

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

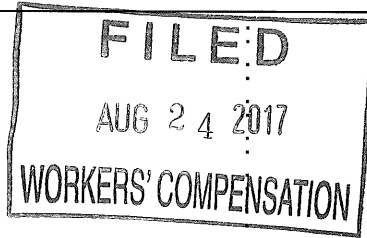
LARRY D. ANDERSON,

Claimant,

vs.

TRINITY HEALTH CORPORATION,
d/b/a MERCY MEDICAL CENTER -
NORTH IOWA,

Employer,
Self-Insured,
Defendant.



File Nos. 5062634
5062757

DECISION ON

85.39 EXAMINATION

On August 2, 2017, claimant filed an 85.39 petition requesting defendant pay for an independent medical examination. Defendant filed a resistance and requested a hearing. Defendant asserted that they had denied liability and therefore were not required to reimburse the claimant for an IME until liability had been established.

The matter was briefed and a hearing was held on August 22, 2017. Iowa Code section 85.39 permits an injured worker to obtain a medical opinion regarding his injury. This right is triggered when there is an employer retained physician who issues a low opinion or no opinion at all.

In this particular case, defendant solicited an opinion from William Boulden, M.D., on November 4, 2016. (Ex. A) Dr. Boulden issued a letter on November 8, 2016, wherein he opined claimant had sustained a temporary aggravation and that the claimant had not sustained any functional impairment rating based on his alleged work injury. (Ex. C)

Under Holton-Martin v. Savery Hotel, File No. 1040787 (App., March 9, 1994), a zero impairment rating suffices to trigger section 85.39 entitlement. Thus, the triggering event occurred. However, defendant disclaim liability. The Iowa 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).

Subsequent Court of Appeals decisions have eroded the McSpadden finding. 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. This decision did not discuss the Supreme Court

precedent. Another appellate court in City of Davenport v. Newcomb, 820 N.W.2d 882 (Iowa App. 2012) allowed the defendant employer to exercise the 85.39 rights.

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").

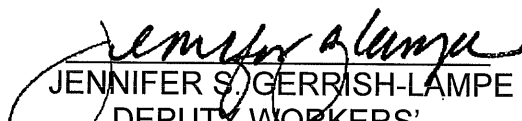
Newcomb, at 892-893 (Emphases in original).

In Randy Sands v. City of Sioux City, (File No. 5050047, March 12, 2015), the undersigned ordered defendant to pay for an 85.39 examination even in the face of a denial of liability. In that case, however, defendant had been directing the care and therefore, the claimant was allowed to undergo an IME at the defendant's expense. In the present case, defendant has denied liability and not provided care. Further, McSpadden has not be overruled by the Iowa Supreme Court and the Iowa Court of Appeals has not explicitly taken on McSpadden. An appellate ruling on the divergent case law would be helpful.

This is an unfortunate result for the claimant. Not only is he left without care, but he does not have a legal process under which he can compel defendant to provide care before a hearing. This places an impoverished injured worker in difficult and possible harmful circumstances. However, the agency is charged with implementing the law not creating new law.

THEREFORE IT IS ORDERED, claimant's request for an 85.39 examination is denied.

Signed and filed this 24th day of August, 2017.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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