

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOUGLAS BUSCH,

Claimant,

vs.

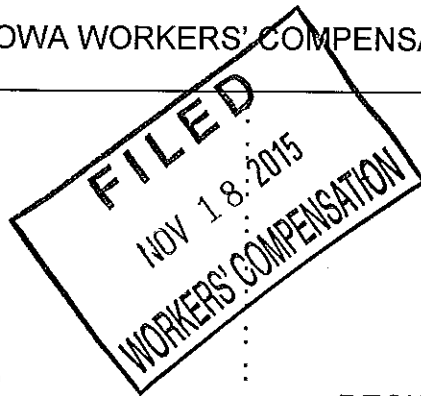
CLIFF VIESSMAN, INC.,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.



File No. 1584503

DECISION ON INDEPENDENT
MEDICAL EXAMINATION PETITION

HEAD NOTE NO.: 2502

STATEMENT OF THE CASE

Douglas Busch, claimant, filed a petition seeking payment of an independent medical examination (IME) under Iowa Code section 85.39 from Cliff Viessman, Inc., employer, and Great West Casualty Company, insurer, both as defendants. This matter concerns an injury claimant sustained on July 1, 2014, that allegedly arose out of and in the course of his employment. This case was fully submitted on the record submitted by the parties on November 13, 2015. The evidence in this case consists of defendants' exhibits A and D.

ISSUE

Whether defendants are liable for payment of the requested IME under to Iowa Code section 85.39.

FINDINGS OF FACT

Claimant alleges a work-related injury to his head, neck and left eye occurring on July 1, 2014.

In an affidavit dated November 11, 2015, Martha Krone indicated she is the workers' compensation adjuster, for defendant insurer, assigned to claimant's workers' compensation case for the July 1, 2014 injury. Ms. Krone indicates she has not chosen any of claimant's physicians regarding treatment for the July 1, 2014 date of injury. Ms. Krone notes when she initially spoke with claimant regarding the injury, claimant

was already scheduled for treatment with his family doctor, Kirk Kilberg, M.D. (Exhibit A)

Ms. Krone indicates when claimant was released to return to work by Dr. Kilberg, she asked the doctor if claimant had any permanent impairment. She indicated the insurer, Great West, paid for the medical providers chosen by claimant, but that Great West has not chosen any of the providers selected by claimant. (Ex. A)

In a September 11, 2015 letter defendants' counsel indicated to claimant's counsel that Ms. Krone had asked Dr. Kilberg if claimant had any permanent impairment. Dr. Kilberg indicated claimant had no permanent impairment. Claimant was returned to work without restrictions on July 7, 2014. (Ex. C)

On October 22, 2015 claimant filed an original notice and petition concerning an IME for a date of injury of July 1, 2014 for injury to the head, neck and left arm. The petition alleges Dr. Kilberg is a physician retained or paid by the employer and the evaluation made by Dr. Kilberg was too low.

CONCLUSION OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. of App. P. 6.14(6).

Iowa Code section 85.39 provides in relevant part:

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. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

Iowa Code section 85.39 only authorizes one independent medical examination when requested by the employee. Stevenson v. Metro Temp, File No. 974182 (App. October 30, 1996).

In IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001) the court held that a doctor chosen by the employee, but paid for by the employer was not "retained" by the employer and therefore the claimant was not entitled to reimbursement for an IME. The court held that paying for the care was not the same as choosing the doctor. Harker Id. p. 327.

The record indicates claimant chose Dr. Kilberg for treatment. Under Harker, because claimant chose Dr. Kilberg, he is not entitled to reimbursement for an IME. Given this

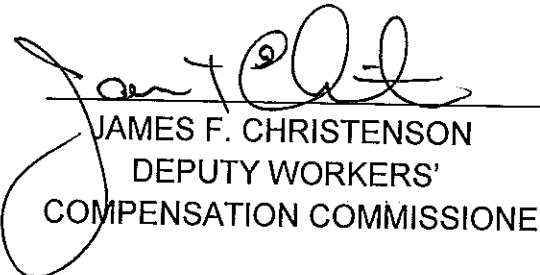
record, claimant has failed to carry his burden of proof he is entitled to an IME by another physician of his choice.

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings

That each party shall pay their own costs.

Signed and filed this 18th day of November, 2015.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

J. Richard Johnson
Attorney at Law
1636 - 42nd St. NE
Cedar Rapids, IA 52402
rjohnson@jllawplc.com

Stephen W. Spencer
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266
steve.spencer@peddicord-law.com

JFC/sam