

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFREY HUSKINS,

Claimant,

vs.

PAR ELECTRICAL CONTRACTORS,

Employer,

and

OLD REPUBLIC,

Insurance Carrier,
Defendants.

FILED

AUG 25 2017

WORKERS' COMPENSATION

File No. 5048504

A P P E A L

D E C I S I O N

Head Note Nos: 1802; 1803; 1804;
2501; 5-9999

Claimant Jeffrey Huskins appeals from an arbitration decision filed on November 30, 2015. Defendants Par Electrical Contractors, employer, and its insurer, Old Republic Insurance Co., cross-appeal. The case was heard in two sessions, with the first session on May 20, 2015, and the second session on July 15, 2015. Effective September 8, 2015, Ronald R. Pohlman, the deputy workers' compensation commissioner who heard this case resigned from his employment with the Iowa Division of Workers' Compensation. On September 8, 2015, the undersigned delegated this case to Deputy Commissioner James F. Christenson to issue the arbitration decision. With the filing of post-hearing briefs, this case was considered fully submitted in front of Deputy Commissioner Christenson on September 16, 2015.

In the arbitration decision, the deputy commissioner found claimant was not a credible witness. The deputy commissioner found the stipulated work injury which arose out of and in the course of claimant's employment with defendant- employer on August 16, 2013, caused claimant to sustain 30 percent industrial disability, which entitles claimant to 150 weeks of permanent partial disability (PPD) benefits commencing on April 19, 2014. The deputy commissioner found claimant failed to carry his burden of proof that he is entitled to permanent total disability (PTD) benefits. The deputy commissioner found claimant carried his burden of proof that the work injury materially aggravated claimant's pre-existing cervical spine condition and caused a right cubital tunnel injury. The deputy commissioner found claimant failed to carry his burden of proof that his pre-existing mental condition was caused by, or was aggravated by, the work injury. The deputy commissioner found claimant is entitled to healing period benefits from October 2, 2013, through April 18, 2014. The deputy commissioner found claimant's gross average weekly earnings for the work injury are \$1,518.43 and claimant's weekly benefit rate, classification single with one exemption, is \$841.26. The

deputy commissioner found claimant is entitled to payment by defendants of all medical costs associated with claimant's cervical surgery and his right cubital tunnel surgery. The deputy commissioner found claimant is not entitled to payment by defendants of medical costs for treatment of claimant's mental condition, or claimant's left arm problems, leg problems, chest pain, photophobia, respiratory ailments or rescue squad bills with the City of Omaha for January and May 2014. The deputy commissioner also ordered defendants to pay the costs of the arbitration proceeding.

Claimant asserts on appeal that the deputy commissioner's decision in this case violates claimant's due process rights and this matter should therefore be remanded for a new trial because the deputy commissioner who did not hear this case but issued the arbitration decision found claimant was not a credible witness. Claimant asserts the deputy commissioner erred in failing to award either PTD benefits or, alternatively, in failing to award substantially more than 30 percent industrial disability. Claimant asserts the deputy commissioner erred in finding claimant failed to carry his burden of proof that his pre-existing mental condition was aggravated by the work injury. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to payment by defendants of medical costs for treatment of claimant's mental condition. Claimant also asserts the deputy commissioner erred in failing to find claimant's correct classification for his weekly benefit rate is married with five exemptions, such that claimant's correct weekly benefit rate is \$950.20.

Claimant also argues in his appeal brief that defendants should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13 for an unreasonable underpayment of weekly benefits and for an unreasonable delay in the payment of weekly benefits. However, claimant's alleged entitlement to penalty benefits is not an appropriate issue on appeal because claimant failed to raise that issue in his petitions, in the hearing report jointly submitted by the parties at the hearing, or prior to or during the two hearing sessions before the deputy commissioner. Therefore, claimant's request to include the issue of his alleged entitlement to penalty benefits in this appeal is denied.

Defendants assert on cross-appeal that the deputy commissioner erred in finding claimant carried his burden of proof that the August 16, 2013, work injury materially aggravated claimant's pre-existing cervical spine condition and caused a right cubital tunnel injury. Defendants assert the deputy commissioner erred in awarding any industrial disability. Defendants assert the deputy commissioner erred in finding claimant is entitled to payment by defendants of all medical costs associated with claimant's cervical surgery and his right cubital tunnel surgery. Defendants also assert the deputy commissioner erred in ordering defendants to pay the costs of the arbitration proceeding.

