BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ISMET CATIC,	:	File No. 5065604
Claimant,	:	APPEAL
vs.	:	DECISION
TYSON FOODS, INC.,	:	
Employer, Self-Insured, Defendant.	:	Head Notes: 1108.50; 1801; 1802; 1804; 1703; 2501;2502; 4100

Defendant Tyson Foods, Inc., self-insured employer, appeals from an arbitration decision filed on August 10, 2018. Claimant Ismet Catic responds to the appeal. The case was heard on May 9, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 30, 2018.

In the arbitration decision, the deputy commissioner found claimant's neck, low back, and bilateral shoulder, arm, forearm, wrist and hand conditions were cumulative, work-related injuries that arose out of and in the course of his employment with defendant. As a result of those injuries, the deputy commissioner found claimant was an odd-lot worker entitled to an award of permanent total disability. The deputy commissioner also awarded claimant medical expenses for the work-related conditions. Lastly, the deputy commissioner found claimant was entitled to reimbursement for the independent medical examination (IME) of Farid Manshadi, M.D., and awarded costs for the report of Arnold Delbridge, M.D.

On appeal, defendant argues claimant failed to satisfy his burden to prove he sustained work-related injuries to any body part other than his right elbow. Defendant additionally asserts claimant is not permanently and totally disabled under either the traditional industrial disability analysis or the odd-lot analysis, and defendant seeks a credit if claimant is found to be less than permanently totally disabled. Lastly, defendant appeals the deputy commissioner's award of medical expenses and the cost assessment.

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

I 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, those portions of the proposed arbitration decision filed on August 10, 2018, that relate to the issues properly raised on intra-agency appeal are affirmed in part with additional findings and analysis and modified in part.

With respect to whether claimant sustained work-related injuries to any body part beyond his right elbow, defendant takes particular issue with the deputy commissioner's decision to give the opinions of Robert Gordon, M.D., less weight than the opinions of Dr. Delbridge and Dr. Manshadi. In this case, however, none of the expert opinions were without flaws, including those of Dr. Gordon. The deputy commissioner appropriately and adequately addressed those flaws and provided her rationale for giving Dr. Gordon's opinions less weight. (See Arbitration Decision, p. 14) I adopt that rationale and affirm the deputy commissioner's determination to give Dr. Gordon's opinion less weight than the opinions of Dr. Delbridge and Dr. Manshadi.

Defendant asserts on appeal that the deputy commissioner misrepresented and manipulated Dr. Gordon's hearing testimony. Defendant is correct that the deputy commissioner made a mistake by attributing 30 percent of Dr. Gordon's practice to the treatment of defendant's employees when he actually testified to 15 percent. This, however, appears to have been a mere scrivener's error, and furthermore, the deputy commissioner did not rely on this fact when setting forth her rationale for giving Dr. Gordon's opinions less weight.

Defendant also criticizes the deputy commissioner for her statement that "Dr. Gordon characterized claimant's pain complaints as exaggerated and/or nonspecific" after the May 11, 2016, evaluation. (Defendant's Appeal Brief, p. 16) Because the medical records from that evaluation do not explicitly use the words "exaggerated and/or nonspecific," defendant claims the deputy commissioner "fictionalized" Dr. Gordon's notes from the appointment. A review of the medical records, however, makes it clear that the deputy commissioner was summarizing Dr. Gordon's comments in the evaluation. In paragraph after paragraph from the May 11, 2016 appointment, Dr. Gordon notes claimant was "animated" or "withdr[e]w suddenly" despite no objective or observable problems. (See Joint Exhibit 2, p. 7) The deputy commissioner also gave examples of the contradictions between claimant's complaints and Dr. Gordon's observations. (Arb. Dec., p. 5 ("While claimant complained of pain in his bilateral wrist, Dr. Gordon felt that claimant had full range of motion in the wrists and arms. (JE 2:7 - 8) Claimant did have tenderness of the paraspinal musculature in the thoracic region but no observable or objective problems in the lumbar region. (JE 2:8))) For these reasons, I am not persuaded by defendants' arguments that the deputy commissioner mischaracterized or misrepresented Dr. Gordon's opinions.

Again, I adopt the deputy commissioner's rationale for giving Dr. Gordon's opinions less weight than the opinions of Dr. Delbridge and Dr. Manshadi. Thus, with this additional analysis, I affirm the deputy commissioner's finding that claimant's neck, low back, and bilateral shoulder, arm, forearm, wrist, and hand conditions are

cumulative injuries that arose out of and in the course of his employment with defendant.

Regarding the extent of claimant's disability, I acknowledge - as did the deputy commissioner - that claimant did not put in an effort to seek out new employment after his last day at work for defendant-employer. However, as correctly noted by the deputy commissioner:

> Claimant's entire relevant work history is working at defendant's meat processing plant. He has limited English skills and very few, if any, transferable work skills. He does not appear to be able to find new employment though retraining. He has not shown efforts at seeking out new employment.
>
> However, Dr. Delbridge opined that there were very few jobs that would not result in further difficulty for the claimant over time. Claimant has also been found permanently disabled by the Social Security Administration. There is no evidence in the record of employment claimant could do with his current pain and restrictions.

(Arb. Dec., p. 16) I adopt the deputy commissioner's rationale and specifically find claimant is incapable of obtaining employment in any well-known branch of the labor market.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105-106 (Iowa 1985). Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. Id. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Id. at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Having found that claimant is not capable of finding employment in the competitive labor market, I conclude claimant made a prima facie case of total disability.

