

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VICTOR SAINZ,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5053964

A P P E A L
D E C I S I O N

Head Note Nos: 1402.30; 1803.1; 1803;
2502; 2907

FILED

SEP 28 2018

WORKERS' COMPENSATION

Defendant Tyson Fresh Meats, Inc., self-insured employer, appeals from an arbitration decision filed on April 10, 2018. Claimant Victor Sainz cross-appeals. The case was heard on November 20, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on January 23, 2018.

The deputy commissioner found claimant carried his burden of proof that he sustained permanent disability to his neck and right upper extremity as a result of the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on August 4, 2015. The deputy commissioner found claimant failed to carry his burden of proof that the work injury caused permanent disability to either of his shoulders. The deputy commissioner found claimant sustained 25 percent industrial disability as a result of the work injury, which entitles claimant to receive 125 weeks of permanent partial disability (PPD) benefits, commencing on October 5, 2017. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement in the amount of \$2,962.00 for the cost of the first independent medical evaluation (IME) of claimant performed by Sunil Bansal on January 8, 2016. The deputy commissioner ordered defendant to pay claimant's costs of the arbitration proceeding in the total amount of \$1,783.41, which includes \$1,326.67 for the cost of the report from a second IME of claimant performed by Dr. Bansal on February 17, 2017, and \$350.00 for the cost of the report from a functional capacity evaluation (FCE) of claimant performed by Daryl Short, DPT, on October 15, 2017.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant's permanent disability from the work injury extends beyond claimant's right upper extremity into claimant's body as a whole, with the result that claimant sustained industrial disability. Defendant asserts the deputy commissioner erred in awarding claimant anything more than scheduled member functional disability for the right upper extremity. Defendant asserts the deputy commissioner erred in finding claimant sustained 25 percent industrial disability as a result of the work injury. Defendant asserts the deputy commissioner erred in finding that pursuant to Iowa Code section 85.39, claimant is entitled to receive reimbursement for the cost of Dr. Bansal's January 8, 2016, IME. Defendant asserts the deputy commissioner erred by taxing defendant in the amount of \$1,326.67 for the cost of the report from Dr. Bansal's February 17, 2017,

IME, and by taxing defendant in the amount of \$350.00 for the cost of Mr. Short's FCE report.

Claimant asserts on cross-appeal that the deputy commissioner erred in finding claimant failed to prove he sustained permanent disability to his right shoulder as a result of the work injury. Claimant asserts the deputy commissioner erred in awarding claimant 25 percent industrial disability because claimant asserts the award for industrial disability should be increased substantially.

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 April 10, 2018, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant carried his burden of proof that the August 4, 2015, work injury caused claimant to sustain permanent disability to his right upper extremity and to his neck, and I affirm the deputy commissioner's finding that claimant sustained industrial disability as a result of the work injury.

I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that the work injury caused permanent disability to either of his shoulders.

I affirm the deputy commissioner's finding that claimant sustained 25 percent industrial disability as a result of the work injury, which entitles claimant to receive 125 weeks of PPD benefits commencing on October 5, 2017.

I affirm the deputy commissioner's taxation of costs as it pertains to \$100.00 for claimant's filing fee, and \$6.74 for claimant's service fee.

I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I reverse the deputy commissioner's finding that pursuant to Iowa Code section 85.39, claimant is entitled to receive reimbursement from defendant for the cost of Dr. Bansal's January 8, 2016, IME.

I reverse the deputy commissioner's taxation in the amount of \$350.00 for the cost of Mr. Short's FCE report.

I reverse the deputy commissioner's taxation in the amount of \$1,326.67 for the cost of the report from Dr. Bansal's February 17, 2017, IME, because I find that pursuant to Iowa Code section 85.39, claimant is entitled to receive reimbursement for the full \$1,990.00 cost of both the February 17, 2017, IME and Dr. Bansal's report for that IME.

