

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN KELLY,
Claimant,

vs.

EAST SIDE JERSEY DAIRY, INC.,
d/b/a PRAIRIE FARMS DAIRY,

Employer,

and

INDEMNITY INS. CO. OF NORTH
AMERICA,

Insurance Carrier,

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 1621904.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 1803; 1803.1;
2502; 2907

Defendants East Side Jersey Dairy, Inc., d/b/a Prairie Farms Dairy, employer, and its insurer, Indemnity Ins. Co. of North America, (hereinafter "defendants") appeal from an arbitration decision filed on November 8, 2022. Claimant Brian Kelly, and defendant Second Injury Fund of Iowa (hereinafter "the Fund"), respond to the appeal. The case was heard on April 11, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 23, 2022.

In the arbitration decision, the deputy commissioner found claimant carried his burden of proof to establish that the permanent disability resulting from claimant's stipulated August 30, 2016, work injury includes claimant's right upper extremity and extends beyond claimant's right upper extremity into claimant's right shoulder, which entitles claimant to receive industrial disability benefits from defendants for the work injury. The deputy commissioner found claimant sustained 50 percent industrial disability as a result of the work injury, which entitles claimant to receive 250 weeks of permanent partial disability benefits commencing on the stipulated commencement date of September 19, 2016. Because the deputy commissioner found claimant is entitled to receive industrial disability benefits from defendants for the work injury, the deputy commissioner found claimant is not entitled to receive benefits from the Fund for the work injury. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is not entitled to reimbursement from defendants for the \$5,775.00 charge for the independent medical evaluation (IME) of claimant performed by Robin Sassman, M.D., on October 26, 2021. However, the deputy commissioner found that pursuant to

rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants for the \$4,785.00 charge from Dr. Sassman for records review and for the preparation of her IME report. The deputy commissioner found that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants in the amount of \$103.00 for the filing fee and \$350.00 for the functional capacity evaluation (FCE) report from Daryl Short, P.T.

Defendants assert on appeal that the deputy commissioner erred in finding claimant's permanent disability resulting from the work injury extends beyond claimant's right upper extremity into claimant's right shoulder. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive industrial disability benefits from defendants for the work injury, and in finding claimant sustained 50 percent industrial disability. Defendants assert it should be found on appeal that claimant is entitled to receive only scheduled member functional disability benefits for his right upper extremity as a result of the work injury. In the alternative, defendants assert if it is found on appeal that claimant's permanent disability resulting from the work injury extends into claimant's right shoulder and claimant is entitled to receive industrial disability benefits, the award for industrial disability should be reduced substantially. Defendants assert the deputy commissioner erred in finding that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants for the \$4,785.00 charge from Dr. Sassman for records review and for the preparation of her IME report.

Claimant and the Fund assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as 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 17A.15 and 86.24, the arbitration decision filed on November 8, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding that claimant's permanent disability resulting from the work injury includes claimant's right upper extremity and extends beyond claimant's right upper extremity into claimant's right shoulder. I affirm the deputy commissioner's finding that claimant is entitled to receive industrial disability benefits from defendants for the work injury. I affirm the deputy commissioner's finding that claimant sustained 50 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's finding that because claimant is entitled to receive industrial disability benefits from defendants for the work injury, claimant is not entitled to receive benefits from the Fund for the work injury. I affirm the deputy commissioner's finding that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants in the amount of \$103.00 for the filing fee and \$350.00 for Mr. Short's FCE report.

With the following additional analysis, I reverse the deputy commissioner's finding that pursuant to Iowa Code section 85.39, claimant is not entitled to reimbursement from defendants for the \$5,775.00 charge from Dr. Sassman for her IME.

The deputy commissioner found that the evaluation of claimant by Erin Kennedy, M.D., on September 13, 2019, satisfies claimant's right to reimbursement by defendants for an IME under section 85.39. The deputy commissioner found that because Dr. Kennedy's evaluation satisfies claimant's right to reimbursement for an IME under section 85.39, claimant is not entitled to reimbursement from defendants under section 85.39 for the evaluation of claimant by Dr. Sassman which took place on October 26, 2021. However, I respectfully reverse the deputy commissioner on this point, and I find that Dr. Kennedy's evaluation of claimant does not satisfy claimant's right to reimbursement from defendants for an IME under section 85.39 in this case, and I find claimant is entitled to reimbursement from defendants for the \$5,775.00 charge from Dr. Sassman for her IME.

