BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PETER LOFTHUS, Claimant, vs. KOCH BROTHERS, INC., Employer, and EMC INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5064144, 5064145 A P P E A L D E C I S I O N Head Notes: 1402.3; 1402.40; 1402.50; 1803; 2401; 2501; 2502; 2801; 2907

Claimant Peter Lofthus appeals from an arbitration decision filed on November 30, 2020. Koch Brothers, Inc., employer, and its insurer, EMC Insurance Company, cross-appeal. The case was heard on August 26, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 7, 2019.

In the arbitration decision, the deputy commissioner found claimant sustained an injury that arose out of and in the course of his employment on October 25, 2016. However, the deputy commissioner determined claimant failed to provide timely notice of his claim, meaning his claim was barred by statute. Lastly, the deputy commissioner determined claimant was entitled to reimbursement for his independent medical examination (IME).

On appeal, claimant asserts the deputy commissioner erred in his determination that claimant failed to provide timely notice. More specifically, claimant asserts the deputy erroneously failed to consider the discovery rule and whether claimant provided verbal notice to defendants. Claimant asserts he sustained a substantial industrial disability as a result of his injury and is entitled to reimbursement for medical expenses and costs.

On cross-appeal, defendants assert the deputy commissioner erred in finding claimant sustained an injury that arose out of and in the course of his employment. Defendants also assert the deputy commissioner erred in ordering defendants to reimburse claimant for the cost of his IME.

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 86.24 and 17A.15, the arbitration decision filed on November 30, 2020, is affirmed in part, modified in part, and reversed in part.

I turn first to the deputy commissioner's finding that claimant sustained an injury that arose out of and in the course of his employment. I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner regarding this issue. The deputy commissioner's finding that claimant sustained a work-related injury is affirmed.

Despite this finding, the deputy commissioner found claimant's claim was barred for failure to provide the required statutory notice. Claimant asserts on appeal that the deputy commissioner improperly failed to consider whether the discovery rule tolled the 90-day period for providing notice. Defendants assert claimant failed to properly raise and preserve the discovery rule theory. I find this issue is moot, however, because I instead find claimant timely provided defendants with actual notice of the work injury within the statutory 90-day period.

I agree with the deputy commissioner's finding that there is insufficient evidence to rely on claimant's testimony about sending defendants an email to report his injury on or about January 5, 2017. I likewise agree that in terms of *written* notice, the approximate date of February 1, 2017, as listed on the FROI is more persuasive. This does not end the analysis, however.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, *unless the employer has actual knowledge of the occurrence of the injury.*

The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work-related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

While claimant was unsure when exactly he provided verbal notice to his employer, he consistently testified it was either in December of 2016 or January of 2017. At hearing, claimant testified he first verbally reported his injury to Kent Festvog in December of 2016. (Hearing Transcript, p. 29) Claimant then testified he followed up with Mr. Festvog either by phone or by email in January of 2017. (Tr., p. 30) On cross-examination, claimant again reiterated his belief that he spoke to Mr. Festvog in December and January: "I'm pretty certain that I talked to Kent in December and then again in January." (Tr., p. 74)

In his deposition, claimant again testified he contacted Mr. Festvog in December of 2016: "I do recall contacting our finance guy, who took care of this kind of stuff, in December because this was not going away. . . . So in December I contacted Kent. I think it was verbally; it may have been an email." (Defendants' Ex. A [Depo. Tr., p. 26]) Claimant went on to state that he again contacted Mr. Festvog in January before they filled out the FROI. (Def. Ex. A [Depo. Tr., p. 26])

During his recorded statement with defendant-insurer, which was most contemporaneous with his injury, claimant was asked when he first notified defendant-employer about his neck pain. (Claimant's Exhibit 3, p. 23) Claimant responded, "I finally decided I needed to do somethin' about the first week in January, I went over and talked to her, to Kent." (Cl. Ex. 3, p. 23)

Claimant's testimony regarding his verbal notice of his injury to Mr. Festvog was uncontroverted. Mr. Festvog did not testify, nor did defendants offer any other testimony or evidence to dispute claimant's testimony regarding his verbal discussions with Mr. Festvog in late December of 2016 or early January of 2017. This is significant, as claimant's injury occurred on October 25, 2016, meaning his 90-day notice period ended on January 24, 2017. The latest claimant indicated he verbally gave notice to Mr. Festvog was "about the first week in January." (Cl. Ex. 3, p. 23) While claimant could not recall the exact moment or even week in which he provided verbal notice to Mr. Festvog, the uncontroverted evidence is that claimant provided such verbal notice no later than the first week in January. Thus, I find claimant gave defendant-employer verbal notice within the 90-day statutory notice period.

The fact that Mr. Festvog eventually filled out the FROI with claimant is highly indicative that claimant's verbal report made him aware that an injury occurred and that it might be work-related. Furthermore, claimant testified he reported his injury to Mr. Festvog "because he was the one responsible for reporting" workers' compensation injuries." (Tr., p. 30) As a result, I find claimant provided verbal notice of his injury within 90 days of its occurrence and that this verbal notice alerted defendant-employer to the possibility of a potential workers' compensation claim. I therefore find defendants had actual knowledge of claimant's injury within the 90-day statutory notice period. In other words, I find defendants had timely notice of claimant's injury, meaning their affirmative notice defense fails. The deputy commissioner's finding that claimant's claim is barred by Iowa Code section 85.23 is therefore respectfully reversed.

