BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LOREN LEE PESICKA, JR., Claimant, vs. SNAP-ON LOGISTICS COMPANY, a/k/a SNAP-ON TOOLS MANUFACTURING COMPANY, Employer, Self-Insured, Defendant.	:	FILED JAN 18 2019 WORKERS' COMPENSATION File No. 5018910 APPEAL DECISION Head Notes: 1703, 1802, 1803.1, 2501, 2502

STATEMENT OF THE CASE

Claimant Loren Lee Pesicka, Jr., appeals from a review-reopening decision filed on January 20, 2017, and from a rehearing decision filed on March 1, 2017. Defendant Snap-On Logistics Company, a/k/a Snap-On Manufacturing Company, self-insured employer, cross-appeals.

The review-reopening decision ordered, in part, that defendant pay claimant healing period benefits of $589.96, along with a penalty of $626.08. The decision also ordered defendant to reimburse claimant's wife for lost wages and expenses associated with taking claimant to medical appointments, and to pay for the independent medical evaluation (IME) of claimant by John Kuhnlein, D.O.

Claimant filed an application for rehearing. Defendant resisted the application. The rehearing decision recalculated claimant's healing period benefits and recalculated the overpayment of permanent partial disability benefits. The rehearing decision also ordered the following:

> If, following this Rehearing Decision, the parties remain in disagreement as to the principle and interest amounts due concerning healing period and the precise overpayment of PPD, and unless otherwise agreed, the parties shall jointly retain a certified public accountant who shall calculate the principle and interest to a specified date in the manner provided above.

(Rehearing Decision, page 6)

A review of the appeal filed in this matter indicates the parties are still in disagreement concerning the principle and interest amounts due concerning healing period benefits and the overpayment of permanent partial disability (PPD) benefits. The administrative file indicates the parties have failed to jointly retain a certified public accountant (CPA) to aid in the calculation of these amounts, as ordered by the rehearing decision.

ISSUES

On appeal the parties raised the following issues:

1. Did the deputy commissioner err in finding claimant has 25 percent permanent impairment of the right lower extremity resulting from the work injury?

2. Did the deputy commissioner err in the finding of claimant's healing period benefits?

3. Did the deputy commissioner err in the credit given to defendant for the overpayment of PPD benefits?

4. Did the deputy commissioner err regarding penalty benefits?

5. Did the deputy commissioner err in ordering defendant to pay claimant's spouse's wages for driving claimant to medical appointments?

6. Did the deputy commissioner err in ordering defendant to reimburse claimant for the cost of Dr. Kuhnlein's IME?

FINDINGS OF FACT

No findings of fact other than those in the review-reopening decision are necessary given the record presented at the review-reopening hearing in this matter.

CONCLUSIONS OF LAW

Appeal Issue Number One: Reimbursement for the IME.

Defendant contends claimant is not due any reimbursement for Dr. Kuhnlein's IME. In the alternative, defendant contends even if it is liable for the IME in this case, defendant should not be ordered to pay for the entire cost of the IME. Claimant maintains the deputy commissioner did not err in ordering defendant to pay $5,321.90 for Dr. Kuhnlein's IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred, and for any wage loss occasioned by the employee attending the subsequent examination.

Defendant is responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The Iowa Supreme Court has 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 medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

The Court in Young noted:

> If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Iowa Code § 85.39.

Young at 847.

As noted in the review-reopening decision, this agency approved an agreement for settlement (AFS) in this case on December 26, 2006. As detailed in the review-reopening decision, claimant has undergone several surgeries to his right foot since the AFS. On January 5, 2012, claimant underwent right foot surgery consisting of a third, fourth, and fifth toe amputation. That surgery was performed by Joseph Galles, M.D. (Claimant's Exhibit II, Part I, pp. 100-103)

In a February 8, 2013, report Dr. Galles gave a rating of claimant's impairment following surgery. (Cl. Ex. II, Part II, p. 233)

On October 21, 2015, claimant underwent another surgery by Dr. Galles consisting, in part, of partial amputation of the first and second toes. (Cl. Ex. II, Part II, p. 322)

Dr. Kuhnlein evaluated claimant on February 2, 2016. His report of that evaluation is dated April 19, 2016. (Cl. Ex. II, Part II, p. 372) Dr. Galles issued another report concerning claimant's permanent impairment on April 15, 2016. (Exhibit B, p. 5)

Defendant contends claimant only would be due reimbursement for an IME after the April 2016 report by Dr. Galles. (Defendant's post-hearing brief, pp. 19-20)

As detailed above, Iowa Code section 85.39, in effect when this case was heard, indicated, "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 may be reimbursed for an employee-retained IME.

The language in Iowa Code section 85.39 and the Young decision do not require that the employee only is allowed to be reimbursed for an IME after the employee's final surgery. To trigger reimbursement for an IME under Iowa Code section 85.39, it is only required that there be a rating by an employer-retained physician.

An AFS was approved by this agency on December 26, 2006. Dr. Galles, the employer-retained physician, issued a permanent impairment opinion regarding claimant on February 8, 2013. Dr. Kuhnlein, the employee-retained physician, issued his rating for permanent impairment on April 19, 2016.

I am empathetic to defendant's position in this situation. However, given the plain language in section 85.39, along with the language in the Young decision, and the chronology of the IMEs in this case, claimant is entitled to reimbursement for Dr. Kuhnlein's IME, as it relates to claimant's right foot.

