

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| DILCIA ANTUNEZ-ERAZO, | : | File Nos. 21012704.01 and 21008748.01 |
| | : | |
| Claimant, | : | A P P E A L |
| | : | |
| vs. | : | D E C I S I O N |
| | : | |
| BRAND FX BODY COMPANY, | : | |
| | : | |
| Employer, | : | |
| | : | |
| CNA INSURANCE COMPANY, | : | |
| | : | |
| Insurance Carrier, | : | Head Notes: 1402.40; 1802; 1803; 2501; |
| Defendants. | : | 2502; 2907 |

Claimant Dilcia Antunez-Eraza appeals from an arbitration decision filed on August 24, 2023. Defendants Brand FX Body Company, employer, and its insurer, CNA Insurance Company, respond to the appeal. This case was heard on March 14, 2023, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 2, 2023.

This appeal involves two consolidated files, a February 10, 2021, injury date, File No. 21012704.01, and a June 23, 2021, injury date, File No. 21008748.01. In File No. 21012704.01, the deputy commissioner found claimant proved a low back injury. However, the deputy commissioner also found claimant's low back injury resolved and claimant failed to prove a permanent injury. The deputy awarded certain past medical expenses through July 22, 2021.

Claimant appeals in File No. 21012704.01, asserting the deputy commissioner erred in finding claimant failed to prove a permanent disability as a result of the February 10, 2021, work injury. Defendants assert the arbitration decision in File No. 21012704.01 should be affirmed.

In File No. 21008748.01, claimant asserts on appeal that the deputy commissioner erred in not awarding healing period benefits from November 21, 2022, through December 5, 2022. Defendants acknowledge the deputy commissioner intended to award healing period benefits during the aforementioned period but failed to do so in the order section of the arbitration decision. Defendants concede this point on appeal, and the arbitration decision will be modified to award the requested healing period benefits.

In File No. 21008748.01, claimant appeals the deputy commissioner's award of independent medical evaluation (IME) expenses, asserting the deputy commissioner erred in not awarding the entirety of claimant's IME fee. Defendants assert claimant failed to qualify for an IME under Iowa Code section 85.39(2) because claimant's evaluation occurred before the issuance of the defendants' expert report providing a permanent impairment rating. Defendants assert claimant could not be dissatisfied with the defendants' evaluation of permanent disability prior to issuance of the report. In the alternative, defendants assert the deputy commissioner's award is within the agency's discretion and should be affirmed.

Those portions of the proposed arbitration 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 17A.5 and 86.24, the arbitration decision filed on August 24, 2023, is affirmed in part and is modified in part.

I affirm the deputy commissioner's decision regarding File No. 21012704.01. I affirm the deputy commissioner's finding that claimant's February 10, 2021, low back injury resolved by July 22, 2021, with no permanent disability. I affirm the finding that symptoms or treatment after July 22, 2021, are not related to the February 10, 2021, work injury. I affirm the deputy commissioner's decision as to the award of medical expenses as well as the determination regarding the denial of permanent partial disability benefits.

With respect to File No. 21008748.01, defendants concede the deputy commissioner intended to award healing period benefits from November 21, 2022, through December 5, 2022. I concur that the deputy commissioner intended to award those benefits and that the benefits are proven to be owed. Therefore, I modify the arbitration decision to award healing period benefits from November 21, 2022, through December 5, 2022.

With respect to claimant's IME fee, the deputy commissioner awarded one-half of the requested fee. Claimant asserts the deputy commissioner erred because both injury dates were deemed compensable, and claimant asserts that pursuant to Iowa Code section 85.39(2) she qualified for an evaluation for each injury date. Defendants point out that claimant's IME occurred on the same date as the defense evaluation and that defendants' expert did not issue a permanent impairment rating until a week after claimant's evaluation occurred. Therefore, defendants assert claimant did not qualify for an evaluation under Iowa Code section 85.39 and that it was proper to assess only one-half of the requested fee as a discretionary cost.

Iowa Code section 85.39(2) provides, in pertinent part:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the 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 choice.

Defendants' argument is technical and procedural. The typical informal practice in Iowa does not necessarily require the technical and procedural precision defendants now urge. Often, the parties can simply agree that a claimant is entitled to an IME knowing the claimant will likely request it after defendants' evaluation.

However, defendants in this case are accurate that their physician did not issue a permanent impairment rating until after claimant's IME occurred. It is not technically possible for claimant to believe the defense evaluation is too low prior to issuance of the defense opinion. Although I acknowledge this is a procedural defense, defendants are correct: the plain language of the statute requires that the defense evaluation be performed and that the employee believe this evaluation to be too low before obtaining her own evaluation under Iowa Code section 85.39(2). "The Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 'only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer.'" Cortez v. Tyson Fresh Meats, Inc., File No. 5044716 (Appeal December 2015) (quoting Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015)). Claimant could not be dissatisfied with the evaluation arranged by the employer a week before that opinion was issued. Accordingly, I find claimant failed to establish the pre-requisites of Iowa Code section 85.39(2).

Claimant also seeks assessment of the costs of Dr. Bansal's report as a cost pursuant to 876 IAC 4.33(6). Defendants conceded that this agency has discretion to assess this as a cost.

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 436 (Iowa 2015), the Iowa Supreme Court held, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony." However, only the cost for preparation of the vocational report, introduced in lieu of the expert's trial testimony, is a permissible cost. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 436 (Iowa 2015); Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (Appeal December 2018). In this case, Dr. Bansal does not itemize his billing to delineate the amount of time spent reviewing records, performing an evaluation, and preparing a report. It would not be appropriate to assess the entirety of the cost of the evaluation. However, some amount would be appropriately assessed as a cost and I found Dr. Bansal's report helpful to frame the

issues and relied upon it with respect to the second date of injury. Given the length and detailed nature of Dr. Bansal's report, I find defendants should be assessed \$1,750.00 as a cost pursuant to 876 IAC 4.33(6).

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed August 24, 2023, is affirmed in part, and is modified in part.

In File No. 21012704.01:

Defendants shall reimburse claimant for the medical bills incurred with Dr. Rittgers.

In File No. 21008748.01:

Defendants shall pay claimant healing period benefits from November 21, 2022, through December 5, 2022.

Defendants shall pay claimant 7.5 weeks of permanent partial disability benefits commencing on January 9, 2023.

All weekly benefits shall be paid at the weekly rate of four hundred fifty-two and 82/100 dollars (\$452.82).

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall receive credit for all benefits previously paid.

Claimant is entitled to future medical care for the right upper extremity injury, including but not limited to, an EMG.

Claimant is entitled to reimbursement of medical bills incurred as a result of treatment or diagnosis of the right upper extremity injury as described in the arbitration decision.

Claimant is entitled to medical mileage reimbursement in the amount of one hundred seventy-seven and 19/100 dollars (\$177.19).

In Both Files:

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of two thousand sixty-three and 10/100 dollars (\$2,063.10) 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 28th day of December, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Greg Egbers (via WCES)

Caitlin Kilburg (via WCES)