

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH KINCAID,
Claimant,

vs.

IOWA DEPARTMENT OF
TRANSPORTATION,
STATE OF IOWA,

Self-Insured,
Employer,
Defendant.

File No. 5044860

A P P E A L
D E C I S I O N

Head Note Nos: 1803; 2502; 2907
4000.2

FILED

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WORKERS' COMPENSATION

Defendant Iowa Department of Transportation, State of Iowa, self-insured employer, appeals from an arbitration decision filed on December 22, 2014. Claimant Kenneth Kincaid cross-appeals. The case was heard on October 14, 2014, and it was considered fully submitted on October 31, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner awarded claimant 25 percent industrial disability, 125 weeks of PPD benefits, for a work-related injury which occurred on or about July 18, 2012. The deputy commissioner also awarded penalty benefits in the amount of \$5,000.00 for defendant's failure to contemporaneously notify claimant of the reasons for an initial denial of permanency benefits. The deputy commissioner also awarded reimbursement for the cost of an independent medical evaluation (IME) performed by Sunil Bansal, M.D.

Defendants assert on appeal that the deputy commissioner's award of 25 percent industrial disability is excessive and should be reduced. Defendants also assert the deputy commissioner erred in awarding penalty benefits. Defendants also assert the deputy commissioner erred in awarding reimbursement of Dr. Bansal's IME fee.

Claimant asserts on cross-appeal that the deputy commissioner's award of 25 percent industrial disability is not adequate and should be increased. Claimant also asserts the award of penalty benefits and the award of reimbursement of Dr. Bansal's IME fee should be affirmed.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

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 December 22, 2014, which relate to issues properly raised on intra-agency appeal with the following analysis:

1. Extent of Industrial Disability:

The deputy commissioner's analysis and findings adequately explain and support the award of 25 percent industrial disability. The award was proper for this claimant due to his ability to continue in his job with accommodations by the employer. Claimant asserts the award should be much higher because the employer has not finally determined that those accommodations will continue in the future. However, should claimant no longer be able to continue in his current job or in similar employment without loss of wages as a result of his work injury, such would constitute a material change of condition warranting a review of this award upon a timely petition for review-reopening. See Norton v. Hy-Vee, Inc., File No. 5041551 (App. December 16, 2015).

2. Penalty Benefits:

Defendant asserts on appeal that the deputy commissioner erred in awarding a \$5,000.00 penalty for defendant's failure to notify claimant of the reasons for the denial of permanency benefits based on the October 21, 2013, impairment rating. Claimant asserts on appeal that the award of penalty benefits should be affirmed.

In its post-hearing brief, defendant argued that claimant did not ask defendant until May 14, 2014, for an explanation why defendant did not pay the October 21, 2013, impairment rating and claimant thereafter was told the reason on May 29, 2014. (Ex. D, p. 32) The deputy commissioner rejected this argument and held that defendant did not contemporaneously convey the reasons for not paying permanent disability benefits pursuant to the October 21, 2013, rating as required by Iowa Code Section 86.13(4)(c) and assessed a penalty of \$5,000.00 for the delay in paying the impairment rating.

In its appeal brief, defendant asserts a new excuse for not paying permanency benefits based on Dr. Kirkland's impairment rating which was included in his October 21, 2013, report. Defendant points out that Dr. Kirkland recommended additional treatment in his report, and that treatment was thereafter authorized. Defendant states it was not until Dr. Kirkland's May 14, 2014, report that the doctor rejected surgery and ended treatment. Claimant learned of the reason for the denial of benefits soon thereafter on May 29, 2014. When Dr. Kirkland finally did impose permanent restrictions on July 10, 2014, defendant began paying permanency benefits on July 23,

2014, and thereafter continued to pay up to 93 weeks of permanency benefits prior to the arbitration hearing. (Ex. C, p. 28; Hearing Report) Essentially, defendant argues no permanency benefits are due until after treatment ends. Defendant's argument on the notice issue in the appeal brief has two problems:

