

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

MAY 27 2016

WORKERS' COMPENSATION

ESTATE OF RICK BASS,

Claimant,

vs.

VIETH CONSTRUCTION CORP.,

Employer,

and

UNITED FIRE & CASUALTY CO., a/k/a
LaFAYETTE INS. CO.,

Insurance Carrier,
Defendants.

File No. 5044438

A P P E A L

D E C I S I O N

Head Note Nos.: 1802; 1803; 1804;
2505; 2907; 4100

Claimant Estate of Rick Bass appeals from an arbitration decision filed on January 26, 2015. Defendant Vieth Construction Corp., employer, and its insurer, United Fire & Casualty Co., a/k/a Lafayette Ins. Co., cross-appeal. The case was heard on October 15, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 12, 2014.

The deputy commissioner found claimant carried his burden of proof that he sustained a permanent injury which arose out of and in the course of his employment on June 11, 2012. The deputy commissioner awarded claimant 50 percent industrial disability for the work injury, which would entitle claimant to 250 weeks of permanent partial disability benefits. The deputy commissioner declined to award healing period benefits from November 13, 2012, through August 4, 2014, finding claimant was placed at maximum medical improvement without restriction on November 8, 2012, claimant then went on regular seasonal layoff, and he was not recalled at the end of the layoff due to a lack of work and performance issues. The deputy commissioner also declined to award medical expenses submitted by claimant, finding a lack of causation because claimant failed to provide an itemization of the medical bills, and a number of the charges were for conditions unrelated to the work injury. The deputy commissioner declined to award the cost of the functional capacity evaluations obtained by claimant. The deputy commissioner awarded claimant the cost of an independent medical examination (IME) performed on January 20, 2014, by Richard Neiman, M.D. The deputy commissioner awarded the cost of the deposition testimony of Chad Abernathy, M.D., taken on September 23, 2013, and the cost of a vocational rehabilitation report dated March 21, 2014, from Thomas W. Magner.

On appeal, claimant initially alleged the deputy commissioner erred in failing to find he is permanently and totally disabled. After filing his appeal, claimant passed away on May 28, 2015, from a condition unrelated to his work injury. On July 7, 2015, claimant's attorney provided the Commissioner with notice that claimant died and acknowledged that because of his death, claimant is not entitled to permanent total disability benefits because claimant's death ended his entitlement to benefits.

Claimant asserts the deputy commissioner erred in failing to award healing period benefits and medical expenses. On cross-appeal, defendants assert the deputy commissioner erred in finding claimant's work-related injury resulted in a permanent injury, and in awarding the cost of a second IME, the \$3,000.00 cost of Dr. Abernathy's deposition, and the cost of Mr. Magner's vocational rehabilitation report.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision. 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 reached by the deputy commissioner that claimant sustained a permanent work-related injury on June 11, 2012, I affirm the finding that claimant sustained a 50 percent industrial disability, which weekly benefits are payable only through the date of claimant's death, and I affirm the finding that claimant is entitled to reimbursement of Mr. Magner's vocational rehabilitation report. I find the deputy commissioner provided sufficient analysis on all of these issues raised in the arbitration proceeding and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to these issues.

I conclude the deputy commissioner erred in failing to award healing period benefits and medical expenses, in awarding the claimant the cost of a second IME, and in awarding claimant the full cost of Dr. Abernathy's deposition testimony. I provide the following additional analysis regarding healing period benefits, medical expenses, and costs:

I. Temporary Benefits

On the hearing report, claimant alleged he is entitled to healing period benefits from November 13, 2012, through August 8, 2014. The deputy commissioner found claimant failed to establish he is entitled to healing period benefits for this period because no physician removed him from work from November 13, 2012, through August 8, 2014, because he went on seasonal layoff, because he was not recalled after the layoff due to a lack of work, and because of performance issues. (Arb. Dec., pp. 8-9) On appeal, claimant alleges he is entitled to healing period benefits. Defendants contend the deputy commissioner's decision should be affirmed.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, “temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition.” Clark v. Vicorp Restaurants, Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to “partially reimburse the employee for the loss of earnings” during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id.

“[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved.” Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). “Stabilization of the employee’s condition ‘is the event that allows a physician to make the determination that a particular medical condition is permanent.’” Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57. The deputy commissioner correctly found the claimant’s work injury resulted in a permanent disability, therefore, any temporary benefits the claimant is entitled to are healing period benefits.

Iowa Code section 85.34(1) governs healing period benefits, as follows:

If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Under Iowa Code section 85.33(6), “‘employment substantially similar to the employment in which the employee was engaged at the time of the injury’ includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed.”