As detailed above, the employer is only required, under Iowa Code section 85.39, to reimburse the employee for the ". . . reasonable fee for a subsequent examination by a physician of the employee's own choice . . ." As detailed in Dr. Kuhnlein's April 2016 report, and as noted in defendant's brief, Dr. Kuhnlein also reviewed medical records and examined claimant for a left knee injury for purposes of claimant's Second Injury Fund (Fund) claim. It is unreasonable that defendant be required to pay for an IME concerning claimant's Fund claim. For that reason, defendant is only liable for half of the cost of Dr. Kuhnlein's IME, or $2,660.95 ($5,321.90 x .50).

Issue Number Two: Transportation expenses for claimant's spouse.

Defendant contends it was error to find claimant's spouse was due payment for wages she allegedly lost driving claimant to medical appointments.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except

where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Iowa Code section 85.27(1) requires an employer to pay for reasonably necessary transportation expenses to get an injured worker to medical appointments. The Iowa Supreme Court has specifically held that this obligation may include paying the lost wages of a spouse if the lost wages were required by time off work to transport the injured worker to medical appointments. Mycogen Seeds v. Sands, 686 N.W.2d 457, 468-469 (Iowa 2004).

To establish a claim for reimbursement of a spouse's wages under the travel expenses portion of Iowa Code section 85.27(1), claimant must prove two things:

1. "The claimant has to prove the 'mode of transportation taken was reasonable and economical under the circumstances, taking into consideration the medical condition of the claimant.'"

2. "The claimant must produce evidence regarding the cost of the chosen manner of travel compared to the cost of 'other reasonably available means of transportation.'"

Sands, 686 N.W. 2d at 468. Once claimant produces the above evidence, the burden shifts to the employer to supply evidence that a more reasonable and economical transportation method exists.

Claimant and his wife testified it was reasonable for claimant's wife to drive claimant to medical appointments, as he was prohibited from driving by his doctors. Claimant has satisfied his burden of proof regarding the first part of the test under Sands.

However, claimant introduced no evidence regarding the cost of other reasonably available means of transportation. Claimant offered no evidence that he or his wife sought to quantify the expense of other transportation services that could come to his residence to transport him. Claimant testified he did not contact a taxi service to get an estimate of travel costs. (Hearing Transcript page 79) Claimant and his wife testified they did not request defendant to provide him transportation for any medical appointments. Claimant and his wife did not seek authorization from defendant to pay claimant's wife any amount for driving claimant to his medical appointments. (Tr., pp. 30-31, 79, 81-82)

The Supreme Court's test requires claimant "must produce" this evidence before any burden shifts to the defendant to challenge the claim for wage reimbursement to a spouse. Claimant failed to offer any "... evidence regarding the cost of the chosen manner of travel compared to the cost of 'other reasonably available means of transportation."

Given this record, claimant has failed to carry his burden of proof for reimbursement for claimant's wife's alleged lost wages for transportation to medical appointments. Sands, 686 N.W.2d at 468.

Issue Number Three: Healing period benefits and overpayment of PPD.

On March 1, 2017, the deputy commissioner in this case ordered the parties to reach an agreement as to the amount due for healing period benefits and interest, and the amount of the overpayment of PPD benefits. The deputy gave detailed criteria for the parties to use in calculating and reaching an agreement regarding the underpayment of healing period benefits. The deputy also gave detailed criteria regarding the overpayment of PPD benefits.

The rehearing decision ordered if the parties could not agree on the calculations they were to jointly retain a CPA to perform a calculation and file the CPA's report with this agency, using criteria consistent with those detailed in the rehearing decision.

Defendant's brief on appeal indicates some communication regarding this issue was exchanged between the parties. There is no indication in the record or in the appeal briefs filed by the parties that the order was followed.

Rule 876 IAC 4.36 states:

> If any party to a contested case or an attorney representing such party shall fail to comply with these rules or an order of a deputy commissioner or the workers' compensation commissioner, the deputy commissioner or the workers' compensation commissioner may impose sanctions which may include dismissing the action without prejudice, excluding or limiting evidence, assessing costs or expenses, and closing the record in whole or in part to further activity by the party.

Both parties are warned that future noncompliance with orders from this agency concerning future cases, and specifically this case, may result in sanctions, including dismissal of this action.

Notwithstanding both parties' failure to comply with the deputy commissioner's order, I find the method prescribed in the rehearing decision regarding healing period, interest, and criteria for the overpayment of PPD to be sound. This matter is remanded to the deputy commissioner to calculate healing period benefits, interest, and the overpayment of permanent partial disability benefits, using the methods detailed in the rehearing decision.

Issue Number Four: Claimant's entitlement to permanent partial disability benefits and penalty.

I find the deputy commissioner provided sufficient analysis of the issues raised in the review-reopening proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to all other issues in this case.

ORDER

The review-reopening, and rehearing decisions, are affirmed, in part, and reversed in part.

This matter is remanded back to the deputy commissioner to issue a decision detailing healing period benefits and interest due, and defendant's right to a credit for overpayment of PPD benefits.

Defendant shall reimburse claimant in the amount of $2,660.95 for half of Dr. Kuhnlein's IME expense as detailed in this opinion.

The review-reopening decision filed on January 20, 2017, and the rehearing decision filed on March 1, 2017, are otherwise affirmed, except defendant does not owe reimbursement to claimant's wife for her lost wages incurred in driving claimant to medical appointments as discussed above.

Signed and filed this 18th day of January, 2019.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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