BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ABAD BENITEZ, Claimant, vs. ALLSTEEL (HNI CORPORATION), Employer, Self-Insured, Defendant.	:	File Nos. 5042714, 5042715 APPEAL DECISION Head Note Nos.: 1402.30, 1402.40, 1803, 2907

FILED
AUG 25 2015
WORKERS' COMPENSATION

On July 18, 2014, defendant Allsteel filed a notice of appeal. On July 24, 2014, claimant filed a notice of cross-appeal.

The case was heard on November 19, 2014, in front of the deputy workers' compensation commissioner and considered fully submitted on April 2, 2014.

An arbitration decision was rendered on July 1, 2014, finding the claimant had sustained a 15 percent permanent partial disability impairment arising out of an injury date of December 14, 2012. All costs were ordered to be paid by the defendant except for two subpoenas and a second independent medical examination with Richard Kreiter, M.D.

Defendant asserts on appeal that the award of 15 percent was not supported by the evidence. Claimant asserts that the deputy erred by not finding claimant sustained a work injury on September 12, 2012, and that she sustained a substantial industrial disability as a result of both work injuries of September 12, 2012, and December 14, 2012. They further argue that the costs of Dr. Kreiter's report should have been assessed against the defendants.

The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on July 1, 2014, that relate to issues properly raised on intra-agency appeal with the following additional clarification regarding causation and costs.

The defendant stipulated the claimant sustained a work injury arising out of and

in the course of her employment on December 14, 2012. The hearing issues pertaining to file number 5042715 were whether claimant sustained a permanent partial disability and the extent of that disability, if any, along with costs. The deputy noted in the exhaustive recitation of facts nearly all of the issues raised by the defendant on appeal such as the claimant's credibility, her past work injuries, and the inadequacies of the claimant's medical examiners. However, the irrefutable evidence was that claimant was able to work over one year for the defendant without complaint or restriction. The work as a machine operator and fabric cutter included lifting rolls of fabric that could weigh up to 50 pounds as well as pushing, pulling and carrying those rolls. During the nine month evaluation, claimant's supervisor praised the claimant for the work she had performed.

On March 24, 2013, Rhea Allen, M.D. placed claimant at MMI and imposed the following work restrictions: No lifting/pushing/pulling over fifteen (15) pounds; and avoid working with hands over shoulder height.

Dr. Allen identified these as previous work restrictions relating to claimant's September 1991 injury. In Dr. Allen's deposition she testified:

> Q. And what you did was you placed on her the same restrictions that Dr. Dean had placed upon her due to her September of 1991injury, correct?
>
> A. I did. Because I had ordered a functional capacity evaluation, but she didn't go.
>
> So without other objective evidence and without evidence that she could do more than that, I just put her permanent restrictions back in place.
>
> Q. Well, for two years she did more than what was Dr. Dean's restrictions, didn't she, between 2010 and '12?
>
> A. Right. She was to – well, Dr. Dean had initially considered letting her lift 50 pounds a few times per work shift, but he had canceled that.
>
> So without any other – if I would've got the FCE and she demonstrated beyond that, then I would've made an adjustment.
>
> But without the FCE, I just put her – said her permanent restrictions stand as they were.

(Exhibit 10, p. 112-113)

Following the imposition of restrictions by the treating and authorized physician, Dr. Allen, claimant was terminated. Dr. Allen opined that claimant had restrictions following the December 14, 2012, injury and even though they were older restrictions,

claimant had worked competently without them for over a year.

On that basis, amongst others, the award of 15 percent is supported by a preponderance of the evidence in the record.

As to the issue of costs, claimant sought the assessment of Richard Kreiter, M.D.'s report. Claimant had already obtained one IME via Iowa Code section 85.39.

Under Des Moines Area Regional Transit Authority v. Young, No. 14-0231 (Iowa, June 5, 2015), section 85.39 is the "sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39."

The only issue on appeal is the assessment of Dr. Kreiter's report as a cost. This is impermissible under section 85.39 and section 85.39 is an express limitation of rule 4.33. Therefore the deputy's finding disallowing Dr. Kreiter's fee as costs is appropriate.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of July 1, 2014, is AFFIRMED.

Each party will be responsible for their own costs.

Signed and filed this 25 day of August, 2015.

JENNIFER GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Anthony J. Bribriesco
Attorney at Law
1313 N. Harrison St.
Davenport, IA 52803-4904
ajbribriesco@netexpress.net

Valerie A. Landis
Attorney at Law
2700 Grand Ave., Ste. 111
Des Moines, IA 50312
vlandis@hopkinsandhuebner.com