

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEBBORAH ELLIOTT,

Claimant,

vs.

FLYNN COMPANY, INC.,

Employer,

and

MIDWEST BUILDERS' CASUALTY
MUTUAL COMPANY,Insurance Carrier,
Defendants.

File No. 20003792.03

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 2502;
2907

Claimant Deborah Elliott appeals from an arbitration decision filed on June 21, 2022. Defendants Flynn Company, Inc., employer, and its insurer, Midwest Builders Casualty Mutual Company, cross-appeal. The case was heard on February 24, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 4, 2022.

In the arbitration decision, the deputy commissioner found claimant failed to meet her burden of proof to establish she sustained an injury that arose out of and in the course of her employment. The deputy commissioner found the remaining issues are moot, with the exception of recovery of the cost the independent medical examination (IME) of Mark Taylor, M.D. The deputy commissioner found defendants should reimburse claimant for the cost of Dr. Taylor's IME under Iowa Code section 85.39. 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 finding claimant failed to prove she sustained a work-related injury. Claimant asserts the deputy commissioner erred in failing to find claimant sustained a permanent work-related injury to her right shoulder, which would entitle claimant to an award of substantial industrial disability benefits. Claimant asserts her rate calculation should be adopted, she asserts she is entitled to recover the cost of medical bills, she asserts she

is entitled to alternate medical care, and she asserts she is entitled to an award of costs. Claimant asserts the remainder of the decision should be affirmed.

On cross-appeal, defendants assert the deputy commissioner erred in finding defendants should reimburse claimant for the cost of Dr. Taylor's IME. Defendants allege the remainder of the decision should be affirmed.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on June 21, 2022, is affirmed in part, and it is reversed in part with my additional and substituted analysis.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility and the credibility of defense witness Mark Gorton. The deputy commissioner found claimant was not a credible witness, and the deputy commissioner found Mr. Gorton was a credible witness. I find the deputy commissioner correctly assessed the credibility of claimant and Mr. Gorton. While I performed a de novo review on appeal, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant and Mr. Gorton by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding the credibility of claimant and Mr. Gorton.

Without additional analysis, I affirm the deputy commissioner's finding that claimant failed to prove she sustained a work-related injury, and I affirm the deputy commissioner's finding that the remaining issues are moot, other than recovery of the IME expense. I also affirm the deputy commissioner's order that the parties pay their own costs of the arbitration proceeding.

With my additional and substituted analysis, I reverse the deputy commissioner's finding that defendants should reimburse claimant for the cost of Dr. Taylor's IME.

Iowa Code section 85.39(2) (2019), provides:

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. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined

is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Under the express wording of section 85.29(2), an employer is only liable to reimburse an employee for the cost of an IME if the injury for which the employee is being examined is determined to be compensable. Claimant did not prove she sustained a compensable injury. Therefore, she is not entitled to recover the cost of Dr. Taylor's IME.

ORDER

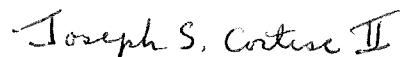
IT IS THEREFORE ORDERED that the arbitration decision filed on June 21, 2022, is affirmed in part, and is reversed in part.

Claimant shall take nothing from these proceedings.

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

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 8th day of November, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Nicholas Shaul (via WCES)

Bryan Brooks (via WCES)