

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TONY A. AUGÉ,

Claimant,

vs.

LAGO CONSTRUCTION, LLC,

Employer,

and

INTEGRITY MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5062048

A P P E A L

D E C I S I O N

Head Notes: 1402.30; 1803; 2501; 2502;
2907

Claimant Tony A. Auge appeals from an arbitration decision filed on February 2, 2018. Defendants Lago Construction, LLC, employer, and Integrity Mutual Ins. Co., insurance carrier, cross-appeal. The case was heard on October 26, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 22, 2017.

The deputy commissioner found claimant carried his burden of proof to establish that the stipulated injuries he sustained on February 23, 2016, arose out of and in the course of his employment with defendant-employer. The deputy commissioner found claimant sustained 50 percent industrial disability as a result of the work injury, which entitles claimant to receive 250 weeks of permanent partial disability benefits commencing on April 4, 2016. The deputy commissioner found claimant is not entitled to reimbursement for any portion of the charges from Marc Hines, M.D., and from Frank Gersh, Ph.D., for their independent medical evaluations (IMEs). The deputy commissioner found claimant is entitled to receive reimbursement from defendants for all mileage itemized in Exhibit 17 associated with the care and treatment of the work injury. The deputy commissioner found claimant is not entitled to receive reimbursement from defendants for the mileage itemized in Exhibit 17 incurred by claimant in traveling to the IMEs with Dr. Hines and Dr. Gersh. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$100.00.

On appeal, claimant asserts the deputy commissioner erred in finding claimant sustained 50 percent industrial disability as a result of the work injury. Claimant asserts the award for industrial disability should be increased substantially. Claimant also asserts the deputy commissioner erred in failing to assess as costs under Iowa Code section 86.40 and under rule 876 IAC 4.33, Dr. Hines' charge in the amount of \$750.00 for the preparation of his IME report (Exhibit 16, p. 77) and Dr. Gersh's charge in the amount of \$1,250.00 for the preparation of his IME report. (Ex. 16, p. 74)

Defendants assert on cross-appeal that the deputy commissioner erred in finding claimant carried his burden of proof that the injuries he sustained on February 23, 2016, are related to his employment. Defendants assert claimant should be awarded nothing. In the alternative, defendants assert if it is found on appeal that claimant did prove his injuries are work-related, the award for industrial disability should be affirmed.

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 17A.5 and 86.24, the proposed arbitration decision filed on February 2, 2018, is affirmed in part and modified in part.

I affirm the deputy commissioner's finding that claimant carried his burden of proof that the injuries he sustained on February 23, 2016, arose out of and in the course of his employment. I affirm the deputy commissioner's finding that claimant sustained 50 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's finding that claimant is entitled to receive reimbursement from defendants for all mileage itemized in Exhibit 17 associated with the care and treatment of the work injury. I affirm the deputy commissioner's finding that claimant is not entitled to receive reimbursement from defendants for the mileage itemized in Exhibit 17 incurred by claimant in traveling to the IMEs with Dr. Hines and Dr. Gersh. I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner regarding those issues.

The deputy commissioner's finding that claimant is not entitled to reimbursement for any portion of the charges from Dr. Hines and from Dr. Gersh for their IMEs is respectfully modified. I provide the following analysis for modification of this finding:

In his appeal brief, claimant concedes he is not entitled to receive reimbursement from defendants under Iowa Code section 85.39 for the cost of the IMEs performed by Dr. Hines and by Dr. Gersh in this case. (Claimant's Appeal Brief, pp. 15-16) However, claimant is correct in his assertion (Clf. App. Brief, pp. 16-17) that the Iowa Supreme Court's decision in DART v. Young, 867 N.W.2d 839 (Iowa 2015) held that when a claimant is not entitled to reimbursement for the cost of an IME under Iowa Code section 85.39, the specific portion of the IME cost associated with the preparation of the

written IME report can be assessed as a cost at hearing under rule 876-4.33. See 867 N.W.2d at 846-847.

In this case, both Dr. Hines and Dr. Gersh have clearly delineated in their invoices how much of their total IME charges are attributable to the preparation of their written reports. Of Dr. Hines' total IME charge in the amount of \$3,666.66, \$750.00 of that amount is itemized as the cost for the preparation of the report. (Ex. 16, p. 77) Of Dr. Gersh's total IME charge in the amount of \$3,250.00, \$1,250.00 of that amount is itemized as the cost for the preparation of the report. (Ex. 16, p. 74) Those amounts total \$2,000.00. I find the amounts itemized by Dr. Hines and by Dr. Gersh for the preparation of their IME reports are reasonable. Therefore, pursuant to Iowa Code section 86.40 and rule 876-4.33, including the amount of \$100.00 taxed as costs by the deputy commissioner, I order defendants to pay claimant's costs of the arbitration proceeding in the total amount of \$2,100.00.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 2, 2018, is affirmed in part and modified in part.

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the weekly rate of four hundred twenty-two and 73/100 dollars (\$422.73) commencing on April 4, 2016.

Defendants shall receive credit for all benefits previously paid.

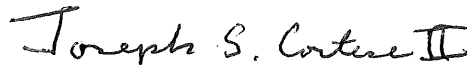
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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).

Defendants shall reimburse claimant for all mileage itemized in Exhibit 17 associated with the care and treatment of the work injury.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of two thousand one hundred and no/100 dollars (\$2,100.00), 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 8th day of August, 2019.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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