I provide the following analysis for my decision:

Dr. Bansal's January 8, 2016, IME:

Iowa Code section 85.39 states the following, in pertinent part:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall . . . be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

The Iowa Supreme Court's decision in DART v. Young, 867 N.W.2d 839 (Iowa 2015), clearly states that if no impairment rating has actually been provided by an employer-retained physician as of the time the IME arranged by the claimant takes place, the injured worker does not qualify for reimbursement for the IME under section 85.39. In this case, no employer-retained physician specifically provided a permanent impairment rating before Dr. Bansal's first IME of claimant took place on January 8, 2016. It was not until Dr. Jensen's IME on April 11, 2016, that an employer-retained physician actually provided a permanent impairment rating. Because Dr. Bansal's January 8, 2016, IME took place before Dr. Jensen's IME, claimant is not entitled to receive reimbursement from defendant under Iowa Code section 85.39 for Dr. Bansal's charge for that IME.

Pursuant to DART, if an injured worker is not entitled to receive reimbursement for an IME fee under section 85.39, then under rule 876 IAC 4.33, the portion of the IME fee attributable to preparation of the report itself can be taxed as a cost. In this case, in Dr. Bansal's invoice for the January 8, 2016, IME, the doctor lists \$386.00 for his examination of claimant and \$2,576.00 for "Record Review and Report." Because Dr. Bansal does not separate out how much was charged for record review and how much was charged for preparation of the report itself, no portion of his charge can be taxed as a cost for the report.

Dr. Bansal's February 17, 2017 IME:

On February 17, 2017, Dr. Bansal performed a second IME of claimant and he issued a report dated February 22, 2017, for that IME. In the February 22, 2017, report, Dr. Bansal revisited the issue of claimant's permanent impairment resulting from the August 4, 2015, work injury. Dr. Bansal's total charge for the February 17, 2017, IME and for the February 22, 2017, report was \$1,990.00. Because the February 17, 2017, IME took place ten months after Dr. Jensen's April 11, 2016, IME which addressed claimant's permanent impairment at the request of defendant, pursuant to Iowa Code section 85.39, claimant is entitled to receive reimbursement from defendant for Dr. Bansal's full \$1,990.00 charge for the February 17, 2017, IME and for the February 22, 2017, report for that IME.

Mr. Short's FCE report:

In assessing whether an FCE report is taxable under rule 876 IAC 4.33, the relevant inquiry is whether the FCE was required by a medical provider as necessary for the completion of a medical report. See e.g. David Mundt v. Nash-Finch Company, File No. 5031874. (Arbitration Decision, May 10, 2012) In a more recent appeal decision, Pastor v. Farmland Foods, Inc., File No. 5050551 (Appeal Decision October 27, 2017) the undersigned reversed a deputy commissioner's finding that pursuant to rule 4.33, the claimant was entitled to receive reimbursement from the defendants for the cost of an FCE report because "no authorized medical provider requested the FCE and because [the FCE provider] was not a practitioner whose charge can be recovered as a cost pursuant to rule 876 IAC 4.33. (Id. at p. 2) In this case, the FCE performed by Mr. Short was requested by claimant's counsel, and not by any of claimant's treating or evaluating providers. In addition, when Mr. Short performed his FCE in October 2017, Dr. Bansal, claimant's IME provider, had already addressed the issue of permanent restrictions in both of his IME reports. Because Mr. Short's FCE was not necessary for a medical provider or medical evaluator to complete their report, no portion of Mr. Short's FCE charge is taxable as a cost under rule 876 IAC 4.33.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of April 10, 2018, is MODIFIED as follows:

Defendant shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the stipulated weekly rate of three hundred eighty-nine and 18/100 dollars (\$389.18), commencing on the stipulated date of October 5, 2017.

Defendant shall receive a credit for all weekly benefits paid to date.

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).

Defendant shall reimburse claimant for the cost of Dr. Bansal's February 17, 2017, IME in the amount of one thousand nine hundred ninety and 00/100 dollars (\$1,990.00).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of one hundred six and 74/100 dollars (\$106.74) 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 28th day of September, 2018.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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