The burden then shifts to defendant to produce evidence showing the availability of suitable work.

While defendant offered opinions that claimant's injuries were not work-related, they offered no evidence to rebut claimant's testimony or expert opinions in the event his permanent disability and work restrictions were found to be work-related. There is no doctor's opinion, for example, to rebut Dr. Delbridge's opinion that claimant cannot engage in the work he did in the past. Nor is there a vocational report that identifies jobs available to claimant within the work restrictions and limitations outlined by Dr. Delbridge and Dr. Manshadi. I therefore find defendant did not produce evidence of suitable employment.

With these additional findings, I affirm the deputy commissioner's determination that claimant falls into the odd-lot category and is entitled to a finding of total disability.

Having determined claimant is entitled to a finding of total disability, I affirm the deputy commissioner's finding that no apportionment or credit is available to defendant.

Regarding medical expenses, I affirm the deputy commissioner's finding that claimant is entitled to an award of medical expenses as itemized in claimant's Exhibits 2 and 3 and I affirm the deputy commissioner's finding that claimant is entitled to future medical care relating to the work-related injuries to his neck, lower back, and bilateral shoulders, arms, forearms, wrist, and hand conditions. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue.

The last issue to address on appeal is the deputy commissioner's award of $300.00 for Dr. Manshadi's examination under Iowa Code section 85.39 and the taxation of Dr. Delbridge's report.

On January 19, 2017, defendant's authorized treating physician, Peter Pardubsky, M.D., issued an opinion that claimant sustained no functional permanent impairment from the April 21, 2016 work injury. (JE5, p.7) This triggered the reimbursement provisions of Iowa Code section 85.39. Claimant then obtained his IME with Dr. Manshadi on February 14, 2018. Because the reimbursement provisions of section 85.39 were triggered prior to claimant's IME with Dr. Manshadi, I agree with the deputy commissioner that claimant is entitled to reimbursement.

However, rather than awarding claimant the full $1,700.00 for Dr. Manshadi's examination <u>and</u> report under section 85.39, the deputy commissioner only awarded $300.00 for the report. This was based on an incorrect application of <u>DART v. Young</u>, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART").

The holding in <u>DART</u> only limited what could be assessed as a cost pursuant to rule 876 IAC 4.33. <u>See</u> <u>DART</u>, 867 N.W.2d at 844, 846-47 ("We must decide if the assessment-of-costs rule is limited to the cost of the doctor's report or whether the rule also includes the fees of the underlying medical examination that was the subject of the

report."). In other words, the holding did not limit the reimbursement provisions of Iowa Code section 85.39. Id. at 846 ("We agree that a physician's written report of an examination and evaluation under section 85.39 would be a reimbursable expense under section 85.39 . . . ."). While I agree with the deputy commissioner that the holding in DART suggests the cost of the report must be itemized separately from the cost of the evaluation when assessed under Iowa Administrative Code rule 876-4.33, the same is not true when the IME is under the umbrella of Iowa Code section 85.39.

Claimant, however, did not cross-appeal any issues in this case. Thus, despite the erroneous application of DART, I will not disturb the deputy commissioner's order. Defendant is therefore ordered to reimburse claimant $300.00 for Dr. Manshadi's IME under Iowa Code section 85.39.

With respect to Dr. Delbridge's report, defendant argues it was a second IME and awarding it as a cost was in error. Iowa Administrative Code rule 876-4.33(6) allows for taxation of the "reasonable costs of obtaining no more than two doctors' or practitioners' reports." Pursuant to DART, however, only the cost associated with the preparation of a written report of a claimant's IME can be assessed under rule 876-4.33. Id. at 846-847. More specifically, the court in DART held the "underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. at 846.

I have previously concluded that expenses for a physician's review of medical records are expenses associated with an examination and therefore cannot be taxed as a cost under rule 876 IAC 4.33(6). See Berte v. Snap-On Logistics, Co., File No. 5065025 (App. Dec., Nov. 22, 2019); Crosby v. Foodliner, Inc., File No. 5054995 (App. Dec., July 16, 2019); Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec. 17, 2018).

In this case, Dr. Delbridge's invoice indicates a $1,000.00 charge for the report and a $1,400.00 charge for records review. (Ex. 1, p. 9) I therefore conclude only $1,000.00 can be assessed as a cost under rule 876 IAC 4.33. The deputy commissioner's costs assessment is therefore modified.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 10, 2018, is affirmed in part with the above-stated additional findings and analysis and modified in part.

Defendant shall pay claimant permanent total disability benefits at a rate of four hundred forty-seven and 25/100 dollars ($447.25) commencing December 16, 2016, continuing during the period of permanent total disability.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) 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 (2) percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay the medical expenses as itemized in Exhibits 2 and 3.

Defendant shall pay claimant three hundred and 00/100 dollars ($300.00) for Dr. Manshadi's IME pursuant to Iowa Code section 85.39.

Pursuant to rule 876 IAC 4.33, defendant shall pay the costs of Dr. Delbridge's report in the amount of one thousand and 00/100 dollars ($1,000.00) as well as the remaining costs as set forth in Exhibit 1.

Pursuant to rule 876 IAC 4.33, defendant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 30th day of January, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Joshua M. Moon Via WCES

Jason Wiltfang Via WCES