

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANGELA FULLER,

Claimant,

vs.

BIMBO BAKERY, U.S.A.,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,Insurance Carrier,
Defendants.

File No. 20012896.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 1402.50;
1802; 1803; 2401; 2501;
2502; 2701; 2907

Defendants Bimbo Bakery, U.S.A., employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on January 26, 2023. Claimant Angela Fuller responds to the appeal. The case was heard on July 15, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 23, 2022.

In the arbitration decision, the deputy commissioner found claimant was a credible witness. The deputy commissioner found claimant carried her burden of proof to establish she sustained a low back injury arising out of and in the course of her employment on or about July 9, 2020. The deputy commissioner found claimant sustained 65 percent industrial disability as a result of the work injury. The deputy commissioner found claimant is entitled to payment of past and future medical expenses causally related to the work injury, with the exception of some chiropractic treatment claimant obtained without obtaining the employer's authorization. The deputy commissioner also found claimant was entitled to an order for alternate medical care, including pain management. The deputy commissioner also awarded claimant's independent medical evaluation (IME) fees. Lastly, the deputy commissioner ordered defendants to reimburse claimant's filing fee as a cost of this proceeding.

Defendants assert on appeal that the deputy commissioner erred in failing to address their argument about an intervening injury. Defendants assert the deputy commissioner erred in awarding 65 percent industrial disability. Defendants assert the deputy commissioner erred in finding defendants are liable for past medical expenses, including certain emergency room expenses. Defendants assert the deputy commissioner erred in ordering defendants to provide claimant with alternate medical care. Defendants further assert the deputy commissioner erred in awarding claimant's IME fees and the costs of the arbitration proceeding.

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 17A.5 and 86.24, the arbitration decision filed on January 26, 2023, is affirmed in part, and is modified in part.

I affirm the deputy commissioner's finding that claimant sustained a low back injury that arose out of and in the course of her employment on July 9, 2020. I acknowledge defendants' arguments pertaining to a potential intervening injury at home after the work injury. However, the evidence defendants cite is not convincing. I note there is no medical expert who supports defendants' intervening injury argument. I affirm the deputy commissioner's rejection of any intervening injury argument.

Having affirmed the finding of a work injury and the rejection of the intervening injury award, I must consider the deputy commissioner's industrial disability award. I find the deputy commissioner considered the relevant factors of industrial disability and made an appropriate analysis of that claim. The only modifications I make to the deputy commissioner's findings of fact are to specifically accept the permanent impairment rating and restrictions of Robin Sassman, M.D.. To the extent the deputy commissioner arguably accepted the permanent impairment rating of Chad Abernathey, M.D., or the restrictions offered by Jonathan Fields, M.D. I reject those findings. I find the opinions of Dr. Sassman to be most credible on the issues of permanent impairment and permanent restrictions. Weighing the relevant industrial disability factors, I concur with the deputy commissioner's overall assessment of Ms. Fuller's industrial disability. I affirm the deputy commissioner's award of 65 percent industrial disability, or 325 weeks of permanent partial disability benefits.

Defendants assert on appeal that the deputy commissioner erred in the award of past medical expenses. Specifically, defendants challenge the award of emergency room charges incurred on October 15, 2020, and October 16, 2020. Defendants assert the emergency room charges cannot be awarded because they were not authorized. Defendants further assert these emergency room charges occurred prior to claimant notifying the employer of her work injury. However, I find claimant gave notice of the

work injury on the date of injury. She did not require treatment at that time, and none was authorized. However, I find that in October 2020, after claimant's chiropractor recommended she seek emergency room care for a blown disk, claimant called her supervisor at the employer. I accept claimant's testimony that she notified her supervisor that her back had gotten worse and that she needed to go to the emergency room. I further accept claimant's testimony that her supervisor responded, "OK, fine. Let me know what happens." (Transcript, p. 45) I find the employer was aware of the injury and aware claimant needed emergent care. Claimant contacted the employer prior to seeking that emergency room treatment and the employer did not direct claimant for specific medical care. Instead, the employer either explicitly authorized claimant to seek the emergency room care or, at a minimum, acquiesced to claimant seeking emergency room treatment.

Iowa Code section 85.27 provides, "In an emergency, the employee may choose the employee's care at the employer's expenses, provided the employer or the employer's agency cannot be reached immediately." In this instance, the employer's supervisor was reached prior to the emergency room visits and the employer did not direct claimant for care nor object to her seeking care at an emergency room. I conclude that the claimant was within her rights to seek emergency room care under the circumstances and that the employer is liable to pay for that care. Therefore, I conclude the deputy commissioner's award of medical expenses was correct and should be affirmed.

