

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN NEAL,

Claimant,

vs.

MENARD, INC.,

Employer,

and

PRAETORIAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5049640

A P P E A L

D E C I S I O N

Head Note Nos: 1402.20; 1402.40; 1803;
2502; 2907

FILED
JAN 24 2019
WORKERS' COMPENSATION

Claimant Steven Neal appeals from an arbitration decision filed on May 25, 2017, and from a ruling on rehearing filed on July 12, 2017. Defendants Menard, Inc., employer, and its insurer, Zurich American Insurance Co., respond to the appeal. The case was heard on February 6, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on March 15, 2017.

The deputy commissioner found claimant failed to carry his burden of proof that the stipulated injury which arose out of and in the course of his employment with defendant-employer on December 10, 2013, extends beyond claimant's left wrist to include his left elbow. The deputy commissioner found claimant sustained scheduled member functional disability of 20 percent of his left upper extremity for the left wrist injury, which entitles claimant to receive 50 weeks of permanent partial disability (PPD) benefits, commencing on November 4, 2015. The deputy commissioner found claimant is not entitled to receive healing period benefits from February 26, 2015, through February 27, 2015, as alleged. The deputy commissioner found claimant is not entitled to payment by defendants for the past requested medical expenses related to claimant's left elbow condition. The deputy commissioner found claimant is not entitled to receive reimbursement from defendants for the independent medical evaluation (IME) of claimant performed by Richard Kreiter, M.D., on December 15, 2015. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$100.00.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant's work-related injury did not extend beyond claimant's left wrist to include his left elbow. Claimant asserts the deputy commissioner erred in finding claimant sustained permanent disability of 20 percent of his left upper extremity for the work injury because claimant asserts the award for permanent disability should be increased

significantly. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive healing period benefits from February 26, 2015, through February 27, 2015. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to payment by defendants for the past requested medical expenses related to claimant's left elbow condition. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive reimbursement from defendants for Dr. Kreiter's IME.

Defendants assert on appeal that the arbitration decision and the ruling on rehearing should be affirmed in their 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 May 25, 2015, and the ruling on rehearing filed on July 12, 2017, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant's December 10, 2013, work-related injury did not extend beyond claimant's left wrist to include his left elbow.

I affirm the deputy commissioner's finding that the work injury caused claimant to sustain scheduled member functional disability of 20 percent of his left upper extremity for the left wrist injury.

I affirm the deputy commissioner's finding that claimant is not entitled to receive healing period benefits from February 26, 2015, through February 27, 2015.

I affirm the deputy commissioner's finding that claimant is not entitled to payment by defendants for the past requested medical expenses related to claimant's left elbow condition.

I affirm the deputy commissioner's order that defendant pay claimant's costs of the arbitration proceeding in the amount of \$100.00.

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

I reverse the deputy commissioner's finding that claimant is not entitled to receive reimbursement from defendants for Dr. Kreiter's IME. I provide the following analysis for my decision in that 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, and reasonably necessary transportation expenses incurred for the examination.

(Iowa Code section 85.39(2))

In DART v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter Dart), the Iowa Supreme Court held that reimbursement for an IME under section 85.39 is available only if an assessment of permanent disability has already been made by an employer-retained physician when the claimant-selected IME takes place. In this case, Dr. Kreiter's IME took place on December 15, 2015, which was after Meiying Kuo, M.D., an authorized treating physician retained by defendants, issued her impairment rating report on November 9, 2015. (Exhibit 4, p. 1) Therefore, because there is no question that Dr. Kreiter's \$700.00 fee for his IME is reasonable, claimant is entitled to receive reimbursement from defendants for Dr. Kreiter's IME.

The deputy commissioner held claimant is not entitled to receive reimbursement for Dr. Kreiter's IME fee because Dr. Kreiter's invoice is not itemized to indicate what portion of his total fee was for his evaluation and what portion of the fee was for his report. However, pursuant to DART, that would be relevant only if claimant was not eligible for reimbursement for the IME under Iowa Code section 85.39, and if claimant was seeking to recover the cost of Dr. Kreiter's report as a case cost under rule 876-4.33. (Id., pp. 846-847)

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on May 25, 2017, and the ruling on rehearing filed on July 12, 2017, are MODIFIED as follows:

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits, at the weekly rate of one hundred eighty-two and 23/100 dollars (\$182.23), commencing on November 4, 2015.

Defendants shall receive a credit for all benefits previously paid.

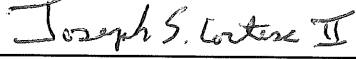
Defendants shall pay accrued benefits in a lump sum, with interest on all accrued benefits pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant in the amount of seven hundred and 00/100 dollars (\$700.00) for the cost of Dr. Kreiter's IME.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant 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 24th day of January, 2019.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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