

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NORA CORTEZ,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5044716

A P P E A L

D E C I S I O N

Head Note Nos.: 1803, 2907

FILED

DEC 22 2015

WORKERS' COMPENSATION

Defendant, Tyson Fresh Meats, Inc., appeals from an arbitration decision filed on October 31, 2014. The case was heard on September 3, 2014, and it was considered fully submitted on October 7, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner found that claimant sustained bilateral shoulder injuries on October 12, 2011, arising out of and in the course of her employment with defendant. The deputy commissioner awarded claimant industrial disability of 35 percent at the weekly benefit rate of \$397.06, with a credit for all benefits previously paid, including but not limited to a credit for all weeks of permanent partial disability benefits paid under an agreement for settlement for a prior injury approved by this agency on September 17, 2008. The deputy commissioner also awarded \$2,500.00 for Dr. Stoken's independent medical evaluation (IME) fee as a cost under rule 876 IAC 4.33.

Defendant asserts on appeal that the deputy commissioner erred in determining that claimant sustained bilateral shoulder injuries arising out of and in the course of her employment. Defendant also asserts that the deputy commissioner erred in awarding 35 percent industrial disability. Defendant also asserts that the deputy commissioner erred in awarding Dr. Stoken's IME fee.

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

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 of October 31, 2014, filed in this matter that relate to issues of causation and industrial disability. I modify the award of Dr. Stoken's IME fee. I provide the following analysis with respect to these issues:

Defendant challenges claimant's credibility and points to some inconsistencies within the medical records. Having had the opportunity to personally view claimant's testimony and demeanor, the presiding deputy commissioner found claimant to be credible. Since the presiding deputy commissioner had the opportunity to view claimant at the hearing, I give considerable deference as to the deputy commissioner's credibility findings. See Iowa Code section 17A.19(10)(f)(3). Although there are discrepancies within the evidentiary record, I rely upon the credibility determinations of the deputy who presided at the hearing. Yaw v. Westside Auto Body of Des Moines, File Nos. 5043051, 5043052 (Appeal April 2015); Bowles v. Smithway MotorXpress, File No. 5034773 (Appeal Aug. 2013); Jenkinson v. HON Industries, File Nos. 5001037, 5001038 (Appeal July 2004).

The deputy commissioner provided sufficient analysis of the causation issue and the industrial disability issue to explain how he arrived at his findings and conclusions. I concur with the deputy commissioner's findings of fact and conclusions of law pertaining to the issues of causation of claimant's bilateral shoulder injuries as well as the industrial disability findings and award. Therefore, I adopt the deputy commissioner's findings, conclusions and analysis on these issues without further comment.

Defendant further challenges the award of the independent medical evaluation. It is not legally accurate to state that the employer's liability is required to be established before an evaluation can be awarded under Iowa Code section 85.39. Dodd v. Fleetguard, Inc., 759 N.W.2d 133 (Iowa App. 2008). On the other hand, Iowa Code section 85.39 provides specific prerequisites for a claimant's entitlement to an evaluation under that statutory section. Section 85.39 states, 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, Claimant obtained an evaluation by Dr. Stoken in July 2013 and Dr. Stoken rendered her impairment rating report in August 2013. (Exhibit 9). The employer did not secure an evaluation of permanent impairment until Dr. Mooney opined in July 2014 that a permanent impairment rating could not be rendered and would be invalid based upon his examination, findings and conclusions. (Ex. 13, p. 142) In a recent opinion, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 "only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer." DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

In DART the Supreme Court addressed whether the full cost of an IME can be taxed as a cost pursuant to rule 876 IAC 4.33 if that IME does not qualify for reimbursement under Iowa Code section 85.39. The Court clarified that rule 876 IAC 4.33 allows only for the taxation of costs "incurred in the hearing." A physician's report

becomes a cost incurred in a hearing when it is used as evidence in lieu of the doctor's testimony. The report is separate from the examination. The underlying expense associated with the examination itself does not become a cost of a report needed for a hearing, just as it does not become a cost of the testimony or deposition. The Supreme Court stated, in pertinent part:

We conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

(Id., p. 846-847)

Rule 876-4.33 is designed, per the Supreme Court, to allow for taxation of costs incurred in the hearing itself rather than reimbursement of fees and expenses incurred in an examination. (Id., p. 847) If an injured worker seeks reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33, if the IME does not qualify for reimbursement under Iowa Code section 85.39 (Id., pp. 846-847)

Dr. Stoken's IME does not qualify for reimbursement under Iowa Code section 85.39 because the IME took place in July 2013, one year before defendant obtained an evaluation of permanent impairment by Dr. Mooney in July 2014. Because Dr. Stoken's IME charge cannot be reimbursed under Iowa Code section 85.39, pursuant to DART, the only reimbursable portion of that expense which can be assessed as a cost under rule 876 IAC 4.33 is the expense specifically itemized for the preparation of Dr. Stoken's written report.

Dr. Stoken's itemized invoice was introduced into evidence. (Ex. 9, p.97) The invoice documents that out of the total fee of \$2,500.00, \$800.00 is attributable to the preparation of the report. Because claimant has carried her burden of proof as to the specific amount Dr. Stoken charged for the preparation of her report, I find that claimant is entitled to recover \$800.00 under rule 876 IAC 4.33 and the deputy commissioner's award of the full \$2,500.00 IME fee is thereby modified.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of October 31, 2014, is affirmed with respect to the issues of causation of claimant's injuries and the industrial disability award.

Defendant shall pay the claimant one hundred seventy-five (175) weeks of permanent partial disability commencing October 12, 2011, at the weekly rate of three hundred ninety-seven and 06/100 dollars (\$397.06).

Defendant shall pay/reimburse as appropriate the medical bills as detailed in the arbitration decision.

Defendant shall receive credit for all benefits previously paid including, but not limited to, credit for all weeks of permanent partial disability benefits paid under the prior agreement for settlement approved by this agency on September 17, 2008.

The October 31, 2014, arbitration decision is modified with respect to the order for reimbursement of Dr. Stoken's IME fee and, pursuant to rule 876 IAC 4.33, claimant is awarded \$800.00 for Dr. Stoken's charge specifically for preparation of her IME report.

Costs of the underlying arbitration proceeding and the costs of this appeal are taxed to defendant pursuant to Iowa code section 86.40 and rule 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 22nd day of December, 2015.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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