In finding claimant is not entitled to healing period benefits, the deputy commissioner relied on a November 8, 2012, report from Robert Broghammer, M.D., finding claimant was at maximum medical improvement and he had no permanent

impairment or permanent restrictions given his history of back problems. (Ex. 10, p. 1) In finding claimant sustained a permanent work-related injury, the deputy commissioner rejected Dr. Broghammer's assertion, and found the opinions of David Segal, M.D. most convincing. (Arb. Dec., p. 12)

Two months after his discharge from treatment by Dr. Broghammer, claimant underwent an MRI of his lumbar spine, which revealed a "diffuse disk bulge with a left paracentral disk protrusion and prominent osteophytes at L5-S1 causing severe left subarticular stenosis and left neural foraminal stenosis." (Ex. 7, pp. 1-2) Patrick Hitchon, M.D., at the University of Iowa Hospitals and Clinics (UIHC), recommended conservative treatment and referred claimant to the UIHC Pain Clinic, where he received treatment. (Ex. 9, p. 25) Claimant received conservative treatment, including facet injections, but complained the treatment did not alleviate his pain and he continued to complain of constant back pain. (Ex. 9, pp. 16, 32-33, 36-37; Ex. 12, pp. 11, 15)

In March 2014, claimant underwent a functional capacity evaluation where the therapist found claimant gave a valid effort. (Ex. 5, p. 15) The therapist concluded claimant could occasionally lift 7.5 pounds from waist to floor, occasionally carry 10 pounds, and concluded claimant did not meet light-work category due to his limitations. (Ex. 5, pp. 17, 24)

Following repeat MRI of the lumbar spine, Muhammed Ali, M.D., at UIHC, recommended claimant undergo posterior decompression surgery at L4-L5 and L5-S1. (Ex. 9, p. 12) Claimant was admitted for surgery on April 11, 2014. (Ex. 9, p. 5) Liesl Close, M.D., and Matthew Howard, M.D., at UIHC performed lumbar laminectomies on claimant at the levels of L4-L5 and L5-S1. (Ex. 9, p. 6)

Preoperative notes indicate claimant's symptoms had been worsening and he could not control his bladder. (Ex. 9, p. 5) Claimant testified that the surgery did not help his symptoms and he had the same pain both before and after surgery. (Tr., p. 41) Following surgery, claimant continued to complain of pain when sitting and when moving. (Ex. 9, p. 4)

In an August 11, 2014, letter responding to questions from claimant's counsel, Dr. Segal opined, "I think it would be impossible for [claimant] to return to a labor intensive job. I think an individual who did injure himself at work and has continued problems cannot return to a labor-intensive job." (Ex. 3, p. 7) On a letter dated September 8, 2014, Dr. Segal further opined claimant had reached maximum medical improvement. (Ex. 3, p. 9)

The record supports a finding that claimant is entitled to healing period benefits. The deputy commissioner erred in failing to award claimant healing period benefits. Claimant never returned to work after his November 13, 2012, layoff. He continued to receive treatment after Dr. Broghammer released him from care, and he eventually

underwent surgery in April 2014. The record supports a finding that claimant is entitled to healing period benefits from November 13, 2012, through August 8, 2014. The arbitration decision is modified and claimant is awarded healing period benefits from November 13, 2012, through August 8, 2014.

II. Medical Expenses

At hearing, claimant sought reimbursement for medical expenses set forth in Exhibit 26, totaling \$12,347.73. The deputy commissioner found claimant failed to establish a causal connection between the claimed medical expenses and the work injury because the medical expenses were not itemized and included "medical charges for the treatment of headaches (Ex. 26, p. 2); multiple skin biopsies (Ex. 26, pp. 13-14, 28); finger wounds (Ex. 26, p. 14); wound repairs and excision of malignant lesions (Ex. 26, p. 18-19); colonoscopies (Ex. 26, p. 24); and heart and vascular charges (Ex. 26, p. 27), which do not appear to be related to claimant's June 2012 back injury." (Arb. Dec., p. 14) Claimant asserts the deputy commissioner erred in failing to award him medical expenses causally related to his work injury. Defendants contend the deputy commissioner's decision should be affirmed.

