

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

**FILED**

**JUL 12 2017**

HOLLY J. JOHNSON f/k/a NOSA,

Claimant,

vs.

STEAK N SHAKE OPERATIONS, INC.,

Employer,

and

AMERICAN ZURICH INSURANCE CO.,

Insurance Carrier,  
Defendants.

File No. 5048919 WORKERS' COMPENSATION

A M E N D E D

A P P E A L

D E C I S I O N

Head Note Nos: 1100, 1803, 2501, 2502

Defendants Steak N Shake Operations, Inc., employer, and its insurer, American Zurich Insurance Co., appeal from an arbitration decision filed on December 21, 2015. Claimant Holly J. Johnson responds to the appeal. The case was heard on October 1, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 5, 2015.

The deputy commissioner found claimant carried her burden of proof that the stipulated work-related injury, which arose out of and in the course of claimant's employment with defendant- employer on April 27, 2014, caused claimant to sustain permanent injuries to her left hip and her low back, and the deputy commissioner found the work injury also caused claimant to sustain a temporary sequela injury to her right foot. The deputy commissioner awarded claimant 25 percent industrial disability, which entitles claimant to 125 weeks of permanent partial disability (PPD) benefits, commencing on April 28, 2014, for her permanent left hip and low back injuries. The deputy commissioner found claimant is entitled to payment by defendants for prior medical expenses submitted by claimant at the hearing for treatment of claimant's left hip, low back and temporary right foot injuries. The deputy commissioner found claimant is entitled to payment by defendants for claimant's future medical expenses necessitated by the work injury for treatment of claimant's left hip and low back. The deputy commissioner found claimant is entitled to reimbursement from defendants pursuant to Iowa Code section 85.39 for the cost of the independent medical evaluation (IME) of Richard L. Kreiter, M.D., performed on August 12, 2015. The deputy

commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the deputy commissioner erred in finding the work injury caused claimant to sustain permanent injuries to her left hip and her low back, and defendants assert the deputy commissioner erred in finding the work injury caused claimant to sustain a temporary sequela injury to her right foot. Defendants assert the deputy commissioner erred in awarding claimant any industrial disability. In the alternative, defendants assert the deputy commissioner erred in awarding claimant anything more than "very minimal" industrial disability. Defendants assert the deputy commissioner erred in finding claimant is entitled to payment by defendants for prior medical expenses for treatment of claimant's temporary right foot injury. Defendants assert the deputy commissioner erred in finding claimant is entitled to payment by defendants for claimant's future medical expenses necessitated by the work injury for treatment of claimant's left hip and low back. Defendants assert the deputy commissioner erred in finding claimant is entitled to reimbursement from defendants for the cost of Dr. Kreiter's IME. Defendants also assert the deputy commissioner erred in ordering defendants 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, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

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 December 21, 2015, which relate to issues properly raised on intra-agency appeal.

I affirm the deputy commissioner's finding that the work injury caused claimant to sustain permanent injuries to her left hip and her low back, and I affirm the deputy commissioner's finding that the work injury caused claimant to sustain a temporary sequela injury to her right foot.

I affirm the deputy commissioner's award of 25 percent industrial disability, which entitles claimant to 125 weeks of PPD benefits commencing on April 28, 2014.

I affirm the deputy commissioner's finding that claimant is entitled to payment by defendants for prior medical expenses for treatment of claimant's left hip, low back and temporary right foot injuries.

I affirm the deputy commissioner's finding that claimant is entitled to payment by defendants for claimant's future medical expenses necessitated by the work injury for treatment of claimant's left hip and low back.

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

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

I also affirm the deputy commissioner's finding that claimant is entitled to reimbursement from defendants for the cost of Dr. Kreiter's IME. I provide the following analysis regarding the issue of Dr. Kreiter's IME:

In their appeal brief, defendants state the following, in pertinent part:

Here Claimant's IME report was issued on August 13, 2015. (Ex. 10 pg. 112-113). However, the physician retained by the employer, Dr. Hussain, did not issue a permanent impairment rating until August 20, 2015, which is seven days **after** Claimant's IME report. (Ex. 5 pg. 81). Therefore, the triggering event under 85.39 was not met and therefore Claimant is not entitled to reimbursement under 85.39.

(Defendants' Appeal Brief, p. 20)

However, page 81 of Exhibit 5, which defendants reference in their appeal brief, is not Dr. Hussain's impairment rating for claimant's left hip. Page 81 is the zero percent impairment rating from Beau Shay, DPM, one of Dr. Hussain's partners, for claimant's right foot. Dr. Shay specifically does not provide an impairment rating for either claimant's left hip or her low back.

Dr. Hussain's zero percent impairment rating for claimant's left hip is actually Exhibit 5, page 80, and that impairment rating is dated April 28, 2015, which was more than three months **before** Dr. Kreiter's IME, which occurred on August 12, 2015, and Dr. Kreiter's IME report which contains his impairment rating, which was issued on August 13, 2015, and which covers only claimant's left hip. (Ex. 5, p. 80) The triggering event under Iowa Code section 85.39, Dr. Hussain's zero percent impairment rating for claimant's left hip, occurred before claimant obtained her IME from Dr. Kreiter. Therefore, claimant is entitled to reimbursement for the full \$700.00 charged by Dr. Kreiter for his IME, which I find to be a reasonable charge. (See cost attachments to hearing report.)

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant to be credible. On appeal, defendants challenge

the deputy commissioner's findings regarding claimant credibility. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 21, 2015, is affirmed in its entirety.

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of one hundred ninety-one and 12/100 dollars (\$191.12) per week from April 28, 2014.

Defendants shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall be given credit for any benefits previously paid.

Defendants shall pay claimant's prior medical expenses submitted at the hearing for treatment of claimant's left hip, low back and temporary right foot injuries.

Defendants shall pay claimant's future medical expenses necessitated by the work injury for treatment of claimant's left hip and low back.

Defendants shall pay/reimburse claimant seven hundred and no/100 dollars (\$700.00) for the cost of Dr. Kreiter's IME.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, 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 as required by this agency.

Signed and filed this 12<sup>th</sup> day of July, 2017.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

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