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

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 November 30, 2015, 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 award of 30 percent industrial disability, which entitles claimant to 150 weeks of PPD benefits commencing on April 19, 2014. I affirm the deputy commissioner's finding that claimant is not entitled to PTD benefits. I affirm the deputy commissioner's finding that claimant carried his burden of proof that the work injury materially aggravated claimant's pre-existing cervical spine condition and caused a right cubital tunnel injury. I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that his pre-existing mental condition was caused by, or was aggravated by, the work injury. I affirm the deputy commissioner's finding that claimant is entitled to healing period benefits from October 2, 2013, through April 18, 2014. I affirm the deputy commissioner's finding that claimant's gross average weekly earnings for the work injury are \$1,518.43 and claimant's weekly benefit rate, classification single with one exemption, is \$841.26. I affirm the deputy commissioner's finding that claimant is entitled to payment by defendants of all medical costs associated with claimant's cervical surgery and his right cubital tunnel surgery. I affirm the deputy commissioner's finding that claimant is not entitled to payment by defendants of medical costs for treatment of claimant's mental condition, or claimant's left arm problems, leg problems, chest pain, photophobia, respiratory ailments or rescue squad bills with the City of Omaha for January and May 2014. I also affirm the deputy commissioner's order that defendants pay the costs of the arbitration proceeding. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I further affirm the deputy commissioner's finding that claimant was not a credible witness, I find the deputy commissioner's finding in that regard does not violate claimant's due process rights, and I deny claimant's request that this matter be remanded for a new trial for the following reasons:

Claimant asserts his due process rights were violated because Deputy Commissioner Christenson's replacement of Deputy Commissioner Pohlman pursuant to Iowa Code section 86.3 to issue the arbitration decision resulted in Deputy Commissioner Christenson ruling on the matter of claimant's credibility without witnessing the live testimony. Specifically, claimant asserts that because his credibility was at issue, such testimony must be heard live and, therefore, a new trial is necessary. However, claimant's request is denied for two distinct reasons.

The first reason claimant's request is denied is claimant failed to raise the issue by filing an application for rehearing during either the 20 days following the delegation of

authority to Deputy Commissioner Christenson or during the 20 days following the filing of the arbitration decision. As such, the power to conduct a new trial is statutorily unavailable, the issue cannot be heard on appeal, and claimant waived his ability to request a new trial.

The second reason claimant's request is denied is the precedent cited by claimant is distinguishable from the facts of this matter because neither claimant's demeanor nor his presentation had any impact on Deputy Commissioner Christenson's determination of claimant's credibility. Rather, Deputy Commissioner Christenson's determination as to claimant's credibility was based on clear contradictions in the record and it was not based on claimant's demeanor. Therefore, claimant's due process rights were not violated by Deputy Commissioner Christenson's finding that claimant was not a credible witness.

As to the first point, the statutory process for requesting a rehearing or retrial following the entry of an award by a deputy workers' compensation commissioner is provided in I.A.C section 876-4.24(17A,86), which states:

Any party may file an application for rehearing of a proposed decision in any contested case by a deputy commissioner or a decision in any contested case by the workers' compensation commissioner within 20 days after the issuance of the decision. A copy of such application shall be timely mailed by the applicant to all parties of record not joining therein. An application for rehearing shall be deemed denied unless the deputy commissioner or workers' compensation commissioner rendering the decision grants the application within 20 days after its filing. For purposes of this rule, motions or requests for reconsideration or new trial or retrial or any reexamination of any decision, ruling or order shall be treated the same as an application for rehearing.

(I.A.C section 876-4.24(17A,86))

Similarly, I.C.A. section 17A.16(2), the statute which supplies the minimum requirements for all State of Iowa administrative agencies states:

Any party may file an application for rehearing, stating the specific grounds for the rehearing and the relief sought, within twenty days after the date of the issuance of any final decision by the agency in a contested case. A copy of such application shall be timely mailed by the presiding agency to all parties of record not joining therein. Such application for rehearing shall be deemed to have been denied unless the agency grants the application within twenty days after its filing.

