

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

<p><b>MASTERBRAND CABINETS, INC.</b> <b>d/b/a OMEGA CABINETRY,</b></p> <p><i>Employer,</i></p> <p><b>and</b></p> <p><b>ACE AMERICAN INSURANCE CO.,</b> <i>Insurance Carrier,</i> <i>Petitioners - Appellants,</i></p> <p><b>v.</b></p> <p><b>DAVID AYARD,</b> <i>Respondent - Appellee.</i></p>	<p><b>Case No. CVCV056593</b></p> <p><b>RULING ON JUDICIAL REVIEW</b></p>
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This is a judicial review action on a workers' compensation appeal proceeding. Hearing was held on September 20, 2019. Petitioners, Masterbrand Cabinets, Inc. and Ace American Insurance Co., (collectively "Petitioner"), were represented by counsel, Patrick O'Connell. Respondent, David Ayard ("Ayard"), was represented by counsel, James Byrne.

The issues before the Court in this case are pretty straightforward. Neither party disputes that Ayard suffered a work related injury to his right shoulder. Petitioner does not challenge the Commission's decision or award of workers compensation benefits concerning Ayard's right shoulder injury. What is hotly disputed is the Commission's final decision and award of benefits to Ayard for a left shoulder injury which

the Commission ultimately determined was causally connected to Ayard's light duty work.

### STATEMENT OF THE CASE

#### A. Statement of facts regarding the injury

At the time of his injury, David Ayard was 48-years-old with limited ability to speak and understand English. Having completed schooling in Mexico only through the sixth grade, Ayard's work history demonstrates that he has always been engaged in physically demanding work. In February of 2013, Ayard began working for Omega Cabinetry as a laborer. At the time of his initial work related injury, Ayard was assigned by his employer to prepare doors for cabinets. In that assignment, Ayard was required to perform repetitive work over his shoulder level. Specifically Ayard was required to remove and lower stacks of doors from a car by lifting them from overhead and lowering them onto a machine. At that point, Ayard then installed hinges and other parts on the doors before again lifting and lowering the doors onto a conveyor.

All parties agree that on March 20, 2015, Ayard suffered a traumatic injury to his right shoulder in the course and scope of his employment with Omega Cabinetry. This right shoulder injury occurred when Ayard was lowering a large cabinet door from about head level at which time he felt a pop and pain in his right shoulder, with pain

extending down to his right arm/wrist. Ayard testified the door measured 4 feet by 3 feet and weighed 35 pounds.

Ayard initially sought treatment for his right shoulder injury from his own physician, but on April 10, 2015 his employer sent Ayard to the employer's physician, Dr. Kenneth McMains, who practices at Allen Occupational Health Services. After evaluating Ayard, Dr. McMains imposed temporary work restrictions on Ayard including no use of the right upper extremity and requiring that he keep his elbow at his right side. Ayard returned to work on April 13, 2015 wearing a sling on his right arm. Because of his work restrictions, Ayard was given a light duty assignment.

For approximately 5 months, Ayard worked on a light duty assignment. At the evidentiary hearing, the parties offered contradictory and inconsistent testimony and evidence regarding the nature and scope of the actual light work performed by Ayard during this time. Ayard testified that his light duty assignment consisted of work where he scanned boxes using a hand held scanner (Exhibit D), he also assembled cardboard boxes to cover cabinets, and he pulled down boxes to make lids to cover the cabinets.

In describing how he performed these duties, Ayard (who is right handed) testified that even though his right arm was in a sling, he held

the scanner in his right hand and, after using the scanner to scan the boxes, he then marked the boxes using a writing utensil held in his left hand. Ayard also testified that in order to retrieve the cardboard boxes he was assigned to assemble for use in covering and protecting the finished cabinets, he was required to stand on his tip toes (Ayard is 5'4" tall) and reach up over his head using his left hand to lift up and bring the cardboard boxes down to the floor level so he could assemble them there. Ayard testified that this was repetitive work, all using his left arm, which he performed for approximately 5 months, from April through August of 2015, for what he testified was between 10 and 13 hours per work day.

