

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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ROBERT OSTWINKLE,

Claimant,

vs.

MATHY CONSTRUCTION COMPANY,

Employer,

and

ZURICH AMERICAN INSURANCE  
COMPANY,

Insurance Carrier,  
Defendants.

File Nos. 5052718, 5052719

A P P E A L

D E C I S I O N

Headnotes: 1402.40; 1403.20; 1702; 1703;  
1802; 1803; 1806, 2905; 2907;  
5-9998

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Claimant Robert Ostwinkle appeals from a review-reopening decision filed on May 28, 2019. Defendants Mathy Construction Company, employer, and its insurer, Zurich American Insurance Company, respond to the appeal. The case was heard on March 20, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 30, 2019.

Claimant filed two petitions in arbitration on July 6, 2015, in File Nos. 5052718 and 5052719. In File No. 5052718, injury date July 6, 2012, claimant alleged he sustained injuries to his right shoulder while working for defendant-employer. In File Number 5052719, injury date July 23, 2013, claimant alleged he sustained injuries to his low back while working for defendant-employer.

An arbitration hearing on both files was held on June 7, 2016. On November 16, 2016, a deputy workers' compensation commissioner issued an arbitration decision. For File No. 5052718, the deputy commissioner found claimant sustained 40 percent industrial disability based on the stipulated injury to claimant's right shoulder, which entitled claimant to receive 200 weeks of permanent partial disability benefits at the weekly rate of \$1,181.11, commencing on March 19, 2013. For File Number 5052719, involving the injury to claimant's low back, the deputy commissioner found claimant was not at maximum medical improvement for that injury and did not award permanent disability benefits. The deputy commissioner awarded claimant temporary total disability benefits for December 5, 2013, through May 4, 2014, from November 14, 2014, through May 10, 2015, and November 10, 2015 through May 18, 2016, except as

interrupted for those weeks claimant was entitled to receive temporary partial disability benefits, which were the weeks of March 8, 2014, April 5, 2014, March 14, 2015, March 28, 2015, April 11, 2015, April 18, 2015, and April 25, 2015, at the weekly rate of \$1,278.92. The November 16, 2016, arbitration decision was not appealed and that decision became final agency action.

On June 11, 2018, claimant filed review-reopening actions in File Nos. 5052718 and 5052719. In File No. 5052718, claimant alleged he sustained an economic change of condition and a physical change of condition with regard to his right shoulder injury of July 6, 2012, after the underlying arbitration decision was filed, which entitled him to receive additional industrial disability benefits, and claimant also alleged he is permanently and totally disabled under both the traditional industrial disability analysis, and also under the common law odd-lot doctrine. In File Number 5052719, claimant alleged he sustained an economic change of condition and a physical change of condition with regard to his low back injury of July 23, 2013, after the underlying arbitration decision was filed, which entitled him to receive industrial disability benefits, and claimant also alleged he is permanently and totally disabled under both the traditional industrial disability analysis and also under the common law odd-lot doctrine. Claimant also alleged he is entitled to receive additional healing period benefits from November 18, 2016, through May 1, 2017, and from November 17, 2017, through May 14, 2018. Claimant also alleged he is entitled to payment by defendants for the past requested medical expense itemized in Exhibit 15.

In the review-reopening decision filed on May 28, 2019, the deputy commissioner found in File No. 5052718 that claimant failed to carry his burden of proof to establish either an economic change of condition or a physical change of condition for the July 6, 2012, right shoulder injury after the underlying arbitration decision was filed. The deputy commissioner awarded claimant nothing further in File No. 5052718.

In the review-reopening decision, the deputy commissioner found in File No. 5052719 that claimant did carry his burden of proof to establish both an economic change of condition and a physical change of condition for the July 23, 2012, low back injury after the underlying arbitration decision was filed, which entitled claimant to receive additional permanent disability benefits. The deputy commissioner found that pursuant to Iowa Code 85.34(7), the successive disabilities statute, claimant sustained a total of 70 percent industrial disability from both injuries taken together, which is a total of 350 weeks of permanent partial disability benefits, for which defendants are entitled to receive a credit of 40 percent, or 200 weeks of PPD benefits, for the July 6, 2012, right shoulder injury, with the result that claimant is entitled to receive 150 additional weeks of PPD benefits for July 23, 2013, back injury, commencing on the stipulated commencement date of May 1, 2017. In File No. 5052719, the deputy commissioner found claimant is not entitled to receive additional healing period benefits from November 18, 2016, through May 1, 2017, and from November 17, 2017, through April 10, 2018. The deputy commissioner did find claimant is entitled to receive additional healing period benefits from April 11, 2018, through May 9, 2018. The deputy

commissioner found claimant is entitled to payment by defendants for the requested past medical expense itemized in Exhibit 15.

