

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ARRON LAGRANGE,

Claimant,

vs.

NASH FINCH COMPANY,

Employer,

and

AMERICAN ZURICH INSURANCE
COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5043316

A P P E A L

D E C I S I O N

FILED

JUL -1 2015

WORKERS' COMPENSATION

Head Note Nos.: 1402.30; 1801; 1803.1
1804; 2501; 2502; 2701; 3203; 4000.2

Defendants Nash Finch Company, employer, and American Zurich Insurance Co., filed a notice of appeal on June 24, 2014. Claimant filed a cross appeal on July 1, 2014.

The case was heard on February 27, 2014, in front of the deputy workers' compensation commissioner and considered fully submitted on March 20, 2014. An arbitration decision filed on June 5, 2014, found the claimant permanently and totally disabled as a result of left knee and low back injuries arising out of and in the course of employment.

The Second Injury Fund of Iowa was an additional defendant but was found to have no responsibility given that the second potentially qualifying injury was deemed to be an industrial loss rather than a scheduled member loss.

Defendants assert on appeal that the deputy erred in finding that the low back condition arose out of and in the course of claimant's employment and that the claimant was totally and permanently disabled. In the cross-appeal, claimant asserts that defendants are required to pay for the expert witness costs.

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.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on June 5, 2014, that relate to issues properly raised on intra-agency appeal with the following additional clarification regarding costs.

Claimant seeks reimbursement for the following costs:

- Functional Capacity Evaluation dated September 26, 2013 - \$960.00. (Ex. 8, p. 77)
- Invoice for release of information from St. Luke's Hospital - \$68.60. (Ex. 27, p. 177)
- Physician's Clinic of Iowa, P.C. for medical records - \$33.00. (Ex. 27, p. 179)
- Stephen Yochum, CVE - \$135.00 for travel and \$900.00 for evaluation. (Ex. 23, p. 170)

The hearing report only references the costs in exhibits 8 and 27 and there are no additional references to costs in the hearing transcript. Nonetheless, the bills in exhibits 8, 23 and 27 will be considered.

Iowa Administrative Code 4.33 outlines the costs that can be taxed.

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 Iowa Supreme Court has recently given additional guidance on the taxation of costs. Des Moines Area Regional Transit Authority v. Young, No. 14-0231. June 5, 2015 (Iowa 2015). In DART, the Court clarified that 4.33 allows only for the taxation of costs "incurred in the hearing." A physician's report becomes a cost incurred in a hearing when it is used as evidence in lieu of the doctor's testimony. The report is separate from the examination. The underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition. "We conclude section 85.39 is the sole

method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39."

Rule 876-4.33 is designed, per the Supreme Court, to allow for taxation of costs incurred in the hearing itself rather than reimbursement of fees and expenses incurred in an examination.

The claimant seeks reimbursement of a functional capacity evaluation performed by Mark Blankespoor, PT, (Ex. 8,) and a vocational rehabilitation report of Stephen Yochum, CVE, (Ex. 23), and the fees charged by medical providers to obtain records.

Fees charged by medical providers to obtain records do not appear to fall within a category itemized by 4.33 and will not be taxed.

While the agency has previously held that functional capacity and vocational experts fall within 4.33, under DART the allowable taxable costs are the reports themselves, not the underlying examination.

The bills from Mark Blankespoor and Stephen Yochum are not itemized. The report of Mr. Blankespoor is two narrative pages and four spreadsheets recording physical measurements. Mr. Yochum's report is seven narrative pages. He notes he spent from 8:15 AM to 4:00 PM with the claimant. (Ex. 21, p. 161) A reasonable taxation of costs would be 1/3 of the total amount billed.

Therefore the defendants are taxed costs in the amount of \$320.00 for Mr. Blankespoor and \$300.00 for Mr. Yochum.


ORDER

IT IS THEREFORE ORDERED that the arbitration decision of August 1, 2014, is MODIFIED as set forth herein and that:

Claimant is awarded costs in the amount of six hundred twenty dollars and no/100 cents (\$620.00.).

The parties shall each pay one half of the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 1st day of July, 2015.


JOSEPH S. CORTESE II
WORKERS'
COMPENSATION COMMISSIONER

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