

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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BRENDA DEHAAI,

Claimant,

vs.

CASEY'S MARKETING COMPANY,

Employer,

and

EMCASCO INS. CO.,

Insurance Carrier,

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5066592

A P P E A L

D E C I S I O N

Head Notes: 1108; 1402.40; 1803; 2206;  
2501; 2502; 2907; 3202

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Claimant Brenda DeHaai appeals from an arbitration decision filed on July 31, 2020. Defendants Casey's Marketing Company, employer, and its insurer, EMCASCO Ins. Co., cross-appeal. Defendant Second Injury Fund of Iowa (the Fund) responds to the appeal. The case was heard on November 26, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on January 16, 2020.

The deputy commissioner found claimant failed to carry her burden of proof to establish she sustained permanent disability of her right upper extremity as a result of the stipulated work injury which occurred on December 20, 2016. The deputy commissioner found claimant is entitled to receive nothing in the way of permanent disability benefits. The deputy commissioner found claimant is not entitled to receive benefits from the Fund. The deputy commissioner found claimant is not entitled to payment by defendants employer and insurer for the requested past medical expenses itemized in Exhibit 6. The deputy commissioner found claimant is entitled to receive reimbursement from defendants employer and insurer in the amount of \$2,763.00 for the full cost of the independent medical evaluation (IME) of claimant performed by Sunil Bansal, M.D. The deputy commissioner ordered defendants employer and insurer to pay claimant's costs of the arbitration proceeding in the amount of \$256.89.

Claimant asserts on appeal that the deputy commissioner erred by not considering claimant's Exhibits 9 and 10. Claimant asserts the deputy commissioner

erred in finding claimant failed to prove she sustained permanent disability of her right upper extremity as a result of the work injury. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive permanent disability benefits. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive benefits from the Fund. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to payment by defendants employer and insurer for the requested past medical expenses.

Defendants employer and insurer assert on cross-appeal that the deputy commissioner erred in finding that claimant is entitled to reimbursement from those defendants for the full cost of Dr. Bansal's IME. Defendants employer and insurer assert the deputy commissioner erred in ordering those defendants to pay claimant's costs of the arbitration proceeding.

The Fund asserts on appeal that the finding that claimant is not entitled to receive benefits from the Fund 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.15 and 86.24, the proposed arbitration decision filed on July 31, 2020, is affirmed in part without additional analysis, it is affirmed in part with additional analysis, it is modified in part, and it is reversed in part.

I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to the following issues without further analysis:

I affirm the deputy commissioner's finding that claimant is not entitled to receive permanent disability benefits. I affirm the deputy commissioner's finding that claimant is not entitled to receive benefits from the Fund. I affirm the deputy commissioner's finding that claimant is not entitled to payment by defendants employer and insurer for the requested past medical expenses.

I affirm the deputy commissioner's finding that claimant failed to prove she sustained permanent disability of her right upper extremity as a result of the work injury with the following additional analysis:

Claimant asserts it appears the deputy commissioner failed to consider claimant's Exhibits 9 and 10, and claimant asserts that because of that failure, the deputy commissioner reached an incorrect determination on the issue of causation.

In Exhibit 9, a medical report dated February 5, 2018, Todd C. Peterson, D.O., claimant's treating orthopedic surgeon, stated claimant's work injury aggravated a pre-

existing arthritic condition in her right wrist. (Exhibit 9, pp. 58-59) In Exhibit 9, Dr. Peterson did not state whether he believed the aggravation of claimant's pre-existing condition caused by the work injury was temporary or permanent. In a report dated March 19, 2018 (Exhibit B), Dr. Peterson states he performed a final evaluation of claimant on March 2, 2018, one month after he issued Exhibit 9, and in the March 19, 2018, report Dr. Peterson stated that based upon the March 2, 2018, evaluation, he determined the aggravation of claimant's pre-existing condition by the work injury was only temporary. Dr. Peterson repeats that conclusion in a report he issued on November 10, 2019. (Ex. C)

Claimant infers Exhibit 9 contradicts Dr. Peterson's causation opinions stated in Exhibits B and C. Claimant infers that if the deputy commissioner had reviewed Exhibit 9, the deputy commissioner would have reached a different conclusion regarding causation because of the alleged contradiction. (Claimant's Appeal Brief, pp. 8-9) I find that if the deputy commissioner did, in fact, fail to review Exhibit 9, it was insignificant because I find Exhibit 9 does not contradict Exhibits B and C on the issue of causation. Exhibits B and C simply include additional detail regarding Dr. Peterson's causation opinions.

