BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PEGGY A. OTTERPOHL, Claimant, vs. ARAMARK UNIFORM SERVICES, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File Nos. 5058096, 5058097 A P P E A L D E C I S I O N Head Notes: 1108, 1803, 2401; 2500, 2800, 4000

Defendants Aramark Uniform Services, employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on April 11, 2019, and from an order nunc pro tunc issued on April 26, 2019. Claimant Peggy A. Otterpohl responds to the appeal. The case was heard on March 22, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 14, 2018.

The arbitration decision addressed two separate dates of injury. In File No. 5058096, injury date of January 9, 2015, the deputy commissioner found defendants did not satisfy their burden of proof to establish their affirmative 90-day notice defense under Iowa Code section 85.23. The deputy commissioner found claimant satisfied her burden to prove she injured her low back in addition to her right knee. The deputy commissioner found defendants are responsible for the medical expenses itemized in claimant's Exhibit 6. The deputy commissioner ordered defendants to authorize care with Quentin Durward, M.D. The deputy commissioner found claimant is entitled to a running award of healing period benefits.

In File No. 5058097, injury date of July 9, 2015, the deputy commissioner found he was unable to assess claimant's full disability under Iowa Code section 85.34(7) because claimant had not yet reached maximum medical improvement (MMI) for the injuries sustained in File No. 5058096. Thus, the deputy commissioner bifurcated the issue of the extent of claimant's disability.

For both files, the deputy commissioner awarded penalty benefits in the amount of $200.00 for late payment of benefits and for underpayment of benefits. Lastly, the deputy commissioner awarded miscellaneous independent medical examination (IME) expenses and assessed costs in the amount of $2,096.08 to defendants.

On appeal in File No. 5058096, defendants assert the deputy commissioner erred in finding claimant's low back condition is causally related to her stipulated work injury. Defendants alternatively assert the deputy commissioner erred in finding defendants failed to meet their burden of proof to establish their 90-day notice defense under Iowa Code section 85.23. Defendants additionally assert the deputy commissioner erred in finding claimant has not yet reached MMI, in finding claimant is entitled to ongoing care with Quentin Durward, M.D., and in finding claimant is entitled to reimbursement for medical expenses itemized in Exhibit 6.

In File No. 5058097, defendants assert the extent of claimant's industrial disability, if ripe for determination, is minimal. Defendants also assert the deputy commissioner erred in ordering defendants to pay all medical expenses in Exhibit 6.

For both files, defendants assert the deputy commissioner erred in awarding claimant penalty benefits, IME expenses, and costs.

Those portions of the proposed agency 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 April 11, 2019, as corrected by the order nunc pro tunc filed on April 26, 2019, is affirmed in part and modified in part. I provide the following findings, conclusions, and analysis for my decision:

File No. 5058096

I affirm the deputy commissioner's finding that claimant satisfied her burden to prove she sustained a work-related injury to her low back on January 9, 2015. I affirm the deputy commissioner's finding that defendants did not satisfy their burden of proof to establish their affirmative 90-day notice defense under Iowa Code section 85.23. I affirm the deputy commissioner's finding that claimant is entitled to ongoing care with Dr. Durward. I affirm the deputy commissioner's finding that claimant is entitled to a running award of healing period benefits.

Some of the above-stated findings were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant to be credible. 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. I find nothing in the record

in this matter which would cause me to reverse the deputy commissioner's credibility findings.

However, for the reasons that follow, the deputy commissioner's findings regarding reimbursement for claimant's medical expenses are modified.

Generally speaking, Iowa Code section 85.27 gives defendants the right to control medical care. If a claimant seeks unauthorized care while defendants maintain their right to control the care, recovery of the expenses is appropriate only "upon proof by a preponderance of the evidence that such care was reasonable and beneficial." Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). "[U]nauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

However, "the employer has no right to choose the medical care when compensability is contested." Id. at 204 (Iowa 2010). Defendants are also precluded from asserting an authorization defense as to any future treatment during their period of denial. Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 243-45 (Iowa 2018); Bell Bros., 779 N.W.2d at 204. If a claimant later "establishes the compensability of the injury at a contested case hearing, then the statutory duty of the employer to furnish medical care for compensable injuries emerges to support an award of reasonable medical care the employer should have furnished from the inception of the injury had compensability been acknowledged." Bell Bros., 779 N.W.2d at 204.

In this case, defendants did not formally deny liability for claimant's low back complaints until claimant was evaluated by Douglas Martin, M.D., on February 28, 2017. Thus, any treatment claimant sought on her own for her back condition before February 28, 2017 was unauthorized.

Claimant, therefore, must show that the unauthorized treatment she received for her back before February 28, 2017 was reasonable and beneficial. This treatment includes appointments with Dr. Durward at CNOS and an MRI of the lumbar spine.

At the time claimant began seeing Dr. Durward in November of 2016, defendants had only authorized a single appointment for claimant's back complaints—a referral that ultimately never materialized because claimant was still recovering from her shoulder condition. In other words, defendants were offering no care at the time claimant began her unauthorized treatment with Dr. Durward.