In contrast and in direct conflict with the testimony of Ayard, Jeffrey Orr, who was the environmental health and safety manager at Omega Cabinetry at the relevant time, testified that Ayard's light duty work did not consist of any lifting or reaching for boxes or any assembly of boxes with one exception. Mr. Orr testified that for approximately one week, Ayard was actually handling the cardboard, but the company discovered that fact and using Ayard's niece as a translator, the company directed Ayard not to do so.<sup>1</sup> Mr. Orr further testified that, to his knowledge, Ayard complied with his instructions during his remaining

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<sup>1</sup> In his testimony at the evidentiary hearing, Ayard unequivocally denied this conversation occurred.

time at the company. However, Mr. Orr acknowledged that Ayard had approached him to report that his left shoulder was starting to bother him because he was utilizing it more than his right shoulder. Mr. Orr further conceded that he wasn't Ayard's direct supervisor, did not see him every work day, and that he was in charge of approximately 900-920 total employees.

The testimony of Mr. Orr was supported by the testimony of another supervisor, Ryan Caley. Mr. Caley testified that outside the incident that occurred during the first week of the light duty assignment that he reported to Mr. Orr and was corrected, he also did not see Ayard violate the work restrictions during the five months he was on light duty assignment. Mr. Caley conceded that he did not watch Ayard every moment of every day, but he testified that he would observe him 20-30 times a day in passing. Mr. Caley candidly admitted it was possible that Ayard departed from his work restrictions during times he was not watching him.

On August 19, 2015, after suffering left shoulder pain, Ayard returned to Dr. Bonebrake who imposed an additional work restriction of no use of his left arm for one month. (Exhibit 1, p. 13). After presenting this restriction to his employer, Ayard was sent home. On September 28, 2015, Ayard was sent by his employer to be evaluated by Dr. McMains

again. After the evaluation, Dr. McMains provided three separate letters (dated October 9, October 20 and December 4, 2015). When taken together, it is clear that the definitiveness of Dr. McMains ultimate opinion on the causal connection between Ayard's left shoulder pain and his light duty work duties evolved in response to information and questions provided by Petitioner and their counsel.

In the initial letter dated October 9, 2015, Dr. McMains noted that "it is hard to state with any degree of medical certainty that he [Ayard] developed an injury to his left shoulder from work activity." (Exhibit 2, P. 94). In this first letter, Dr. McMains did however note that Ayard had reported during the September 28, 2015 evaluation that because of his right shoulder injury he had been using his left shoulder more which has caused increased symptoms in his left shoulder.

After being contacted by Petitioner's counsel on October 20, 2015, Dr. McMains issued an addendum to his first letter in which he concluded that since "at the time the worker [Ayard] developed increased symptoms of his left shoulder he was not working, which leads me to believe, with a degree of medical certainty that there was no event or occurrence at work causing a left shoulder pain." (Exhibit 2, P. 96). Finally, by letter dated December 4, 2015, Dr. McMains opined as follows:

What I can state with a degree of medical certainty is that Mr. Ayard did not perform any work activity that would explain an

injury to his left shoulder. I reviewed the enclosed file of Mr. Ayard's job, where he was making boxes, with all of the work occurring at waist level, with no evidence of any shoulder involvement.

As noted in my previous letters to you, the worker had pain in his left shoulder that was chronic and progressive, even though he was not working. This appears to be an idiopathic presentation, with no specific causation and certainly no causation attributed to a work related event.

Of note in Dr. McMains opinion is that he solely relied upon information presented by Ayard's employer as to the nature, scope and extent of Ayard's light duty duties. As set forth above, the employer's description of the duties performed by Ayard was clearly disputed by Ayard.

Ayard was also evaluated by Dr. Kuhnlein in October 1, 2015. Dr. Kuhnlein opined that:

Given the currently available record, with accommodation by the left arm for the right shoulder injury in accommodation, the left shoulder pain that Mr. Ayard is currently experiencing is sequela to the March 20, 2015 injury related to overuse of the left arm. This would be consistent with the documentation by other physicians besides Dr. McMains.

