

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK KAMPAS,

Claimant,

vs.

CENTURION INDUSTRIES, INC. d/b/a
A-LERT CONSTRUCTION SERVICES,

Employer,

and

ZURICH AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

FILED

JUL - 6 2017

WORKERS' COMPENSATION

File No. 5042730

A P P E A L

D E C I S I O N

Head Note Nos: 1703; 1802; 1803;
2501; 2701; 2907

This intra-agency appeal involves the appeal of two separate proposed arbitration decisions from the deputy level. On September 30, 2014, a deputy commissioner issued an arbitration decision which awarded claimant Mark Kampas healing period benefits and made a determination on a weekly rate issue. Defendants Centurion Industries, Inc., d/b/a A-Lert Construction Services, employer, and its insurer, Zurich American Insurance Company, appeal from that decision, asserting the deputy commissioner erred in awarding healing period benefits from December 13, 2008, through July 11, 2010. Claimant cross-appeals that decision, asserting the deputy commissioner erred in calculating claimant's weekly rate by failing to include per diem payments as part of claimant's gross weekly earnings.

The second arbitration decision, issued by another deputy commissioner, was filed on July 19, 2016. That decision awarded healing period benefits from July 12, 2010, through July 17, 2011, and from June 30, 2014, through February 19, 2015. That decision also awarded claimant 400 weeks of permanent partial disability benefits after finding claimant sustained 80 percent industrial disability as a result of the stipulated low back injury, which occurred on December 10, 2007.

Claimant appeals the July 19, 2016, arbitration decision, asserting the deputy commissioner erred in terminating healing period benefits as of July 17, 2011, and claimant asserts healing period benefits should have been paid continuously through February 19, 2015. Claimant also asserts on appeal that the deputy commissioner

erred because he awarded less than permanent total disability. Claimant also asserts in the appeal of the July 19, 2016, arbitration decision, that the deputy commissioner erred in denying expenses for claimant's driver during an overnight stay while claimant underwent back surgery in June 2014.

Defendants cross-appeal the July 19, 2016, arbitration decision, asserting the 80 percent industrial disability award was excessive and should be reduced. Defendants contend the remainder of the July 19, 2016, arbitration decision should be affirmed.

Those portions of the proposed agency decisions pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

September 30, 2014, Arbitration Decision

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner in the September 30, 2014, arbitration decision. Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on September 30, 2014, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided sufficient analysis of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's finding that claimant did not work, was not capable of performing substantially similar employment, and was not at maximum medical improvement between December 13, 2008, and July 11, 2010. (Claimant's Exhibit 9, page 5) Therefore, I affirm the deputy commissioner's award of healing period benefits from December 13, 2008, through July 11, 2010.

I also affirm the deputy commissioner's determination that per diem payments made to claimant should not be included in the calculation of claimant's weekly benefit rate. The per diem payments made to claimant were clearly intended to be reimbursement for living expenses incurred while working away from home. (Transcript, pages 82, 120) There is disputed evidence in the record about whether the per diem was included in gross or taxable earnings. (Tr., pp. 85, 122)

However, Iowa Code section 85.61(3) provides a definition of "gross earnings" and provides that "reimbursement of expenses" and "expense allowances" should be excluded from calculation of gross earnings. The plain language of the statute excludes per diem payments. I concur with the deputy commissioner's conclusion to exclude the per diem payments from the calculation of gross earnings and the applicable weekly worker's compensation benefits rate.

Having reached similar findings and conclusions as those of the deputy commissioner, I fully affirm the September 30, 2014, arbitration decision.

July 19, 2016, Arbitration Decision

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties and pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on July 19, 2016, which relate to the issues properly raised on intra-agency appeal with the following analysis and modifications:

I find that the deputy commissioner provided sufficient analysis of the issue of permanent disability. I concur with the deputy commissioner's findings of fact and conclusions of law pertaining to the issue of permanent disability. I affirm the deputy commissioner's award of 80 percent industrial disability, which entitles claimant to 400 weeks of permanent partial disability benefits.

With respect to the challenge of the deputy commissioner's conclusion to terminate healing period benefits on July 18, 2011, through June 29, 2014, I reverse the deputy commissioner and award additional healing period benefits.

At the commencement of the January 14, 2014, hearing, the deputy commissioner noted that the parties were stipulating to a running healing period. Specifically, the deputy commissioner noted at the commencement of the first hearing, "the parties stipulate that the alleged injury is a cause of temporary disability during a period of recovery; and the parties are not here today to look at the issue of permanency. That's for a later point in time. The parties agree that Claimant is still in a healing period and so this award would be some type of a running award that I would be making today." (January 14, 2014, Hearing Transcript, pp. 5-6) No objection or modification of that statement was made by the parties to the deputy commissioner and the assumption made was that there was a running healing period.

Similarly, at the February 17, 2016, hearing, the presiding deputy commissioner indicated, "I'm not going to be really issuing any sort of decision, any sort of finding of fact or conclusion of law regarding claimant's entitlement to healing period benefits." (February 17, 2016, Hearing Transcript, p. 5) At the time of the January 2014 hearing, defendants continued to pay healing period benefits and did not challenge entitlement to those benefits. The applicable time to challenge entitlement to the ongoing payment of healing period benefits was at the January 2014 hearing. Defendants cannot challenge that entitlement after the initial hearing at the second hearing. All facts were known and could have been presented at the first hearing.

Given the parties stipulation to a running healing period at the first arbitration hearing, defendants' failure to challenge entitlement to healing period benefits at the first arbitration hearing, and the deputy commissioner's statement at the second arbitration hearing that no findings of fact or conclusion of law would be entered

pertaining to healing period benefits in the second arbitration proceeding, I conclude it was error for the deputy commissioner in the second arbitration decision to make findings and conclusions pertaining to the healing period and to terminate healing period benefits during the claimed period of time. In addition to the benefits awarded in the September 30, 2014, arbitration decision, healing period should be payable from July 12, 2010, through the date of maximum medical improvement because claimant did not actually return to work and was not capable of returning to substantially similar work prior to his maximum medical improvement date. (Ex. 9, p. 10) I find maximum medical improvement occurred on February 19, 2015. (Ex. 2, p. 1) Therefore, claimant is entitled to additional healing period benefits from July 12, 2010, through February 19, 2015.

I considered and I affirm the deputy's analysis, findings and conclusions pertaining to the issue of lodging and meals for claimant's sister. Although claimant required transportation and it was reasonable to utilize his sister to transport him to and from his surgical site, his sister lived two hours from the surgical site and it was not reasonable or justified for her to spend two nights in a motel to provide the requested transportation. Nothing in Iowa Code section 85.27 or 876 IAC 8.1 requires reimbursement of claimant's sister's expenses. Therefore, I affirm the deputy's decision in this respect.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 30, 2014, is affirmed in its entirety and the arbitration decision filed on July 19, 2016, is MODIFIED as follows:

Defendants shall pay healing period benefits from December 13, 2008, through February 19, 2015.

Defendants shall pay claimant four hundred (400) weeks of permanent partial disability benefits commencing on February 20, 2015.

All weekly benefits shall be payable at the weekly rate of eight hundred seventy-seven and 27/100 dollars (\$877.27).

Defendants shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.


Defendants shall be given credit for all benefits previously paid.

Defendants shall pay medical expenses as detailed in the July 19, 2016, arbitration decision.

Pursuant to rule 876 IAC 4.33, defendants shall pay costs as detailed in the July 19, 2016, arbitration decision, and 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 this 6th day of July, 2017.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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