(I.C.A. section 17A.16(2))

In his appeal brief, claimant requests that this matter be remanded for a new trial. There is no doubt claimant's request is an application for rehearing which falls within the purview of sections 867-4.24 and 17A.16(2) because as an administrative agency, the workers' compensation commissioner "has no inherent power and has only such authority as is conferred by statute or necessarily inferred from the power expressly granted." Cincinnati Ins. Companies v. Kirk, 801 N.W.2d 856, 859 (Iowa App. 2011). As such, the commissioner is only vested with those powers to rehear evidence or conduct a new trial that are conferred by statute. The only two statutes addressing the power of the commissioner or a deputy commissioner to conduct or order a new trial are I.A.C section 876-4.24(17A,86) and I.C.A. section 17A.16(2). Both statutes require the application for rehearing to be filed within 20 days of the commission's decision. Because Iowa law does not vest the state's administrative agencies, including the workers' compensation commissioner, with any inherent authority, the Iowa courts "have consistently held that once the time periods have passed an agency is without further power to act." Kash v. Iowa Dept. of Emp. Services, 476 N.W. 2d 82, 83 (Iowa 1991). Therefore, because claimant failed to file an application for a new trial in the allotted 20 days, Deputy Commissioner Christenson would not have the power to conduct a new trial even if ordered to do so.

As pointed out by defendants in their appeal brief, an overview of the events leading up to claimant's assertion of a due process violation provides necessary context. The arbitration hearing before Deputy Commissioner Pohlman took place on May 20, 2015, and the hearing continued on July 15, 2015. Claimant received actual notice of the pending delegation of authority on or about August 14, 2015, via an email from Deputy Commissioner Pohlman. Claimant received formal notice of the delegation of authority pursuant to Iowa Code section 86.3 on September 8, 2015. Claimant did not resist, appeal, or request a new hearing after the order of delegation of authority was issued. Deputy Commissioner Christenson issued the arbitration decision on November 30, 2015. Claimant failed to request a new hearing within 20 days after the issuance of the arbitration decision pursuant to I.A.C. section 876-4.24(17A,86) and I.C.A. section 17A.16(2). Because claimant waited until he filed his appeal brief to raise the issue of an alleged violation of his due process rights and to request a new trial, his contentions in that regard are procedurally untimely and claimant's request for a new trial is denied on that basis.

As to the second basis for denial of claimant's request for a new trial, the facts of this case do not support a finding that claimant's due process rights were violated by Deputy Commissioner Christenson's finding that claimant was not a credible witness. A new trial is not required because the facts show that Deputy Commissioner's finding was fundamentally fair.

The sole case offered by claimant in support of his contention is In re Marriage of Seyler, 559 N.W.2d 7 (Iowa 1997). While the Iowa Supreme Court ultimately ruled that due process required a new trial in Seyler, the legal propositions contained in that decision do not apply in the manner asserted by claimant.

The Iowa Supreme Court noted in Seyler that situations arise where the trial judge is unable to issue a decision and the matter must be resolved by a second judge. Under such circumstances, the general rule is a successor judge may render a judgment consistent with due process so long as he or she orders a full or partial retrial, or in appropriate cases, becomes familiar with the entire existing record. Seyler, at p. 9.

The facts of this case are different from Seyler and support a finding that Deputy Commissioner Christenson rendered judgment consistent with due process through a review of the existing record. Seyler is an appeal from a dissolution of marriage and child custody case. In Seyler, “[t]he matter was tried to one judge and taken under advisement. Subsequently, for reasons not shown in the record, a second judge entered a decree disposing of the case.” (Id. at p. 8) Furthermore, the trial was comprised of “a half day of testimony, including several charged recitations of parental impropriety.” (id.) And “[d]espite the nature of the testimony at trial, there were no factual findings of credibility or discussion of the children’s best interests regarding custody.” (id.) Additionally, the trial court’s order conflicted with the property settlement stipulated to by the parties. (Id.) In light of that, the Supreme Court ruled, “In a child custody case where credibility of the witnesses is of paramount importance, due process requires that the deciding judge hear the evidence.” (Id. at p. 10)

The facts of Seyler are not similar to those in this case because the demeanor of the witnesses in Seyler was of paramount importance. Most significantly, to the extent claimant’s credibility factored into Deputy Commissioner Christenson’s decision, that determination was based solely on the inconsistencies present in the evidence and not on any observations, or lack thereof, related to live testimony. In fact, Deputy Commissioner Christenson clarified this particular point on page one of the arbitration decision, stating:

I have reviewed the transcript, records, and post hearing briefs of the parties. There is nothing in the transcript, records, or post hearing briefs indicating claimant’s demeanor at hearing was a factor that needed to be weighed and considered in rendering a decision. For this reason, claimant’s demeanor at hearing is not a factor discussed in the decision of this case.