Having determined claimant's claim is not barred for failure to provide timely notice, I must now consider the extent of claimant's industrial disability. For the reasons set forth by the deputy commissioner, I find the opinions of Sunil Bansal, M.D., to be more persuasive than those of Charles Mooney, M.D. I therefore find claimant sustained a five percent whole person impairment as a result of his work-related injury. (See Cl. Ex. 1, p. 15)

Dr. Bansal also indicated claimant should avoid lifting more than 25 pounds. (See Cl. Ex. 1, p. 15) This is consistent with claimant's testimony that he avoids lifting

anything of "significant weight." (Tr., p. 43) Thus, I also find claimant's ability to lift significant weight has been negatively impacted by his work injury.

That said, claimant, who was 60 years old at the time of the hearing, has sought out and received virtually no treatment for his injury and missed no work due to his injury before being terminated for unrelated reasons. (Tr., pp. 40-41, 43) His job search since being terminated by defendant-employer consisted of a single application for an IT position. (Tr., p. 44) Though he helps his wife with her interpreting agency business, I find claimant is not significantly motivated to find new employment. Furthermore, there is no evidence claimant would not still be employed with defendant-employer but for his poor performance issues. Even with his lifting restriction, claimant was not required to lift more than 20 pounds in his job. (Tr., p. 16) While claimant would be precluded from returning to some of his past work due to his limited lifting capacities, he still remains capable of performing IT work. For these reasons, I find claimant sustained a minimal loss of earning capacity. I find claimant's work injury resulted in a ten percent loss of earning capacity.

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34.

Considering all of the above-stated factors, I found claimant sustained a ten percent loss of earning capacity. Industrial disability of ten percent entitles claimant to 50 weeks of permanent partial disability benefits starting on the stipulated commencement date of October 25, 2016.

Claimant also asserts he is entitled to reimbursement for the requested past medical expenses itemized on pages 37a, 37b and 41 of his Exhibit 6, along with corresponding mileage. (Tr., p. 78) Defendants are correct that page 41 is an expense related to claimant's routine physical with his primary care provider. However, the treatment note indicates that "1 of the major concerns he [wants] to talk about today is his ongoing neck pain." (Joint Ex. 1, p. 10) Claimant was prescribed a muscle relaxer

for his neck and was sent for an MRI of the cervical spine. (JE 1, p. 13) Thus, although the purpose of the appointment was for a physical, claimant received treatment for his work-related neck condition. The same is true for the MRI expenses on page 37a, and the Regenexx expenses on page 38b. The MRI was ordered due to claimant's work-related neck condition, and claimant sought a consultation with Regenexx due to his work-related neck condition. Importantly, defendants stipulated to both the reasonableness and necessity of this treatment. (See Hrg. Report) As a result, I find claimant is entitled to reimbursement for his requested past medical expenses and related mileage. See Iowa Code section 85.27; Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

The final issues to address on appeal are whether claimant is entitled to reimbursement for his IME and costs. The deputy commissioner ordered defendants to reimburse claimant for his IME. The deputy commissioner found Dr. Bansal's review of Dr. Mooney's impairment rating was enough to trigger the reimbursement provisions of Iowa Code section 85.39 despite the fact that Dr. Bansal's physical examination took place prior to the one conducted by Dr. Mooney.

Iowa Code section 85.39 states: 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 . . . 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." Iowa Code section 85.39(2) (emphasis added). The examination performed by Dr. Bansal on May 15, 2019, occurred prior to Dr. Mooney's evaluation of permanent disability (June 21, 2019). While Dr. Bansal's report was issued later, the statute references the examination by a physician of claimant's choosing. Thus, I find the reimbursement provisions of Iowa Code section 85.39 were not triggered and claimant is not entitled to reimbursement for the entirety of Dr. Bansal's IME. The deputy commissioner's determination is respectfully reversed.

Claimant also seeks reimbursement for the costs set forth in his Exhibit 7. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

While the cost of an IME report (and not the examination) can be recoverable as a cost under the Iowa Supreme Court's holding in DART v. Young, 867 N.W.2d 839 (Iowa 2015), I have previously held that a claimant must provide some evidence of a breakdown of the expenses that are attributable to the report itself. In this case, the expenses relating to the report itself amount to $2,891.00. (Cl. Ex. 7, p. 44) Because I relied on Dr. Bansal's report in my decision, I assess defendants with the cost of his report.

I also tax defendants with the cost of claimant's filing fee ($100.00), service fee ($13.34) and claimant's deposition transcript ($76.10), all of which are allowable as

costs under 876 IAC 4.33. Therefore, defendants must reimburse claimant's costs in the amount of $3,080.44.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 30, 2020, is affirmed in part, modified in part, and reversed in part.

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits at the stipulated weekly rate of five hundred eighty-two and 98/100 dollars ($582.98) per week starting on the stipulated commencement date of October 25, 2016.

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, or reimburse, or otherwise hold claimant harmless for the requested past medical expenses itemized on pages 37a and 37b of claimant's Exhibit 6, along with corresponding mileage.

Pursuant to rule 876 IAC 4.33, defendants shall play claimant's costs of the arbitration proceeding in the amount of three thousand eighty and 44/100 dollars ($3,080.44), and defendants shall pay 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 (SROI) as required by this agency.

Signed and filed on this 25th day of May, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

James Neal (via WCES)

Lindsey Mills (via WCES)