

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JULOUS E. BARNHART,

Claimant,

vs.

JOHN DEERE DUBUQUE WORKS
OF DEERE & COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 5065851

A P P E A L

D E C I S I O N

Head Notes: 1600; 2208; 2502

Defendant John Deere Dubuque Works, self-insured employer, appeals from an arbitration decision filed on March 22, 2019. Claimant Julous Barnhart responds to the appeal. The case was heard on November 27, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 18, 2018.

In the arbitration decision, the deputy commissioner found claimant's hearing loss arose out of and in the course of his employment with defendant. More specifically, the deputy commissioner found claimant sustained a 14.54 percent hearing loss, which entitles him to receive 25.445 weeks of permanent partial disability benefits pursuant to Iowa Code section 85B.6. The deputy commissioner found claimant's petition and amended petition were sufficient to give defendant notice of the incident giving rise to, and the general nature of, claimant's claim. The deputy commissioner determined claimant's scrivener's error had no identifiable effect on the proceedings and caused defendant no articulable prejudice. As a result, the deputy commissioner declined to dismiss claimant's claim and likewise determined defendant failed to carry its burden of proof to establish claimant's claim was untimely under Iowa Code section 85.26(1). Lastly, the deputy commissioner found claimant proved his entitlement to receive reimbursement from defendant for claimant's independent medical examination (IME) with Richard S. Tyler, Ph.D.

On appeal, defendant argues the deputy commissioner erred by finding a causal relationship between claimant's job and his hearing loss. In the alternative, defendant asserts the deputy commissioner erred by not finding claimant's claim to be barred by the statute of limitations. Lastly, defendant argues the deputy commissioner erred by ordering defendant to reimburse claimant for his IME.

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 March 22, 2019, that relate to the issues properly raised on intra-agency appeal are affirmed in part without additional comment, affirmed in part with additional analysis, and reversed in part.

I affirm the deputy commissioner's finding that claimant's hearing loss arose out of and in the course of his employment with defendant. I affirm the deputy commissioner's reliance on the opinions of Monica Duve, AuD, and Dr. Tyler. I affirm the deputy commissioner's finding that claimant sustained a 14.54 percent hearing loss, which entitles him to receive 25.445 weeks of permanent partial disability benefits pursuant to Iowa Code section 85B.6.

I affirm the deputy commissioner's finding that claimant's petition and amended petition were sufficient to give defendant notice of the incident giving rise to, and the general nature of, claimant's claim. I affirm the deputy commissioner's finding that claimant's scrivener's error had no identifiable effect on the proceedings and caused defendant no articulable prejudice. As such, I affirm the deputy commissioner's decision not to dismiss claimant's claim.

I also affirm the deputy commissioner's finding that defendant failed to carry its burden of proof to establish that claimant's claim was untimely under Iowa Code section 85.26(1). In doing so, I offer the following additional brief analysis:

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury.

For hearing loss claims, Iowa Code section 85B.8 provides that the date of injury is the date of occurrence of any one of the following events: transfer from excessive noise exposure employment; retirement; or termination. Iowa Code section 85B.8.

In this case, claimant retired on May 30, 2015, and his petition was timely filed within two years on March 30, 2017. While the original petition did not contain the date of injury, claimant's amended petition, filed on April 26, 2017, did, and it was also filed within two years of claimant's injury date. With this additional analysis, I affirm the deputy commissioner's finding that defendant failed to carry its burden of proof to establish claimant's claim was untimely.

For the reasons that follow, the deputy commissioner's finding that claimant is entitled to receive reimbursement for his IME is reversed.

Iowa Code section 85.39 allows claimants to request reimbursement for an IME "[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 section

85.39. As I have previously held, there is a distinct difference between evaluations of permanent impairment and evaluations to determine causation. See Reh, File No. 5053428 (App. Mar. 26, 2018).

In this case, Dr. Tyler's IME occurred in August of 2018. Claimant was evaluated by a physician of defendant's choosing, L. Peter Alt, M.D., in August of 2013. However, Dr. Alt did not offer an evaluation of permanent disability; instead, it was an opinion denying causation. (Joint Exhibit 1, p. 3) I find Dr. Alt's causation opinion did not trigger the reimbursement provisions of Iowa Code section 85.39. I further conclude there had been no evaluation of permanent disability by an employer-retained physician when claimant obtained his IME with Dr. Tyler. Thus, I conclude claimant is not entitled to receive reimbursement for his IME under Iowa Code section 85.39. The deputy commissioner's finding regarding claimant's IME reimbursement is therefore reversed.

I decline to assess any of Dr. Tyler's report as a cost. Under DART v. Young, 856 N.W.2d 383 (Iowa 2015), the allowable taxable costs are the reports themselves, and not the underlying examination. In this case, however, Dr. Tyler failed to itemize his bill. (Ex. 12) Therefore, consistent with my past decisions, no portion of Dr. Tyler's IME charge can be taxed as a cost under rule 876-4.33. See Reh, File No. 5053428 (App. Mar. 26, 2018).

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on March 22, 2019 is affirmed in part with the above-stated additional analysis and reversed in part.

Defendant shall pay claimant twenty-five point four four five (25.445) weeks of permanent partial disability benefits commencing on May 30, 2015.

Defendant shall receive credit for all weekly benefits paid to date, if any.

All weekly benefits shall be paid at the stipulated weekly rate of seven hundred seventy-three and 75/100 dollars (\$773.75).

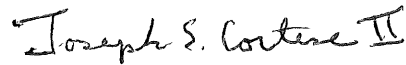
Defendants employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or 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).

Defendant shall pay a late discovery sanction of one hundred and no/100 dollars (\$100.00).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of one hundred and no/100 dollars (\$100.00), 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), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 27th day of March, 2020.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Jenny L. Weiss Via Email: jweiss@fuerstelaw.com

Dirk J. Hamel Via WCES