

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JIM THYGESEN,

Claimant,

vs.

CITY OF HARLAN,

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5057045

A P P E A L

D E C I S I O N

Headnotes: 1402.30, 1402.40, 1402.60,
2208, 2209, 2401, 2402, 2501

FILED
JUL - 3 2019
WORKERS' COMPENSATION

Defendants City of Harlan, employer, and EMCASCO Insurance Company, insurer, appeal from an arbitration decision filed on January 8, 2018. Claimant Jim Thygesen responds to the appeal. The case was heard on September 19, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 3, 2017.

In the arbitration decision, the deputy commissioner found claimant did not know, or in the exercise of reasonable diligence would not have recognized, the seriousness or probable compensable character of his hearing loss or tinnitus before he discussed his conditions and the possibility of filing a workers' compensation claim with his supervisor and a city administrator. The deputy commissioner found this discussion occurred roughly six months before February 4, 2015, when claimant filed his formal work injury report. The deputy commissioner also found defendant-employer acquired knowledge of claimant's injury during that same earlier discussion. Because claimant discovered his injury and defendants acquired knowledge of the injury during the same discussion, the deputy commissioner determined defendants failed to establish their Iowa Code section 85.23 90-day notice defense.

The deputy commissioner also determined claimant's petition, filed on July 27, 2016, was filed within two years of claimant's discovery of his injury—which, again, occurred within six months before his February 4, 2015, work report. As such, the deputy commissioner determined defendants failed to establish their Iowa Code section 85.26 statute of limitations defense.

Because the deputy commissioner determined defendants failed to prove either of their affirmative defenses, the deputy commissioner went on to address the nature and extent of claimant's disability. Relying on the opinions of Mark Zlab, M.D., and Richard Tyler, Ph.D., the deputy commissioner found claimant sustained permanent hearing loss and tinnitus due to his work for defendant-employer. The deputy commissioner ultimately determined claimant sustained ten percent industrial disability. The deputy commissioner likewise found defendants liable for all causally related medical bills, including claimant's hearing aids. Lastly, the deputy commissioner taxed all of claimant's claimed costs to defendants.

On appeal, defendants assert claimant's claim is barred for lack of timely notice and by the statute of limitations. Defendants alternatively assert claimant sustained no industrial disability as a result of his hearing loss/tinnitus.

Those portions of the proposed agency decision and ruling 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 arbitration decision filed on January 8, 2018 that relate to the issues properly raised on intra-agency appeal.

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

I affirm the deputy commissioner's finding that claimant did not know, or in the exercise of reasonable diligence would not have recognized, the seriousness or probable compensable character of his hearing loss or tinnitus before he discussed his conditions and the possibility of filing a workers' compensation claim with his supervisor and a city administrator. I affirm the deputy commissioner's finding that this discussion occurred roughly six months before February 4, 2015, when claimant filed his formal work injury report. I affirm the deputy commissioner's finding that defendant-employer acquired knowledge of claimant's injury during that same earlier discussion. As a result, I affirm the deputy commissioner's determination that defendants failed to establish their Iowa Code section 85.23 notice defense. I also affirm the deputy commissioner's finding that claimant's petition was filed within two years of claimant's discovery of his injury. Thus, I affirm the deputy commissioner's determination that defendants failed to establish their Iowa Code section 85.26 statute of limitations defense. I affirm the deputy commissioner's finding that claimant sustained ten percent industrial disability due to his work-related hearing loss/tinnitus.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant to be credible. While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed claimant's credibility in this matter. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

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

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 8, 2018 is affirmed in its entirety.

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits, at the rate of six hundred fifty-one and 27/100 dollars (\$651.27), commencing on December 17, 2014.

Defendants 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).

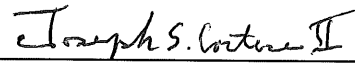
Defendants are assessed seven thousand one hundred ninety-nine and 00/100 dollars (\$7,199.00) for the cost of claimant's hearing aids and for the servicing of the hearing aids.

Defendants are responsible for all causally related medical bills.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding as follows: one hundred and 00/100 dollars (\$100.00) for the filing fee, twelve and 93/100 dollars (\$12.93) for service costs, one thousand five hundred thirty-five and 50/100 dollars (\$1,535.50) for the cost of Dr. Tyler's report, and fifty and 70/100 dollars (\$50.70) for the deposition transcript, 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 on this 3rd day of July, 2019.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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