(Exhibit 4, P. 124). In forming his opinion on causation, Dr. Kuhnlein relied upon information supplied by Ayard describing the actual nature of his light duty work. Again, Ayard's description of the work he performed is contested by his employer. Dr. Kuhnlein, after reviewing

Dr. McMains' written opinions, ultimately confirmed his opinion by letter dated December 31, 2015. (See, Exhibit 4, P. 127).

In sum, the evidence presented at the evidentiary hearing by Ayard and the employer was inconsistent and contradictory regarding the nature of the work performed by Ayard on his light duty assignment. In reaching an opinion on causation, the employer's medical experts, Drs. McMains and Broghammer, accepted and relied on the employer's description of Ayard's duties. In contrast, Ayard's medical expert, Dr. Kuhnlein, gave weight to Ayard's description of the work he performed in forming his opinion.

B. Proceedings before the Workers' Compensation Commission.

This case was originally arbitrated before Deputy Workers' Compensation Commissioner Larry P. Walshire with an evidentiary hearing occurring on November 21, 2016. By Arbitration decision filed January 27, 2017, he found that Ayard had met his burden of proving his work injury on March 20, 2015 to his right shoulder and his consequent inability to use the right arm caused an overuse injury to his left shoulder, a sequelae injury. In so doing, Deputy Walshire made certain credibility findings. In particular, he found the testimony of Ayards's managers (Orr and Caley) to be not convincing. In addition, the hearing



officer found, concerning Ayard, that "I did not observe anything in his demeanor to suggest lack of truthfulness."

Concerning the primary issue raised in this administration appeal, that being the causal connection between Ayard's right shoulder injury and light work assignment and his subsequent left shoulder injury,

Deputy Walshire found:

I find that the work injury of March 20, 2015 to the right shoulder and the consequent inability to fully use the right arm caused an overuse injury to the left shoulder, a sequelae injury. This injury is also an aggravation of a pre-existing left shoulder injury. This finding is based on the views of Dr. Kuhnlein. I found the views of Dr. McMains and Broghammer unconvincing because they based their views of information from Omega managers that indicated he only used the scanner and crayon marker in his job. I did not find their testimony at the hearing convincing. Both claim that they observed David frequently, if not daily, after David began working the light duty job, but if that were so, why would it take a week or so to notice that he was working outside of his restrictions doing the cardboard work. It seems apparent that they were speculating as to how long David performed the cardboard tasks.

*See*, Arbitration Decision, P. 10. Based on these factual and credibility findings, Deputy Walshire awarded Ayard temporary total disability healing period benefits from August 19, 2015 at the rate of \$414.70 per week and reimbursement for out of pocket medical expenses.

On February 16, 2017, Petitioner filed an appeal of the arbitration award to the Workers Compensation Commissioner. In its appeal Petitioner contended that the causation determination made by the Deputy was flawed because it relied on wrong facts or incomplete facts.

On appeal, the workers' compensation commissioner delegated authority to hear the appeal due to a conflict of interest to Deputy Workers' Compensation Commissioner Jennifer Gerrish-Lampe. Deputy Gerrish-Lampe affirmed Deputy Walshire's decision with additional analysis and findings of fact. In particular, Deputy Gerrish-Lampe found:

Because claimant's version of how he conducted himself during the period of light duty is adopted by both the presiding deputy and by the undersigned after a de novo review of the evidence, Dr. Kuhnlein's opinion is also given greater weight as he is the only expert that relied on claimant's version of his physical conduct during the light duty time period.

See, Appeal Decision P. 3.

Petitioner then timely filed for judicial review to this Court. In doing so, Petitioner argues there is not substantial evidence to support the Commissioner's determination that Ayard's left shoulder injuries are casually related to his employment, that is, his light duty work.