Claimant asserts that because the deputy commissioner failed to mention Exhibit 10 in the arbitration decision, the deputy commissioner most likely failed to consider Exhibit 10, which is Dr. Bansal's rebuttal report dated December 27, 2019, before issuing the arbitration decision. Upon reviewing all of the reports from both Dr. Peterson and Dr. Bansal, I find Dr. Peterson's causation opinion to be most persuasive. Therefore, if the deputy commissioner did fail to review Exhibit 10, it does not change the outcome of this case.

Claimant states the following in her appeal brief:

The reasons stated by Dr. Peterson in his November 2019 report for why DeHaa's work injury was only temporary are internally inconsistent, speculative, and based on inaccurate facts. The deputy's conclusion that Dr. Peterson's opinion is the most consistent with the other evidence in the record is inaccurate and must be reversed. The initial opinion of Dr. Peterson, provided to Casey's on February 5, 2018, is correct and is the same opinion of Dr. Bansal. (See Cl. Ex. 9, Cl. Ex. 1). The record clearly establishes that DeHaa sustained a permanent aggravation of a preexisting condition.

(Claimant's Appeal Brief, p. 10)

As noted above, Dr. Peterson did not state in his February 5, 2018, report (Ex. 9) that he believed the aggravation of claimant's pre-existing condition caused by the work injury was permanent. He simply stated the work injury aggravated claimant's pre-existing condition. (Ex. 9) Dr. Peterson later stated, after re-evaluating claimant on

March 9, 2018, that the aggravation caused by the work injury was temporary. (Exs. B and C)

In his IME report, Dr. Bansal states the following, in pertinent part, regarding his impairment rating for the work injury:

**2. Does Ms. DeHaaI have any permanent impairment for her right wrist associated with her December 20, 2016 right wrist injury?**

**RIGHT WRIST:**

With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Figures 16-28, 16-31, and, 16-37, she qualifies for the following impairment values on her range of motion deficits.

	<b>RANGE OF MOTION</b>	<b>%UE IMPAIRMENT</b>
Flexion:	60 degrees	0
Extension:	49 degrees	2
Radial Deviation:	10 degrees	2
Ulnar Deviation	24 degrees	1

**Upper extremity impairment = 5%**

(Ex. 1, p. 15)

In Exhibit 10, Dr. Bansal states the following, in pertinent part:

It should be noted that a temporary exacerbation vs a permanent aggravation presupposes a return to pre-injury baseline after a reasonable treatment period. It has been more than two years since the 12/20/16 fall and she is clearly not at her pre-injury baseline that was characterized by Dr. Peterson himself as an asymptomatic right wrist. Therefore, she has permanently aggravated her right wrist.

(Ex. 10, p. 61)

It must be noted that nowhere in his records does Dr. Peterson himself characterize claimant's right wrist as "asymptomatic" prior to the work injury. In his report of November 10, 2019, Dr. Peterson noted, ". . . according to the patient, she had no pain or loss of range of motion prior to this injury." (Ex. C, p. 3) In that same report, Dr. Peterson states the following regarding claimant's range of motion prior to the injury:

. . . On viewing her imaging from December 21, 2016, the day after her injury at work, I see she has significant arthritis present in the radiocarpal joint and distal radioulnar joint. She has dorsal osteophytes, which would

prevent full dorsiflexion, arthritis in her radioulnar joint with osteophyte formation, as well as evidence of previous ulnar styloid fracture. She also has a DISI pattern of arthritis with a scapholunate angle of around 90 degrees. These are significant chronic findings which undoubtedly had an effect on her wrist motion prior to her injury on December 20, 2016. There were no acute injuries seen on wrist x-ray.

(Id.)

