

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASSIM KANDAH,

Claimant,

vs.

AMERICAN BUILDING MAINTENANCE,
d/b/a SERVICEMASTER GREEN,

Employer,

and

WESTFIELD INSURANCE,

Insurance Carrier,
Defendants.

File No. 5042650

A P P E A L
D E C I S I O N

FILED

MAR 31 2017

WORKERS' COMPENSATION

Head Note Nos: 1803, 1402.40, 1801.1
2700, 2907

Claimant Jassim Kandah appeals from an arbitration decision filed on July 24, 2015. Defendants American Building Maintenance, d/b/a ServiceMaster Green, employer, and its insurer, Westfield Insurance, respond to the appeal. This case was bifurcated and it was heard on February 3, 2014, and on November 24, 2014. It was considered fully submitted in front of the deputy workers' compensation commissioner on January 28, 2015.

The deputy commissioner found claimant carried his burden of proof that he sustained an injury on February 3, 2011, which arose out of and in the course of his employment with defendant-employer. The deputy commissioner found claimant is entitled to healing period benefits from August 15, 2011, through August 18, 2011. The deputy commissioner found claimant failed to carry his burden of proof that the work injury resulted in permanent disability. The deputy commissioner found claimant is not entitled to industrial disability benefits, or permanent total disability benefits, for the work injury. The deputy commissioner found claimant is not entitled to alternate medical care for the work injury. The deputy commissioner found claimant is entitled to payment of requested out-of-pocket medical expenses and medical mileage incurred by claimant from February 3, 2011, through August 18, 2011. The deputy commissioner ordered defendants to pay the unpaid disputed remaining balance of \$745.00 for the independent medical evaluation (IME) of claimant by Robin Sassman, M.D. The deputy commissioner ordered defendants to pay costs requested by claimant totaling \$276.89.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to carry his burden of proof that the work injury resulted in permanent disability. Claimant asserts the deputy commissioner erred in failing to award claimant either substantial industrial disability benefits, or permanent total disability benefits, for the work injury. Claimant also asserts the deputy commissioner erred in failing to find claimant is entitled to an award of additional healing period benefits from August 12, 2011, through August 14, 2011, from August 19, 2011, through May 9, 2012, and from August 14, 2012, through August 21, 2012. Claimant also asserts the deputy commissioner erred in failing to award claimant alternate medical care for the injury. Claimant also asserts the deputy commissioner erred by improperly considering Exhibit 28, an opinion statement from Robert Hirschl, M.D., which was obtained by claimant, which was offered into evidence at the arbitration hearing by claimant, but which then was withdrawn by claimant at the arbitration hearing before it was admitted into evidence. Claimant asserts in his appeal brief that the arbitration decision should therefore be vacated and this matter should be remanded to another deputy commissioner for review, with Exhibit 28 to be stricken from the record.

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.

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 July 24, 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 findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant sustained an injury on February 3, 2011, which arose out of and in the course of his employment with defendant-employer. I affirm the deputy commissioner's finding that claimant is entitled to healing period benefits from August 15, 2011, through August 18, 2011. I affirm the deputy commissioner's finding that claimant is not entitled to an award of additional healing period benefits from August 12, 2011, through August 14, 2011, from August 19, 2011, through May 9, 2012, and from August 14, 2012, through August 21, 2012. I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that the work injury resulted in any permanent disability. I affirm the deputy commissioner's finding that claimant is not entitled to either industrial disability benefits or permanent total disability benefits for the work injury. I affirm the deputy commissioner's finding that claimant is entitled to payment of requested out-of-

pocket medical expenses and medical mileage incurred by claimant from February 3, 2011, through August 18, 2011. I affirm the deputy commissioner's finding that claimant is not entitled to alternate medical care for the work injury. I affirm the deputy commissioner's order that defendants pay the unpaid disputed remaining balance of \$745.00 for Dr. Sassman's IME. I affirm the deputy commissioner's order that defendants pay costs requested by claimant in the arbitration proceeding totaling \$276.89.

I find claimant's assertion that the deputy commissioner erred by improperly considering Exhibit 28, and the assertion that the arbitration decision should therefore be vacated and this matter should be remanded to another deputy commissioner for review, to be entirely without merit. First of all, this issue should have been asserted and dealt with in an application for rehearing filed within 20 days after the filing of the arbitration decision. That was not done in this matter and claimant's contention in that regard is rejected on that basis.

Furthermore, it is clear from the arbitration decision that the deputy commissioner found the causation opinion of Todd Troll, M.D., to be most convincing. (Arb. Dec., p. 8.) The deputy commissioner provided a thorough and convincing analysis of Dr. Troll's opinions. (Id.) The deputy commissioner also found that the medical records from Majed Barazanji, M.D., and from Michael Knipp, M.D., support Dr. Troll's causation opinion. (Id.) The one very brief reference by the deputy commissioner in the arbitration decision to Exhibit 28 simply states:

On October 14, 2014, Dr. Hirschl responded to questions from claimant's counsel. He was not able to provide an opinion on causation. He noted that overall claimant's condition was degenerative in nature and his injury of February 2011 could aggravate his underlying condition. (Ex. 28, p.231)

(Arb. Dec., p. 4)

Nowhere in the arbitration decision is there any indication by the deputy commissioner that he relied on any of the information contained in Exhibit 28 to arrive at his findings regarding causation. There is ample evidence from Drs. Troll, Barazanji and Knipp to support the finding that claimant did not sustain any permanent disability. Therefore, it is clear claimant has not been prejudiced by the deputy commissioner's review of Exhibit 28 and by his brief reference to it in the arbitration decision.

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

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. While I performed a de novo review, I give considerable deference to findings of fact which are

impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of July 24, 2015, is affirmed in its entirety.

Defendants shall pay claimant temporary total disability benefits for August 15, 16, 17 and 18, 2011, at the rate of two hundred fourteen and 13/100 dollars (\$214.13) per week.

Defendants shall pay seven hundred forty-five dollars (\$745.00) for the remaining unpaid balance of Dr. Sassman's IME charge.

Defendants shall pay the requested medical expenses and medical mileage incurred by claimant from February 3, 2011, through August 18, 2011.

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

Pursuant to rule 876 IAC 4.33, defendants shall pay costs requested by claimant in the arbitration proceeding totaling \$276.89, 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 31st day of March, 2017.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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