BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHAWN GLENN, Claimant, vs. GENUINE PARTS COMPANY, Employer, and SAFETY NATIONAL CASUALTY CORP, Insurance Carrier, Defendants.	File Nos. 5064429, 5067833 A P P E A L D E C I S I O N Head Notes: 1402.40; 1803; 2502; 2907

Defendants Genuine Parts Company, employer, and its insurer, Safety National Casualty Corp., appeal from an arbitration decision filed on June 18, 2020. Claimant Shawn Glenn cross-appeals. The case was heard on August 6, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 9, 2019.

During the arbitration hearing, claimant dismissed File No. 5067833. Therefore, the only file addressed in this appeal is File No. 5064429.

In the arbitration decision, the deputy commissioner found claimant sustained 20 percent industrial disability as a result of the stipulated work-related injury to his low back, which occurred on January 31, 2017. The deputy commissioner denied claimant's claim for alternate medical care. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

On appeal, defendants assert the deputy commissioner erred in finding claimant sustained 20 percent industrial disability as a result of the work injury. Defendants also assert the deputy commissioner erred in ordering defendants to pay claimant's costs.

In his appeal brief, claimant does not raise any issues on cross-appeal.

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 June 18, 2020, is affirmed in part and modified in part.

For the reasons set forth below, I affirm the deputy commissioner's finding that claimant sustained permanent disability as a result of the work-related low back injury, but the deputy commissioner's award of 20 percent industrial disability is modified to ten percent industrial disability.

Relying on the opinions of Trevor Schmitz, M.D., defendants assert claimant did not satisfy his burden of proof to establish he sustained any permanent disability. However, as correctly noted by the deputy commissioner, claimant continued to be symptomatic, albeit mildly, upon his release from Dr. Schmitz's care. At claimant's final appointment with Dr. Schmitz on May 3, 2017, claimant's radiating pain was gone, but he had a mild, persistent ache in his low back. (Joint Exhibit 5, pp. 70-71) Similarly, at his final work hardening appointment, claimant continued to report soreness. (JE 4, p. 47-48) When tested, claimant met 17 out of 18 job demands, but he was unable to perform carrying of more than 35 pounds greater than 240 feet. The work hardening therapist also indicated claimant lacked full truck active range of motion. (JE 4, p. 47) This is consistent with claimant's testimony at hearing that his symptoms "never fully went away." (Hearing Transcript, p. 25)

Contrary to Dr. Schmitz's opinion, Sunil Bansal, M.D., stated after an independent medical examination (IME) that claimant sustained five percent whole person impairment for his radicular complaints, loss of range of motion, and muscle guarding. (Claimant's Ex. 2, p. 23) While I acknowledge Dr. Schmitz's records from claimant's final appointment indicate his radicular pain was gone, claimant testified this was accurate only for that particular day: "[Dr. Schmitz] would never ask me for like previous [days]. It would be like how are you feeling right that minute." (Tr., p. 25) Claimant testified he was still having the radicular symptoms down his left leg at least once or twice a day in the days leading up to his final appointment with Dr. Schmitz and he continued to have those symptoms at the time of the hearing. (Tr., pp. 25, 35-36)

The deputy commissioner found claimant to be a generally credible witness. 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. The deputy commissioner found claimant to be credible. I find the deputy commissioner correctly assessed claimant's credibility. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's credibility findings.

Thus, like the deputy commissioner, I find Dr. Bansal's opinions regarding claimant's permanent disability to be more credible and consistent with the evidence than those of Dr. Schmitz. I therefore affirm the deputy commissioner's finding that claimant sustained permanent disability as a result of the work injury.

As it pertains to the extent of claimant's permanent disability, however, there are several facts that were not included in the arbitration decision or that need to be clarified which impact the issue of the extent of industrial disability.

The deputy commissioner indicated claimant, after being released from Dr. Schmitz' care, was unable to return to work as a loader because claimant was unable to perform the heavy lifting he was previously able to do. The deputy commissioner stated claimant took a pay cut of 17.5 percent to remain employed with defendant-employer as a delivery driver. In actuality, however, when claimant was hired by defendant-employer, he was placed on a short probationary period. (Defendants' Ex. L [Deposition Tr. p. 28]) While claimant was off recovering from his injury, he remained in his probationary period, and his stockroom job was filled. (Def. Ex. L [Depo . Tr. pp. 39-40]; Cl. Ex. 4, p. 38) In other words, contrary to the arbitration decision, claimant did not return to the job he was hired for because it was filled by someone else not because he was unable to perform his duties.

Claimant was given four different job options upon his release from Dr. Schmitz's care, three of which he declined not because he was physically unable to perform the duties, but because he lacked the requisite experience. (Hrg. Tr., p. 32; see Cl. Ex. 4, p. 38). Claimant ultimately chose the delivery driver position. Importantly, this job required claimant to be "[c]apable of lifting and moving merchandise of up to 60 pounds," which is well beyond the lifting restrictions set forth by Dr. Bansal. (Cl. Ex. 4, p. 52) Notably, claimant did this job without work restrictions and without medical treatment from May of 2017 through July of 2017. Thus, while I find claimant's testimony credible that he needs a work restriction against "super heavy lifting," I also find claimant can perform work in excess of the restrictions assigned by Dr. Bansal.

Claimant does have some minor lifting limitations as a result of his injury, as indicated in his final work hardening visit and his testimony that he believes an appropriate work restriction would be no "super heavy lifting." (Hrg. Tr., p. 74) However, based on his work hardening functional status report, he is capable of performing in the heavy physical demand level. (JE 4, p. 46) Thus, contrary to the deputy commissioner, I find claimant remains a suitable worker in heavy labor but for some minor limitations.

Claimant credibly testified part of the reason he ultimately voluntarily resigned from the delivery driver job was because getting in and out of the truck all day was

physically difficult. (Hrg. Tr., p. 34) He also left, however, because he was offered work in the medical field - which had been his goal all along, even before he took the job with defendant-employer. (Hrg. Tr., pp. 56-58) In other words, claimant's motivation for leaving defendant-employer was not due entirely to his work-related injury or any physical limitations.

When these additional facts and clarifications are considered, I find the record does not justify an award of 20 percent industrial disability. Instead, I find claimant sustained ten percent industrial disability. The deputy commissioner's industrial disability award is therefore modified.

The final issue on appeal is claimant's entitlement to costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Claimant was generally successful in his claim. As such, I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding.

Claimant is entitled to reimbursement for his filing fee per 876 IAC 4.33(7). With respect to Dr. Bansal's IME, I agree with defendants that it was a second IME and is therefore not reimbursable under Iowa Code section 85.39. However, the rules allow for reimbursement of no more than two doctors' reports. 876 IAC 4.33(6). Under the Iowa Supreme Court's holding in DART v. Young, the costs associated with preparation of a written IME report fall under this provision of the rules. 867 N.W.2d 839, 846-47 (Iowa 2015). Thus, I find the cost of Dr. Bansal's report in the amount of $2,181.00 (which does not include the cost of the examination) is reimbursable. (Cl. Ex. 6, p. 65) The deputy commissioner's costs' assessment is therefore affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 18, 2020, is affirmed in part and modified in part.

Defendants shall pay the claimant fifty (50) weeks of permanent partial disability benefits at the weekly rate of three hundred twelve and 28/100 ($312.28) commencing on April 7, 2017.

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).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of two thousand two hundred eighty-one and 00/100 dollars ($2,281.00), 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 January, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Neal (via WCES)

Aaron Oliver (via WCES)