BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN PLEW, JR., Claimant, vs. AJS OF DES MOINES, INC., Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5056490 APPEAL DECISION HEAD NOTE NOS.: 1402.30, 1402.40 3000, 4000

FILED
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WORKERS' COMPENSATION

Defendants AJS of Des Moines, Inc., employer, and Accident Fund General Insurance Company, insurer, appeal from an arbitration decision filed on October 30, 2017. Claimant Steven Plew, Jr., cross-appeals.

On February 1, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

This case originally proceeded to hearing on May 24, 2017. In the resulting October 30, 2017 arbitration decision, the deputy commissioner determined claimant sustained an injury on February 8, 2016 that arose out of and in the course of his employment with defendant-employer. While the deputy commissioner determined claimant did not sustain any permanent disability to his right knee or right hip, the deputy commissioner ultimately determined claimant sustained a 15 percent industrial disability due to his back injury. The deputy commissioner also determined claimant was entitled to healing period benefits from February 16, 2016 through June 26, 2016. The deputy commissioner then determined claimant's weekly benefits should be paid at the rate of $442.14 based on average gross earnings of $698.86.

Based on her determination that claimant sustained a work-related injury, the deputy commissioner found defendants responsible for medical expenses and medical mileage for all causally related medical bills.

The deputy commissioner declined to award penalty benefits, however.

Regarding costs and reimbursement, the deputy commissioner determined claimant's right to an independent medical examination (IME) was triggered pursuant to Iowa Code section 85.39, but she determined claimant was not entitled to reimbursement for the cost of the examination and report because the bill was not itemized. The deputy commissioner then assessed costs to defendants as follows: $100.00 (filing fee); $77.94 (service costs); and $515.00 (depositions).

On appeal, defendants argue the deputy erred by determining claimant sustained an injury that arose out of and in the course of his employment. Alternatively, defendants argue claimant's industrial disability is less than 15 percent and the deputy commissioner should have adopted defendants' rate calculation.

On cross-appeal, claimant asserts his industrial disability is significantly more than 15 percent. He also asserts his average weekly wage was higher than that calculated by the deputy commissioner. Claimant additionally argues the deputy commissioner erred by declining to award penalty benefits, by failing to find claimant was entitled to reimbursement for his IME, and by failing to assess costs for claimant's deposition transcript.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, the proposed arbitration decision filed on October 30, 2017 is affirmed in part with additional findings and analysis and reversed in part.

The threshold issue to be addressed on appeal is whether claimant sustained an injury on February 8, 2016 that arose out of and in the course of his employment with defendant-employer. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue with the following additional findings and analysis:

The deputy commissioner's determination that claimant sustained a work-related injury on February 8, 2016 is based, in part, on her implied finding that claimant was a credible witness. (See Arbitration Decision, p. 12 ("During the hearing I did not observe [claimant] engage in any furtive or suspicious movements, his eye contact was appropriate, and his rate of speech was appropriate.")). Defendants argue on appeal that the deputy commissioner failed to appropriately consider the affidavits and

testimony of claimant's co-workers and the discrepancies in claimant's medical records when assessing claimant's credibility and determining whether he sustained a work-related injury.

First, while I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly made, of the deputy commissioner who presided at the arbitration hearing.

Further, while I acknowledge defendants offered affidavits and testimony from several of claimant's co-workers to support their assertion that claimant's injury is related to a non-work-related shoveling incident, only one of these co-workers (Patrick Fusaro) alleges hearing about the shoveling incident directly from claimant. The rest heard this information secondhand. (See Exhibit 17, p. 140 [Pollard Deposition Transcript, p. 9]; Ex. 18, p. 158 [Roovart Depo. Tr., p. 6]; Ex. 20, p. 188 [Hitzell Depo. Tr., p. 7]). Importantly, however, there are problems with the timeline of Mr. Fusaro's recollection.

For example, as noted by the deputy commissioner, Mr. Fusaro testified claimant told him he injured himself while shoveling about a week and a half before the alleged work-related injury on February 8, 2016. (Ex. 19, p. 180 [Fusaro Depo. Tr., pp. 5-8]) However, the snowfall that required shoveling occurred on February 2, 2016, less than a week before February 8, 2016. (See Ex. 11) Further, Mr. Fusaro testified the conversation occurred while claimant was on-call, but claimant was not on-call on February 2, 2016. (Ex. 19, p. 180 [Fusaro Depo. Tr., p. 5]; Tr., p. 42; JE 100) Because of the inconsistencies in Mr. Fusaro's statement, the affidavits and testimony of claimant's co-worker's do not cause me to question the deputy commissioner's finding that claimant was credible or to reverse the deputy commissioner's determination that claimant sustained a work-related injury on February 8, 2016.

