

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL NASSIF,

Claimant,

vs.

ANAMOSA STATE PENITENTIARY,

STATE OF IOWA,

Self-Insured,
Employer,
Defendant.

FILED

NOV 15 2018

WORKERS' COMPENSATION

File No. 5056715

A P P E A L

D E C I S I O N

Head Notes: 1108; 1802; 1803; 2501;
2502; 2907

Defendant Anamosa State Penitentiary, State of Iowa, self-insured employer, appeals from an arbitration decision filed on June 14, 2017. Claimant Michael Nassif responds to the appeal. The case was heard on May 25, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 8, 2017.

The deputy commissioner found claimant carried his burden of proof that he sustained a permanent material aggravation of a pre-existing cervical spine condition which arose out of and in the course of his employment with defendant on June 12, 2014. The deputy commissioner found claimant is entitled to receive healing period benefits for the injury from January 6, 2015, through January 23, 2015. The deputy commissioner found claimant sustained ten percent industrial disability as a result of the work injury, which entitles claimant to receive 50 weeks of permanent partial disability (PPD) benefits commencing on May 12, 2015. The deputy commissioner found claimant is entitled to payment by defendant for requested past medical expenses itemized in Exhibits 5 and 6 for treatment of the work injury. The deputy commissioner found claimant is entitled to receive reimbursement from defendant for the cost of the independent medical evaluation (IME) of claimant performed by Robert Milas, M.D., on April 18, 2016. The deputy commissioner ordered defendant to pay claimant's costs of the arbitration proceeding in the amount of \$667.97.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant sustained a permanent work-related cervical spine injury on June 12, 2014. Defendant asserts the deputy commissioner erred in finding claimant is entitled to receive healing period benefits and PPD benefits. Defendant asserts the deputy commissioner erred in finding claimant is entitled to payment by defendants for the past requested medical expenses. Defendant asserts the deputy commissioner erred in finding claimant is entitled to receive reimbursement from defendant for the cost of Dr.

Milas' IME. Defendant asserts the deputy commissioner erred in ordering defendant to pay claimant's costs of the arbitration proceeding.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

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

Having 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, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on June 14, 2017, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant carried his burden of proof that on June 12, 2014, he sustained a work-related permanent material aggravation of his pre-existing cervical spine condition.

I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits for the work injury from January 6, 2015, through January 23, 2015.

I affirm the deputy commissioner's finding that claimant sustained ten percent industrial disability as a result of the work injury.

I affirm the deputy commissioner's finding that claimant is entitled to payment by defendant for the requested past medical expenses itemized in Exhibits 5 and 6 for treatment of the work injury.

I affirm the deputy commissioner's order that defendant pay claimant's costs of the arbitration proceeding.

I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I reverse the deputy commissioner's finding that claimant is entitled to receive reimbursement from defendant for the cost of Dr. Milas' IME. I provide the following analysis for my decision in this regard:

Iowa Code section 85.39(2) states the following, in pertinent part:

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 . . .

In this case, Dr. Milas' IME took place on April 18, 2016. (Exhibit 2, page 5) Prior to that, on January 11, 2016, Patrick Hitchon, M.D., neurosurgeon at the University of Iowa Hospitals and Clinics, a physician retained in this matter by defendant, issued a report in which he opined claimant's cervical spine condition was unrelated to the work injury. (Jt. Ex. 4, pp. 49-50) Dr. Hitchon did not provide an impairment rating in his report. No other physician retained by defendant provided an impairment rating. Dr. Hitchon's report does not satisfy the requirements of section 85.39 because it is a causation report and it does not contain "an evaluation of permanent disability." Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) requires a literal interpretation of Iowa Code section 85.39 (Id. at p. 847) and pursuant to that literal interpretation, claimant is not entitled to receive reimbursement from defendant for any portion of the cost of Dr. Milas' IME or his report. I therefore reverse the deputy commissioner's finding that claimant is entitled to receive reimbursement from defendant for the cost of Dr. Milas' IME.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 14, 2017, is MODIFIED as follows:

Defendant shall pay claimant healing period benefits from January 6, 2015, through January 23, 2015, at the stipulated weekly rate of seven hundred twenty-nine and 18/100 dollars (\$729.18).

Defendant shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing on May 12, 2015, at the stipulated weekly rate of seven hundred twenty-nine and 18/100 dollars (\$729.18).

Defendant shall receive a credit for all benefits previously paid.

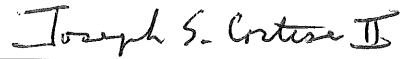
Accrued benefits shall be paid in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendant shall pay/reimburse as appropriate the requested past medical expenses itemized in Exhibits 5 and 6.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of \$667.97, 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 15th day of November, 2018.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Robert R. Rush
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406-0637
bob@rushnicholson.com

Sarah C. Brandt
Assistant Attorney General
Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319-0106
sarah.brandt@iowa.gov