IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BRIDGESTONE AMERICAS, INC. and OLD REPUBLIC INSURANCE COMPANY, Petitioners. vs. **CHARLES ANDERSON,** Respondent.	**Case No. CVCV063124** **RULING ON PETITION FOR JUDICIAL REVIEW**

A Petition for Judicial Review came before the Court from a final decision of the Iowa Workers' Compensation Commission. The Court held a hearing on this matter on June 28, 2022. The Petitioners were represented by attorneys Alison Stewart and Timothy Wegman. Attorney Channing Dutton appeared for Respondent ("Anderson"). Prior to trial, Anderson dismissed his cross appeal. Having heard the arguments of counsel and reviewed the court file, including the briefs provided by the parties, the certified administrative record, and being otherwise fully advised in the premises, the Court now enters the following ruling.

I. INTRODUCTION

A. Factual Background

Anderson filed a petition against Bridgestone alleging injury to his right arm and right shoulder which allegedly occurred at work on October 31, 2018. Arbitration Decision at 2.

At the time of the arbitration hearing, Anderson was 68 years old and right-handed. *Id.* at 3. He graduated from high school in 1971 and received no further education. *Id.* He worked for Bridgestone from March 1, 1974 until October 31, 2018. *Id..* Prior to his employment at Bridgestone, Anderson worked as a laborer pouring and finishing concrete and laying telephone cables. *Id..*

Anderson's first assignment at Bridgestone was stock cutting for 9 years, which involved lifting, stretching his arms out and holding weight in front of his body. *Id.* He also briefly worked on the sort line where he picked up tires of varying sizes and stacked them, with the tire weights ranging from 20 to 50 pounds. *Id.*

During his last 35 years at Bridgestone, Anderson worked as a tire builder. *Id.* Anderson testified the work involved intense use of his hands and upper extremities and considerable hand and finger strength, along with the use of his hands and upper extremities away from his torso. *Id.*

On October 31, 2018, while on the job, Anderson tried to reach up to a control panel but could not get his right arm past shoulder height and said it felt like his shoulder was locking up. *Id.* As this was affecting his ability to perform his job, he asked to go to medical. *Id.* Anderson also was having his hand go numb for the past month or so. *Id.*

Anderson saw Dr. Troll, a company doctor. *Id.* Dr. Troll noted Anderson was seen for an evaluation of right shoulder pain and numbness in his right hand. *Id.* Dr. Troll told Anderson he needed to find a new job, but put in his notes that Anderson had no specific injury. *Id.* at 4. However, Dr. Troll's impression was right shoulder pain with mild impingement signs and possible carpal tunnel syndrome and referred Anderson to see his primary care physician for the carpal tunnel symptoms. *Id.* Dr. Troll believed the

shoulder issue was a result of a nonspecific work injury. *Id.* He referred Anderson to physical therapy and returned him to regular duty without restrictions. *Id.*

Anderson returned to his workstation that day but was not able to perform his duties very well. *Id.* At the beginning of his shift the following day, Anderson saw Dr. Troll again. *Id.* Dr. Troll stated he could do nothing for Anderson and agreed that Anderson should see his own physician. *Id.*

Anderson saw his own doctor, Dr. Harrison, on November 5, 2018. Dr. Harrison found Anderson had right shoulder pain, that it could be an overuse injury related to his occupation, and referred him to an orthopedic specialist. *Id.* Anderson saw Dr. Harrison again on November 16, 2018 as he continued to have shoulder pain, paresthesia of his right hand, and possible carpal tunnel syndrome. *Id.* Anderson had been unable to work. *Id.*

On November 28, 2018, Anderson saw Dr. Davick at Des Moines Orthopaedic Surgeons. *Id.* Dr. Davick's impression was a right shoulder probable rotator cuff tear and noted Anderson had a large, type III acromion and had injuries at work. *Id.* Dr. Davick ordered an MRI arthrogram. *Id.*

The MRI, performed on December 21, 2018, revealed moderate to advanced supraspinatus tendinosis with near full thickness bursal-sided tear; mild to moderate infraspinatus tendinosis; suspect small partial tear of subscapularis; and moderate to advanced AC joint arthrosis, small subacromial spurring. *Id.* at 5. Dr. Davick recommended surgery. *Id.*

Dr. Davick performed right shoulder arthroscopy with subacromial decompression, distal clavicle excision and open rotator cuff repair on February 7, 2019 on Anderson. *Id.*

