

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KARLA KERN,

Claimant,

vs.

FENCHEL, DOSTER & BUCK, P.L.C.,

Employer,

and

PHARMACISTS MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5062419

REMAND DECISION

Head Note Nos: 2502

STATEMENT OF THE CASE

This matter is before the Iowa Workers' Compensation Commissioner on remand from the Iowa Court of Appeals for a decision dated September 1, 2021.

This matter was initially heard on August 7, 2017. An arbitration decision was filed on December 18, 2017. That decision found, in part, that claimant was not entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39. The decision also found that claimant was not entitled to reimbursement for preparation of the IME report as a cost under Rule 876 IAC 4.33.

The arbitration decision was appealed within the agency. That appeal decision affirmed the arbitration decision and found, in part, that claimant was not entitled to reimbursement for an IME under Iowa Code section 85.39.

A petition for judicial review was filed. The district court affirmed the agency's decision and found, in part, that claimant was not entitled to reimbursement for an IME under Iowa Code section 85.39.

The Iowa Court of Appeals affirmed the commissioner's decision, in part, and reversed, in part. The Court determined claimant was entitled to reimbursement for an IME under Iowa Code section 85.39. This case was remanded back to the agency to make a determination regarding reimbursement of the IME consistent with the Court of Appeals' Decision.

ISSUE

As required by the decision from the Iowa Court of Appeals, the sole issue on remand is whether claimant is entitled to reimbursement for an IME under Iowa Code section 85.39.

FINDINGS OF FACT

The findings of fact in the arbitration and the appeal decision adequately detail the record in this case. The findings of fact in this remand decision will only address facts relevant to the issue on remand.

Claimant was evaluated by Benjamin Paulson, M.D., on August 25, 2016. Dr. Paulson diagnosed the claimant with trigger fingers of the left and right thumbs. He diagnosed bilateral carpal tunnel syndrome and osteoarthritis of the first carpometacarpal in both of claimant's hands. Regarding causation of the conditions, Dr. Paulson opined:

With regard to causation, within reasonable medical certainty, her job working as a typist working in a law office for approximately 12 years neither caused nor materially aggravated her diagnosis of carpal tunnel syndrome, thumb osteoarthritis or bilateral trigger thumbs. I would say she is at baseline from these conditions and she would have had these same conditions whether she worked or not.

(Exhibit A, p. 3)

On June 23, 2017, claimant was evaluated by Sunil Bansal, M.D. Dr. Bansal found that claimant had bilateral carpal tunnel syndrome, a left trigger thumb and CMC arthritis. (Ex. 1, p. 20)

Dr. Bansal found that claimant had a 4 percent permanent impairment to the right upper extremity regarding the right carpal tunnel syndrome. He found claimant had a 4 percent permanent impairment to the left upper extremity regarding the left carpal tunnel syndrome. Dr. Bansal also found that claimant had a 6 percent permanent impairment to the left upper extremity due to the left trigger thumb. (Ex. 1, p. 22)

Billing for the report indicates that Dr. Bansal charged \$2,172.00 for the record review and the report. (Hearing Report)

CONCLUSION OF LAW

The only issue to be determined is whether claimant is entitled to reimbursement of the IME by Dr. Bansal under Iowa Code section 85.39.

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 that 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.

Defendants are 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).

In Kern v. Fenchel, Doster and Buck, P.L.C., No. 20-1206, slip op. at 10 (Iowa Court of Appeals)(Sept. 1, 2021), the Iowa Court of Appeals found that Dr. Paulson's opinions on lack of causation were tantamount to a zero impairment.

In an August 25, 2016 opinion, Dr. Paulson, the employer-retained expert, found claimant's condition was not caused by her work with the employer. The Iowa Court of Appeals has held that an opinion of lack of causation is the same as a finding of no permanent impairment. In a June 23, 2017 report, Dr. Bansal, the employee-retained expert, found that claimant had a permanent impairment caused by the work injury. Given the chronology of the IMEs, claimant is entitled to reimbursement of Dr. Bansal's IME report.

The Iowa Court of Appeals also instructed this agency to also consider costs of the report preparation for Dr. Bansal's IME. Kern, slip op. at 10-11. Claimant has been awarded reimbursement for the IME. However, in order to comply with the order of the Iowa Court of Appeals, Findings of Fact and Conclusions of Law will be made regarding reimbursement for the cost of the report, in the event the IME would not be reimbursable under Iowa Code section 85.39.

In Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W. 2d 839, 847 (Iowa 2015) the Iowa Supreme Court held an employee can only be reimbursed for an IME, at the employer's expense, if an evaluation of permanent impairment had been made by an employer-retained physician. The Court also noted that in cases where Iowa Code section 85.39 was not triggered to allow reimbursement of an IME, a claimant could still be reimbursed for costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33 (6). Young at 846-847

Dr. Bansal's bill indicates fees for records review and the report were \$2,172.00. If claimant was not being reimbursed the cost of the IME under Iowa Code section 85.39, claimant would be awarded the costs of the review and the report under 876 IAC 4.33(6).

ORDER

Therefore it is ordered on remand:

That defendants shall reimburse claimant for all costs associated with Dr. Bansal's IME under Iowa Code section 85.39.

Signed and filed this 3rd day of March, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE, II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

Mark Soldat (via WCES)

Jason Neifert (via WCES)

Thomas Wolle (via WCES)