

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

**FILED**

RUBIJA BABIC,

JUN 10 2015

Claimant,

File No. 5039150 WORKERS' COMPENSATION

vs.

A P P E A L

TYSON FRESH MEATS, INC.,

D E C I S I O N

Employer,  
Self-Insured,  
Defendant.

Head Note Nos.: 1108; 1803

Claimant Rubija Babic appeals from an arbitration decision filed February 11, 2014. This case was heard on February 26, 2013, and it was considered fully submitted on March 19, 2013, in front of Deputy Workers' Compensation Commissioner Erica J. Fitch. On November 15, 2013, this matter was delegated to Deputy Workers' Compensation Commissioner Helenjean Walleser because Deputy Fitch went on leave of absence. Deputy Walleser then issued the arbitration decision on February 11, 2014. Deputy Walleser determined claimant failed to establish that she sustained an injury that arose out of and in the course of her employment with defendant.

On February 28, 2014, claimant filed an application for rehearing asserting that the order of delegation filed on November 15, 2013, was not received by claimant's attorney because the email provider for claimant's counsel went out of business and a new email address started on November 1, 2013. Claimant asserted that had her attorney received the order of delegation, the delegation would have been objected to because it was not appropriate as this is a case where claimant's "demeanor" is a "substantial factor."

Defendant resisted claimant's application for rehearing pointing out that claimant did not object to the delegation of this case to Deputy Walleser and that the email address at issue was the one listed by claimant's counsel on the petitions, on claimant's post-hearing brief and on the arbitration decision, which was issued on February 11, 2014, nearly three months after the order of delegation was filed on November 15, 2013. Apparently claimant's counsel received the arbitration decision without difficulty.

On March 11, 2014, because Deputy Walleser had retired, Deputy Fitch, who by that time had returned from leave of absence, issued a ruling which denied the request for rehearing. Claimant then filed her notice of appeal on March 27, 2014.

Claimant asserts on appeal that Deputy Commissioner Walleser erred in finding that claimant failed to establish that she sustained a work-related injury. Claimant

further asserts that Deputy Commissioner Fitch erred in denying the application for rehearing. Defendant asserts that the findings of the deputy commissioners should be affirmed on appeal. The detailed arguments of the parties have been considered and the entire record of evidence has been reviewed de novo.

In the ruling dated March 11, 2014, in which claimant's application for rehearing was denied, Deputy Fitch stated the following, in pertinent part:

Claimant asserts rehearing is necessary, as the matter was not appropriate for delegation to Deputy Walleser due to involvement of demeanor evidence. In her application, however, claimant does not make reference to the impact of claimant's demeanor, but rather, of the impact of demonstrative evidence offered at hearing. Claimant argues Deputy Walleser was unable to view [claimant's] physical depiction of her job duties, therefore putting demeanor at issue. Claimant is incorrect in her assertion. A physical depiction of job duties is not demeanor evidence. It is a physical demonstration. When physical demonstrations occur, it is imperative for the witness and questioning counsel to describe that demonstration verbally. Failure to do so can lead to perceived voids in the evidentiary record relevant to future appeals or as in this case, delegations to other than the presiding deputy.

Furthermore, demeanor evidence refers to matters of credibility, not demonstrative evidence. Deputy Walleser did not make a negative credibility assessment of claimant. Instead, Deputy Walleser weighed the medical evidence presented in the evidentiary record and accepted the opinions of Drs. Gordon and Gorsche over the contrary opinion of Dr. Delbridge. Deputy Walleser expressly stated her reasoning in accepting these opinions over that offered by Dr. Delbridge and found claimant did not meet her burden of proof based upon this evidence. Claimant's demeanor at hearing and any potential impact of her demeanor did not negatively impact claimant's claim.

Finally, it should be noted claimant asserts she would have objected to the delegation to Deputy Walleser, had she received the order of delegation. In her application, claimant states:

4. Apparently there was an email sent November 15, 2013, to the address, "elwood@myclearwave.net" indicating that this order had been entered, however this email address was no longer valid as the email provider went out of business and a new email address started on November 1, 2013. The office did attempt to contact everyone regarding the new email address. It is unknown at this point whether the Workers [sic] Compensation Commission [sic] received such a notice or not.

The order of November 15, 2013 was not sent as an informal email to the parties. It was sent via the approved procedure for delivery of proposed or final decisions, orders or rulings, as set forth in 876 IAC 4.7. In order to facilitate receipt of such correspondence, the parties are charged with providing the agency with a valid email address. Unless an undeliverable message is received in response to an attempted electronic delivery, the agency would otherwise have no notice of a potential issue with delivery. No such message was received in reply to the November 15, 2013 notice.

The reasoning stated by Deputy Fitch in her ruling which denied the application for rehearing is hereby affirmed, with the additional rationale that while claimant stated the following in paragraph 4 of the application, "The office [of claimant's attorney] did attempt to contact everyone regarding the new email address. It is unknown whether the Workers Compensation Commission received such a notice or not.", absolutely no showing was made to specifically document what efforts the office of claimant's attorney actually made to notify this agency that claimant's attorney's email address had changed immediately when the new email address went into effect. Such a showing is necessary to support the contention made by claimant's attorney that some effort was made to notify this agency of the change.

For all of the above-stated reasons, the denial of claimant's application for rehearing filed on February 28, 2014, is affirmed.

Furthermore, pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on February 11, 2014, that relate to issues properly raised on intra-agency appeal without additional comment other than to state that a careful review of all of the medical evidence in this matter supports the deputy commissioner's decision to give greater weight to the opinions of Dr. Gordon and Dr. Gorsche over the opinions of Dr. Delbridge.

#### ORDER

IT IS THEREFORE ORDERED that the ruling on request for rehearing filed on March 11, 2014, and the arbitration decision filed on February 11, 2014, are AFFIRMED.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 10th day of June, 2015.

*Joseph S. Cortese II*

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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

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