BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JIMMY CROSBY, Claimant, vs. FOODLINER, INC., Employer, and TRAVELERS, Insurance Carrier, Defendants.	:	File No. 5054995 APPEAL DECISION Head Notes: 1108; 1803; 2502; 2907

Defendants Foodliner, Inc., employer, and its insurer, Travelers, appeal from an arbitration decision, filed on February 13, 2018, and from a ruling on defendants' motion for rehearing and application for a nunc pro tunc order, filed on March 8, 2018. Claimant Jimmy Crosby responds to the appeal. The case was heard on March 1, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on March 27, 2017.

In the arbitration decision, the deputy commissioner found claimant reached maximum medical improvement (MMI) on September 16, 2016, based on the opinion of Todd Harbach, M.D. The deputy commissioner found claimant sustained 60 percent industrial disability due to his stipulated September 2, 2015, work injury. The deputy commissioner, however, found claimant was not entitled to reimbursement for his unauthorized treatment with Ojiaku Ikezuagu, M.D. Lastly, the deputy commissioner ordered defendants to pay for claimant's independent medical examination (IME) with Sunil Bansal, M.D., performed on October 31, 2016.

In the ruling on defendants' motion for rehearing and application for a nunc pro tunc order, the deputy commissioner amended the issues and stipulations section of the arbitration decision but did not modify the above-mentioned findings.

On appeal, defendants assert claimant had not yet reached MMI at the time of the arbitration hearing. As such, defendants assert the extent of claimant's industrial disability, if any, was not ripe for determination. In the alternative, defendants assert claimant sustained little or no industrial disability due to the work injury. Lastly, defendants assert claimant is not entitled to reimbursement for claimant's IME with Sunil Bansal, M.D.

Defendants assert on appeal that the arbitration decision and ruling on defendants' motion for rehearing and application for a nunc pro tunc order should be affirmed in their entirety.

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

Pursuant to Iowa Code sections 17A.5 and 86.24, the proposed arbitration decision, filed on February 13, 2018, and the ruling on defendants' motion for rehearing and application for a nunc pro tunc order, are affirmed in part with additional analysis, affirmed in part without additional comment, and reversed in part.

Turning first to whether claimant reached MMI at the time of the hearing, I affirm the deputy commissioner's finding that claimant reached MMI as of September 16, 2016, with the following additional findings and analysis:

Defendants argue claimant was not at MMI at the time of the hearing because he was receiving treatment leading up to and including the day of the hearing. The hearing in this case occurred on March 1, 2017. Defendants are correct that as of February 14, 2017, two weeks before hearing, Kyle Galles, M.D., attempted another injection into claimant's right shoulder and asked claimant to follow up in three to four weeks to evaluate his response. (Exhibit 4, page 71) Defendants, however, overlook the context of the February 14, 2017, appointment and injection.

Since mid-October of 2015, claimant had been receiving treatment from both Dr. Galles and Dr. Harbach. At claimant's first appointment with Dr. Harbach on October 18, 2015, Dr. Harbach injected claimant's right shoulder. (Ex. 4, p. 35) Claimant's pain actually increased after the injection. (Ex. 4, p. 36) Just two months later, at an appointment on December 17, 2015, Dr. Harbach indicated claimant was "stuck and not getting better." (Ex. 4, p. 41) At claimant's follow-up appointment on January 15, 2016, Dr. Harbach indicated he "would not recommend any surgical procedure" for claimant and that claimant "had reached a steady state without change." (Ex. 4, p. 43) As a result, Dr. Harbach placed claimant at MMI with no restrictions. (Ex. 4, p. 43)

When claimant returned to Dr. Harbach after his symptoms worsened upon his return to work, Dr. Harbach referred claimant to Dr. Galles for a second opinion regarding his shoulder. (Ex. 4, p. 47) Dr. Galles initially felt claimant's pain was "shoulder mediated." (Ex. 4, p. 50) However, upon examination and review of claimant's imaging studies, Dr. Galles agreed "there is really nothing shoulder wise that appears to be surgical in nature." (Ex. 4, p. 56) Claimant was referred back to Dr. Harbach to determine whether claimant's pain originated from his neck. In other words, Dr. Galles had nothing substantive or alternative to offer claimant in terms of a diagnosis or treatment of his symptoms.

Upon claimant's return to Dr. Harbach, he was referred for an EMG/nerve conduction study. The test, however, did "not show any evidence of cervical radiculopathy." (Ex. 4, p. 63) Dr. Harbach sent claimant for a cervical epidural steroid injection (ESI). As explained by Dr. Harbach, "If this helps, then [it] really is his cervical spine; however, if he is no better then I will consider sending him for 2nd opinion to one of our shoulder specialists because of [sic] the workup points to his right shoulder being the pathology." (Ex. 4, p. 63)

Claimant followed up with Dr. Harbach on January 26, 2017, after his cervical ESI, which claimant reported was not helpful. (Ex. 4, p. 68) Based on the negative result, Dr. Harbach returned to his original opinion that claimant's pain originated in his shoulder: "Adding everything together including an EMG that was negative, a cervical [ESI] which did not help and a clinical exam which seems to point away from the cervical spine, I really feel this patient clinically seems to have a shoulder mediated problem." (Ex. 4, p. 68) Dr. Harbach sent claimant back to Dr. Galles to "reevaluate" him. (Ex. 4, p. 68) At that point, therefore, Dr. Harbach had no substantive or alternative recommendations for claimant.

