

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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YENNI MEJIA,  
Claimant,

vs.

COSTCO WHOLESALE CORP.,

Employer,

and

SAFETY NATIONAL CASUALTY  
CORP.,

Insurance Carrier,  
Defendants.

File No. 1655858.01

A P P E A L

D E C I S I O N

Head Notes: 1402.40; 1402.50; 1801;  
2401; 2502; 2701; 2907;

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Claimant Yenni Mejia appeals from an arbitration decision filed on November 7, 2022. Defendants Costco Wholesale Corporation, employer, and its insurer, Safety National Casualty Corporation, respond to the appeal. The case was heard on August 29, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 23, 2022.

In the arbitration decision, the deputy commissioner found claimant met her burden of proof to establish she sustained a work-related injury to her left arm and her left shoulder on October 23, 2018. The deputy commissioner found defendants received timely notice of the work injury under Iowa Code section 85.23 because defendants had actual knowledge of the injury. The deputy commissioner found claimant failed to prove she sustained temporary or permanent disability of her left arm or her left shoulder as a result of the work injury. The deputy commissioner found claimant is not entitled to alternate medical care under Iowa Code section 85.27. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is not entitled to recover the cost of the independent medical examination (IME) of claimant conducted by Sunil Bansal, M.D. The deputy commissioner found claimant is not entitled to recover costs under rule 876 IAC 4.33.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to prove she sustained permanent impairment of her left arm, and temporary and permanent impairment of her left shoulder, caused by the work injury, and claimant asserts she is entitled to an award of permanent partial disability benefits. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to

alternate medical care under Iowa Code section 85.27. Claimant asserts the deputy commissioner erred in finding that pursuant to Iowa Code section 85.39 claimant is not entitled to recover the cost of Dr. Bansal's IME. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to recover costs.

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

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

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 November 7, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding that defendants received timely notice of the work injury under Iowa Code section 85.23 because defendants had actual knowledge of the injury. I affirm the deputy commissioner's finding that claimant proved she sustained a work-related injury to her left shoulder. I affirm the deputy commissioner's finding that claimant failed to prove she sustained temporary disability or permanent disability of her left shoulder because of the work injury. I affirm the deputy commissioner's finding that claimant is not entitled to alternate medical care under Iowa Code section 85.27.

With the following additional analysis, I reverse the deputy commissioner's finding that claimant failed to prove she sustained permanent disability of her left arm as a result of the work injury. I reverse the deputy commissioner's finding that claimant is not entitled to recover the cost of Dr. Bansal's IME under Iowa Code section 85.39. I reverse the deputy commissioner's finding that claimant is not entitled to recover costs under rule 876 IAC 4.33.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-845 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-360, 154 N.W.2d 128, 132 (1967).

On October 23, 2018, claimant was moving trash and cardboard on a flatbed cart to the back of the store when the trash and cardboard began to shift and fall. Claimant tried to catch the trash and cardboard, and when she turned she tripped on a tire on the flatbed cart she was using and fell on her left arm.

Claimant was transported by ambulance to the University of Iowa Hospitals and Clinics for treatment. (Joint Exhibit 2, p. 8) Matthew Karam, M.D., an orthopedic surgeon, examined claimant and determined she had a left midshaft ulnar and radius fracture with displacement and an open fracture. (JE 3, pp. 10-17) Dr. Karam reduced the fractures in the emergency room and two days later, on October 25, 2018, Dr. Karam performed an open reduction and internal fixation of both the left forearm fracture, and an excisional debridement of the open fracture site. (JE 3, pp. 21-24) Dr. Karam installed plates and screws in claimant's left arm to repair the fracture sites. (JE 3, pp. 21-24)

Following surgery, claimant received physical therapy to work on range of motion, strengthening, and work hardening. (JE 3) Dr. Karam released claimant to return to work with no use of her left arm on January 22, 2019. (JE 3, p. 34) Claimant continued to receive physical therapy and work hardening, and Dr. Karam imposed a 15-pound lifting restriction on April 30, 2019. (JE 3, p. 52) Claimant continued to complain of persistent pain in her left upper extremity. (JE 3, p. 55)

During an appointment on September 10, 2019, Dr. Karam found claimant's left upper extremity was stable on x-ray. Dr. Karam found claimant could resume full activities as tolerated, and he determined claimant had reached MMI. (JE 3, p. 60) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Karam assigned claimant a zero percent impairment rating finding "[t]here is no diagnosis-based impairment for this condition," noting claimant had full range of motion and lacked any neurologic dysfunction. (JE 3, p. 60)

Claimant continued to complain of significant left upper extremity pain exacerbated by cold weather and by her work activities, and claimant continued to treat with Dr. Karam. (JE 3) Dr. Karam determined the hardware should be removed from claimant's left arm. (JE 3, p. 74) Dr. Karam removed the hardware due to claimant's ongoing pain on June 17, 2021. (JE 3, pp. 75-78) Claimant returned to work in July 2021, following her second surgery.