I also acknowledge claimant failed to mention at his initial medical appointment on February 10, 2016 that his injury was work-related and that the record from the following appointment on February 16, 2016 indicates claimant was injured while shoveling snow, consistent with Mr. Fusaro's account. However, as of the February 10, 2016 appointment, claimant still expected his condition would resolve without much medical intervention. (Tr., p. 35) Regarding the February 16, 2016 appointment, both claimant and his significant another denied that claimant told the physician's assistant he was injured while shoveling. (Tr., p. 18; Tr. p. 63) As noted by the deputy commissioner, claimant's significant other also testified the physician's assistant was not taking notes during the appointment. (Tr., p. 18) From claimant's February 22, 2016 appointment forward, his descriptions of the alleged incident on February 8, 2016 were consistent. Thus, these two appointments appear to be outliers and do not cause me to question the deputy commissioner's finding that claimant was credible or to reverse her determination that claimant sustained an injury that arose out of and in the course of his employment on February 8, 2016.

For the above-stated reasons, I find the deputy commissioner correctly assessed claimant's credibility in this matter. I further find claimant's argument that he sustained an injury that arose out of and in the course of his employment on February 8, 2016 more persuasive than defendants' assertion that claimant sustained a non-work-related injury while shoveling. The deputy commissioner's determination that claimant sustained an injury that arose out of and in the course of his employment on February 8, 2016 is therefore affirmed with my additional findings and analysis.

Having affirmed the deputy commissioner's determination that claimant sustained a work-related injury, the next issue to be addressed is the extent of claimant's industrial disability. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue with the following additional analysis:

Defendants on appeal argue claimant's industrial disability is less than 15 percent because he sustained no actual loss of earnings and no loss of earning capacity. However, claimant credibly testified he tries to limit his lifting at work to no more than 60 pounds. (Tr., p. 52) This is consistent with the restrictions recommended by Sunil Bansal, M.D., of no lifting more than 60 pounds occasionally and the suggestion from David Hatfield, M.D., to claimant of lifting no more than 50 pounds. (Ex. 5, p. 52; Tr., p. 49) While claimant was back at his regular job at the time of the hearing, he credibly testified he does his job differently than he did prior to his work-related injury. (Tr., p. 49) He also credibly testified he would have difficulty returning to many of his former jobs. (Tr., pp. 55-59) Thus, while claimant may not have an actual loss of earnings, his earning capacity has been negatively impacted by his February 8, 2016 work injury.

Claimant argues on cross-appeal that his industrial disability is more significant than 15 percent. As mentioned above, however, claimant had returned to his regular job with defendant-employer at the time of the hearing earning the same amount, if not more, money than he was earning at the time of his injury. (Tr., p. 68-69) Thus, based on the factors prevailing at the time of the hearing—not based on what claimant's physical or economic realities might be at some future time—I agree with the deputy commissioner that claimant sustained a 15 percent industrial disability. See Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009) The deputy commissioner's determination that claimant sustained a 15 percent industrial disability is therefore affirmed with my additional analysis.

The parties also appealed the deputy commissioner's rate calculation. I affirm the deputy commissioner's determination that claimant's gross average weekly wage is $698.86, making his rate $442.14. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in their entirety.

On cross-appeal, claimant challenges the deputy commissioner's determination that claimant was not entitled to penalty benefits. Claimant argues defendants' investigation was not reasonable and that the deputy commissioner failed to address

whether defendants satisfied their duty to maintain an ongoing investigation. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue with the following additional findings and analysis:

Prior to making their decision to deny claimant's claim, defendants reviewed claimant's medical records, interviewed claimant, and spoke to several co-workers (and shortly thereafter acquired affidavits from both Mr. Fusaro and Mr. Pollard, among others). (Ex. 21, p. 205 [Maluchnik Depo. Tr., pp. 8-15) I find this was a reasonable investigation into whether benefits were owed.

Based on their investigation, defendants relied on the statements of claimant's co-workers, including Mr. Fusaro, and claimant's initial medical appointments (during which he failed to report a work-related injury and described a mechanism of injury consistent with Mr. Fusaro's statement) to deny claimant's claim. I find these factors made defendants' liability fairly debatable. I also find these factors were the actual basis upon which defendants' relied to deny claimant's claim, which was conveyed contemporaneously to claimant in writing on March 17, 2016.

Claimant asserts defendants did not maintain an ongoing investigation after their initial denial of liability. More specifically, claimant argues the depositions of several co-workers in April of 2017 constituted new evidence because it became clear that the only person who was claiming firsthand knowledge of the alleged shoveling incident was Mr. Fusaro. While claimant is correct that the depositions confirmed only Mr. Fusaro was claiming to have heard this story from claimant directly, no one claimed otherwise in the affidavits acquired by defendants. (See Ex. 15, p. 113 (indicating Mr. Roovaart was informed by Mr. Fusaro that claimant had been injured while shoveling at home)). In other words, nothing in the depositions contradicted the original basis of defendants' denial.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

I found defendants' reliance on the statement of Mr. Fusaro and the discrepancies in claimant's initial medical appointments were factors that made

defendants' liability fairly debatable. I also found defendants conducted a reasonable investigation, that the results of their investigation were the actual basis for their denial, and that they contemporaneously conveyed the basis for their denial. I therefore conclude defendants proved a reasonable or probable cause or excuse for their denial of claimant's claim.