This brings us to the February 14, 2017 appointment. Dr. Galles noted claimant "had quite an extensive evaluation and workup to date by Dr. Harbach" yet claimant was still having deep right shoulder pain. (Ex. 4, p. 71) Dr. Galles recommended an injection to the right shoulder "[t]o further sort this out." (Ex. 4, p. 71) Claimant was instructed to return in three to four weeks to discuss his response to the injection. (Ex. 4, p. 71)

As mentioned above, however, claimant had already received a right shoulder injection at his very first appointment with Dr. Harbach. That initial injection neither explained or alleviated his symptoms. There is nothing to suggest Dr. Galles expected a different result with the injection performed on February 14, 2017. Instead, it appears the February 14, 2017, injection was a last-ditch effort. Claimant testified at hearing, however, that neither shoulder injection alleviated his symptoms. (See Hearing Transcript, p. 46)

As of claimant's most recent appointment with Dr. Galles before hearing, both Dr. Galles and Dr. Harbach had evaluated claimant on numerous occasions, reviewed his imaging and diagnostic testing, and offered various forms of conservative treatment, yet claimant continued to have steady and ongoing symptoms. At the time of the hearing, neither Dr. Harbach nor Dr. Galles were recommending treatment or testing that claimant had not already attempted. (See Tr., p. 46) Furthermore, in response to a letter from defendants' counsel written on February 24, 2017, Dr. Harbach opined claimant reached MMI for his neck as of September 16, 2016. (Def. Ex. L, p. 2)

Consistent with his medical records, claimant testified that medically and physically nothing has substantially changed regarding his condition. (Tr., p. 68)

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, defines MMI as follows: "A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated." Guides, p. 601. The Guides also note that "impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximum medical improvement (MMI)." Guides, p. 19. Before permanency can be determined, there must be a finding "that the condition is 'not likely to remit in the future despite medical treatment.'" Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010)

In this case, given the absence of any true remission of claimant's symptoms or recommendations for new courses of treatment, I find claimant's condition was well stabilized and unlikely to change substantially at the time of the hearing. There is little evidence claimant's condition was likely to remit in the future, particularly given claimant did not positively respond to the injection administered just before hearing. Thus, with this additional analysis, I affirm the deputy commissioner's finding that claimant was at MMI at the time of the hearing. As such, I affirm the deputy commissioner's determination that the extent of claimant's permanent disability was ripe for determination.

Regarding the extent of claimant's permanent disability, I affirm the deputy commissioner's determination that claimant sustained 60 percent industrial disability without additional comment. I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner on this issue.

The last issue raised on appeal by defendants is whether defendants should be responsible for the costs of claimant's IME with Dr. Bansal. The deputy commissioner ordered defendants to pay for the entirety of claimant's IME but did not address whether

this payment was pursuant to Iowa Code section 85.39 or Iowa Administrative Code rule 876-4.33. Claimant concedes in his responsive brief on appeal that the reimbursement provisions of Iowa Code section 85.39 apply in this case. Claimant asserts defendants should be taxed with the cost of Dr. Bansal's report in the amount of $2,932.00 pursuant to the Iowa Supreme Court's holding in DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Claimant is correct that the DART decision holds 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 rule 876-4.33. See 867 N.W.2d 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 under rule 876 IAC 4.33(6). See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec. 17, 2018).

In this case, Dr. Bansal's bill is broken down between the "Physical Examination" in the amount of $648.00 and the "Record Review and Report" in the amount of $2,932.00. (Ex. 21, p. 144) Claimant failed to establish which portion of the $2,932.00 was associated with Dr. Bansal's preparation of his report versus his records review. Because claimant did not offer any evidence regarding what was charged solely for Dr. Bansal's report, I conclude no portion of Dr. Bansal's $3,580.00 IME charge can be taxed as a cost under rule 876-4.33. See Kirkendall, File No. 5055494 (App. Dec. 17, 2018); Reh v. Tyson Foods, Inc., File No. 5053428 (App. March 26, 2018). The deputy commissioner's order for defendants to pay claimant $2,932.00 for Dr. Bansal's IME is therefore reversed.

ORDER

IT IS THEREFORE ORDERED that the proposed arbitration decision, filed on February 13, 2018, and the ruling on defendants' motion for rehearing and application for a nunc pro tunc order, filed on March 8, 2018, are affirmed in part with additional analysis, affirmed in part without comment, and reversed in part.

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the weekly rate of five hundred thirty and 41/100 dollars ($530.41) commencing on September 11, 2015.

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 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), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 16th day of July, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Fredd J. Haas
Attorney at Law
5001 S.W. 9th St.
Des Moines, IA 50315
freddjhaas1954@gmail.com

Chris J. Scheldrup
Jason P. Wiltfang
Attorneys at Law
905 Third Street SE, Suite 111
Cedar Rapids, IA 52401
cscheldrup@corridorlaw.legal
jwiltfang@corridorlaw.legal

Patrick V. Waldron
Attorney at Law
505 Fifth Avenue, Suite 729
Des Moines, IA 50309
pwaldron@pattersonfirm.com