

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSH SILVERS,

Claimant,

vs.

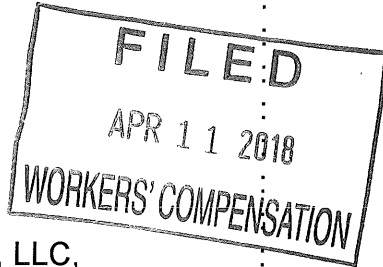
PRECISION PIPELINE, LLC,

Employer,

and

INDEMNITY INS. CO. OF AMERICA,

Insurance Carrier,
Defendants.



File No. 5057994

RULING ON CLAIMANT'S

MOTION FOR REHEARING

On April 4, 2018, claimant timely filed a motion for rehearing on two grounds. He requested rulings be made on his claim for reimbursement of mileage and for the alleged 85.39 examination by Marc Taylor, M.D. Defendants resisted on the grounds claimant was not entitled to reimbursement for mileage as the medical care was unauthorized and second that the appropriate triggers required by Iowa Code section 85.39 never occurred. Therefore, claimant was not entitled to rehearing.

Entitlement to reimbursement of the medical bills and the bill of Dr. Taylor were properly raised in the hearing report but not addressed in the March 15, 2018, Arbitration Decision. Therefore, claimant is entitled to a rehearing or reconsideration on the two issues.

The facts in the Arbitration Decision of March 15, 2018, are incorporated herein.

Claimant was awarded medical expenses included in Exhibit 6. Exhibit 7 contained itemized mileage reimbursement requests related to the medical expenses in Exhibit 6. Iowa Code section 85.27(1) provides that the employer shall allow reasonably necessary transportation expenses incurred for those medical services for which the employer is liable. Therefore, defendants are ordered to pay the mileage expenses in Exhibit 7, of \$101.20.

The next issue is whether claimant is entitled to a reimbursement of Dr. Taylor's fees and charges under Iowa Code § 85.39. Defendants argue that claimant did not

meet the statutory requirements of the code and are therefore not entitled to relief under the statute.

Iowa Code section 85.39(2) states as follows:

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.

There are three triggering events that must occur before claimant is entitled to an examination by another physician at the employer's expense. First, there must be an evaluation by an employer-retained physician. Id. Second, the evaluation must be of a permanent disability, and finally, the employee must believe the evaluation is too low. Id. The commissioner has previously held that a zero impairment rating constitutes an evaluation of permanent disability sufficient to trigger entitlement. Holton-Martin v. Savery Hotel, File No. 1040787 (App., March 9, 1994).

Claimant opted to treat with Peter Caldwell, D.P.M. Those bills are included in Exhibit 6 and part of the medical services the defendants argue were unauthorized. (Ex. 6: 1-2) Defendants assert that the Iowa Code section 85.39 not only requires the doctor to be paid for by the employer, but also chosen by the employer. In support of their argument, defendants refer to IBP, Inc. v. Harker, 633 N.W. 2d 322 (Iowa 2001). The issue presented in the Harker case is whether the claimant was entitled to a reimbursement of a medical examination when the treating physicians, selected by the employee but paid for by the employer, rendered a rating claimant thought was too low. Id. at 323.

This is the same issue presented in the present case. In Harker, the employee sought treatment from Dr. Merle Muller. Id. The employer agreed to pay for Dr. Muller's services despite the doctor being selected by the employee. Id. Dr. Muller referred claimant to an orthopedist, Dr. Sherman, who referred claimant to Dr. Herrera, a neurologist. Id. at 324. After a period of a few months, the orthopedist and neurologist both released claimant from care and opined that he had suffered no permanent impairment from the work injury. Id. The worker then sought to obtain a Iowa Code section 85.39 examination at the cost of the employer. Id. The employer refused. Initially, the commissioner of this agency awarded section 85.39 fees but this decision was overturned by the Iowa Supreme Court who found that "retained by the employer" did not mean solely "paid by the employer" but also chosen or selected by the employer. Id. at 327.


Dr. Caldwell is not a physician selected or chosen by the defendant. He is an unauthorized treater. While defendants did make inquiry to Dr. Caldwell about the extent of claimant's injury, there is not sufficient case law to support a finding that obtaining a report from an employee's chosen medical provider is sufficient to meet the "retained by the employer" standard.

Therefore, claimant did not meet the triggering or threshold factors in Iowa Code section 85.39.

THEREFORE IT IS ORDERED, claimant's motion for rehearing is granted. The Order of the March 15, 2018, Arbitration Decision shall be amended as follows:

Defendants shall pay the mileage fees and expenses itemized in Exhibit 7 totaling one hundred one and 20/100 dollars (\$101.20).

Signed and filed this 11th day of April, 2018.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Daniel Anderson
Attorney at Law
1500 Center St., NE
PO Box 849
Cedar Rapids, IA 52406-0849
danderson@wertzlaw.com

Gregory M. Taylor
Attorney at Law
1307 50th St.
West Des Moines, IA 50266
gtaylor@cutlerfirm.com

JGL/kjw