

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHU REH,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5053428

A P P E A L

D E C I S I O N

Head Note No: 2502

FILED

MAR 26 2018

WORKERS' COMPENSATION

Defendant Tyson Foods, Inc., self-insured employer, appeals from an arbitration decision filed on October 28, 2016. Claimant Shu Reh responds to the appeal. The case was submitted by way of briefs with no arbitration hearing and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 2, 2015.

The deputy commissioner found claimant is entitled pursuant to Iowa Code section 85.39 to reimbursement from defendant for the cost of an independent medical evaluation (IME) performed by David S. Tearse, M.D., on May 23, 2016. The deputy commissioner also ordered defendant to pay claimant's costs of the arbitration proceeding in the amount of \$106.48.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant is entitled to reimbursement from defendant for the cost of Dr. Tearse's IME.

Claimant asserts on appeal that the arbitration 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.

Having 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, I reverse the deputy commissioner's finding that claimant is entitled to reimbursement pursuant to Iowa Code section 85.39 for the cost of Dr. Tearse's IME. I provide the following analysis for my decision:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The undersigned, having considered all of the evidence in the record, finds:

Claimant reported an alleged work-related injury to his right shoulder to defendant on December 30, 2014. At defendant's direction, claimant treated with Thomas Gorsche, M.D. until April 15, 2015, at which time Dr. Gorsche recommended surgery for claimant's shoulder. Following that recommendation, claimant was evaluated at defendant's plant by Robert Gordon, M.D. Dr. Gordon opined claimant's "job from a biomechanical standpoint would not precipitate or otherwise aggravate a labral disorder" and "it can't be stipulated that [claimant] developed a right shoulder labral disorder from issues that occurred during the 2013 or 2014 time periods." (Exhibit 1, page 3) Claimant then began treating for his right shoulder through his personal health insurance. (Ex. 2, p. 3)

On June 1, 2016, Dr. Gorsche indicated he did not believe the shoulder conditions as noted in the MRI, or which required surgical repair on July 16, 2015, were causally related to claimant's employment duties and activities with defendant. (Ex. 2, p. 3)

On May 23, 2016, David S. Tearse, M.D. performed an IME of claimant at the request of claimant's counsel. In his IME report, Dr. Tearse addressed the issues of causation, maximum medical improvement, future treatment, and permanent impairment. (Ex. 3) On May 25, 2016, Dr. Tearse's office issued an invoice for his IME. The charge on the invoice states "Independent Medical Evaluation \$1,600.00." There is no further breakdown of Dr. Tearse's charge. (Ex. 4, p. 5) The bill has been paid and claimant seeks reimbursement pursuant to Iowa Code section 85.39. (Ex. 4, p. 6)

Claimant contends that under Iowa Code section 85.39, defendant is required to reimburse claimant for the cost of Dr. Tearse's IME. Claimant urges that both Dr. Gordon's and Dr. Gorsche's findings of no causation triggered claimant's right to an 85.39 examination because those were evaluations of disability which claimant felt were too low. It is claimant's position that proving an injury arose out of and in the course of employment is not a requirement for entitlement to an 85.39 examination.

Defendant contends claimant may be reimbursed for the IME only if the statutory requirements of section 85.39 are met. Defendant argues that the employer must have obtained an impairment rating before claimant is entitled to reimbursement for an IME. Defendant states:

In this case, there was no evaluation of permanent impairment and no impairment rating from any physician retained by the employer. In order for the IME to be reimbursable, there must be an injury and the employer must have a rating which Claimant believes is too low. See § 85.39. It is clear that the requirements of Iowa Code section 85.39 were not met. Tyson cannot be responsible to pay for the Dr. Tearse IME pursuant to 876 IAC 4.33(6) because it has been stipulated there was no work-related injury and there was no rating from any physician prior to Claimant obtaining his IME.

(Defendant's Appeal Brief, p. 5)

Defendant does not dispute that both Dr. Gorsche and Dr. Gordon were physicians retained by Tyson. Defendant contends neither doctor provided an evaluation of permanent disability because they determined there was no injury.

The deputy commissioner found the cost of Dr. Tearse's IME was recoverable by claimant under Iowa Code section 85.39 because Dr. Gorsche and Dr. Gordon opined claimant did not sustain a work-related injury. (Arbitration Decision, pages 3-4) The deputy commissioner found Drs. Gorsche and Gordon had, in effect, given "zero" impairment ratings. (Id.)

This position is contrary to the Iowa Supreme Court's literal interpretation of Iowa Code section 85.39. See, e.g., DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015) In that decision, the supreme court held that an employee can obtain an IME at the employer's expense only if an evaluation of permanent disability has been made by an employer-retained physician. The evaluations of Drs. Gorsche and Gordon were not evaluations of permanent impairment, but rather were evaluations to determine causation. This is a distinct difference. The record in this case shows there was no impairment rating from any physician chosen by defendant because defendant determined there was no work-related injury. There is no evidence claimant obtained defendant's consent to the IME, nor did defendant agree to pay the cost of the IME. As such, claimant cannot recover the cost of Dr. Tearse's IME from defendant under section 85.39. Therefore, I reverse the deputy commissioner's finding that claimant is entitled to reimbursement from defendant pursuant to Iowa Code section 85.39 for the cost of Dr. Tearse's IME.

The cost of Dr. Tearse's IME also is not recoverable from defendant as a taxable cost under rule 876-4.33. The charge on Dr. Tearse's invoice states "Independent Medical Evaluation \$1,600.00." (Ex. 4, p.5.) The invoice does not break down how much Dr. Tearse charged to examine claimant and how much Dr. Tearse charged to write his report. (Id.) The DART decision holds that only the cost associated with the preparation of a written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876-4.33. See DART, 867 N.W.2d, at 846-847. Under DART, defendant in this case would only have to pay the cost of preparing the IME report and not what was charged to examine claimant. Dr. Tearse's IME invoice does not qualify for reimbursement under DART because Dr. Tearse did not break down what was charged for the written report and what was charged for the examination. Therefore, no portion of Dr. Tearse's IME charge can be taxed as a cost under rule 876-4.33.

Costs are to be assessed at the discretion of the deputy commissioner at the hearing level and at the discretion of the commissioner on appeal. Because I have reversed the deputy commissioner's holding and claimant is not successful on his claim, I therefore find it is appropriate for the parties to pay their own costs of the arbitration proceeding and I find it is appropriate to assess the costs of the appeal against claimant.

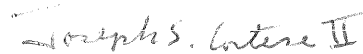
ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 28, 2016, is REVERSED:

Claimant shall take nothing from these proceeding

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed on this 26th day of March, 2018.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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