IN THE COURT OF APPEALS OF IOWA

No. 5-602 / 95-0144

FILED
APR 23 1996
CLERK SUPREME COURT

RONALD LEE MEYERS,

Appellant,

vs.

HOLIDAY EXPRESS CORPORATION and LIBERTY MUTUAL COMPANY,

Appellees.

Appeal from the Iowa District Court for Kossuth County, Joseph J. Straub, Judge.

Ronald Lee Meyers appeal a district court ruling on judicial review affirming the industrial commissioner's finding that no penalties would be awarded for delays in several payments. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Mark S. Soldat, Algona, for appellant.

Tito Trevino and Joseph W. Fernandez of Trevino Law Office, Fort Dodge, for appellees.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

PER CURIAM

This is an appeal by an employee claiming the district court erred in affirming the decision of the Industrial Commission which found he was not entitled to penalty benefits.

This workers' compensation action arose from injuries Ronald Meyers sustained to his left knee while employed as a truck driver for Holiday Express Corporation. In a previous decision, we remanded the case to the commissioner on the following issues: (1) computation of healing period benefits from August 25, 1989, to January 9, 1990; (2) a determination of whether Meyers was entitled to penalty benefits under Iowa Code section 86.13; and (3) a reevaluation by the commissioner on the assessment of costs. *Meyers v. Holiday Express Corp.*, No. 93-23 (Iowa App. Jan. 25. 1994) (Unpublished).

On remand, the commissioner calculated Meyers' healing period benefits. The commissioner determined that any delay in the payment of benefits was minimal, and Meyers was not entitled to penalty benefits. Finally, the commissioner determined the court of appeals decision did not change the original assessment of costs.

Meyers filed a petition for judicial review. The district court remanded to the commissioner to determine the penalty due for the employer's delay in paying benefits from July 8 to 11, 1988, and to determine whether penalties should be assessed for late payments beginning July 26, 1989, and October 11, 1989. The

district court affirmed on all other issues. Meyers has appealed that portion of the district court opinion which affirmed the Industrial Commissioner.

I. The employer asks us to stay these proceedings until the Industrial Commissioner renders a decision on the portion of the case which was remanded by the district court. We determine the issues presented in this appeal may be considered separately from the issues which have been remanded. We, therefore, deny the request for a stay.

II. Meyers raises several instances in which he claims Holiday Express delayed paying him workers' compensation benefits. He believes there is not substantial evidence in the record to support the commissioner's conclusion the delays were minimal. Meyers asks us to remand the case for the assessment of penalty benefits under section 86.13. The applicable portion of section 86.13 provides:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

Our scope of review is for the correction of errors at law. *Presthus v. Barco, Inc.*, 531 N.W.2d 476, 478 (Iowa App. 1995). We apply the standards of section 17A.19(8). *Id.* at 479. An agency's findings of fact will be upheld if supported by substantial evidence. *Id.*

Meyers claims the commissioner should have awarded him penalty benefits for the following delays: (1) a delay in paying healing period benefits immediately after his injuries; (2) a delay in paying temporary partial disability benefits from July 12, 1988, to August 5, 1988; (3) failure to pay full permanent partial disability benefits after the March 15, 1988, injury; (4) failure to pay full permanent partial disability benefits after the December 21, 1988, injury; and (5) a delay in the payment of interest on permanent partial disability benefits.

The commissioner determined the delays, if any, for nearly all payments were minimal. Under the statute, additional benefits will be awarded if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse. Iowa Code §86.13. This requires the commissioner to make a finding regarding reasonable or probable cause or excuse. *Presthus*, 531 N.W.2d at 481. No such finding was made in this case. Therefore, a remand is necessary to enable the commissioner to make this determination.

III. Meyers contends the district court should not have affirmed the commissioner's finding that there was a good excuse for the delay in paying healing period benefits from August 25, 1989, to January 9, 1990. The commissioner found the claim for benefits during this time period was fairly debatable.

Section 86.13 is not violated if the workers' compensation insurer has a good faith dispute over the legal or factual validity of a claim for benefits. *Squealer Feeds*

v. Pickering, 530 N.W.2d 678, 686 (Iowa 1995). Benefits may be delayed, without penalty, during such time as the employer's liability is "fairly debatable." *Kiesecker v. Webster City Meats, Inc.*, 528 N.W.2d 109, 111 (Iowa 1995) (citing *Covia v. Robinson*, 507 N.W.2d 411, 416 (Iowa 1993).

We find there is substantial evidence in the record to show Meyers' claim for healing period benefits for this period of time was fairly debatable. Not until our previous decision, on January 25, 1994, was it clear that Meyers was entitled to benefits for this period of time. We affirm on this issue.

IV. Meyers claims the district court erred by affirming the commissioner's assessment of costs against him. Meyers also claims the district court erred in assessing one-half of the costs of judicial review against him. Under section 86.40, the commissioner has discretion in the assessment of costs and under section 86.32, the district court has discretion in taxing costs. We find no abuse of discretion in the commissioner or the district court.

We remand to the Industrial Commissioner on the issue of whether there was reasonable or probable cause or excuse for the delay in benefit payments to Meyers. We affirm the district court and the commissioner on all other issues raised in this appeal. Costs of this appeal are assessed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.