

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

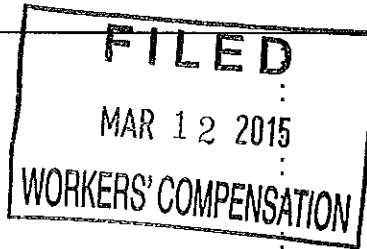
RANDY A. SANDS,

Claimant,

vs.

CITY OF SIOUX CITY,

Employer,
Self-Insured,
Defendant.



File No. 5050047

IOWA CODE SECTION 85.39

DECISION

Head Note No. 2500

STATEMENT OF THE CASE

The claimant filed an original notice and petition for an independent medical evaluation pursuant to Iowa Code section 85.39. An answer was timely filed by City of Sioux City, self-insured employer, as defendant. A telephonic hearing took place Wednesday, March 4, 2014. The case was submitted without any further evidence.

ISSUE

Is the claimant entitled to an independent medical evaluation with Dr. Sunil Bansal pursuant to Iowa Code section 85.39?

FINDINGS OF FACT

On February 4, 2015, claimant filed a petition requesting an examination and rating from a physician of his choosing based on Iowa Code section 85.39. Claimant argued that the permanent disability rating of Dr. Mathew R. Johnson was too low.

Claimant's counsel wrote to Dr. Johnson on October 15, 2014, requesting a supplemental report to update a previous check sheet completed by Dr. Johnson on May 21, 2014. The May 21, 2014, report is not attached. At hearing, the defendant resisted payment of an 85.39 on two grounds. First, that they had denied compensability for both the carpal tunnel syndrome and the cervical spine injury and second that claimant already obtained an independent medical examination (IME) in the form of Dr. Johnson's supplemental report that claimant now argues is too low.

Although not attached to the answer as evidence, defendant referred to the medical report of Douglas Martin, M.D., attached to its answer to the original petition. Dr. Martin opined that the claimant's cervical spine symptomatology was related to

degenerative arthritis. No impairment rating was given in that January 24, 2014, letter because claimant had not reached maximum medical improvement (MMI) at that time.

CONCLUSIONS OF LAW

Iowa Code section 85.39 permits an employee to obtain an examination by a physician of the employee's choice when an employer-retained physician has previously evaluated a permanent disability and the result is too low in the employee's opinion.

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, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

(Iowa Code section 85.39)

There are triggering events that must take place before an employee is entitled to an IME.

First, there must be an evaluation by an employer-retained physician.

Second, the evaluation must be of a "permanent disability".

Third, the evaluation must be deemed too low.

The defendants first argue that because they have denied compensability, there is no obligation to pay for an evaluation by a physician of claimant's choosing. While no case law was put forward by the defendant, one presumes that they rely upon McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980).

Subsequent case law has refined that position. According to Dodd v. Fleetguard, Inc., 759 N.W.2d 133 (Iowa App. 2008), an employee's right to an 85.39 examination does not require an admission of responsibility by the employer.

The Dodd Court held that an employer could be held liable for an examination when the injury did not arise out of or in the course of employment. Dodd at 140. The court cited with approval the following language from IBP, Inc. v. Harker, 633 N.W. 2d 322, 327 (Iowa 2001).

The appellate court followed this line of reasoning in City of Davenport v. Newcomb, 820 N.W.2d 882 (Iowa App). In Newcomb the employer appealed the denial of an examination under Iowa Code section 85.39. This agency had ruled that as the employer had denied liability for the claim the employer was not entitled to a section 85.39 IME. The Newcomb court reversed on this issue stating:

Our supreme court has held that *reimbursement* for a medical examination under Iowa Code section 85.39 cannot be ordered until liability for an injury has been established. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980). In addition, the court has held an employer's "right to control treatment . . . is lost if the employer disputes liability." Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 575 (Iowa 2006). Although an admission of liability affects the employer's right to control treatment and an employee's ability to receive compensation for an employee-requested IME, we do not find a denial of liability wholly precludes an IME under Iowa Code section 85.39. In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination. See Daugherty v. Scandia Coal Co., 206 Iowa 120, 124, 219 N.W. 65, 67 (1928) (recognizing the purpose of what is now Iowa Code section 85.39 is "doubtless for the purpose of enabling the employer to ascertain the extent and character of the injury").

Newcomb, at 892-893 (Emphases in original)

In Newcomb, the court was concerned that the employer would not be able to obtain medical evidence to determine causation. The court recognized that one of the purposes of an IME is to determine causation. "In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination." Newcomb, at 892. In Dodd, the court was concerned about the claimant being able to obtain medical evidence. The employer has directed care in this case. The quid pro quo for directing care is that the claimant is entitled to a section 85.39 IME, provided the employer has retained a physician who has made an evaluation of permanent disability that is believed to be too low by the claimant. The commissioner has previously held that a zero impairment rating constitutes an evaluation of permanent disability such as to trigger entitlement. Holton-Martin v. Savery Hotel, File No. 1040787 (App., March 9, 1994).

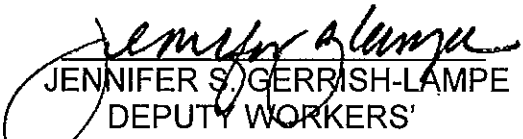
No impairment rating was given by Dr. Martin, only a finding of no compensability. In order to trigger the 85.39 entitlement, claimant procured ratings from the physician selected by the employer – Dr. Johnson. Dr. Johnson found that claimant's impairment rating as to the carpal tunnel syndrome was zero but 25 percent as it related to the cervical spine.

Dr. Johnson's opinions were those expressed by a physician chosen by the defendants. Claimant believes that these ratings are too low. Therefore, claimant is entitled to an evaluation by a subsequent physician of his choosing.

ORDER

THEREFORE IT IS ORDERED, claimant's Independent Medical Examination is granted.

Signed and filed this 12th day of March, 2015.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.