

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE A. SIMMER,

Claimant,

vs.

MENARD, INC.,

Employer,

and

PRAETORIAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5041139

A P P E A L

D E C I S I O N

Head Notes: 1402.40; 1804;

Defendants Menard, Inc., employer, and its insurer, Praetorian Insurance Company, appeal from a review-reopening decision filed on February 22, 2019. Claimant Dale A. Simmer responds to the appeal. The case was heard on January 18, 2018, and it was considered fully submitted before the deputy workers' compensation commissioner on March 14, 2018.

The deputy commissioner found claimant proved he is permanently and totally disabled as a result of the stipulated work injury which occurred on February 19, 2012. The deputy commissioner found claimant is entitled to ongoing medical treatment with Sandeep Bhangoo, M.D. Finally, the deputy commissioner found claimant is entitled to all costs requested, in the total amount of \$5,044.62.

Defendants assert on appeal the deputy commissioner erred in awarding permanent total disability. Defendants further assert the deputy commissioner erred in his award of costs. Specifically, defendants argue claimant is not entitled to the full cost awarded for the vocational reports prepared by Lewis Vierling, nor the charges awarded for a telephone conference and two office conferences between claimant's attorney and Dr. Bhangoo.

Claimant asserts on appeal that the deputy commissioner's decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed review-reopening decision filed on February 22, 2019, that relate to issues properly raised on intra-agency appeal are affirmed in part without additional comment and modified in part.

I affirm the deputy commissioner's finding that claimant is permanently and totally disabled as a result of the work injury. I affirm the deputy commissioner's finding that claimant is entitled to ongoing medical treatment with Dr. Bhangoo.

I find the deputy commissioner provided a well-reasoned analysis of the issues noted above and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

With respect to the assessment of costs, the deputy commissioner's decision is modified, with the following additional analysis:

The deputy commissioner awarded \$1,905.00 for the first vocational report authored by Mr. Vierling, pursuant to the invoice dated November 9, 2016. (See Attachment to Hearing report, page 9) The deputy commissioner also awarded \$1,320.00 for the second vocational report authored by Mr. Vierling, pursuant to the invoice dated December 29, 2017. (See Attachment to Hearing report, page 23) Mr. Vierling's invoices are itemized, and defendants argue that the deputy erred in awarding the entire amount of each invoice, rather than limiting the award to the cost of preparing the written report. I agree. Pursuant to the holding of the Iowa Supreme Court in DART v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician—and not the examination itself—can be taxed as a cost pursuant to rule 876 IAC 4.33(6). DART, 867 N.W.2d at 846. The court explained that “a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony,” while “[t]he 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. (noting additionally that “[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition”).

I have previously found the court's rationale is equally applicable to the expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019). In this case, Mr. Vierling's reports became a cost incurred in a hearing because they were used as evidence in lieu of his testimony, while the expenses associated with his vocational assessment(s) did not. Pursuant to his invoices, he spent 2 hours and 1.7 hours, respectively, preparing the written reports, for a total of \$360.00 on the November 9, 2016 invoice, and \$315.00 on the December 29, 2017 invoice. (See Attachment to Hearing report, pages 9, 23) I therefore modify the deputy commissioner's assessment of Mr. Vierling's expenses and tax only the report portions of those invoices to defendants.

The deputy commissioner also awarded costs related to three invoices from Dr. Bhangoo. The first, dated August 16, 2016, is for a phone conference with claimant's attorney, and totals \$125.00. (See Attachment to Hearing report, page 5) The second invoice is dated April 25, 2017, and states "Office Consultation, April 18, 2017." The total charge is \$260.00. (See Attachment to Hearing report, page 17) The third is a health insurance claim form, with a date of service of December 26, 2017, in the amount of \$100.00. (See Attachment to Hearing report, page 25) Defendants argue that rule 4.33 does not allow claimant to recover these costs, and claimant cannot receive them as "practitioner's reports" as he has exhausted the two-report limit with Mr. Vierling's two reports. Additionally, these charges are not recoverable under section 85.39. Again, I agree. The three invoices from Dr. Bhangoo included with claimant's itemization of costs are not recoverable as costs under rule 4.33 or under Iowa Code section 85.39. I therefore modify the deputy commissioner's assessment of costs to exclude those three expenses.

Based on the above analysis, the award of costs is modified to a total of \$2,009.62.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on February 22, 2019, is affirmed in part and modified in part.

Defendants shall pay claimant permanent total disability benefits at the stipulated weekly rate of three hundred eighty-five and 24/100 dollars (\$385.24) commencing from the date of injury.

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).

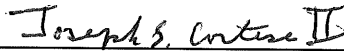
Defendants shall receive a credit for all benefits previously paid.

Defendants shall authorize Dr. Bhangoo as the treating physician and defendants shall timely pay all future medical expenses.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of two thousand nine and 62/100 dollars (\$2,009.62), and the parties shall split 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 29th day of April, 2020.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James T. Fitzsimmons Via WCES

Charles A. Blades Via WCES