(Arbitration Decision, p. 1)

When Deputy Commissioner Christenson discussed appellant’s credibility as a witness, the deputy’s findings related only to the undeniable inconsistencies present in the record between claimant’s testimony and the documented medical evidence and not claimant’s demeanor as a witness. (Arb. Dec., p. 1)

In light of the relevant facts, claimant’s due process rights were not violated by Deputy Christenson’s issuance of the arbitration decision based upon his review of the record. Violations of due process are not per se. Rather, the pertinent facts are determinative. The facts in this matter show claimant’s demeanor was not crucial to

Deputy Commissioner Christenson's decision. Rather, the lack of credibility found by Deputy Commissioner Christenson related to blatant contradictions with the documented medical evidence. Claimant clearly and repeatedly conveyed information which directly conflicted with the uncontroverted evidence. It is not necessary to observe testimony in order to fact check against it, such as when claimant alleged he never had problems with his neck prior to the work injury (Hearing Transcript 1, p. 26) and the medical records document that such a claim is false. (Ex. I, pp. 14-16; Ex. R, pp. 10-13) Claimant also alleged he had no mental health issues prior to the work injury, (Tr. 1, p. 116; Ex. 14a, pp. 2-5; Ex. 15 a, pp. 2-5) and the medical records document that such a claim is false. (Ex. J, pp. 13-14; Ex. R, pp. 1, 5, 10-16, 21) Therefore, such inconsistencies bear no relation to claimant's live testimony. Similarly, such inconsistencies could not be remedied in any way by claimant's live testimony unless claimant provided different answers. Therefore, I find Deputy Commissioner Christenson's review of the record afforded sufficient due process because claimant's demeanor through live testimony was not crucial to the Deputy Commissioner's decision regarding claimant's credibility or to the arbitration decision as a whole.

Finally, as part of his due process argument, claimant asserts Deputy Commissioner Christenson failed to address the alleged impropriety of the testimony of defense witness Jim Turner. (Claimant's Appeal Brief, pp. 10-11) The exchange referenced in claimant's brief between opposing counsel and Mr. Turner is clearly preserved in the hearing transcript for the second session of the hearing, which was held on July 15, 2015. (Tr. 2, p. 47) Claimant's counsel did not object to Mr. Turner's testimony, but now hold it up as a substantive violation of due process. Mr. Turner testified via telephone as an accommodation to claimant because claimant's case-in-chief ran long and caused the hearing to spill over into a second day. Mr. Turner was available to testify live on the first day of hearing, but could not do so on the second day and claimant's counsel was aware of this arrangement prior to the hearing. Accordingly, claimant cannot now argue Mr. Turner's testimony was improper because no objections were made as to the manner or the substance of Mr. Turner's testimony at the hearing.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 30, 2015, is affirmed in its entirety.

Defendants shall pay claimant healing period benefits from October 2, 2013, through April 18, 2014, at the weekly rate of eight hundred forty-one and 26/100 dollars (\$841.26).

Defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits from April 19, 2014, at the weekly rate of eight hundred forty-one and 26/100 dollars (\$841.26).

Defendants shall receive a credit for all weekly benefits previously paid.

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

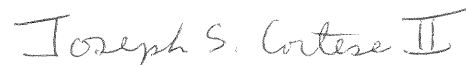
Defendants shall pay all medical costs associated with claimant's cervical surgery and his right cubital tunnel surgery as detailed in the arbitration decision.

Defendants shall pay the future medical expenses of claimant for his cervical condition and for his right upper extremity condition necessitated by the August 16, 2013, work injury.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and claimant 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 25th day of August, 2017.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Laura Pattermann
T.J. Pattermann
Attorneys at Law
300 W. Broadway, Ste. 145
Council Bluffs, IA 51503
lpattermann@sgallnerlaw.com
tjpattermann@sgallnerlaw.com

Paul Thomas Barta
Attorney at Law
1248 "O" St, Ste. 600
Lincoln, NE 68508
pbarta@baylorevenen.com