

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JENNIE MARTINEZ,

Claimant,

vs.

PACKERS SANITATION
SERVICES, INC.,

Employer,

and

ACE AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

File No. 5060542

A P P E A L

D E C I S I O N

Head Notes: 1402.40; 1803; 2501; 2907;
5-9999

Defendant Packers Sanitation Services, Inc., employer, and its insurer, Ace American Insurance Company, appeal from an arbitration decision filed on August 7, 2019. Claimant Jennie Martinez responds to the appeal. The case was heard on December 18, 2018, and it was deemed fully submitted in front of the deputy workers' compensation commissioner on February 22, 2019.

The deputy commissioner found claimant satisfied her burden of proof to establish her stipulated work injury, which occurred on May 3, 2017, caused permanent disability to claimant's left shoulder and low back. The deputy commissioner found claimant sustained 20 percent industrial disability as a result of the work injury, which entitles her to receive 100 weeks of permanent partial disability benefits commencing on September 8, 2017. The deputy commissioner found claimant is entitled to reimbursement for expenses related to her unauthorized medical treatment as set forth in Exhibit 7. The deputy commissioner awarded claimant costs in the amount of \$720.00, which included expense relating to a functional capacity evaluation (FCE) report.

On appeal, defendants assert the deputy commissioner erred in his determination that claimant sustained any industrial disability as a result of the work injury. Defendants additionally assert claimant is not entitled to reimbursement for her claimed medical expenses or for the cost of the FCE report.

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 86.24 and 17A.15, the arbitration decision filed on August 7, 2019, is affirmed in part without additional comment, affirmed in part with additional analysis, and reversed in part.

I affirm the deputy commissioner's finding that claimant satisfied her burden to prove that the work injury caused permanent disability to her left shoulder and lower back. I affirm the deputy commissioner's finding that claimant sustained 20 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's findings, conclusions, and analysis regarding those issues in their entirety.

With the following additional analysis and findings, I affirm the deputy commissioner's finding that claimant is entitled to receive reimbursement for the expenses related to her unauthorized medical treatment as set forth in Exhibit 7.

Generally speaking, Iowa Code section 85.27 gives the employer and insurer the right to control medical care. If a claimant seeks unauthorized care while defendants maintain their right to control the care, recovery of the expenses is appropriate only "upon proof by a preponderance of the evidence that such care was reasonable and beneficial." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). "[U]nauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

In this case, David Berg, D.O., the authorized treating physician, released claimant from his care without any restrictions several months before claimant sought unauthorized care. (Exhibit B, p. 4) Before his full-duty release, Dr. Berg attempted physical therapy, medications, and injections, noting "nothing has helped her." (Id.) In other words, claimant's treatment with Dr. Berg was not successful in relieving her symptoms. On the other hand, claimant testified the unauthorized care she received, including physical therapy, muscle relaxants, and an injection, helped her some, at least temporarily. Thus, I find the unauthorized care claimant received provided a more favorable outcome than would likely have been achieved by Dr. Berg, whose care proved unsuccessful.

This finding relies, in part, on claimant's testimony that the unauthorized care was helpful to some extent. The deputy commissioner found claimant's testimony credible. 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, by the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed the credibility of claimant. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's credibility findings.

With respect to the reasonableness of the care, claimant's unauthorized care included conservative treatment similar to that offered by Dr. Berg. For that reason and for the reasons set forth by the deputy commissioner in the arbitration decision, I therefore find the unauthorized care was reasonable.

Having found claimant's unauthorized treatment to be both reasonable and beneficial, I find claimant satisfied her burden of proof for reimbursement under the standard set forth in Bell Bros.

Thus, with the above-stated additional findings and analysis, I affirm the deputy commissioner's finding that claimant is entitled to receive reimbursement from defendants for the expenses set forth in Exhibit 7.

The final issue on appeal is the cost of claimant's FCE report, which the deputy commissioner taxed to defendants. For the reasons that follow, the deputy commissioner's taxation of the FCE report is respectfully reversed.

As I have previously held, in assessing whether an FCE report is taxable under rule 876 IAC 4.33, the relevant inquiry is whether the FCE was required by a medical provider as necessary for the completion of a medical report. See Sainz v. Tyson Fresh Meats, Inc., File No. 5053964 (App. Sept. 28, 2018).

In this case, the FCE performed at Kinetic Edge Physical Therapy was requested by claimant's counsel, and not by any of claimant's treating or evaluating providers. In addition, when this FCE was performed on August 20, 2018, claimant's IME provider, Jacqueline Stoken, D.O., had already addressed the issue of permanent restrictions in her IME report. Because the FCE was not necessary for a medical provider or medical evaluator to complete their report, no portion of claimant's FCE charge is taxable as a cost under rule 876 IAC 4.33. See Sainz, File No. 5053964 (App. Sept. 28, 2018). The deputy commissioner's taxation of the FCE report is therefore respectfully reversed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 7, 2019 is affirmed in part with the above-stated additional findings and analysis and reversed in part.

Defendants shall pay claimant 100 weeks of permanent partial disability benefits at the weekly rate of four hundred nineteen and 55/100 dollars (\$419.55) commencing September 8, 2017.

Defendants shall pay the costs of medical care as set out in Exhibit 7.

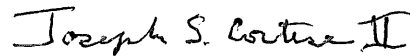
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred and no/100 dollars (\$100.00), 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 8th day of May, 2020.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Ashley N. Grieser Via WCES

Timothy Clausen Via WCES

Deena Townley Via WCES