

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEYBI CARRILLO GONZALEZ,

Claimant,

vs.

DORMARK CONSTRUCTION CO.,

Employer,

and

BITCO GENERAL INS. CORP. f/k/a  
BITUMINOUS CASUALTY CORP.,

Insurance Carrier,  
Defendants.

File No. 5062410

A P P E A L

D E C I S I O N

Head Note Nos: 1402.30; 2502; 2907;  
4000; 5-9999

**FILED**  
MAY 13 2019  
WORKERS' COMPENSATION

Claimant Deybi Carrillo Gonzalez appeals from an arbitration decision filed on December 28, 2017. Defendants, Dormark Construction Co., employer, and its insurer, Bitco General Insurance Corp., respond to the appeal. The case was heard on August 22, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 19, 2017.

The deputy commissioner found claimant failed to carry his burden of proof that he sustained an injury which arose out of and in the course of his employment with defendant-employer on November 23, 2015, as alleged. The deputy commissioner found all other issues raised in this matter are moot, including whether claimant is entitled to receive temporary disability benefits, permanent disability benefits, medical benefits and penalty benefits. The deputy commissioner found claimant is not entitled to receive reimbursement pursuant to Iowa Code section 85.39 from defendants for the cost of the independent medical evaluation (IME) of claimant performed by Sunil Bansal, M.D., on June 23, 2017. The deputy commissioner ordered the parties to pay their own costs of the arbitration proceeding.

Claimant asserts on appeal that the deputy commissioner erred in failing to make a credibility determination regarding claimant. Claimant asserts the deputy commissioner erred in finding claimant failed to prove he sustained a work injury on November 23, 2015, as alleged. Claimant asserts the deputy commissioner erred by

failing to award permanent total disability benefits or permanent partial disability benefits, temporary disability benefits, medical benefits and penalty benefits. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive reimbursement from defendants for Dr. Bansal's IME. Claimant asserts the deputy commissioner erred in failing to order defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on December 28, 2017, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that he sustained a work-related injury on November 23, 2015, as alleged. I affirm the deputy commissioner's finding that all other issues raised in this matter are moot, including whether claimant is entitled to receive temporary disability benefits, permanent disability benefits, medical benefits and penalty benefits. I affirm the deputy commissioner's finding that pursuant to Iowa Code section 85.39, claimant is not entitled to receive reimbursement from defendants for the cost of Dr. Bansal's IME. I affirm the deputy commissioner's order that the parties pay their own costs of the arbitration proceeding.

I affirm the deputy commissioner's findings, conclusions and analysis regarding all of the above issues with the following additional analysis for my decision:

It is appropriate to respond to claimant's assertion that explicit determinations of a claimant's credibility are highly encouraged, if not required, under the Iowa workers' compensation act. Claimant's assertion is a misstatement of agency precedent.

In the matter at hand, the presiding deputy commissioner did not make any explicit findings concerning the credibility of the witnesses. It is common for specific findings on credibility to not be made by a deputy commissioner unless credibility is

found to be lacking or the witness is found to be unusually credible. Further, determining the overall credibility of a claimant's testimony or the testimony of another witness is best done by examining the entire record and comparing the testimony provided at hearing with the material facts in the record as a whole. Credibility assessments can be expressed or implied. Where evidence in the record clearly shows a witness has made inconsistent statements, as is the case in the matter at hand, the damage to credibility is evident.

The case cited in claimant's appeal brief does not support a finding that credibility assessments must be explicitly stated in arbitration decisions. Rather, the decision comments on demeanor findings, a rarely utilized subpart of credibility assessments. Claimant cites to Davis v. KPR/Tyson, File No. 5036477 (App. Dec., Feb. 14, 2013). In Davis, the commissioner addressed the sufficiency of the agency's findings with respect to credibility assessments based upon a claimant's demeanor at hearing. The commissioner held that demeanor findings of a deputy commissioner shall require, if to be found persuasive on appeal, some evidence as to the basis of such a finding, rather than simply citing boilerplate language. In the matter at hand, the deputy commissioner did not make a credibility assessment based upon claimant's demeanor. Further, the quoted section, "determining credibility of a claimant and other witnesses is required in many cases" is taken out of context. The quote is not to be understood as a definitive statement or the imposition of a requirement; it is provided in the decision to contrast the frequency of demeanor determinations versus credibility assessments. It is merely a commentary on the fact deputy commissioners are regularly called upon to assess an individual's credibility.

