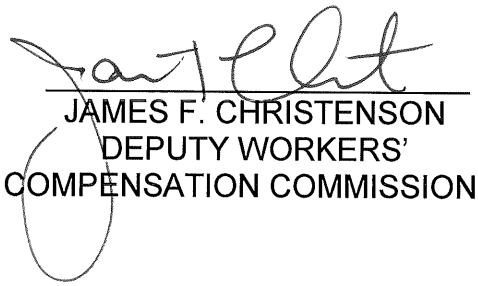
That defendant shall pay claimant five thousand two hundred seventy-six and 25/100 dollars ($5,276.25) in penalty for failure to pay permanent partial disability benefits.

That defendant shall pay claimant a penalty of five thousand six hundred twenty-eight and 00/100 dollars ($5,628.00) for failure to pay healing period benefits. (12 weeks x $938.00 x 50%)

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 13th day of July, 2017.



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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.