

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUAN PABLO LOPEZ,

Claimant,

vs.

MAPLE VALLEY FEEDERS CO.,

Employer,

and

GRINNELL MUTUAL REINSURANCE
CO.,Insurance Carrier,
Defendants.

File No.1663048.01

A P P E A L

D E C I S I O N

Head Notes: 1108, 1803, 2500

Defendants Maple Valley Feeders Co., employer, and its insurer, Grinnell Mutual Reinsurance Co., appeal from an arbitration decision filed on June 25, 2021. Claimant Juan Pablo Lopez responds to the appeal. The case was heard on October 8, 2020, and it was considered fully submitted in front of deputy workers' compensation commissioner on November 16, 2020.

In the arbitration decision, the deputy commissioner found claimant was generally credible, although the deputy commissioner acknowledged claimant was "not a stellar historian" or a "sophisticated witness." (Arbitration Decision, p. 2) The deputy commissioner found claimant proved he sustained an injury on March 10, 2019, that arose out of and in the course of his employment with defendant-employer. The deputy commissioner found the work injury was a substantial factor in causing claimant's permanent disability. More specifically, the deputy commissioner found claimant sustained 20 percent industrial disability. The deputy commissioner found claimant was single and entitled to three exemptions, making his weekly benefit rate \$439.91. The deputy commissioner ordered defendants to authorize medical treatment for claimant with Michael Espiritu, M.D. The deputy commissioner ordered defendants to reimburse claimant for the cost of claimant's independent medical examination (IME) with Robin Sassman, M.D.

On appeal, defendants assert the deputy commissioner erred in his credibility assessment of claimant. Defendants argue the deputy commissioner erred in finding an injury that arose out of an in the course of claimant's employment or, in the alternative, that claimant's back complaints were caused by a work-related injury. Defendants

likewise alternatively argue that the deputy commissioner's industrial disability award is excessive and that the deputy commissioner erred in his rate calculation, in ordering defendants to authorize treatment with Dr. Espiritu, and in ordering defendants to reimburse claimant for the cost of Dr. Sassman's IME.

Claimant asserts 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 a 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 86.24 and 17A.15, the arbitration decision filed on June 25, 2021, is affirmed in part and is reversed in part.

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

I affirm the deputy commissioner's finding that claimant sustained a work-related injury on March 10, 2019. I affirm the deputy commissioner's finding that claimant's work injury was a substantial factor in causing claimant's permanent disability. I affirm the deputy commissioner's finding that claimant sustained 20 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's order that defendants authorize treatment with Dr. Espiritu.

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

With respect to claimant's rate, defendants assert on appeal that claimant offered no evidence that he is entitled to exemptions for dependents. Both at hearing and in his deposition, however, claimant testified he lives at home with his two daughters, ages 10 and 5. (Hearing Transcript, pp. 10-11; Defendants' Exhibit L, Deposition Tr., pp. 6-7). This testimony was consistent with claimant's answers to interrogatories. (Claimant's Ex. 3, p. 34) With this additional analysis, I affirm the deputy commissioner's finding that for purposes of the weekly benefit rate, claimant is single and entitled to three exemptions.

Lastly, regarding reimbursement for claimant's IME, defendants assert on appeal that the reimbursement provisions of Iowa Code section 85.39 were not triggered because there was no evaluation of disability by a physician retained by the employer. See Iowa Code § 85.39(2). I agree.

The deputy commissioner interpreted a return-to-work slip from Kingsley Chiropractic issued in May of 2019 as an assessment of disability. (See Arb. Dec. p. 12) However, there is no evidence that the provider intended this to be an evaluation of permanent disability. This release was given early in claimant's treatment - he received additional treatment both from Kingsley and from other providers after the work release was given - and there is no evidence the providers at Kingsley were asked to assess claimant's disability. Thus, I do not find the return-to-work slip to be an assessment of permanent disability.

Further, while there is some evidence that defendants paid for claimant's treatment at Kingsley Chiropractic in March of 2019, I find there is insufficient evidence that defendants paid for claimant's treatment in May of 2019. Though defendant-employer had a practice of paying for treatment for minor injuries in an effort to get its employees back to work, claimant was no longer employed by defendant-employer in May of 2019. Thus, even if the return-to-work slip was an assessment of disability, it was not an assessment "made by a physician retained by the employer." See Iowa Code § 85.39(2).

For those reasons, the deputy commissioner's finding that the reimbursement provisions of Iowa Code section 85.39 were triggered is respectfully reversed.

With regard to Dr. Sassman's IME charge, although the Iowa Supreme Court's holding in DART v. Young, 867 N.W.2d 839 (Iowa 2015) allows claimants to recover the cost associated with preparation of an IME report when the charge for the IME is not recoverable under section 85.39, Dr. Sassman in her invoice failed to specify how much of her time was spent exclusively on the preparation of the report. (Cl. Ex. 2, p. 28) The invoice provides 3.25 hours were spent on "record review and report preparation." (Cl. Ex. 2, p. 28 (emphasis added)).

The court in DART specifically held that "underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." 867 N.W.2d at 846. Relying on this language, I have previously found that the expenses associated with a physician's review of medical records are expenses associated with an examination and therefore cannot be taxed under rule 876 IAC 4.33(6). See Nuhanovic v. Tyson Fresh Meats, Inc., File No. 5059062 (App., May 15, 2020); Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App., Dec. 17, 2018). As such, I find the cost of Dr. Sassman's IME report is not recoverable as a cost.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 25, 2021, is affirmed in part and is reversed in part.

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the weekly rate of four hundred thirty-nine and 91/100 (\$439.91) commencing on March 11, 2019.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Dr. Espiritu is the authorized treating physician for future care for the work injury.

Pursuant to rule 876 IAC 4.33, 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 on this 9th day of December, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Willis Hamilton (via WCES)

Aaron Oliver (via WCES)