In File No. 5052718, claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to prove either an economic change of condition or a physical change of condition for the July 6, 2012, right shoulder injury after the underlying arbitration decision was filed. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive additional permanent disability benefits in File No. 5052718. Claimant asserts that on appeal claimant should be awarded an additional 25 weeks of PPD benefits for the July 6, 2012, right shoulder injury.

In File No. 5052719, claimant asserts the deputy commissioner erred in awarding claimant only 30 percent industrial disability, 150 weeks of PPD benefits, for the July 23, 2013, low back injury. Claimant asserts that on appeal the industrial disability award for the low back injury should be increased to 50 percent, 250 weeks of PPD benefits. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive additional healing period benefits from November 18, 2016, through May 1, 2017, and from November 17, 2017, through April 10, 2018.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

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 and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed review-reopening decision filed on May 28, 2019, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the review-reopening proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

In File No. 5052718, I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof to establish he sustained either an economic change of condition or a physical change of condition for the July 6, 2012, right shoulder injury after the underlying arbitration decision was filed. I affirm the deputy commissioner's finding that claimant is entitled to receive nothing further in File No. 5052718.

In File No. 5052719, I affirm the deputy commissioner's finding that claimant did carry his burden of proof to establish both an economic change of condition and a physical change of condition for the July 23, 2012, low back injury after the underlying arbitration decision was filed, which entitles claimant to receive additional permanent

disability benefits. I affirm the deputy commissioner's finding that pursuant to Iowa Code 85.34(7), claimant sustained a total of 70 percent industrial disability from both injuries taken together, which is a total of 350 weeks of permanent partial disability benefits, for which defendants are entitled to receive a credit of 40 percent, or 200 weeks of PPD benefits, for the July 6, 2012, right shoulder injury, with the result that claimant is entitled to receive 150 additional weeks of PPD benefits for the July 23, 2013, back injury, commencing on the stipulated commencement date of May 1, 2017. I affirm the deputy commissioner's finding that claimant is not entitled to receive additional healing period benefits from November 18, 2016, through May 1, 2017, and from November 17, 2017, through April 10, 2018. I affirm the deputy commissioner's finding that claimant is entitled to receive additional healing period benefits from April 11, 2018, through May 9, 2018. I affirm the deputy commissioner's finding that claimant is entitled to payment by defendants for the requested past medical expense itemized in Exhibit 15.

I affirm the deputy commissioner's findings, conclusions and analysis regarding all of the above issues.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on May 28, 2019, is affirmed in its entirety.

**File No. 5052718 - Date of Injury: July 6, 2012:**

Claimant shall take nothing further from these proceedings.

**File No. 5052719 - Date of Injury: July 23, 2013:**

Defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits, at the stipulated weekly rate of one thousand two hundred seventy-eight and 92/100 dollars (\$1,278.92), commencing on the stipulated commencement date of May 1, 2017.

Defendants shall pay claimant intermittent healing period benefits from April 11, 2018, through May 9, 2018, at the stipulated weekly rate of one thousand two hundred seventy-eight and 92/100 dollars (\$1,278.92).

Defendants are entitled to receive a credit for all benefits paid from January 18, 2017, to April 10, 2018, and May 10, 2018, through March 20, 2019.

Defendants are entitled to receive a credit of three thousand three hundred thirty-nine and 30/100 dollars (\$3,339.30) for overpaid permanent partial disability benefits paid to claimant for File Number 5052719, pursuant to the parties' stipulation.

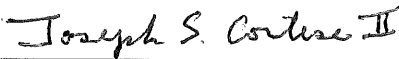
Defendant-employer shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall 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 pay the nine hundred four and 02/100 dollars (\$904.02) outstanding anesthesia bill itemized in Exhibit 15, and defendants remain responsible for all medical care causally connected to the work injury.

Pursuant to rule 876 IAC 4.33, defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 28<sup>th</sup> day of May, 2020.

  
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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Dirk Hamel                      Via WCES

Thomas D. Wolle                Via WCES