At claimant's appointment with Dr. Durward on November 7, 2016, Dr. Durward ordered physical therapy, an EMG, and an MRI because he felt claimant's condition needed to be further evaluated. (Joint Exhibit 3, pp. 58-60) The MRI and EMG occurred on December 6, 2016. (JE 3, pp. 63-66) This set into motion several months of conservative treatment before Dr. Durward finally recommended surgery in May of 2017. (JE 3, p. 80-81) Notably, I affirmed the deputy commissioner's finding that Dr.

Durward should be authorized to provide treatment for claimant's back condition, including surgery.

Given that defendants had no authorized treatment scheduled for claimant's back condition, I find the treatment provided by Dr. Durward, which set into motion an eventual recommendation for surgery, provided a more favorable outcome than no treatment at all. I also find this treatment was reasonable. Thus, I find claimant satisfied her burden to recover the unauthorized medical expenses relating to her low back, including any left hip condition or symptoms, under the standard set forth in Bell Bros.

After claimant's February 28, 2017, evaluation with Dr. Martin, defendants denied liability for claimant's back condition. At this point, defendants were precluded from asserting an authorization defense, which they acknowledged at hearing. Brewer-Strong, 913 N.W.2d at 243-45; Bell Bros., 779 N.W.2d at 204; (Hearing Transcript, pp. 17-18) Thus, claimant need only prove that the care she sought after this date was reasonable and casually related to her low back condition, including any left hip condition or symptoms.

As noted in the arbitration decision, Exhibit 6 includes the medical expenses for both files. Thus, as it pertains to File No. 5058096, defendants are responsible only for the expenses in Exhibit 6 that relate to claimant's low back condition, including any left hip condition or symptoms. The deputy commissioner's findings regarding the claimed medical expenses in Exhibit 6 are therefore modified.

File No. 5058097

I affirm the deputy commissioner finding that an assessment of claimant's full disability under Iowa Code section 85.34(7) is not yet ripe because claimant had not yet reached maximum medical improvement (MMI) for the injuries sustained in file number 5058096. As a result, I affirm the deputy commissioner's bifurcation of the issue of the extent of claimant's disability.

The deputy commissioner did not specifically address the medical expenses contained in Exhibit 6 that pertain to claimant's shoulder condition. Defendants admitted liability for claimant's shoulder condition. As such, claimant must prove that any expenses in Exhibit 6 related to her shoulder condition were for treatment that was both reasonable and beneficial. Bell Bros., 779 N.W.2d at 206.

Claimant offered no specific testimony or evidence regarding whether any of the expenses contained in Exhibit 6 relate to her shoulder, and if so, whether the treatment related to those expenses provided a more favorable medical outcome than would likely have been achieved by the care authorized by defendants. I therefore find claimant failed to carry her burden to prove she is entitled to payment or reimbursement for any expenses in Exhibit 6 relating to unauthorized treatment of her shoulder condition. The

deputy commissioner's findings regarding the claimed medical expenses in Exhibit 6 are therefore modified.

Both Files

I affirm the deputy commissioner's award of penalty benefits in the amount of $200.00 for late payment of benefits and for underpayment of benefits.

With respect to costs, I affirm the deputy commissioner's assessment, but for Rick Ostrander's vocational evaluation. The deputy commissioner awarded $1,624.00 for Mr. Ostrander's vocational evaluation. Per Mr. Ostrander's invoice, however, the report itself was billed for $112.00.

The Iowa Supreme court's decision in DART v. Young, 867 N.W.2d 839 (Iowa 2015) holds that only the cost associated with the preparation of a written report of a claimant's IME can be assessed as a cost at hearing under rule 876-4.33. See 867 N.W.2d at 846-847. More specifically, the court in DART held the "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." Id. at 846.

I have previously applied the rationale from DART to the costs of a vocational expert's report. Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec. 17, 2018). Applied to this case, therefore, only the cost of Mr. Ostrander's report can be assessed as a cost. The deputy commissioner's costs assessment is modified to reflect only the cost of Mr. Ostrander's report in the amount of $112.00 and not the entirety of his invoice.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on April 11, 2019, as corrected by the order nunc pro tunc filed on April 26, 2011, is affirmed in part and modified in part.

File No. 5058096:

Claimant is entitled to a running award of healing period benefits. Defendants shall pay the claimant a running award commencing on the date claimant last worked, forward until such time as benefits may cease pursuant to Iowa Code section 85.34(1), at the weekly rate of three hundred ninety-nine and 48/100 dollars ($399.48).

Either party may file a new petition for arbitration for the purpose of assessment of permanent disability, when appropriate.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants are responsible for medical expenses set forth in Exhibit 6 related to claimant's low back condition, including any left hip condition or symptoms.

Claimant is entitled to alternate medical care. Dr. Durward is claimant's treating physician at this time and shall direct all medical care for claimant's low back condition, including any left hip condition or symptoms.

File No. 5058097:

For the reasons set forth in the decision, permanency cannot be assessed at this time. Either party may file a new petition for arbitration for the purpose of assessment of permanent disability, when appropriate.

For Both Files:

Defendants shall pay claimant penalty benefits of two hundred and no/100 dollars ($200.00) in each file.

Defendants shall pay outstanding IME expenses in the amount of forty-eight and 13/100 dollars ($48.13).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of five hundred eighty-four and 08/100 dollars ($584.08), 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 30th day of April, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Dennis J. Mahr Via WCES

Cory D. Abbas Via WCES