

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH CAVEN,	:	File Nos.: 5023051; 5023052
Claimant,	:	
vs.	:	A P P E A L
JOHN DEERE DUBUQUE WORKS,	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	Head Note Nos.: 1108.50; 1402.30
Defendants.	:	1803; 1808; 2208; 2209; 2402

Upon written delegation of authority by the workers' compensation commissioner pursuant to Iowa Code section 86.3, I render this decision as a final agency decision on behalf of the Iowa workers' compensation commissioner.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision of September 12, 2008, filed in this matter that relate to issues properly raised on intra-agency appeal with the following additional analysis, except for the denial of the costs of Dr. Tyler's report:

The issues raised by claimant on appeal were adequately addressed in the arbitration decision and I agree with that analysis. Much of the matters raised by claimant involve a claim that claimant's testimony was not adequately considered. However, the claimant was not found credible by the hearing deputy. 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 who presided at the hearing. The deputy who presided at the hearing had the best opportunity to evaluate the demeanor of the persons who testified at the hearing. The presiding deputy has the ability to include the demeanor of a witness when weighing credibility to find the true facts of the case. My ability to find the true facts that are affected by witness demeanor and credibility cannot be expected to be superior to that of the deputy who presided at the hearing. If anything, my ability when reviewing a transcript is likely inferior because I do not have the tool of witness demeanor to use in my evaluation.

The admission of Exhibit 2 (P, Q, & R) and Exhibits 17-22 was correct. As this was an industrial disability claim, his entire medical condition whether work related or not is relevant to these proceedings. Also, these exhibits were relevant to the issue of claimant's credibility as discussed by the hearing deputy in the arbitration decision.

While the hearing deputy limited the reimbursement for the cost of Dr. Tyler's and other reports under rule 876 IAC 4.33 to \$150.00 based upon agency precedent, that precedent is legally flawed and must be reversed. Almost 25 years ago, this agency held that a maximum of \$150.00 would only be allowed as a cost reimbursement for any one doctor or practitioner's written report as that is all that would be allowed as an expert witness fee had the expert's views been obtained in an oral deposition under the costs provisions of Iowa Code section 622.72. Lytle v. Hormel Corp. 1-4, Comm'r Dec. 968 (App Dec 1985). That decision was re-affirmed in Schmitt v. Cardinal Construction,

No. 947339 (App. July 22, 1999). However, these decisions are contrary to the plain language of 876 IAC 4.33 which provides as follows:

Costs taxed by the worker's compensation commissioner or a deputy commissioner shall be(6) the reasonable costs of obtaining no more than two doctor's or practitioners' reports...

While a doctor or practitioner deposition testimony is limited by Iowa Code section 622.69 and 622.72, no such limitation is contained in this rule for obtaining written reports, nor is there any application of those statutes to written reports. As recently instructed by the Iowa Supreme Court, this agency cannot ignore the plain wording of its own rules. Boehme v. Fareway Stores, Inc, Supreme Court Decision, No. 07-2094, Filed February 27, 2009, page 7; Rock v Warhank, 757 N.W.2d 670, 673 (Iowa 2008). Therefore, the prior agency precedent set forth above shall no longer be controlling agency precedents in cases before this agency and the entire reasonable costs of doctor and practitioner's reports may be taxed as costs pursuant to 876 IAC 4.33.

As the defendant did not raise any issue of the reasonableness of the charge for Dr. Tyler's report either in the hearing report or in their brief on appeal, the report fee shall be ordered reimbursed in its entirety.

ORDER

The arbitration decision is modified by adding the following order:

Defendants shall pay to claimant the sum of (nine hundred seventy-two and 00/100 dollars) \$972.00 as re-imbusement for the costs of obtaining the report of Dr. Tyler pursuant to rule 876 IAC 4.33.

Signed and filed this 21st day of July, 2009.



LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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