EVANS & DIXON L.L.C.

ATTORNEYS AT LAW

IOWA CASE LAW UPDATE

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Clemons v. GKN Armstrong Wheels **85.39 IME**

Defendants retained Dr. David Hoversten as an expert and scheduled Claimant with an IME. Dr. Hoversten determined that Claimant had a pre-existing arthritic condition caused in party be an earlier injury. He opined that 95% of Claimant's current condition was the result of the prior injury, while only 5% from the work-related aggravation. Dr. Hoversten did not provide an impairment rating, only a causation opinion.

The Deputy held that Claimant's right to reimbursement for Dr. Hines' IME had occurred, and that Dr. Hines' fees were reasonable.

A rating of no impairment is a rating of impairment for section 85.39 purposes. Vaughn v. Iowa Power Inc., File No. 925283 (Arb. August 5, 1992). Dr. Hoversten opined that claimant's injuries were not caused by work related activities, triggering claimant's right to obtain an IME.

Sands v. city of Sioux City **85.39 IME**

Claimant filed a petition under Iowa Code Section 85.39 requesting an examination from a physician of his choosing. Claimant argued that the permanent disability rating of Dr. Matthew Johnson was too low. Dr. Johnson was a physician selected by Defendant. Yet, Claimant's Counsel solicited the impairment rating from Dr. Johnson. Defendant had also retained Dr. Douglas Martin, who issued a causation opinion in favor of Defendant. Dr. Martin also did not give an impairment rating.

Defendant resisted Claimant's petition because (1) it had denied compensability for the work-related conditions and (2) Claimant had already obtained an IME in the form of Dr. Johnson's impairment rating.

The Deputy rejected Defendant's first argument citing to Dodd v. Fleetguard, Inc. The Deputy rejected Defendant's second argument based upon the plain language of the statute.

> In Dodd, the court was concerned about the claimant being able to obtain medical evidence. The employer has directed care in this case. The quid pro quo for directing care is that the claimant is entitled to a section 85.39 IME, provided the employer has retained a physician who has made an evaluation of permanent disability that is believed to be too low by the claimant… NO impairment rating was given by Dr. Martin, only a finding of no compensability. In order to trigger the 85.39 entitlement, claimant procured ratings from the physician selected by the employer – Dr. [Matthew] Johnson.

The Deputy granted Claimant's petition because Dr. Johnson's disability rating was (1) an opinion expressed by the employer-chosen physician and (2) Claimant believed that opinion was too low.

Ratliff v. Sherwood Company **Failure to Attend IME / TTD Suspension**

Defendants had scheduled Claimant with an IME on 10/28/13 and 11/14/13. Claimant did not attend either of them. Claimant attended an IME at Defendants' request on 12/11/13.

The Deputy ordered payment of HP benefits from June 20, 2012 (DOI) thru January 17, 2013 (day before return to work). Defendants, however, argued that Claimant should be suspended from HP benefits from October thru December of 2013, which is during the time when Claimant refused to attend Defendants' scheduled IMEs. Defendants also requested reimbursement for the cost for Claimant's non-attendance of the two missed IMEs. The Deputy rejected Defendants' argument.

Defendants' request that claimant not be paid healing period benefits for the time he did not attend an IME is not supported by the law. The commissioner issued a declaratory order holding that temporary benefits may be suspended during a time of refusal to attend a reasonable IME, but the benefits accrue and are payable when the claimant has complied with the request for the IME. Claimant complied and attended an IME [December]. Similarly, there is no enforcement mechanism in section 85.39 to require claimant to pay for not showing up at an IME. Defendants' request for suspending claimant's temporary benefits and payment of IME expenses is denied.

Meyering v. Harrison Truck Centers **Causation Standard**

Claimant alleged a cumulative work injury to his bilateral upper extremities with a date of injury of August 30, 2012. Claimant was a diesel mechanic for the Defendant since 2007. His job required repetitive and strenuous work with his hands, including using his hands as a hammer to pound parts. Claimant was also the "go to guy" for heavier jobs. Defendants argued that Claimant's conditions were the result of Claimant's activities outside of work. Claimant was a body builder and a semi-pro arm wrestler.