Anderson's postoperative diagnosis was right shoulder traumatic full thickness rotator cuff tear with acromioclavicular joint arthropathy. *Id.* Anderson testified he was able to lift his right arm after the surgery, something he was not able to do before. *Id.*

At a follow up appointment with Dr. Harrison on February 25, 2019, Dr. Harrison anticipated that it would be a full 6 months before Anderson could return to work. *Id.*

Anderson saw Dr. Harrison on August 6, 2019, a day before the six months was up. *Id.* Anderson reported that Dr. Davick believed it could take up to a full year for recover and Anderson stated he was still having problems with numbness and tingling of his right hand. *Id.*

Anderson saw Dr. Rodgers on the recommendation of Dr. Davick. *Id.* Dr. Rodgers performed right carpal tunnel release and right ulnar nerve transposition testing on October 8, 2019. *Id.* Anderson saw Dr. Davick on November 4, 2019 and reported some continued weakness in his right shoulder but his shoulder pain was much less than prior to surgery. *Id.* Dr. Davick noted Anderson had recently had cubital and carpal tunnel surgery and recommended that once Anderson was able, he should resume his exercises for his right rotator cuff. *Id.*

On November 27, 2019, in a missive to counsel for the Petitioners, Dr. Davick placed Anderson at maximum medical improvement (MMI) as of August 5, 2019. *Id.* He also assigned 8 percent shoulder impairment, did not see a connection between the right shoulder surgery and the subsequent right carpal tunnel surgery, and did not feel Anderson's had a recent re-tear in his cuff due to a reaching incident. *Id.* at 5-6. In an appointment with Anderson on February 12, 2020, Dr. David noted things were the same, that Anderson was at MMI, and his impairment numbers were unchanged. *Id.* at 6.

On February 24, 2020, Anderson saw Dr. Harrison for medication management, where Anderson reported continued numbness, tingling, and weakness of his right upper extremity. *Id.* Dr. Harrison believed Anderson had been continuously disabled from work from November 2, 2018 through May 1, 2020 due to his right shoulder and arm. *Id.*

On March 6, 2020, Dr. Davick opined that Anderson's right shoulder rotator cuff tear was caused by his work as a tire builder and that he did not believe Anderson was capable of working in that position. *Id.* He further opined that repetitive lifting up to 75 pounds was too much for Anderson's shoulder condition. *Id.*

Anderson saw Dr. Jacqueline Stoken for an IME on July 8, 2020 at the request of his attorney. *Id.* After examining Anderson and reviewing provided medical records, Dr. Stoken opined that the October 31, 2018 injuries were casually linked to Anderson's employment. *Id.* Regarding the right shoulder injury and the right carpal and cubital tunnel syndrome, she assigned a total of 42 percent right upper extremity impairment, which was the equivalent of 25 percent whole body impairment. *Id.* Dr. Stoken assigned permanent work restrictions for Anderson which included avoiding working at or above shoulder level, avoiding lifting more than 10 pounds on a frequent basis and 20 pounds on an occasional basis. *Id.*

There were several medical experts who opined about the issue of causation of Anderson's October 31, 2018 right shoulder injury. Dr. Troll believed Anderson was experiencing some wear and tear degenerative changes in his right shoulder and his work activities exacerbated the non-work issue. *Id.* at 7. However, Dr. Harrison, Dr. Stoken, and Dr. Davick all opined that Anderson's injuries to his right shoulder related to his work duties. *Id.*

B. Procedural History

Anderson filed a Petition before the Iowa Workers' Compensation Commissioner on February 28, 2019 alleging an injured right shoulder and arm. Anderson later filed amended petitions alleging other injuries for Second Injury Fund purposes, although issues involving the Second Injury Fund are not addressed in this ruling.

