

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KIM SAENGCHANPHENG,

Claimant,

vs.

TYSON FRESH MEATS,

Employer,
Self-Insured,
Defendant.

File Nos. 5043784
5043785
5043786

A P P E A L

D E C I S I O N

Head Note No. 1108

FILED

MAY - 8 2015

WORKERS' COMPENSATION

Claimant Kim Saengchanpheng appeals from an arbitration decision filed May 20, 2014. The case was heard on April 3, 2014, and it was considered fully submitted on April 28, 2014, before the deputy commissioner. The deputy commissioner determined that claimant failed to carry her burden of proof on the causation issues and claimant was awarded nothing. Claimant asserts on appeal that the deputy commissioner erred in determining that claimant failed to carry her burden of proof on the causation issues. Claimant asserts that she is entitled to industrial disability benefits. Claimant also asserts that the deputy commissioner erred in not admitting into evidence a rebuttal report from Sunil Bansal, M.D. Claimant also asserts that the deputy commissioner erred in not ruling on whether claimant should be reimbursed for the cost of Dr. Bansal's IME. Defendant asserts that the findings of the deputy commissioner should be affirmed on appeal. Defendant also asserts that claimant is not entitled to reimbursement for the cost of Dr. Bansal's IME. 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.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision of May 20, 2014, filed in this matter that relate to issues properly raised on intra-agency appeal with the following additional analysis:

The major fighting issue in this case is which medical expert's causation opinion should be given greater weight. The deputy commissioner found that claimant did not prove by a preponderance of the evidence that her low back condition is causally related to her work activities at Tyson. In making this finding, the deputy commissioner gave more credibility to the opinions of Wade Jensen, M.D. and David Archer, M.D. than those of claimant's independent medical examiner, Sunil Bansal, M.D.

Reasonable arguments could be made either way in this case. However, I concur with the deputy commissioner that there is some troubling and potentially contradictory information in Dr. Bansal's reports. Although he had access to prior medical records which document pre-existing low back issues, Dr. Bansal records in his oral history taken from claimant that she had no such prior issues. Dr. Bansal makes no mention or explanation of this discrepancy.

Dr. Bansal attributes claimant's low back condition to standing at work. Yet, he also notes that claimant's condition, including her range of motion and symptoms worsened between his two evaluations. Claimant did not work during this time period. Dr. Bansal offers no explanation for this worsening if claimant was not standing for extended periods of time at work.

Dr. Bansal also noted that the production line at which claimant worked was at chest level. Claimant's testimony and the job video introduced as exhibit B clearly disclose this to be either an erroneous assumption or a misunderstanding by Dr. Bansal. Claimant seeks to attribute any discrepancies to miscommunications due to her language barrier. While these discrepancies may be attributable to a language barrier, some of these issues are internally inconsistent without comment in Dr. Bansal's report and reduce my confidence in the accuracy of his opinions in this case.

When all of the competing medical opinions are considered, along with all lay testimony and surrounding evidence, I find the medical opinions of Dr. Jensen to be the most credible and convincing in this case. Dr. Jensen is the surgeon who evaluated claimant. He was not specifically hired by claimant or by the defendant. His opinions are consistent with other evidence I find convincing in this record and I accept his opinions as accurate in this case. Therefore, I concur with the deputy's finding that claimant failed to prove causal connection, or a material aggravation, of her underlying condition, between her current low back condition and her work activities at Tyson.

The next issue is whether the deputy erred in excluding the rebuttal report from Dr. Bansal which was offered by claimant. Defendants objected to the admission of the rebuttal report as being untimely. The deputy commissioner sustained defendant's objection because the report was generated shortly before the arbitration hearing and it was not served on defendants until the evening before the hearing.

The deputy commissioner offered claimant the opportunity to explain or justify the untimeliness of the report. Claimant's counsel conceded that there was no explanation for the untimeliness of the report. Claimant further acknowledged that the rebuttal report was not even solicited from Dr. Bansal until a few days before the hearing. I find that claimant offered no justification for the late report. I find that because the report was served on the eve of hearing, it was prejudicial to defendant and to the administration of justice and efficiency within this agency.

This agency has discretion to apply its administrative rules and to oversee the admissibility of evidence offered before it. Marovec v. PMX Industries, 693 N.W.2d 779 (Iowa 2005); Lull-Gumbusky v. Great Plains Communication, File Nos. 5011034 and 5031667 (Appeal December 2012) (affirmed by Iowa Court of Appeals February 11, 2015). Indeed, such discretion is needed to prevent trial by ambush as well as significant and unnecessary delays in the submission of cases and decisions. I perceive no abuse of discretion by the deputy commissioner in excluding Dr. Bansal's rebuttal report. Therefore, I affirm the deputy's ruling excluding the rebuttal report.

The final disputed issue on appeal is whether claimant is entitled to reimbursement for the expense of Dr. Bansal's independent medical evaluation. Claimant accurately notes that this issue was overlooked in the arbitration decision. Therefore, it is an appropriate issue for appeal.

Section 85.39 permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, no physician retained by defendants offered a permanent impairment rating prior to Dr. Bansal's independent medical evaluation. Although defendants solicited a rebuttal report from Dr. Archer that responded to the permanent impairment issue, defendants did not obtain a permanent impairment rating prior to Dr. Bansal's initial evaluation. Therefore, I conclude that claimant failed to establish the requisite elements needed under Iowa Code section 85.39 to obtain reimbursement of the cost of Dr. Bansal's evaluation. For this reason, I reject claimant's request for reimbursement of Dr. Bansal's independent medical evaluation fee.

ORDER

IT IS THEREFORE ORDERED claimant's request for reimbursement of the cost of Dr. Bansal's independent medical evaluation pursuant to Iowa Code section 85.39 is denied.

The arbitration decision is affirmed in all other respects with the additional analysis contained in this decision.

Costs of this appeal are assessed against claimant.

Signed and filed this 8th day of May, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
IOWA WORKERS'
COMPENSATION COMMISSIONER

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