### **STANDARD OF REVIEW**

Judicial review proceedings of administrative actions are governed by Chapter 17A of the Iowa Code. Upon review, the district court acts in an appellate capacity to correct potential errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The standard of review varies based upon the type of error allegedly committed by the Commission. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). Where an agency has been "clearly vested" with a fact-finding

function, the “standard of review [on appeal] depends on the aspect of the agency’s decision that forms the basis of judicial review” depending on if it involves an issue of 1) findings of fact, 2) interpretation of law, or 3) an application of law to fact. *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Systems, Inc. v. Iowa Utilities Board*, 805 N.W.2d 758, 762 (Iowa 2011)).

**Review of findings of fact:** The courts employ a substantial evidence standard when evaluating challenges to findings of fact by the Iowa Workers’ Compensation Commission. A reviewing court can only disturb factual findings if they are “not supported by substantial evidence in the record before the court when that record is reviewed as a whole.” *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Iowa Supreme Court has provided guidelines for the Court when reviewing substantial evidence claims under Iowa Code section 17A.19, which are as follows:

When reviewing a finding of fact for substantial evidence, we judge the findings in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it. Our review of the record is fairly intensive, and we do not simply rubber stamp the agency findings of fact.

Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn

a different conclusion as fact finder. Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.

*Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011)

(internal citations and quotation marks omitted).

**Review of Agency's interpretation of law:** The Court has discretion to substitute its own interpretations of law for that of the agency when legal challenges are made on review. *Meyer*, 710 N.W.2d at 219. The Court is, however, required to give deference to the Workers' Compensation Commission's interpretation of law when it has been "clearly vested" with authority to interpret a provision of the law. *Burton*, 813 N.W.2d at 256. If the Iowa Legislature has not given the Workers' Compensation Commission clear authority to interpret a challenged provision of law, the Court may reverse its interpretation if erroneous. *Id.*

The Iowa Supreme Court has held the level of deference to be given to the Commission's legal interpretations is determined on a case-to-case basis depending on the "particular phrase [of the law] under consideration." *Id.* The Iowa Supreme Court has provided the following guidance:

When a term is not defined in a statute, but the agency must necessarily interpret the term in order to carry out its duties, we are more likely to conclude the power to interpret the term was clearly vested in the agency. This is especially true "when

the statutory provision being interpreted is a substantive term within the special expertise of the agency.” However, “[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency,” or when the language to be interpreted is “found in a statute other than the statute the agency has been tasked with enforcing,” we are less likely to conclude that the agency has been clearly vested with the authority to interpret that provision of the statute.

*Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256-257 (Iowa 2012)

(internal citations omitted).

**Application of law to fact:** When a party challenges the ultimate conclusion reached by the Commission, then the challenge is to the agency’s application of law to the facts. Under this approach, “the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence.” *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(i), (j). The Court will only reverse the agency’s application of law to the facts if it is irrational, illogical, or wholly unjustifiable. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012).

### **CONCLUSIONS OF LAW**

In his briefing and legal arguments the Petitioner makes related challenges to the Commissioner’s factual and legal conclusions regarding causation. The Court will address each in turn.

#### **a. Legal error.**

The injured worker bears the burden of proving a causal connection between their injury and their right to workers' compensation benefits. *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 153 (Iowa 1997). The burden of proof is adjudged by the preponderance of the evidence. *Id.* A preponderance of the evidence exists when a causal connection is probable rather than merely possible. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). The Court thus evaluates the basis of Ayard's claim under the preponderance of the evidence standard when determining a challenge to the causal connection between a worker's injury and their awarded benefits.

The Iowa Supreme Court has provided guidance when evaluating the need for expert testimony in workers' compensation cases. Expert testimony from, for instance, a medical doctor is ordinarily required for causal determinations of a workers' injury. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 273 (Iowa 1995). Expert testimony in determining causal connection can be supported or undermined by lay testimony, such as from the injured worker. *See Id.* In other words, expert testimony is not the sole basis used to evaluate a worker's injury. *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 560 (Iowa 2010). As the Iowa Court of Appeals has recognized:

While our case law emphasizes that expert testimony is "ordinarily" necessary to establish causation, there is nothing

in our law that states expert opinion is the sole basis on which a causation finding must be made. Rather, our law allows the commissioner the option of wholly rejecting uncontroverted expert opinion testimony after considering *all* evidence that is relevant and material. In other words, the commissioner could find the nonmedical evidence sufficient to support a causation finding even in the face of uncontroverted expert medical opinion testimony to the contrary. Accordingly, we find expert witness evidence, although typically necessary to establish causation, is not required to establish causation in every workers' compensation case.