The arbitration hearing was held on April 1, 2021. On September 2, 2021, Deputy Commissioner Erin Q. Pals issued an arbitration decision. The Deputy found: (1) Anderson sustained a permanent disability to his right arm and a permanent disability to his right shoulder caused by a single accident, (2) Andersons' permanent partial disability did not fall into any single subsection listed in "a" through "u" and therefore should be compensated under subsection "v", (3) Anderson demonstrated he should be compensated on the basis of an unscheduled injury based on a 500-week schedule, (4) Anderson's compensation should not be based only upon the functional impairment resulting from his injury but should be based in relation to his earning capacity, (5) Anderson had established impairment to the body as a whole and therefore an industrial disability had been sustained; (6) Anderson sustained a 50 percent loss of future earning capacity as a result of his work injury with Bridgestone; (7) Anderson demonstrated entitlement to 250 weeks of permanent partial disability benefits, (8) Anderson's permanent partial disability benefits were to commence November 15, 2019, (9) Anderson was entitled to healing period benefits for his right shoulder from November 2, 2018 through August 4, 2019, (10) Anderson was entitled to healing period benefits for his right upper extremity from August 5, 2019 through November 14, 2019, (11) as

Andersons' right shoulder and right upper extremity injuries were causally connected to the October 31, 2018 work injury, the Petitioners was responsible for Anderson's past medical expenses and medical mileage, (12) Anderson failed to carry his burden of proof to demonstrate claims under the Second Injury Fund, and (13) costs were assessed against the Petitioners. Administrative Decision at 13-16. Anderson's weekly benefits were ordered to be paid at the stipulated rate of $973.03. *Id.* at17.

In the arbitration decision, the Deputy Commissioner found Anderson had demonstrated that he sustained an October 31, 2018 injury to his right shoulder which arose out of and in the course of his employment. *Id.* at 7. He further found that the injury resulted in permanent impairment. *Id.* The Deputy Commission also adopted Dr. Stoken's impairment rating of 28 percent of the right upper extremity as the Deputy Commission believed Dr. Stoken set forth specifics in support of her rating. *Id.*

Regarding causation of the right carpal and cubital tunnel syndromes, the Deputy Commissioner also gave Dr. Stoken's opinion the greatest weight and found Anderson had demonstrated that he sustained an October 31, 2018 injury to his right upper extremity which arose out of and in the course of his employment and that it was a permanent impairment. *Id.* at 8.

The Deputy Commissioner found that based on Anderson's age, educational background, employment history, ability to retrain, lack of motivation to obtain a job, length of healing period, permanent impairment and permanent restrictions, the number of years in the future he could reasonably be anticipated to work at the time of the injury, and the other industrial disability factors, Anderson had sustained a 50 percent loss of future earning capacity as a result of his work injury with Bridgestone. *Id.* at 9.

The Petitioners filed notice of appeal. On January 25, 2022, Commissioner Joseph S. Cortese II entered an appeal decision, reaching the same analysis, findings, and conclusions at the Deputy Commissioner. The Commissioner affirmed and adopted the arbitration ruling.

On February 7, 2022, the Petitioners filed a Petition for Judicial Review. The Petitioners argue the Commissioner erred in finding Anderson was entitled to compensation on the basis of an unscheduled injury under Iowa Code §85.34(2), and awarding industrial disability benefits and the Commissioner further erred in finding Anderson met his burden of proof as to causation and in finding he sustained an industrial disability of 50%. (Petition at 1).

II. STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id*. § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the

part of the agency. *Grundmeyer v. Weyerhaeuser Co*., 649 N.W.2d 744, 748 (Iowa 2002).

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so the Court is bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1); *Mycogen*, 686 N.W.2d at 464. "When reviewing a finding of fact for substantial evidence, we judge the finding '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.'" *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (quoting Iowa Code § 17A.19(10)(f)(3)). "Evidence is not insubstantial merely because different conclusions may be drawn from the evidence." *Pease*, 807 N.W.2d at 845. "To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder." *Id.* "Judicial review of a decision of the [Commission] is not de novo, and the commissioner's findings have the force of a jury verdict." *Holmes v. Bruce Motor Freight*, 215 N.W.2d 296, 297-98 (Iowa 1974).

The application of the law to the facts is also an enterprise vested in the commissioner. *Mycogen*, 686 N.W.2d at 465. Accordingly, the Court will reverse only if

the commissioner's application was "irrational, illogical, or wholly unjustifiable." *Id.*; Iowa Code § 17A.19(10)(l). "A decision is "irrational" when it is not governed by or according to reason." *Christensen v. Iowa Dep't. of Revenue*, 944 N.W.2d 895 at 905 (Iowa 2020). A decision is "illogical" when it is "contrary to or devoid of logic." *Id*. "A decision is "unjustifiable" when it has no foundation in fact or reason" or is "lacking in justice." *Id*. This standard requires the Court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). However, when the legislature has not vested the agency with such authority, the Court reviews an agency's interpretation of a statute for correction of errors at law. *Westling v. Hormel Foods Corp.*, 810 N.W.2d 247, 251 (Iowa 2012).

