

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RUSSELL DILLAVOU,

Claimant,

vs.

JOHN DEERE WATERLOO WORKS,

Employer,
Self-Insured,
Defendant.

File Nos. 5051562, 5051931,
5051932, 5051933

A P P E A L

D E C I S I O N

Head Note Nos: 1108.50; 1402; 1802; 1803;
2501; 2502; 2907

FILED

MAR 22 2018

WORKERS' COMPENSATION

Defendant John Deere Waterloo Works, self-insured employer, appeals from an arbitration decision filed on August 25, 2016. Claimant Russell Dillavou responds to the appeal. The case was heard on March 21, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 10, 2016.

In File No. 5051562, the deputy commissioner found claimant carried his burden of proof that he sustained a permanent injury which arose out of and in the course of his employment with defendant-employer on June 27, 2014. The deputy commissioner found claimant is entitled to receive healing period benefits from January 27, 2015, through March 9, 2015. The deputy commissioner found claimant sustained 40 percent industrial disability as a result of the work injury, which entitles claimant to receive 200 weeks of permanent partial disability (PPD) benefits commencing on March 10, 2015. The deputy commissioner found defendant is entitled to a credit in the amount of \$12,834.80 against the award for the net amount received, by claimant after taxes, from March 11, 2015, through April 2, 2015, and from July 22, 2015, through February 28, 2016, and also \$349.16 per week going forward, for weekly indemnity (WI) payments paid by defendant to claimant until WI payments end. The deputy commissioner found claimant is entitled to payment or reimbursement by defendants for the requested past medical expenses itemized in Exhibit 20. The deputy commissioner found claimant is entitled pursuant to Iowa Code section 85.39 to reimbursement from defendants in the amount of \$3,495.00 for the cost of an independent medical evaluation (IME) performed by Sunil Bansal, M.D., on September 25, 2015. The deputy commissioner also ordered defendant to pay claimant's costs of the arbitration proceeding in the amount of \$2,832.35.

In File No. 5051931, the deputy commissioner found that the alleged work injury of July 24, 2014, was a continuation of the June 27, 2014, work injury which is the subject of File No. 5051562, and claimant was awarded nothing in File No. 5051931.

In File No. 5051932, the deputy commissioner found that the alleged work injury of October 2, 2014, was a continuation of the June 27, 2014, work injury which is the subject of File No. 5051562, and claimant was awarded nothing in File No. 5051932.

In File No. 5051933, the deputy commissioner found that the alleged work injury of October 21, 2014, was a continuation of the June 27, 2014, work injury which is the subject of File No. 5051562, and claimant was awarded nothing in File No. 5051932.

In File No. 5051562, defendant asserts on appeal that the deputy commissioner erred in finding claimant sustained a work-related injury on June 27, 2014. Defendant asserts the deputy commissioner erred in finding claimant is entitled to receive healing period benefits from January 27, 2015, through March 9, 2015. Defendant asserts the deputy commissioner erred in finding claimant is entitled to receive 40 percent industrial disability for the work injury. Defendant asserts the deputy commissioner erred in finding claimant is entitled to receive payment or reimbursement by defendant for the requested past medical expenses itemized in Exhibit 20. Defendant asserts the deputy commissioner erred in finding claimant is entitled to reimbursement from defendant for the cost of Dr. Bansal's IME. Defendants also assert the deputy commissioner erred in ordering defendant to pay claimant's costs of the arbitration proceeding in the amount of \$2,832.35.

Defendant's appeal in this matter is limited to File No. 5051562. Defendant makes no assertions on appeal regarding File Nos. 5051931, 5051932 and 5051933.

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 affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on August 25, 2016, which relate to the following issues:

In File No. 5051562, I affirm the deputy commissioner's finding that claimant sustained a permanent work-related injury on June 27, 2014. I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits from January 27, 2015, through March 9, 2015. I affirm the deputy commissioner's finding that claimant is entitled to receive 40 percent industrial disability for the work injury. I affirm the deputy commissioner's finding that defendant is entitled to a credit in the amount of \$12,834.80 against the award for the net amount received by claimant, after taxes, from March 11, 2015, through April 2, 2015, and from July 22, 2015, through February 28, 2016, and also \$349.16 per week going forward, for weekly indemnity (WI) payments paid by defendant to claimant until WI payments end. I affirm the deputy commissioner's finding that claimant is entitled to payment or reimbursement by

defendant for the requested past medical expenses itemized in Exhibit 20. I affirm the deputy commissioner's order that defendant pay claimant's costs of the arbitration proceeding in the amount of \$2,832.35. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant to be credible. Defendant asserts claimant was not credible. I find the deputy commissioner correctly assessed claimant's 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 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.

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. Bansal's IME. I provide the following analysis for my decision in that regard:

The deputy commissioner stated the following in the arbitration decision regarding the cost of Dr. Bansal's IME:

Defendant argues that they do not owe reimbursement [for Dr. Bansal's IME] because no physician retained by the employer provided an impairment rating. However, no impairment rating is the equivalent of a zero percent impairment rating.

(Arbitration Decision, page 12)

No legal authority was cited in support of this finding. Moreover, this position is contrary to the Iowa Supreme Court's literal interpretation of Iowa Code section 85.39. See, e.g., Des Moines Area Regional Transit Authority 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 record in this case shows there was no impairment rating from any physician chosen by defendant because defendant determined there was no work injury. There is no evidence in the record that 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. Bansal's IME from defendant under section 85.39. The cost of Dr. Bansal's IME also is not recoverable from defendant under rule 876-4.33 as a taxable cost. Therefore, I reverse the deputy commissioner's finding that claimant is entitled to reimbursement from defendant for the cost of Dr. Bansal's IME.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 25, 2016, is MODIFIED as follows:

File No. 5051562 (Date of Injury: June 27, 2014)

Defendant shall pay claimant healing period benefits from January 27, 2015, through March 9, 2015, at the stipulated weekly rate of six hundred eighty-five and 26/100 dollars (\$685.26).

Defendant shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on March 10, 2015, at the stipulated weekly rate of six hundred eighty-five and 26/100 dollars (\$685.26).

Defendant shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendant shall be entitled to credit for all weekly benefits paid to date.

Defendant shall also be entitled to a credit in the amount of \$12,834.80 against the award for the net amount received by claimant, after taxes, from March 11, 2015, through April 2, 2015, and from July 22, 2015, through February 28, 2016, and also \$349.16 per week going forward, for weekly indemnity (WI) payments paid by defendant to claimant until WI payments end.

Defendant shall pay, or reimburse claimant, or hold claimant harmless, for the requested past medical expenses itemized in Exhibit 20.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of \$2,832.35, 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), defendant shall file subsequent reports of injury as required by this agency.

File No. 5051931 (Alleged Date of injury: July 24, 2014)

Claimant shall take nothing from these proceedings.

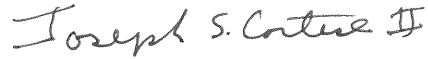
File No. 5051932 (Alleged Date of Injury: October 2, 2014)

Claimant shall take nothing from these proceedings.

File No. 5051933 (Alleged Date of Injury: October 21, 2014)

Claimant shall take nothing from these proceedings.

Signed and filed on this 22nd day of March, 2018.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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