

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GALE HENRY-PETE,

Claimant,

vs.

MEDICAL ASSOCIATES OF CLINTON
IOWA, P.L.C.,

Employer,

and

ARGENT,

Insurance Carrier,
Defendants.

FILED

FEB - 4 2019

WORKERS' COMPENSATION

File No. 5055779

A P P E A L

D E C I S I O N

Head Note Nos: 1108; 1803; 1804; 2502

Defendants Medical Associates of Clinton Iowa, P.L.C., employer, and Argent, insurer, appeal from an arbitration decision filed on October 19, 2017. Claimant Gale Henry-Pete cross-appeals. The case was heard on April 27, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 18, 2017.

In the arbitration decision, the deputy commissioner found claimant sustained an injury to her neck and shoulder that arose out of and in the course of her employment with defendant-employer. However, the deputy commissioner found claimant's alleged low back injury was not causally related to her work activities. As such, the deputy commissioner determined defendants were responsible for medical expenses relating to claimant's neck, shoulder, and upper back but not claimant's low back. The deputy commissioner ultimately found claimant sustained 75 percent industrial disability due to the work injury.

The deputy commissioner also determined claimant was entitled to an independent medical examination (IME) pursuant to Iowa Code section 85.39, but the deputy commissioner awarded only the cost of the IME examination and not the cost of the IME report.

On appeal, defendants argue the deputy commissioner erred in finding claimant sustained an injury that arose out of and in the course of her employment. In the alternative, defendants assert if it is found on appeal that claimant did sustain a work injury, the award of 75 percent industrial disability is excessive and should be reduced substantially.

On cross-appeal, claimant argues the deputy commissioner erred by awarding only the cost of the IME examination under Iowa Code section 85.39 instead of the cost of both the examination and the report.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the proposed arbitration decision filed on October 19, 2017, is affirmed in part with additional analysis and modified in part.

I affirm the deputy commissioner's determination that claimant sustained work-related injuries to her neck and shoulder. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue with the following additional analysis.

Defendants on appeal argue this finding is not supported by any objective evidence, such as the imaging of claimant's neck and right shoulder or Sue Tomich's ergonomic study. While I appreciate defendants' position, defendants provide no explanation as to why claimant was asymptomatic before her increased workload in June and July of 2015 but became symptomatic during and after. Further, the deputy commissioner noted claimant's description of the origin of her pain was consistent throughout her treatment (see Arbitration Decision, p. 7), and defendants make no argument to the contrary, nor do they suggest claimant was not a credible witness. For these reasons, I find claimant's subjective complaints to be credible.

Defendants argue the deputy commissioner erroneously relied on the opinions of Mark Taylor, M.D., Wade Lenz, M.D. and Jill Johnson, D.O., because their opinions are based on claimant's subjective complaints. However, given my finding that claimant's subjective complaints are credible, these doctors' opinions are more consistent with claimant's persistent symptoms. I therefore affirm the finding of the deputy commissioner and I give more weight to the opinions of Dr. Taylor, Dr. Lenz, and Dr. Johnson.

Regarding the extent of claimant's permanent disability, I affirm the deputy commissioner's determination that claimant sustained 75 percent industrial disability. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in their entirety.

On cross-appeal, claimant argues the deputy commissioner erred by awarding only the cost of Dr. Taylor's examination instead of awarding both the cost of the examination and the cost of the report. In the arbitration decision, the deputy

commissioner determined the reimbursement provisions of Iowa Code section 85.39 were triggered but that claimant was only entitled to the cost of the evaluation pursuant to the Iowa Supreme Court's holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter DART). I respectfully disagree with the deputy commissioner's application of DART.

The holding in DART only limited what could be assessed as a cost pursuant to 876 IAC 4.33. See DART, 867 N.W.2d at 844, 846-47 ("We must decide if the assessment-of-costs rule is limited to the cost of the doctor's report or whether the rule also includes the fees of the underlying medical examination that was the subject of the report."). In other words, the holding did not limit the reimbursement provisions of Iowa Code section 85.39. Id. Thus, both the cost of the examination and the report are still reimbursable pursuant to Iowa Code section 85.39—that is, assuming the prerequisites to reimbursement are appropriately triggered.

The deputy commissioner determined those provisions were triggered in this case. While I disagree given the fact that Abdul Foad, M.D.'s IME was not an evaluation of permanent impairment, but an evaluation to determine causation (see Reh, File No. 5053428 (Appeal Dec. Mar. 26, 2018)), defendants did not appeal this determination. Because it was not raised as an issue, I adopt the deputy commissioner's determination that claimant was entitled to reimbursement of an IME under Iowa Code section 85.39.

Because Iowa Code section 85.39 was triggered, claimant is entitled to reimbursement for the full cost of Dr. Taylor's IME, including both the examination and the report. The deputy commissioner's findings and conclusions regarding this issue are therefore modified to include reimbursement for Dr. Taylor's report.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 19, 2017, is affirmed in part with my additional analysis and modified in part:

Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the weekly rate of three hundred twenty-eight and 76/100 dollars (\$328.76) commencing July 1, 2016.

Defendant 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 credit for all benefits previously paid.

Defendants shall pay temporary and/or healing period benefits as identified in Exhibit 4.

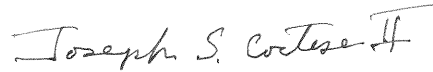
Defendants shall reimburse and/or pay medical expenses associated with claimant's neck and shoulder injury.

Defendants shall pay four thousand two hundred twenty-five and no/100 dollars (\$4,225.00) for Dr. Taylor's examination and report pursuant to Iowa Code section 85.39.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, 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 4th day of February, 2019.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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