Nowhere in either of his reports does Dr. Bansal state whether he believes any portion of the permanent impairment he assigns to claimant's right wrist, which impairment Dr. Bansal determined is caused by loss of range of motion, is the result of claimant's pre-existing condition. Nor does Dr. Bansal state whether he believes there was any significant permanent impairment of claimant's wrist prior to the work injury, in light of the objective findings that clearly were present before the work injury occurred, as documented by the x-ray of claimant's wrist taken the day after the injury occurred

Because Dr. Bansal's impairment rating for claimant's right wrist is based on claimant's range of motion, because Dr. Bansal attributes all of the loss of range motion he measured to the work injury (Ex. 1, p. 15), and because Dr. Peterson gives a very detailed analysis based on the objective evidence as to why claimant's range of motion in her wrist must have been limited by her pre-existing condition prior to the work injury, I find Dr. Bansal's opinion is not convincing with regard to causation of the permanent impairment resulting from the work injury. With this additional analysis of Exhibits 9 and 10, I affirm the deputy commissioner's finding that claimant failed to carry her burden of proof that she sustained permanent disability of her right upper extremity as a result of the work injury.

With regard to reimbursement to claimant of Dr. Bansal's IME fee, I respectfully modify the deputy commissioner's finding that claimant is entitled to receive reimbursement from defendants employer and insurer for the full amount of the cost of the IME. I provide the following analysis regarding this issue:

In the arbitration decision, the deputy commissioner ordered defendants employer and insurer to reimburse claimant for the full cost of Dr. Bansal's IME in the amount of \$2,763.00. (Arb. Dec., p. 8) However, agency precedent holds that an employer is not liable for reimbursing an entire IME fee when a portion of that fee is for a claimant's case against the Fund. Keyser v. St. Gobain Corp., d/b/a Certainteed Gypsum & Ceiling Mfg., Inc., File No. 5061026, 2018 WL 4191753 (App. Dec. Aug 24, 2018).

In Keyser, Dr. Bansal charged \$2,732.00 for an IME that addressed the claimant's work injury and also her other injuries for her case against the Fund. In Keyser, Dr. Bansal did not provide a breakdown of the time he spent evaluating each condition, and there was no evidence of what the IME would have cost had Dr. Bansal

only considered the conditions making up the claimant's case against the employer. In denying liability for the full cost of the IME, the commissioner held, "It is reasonable to assume, without evidence to the contrary, that his fees would have been lower had he not spent time considering the left knee and left ankle injuries" for the claim against the Fund. The commissioner held there is an implicit requirement in Iowa Code section 85.39 that the fee for which a claimant seeks reimbursement is only for the evaluation of the body parts which make up the claim against the employer and insurer. (Id. at 3-4)

In the IME in this case, Dr. Bansal evaluated four different body parts: claimant's right wrist for her claim against defendants employer and insurer, and claimant's left wrist, left foot and right foot for the claim against the Fund. Because 75 percent of the body parts Dr. Bansal evaluated are for the claim against the Fund, I modify the order for reimbursement for the IME, and I order defendants employer and insurer to reimburse claimant for 25 percent of the cost of the IME, which is a total reimbursement from those defendants in the amount of \$670.75.

With regard to the taxation of costs, I respectfully reverse the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding in the amount of \$256.89. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In the arbitration proceeding in this matter, claimant failed to establish entitlement to any permanent disability benefits, entitlement to payment of the requested past medical expenses, or entitlement to benefits from the Fund. Because claimant failed to prevail on any of the major issues raised in the arbitration proceeding, in exercising the agency's discretion, I respectfully reverse the deputy commissioner's order taxing defendants employer and insurer with claimant's costs of the arbitration proceeding.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on July 31, 2020, is affirmed in part without additional analysis, it is affirmed in part with additional analysis, it is modified in part, and it is reversed in part.

Claimant shall take no further weekly benefits from defendants employer and insurer in these proceedings.

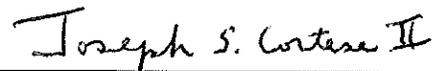
Claimant shall take nothing from the Second Injury Fund of Iowa in these proceedings.

Defendants employer and insurer shall reimburse claimant in the amount of six hundred seventy and 75/100 (\$670.75) for twenty-five percent (25%) of Dr. Bansal's IME fee.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants employer and insurer shall file subsequent reports of injury as required by this agency.

Signed and filed on this 14<sup>th</sup> day of January, 2021.

  
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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served, as follows:

Joseph Powell (via WCES)

Gregory Taylor (via WCES)

Meredith Cooney (via WCES)