In support of his claim, Claimant introduced medical opinions of Dr. Carlsen and Dr. Taylor. Dr. Carlsen was Claimant's surgeon, not a hired expert. The Deputy adopted the opinions of Dr. Carlsen as the most credible because: his credentials were impeccable; he utilized the correct causation standard; and had an accurate description of Claimant's onset of symptoms. The Deputy then went on to discuss the opinions of Dr. Berg and Dr. Mooney, the experts retained by Defendants. The Deputy discussed how their opinions were thoughtful and thorough. However, the Deputy ultimately found hem less persuasive because they were premised upon the "fallacy of false alternatives" or "false dichotomy." In other words, the experts retained by Defendants only considered whether the cause of Claimant's injuries was either (a) his work activities or (b) his arm wrestling, wood cutting, and weight lifting activities. They did not consider any other alternative, including whether Claimant's work activities, as well as his non-work activities, were bot a substantial cause of his disability.

It is well-established that to prove medical causation, an injured worker need not prove that his work activities were the sole cause or even the primary cause of the disability. The worker only must prove that the work activities were a substantial cause of the disability. "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Both of the adverse medical reports in this case are flawed in that the opinions received are predicated upon a false assumption; namely that the expert must choose the cause or the primary cause of the onset (or etiology) of the condition.

Schoenfeld v. Nestle USA, Inc. **Non-Production of IME Report = Negative Inference**

The Commissioner reversed the Arbitration Decision, and found that Claimant had met his burden of proof that the rotator cuff tear in his left shoulder was caused by the work accident on 10/19/19.

The Commissioner came to a different conclusion than the Deputy with a de novo review of the evidence. The Commissioner gave great weight to the medical opinions of Dr. Bries. The Commissioner also took into account that Defendants did not introduce a clinical note or report from their chosen-IME physician, Dr. Theron Jameson.

It is noteworthy that defendants sent claimant to Dr. Jameson for evaluation on April 12, 2014, and defendants then did not introduce a clinical note or report from Dr. Jameson at hearing. Where, without satisfactory explanation, relevant evidence within the control of a party whose interests would naturally call for its production is not produced, in such circumstances, it may be inferred the evidence would be unfavorable.

Yaw v. Westside Auto Body **PPD Industrial Disability**

The Deputy found Claimant had sustained 60% industrial disability due to a stipulated inguinal hernia injury that occurred in December of 2010. The Defendants appealed only the disability award. Upon a de novo review, the Commissioner lowered the award to 30% industrial disability.

Claimant is 65 years old with no GED, high school, or trade certification. Claimant's entire work career has been an automobile body man ("the only trade he knows"). In December of 2010, he sustained an injury and was authorized to treat with Dr. Daniel Miller, who recommended a hernia repair. Claimant underwent the hernia repair with Dr. Prasad. Claimant was released to return to work full duty about 2 months after the surgery. Despite this, Claimant continued to have burning, numbness, and radiating pain. Dr. Miller believed that the inguinal nerve was irritated and referred Claimant to Dr. Kenneth Pollack. Eventually Dr. Miller placed Claimant at MMI with a 5% PPI rating. Claimant never had formal restrictions, but was self-limiting his work activities. Claimant was earning $20.00 per hour before and after his injury. Since his termination, Claimant had been unemployed and looking for work. Dr. Karen Kienker, Claimant's IME physician, gave a 5% PPI rating and recommended that he limit his lifting to 20 lbs. The Commissioner agreed with the Deputy that the Claimant's work injury did not contribute to the termination of Claimant.

The Commissioner did not agree that the evidence demonstrated that the permanent work restrictions recommended by Dr. Kienker was caused by the December 2010 work injury. Claimant had continued to work full duty at Defendant for over 2 years after the hernia repair. The Commissioner also noted that Dr. Kienker was likely provided misinformation about why Claimant was terminated. The Commissioner did not find that the work injury impacted Claimant's performance to the extent it endangered his job.

Seymour v. Sherwin Williams **Penalty – Unreasonable Investigation**

The Deputy concluded that Claimant sustained a work injury and was permanently and totally disabled. The Deputy also assessed a fifty percent penalty. Defendants argued on Appeal that no penalty should be awarded because of: Claimant's inconsistent statements in the beginning; the lack of credibility of the expert medical opinions; and Claimant's delay in pursing his own claim.

