BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARSHALL SANDLIN, Claimant, vs. MID AMERICAN CONSTRUCTION, LLC, Employer, and GRINNELL MUTUAL, Insurance Carrier, Defendants.	File No. 5806495 A P P E A L D E C I S I O N Head Notes: 1402.40; 1803; 2502; 2907; 5-9999

Defendants Mid American Construction, LLC, employer, and its insurer, Grinnell Mutual, appeal from an arbitration decision filed on June 18, 2020, and from a ruling on defendants' application for rehearing (hereinafter "ruling") filed on July 13, 2020. Claimant Marshall Sandlin cross-appeals. The case was heard on September 5, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 2, 2019.

In the arbitration decision, the deputy commissioner found claimant's stipulated work-related injury which occurred on September 6, 2017 resulted in two percent permanent scheduled member functional disability of his left leg. The deputy commissioner found claimant is entitled to reimbursement for his independent medical examination (IME) with Mark Taylor, M.D. The deputy commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants then filed an application for rehearing asserting that the deputy commissioner overlooked the parties' stipulation that claimant's injury was confined to his left foot and asserting that claimant did not meet the prerequisites for IME reimbursement under Iowa Code section 85.39 because defendants never "retained" any physicians.

In the ruling, the deputy commissioner acknowledged his error regarding the parties' stipulation and corrected his finding to provide claimant sustained two percent

permanent disability of his left foot. The deputy commissioner denied defendants' application regarding the IME, however.

On appeal, defendants assert the deputy commissioner erred in his determination that claimant sustained permanent disability of his foot. Defendants also assert the deputy commissioner erred in ordering defendants to reimburse claimant for Dr. Taylor's IME because the reimbursement provisions were never triggered. Defendants alternatively argue the costs of the IME are unreasonable.

Claimant does not specify what remedies he seeks on cross-appeal, though it appears he may be seeking clarification regarding the assessment of costs.

Those portions of the proposed agency decisions 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 86.24 and 17A.15, the arbitration decision filed on June 18, 2020, and ruling filed on July 13, 2020, are affirmed in part without additional comment and are affirmed in part with the following additional analysis, as set forth below.

I affirm the deputy commissioner's finding that claimant sustained two percent permanent scheduled member functional disability of his left foot which entitles him to receive three weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(o) (post-July 1, 2017). I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in their entirety.

I now turn to whether claimant is entitled to reimbursement for Dr. Taylor's IME under Iowa Code section 85.39. With the following additional analysis, I affirm the deputy commissioner's finding that claimant is entitled to reimbursement for the IME.

Iowa Code section 85.39 requires employers to reimburse claimants for IMEs when "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." Iowa Code section 85.39(2) (emphasis added). In this case, defendants argue the reimbursement provisions of this section were never triggered because they did not retain Dr. Kennedy, who ultimately opined claimant did not sustain any permanent impairment to his foot. (Joint Exhibit 4, p. 19)

In support of their argument, defendants rely on the Iowa Supreme Court's holding in IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001). In Harker, the claimant was injured in Nebraska and was advised by the employer "that under Nebraska law he was allowed to choose his own physician for treatment of his injuries." Id. at 324. The claimant in Harker chose a physician and the employer "acquiesced in this choice." Id. The claimant's chosen physician then referred the claimant to a specific orthopedist, who in turn referred claimant to a specific neurologist, both of whom opined claimant sustained no permanent impairment. Id. The employer refused to pay the claimant's IME cost, asserting it had not retained those physicians. Id.

The Iowa Supreme Court ultimately held the word "retained" meant more than acquiesced:

> We conclude that when the statute is considered in its entirety, it is apparent that the legislature intended to balance the competing interests of the employee and employer with respect to the choice of doctor. We think, therefore, that the legislature meant to allow the employee to obtain a disability rating from a physician of his "own choice" when the physician chosen by the employer gives a disability evaluation unsatisfactory to the employee. Accordingly, the industrial commissioner and the district court erred in interpreting the language "retained by the employer" to mean "paid by the employer."

Id. at 327.

As a result, the court in Harker found both the orthopedist and the neurologist were not retained by the employer, meaning the reimbursement provisions of Iowa Code section 85.39 were not triggered.

While defendants in this case also acquiesced in claimant's decision to seek care at Medical Associates and the eventual referral to Theresa Hughes, D.P.M., there are subtle differences in this case that distinguish it from Harker.

Notably, in Harker, there was essentially no involvement by the employer other than telling claimant he was free to choose his own provider for treatment. See id. at 324; see also Harker v. IBP, Inc., File No. 1169917 (App. Dec. March 31, 1999 re: IME) (not referencing any request from defendant to provider for impairment rating); Harker v. IBP, Inc., File No. 1169917 (Arb. Dec. Feb. 10, 2000 re: impairment) (not referencing any request from defendant to provider for impairment rating). In this case, however,

when claimant's condition stabilized and an impairment rating was appropriate, defendants did more than acquiesce.

