

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTA MULL,

Claimant,

vs.

B & G FOODS, INC.,

Employer,

and

ZURICH NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 20004338.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.30; 1402.40;
1402.50; 1801; 1803;
1803.1; 2209; 2401; 2402;
2501; 2502; 2601.10; 2803;
2907; 3002; 5-9999

Defendants B & G Foods, Inc., employer, and its insurer, Zurich North America, appeal from an arbitration decision filed on August 3, 2021. Claimant Roberta Mull cross-appeals. The case was heard on July 28, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 20, 2020.

In the arbitration decision, the deputy commissioner found claimant met her burden of proof to establish she sustained a cumulative injury arising out of and in the course of her employment, which manifested on January 9, 2018. The deputy commissioner found claimant provided defendants with timely notice of her injury under Iowa Code section 85.23. The deputy commissioner found claimant timely filed her petition under Iowa Code section 85.26. The deputy commissioner found claimant is entitled to receive healing period benefits from July 2, 2018, through September 18, 2018. The deputy commissioner found claimant sustained 40 percent industrial disability because of the work injury, which entitles claimant to receive 200 weeks of permanent partial disability (PPD) benefits, commencing on July 2, 2019. The deputy commissioner found claimant's weekly benefit rate for the injury is \$557.26. The deputy commissioner found claimant is entitled to reimbursement from defendants for medical bills claimant paid with her own funds, along with reimbursement for medical mileage incurred by claimant. The deputy commissioner found claimant is entitled to reimbursement from defendants only for the cost of the report from Robin Sassman,

M.D., and not for the full cost of Dr. Sassman's independent medical examination (IME). The deputy commissioner ordered defendants to pay claimant costs of the arbitration proceeding in the amount of \$100.00 for the filing fee.

On appeal, defendants assert the deputy commissioner erred in finding claimant proved she sustained a cumulative injury arising out of and in the course of her employment, which manifested on January 9, 2018. Defendants assert the deputy commissioner erred in finding claimant provided timely notice of her injury under Iowa Code section 85.23. Defendants assert the deputy commissioner erred in finding claimant timely filed her petition under Iowa Code section 85.26. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive healing period benefits from July 2, 2018, through September 18, 2018. Defendants assert the deputy commissioner erred in finding claimant sustained 40 percent industrial disability because of the work injury. Defendants assert the deputy commissioner erred in finding claimant is entitled to reimbursement from defendants for medical bills and for medical mileage.

On cross-appeal, claimant asserts the deputy commissioner erred in failing to award the full cost of Dr. Sassman's IME. Claimant asserts the remainder of the decision should be affirmed.

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 17A.5 and 86.24, the arbitration decision filed on August 3, 2021, is affirmed in part, and it is reversed in part.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility and the credibility of her two adult children. The deputy commissioner found them to be credible witnesses. I find the deputy commissioner correctly assessed their 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 and her two adult children 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 or the credibility of her adult children.

I affirm the deputy commissioner's finding that claimant proved she sustained a cumulative injury arising out of and in the course her employment, which manifested on January 9, 2018. I affirm the deputy commissioner's finding that claimant provided

defendants with timely notice of the injury under Iowa Code section 85.23. I affirm the deputy commissioner's finding that claimant timely filed her petition under Iowa Code section 85.26. I affirm the deputy commissioner's finding that claimant's weekly benefit rate for the injury is \$557.26. I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits from July 2, 2018, through September 18, 2018. I affirm the deputy commissioner's finding that claimant sustained 40 percent industrial disability, which entitled claimant to receive 200 weeks of PPD benefits. I affirm the deputy commissioner's finding that claimant is entitled to reimbursement from defendants for medical bills she paid with her own funds, along with reimbursement for medical mileage incurred by claimant. I affirm the deputy commissioner's order that defendants reimburse claimant in the amount of \$100.00 for the filing fee.

I respectfully reverse the deputy commissioner's finding that claimant is entitled to reimbursement from defendants only for the cost of Dr. Sassman's report and not for the full cost of Dr. Sassman's IME. With the following additional analysis, I find claimant is entitled to reimbursement for the full cost of Dr. Sassman's IME:

On March 28, 2018, Kurt Smith, M.D., issued an opinion finding no causation for claimant's condition. (Exhibit D, pp. 12-13) In Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021), the defendants' expert found there was no causation. Kern disagreed with that finding and sought an IME at the defendants' expense. The Commissioner found Kern was not entitled to recover the full cost of the IME. The Iowa Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. In this case, Dr. Smith opined claimant's condition was not caused by her employment and defendants denied her claim. Claimant disagreed with Dr. Smith's opinion and sought treatment on her own and an IME with Dr. Sassman, which occurred after Dr. Smith issued his opinion. Under Kern, claimant is entitled to recover the full \$4,350.00 cost of Dr. Sassman's IME.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 3, 2021, is affirmed in part, and it is reversed in part, with the above-stated additional analysis.

All weekly benefits shall be paid at the weekly rate of five hundred fifty-seven and 26/100 dollars (\$557.26).

Defendants shall pay claimant healing period benefits from July 2, 2018, through September 18, 2018.

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on July 2, 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.

Defendants shall reimburse claimant for medical bills she paid with her own funds, and defendants shall reimburse claimant for medical mileage incurred by claimant.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant four thousand three hundred fifty and 00/100 dollars (\$4,350.00) for the cost of Dr. Sassman's IME.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred and 00/100 dollars (\$100.00), and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 27th day of April, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

R. Saffin Parrish-Sams (via WCES)

Jason Kidd (via WCES)