The Commissioner acknowledged that there was initial inconsistency and confusion with Claimant's testimony; however, the Commissioner found that the denial of benefits based upon his initial inconsistency/confusion was not reasonable. Claimant (a non-physician), once he discovered he had a disc herniation, timely requested care.

The Commissioner acknowledged that it was unknown whether any physician was aware of Claimant's chiropractic history. However, the Commissioner noted that a reasonable investigation of this claim "would have sought answers to these questions and obtained greater clarity in the views of the physicians." The Commissioner held that Defendants either failed to perform a reasonable investigation required by Section 86.13(4) or they failed to show they performed such an investigation. The Commissioner concluded that, had they performed a reasonable investigation, Defendants would have known that Claimant hand no activity restrictions at the time of his work injury.

The Commissioner also noted that Defendants failed to re-evaluate their initial denial after obtaining more information. "To avoid a penalty, defendants must show that they re-evaluated the case promptly after they had reason to know that the initial denial was unreasonable." Apparently, Defendants did not re-evaluate the Case because it is Sherwin Williams' policy to deny claims if they are not pursued within 5-7 days after an injury.

Finally, a delay in filing a petition with the Agency is not a reasonable basis to deny a claim for a work injury that is timely reported.

Punt v. De Jong Farms **Authorized Physician Recommendations**

This case was submitted on the record with not testimony taken. Defendants authorized Dr. Daniel Tynan to treat Claimant's work injury. Dr. Tynan recommended treatment involving nerve blocks and a facetectomy. Defendants denied authorization pending an IME with Dr. Douglas Martin. The Deputy granted Claimant's Alternate Care Petition, finding that Defendants are not permitted to place on "hold" Claimant's care for an IME.

Defendants are not entitled to second-guess Dr. Tynan's recommendations and decline to authorize the care recommended. Defendants are free to continue to investigate compensability in this matter; however, defendants are not entitled to place a "hold" on claimant's medical treatment pending further investigation. Defendants chose claimant's treating physician and thus, are responsible for any treatment recommendations made by that treating physician.

Reyes v. Rosenboom Machine and Tool **Authorized Physician Recommendations**

Defendants authorized Claimant to treat with orthopedist Dr. Blake Curd. Dr. Curd performed an injection, and eventually recommended a carpal tunnel release for Claimant's work injury. The nurse case manager for Defendants wrote to Claimant's Counsel, advising that a job video analysis and an IME would be completed prior to authorization of surgery. Defendants scheduled Claimant with an IME with Dr. Nipper. Defense Counsel argued that given the carpal tunnel was mild, it was reasonable for a second opinion in order to confirm that diagnosis.

Alternate Care was granted. The Deputy concluded that the authorized treating surgeon had recommended surgery, and that Defendants were not free to interfere with the judgment of their chosen physician.

Jones v. American Greetings **Authorized Physician Recommendations**

The authorized treating medical providers recommended shoulder surgery for Claimant's work injury. Defendants denied the requested surgery because it was not consistent with Coventry's clinic review. The Deputy granted Claimant's Petition for Alternate Care as Defendants interfered with and "second guessed" the authorized physician's recommendations.

> This is a textbook example of defendants interfering with the medical judgment of their own treating physicians. Employers have the right to choose medical care. Employers and their insurance carriers do not have the right to second guess their own chosen physicians.
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> Dr. Kirkland and Dr. Jacobson have examined Ms. Jones. They have exercised their clinical judgments as to the medical necessity of shoulder surgery.
>
> Dr. Kuhn has not examined Ms. Jones. Dr. Kuhn applies ODG guidelines in his evaluation of the necessity of her surgery. Iowa had not by statute, rule or case law adopted ODG guidelines.
>
> Ms. Jones has proven by a preponderance of the evidence that the defendants are not offering reasonable care. Ms. Jones has shown that defendants are interfering in the care being offered by authorized physicians. The authorized examining physicians have clearly stated Ms. Jones needs surgery. Given their familiarity with Ms. Jones' condition and credible medical evidence the care recommended by Dr. Kirkland and Dr. Jacobson is the only reasonable medical care for claimant.