In this case, on November 15, 2017, the medical case manager (hereinafter "MCM"), after speaking with defendants' representative, contacted Dr. Hughes "with a request to address MMI/disability." (Defendants' Ex. B, p. 1) The MCM was told Dr. Hughes does not perform impairment ratings. Instead, the "Medical Associates staff recommended MCM to contact Occupational Medicine and inquire if Dr. Erin Kennedy would address MMI/disability." (Def. Ex. B, p. 1 (emphasis added)) In response to this recommendation, the MCM "secured an appointment" with Dr. Kennedy. (Def. Ex. B, p. 1 (emphasis added))

I find this act—seeking out an appointment with Dr. Kennedy for purposes of obtaining an impairment rating—is more than mere acquiescence. While Dr. Hughes later indicated in July of 2019 that Dr. Kennedy was the physician that she referred patients to for impairment ratings as part of her "normal process," defendants were not aware of this relationship at the time they secured the appointment. (See JE 3, p. 18) Instead, defendants chose to use Dr. Kennedy at the recommendation of the staff.

This is distinguishable from the facts in Harker, in which claimant's physician made a specific referral to a specific physician, who in turn made another specific referral to another specific physician - all of which defendant allowed. In this case, Dr. Hughes indicated she was finished treating claimant and did not provide impairment ratings, and Dr. Hughes' staff made a recommendation, which defendants chose to pursue. That pursuit is what renders Harker inapplicable to this case. As such, I find Dr. Kennedy was "retained by" defendants.

Because Dr. Kennedy, a physician retained by the employer, made an evaluation that claimant believed to be too low, I conclude the reimbursement provisions of Iowa Code section 85.39 were triggered.

With this additional analysis, the deputy commissioner's finding that claimant is entitled to reimbursement for the cost of Dr. Taylor's IME is affirmed.

Having determined claimant is entitled to reimbursement for the IME, I must decide the extent of what is reimbursable. Dr. Taylor's bill was $2,020.00. (Claimant's Ex. 2, p. 13) Relying on the legislature's 2017 changes to Iowa Code section 85.39, defendants assert claimant should only be entitled to reimbursement for $174.25, or at the most, $500.00.

Iowa Code 85.39(2) was amended in 2017 to include the following language:

> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

(emphasis added).

Defendants focus on the final sentence of this section and assert the legislature intended to limit reimbursement only to what a medical provider would charge to perform an impairment rating - and nothing else. Defendants assert they should not be responsible for reimbursing charges related to other opinions, such as causation, or for medical records review. As a result, defendants assert $174.25 is appropriate in this case because that is the amount Dr. Kennedy received for her impairment evaluation. In the alternative, defendants assert $500.00 is the maximum for which they should be responsible because this is the flat fee Dr. Taylor's office charges for "Impairment Rating/Restrictions Exam" for a single body part. (Def. Ex. C, p. 1; Def. Ex. E, p. 1)

Defendants, however, failed to offer any context or explanation for the $174.25 for which Dr. Kennedy received for her impairment rating. The "Explanation of Review" in evidence indicates only that Dr. Kennedy charged $205.00, which was reduced by $30.75, for "OFFICE/OUTPATIENT VISIT NEW." (Def. Ex. C, p. 1) As aptly noted by claimant in his brief, there is no breakdown regarding those charges or the reduction, nor did defendants indicate whether Dr. Kennedy has fee-reduction agreements in place. In other words, it is an incomplete picture of Dr. Kennedy's fees, and I do not find it persuasive.

Dr. Taylor stated in his report that the fees for his examination are reasonable. (Claimant's Ex. 1, p. 8) I acknowledge the fee schedule from Dr. Taylor's office suggests his office offers an independent medical exam and a less expensive impairment rating/restrictions exam. Presumably, this would be a case in which the less expensive impairment rating/restrictions exam would be appropriate. However, that is

merely a presumption, which is outweighed by Dr. Taylor's statement that his fees, including the time spent with claimant, the time spent on the report and the time spent reviewing claimant's records, are reasonable. Other than the "Explanation of Review," which I did not find to be persuasive, defendants offered no contrary evidence. I therefore find the entirety of Dr. Taylor's bill was reasonable and must be reimbursed by defendants under Iowa Code section 85.39.

With this additional analysis, the deputy commissioner's finding that defendants shall reimburse claimant for Dr. Taylor's full IME charge is affirmed.

The deputy commissioner did not address claimant's costs in the body of the arbitration decision or in the ruling, but the deputy commissioner taxed them against defendants in the order. With the exception of Dr. Taylor's IME, defendants did not appeal the remainder of claimant's costs. For the sake of clarity, however, I find the taxation of claimant's filing fee and deposition transcript was appropriate under 876 IAC 4.33(2) and (7). Defendants shall therefore reimburse claimant in the amount of $122.50 per the statement of costs.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 18, 2020, and the ruling on defendants' application for rehearing filed on July 13, 2020, are affirmed in their entirety with the above-stated additional analysis.

Defendants shall pay claimant three (3) weeks of permanent partial disability benefits at the weekly rate of three hundred seventy-three and 90/100 dollars ($373.90) commencing on October 8, 2017.

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 reimburse claimant for Dr. Taylor's IME expense set forth in claimant's Exhibit 2 in the amount of two thousand twenty and 00/100 dollars ($2,020.00).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred twenty-two and 50/100 ($122.50), and defendants shall pay 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 27th day of January, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Zeke McCartney (via WCES)

Stephen W. Spencer (via WCES)

Christopher Spencer (via WCES)