ELECTRONICALLY FILED 2020-May-06 09:40:45 DIVISION OF WORKERS' COMPENSATION

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIKE TRIPLETT, Claimant, vs. OMG D/B/A HALLETT MATERIALS, Employer, and LIBERTY MUTUAL INSURANCE, Insurance Carrier, Defendants.	File No. 5056594 A P P E A L D E C I S I O N Head Note Nos.: 1402, 1403.30, 1803, 2800, 2907

Defendants OMG d/b/a Hallett Materials, employer, and Liberty Mutual Insurance, insurer, appeal from an arbitration decision filed on June 7, 2019. Claimant Mike Triplett cross-appeals.

On April 6, 2020, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

In the arbitration decision, the deputy commissioner found defendants failed to satisfy their burden to prove their affirmative notice and statute of limitations defenses. The deputy commissioner found claimant satisfied his burden to prove he sustained a cumulative trauma injury to his back that arose out of and in the course of his employment. The deputy commissioner found claimant sustained a 75 percent industrial disability as a result of his work-related back condition. The deputy commissioner found claimant was entitled to healing period benefits from March 23, 2018 through June 20, 2018 and that the commencement date for permanent partial disability benefits was October 1, 2016. The deputy commissioner found defendants were entitled to a four percent credit for claimant's preexisting disability. The deputy commissioner found the medical expenses listed in Exhibit 3 were causally related to claimant's work injury and found defendants responsible for those expenses. The

deputy commissioner found claimant was entitled to reimbursement for the independent medical examination performed by Sunil Bansal, M.D., along with costs in the amount of $456.00.

On appeal, defendants assert claimant's claim is barred by the notice provisions of Iowa Code section 85.23. In the alternative, defendants assert claimant failed to prove he sustained a work-related injury, but if he did, any industrial disability would be minimal. Lastly, defendants argue claimant is not entitled to reimbursement for the entirety of Dr. Bansal's IME.

On cross-appeal, claimant argues he is permanently and totally disabled as a result of his work-related injury.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on June 7, 2019 that relate to issues properly raised on intra-agency appeal and cross-appeal are affirmed in part, modified in part, and reversed in part.

I affirm the deputy commissioner's finding that defendants failed to satisfy their burden to prove their affirmative notice defense under Iowa Code section 85.23. In doing so, I affirm the deputy commissioner's finding that pursuant to the discovery rule, claimant did not discover the possible compensable nature of his claim until the first week of April 2016. I likewise affirm the deputy commissioner's finding that claimant notified defendant-employer (Kyle Timmer) in early April 2016 about a potential work-related injury.

Some of the above-stated findings were based on the deputy commissioner's findings regarding claimant's credibility, particularly with respect to his conversation with Mr. Timmer. 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, by the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed the credibility of claimant. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's credibility findings.

I affirm the deputy commissioner's finding that claimant sustained a work-related cumulative trauma injury to his back. I affirm the deputy commissioner's finding that claimant's job for defendant-employer lighted up and accelerated his degenerative back condition. In doing so, I affirm the deputy commissioner's finding that the opinions of

Dr. Bansal, as supported by James McQueen, D.O., were more persuasive than those of Wade K. Jensen, M.D.

The remaining issues on appeal are the extent of claimant's industrial disability and Dr. Bansal's IME costs.

Regarding the extent of claimant's permanent disability, the deputy commissioner found claimant sustained a 75 percent industrial disability. For the reasons that follow, I modify the deputy commissioner's award and find claimant sustained a 50 percent industrial disability.

Defendants on appeal argue claimant has no credible permanent restrictions as a result of his work-related back condition. While defendants are correct that claimant's surgeon, John Gachiani, M.D., cleared claimant "to gradually return to full activity without any restrictions," claimant credibly testified he has difficulty sitting, sleeping, lifting more than 50 pounds. (Joint Exhibit 4, p. 111; Hearing Transcript, pp. 86-91) Thus, claimant's testimony is not consistent with Dr. Gachiani's "full activity" release.