Exhibit 26 contains medical expenses for the treatment of headaches, skin biopsies, finger wounds, wound repairs and excision of malignant lesions, colonoscopies, and heart and vascular conditions. These medical expenses are unrelated to the work injury. Claimant is entitled to reimbursement for all causally related medical expenses. The majority of the medical expenses set forth in pages two through six of Exhibit 26, totaling \$11,765.25 are for treatment of claimant's work injury. The deputy commissioner erred in failing to award medical expenses causally related to the work injury. The decision is modified and claimant is awarded eleven thousand seven hundred sixty-five and 25/100 (\$11,765.25) in medical expenses.

III. Costs

A. Dr. Neiman's IME

On the hearing report, defendants disputed that claimant is entitled to the cost of the IME performed by Richard Neiman, M.D., and any independent medical examination prior to an impairment rating by defendants' doctor. (Hearing Report) The deputy commissioner ordered defendants to pay the cost of Dr. Neiman's January 20, 2014, IME. On appeal, defendants assert the deputy commissioner erred in awarding the cost of Dr. Neiman's January 20, 2014, IME because defendants had already paid the cost of Dr. Segal's May 16, 2013, IME. Claimant concedes defendants paid the cost of Dr. Segal's May 2013 IME, but claimant alleges because of his surgery on April 11, 2014, claimant needed a supplemental report, and claimant asserts defendants should be assessed the cost of Dr. Segal's August 20, 2014, supplemental report.

After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code section 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee shall, upon "application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id. The statute discusses one evaluation, as does the case of DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015). The statute and Young do not support claimant's contention. The deputy commissioner erred in awarding the cost of Dr. Neiman's IME because defendants had already reimbursed claimant for the cost of Dr. Segal's May 16, 2013, IME.

B. Cost of Dr. Abernathy's Deposition Testimony

On the Hearing Report defendants disputed the cost of the evidentiary deposition of Chad Abernathy, M.D. (Hearing Report) The deputy commissioner ordered defendants to pay the \$3,000.00 cost of Dr. Abernathy's deposition testimony. On appeal, defendants contend the deputy commissioner erred in assessing the entire cost of Dr. Abernathy's testimony because under rule 876 IAC 4.33, the maximum amount that can be assessed is one hundred fifty and 00/100 (\$150.00). Claimant argues the deputy commissioner properly assessed the full cost of the testimony.

The workers' compensation commissioner has discretion to tax costs set forth in rule 876 IAC 4.33. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 262 (Iowa 1996). Rule 876 IAC 4.33 provides:

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The rule expressly incorporates the provisions of Iowa Code sections 622.69 and 622.72 governing the cost of expert deposition testimony. Iowa Code section 622.72 provides:

Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional

examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed one hundred fifty dollars per day while so employed.

Claimant cites John Deere Dubuque Works v. Caven, 804 N.W.2d 297 (Iowa App. 2011) for the proposition that the full cost of Dr. Abernathy's deposition testimony may be assessed to defendants. Caven discusses the award of expenses for an IME report, not the cost of deposition testimony. Caven, 804 N.W.2d 301. Caven does not support claimant's contention.

The statute expressly limits the compensation for expert deposition testimony to \$150.00 per day. Iowa Code section 622.72. The deputy commissioner erred in assessing defendants the \$3,000.00 cost of Dr. Abernathy's deposition testimony. Whirlpool Corp. v. Davis, No. 12-1962, 2013 WL 3864539, at *9 (Iowa Ct. App. July 24, 2013) (finding "[t]he taxation of costs for expert discovery depositions in excess of the \$150 amount permitted by section 622.72 was in error"). Defendants are assessed \$150.00 for Dr. Abernathy's deposition.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of March 12, 2015, is MODIFIED as follows:

Defendants shall pay claimant healing period benefits at the rate of five hundred sixty-five and 24/100 dollars (\$565.24), from November 13, 2012, through August 8, 2014.

Defendants shall pay claimant permanent partial disability benefits at the rate of five hundred sixty-five and 24/100 dollars (\$565.24) per week commencing on September 8, 2014, through May 28, 2015, the date of the claimant's death.

Defendants shall pay accrued benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits as awarded above as set forth in Iowa Code section 85.30.

Defendants shall pay all causally related medical expenses set forth in Exhibit 26, totaling eleven thousand seven hundred sixty-five and 25/100 (\$11,765.25).

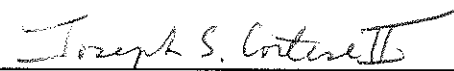
Defendants shall pay one hundred fifty and 00/100 dollars (\$150.00) for Dr. Abernathy's deposition.

Defendants shall pay the cost of Thomas Magner's March 21, 2014, vocational report.

Defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Pursuant to rule 876 IAC 4.33, the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 27th day of May, 2016.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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