Claimant resumed physical therapy and began using her left arm again. (JE 3, p. 80) On November 16, 2021, claimant returned to Dr. Karam, complaining of left upper extremity pain when carrying heavy objects. (JE 3, pp. 80-81) Dr. Karam found claimant's left upper extremity was healing appropriately following the hardware removal. (JE 3, p. 81) Dr. Karam continued claimant's physical therapy and noted she would reach MMI after six weeks of physical therapy. (JE 3, p. 81)

On December 6, 2021, Dr. Karam sent a letter to defendants' counsel stating claimant remained at MMI and stating claimant's impairment rating had not changed, noting claimant had full and normal range of motion and no neurologic dysfunction, instability, joint space narrowing, or any other permanent impairment. (JE 3, p. 83)

Claimant disagreed with Dr. Karam's opinion and underwent an IME with Dr. Bansal, an occupational medicine physician, on May 6, 2022. (Ex. 2) Dr. Bansal reviewed claimant's medical records and examined her. (Id.) Claimant complained of residual pain and stiffness in her left upper extremity with use, along with left shoulder pain. (Ex. 2, p. 20) On exam, Dr. Bansal found claimant had flexion of 55 degrees, extension of 50 degrees, radial deviation of 14 degrees, and ulnar deviation of 25 degrees, in her left wrist and hand. (Ex. 2, p. 22) Dr. Bansal measured claimant's grip strength with a dynamometer. (Id.) For claimant's right side, Dr. Bansal found Claimant had strength of 37 kilograms, 37 kilograms, and 35 kilograms, and for the left side, Dr. Karam found claimant had strength of 26 kilograms, 27 kilograms, and 26 kilograms. (Ex. 2, p. 22) Dr. Bansal placed claimant at MMI as of May 6, 2022, the date of his exam. (Ex. 2, p. 23) Dr. Bansal found as follows:

#### LEFT WRIST

With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Figures 16-28, 16-31, and 16-37, she qualifies for the following impairment based on her range of motion deficits.

	RANGE OF MOTION	%UE Impairment
Flexion:	55 degrees	1
Extension:	50 degrees	2
Radial Deviation:	14 degrees	1
Ulnar Deviation:	25 degrees	1

Upper extremity impairment = 5%

(Ex. 2, p. 24)

After receiving Dr. Bansal's report, defendants sent claimant to Joseph Chen, M.D., a physiatrist, for an IME. (Ex. D) Dr. Chen examined claimant, reviewed her medical records, and issued his report on August 22, 2022. (Ex. D)

Dr. Chen found "[w]rist range of motion was normal with flexion over 80 degrees, extension of 70 degrees and symmetric radial deviation of 20 degrees and ulnar deviation of 30 degrees. Of note, these range of motion values were in excess of those recorded in Dr. Bansal's report of May 6, 2022." (Ex. D, p. 5) Later in his report Dr. Chen noted, "I also found that Ms. Mejia exhibits much better left wrist range of motion values than were recorded by Dr. Bansal. I found that her wrist flexion was nearly 60 degrees, extension of 70 degrees, 20 degrees of radial deviation and 30 degrees of ulnar deviation. These were symmetric with her uninjured right wrist." (Ex. D, p. 8) Dr. Chen did not indicate whether he used any devices in obtaining his measurements, and he does not explain the discrepancy between his finding of "flexion over 80 degrees" with his later finding of "wrist flexion was nearly 60 degrees." (Compare Ex. D, p. 5 with Ex. D, p. 8)

Dr. Chen stated he agreed with Dr. Karam's assessment that claimant has no ratable permanent impairment from her left radius and ulnar fracture, noting "[s]he has excellent and normal left wrist range of motion in all planes." (Ex. D, p. 9) Dr. Chen recommended claimant perform wrist range of motion exercises with weight of up to one pound to work on improving her forearm muscle strength noting the exercises "may help her with opening jars or manipulating objects in her left arm." (Ex. D, p. 9)

At hearing claimant testified she experiences left forearm pain when working in cold areas at work. She continues to work for defendant-employer performing her normal job without restrictions.

The deputy commissioner found claimant failed to prove she sustained permanent impairment of her left upper extremity caused by the work injury, relying on Dr. Karam's opinion. Dr. Karam found claimant reached maximum medical improvement (MMI) on September 10, 2019 and assigned claimant a zero percent impairment rating. (JE 3, p. 60)

However, after Dr. Karam found claimant reached MMI, claimant continued to complain of significant left upper extremity pain exacerbated by cold weather and by her work activities. (JE 3) Claimant continued to treat with Dr. Karam, and on June 17, 2021, Dr. Karam surgically removed the hardware in claimant's left arm due to her ongoing pain. (JE 3, pp. 75-78) Dr. Karam then prescribed additional physical therapy. (JE 3, p. 81)

Following the June 17, 2021, hardware removal surgery claimant continued to complain of left upper extremity pain while lifting heavy objects. (Id.) During an appointment on November 16, 2021, Dr. Karam initially found claimant would reach MMI in six weeks, but later issued a letter on December 6, 2021, stating claimant “had been placed at MMI as of September 10, 2019. She remains at MMI and her impairment rating has not changed.” (JE 3, p. 83) Dr. Karam did not indicate what devices, if any, he used to determine claimant’s range of motion. Dr. Karam also did not explain why he found claimant remained at MMI from September 2019, yet also found she would reach MMI six weeks after November 16, 2021. I do not find his opinion persuasive.