III. MERITS

A. Whether the Commissioner's determination that Anderson's injuries were unscheduled industrial injuries was in error.

The Deputy Commissioner looked at the subsections under §85.34(2) to see where Anderson's claims for reimbursement fell within the statutory framework. The Deputy Commissioner examined Iowa Code §85.34(2)(m), which concerns the loss of an arm. Subsection m states as follows "The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks." Iowa Code §85.34(2)(m).

However, the Deputy Commissioner also found Anderson also sustained a loss of his shoulder. Subsection m speaks only to the loss of *an* arm, a singular body part. Thus,

the Deputy Commissioner properly determined that subsection m did not apply to Anderson as he had more than just the loss of an arm.

The Deputy Commissioner also examined subsection (n) which concerns the loss of a shoulder. Subsection n states the following: "For the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code §85.34(2)(n).

Similarly, since Anderson suffered loss of both an arm and a shoulder, the Deputy Commissioner determined subsection n also did not apply. Historically, injuries to two scheduled body parts were addressed by §85.34(2)(t) and so the Deputy Commissioner next examined subsection t.

Iowa Code § 85.34(2)(t) applies to "[t]he loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident". Iowa Code §85.34(2)(t). The Iowa Supreme Court, in dicta, seems to agree subsection t does not apply to injuries involving the shoulder. *Chavez v. MS Technology LLC,* 972 N.W.2d 662, 670-671 (Iowa 2022) ("Chavez acknowledges this section does not apply because it does not mention shoulder injuries…"). When §85.34 was amended to add a single shoulder injury to the schedule, the legislature did not amend subsection (t) to include the shoulder under the two-injury schedule.

The Iowa Supreme Court discussed the workers compensation statute at length in *Chavez.*

> Our goal in interpreting the statutory provisions contained in chapter 85 of the Iowa Code "is to determine and effectuate the legislature's intent." *Id.* at 249 (*quoting Ramirez-Trujillo*, 878 N.W.2d at 770). We do so "by looking at the legislature's language rather than speculating about what the legislature

might have said." *Id.* Further, "[w]e assess the statute in its entirety rather than isolated words or phrases to ensure our interpretation is harmonious with the statute as a whole." *Id.* (*quoting Ramirez-Trujillo*, 878 N.W.2d at 770). "[L]egislative intent is expressed by omission as well as by inclusion ...." *In re Guardianship of Radda*, 955 N.W.2d 203, 209 (Iowa 2021) (*alteration in original*) (*quoting Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995)). *Thus, when the legislature includes certain language in one section of a statute but omits it in another section of the same statute, we generally presume the omission is intentional*. *Id.*

Chavez v. MS Tech. LLC, 972 N.W.2d 662, 667–68 (Iowa 2022) *(emphasis added).*

Subsection (t) exists so that if a worker has injuries to two body parts as specified in the subsection, a schedule for compensation should be followed. However, this is not the case here, as injuries to the shoulder were not specifically included in subsection (t) and the court presumes the omission was intentional. The only logical conclusion is that subsection (t) cannot apply to Anderson and the Deputy Commissioner and Commissioner did not err when they reached this conclusion.

The Deputy Commissioner then considered Iowa Code § 85.34(2)(v), which applies to "all cases of permanent partial disability other than those described or referred to in paragraphs "a" through "u"". Iowa Code §85.34(2)(v). Because Anderson suffered a permanent disability to his right arm and a permanent disability to his right shoulder, caused by a single accident, the Deputy Commissioner correctly found that subsection v applicable.

The Petitioners argue the legislature intended to place the shoulder in the schedule and therefore Anderson's case does not fall under Subsection v. The Legislature intended to put a single injured shoulder in the schedule by their recent amendment to the statute, but they opted not to include the shoulder in the two-injury schedule under subsection t. The only logical conclusion is that they intended a worker who has multiple injuries (which specifically includes a shoulder injury) should fall into the catch-all subsection v. Subsection v, which was not modified when subsection n was added to the statute, must be there for a reason and the reasonable conclusion is it is for multiple injuries which do not fall under subsection t.

Thus, the Deputy Commissioner and Commissioner did not err when determining Anderson should be compensated under Iowa Code §85.34(2)(v).