One of claimant's authorized treating physicians, Tobias Mann, M.D., orthopedic surgeon, evaluated claimant on April 12, 2019, (Hearing Transcript, p. 50-51) and issued an impairment rating on May 8, 2019. (Ibid., Joint Exhibit 8, pp. 149-150) Upon receipt of Dr. Mann's impairment rating, claimant contacted Cathy Johnson, defendant insurer's claims adjustor assigned to this case, and requested a second opinion. (Tr. pp.52-53) Ms. Johnson agreed to pay for such an evaluation and instructed claimant to look for someone in Dubuque to perform the evaluation. (Tr. p. 53) This was before claimant was represented, and Ms. Johnson did not explain to claimant that under section 85.39, he was not restricted to providers in Dubuque. (Tr. p.54) Claimant went online to determine who performs impairment ratings in Dubuque and discovered that Dr. Kennedy and David Field, M.D., orthopedic surgeon, were the only two providers in Dubuque who performed impairment ratings (Tr. p. 53) Claimant contacted Dr. Field's office and was told Dr. Field would not perform an impairment rating for claimant. (Id.) Claimant then scheduled an evaluation with Dr. Kennedy (Tr. p. 54) Ms. Johnson sent claimant's medical records to Dr. Kennedy's office in advance of the evaluation. (Id.) After the evaluation, Dr. Kennedy's office sent the impairment rating report to Ms. Johnson (JE2, p. 23), but did not send the report to claimant. (Tr. p.55) After waiting several weeks for a copy of the report to be sent to him, claimant finally had to go to Dr. Kennedy's office in person to obtain a copy. (Id.)

Because Dr. Kennedy was an authorized treating physician for claimant's injury shortly after the injury occurred (JE2, pp. 7-10), which Ms. Johnson undoubtedly would have known, and because Ms. Johnson instructed claimant to limit his search for an impairment rating provider to Dubuque, with the result that the only option for the evaluation was Dr. Kennedy, Dr. Kennedy's evaluation of claimant cannot be considered an independent evaluation under the meaning of section 85.39. The fact that Dr. Kennedy's impairment rating was the same as Dr. Sassman's rating is irrelevant. Claimant did not obtain an independent medical evaluation under Section 85.39 until he was evaluated by Dr. Sassman on October 26, 2021. Because Dr.

Sassman's evaluation took place after Dr. Mann's impairment rating was issued, Dr. Sassman's IME satisfies the requirements of section 85.39 and claimant is entitled to reimbursement from defendants for the full cost of Dr. Sassman's IME. Defendants are still responsible for the cost of Dr. Kennedy's impairment rating evaluation, and the issue of whether claimant is entitled to reimbursement under rule 876 IAC 4.33 for the \$4,785.00 charge from Dr. Sassman for records review and for the preparation of her IME report is a moot point because that charge is included within Dr. Sassman's \$5,775.00 charge for her IME.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 8, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Defendants shall pay the claimant two hundred fifty (250) weeks of permanent partial disability benefits at the stipulated weekly rate of six hundred forty-six and 81/100 (\$646.81), commencing September 19, 2016.

As stipulated by the parties, defendants shall receive credit for the nineteen point one four three (19.143) weeks of benefits previously paid.

Defendants shall pay all accrued weekly benefits in lump sum. 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).

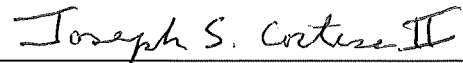
There is no Second Injury Fund liability in this matter.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant in the amount of five thousand seven hundred seventy-five and 00/100 dollars (\$5,775.00) for the cost of Dr. Sassman's IME.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant's costs of the arbitration proceeding in the amount four hundred fifty-three and 00/100 dollars (\$453.00), and defendants shall pay 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 7th day of March, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Mark Sullivan (via WCES)

Thomas Wolle (via WCES)

Jonathan Bergman (via WCES)