I also affirm the deputy commissioner's award of alternate medical care and an order that defendants provide pain management treatment for claimant. Again, I accept the opinion of Dr. Sassman as the most reasonable and credible on this issue. Defendants are not offering further medical care. Claimant has proven that additional medical care, and specifically pain management, is reasonable and necessary. Therefore, I affirm the deputy commissioner's order of alternate medical care.

With respect to the issue of claimant's IME, the deputy commissioner awarded full reimbursement of Dr. Sassman's fee. In so doing, the deputy commissioner found, "There is no meaningful way in this case to apportion out the expenses related to the claims dismissed by the claimant." (Arbitration Decision, p. 9) I acknowledge that prior agency caselaw indicates that review of medical records are expenses associated with an IME, and have been awarded in past cases before this agency. Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (Appeal December 2018). However, the Iowa Court of Appeals has twice reversed this agency's award of IME fees that included expenses related to something other than rendering a permanent impairment rating. See MidAmerican Construction, L.L.C. v. Sandlin, 992 N.W.2d 237 (Iowa App. 2023)

(table of unpublished opinion) (2023 WL 2148754); P.M. Lattner Manufacturing Co. v. Rife, 2023 WL 3862594 (Iowa App. June 7, 2023) (unpublished decision)¹

Moreover, the Iowa Court of Appeals has indicated that the plain language of the statute requires that the injury for which an evaluation is conducted must be compensable before reimbursement is required. Iowa Code section 85.39(2); MidAmerican Construction, L.L.C. v. Sandlin, 992 N.W.2d 237 (Iowa App. 2023) (table of unpublished opinion) (2023 WL 2148754); P.M. Lattner Manufacturing Co. v. Rife, 2023 WL 3862594 (Iowa App. June 7, 2023) (unpublished decision) (holding the employer “is not responsible to reimburse costs from the examination that did not relate to the impairment rating of the compensable - that is, work-related - injury.”). The Court of Appeals in Rife specifically held, “The commissioner’s determination that Lattner had to reimburse the full costs of the examination was erroneous under the 2017 changes in the law.”

Similarly, in this case, claimant withdrew some of the claims and alleged injuries that were evaluated by Dr. Sassman. Claimant cannot establish the requirement that those injury claims be compensable to obtain reimbursement for the evaluation of those conditions. Therefore, notwithstanding prior agency precedent, I find it was erroneous for the deputy commissioner to award the full cost of the IME against defendants.

In Rife, the Iowa Court of Appeals reversed and remanded the case to this agency with instructions to parse out the cost and fee of non-reimbursable items under Iowa Code section 85.39(2). Accordingly, while I acknowledge the deputy commissioner’s finding that there is not a meaningful way to apportion out those expenses, the directive from the Iowa Court of Appeals is that this agency must do just that when assessing the cost of an IME.

Dr. Sassman evaluated five conditions (neck, low back, left ulnar neuropathy, right carpal tunnel, and left carpal tunnel) as part of her IME. (Claimant’s Ex. 2, p. 18) She charged \$4,455.00 for her services. Dr. Sassman’s invoice breaks down her services between her exam time and her record review and report preparation. She spent a total of 6.75 hours working on claimant’s case at the rate of \$660.00 per hour. (Cl. Ex. 3, p. 28) I find that a reasonable fee to prepare a permanent impairment rating for claimant’s compensable low back injury is \$1,500.00 under the facts of this case. Therefore, I find claimant is entitled to reimbursement of \$1,500.00 from defendants pursuant to Iowa Code section 85.39(2).

I affirm the deputy commissioner’s assessment of the filing fee against defendants as a cost.

¹ The Iowa Supreme Court accepted further review in both Sandlin and Rife. The Iowa Supreme Court has not yet filed its decision on further review in either case. Nevertheless, given two recent Court of Appeals’ cases reversing the agency on this issue, I feel compelled to acknowledge this developing appellate case law and reverse the deputy’s award of the full IME expense.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 26, 2023, is affirmed in part, and is modified in part.

Defendants shall pay claimant three hundred and twenty-five (325) weeks of permanent partial disability benefits at the weekly rate of five hundred and fifty-three and 08/100 (\$553.08) commencing July 21, 2021.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall receive credit for the thirty-five (35) weeks previously paid.

Defendants are responsible for the medical expenses set forth in Claimant's Exhibit 1, with the exception of chiropractic bills and Grand River Medical Group in a manner consistent with the arbitration decision.

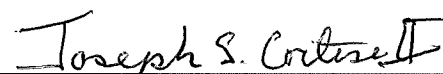
Defendants shall authorize an evaluation and treatment with a pain management specialist.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant in the amount of one thousand five hundred and 00/100 dollars (\$1,500.00) 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 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 12th day of September, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Mark Sullivan (via WCES)

Peter Thill (via WCES)