B. <u>Whether causation for the injury was established.</u>

A claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). A cause is proximate if it is a substantial factor in bringing about the result, however, it need not be the only cause. *Ayers v. D & N Fence Co.*, 731 N.W.2d 11, 17 (Iowa 2007). A preponderance of the evidence exists when the causal connection is probable rather than merely possible. *Sherman*, 576 N.W.2d at 321. The question of causal connection is essentially within the domain of expert testimony. *Id.*

The Petitioners overall argument as to causation is that the Deputy Commissioner, who is the finder of fact, was persuaded by the expert opinions of Dr. Davick, Dr. Harrison,

and Dr. Stoken. These opinions were consistent with other medical records in evidence as well as Anderson's testimony, although they were contrary to Dr. Troll's opinions.

A commissioner is not compelled to accept the opinion of any medical expert. *See Hurley v. Sheller-Globe Corp.*, 512 N.W.2d 796, 798 (Iowa Ct. App. 1993). The trier of fact may accept or reject in whole or in part, even if uncontroverted, expert opinion testimony. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa Ct. App. 1991). The weight to give evidence remains within a commissioner's exclusive domain. *Titan Tire Corp. v. Emp't Appeal Bd.*, 641 N.W.2d 752, 755 (Iowa 2002). The Deputy Commissioner rejected Dr. Troll's medical opinion and gave weight to the records and opinion of Dr. Davick, Dr. Harrison, and Dr. Stoken.

Here, the Deputy Commissioner adequately explained the basis for its decision for its affirmal. As the finder of fact, the Deputy Commissioner determines the weight to assign an expert opinion, assessing the accuracy of the facts provided to the expert as well as other surrounding circumstances. *Sherman v. Pella Corp.,* 576 N.W.2d 312, 321 (Iowa 1998). A commissioner may reject or accept the expert evidence entirely or in part. *Cedar Rapids Cmty. Sch. Dist. v. Pease,* 807 N.W.2d 839, 850 (Iowa 2011). In our appellate posture, we " 'are not at liberty to accept contradictory opinions of other experts in order to reject the finding of the commissioner.' " *Id.* (citation omitted). Thus, whether a piece of evidence trumps another or is qualitatively weaker is not an assessment for either the district court or the court of appeals to make when reviewing an agency's decision on the basis of substantial evidence. *Arndt v. City of Le Claire*, 728 N.W.2d 394, 389 (Iowa 2007). The Court finds the findings by the Deputy Commissioner to constitute substantial

evidence to support its decision that Anderson proved his arm and shoulder complaints are causally related to the work injury.

C. Whether the award of 50 percent industrial disability supported by the evidence.

As noted above, the Deputy Commissioner considered Anderson's age, educational background, employment history, ability to retrain, lack of motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, the number of years in the future it was reasonably anticipated that Anderson would work at the time of the injury and the other industrial disability factors set forth by the Iowa Supreme Court in determining Anderson sustained a 50 percent loss of future earning capacity as a result of his work injury. The Commissioner, reviewing the arbitration decision, fully adopted the Deputy Commissioner's findings and legal conclusions.

In this case, Anderson was 68 years old, has a limited education and a 44-year work history with Bridgestone. Industrial disability is essentially a measure of loss of earning capacity. *McSpadden v. Big Ben Coal Co.,* 288 N.W.2d 181, 192 (Iowa 1980). As the Petitioners admit, there is no certain formula for this determination. Reviewing all the factors considered by the Deputy Commissioner, this court finds no reason or cause to disturb the assignment of a 50 percent loss.

IV. CONCLUSIONS AND DISPOSITIONS

For all the reasons set forth above, the Court concludes there is substantial evidence to support the Agency's findings as to the determination that Anderson should

be entitled to compensation under Iowa Code §85.34(2)(v) and awarding industrial disability benefits, that Anderson met his burden of proof as to causation and in the finding he sustained an industrial disability of 50 percent.

IT IS THE ORDER OF THE COURT that the Iowa Workers' Compensation Commission's decision is **AFFIRMED.**

Costs are assessed to Petitioners.

State of Iowa Courts

Case Number	**Case Title**
CVCV063124	BRIDGESTONE AMERICAS ET AL V CHARLES ANDERSON
Type:	OTHER ORDER

So Ordered

Celene Gogerty, District Judge
Fifth Judicial District of Iowa

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