First, the excuse offered in defendant's appeal brief for not starting permanency benefits soon after the October 21, 2013, impairment rating is not the reason the adjuster for defendant's third-party administrator gave at hearing for not paying benefits. The adjuster testified at hearing he denied weekly benefits because claimant returned to work without restrictions. (Tr. pp. 82-84) Iowa Code section 85.13(4)(c) requires that the actual basis for the denial of benefits must be conveyed to the claimant contemporaneously at the time benefits are denied. Claimant was not told in October 2013 any reasons why benefits were being denied.

Second, Dr. Kirkland was not a treating physician on October 21, 2013, but a physician retained by defendant to provide an IME. Although the adjuster did seek Dr. Kirkland's views on causation and treatment recommendations for any shoulder pathology he might find, (Ex. 7, p. 41) the shoulder condition had actually not been previously treated and there was no immediate authorization of treatment following receipt of Dr. Kirkland's report. The MRI was not done until February 2014. If defendant had intended to await further authorized treatment before paying permanency benefits, it should have communicated this to claimant soon after Dr. Kirkland's October 21, 2013, report was received. Defendant did not communicate this or any other reason for not paying benefits to claimant at that time. For these reasons, the award of \$5,000.00 in penalty benefits is appropriate and it is affirmed.

3. Reimbursement of Dr. Bansal's IME Fee:

Defendant also appeals the award of full reimbursement to claimant for Dr. Bansal's fee for his IME which took place on August 26, 2013. Defendant admits that in light of a disability opinion by the treating orthopedist, Benjamin Paulson, M.D. on January 31, 2013, in which Dr. Paulson provided a zero percent impairment rating (Ex. 3, p. 34), claimant was entitled to an IME at defendant's expense. However, as defendant points out, Dr. Paulsen's evaluation was only for the right hand and wrist carpal tunnel syndrome, post-surgery. (Id) Dr. Bansal evaluated not only the carpal tunnel syndrome, but also claimant's right shoulder condition, which was not addressed by Dr. Paulsen. (Ex. 13, pp. 59-65) The presiding deputy awarded Dr. Bansal's full IME fee in the amount of \$2,595.00, stating there was no evidence in the record to "parse out" or apportion the fee between the hand/wrist evaluation and the shoulder evaluation.

On appeal, claimant asserts an agency precedent in Connell v. United Suppliers, Inc., File No. 5009207 (App. July 29, 2005), which states it is the employer's burden to show a factual means to apportion an IME fee, which defendant did not do.

In this case, there was no prior evaluation for a shoulder disability before Dr. Bansal's examination, largely because the shoulder condition went untreated until after Dr. Kirkland evaluated claimant's shoulder in October 2013. However, I agree that because defendants failed to show a valid means to apportion Dr. Bansal's fee, the award of Dr. Bansal's full fee was appropriate and it is affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of December 22, 2014, is AFFIRMED in its entirety.

Defendant shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the stipulated weekly rate of five hundred ninety-two and 61/100 dollars (\$592.61), commencing on October 16, 2012.

Defendant shall pay all accrued weekly benefits in a lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendant shall be entitled to a credit for any permanent partial disability benefits paid to date.

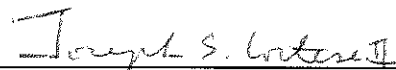
Defendant shall pay penalty benefits to claimant totaling five thousand dollars (\$5,000.00).

Defendant shall reimburse claimant for Dr. Bansal's full IME fee in the amount of two thousand five hundred ninety-five dollars (\$2,595.00).

Defendant shall reimburse claimant's costs in the arbitration proceeding totaling two hundred twenty-nine and 05/100 dollars (\$229.05) and defendants shall also pay the costs of this appeal, including the cost of the hearing transcript, pursuant to rule 876 IAC 4.33.

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

Signed and filed this 30th day of March, 2016.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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