

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SANDRA CALDERON,

Claimant,

vs.

SMITHFIELD FOODS, INC.,

Employer,

and

SAFETY NATIONAL CASUALTY CO.,

Insurance Carrier,
Defendants.

File No. 5068837

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.30; 1402.40;
1803; 1803.1; 2502; 2907

Claimant Sandra Calderon appeals from an arbitration decision filed on January 24, 2022. Defendants Smithfield Foods, employer, and its insurer, Safety National Casualty Co., respond to the appeal. The case was heard on July 13, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 9, 2021.

In the arbitration decision, the deputy commissioner found claimant sustained nine percent permanent impairment of her right shoulder as a result of the stipulated January 6, 2018, work injury, which entitles claimant to receive 36 weeks of permanent partial disability benefits commencing on March 30, 2021. The deputy commissioner found claimant failed to prove the work injury caused an injury to claimant's cervical spine, and the deputy commissioner found claimant is not entitled to receive industrial disability benefits for the work injury. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is not entitled to reimbursement from defendants for the cost of the first independent medical evaluation (IME) of claimant performed by Sunil Bansal, M.D., on April 18, 2019, and the deputy commissioner found that pursuant to section 85.39 claimant is not entitled to reimbursement for the cost of Dr. Bansal's second IME of claimant performed on December 31, 2020. The deputy commissioner found that under rule 876 IAC 4.33, claimant is not entitled to reimbursement for the cost of Dr. Bansal's first IME report issued on June 4, 2019, and the deputy commissioner found claimant is not entitled to reimbursement for the cost of Dr. Bansal's second IME report issued on January 22, 2021. The deputy commissioner

found that under rule 876 IAC 4.33, claimant is not entitled to reimbursement from defendants for her costs of the arbitration proceeding itemized in claimant's Exhibit 7.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to prove the work injury caused an injury to claimant's cervical spine, and claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive industrial disability benefits for the work injury. Claimant asserts the deputy commissioner erred in declining to assess defendants with claimant's costs itemized in Exhibit 7.

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

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

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, the arbitration decision filed on January 24, 2022, is affirmed in part, and is reversed in part.

I affirm the deputy commissioner's finding that claimant sustained nine percent permanent impairment of her right shoulder as a result of the work injury. I affirm the deputy commissioner's finding that claimant failed to prove she sustained an injury to her cervical spine as a result of the work injury, and I affirm the deputy commissioner's finding that claimant is not entitled to receive industrial disability benefits for the work injury. I affirm the deputy commissioner's finding that defendants should not be assessed with the cost of Dr. Bansal's second IME performed on December 31, 2020. I affirm the deputy commissioner's finding that defendants should not be assessed with the cost of the second functional capacity evaluation (FCE). I reverse the deputy commissioner's finding that pursuant to Iowa Code section 85.39, defendants should not be assessed with the \$2,971.00 cost of Dr. Bansal's first IME, and I reverse the deputy commissioner's finding that under rule 876 IAC 4.33 defendants should not be assessed with the filing fee and the two service fees.

I provide the following additional and substituted analysis for my finding that defendants should reimburse claimant for the \$2,971.00 cost of Dr. Bansal's first IME, and for my finding that defendants should reimburse claimant for the filing fee and for the two service fees:

Dr. Bansal performed two IMEs in this case, the first one on April 18, 2019, and the second one on December 31, 2020. (Ex. 1, pp. 1, 17) The reports for both IMEs provided impairment ratings for claimant's accepted right shoulder injury and for the alleged cervical injury. As noted by the deputy commissioner, defendants assert in their

post-hearing brief that no physician offered an impairment rating regarding claimant's neck condition before Dr. Bansal issued his first or second report and defendants assert claimant is entitled only to the pro rata share of the first report related to her right shoulder and not related to the alleged cervical condition. Defendants represented they had paid one-half of the cost of Dr. Bansal's first report.

In declining to award the cost of Dr. Bansal's two IMEs under Iowa Code section 85.39, the deputy commissioner found Dr. Bansal's reports were issued well before any physician retained by defendants provided a causation opinion on her cervical spine condition.

Iowa Code section 85.39(2) (2018), provides:

2. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

On appeal, claimant requests assessment of costs in her appeal brief and in her reply brief. Defendants' appeal brief does not address claimant's alleged entitlement to costs.

Bradley Lister, M.D., the authorized treating physician, provided an impairment rating for defendants regarding claimant's right shoulder condition on January 4, 2019, before Dr. Bansal performed either of his IMEs and before Dr. Bansal issued either of his IME reports. (JE 5, p. 93) Claimant disagreed with Dr. Lister's impairment rating and sought an IME with Dr. Bansal which was performed on April 18, 2019, three and a half months after Dr. Lister issued his impairment rating. Dr. Bansal issued the report for his first IME on June 4, 2019, which was five months after Dr. Lister issued his impairment rating.

The express wording of the statute does not discuss a pro rata share as argued by defendants at hearing. Under the statute, a claimant is entitled to recover the cost of one independent medical examination “[i]f an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low. . . .” Iowa Code § 85.39(2). Defendants did not offer any argument on appeal related to the recovery of the cost of the first IME. I find claimant is entitled to recover the \$2,971.00 cost of Dr. Bansal’s first IME, which amount includes the cost of the IME report.

I affirm the deputy commissioner’s finding that under section 85.39 defendants should not be assessed the cost of Dr. Bansal’s second IME performed on December 31, 2020, and I affirm the deputy commissioner’s finding that under rule 876 IAC 4.33 defendants should not be assessed the cost of the second IME report issued on January 22, 2021. I affirm the deputy commissioner’s finding that defendants should not be assessed the cost of the second FCE because that FCE was not ordered by a physician nor was it helpful in the case. Claimant also seeks reimbursement of the \$100.00 filing fee, and the two service fees of \$6.75 each. (Ex. 7) Using my discretion on de novo review, I find that under rule 876 IAC 4.33, defendants should reimburse claimant for the \$100.00 filing fee and for the two \$6.75 service fees.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 24, 2022, is affirmed in part, and is reversed in part.

Defendants shall pay claimant 36 weeks of permanent partial disability benefits commencing on March 30, 2021, at the stipulated weekly rate of seven hundred thirty-six and 18/100 dollars (\$736.18).

Defendants shall receive credit for all benefits previously paid.

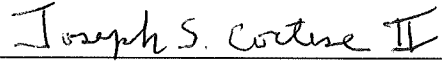
Defendants shall pay accrued benefits in a lump sum, together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant two thousand nine hundred seventy-one and 00/100 dollars (\$2,971.00) for the cost of Dr. Bansal’s first IME performed on April 18, 2019.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant one hundred and 00/100 dollars (\$100.00) for the filing fee and thirteen and 50/100 dollars (\$13.50) for the two service fees, and the parties shall split 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 15th day of July, 2022.

Handwritten signature of Joseph S. Cortese II in black ink.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Byrne (via WCES)

Michael J. Miller (via WCES)

Andrew Workman (via WCES)