As correctly noted by the deputy commissioner, claimant's employment history is not significant for work in the sedentary to medium categories. Thus, based on claimant's credible testimony that he is unable to lift more than 50 pounds, claimant would be precluded from returning to many of his former jobs.

On the other hand, claimant failed to search for any jobs upon his relocation to Washington. This makes it difficult to assess the credibility of Dr. Bansal's restrictions, which limited claimant to lifting no more than 25 pounds, along with no frequent standing for more than 30 minutes at a time and no frequent bending or twisting. (Claimant's Exhibit 2, p. 24) Further, while I recognize claimant does not have significant experience in the sedentary to medium work categories, his physical limitations did not preclude him from attempting such work. Claimant's failure to look for work is also suggestive of a lack of motivation to reenter the workforce. These facts do not support an award of 75 percent industrial disability. Instead, I find claimant sustained a 50 percent industrial disability. The deputy commissioner's industrial disability finding is therefore modified.

Lastly, with respect to reimbursement for Dr. Bansal's IME, the deputy commissioner ordered defendants to reimburse claimant for the entirety of Dr. Bansal's bill pursuant to Iowa Code section 85.39. For the reasons that follow, the deputy commissioner's findings regarding reimbursement under Iowa Code section 85.39 is respectfully reversed.

The deputy commissioner correctly noted that Dr. Bansal performed his IME after the IME of Dr. Jensen, who was a physician retained by the employer. However, Dr. Jensen did not offer an evaluation of permanent disability in his April 24, 2017 IME. Instead, he offered an opinion on causation.

The Commissioner has previously held that there is a "distinct difference" between evaluations of permanent disability and evaluations to determine causation. See Reh v. Tyson Foods, Inc. File No. 5053428 (App. Dec., March 26, 2018). Thus, consistent with the Commissioner's past decisions, I find Dr. Jensen's IME did not trigger the reimbursement provisions of Iowa Code section 85.39. The deputy commissioner's finding that claimant is entitled to reimbursement under Iowa Code section 85.39 is therefore respectfully reversed.

Under the Iowa Supreme Court's holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the cost associated with the preparation of a written report of a claimant's IME can be assessed as a cost at hearing under Iowa Administrative Code rule 876-4.33. See 867 N.W.2d at 846-847. Dr. Bansal's bill indicates that he charged $2,404.00 for preparation of his written report. I therefore assess $2,404.00 to defendants for the cost of Dr. Bansal's report pursuant to 876 IAC 4.33. The remainder of the costs assessed by the deputy commissioner were not appealed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 7, 2019 is affirmed in part, modified in part, and reversed in part.

Defendants shall pay healing period benefits from March 23, 2018 through June 20, 2018 at the weekly rate of eight hundred forty-five and 98/100 dollars ($845.98).

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing October 1, 2016 at the weekly rate of eight hundred forty-five and 98/100 dollars ($845.98).

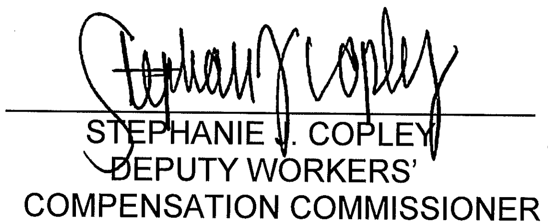
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 shall pay the medical cost found in Exhibit 3.

Pursuant to rule 876 IAC 4.33, defendants shall pay the costs of the arbitration decision in the amount of two thousand eight hundred sixty and 00/100 dollars ($2,860.00), and the parties shall split the cost of the appeal, including the cost of the hearing transcript.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 6th day of May, 2020.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Steve Hamilton	Via WCES
René Charles Lapierre	Via WCES
Deena A. Townley	Via WCES