I also found there was no new evidence that contradicted the original basis of defendants' denial. I therefore conclude there was nothing to make defendants aware there was no longer a reasonable basis to deny their claim; as such, they did not violate their duty to maintain an ongoing investigation. See McIlravy v. North River Ins. Co., 653 N.W.2d 323, 332 (Iowa 2002) Thus, with my additional findings and analysis I affirm the deputy commissioner and conclude claimant is not entitled to penalty benefits.

Claimant also appealed the deputy commissioner's determination that he was not entitled to reimbursement of his IME. Relying on Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"), the deputy commissioner determined claimant's IME was not reimbursable under Iowa Code section 85.39 because Dr. Bansal's bill was not itemized to separate the cost of the examination from the cost of the report. I respectfully disagree with the deputy commissioner's application of DART.

The holding in DART only limited what could be assessed as a cost pursuant to rule 876 IAC 4.33. See DART, 867 N.W.2d at 844, 846-47 ("We must decide if the assessment-of-costs rule is limited to the cost of the doctor's report or whether the rule also includes the fees of the underlying medical examination that was the subject of the report."). In other words, the holding did not limit the reimbursement provisions of Iowa Code section 85.39. Id. at 846 ("We agree that a physician's written report of an examination and evaluation under section 85.39 would be a reimbursable expense under section 85.39 . . . ."). While I agree with the deputy commissioner that the holding in DART suggests the cost of the report must be itemized separately from the cost of the evaluation to be assessed as a *cost* under Iowa Administrative Code rule 876-4.33, the same is not true when the IME is under the umbrella of Iowa Code section 85.39.

In this case, the deputy commissioner found that Dr. Bansal's examination occurred after Dr. Hatfield evaluated claimant's permanent disability. I agree. Thus, the reimbursement provisions of Iowa Code section 85.39 were triggered. See Iowa Code § 85.39. As such, I conclude claimant is entitled to reimbursement for both the cost of Dr. Bansal's report and examination. Id.; DART, 867 N.W.2d at 846. The deputy commissioner's determination that claimant is not entitled to reimbursement for Dr. Bansal's IME is therefore reversed. Defendants are responsible for Dr. Bansal's IME in the amount of $2,560.00.

Lastly, claimant appeals the deputy commissioner's determination that claimant should recover costs for deposition transcripts in the amount of $515.00 instead of the full $635.40 requested.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

The cost of the deposition transcripts of claimant's four co-workers totaled $515.00, which the deputy commissioner assessed against defendants. Claimant's deposition transcript cost $120.40. (Ex. 23, pp. 237, 240) While the transcripts of claimant's four co-workers substituted for testimony at hearing, the claimant's deposition was largely redundant of his hearing testimony. For this reason, I decline to assess the cost of claimant's deposition transcript. The deputy commissioner's assessment of costs is therefore affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of October 30, 2017 is affirmed in part with my additional findings and analysis and reversed in part.

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of four hundred forty-two and 14/100 dollars ($442.14) per week, commencing on June 27, 2016.

Defendants shall pay claimant healing period benefits from February 16, 2016 through May 31, 2016, and June 1, 2016 through June 26, 2016, at the rate of four hundred forty-two and 14/100 dollars ($442.14) per week.

Defendants shall take credit for all benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum, together with interest from the date of this appeal decision, 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 October 21, 2015, date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants are responsible for all causally related medical bills, including but not limited to three thousand one hundred eighty-five and 22/100 dollars ($3,185.22) in out-of-pocket medical expenses, one thousand three hundred four and 00/100 dollars ($1,304.00) in unpaid medical expenses, and one hundred fifty-seven and 72/100 dollars ($157.72) in medical mileage.

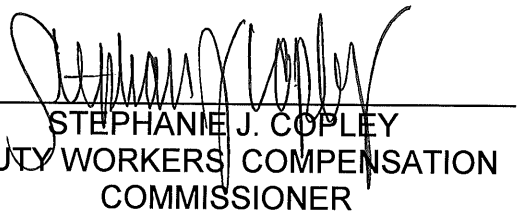
Defendants shall reimburse claimant two thousand five hundred sixty and 00/100 dollars ($2,560.00) for Dr. Bansal's independent medical examination.

Defendants are assessed one hundred and 00/100 dollars ($100.00) for the filing fee, seventy-seven and 94/100 dollars ($77.94) for service costs, and five hundred fifteen and 00/100 dollars ($515.00) for depositions.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Defendants shall pay the costs of the appeal, including the hearing transcript.

Signed and filed this 11th day of February, 2019.



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