*Martinez Const. V. Ceballos*, 836 N.W.2d 152, 2013 WL 2646833 at \*4 (Iowa Ct. App. 2013) (Table) (internal citations and quotations omitted). This legal standard using the term “ordinarily”, as the Court of Appeals recognizes, is more malleable than a rigid requirement for expert testimony. *See id.* Thus, the need for expert testimony, medical or otherwise, is not immediately determinative of the outcome in a workers' compensation proceeding. *Id.*

The Court thus finds the legal standard applied by the Workers' Compensation Commission at arbitration hearing or on intra-agency appeal was legally correct. There is therefore no need to substitute our findings for the Commission's interpretation of Iowa's workers' compensation law regarding causal connection. *Pease*, 807 N.W.2d at 845.

**b. Findings of fact.**

The Petitioners additionally allege the Commission erred in finding a factual basis for causal connection. In evaluating challenges to the

findings of fact by the Commission, the Court reviews the record to see if substantial evidence supports the Commission's findings. Factual determinations are clearly vested within the Commissioner's discretion and this Court is therefore required to give "appropriate deference to the view of the agency with respect to [that] particular matter." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004); Iowa Code §§ 17A.19(10)(f), (11)(c). The ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Reed v. Iowa Dept. of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991) (citations omitted).

A review of the record in this case reveals that at the evidentiary hearing, Ayard and his employer provided different accounts of the scope and nature of Ayard's light duty work. This contradictory evidence was incorporated into the medical opinions offered by the parties. Ayard provided the report of Dr. Kuhnlein, who opined there was a causal connection between Ayard's light work duties and his left shoulder injury. In so doing, Dr. Kuhnlein was the only medical expert who utilized Ayard's description of the scope and nature of his light duty work in formulating his medical opinion on causation. After both the arbitration hearing and on review, the Agency found Ayard's testimony at the evidentiary hearing to be more credible than that of his employers.



Accordingly, the Agency found that the only medical expert who relied on Ayard's credible testimony was the more credible evidence.

Giving the appropriate deference to this finding, this Court finds substantial evidence supports the Commission's findings. Ayard introduced expert testimony that, when combined with lay testimony, provides substantial evidence to support the factual findings of the Commission. Again, evidence is not insubstantial merely because different conclusions could be drawn from the evidence.

The Court recognizes that Drs. McMains and Broghammer provided contrary opinions on causation, however, the Commission then, as the finder of fact, did not give weight to Drs. McMains and Broghammer's opinion as they were based on information from Ayard's employer that the Commission did not find reliable and credible. As the Commission is vested with the fact-finding function, this Court will not disturb the findings and the weight given to the testimony of witnesses presented before it. *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Commission's findings were not irrational, illogical or wholly unjustifiable, accordingly, this Court has no grounds to reverse the agency's decision. *See, Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012).

Viewing the record as a whole, the Court concludes, as it must, that

substantial evidence supports the findings. So, in sum, the Court thus finds the Commission did not err in its application of workers' compensation law to the facts presented in the case before it. The Commission did not abuse its discretion in finding a causal connection existed and the expert testimony, in combination with Ayard's consistent testimony it deemed credible, was satisfactory to establish both legal and factual causation necessary to support the awarded benefits.

**RULING**

**IT IS HEREBY ORDERED** that the ruling of the Commissioner is **AFFIRMED**. Costs are assessed to Petitioners.



State of Iowa Courts

**Type:** OTHER ORDER

<b>Case Number</b>	<b>Case Title</b>
CVCV056593	MASTERBRAND CABINETS OMEGA CABINETRY V DAVID AYARD

So Ordered

A handwritten signature in cursive script, appearing to read "Col. McAllister", is written over a horizontal line.

Coleman McAllister, District Judge  
Fifth Judicial District of Iowa