

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PHILLIP ISBELL,

Claimant,

vs.

DEE ZEE, INC.,

Employer,

and

WEST BEND MUTUAL,

Insurance Carrier,
Defendants.

File No. 1619855.01

A P P E A L

D E C I S I O N

Head Notes: 1402.40; 2502; 5-9999

Claimant Phillip Isbell appeals from an order regarding a petition concerning independent medical examination filed on July 12, 2019. Defendants Dee Zee, Inc., employer, and its insurer, West Bend Mutual, respond to the appeal.

In the order, the deputy commissioner granted claimant's petition for reimbursement for independent medical evaluation (IME), in part, as it related to claimant's admitted right ankle fracture, but denied the petition in part as it related to the denied sequela injury to claimant's back.

On appeal, claimant argues the deputy commissioner erred by limiting reimbursement to the portion of the IME related to the admitted lower extremity injury.

I performed a de novo review of the evidentiary record and the arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed order filed on July 12, 2019, that relate to the issue properly raised on intra-agency appeal. I offer the following additional analysis:

Relying on the Iowa Supreme Court's literal interpretation of Iowa Code section 85.39 in DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015), I have previously held that opinions on causation do not equate to "zero" impairment ratings:

The deputy commissioner found the cost of Dr. Tearse's IME was recoverable by claimant under Iowa Code section 85.39 because Dr. Gorsche and Dr. Gordon opined claimant did not sustain a work-related injury. (Arbitration Decision, pages 3-4) The deputy commissioner found Drs. Gorsche and Gordon had, in effect, given "zero" impairment ratings. (Id.)

This position is contrary to the Iowa Supreme Court's literal interpretation of Iowa Code section 85.39. See, e.g., DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015) In that decision, the supreme court held that an employee can obtain an IME at the employer's expense only if an evaluation of permanent disability has been made by an employer-retained physician. **The evaluations of Drs. Gorsche and Gordon were not evaluations of permanent impairment, but rather were evaluations to determine causation. This is a distinct difference.** The record in this case shows there was no impairment rating from any physician chosen by defendant because defendant determined there was no work-related injury. There is no evidence claimant obtained defendant's consent to the IME, nor did defendant agree to pay the cost of the IME. As such, claimant cannot recover the cost of Dr. Tearse's IME from defendant under section 85.39. Therefore, I reverse the deputy commissioner's finding that claimant is entitled to reimbursement from defendant pursuant to Iowa Code section 85.39 for the cost of Dr. Tearse's IME.

See Reh v. Tyson Foods, Inc., File No. 5053428 (App. Mar 26, 2018) (emphasis added); see also Jackson v. CHEP Recycled Pallet Solutions, File No. 5061686 (App. April 20, 2020); Barnhart v. John Deere Dubuque Works, File No. 5065851 (App. Mar. 27, 2020).

In this case, defendants admitted claimant sustained an injury on July 19, 2016, but defendants deny liability for claimant's alleged sequela injury to his back based on the causation reports of Dr. Isaacson and Dr. Broghammer. None of the employer-retained physicians in this case has provided an evaluation of permanent disability for claimant's alleged back sequela.

Given that this case involves an admitted occurrence of a work-related injury but a denied condition allegedly stemming from that injury, I acknowledge this case is somewhat different from Reh. However, as the parties are aware, this is an extremely common occurrence in workers' compensation cases. In disputes regarding requests for alternate medical care, for example, petitions are routinely dismissed when the condition for which claimant seeks care is denied, even if the occurrence of an injury is admitted. See Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010); R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003).

Importantly, claimant in this case offers no argument as to how this distinction negates the applicability of the Court's strict interpretation of Iowa Code section 85.39 in DART. Iowa Code section 85.39 provides that there must be "an evaluation of permanent disability . . . made by a physician retained by the employer" before the reimbursement provisions are triggered. In this case, there has been no evaluation of permanent disability relating to claimant's alleged back sequela. And as noted by the court in DART, "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." 867 N.W.2d at 847 (emphasis added). In this case, because there was no evaluation of permanent disability of claimant's alleged back sequela before his IME petition, I find the process established in Iowa Code section 85.39 has not yet been followed.

Claimant in this case asserts several arguments regarding the unfairness of this outcome. Similar arguments were addressed and dismissed in DART, however:

Young argues the process is unfair to workers because the employer has too much control over the evaluation and can impose adverse consequences on the employee. She argues the process unfairly limits her to one reimbursable, independent evaluation and could permit employers to sabotage the claim process by failing to initiate the evaluation process. Yet, these arguments have been impliedly rejected by the legislature in enacting section 85.39. Additionally, the consequences feared by Young fail to consider the authority given to the commissioner by the legislature to order an examination and report of the injured worker by an impartial physician. *Id.* § 86.38. If an employer unduly delays in seeking an examination under section 85.39, or fails to obtain an examination, the employee may request the commissioner to appoint an independent physician to examine the employee and make a report. *Id.*

DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Ultimately, therefore, there remains a distinct difference between opinions on causation and evaluations of permanent disability when those opinions pertain to a condition allegedly stemming from an admitted occurrence of a work-related injury. Thus, I find the reimbursement provisions of Iowa Code section 85.39 were not triggered for claimant's alleged back sequela. With this additional analysis, I affirm the deputy commissioner's order of July 12, 2019.

ORDER

IT IS THEREFORE ORDERED that the order filed on July 12, 2019 is affirmed in its entirety with the above-stated additional analysis.

Claimant shall pay the costs of the appeal, if any.

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 11th day of June, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Marlon Mormann Via WCES

Charles A. Blades Via WCES

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