

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE JUAN ROLDAN,

Claimant,

vs.

SMITHFIELD FOODS, INC.,

Employer,

and

SAFETY NATIONAL CASUALTY CORP.,

Insurance Carrier,
Defendants.

File No. 19005723.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 1803;
1803, 1803.1; 2206; 2209;
2401; 2502; 2802; 2907

Defendants Smithfield Foods, Inc., employer, and its insurer, Safety National Casualty Corporation, appeal from an arbitration decision filed on August 2, 2021. Claimant Jose Juan Roldan cross-appeals. The case was heard on January 7, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on January 28, 2021.

In the arbitration decision, the deputy commissioner found claimant was a credible witness. The deputy commissioner found claimant met his burden of proof to establish he sustained a cumulative work injury in July 2018, which aggravated or lit up claimant's pre-existing degenerative condition in his neck and in his shoulder joints, resulting in permanent impairment of his neck. The deputy commissioner found defendants failed to prove claimant did not provide timely notice of the injury under Iowa Code section 85.23. Because claimant was earning higher wages working for defendant-employer at the time of the hearing than he was earning when he was injured, the deputy commissioner found that pursuant to Iowa Code section 85.34(2)(v) claimant's recovery for the work injury is limited to his functional impairment and claimant is not entitled to receive industrial disability benefits for the work injury. The deputy commissioner found claimant sustained ten percent permanent functional impairment of his neck, which entitles claimant to receive 50 weeks of permanent partial disability (PPD) benefits at the weekly rate of \$567.18, commencing on January 31, 2019. The deputy commissioner found that pursuant to Iowa Code Section 85.39, claimant is entitled to receive reimbursement from defendants for the cost of the independent medical evaluation (IME) of claimant performed by Sunil Bansal, M.D. 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 was a credible witness and defendants challenge the deputy commissioner's credibility findings and analysis. Defendants assert the deputy commissioner erred in finding defendants failed to prove claimant did not provide timely notice of the injury under Iowa Code section 85.23. Defendants assert the deputy commissioner erred in finding claimant proved he sustained injuries to his neck and shoulders. Defendants assert the deputy commissioner correctly limited claimant's recovery to a functional impairment rating, but defendants assert the deputy commissioner erred in finding claimant sustained ten percent functional impairment of his neck and body as a whole. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive reimbursement from defendants for the cost of the IME. Defendants assert the deputy commissioner erred in ordering defendants to pay claimant's costs of the arbitration proceeding.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant's recovery is limited to his functional impairment, as opposed to an award of industrial disability. Claimant asserts the remaining portions of the decision should be affirmed.

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 August 2, 2021, is affirmed in part, modified in part, and reversed in part.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's finding that claimant was a credible witness.

I affirm the deputy commissioner's finding that claimant proved he sustained a cumulative work injury that aggravated or lit up the pre-existing degenerative condition in his neck and shoulder joints, resulting in permanent impairment of his neck. I affirm the deputy commissioner's finding that defendants failed to prove claimant did not provide timely notice of the work injury under Iowa Code section 85.23. I affirm the deputy commissioner's finding that claimant's recovery is limited to his functional impairment because claimant was earning higher wages working for defendant-employer at the time of the hearing than he was earning at the time of the work injury.

I modify in part, and I reverse in part, the deputy commissioner's finding that claimant sustained ten percent functional impairment of his neck caused by the work injury with the following additional analysis:

At page 15 of the arbitration decision, the deputy commissioner found claimant sustained ten percent permanent functional loss of his neck, noting "Dr. Bansal assigned a 5 percent impairment and Dr. Luft a 5-10 percent impairment." Defendants correctly note Ric Jensen, M.D., a treating neurosurgeon responded to a check-the-box letter from claimant's counsel agreeing to the following without providing any additional comments:

It is your medical conclusion based on your own evaluation of Mr. Roldan, and your review of his medical records that Mr. Roldan likely has permanent impairment as a result of his neck injury, referenced (in No. 2) above, which is likely between 5% -10% permanent impairment of the whole person?

(JE 9, p. 87)

Dr. Jensen agreed with the statement above, not Michael Luft, D.O., a treating family practice physician.

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001), Sunil Bansal, M.D., an occupational medicine physician who performed an IME of claimant, assigned claimant five percent whole person impairment, finding, "based on his current symptomatology and physical examination, he meets the criteria for a DRE Category II Impairment. He meets several criteria from Category II, including radicular complaints, guarding, and loss of range of motion." (Ex. 1, p. 14) As noted by the deputy commissioner, while Dr. Harbach opined claimant sustained a temporary aggravation of his preexisting neck condition, he also found Dr. Bansal's impairment rating "fairly reasonable," and "very restrained." (JE 7, pp. 47, 49) Based on my de novo review, I find Dr. Jensen's opinion is too vague on the extent of disability. I find Dr. Bansal's rating most persuasive and I find claimant has sustained permanent functional loss of five percent of his neck, which entitles claimant to receive 25 weeks of PPD benefits at the weekly rate of \$567.18, commencing on January 31, 2019.

The deputy commissioner ordered defendants to pay claimant's costs in this matter, including the cost of Dr. Bansal's report. Defendants assert claimant is not entitled to recover the cost of the IME under Iowa Code section 85.39, or under rule 876 IAC 4.33 because defendants had not obtained an impairment rating before Dr. Bansal conducted the IME. The deputy commissioner did not award claimant a specific dollar amount regarding Dr. Bansal's IME. I modify the deputy commissioner's decision with the following additional analysis:

Iowa Code section 85.39(2) (2018), provides:

2. 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, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, 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. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

On October 18, 2018, treating physician Benjamin Paulson, D.O., an orthopedic surgeon, examined claimant and found claimant's bilateral hand osteoarthritis is part of the normal aging process and is not work-related. (JE 7, p. 37) After receiving Dr. Paulson's opinion, defendants denied claimant's claim. Claimant disagreed with Dr. Paulson's opinion and sought treatment on his own and claimant obtained an IME with Dr. Bansal.

The Iowa Court of Appeals recently addressed this issue in Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021). In Kern, defendants' expert found there was no causation. Kern disagreed with the opinion and sought an IME at defendants' expense. The commissioner found Kern was not entitled to recover the cost of the IME. The Iowa Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. In this case, Dr. Paulson opined claimant did not sustain any permanent injury as a result of his work activities and defendants denied claimant's claim. Claimant disagreed with Dr. Paulson's opinion and sought treatment on his own and an IME with Dr. Bansal, which was issued after Dr. Paulson's opinion. Under Kern, claimant is entitled to recover the \$2,632.00 cost of Dr. Bansal's IME.

Claimant also seeks to recover the \$100.00 cost of the filing fee, and two service fees of \$6.75, for a total of \$113.50. (Ex. 6) The arbitration decision does not reference these costs. Claimant was successful in proving his case. Using my discretion on de novo review, pursuant to rule 876 IAC 4.33, I find claimant is entitled to recover his costs of the arbitration proceeding in the amount of \$113.50.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 2, 2021, is affirmed in part, modified in part, and reversed in part, with the above-stated additional analysis.

Defendants shall pay claimant 25 weeks of permanent partial disability benefits, at the weekly rate of five hundred sixty-seven and 18/100 dollars (\$567.18), commencing on January 31, 2019.

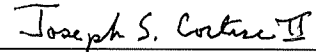
Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018).

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant in the amount of two thousand six hundred thirty-two and 00/100 dollars (\$2,632.00) for the cost of Dr. Bansal's IME.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred thirteen and 50/100 dollars (\$113.50), 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 3rd day of March, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Byrne (via WCES)

Michael Miller (via WCES)