As previously stated, credibility can be assessed by comparing an individual's testimony to the evidentiary record as a whole. Although the deputy commissioner in this instance did not make specific findings regarding the credibility of each witness, such findings are strongly implied. Prior to finding claimant did not meet his burden of proof with respect to causation, the deputy commissioner discussed a number of inconsistencies regarding the alleged injury:

As noted, the record indicates claimant offered several dates of injury for a traumatic injury. Mr. Schlueter and Mr. Guerrero indicate claimant was not injured at work. Claimant waited nearly six months after the alleged injury before he sought medical treatment. A report from the Iowa Civil Rights Commission (ICRC) found claimant was initially injured at work when struck in the head with a rock by Mr. Schlueter. Because of those inconsistencies in the record, particularly because of the ICRC report, claimant failed to carry his burden of proof he sustained an injury which arose out of and in the course of employment. (Arbitration Decision p. 8)

By discussing the above inconsistencies, and specifically focusing on the ICRC report wherein claimant details a markedly different mechanism of injury, it follows that

the deputy commissioner implicitly found claimant's testimony regarding the injurious event was not credible. I affirm the deputy commissioner's findings in this regard.

The same can be said of Mr. Vargas-Plaza's testimony. Mr. Vargas-Plaza's testimony is, at times, inconsistent and contradictory to claimant's testimony. In his sworn affidavit, Mr. Vargas-Plaza stated he witnessed claimant, "trip, fall and sustain injuries" on or about November 25, 2015. (Ex. 3, p. 1) During his deposition, Mr. Vargas-Plaza testified he did not see what caused the fall, but he did witness claimant in the process of falling. (Ex. F, depo tr. pp. 15-16) At hearing, Mr. Vargas-Plaza testified he did not witness claimant's fall; rather, he only saw the aftermath with claimant sitting on the ground. (Hearing Transcript p. 89) In addition, Mr. Vargas-Plaza testified at deposition that claimant was "supposedly" holding forms when he fell. (Ex. F, depo tr. p. 16) At hearing, Mr. Vargas-Plaza testified he did not know if claimant was holding anything when he fell, but assumed claimant was carrying forms. (Tr. pp. 86, 90) In contrast, claimant's deposition testimony provides he had screws in his hands when he fell. (Ex. E, depo tr. p. 28) At hearing, claimant testified he (1) was holding screws; (2) was not holding screws; and (3) could not recall whether he was holding screws when he fell. (Tr. p. 52) By discussing the above inconsistencies in the arbitration decision, and ultimately finding claimant failed to carry his burden of proof he sustained an injury, it is evident the deputy commissioner did not afford claimant or Mr. Vargas-Plaza's testimony substantial weight in rendering his decision. I affirm the deputy commissioner's findings in this regard.

Claimant asserts Mr. Schlueter is not a credible witness. From a de novo review of the hearing transcript and his affidavit, it is not apparent that Mr. Schlueter was inconsistent in his testimony. (See Ex. C; Tr. pp. 92-124) The answers provided by Mr. Schlueter on direct and cross examination do not appear to be evasive or lacking in honesty. Mr. Schlueter was not impeached with inconsistent, prior testimony. By including Mr. Schlueter's testimony in the above quoted analysis, it is implied the deputy commissioner found Mr. Schlueter sufficiently credible. I affirm the deputy commissioner's findings in that regard.

The deputy commissioner provided a thorough, well-reasoned analysis of the evidentiary record. It is evident the deputy commissioner weighed the multiple inconsistencies against the record as a whole in reaching his ultimate conclusion. I find no reversible error in the deputy commissioner's analysis.

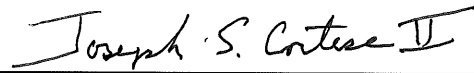
#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 28, 2017, is affirmed in its entirety.

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal.

Signed and filed on this 13<sup>th</sup> day of May, 2019.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

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