Dr. Chen, likewise, did not indicate what devices, if any, he used to determine claimant’s range of motion. Dr. Chen also did not explain the discrepancies in his flexion findings in his report. I do not find his opinion persuasive.

Dr. Bansal examined claimant and recorded his range of motion findings based on objective testing. Dr. Bansal’s finding that claimant sustained permanent impairment of her left upper extremity is supported by her testimony and by the medical records. Claimant repeatedly complained of increased and ongoing pain in her left arm when working in cold environments and when lifting heavy objects at work. I find claimant proved she sustained permanent impairment of her left arm caused by the work injury.

Dr. Bansal assigned claimant five percent permanent impairment for loss of range of motion in her left arm using Figures 16-28, 16-31, and 16-37 of the AMA Guides. (Ex. 2, p. 24) I find Claimant has established she sustained five percent permanent impairment of her left arm caused by the work injury. Under the schedule, compensation for loss of an arm is 250 weeks. Iowa Code § 85.34(2)(m). Therefore, claimant is entitled to receive 12.5 weeks of permanent partial disability benefits for the work injury, at the stipulated weekly rate of \$706.75, commencing on May 6, 2022, the date Dr. Bansal examined her and assigned his impairment rating. Iowa Code § 85.34(2) (noting commencement of permanent partial disability benefits begins “when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined” under the AMA Guides).

The deputy commissioner found claimant is not entitled to recover the cost of Dr. Bansal’s IME because he assigned permanent impairment for claimant’s left upper extremity and her left shoulder, Dr. Karam did not provide an opinion on claimant’s left shoulder, and Dr. Bansal’s bill was not itemized.

Iowa Code section 85.39(2) (2018), provides:

2. 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.

During an appointment on September 10, 2019, Dr. Karam found claimant had reached maximum medical improvement for her arm and he assigned claimant zero percent permanent impairment. (JE 3, p. 60) Claimant disagreed with Dr. Karam's opinion and sought an IME with Dr. Bansal. Dr. Bansal provided permanent impairment ratings for claimant's left arm and left shoulder.

The deputy commissioner found because Dr. Bansal's invoice does not break down which part of his opinions and time are related to claimant's left arm and which parts are related to her left shoulder, claimant is not entitled to recover the cost of the IME. I disagree with the deputy commissioner's conclusion. The statute contains no language requiring the claimant seek an IME only for the body part addressed by the defendants' expert to receive reimbursement for an IME. The statute requires claimant receive an evaluation of permanent disability by a medical provider that the claimant believes is too low before the claimant seeks an IME. In this case claimant disagreed with Dr. Karam's zero percent rating and sought an IME with Dr. Bansal.

In Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021), defendants' expert found there was no causation. Kern disagreed with the opinion and sought an IME at defendants' expense. The Commissioner found Kern was not entitled to recover the cost of an IME because the expert did not give an impairment rating. The Iowa Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. In this case, Dr. Karam opined claimant sustained zero percent impairment. Claimant disagreed and sought an IME with Dr. Bansal. Dr. Bansal's exam occurred after Dr. Karam issued his opinion. Under Kern, claimant is entitled to recover the \$3,370.00 cost of Dr. Bansal's IME.

Claimant seeks to recover \$100.00 for the filing fee, \$13.34 for the service fee, and \$216.15 for the deposition transcript. The deputy commissioner declined to award claimant costs.

Iowa Code section 86.40, provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 IAC 4.33(86), provides:

Costs taxed by the workers’ compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors’ and practitioners’ deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors’ or practitioners’ reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

I found claimant proved she sustained five percent permanent impairment of her left arm as a result of the work injury. I find defendants should reimburse claimant \$100.00 for the filing fee, \$13.34 for the service fee, and \$216.15 for the deposition transcript.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 7, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Defendants shall pay claimant 12.5 weeks of permanent partial disability benefits commencing on May 6, 2022, at the weekly rate of seven hundred six and 75/100 dollars (\$706.75).

Defendants shall receive credit for all benefits paid to date.

Defendants shall pay accrued benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

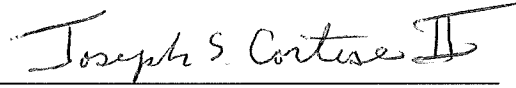
Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant in the amount of three thousand three hundred seventy and 00/100 dollars (\$3,370.00), for the cost of Dr. Bansal’s IME.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, thirteen and 34/100 dollars (\$13.34) for the service fee, and two hundred sixteen and 15/100 dollars (\$216.15) for the deposition transcript, and defendants shall pay the cost of the appeal, including the cost of the hearing transcript.



Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 24<sup>th</sup> day of February, 2023.

A handwritten signature in black ink, reading "Joseph S. Cortese II". The signature is written in a cursive style with a horizontal line extending from the end.

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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Anita Dhar Miller (via WCES)

Gabriela Navarro (via WCES)