IN THE IOWA DISTRICT COURT FOR POLK COUNTY

WENDY KISH, Petitioner, vs. **UNIVERSITY OF DUBUQUE and TRAVELERS INDEMNITY COMPANY OF CONNECTICUT**, Respondents.	**Case No. CVCV063017** **RULING ON PETITION FOR JUDICIAL REVIEW**

INTRODUCTION

Before the court is a petition for judicial review filed by petitioner Wendy Kish on January 14, 2022. Petitioner filed her brief on April 11, 2022, and respondents University of Dubuque and Travelers Indemnity Company of Connecticut filed their brief on May 12, 2022. Petitioner filed her reply brief on May 24, 2022. The court held a hearing on July 1, 2022. After hearing the arguments of counsel and reviewing the court file, including the briefs filed by both parties and the administrative record, the court now enters the following ruling on petitioner's petition for judicial review.

FACTUAL & PROCEDURAL BACKGROUND

This matter comes before the court as an administrative appeal by petitioner Wendy Kish from the Iowa Workers' Compensation Commission's final agency action. On February 27, 2012, Kish was hired by the University of Dubuque ("the University") as a full-time custodian. Admin. R. Part 5, p. 31. In March of 2016, Kish was promoted to the position of lead custodian at the University. Admin. R. Part 1, p. 75. On May 30, 2018, Kish sustained a work-related back injury. Id. at p. 76. Kish underwent examinations for her back pain and attended follow-up appointments

at Finley Occupational Health in June through October. Id. at pp. 77–78. Kish also saw Dr. Timothy Miller at Finley Pain Clinic on August 2 and September 6, as well as visited the emergency department at the University of Iowa Hospitals and Clinics on October 12. Id.

On October 31, 2018, Kish saw Dr. Cassim Igram at the University of Iowa, who diagnosed Kish with lumbar disc herniation related to her May 30, 2018 work injury. Admin. R. Part 1 pp. 78–79; Admin. R. Part 2, pp. 9–13. Dr. Igram ordered an Electromyogram Test and Nerve Conduction Study (EMG/NCS), which Kish underwent on November 19 and revealed evidence of a left L5 radiculopathy. Admin. R. Part, 1 p. 79; Admin. R. Part 2, p. 22. On November 28, 2018, Dr. Igram recommended lumbar discectomy and performed the surgery on January 10, 2019. Admin. R. Part 1, p. 79; Admin. R. Part 2, pp. 30, 35–37. Kish continued to attend regular appointments with Dr. Igram until June 19, 2019, when Dr. Igram placed her at maximum medical improvement ("MMI") and released Kish to return to work without restrictions. Admin. R. Part 1, pp. 80, 148, 151–52. Kish returned to full duty work on June 19 as a lead custodian, the same position she held on the date of injury. Admin. R. Part 1, p. 80.

On July 24, 2019, Dr. Igram drafted a letter assigning 10 percent functional impairment of the body as a whole based on Table 15-3 on page 384 of the American Medical Association *Guides to the Evaluation of Permanent Impairment* ("the AMA Guides"). Admin. R. Part 1 pp. 80, 154; Admin. R. Part 5, p. 6. However, the University states that the insurance carrier, Travelers, did not receive the letter until September 13, 2019. Admin. R. Part 1, p. 80. On July 31, 2019, Kish underwent an independent medical examination ("IME") with Dr. Richard Kreiter, who suggested Kish reached MMI "around June 1, 2019." Admin. R. Part 4, p. 12. Using the same table in the AMA Guides as Dr. Igram, Dr. Kreiter assigned a 13 percent functional impairment rating of the body as a whole. Id.

After returning to work on June 19, 2019, Kish found that she had difficulty performing the duties of a lead custodian and now required several breaks to stretch and rest her back. Admin. R. Part 1 p. 81. Therefore, when a regular custodial position opened in August of 2019, Kish bid for the position[1] and was awarded it by seniority. Id.; Admin. R. Part 5, pp. 19, 36. On August 29, 2019, Kish filed an amended petition with the Workers' Compensation Commission.[2] Admin. R. Part 5, p. 56. Although the parties agreed Kish's injury should be compensated pursuant to Iowa Code section 85.34(2)(v), the parties disputed whether that section limited Kish's permanent partial disability award to her functional impairment rating. Admin. R. Part 1, p. 83. Kish also asserted that although Dr. Igram's impairment rating is dated July 24, 2019, Kish did not receive her first check for permanent partial disability until September 19. Id. at p. 85. Therefore, Kish argued that she is entitled to penalty benefits for an unreasonable delay in the payment of her weekly benefits.

The case proceeded to hearing before Deputy Commissioner Jessica Cleereman ("the Deputy") on June 25, 2020. Admin. R. Part 1, p. 57, p. 17. On July 29, 2021, the Deputy filed her decision concluding that Kish was entitled to 50 weeks of benefits but not entitled to an award of penalty benefits. Id. at pp. 74–86 (Arbitration Decision). The Deputy accepted Dr. Igram's impairment rating and therefore found that Kish "sustained a 10 percent impairment of the whole person as a result of her May 30, 2018 work injury." Id. at p. 81. However, the Deputy found that the University "offered [Kish] continued employment in a position that paid the same or more than she earned on the date of injury." Id. at p. 82. Therefore, the Deputy concluded that Kish's

[1] Kish sustained another injury on August 1, 2019, which is not part of this judicial review action. See Admin. R. Part 1, p. 81 (acknowledging this fact in the Deputy's decision). However, the Deputy noted that although Kish applied for her reassignment to regular custodian after her August 1, 2019 injury, Kish "testified that the new injury did not factor into her decision to transfer positions." Id.

[2] Kish filed her original notice and petition on November 19, 2018. Admin. R. Part 5, p. 74.

recovery is limited by Iowa Code section 85.34(2)(v) to Kish's functional impairment, with no consideration for industrial disability. Id. at p. 83.

On August 17, 2021, Kish timely appealed from the Deputy's arbitration decision, arguing that the Deputy erred in finding Kish is not entitled to receive industrial disability benefits or penalty benefits. Admin. R. Part 1, pp. 17, 73. On November 30, 2021, the Commissioner affirmed and adopted the Deputy's decision in its entirety. Id. at pp. 17–19 (Appeal Decision). On December 20, 2021, Kish filed a motion for rehearing arguing that following the hearing in front of the Deputy and before the Commissioner's appeal decision, the Commissioner filed an appeal decision in another case establishing "new legal precedence" relevant to Kish's case. Id. at pp. 11–16 (citing Vogt v. XPO Logistics Freight, File No. 5064694.01 (App. June 11, 2021)). The University filed a resistance on December 20. Id. at pp. 9–10. No ruling was issued and therefore, after 20 days from the date of filing, Kish's motion for rehearing was deemed denied. Id. at p. 3, ¶ 2. On January 14, 2022, Kish filed a petition for judicial review, which is presently before the court. Additional facts are set forth below as necessary.

LEGAL STANDARD

The Iowa Administrative Procedure Act codifies a court's judicial review of agency action in Iowa Code section 17A.19. Pursuant to this section, a district court has the power to "affirm the agency action or remand to the agency for further proceedings." Iowa Code § 17A.19(10). Additionally, "[t]he court shall reverse, modify, or grant other appropriate relief from agency action . . . if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action" falls within any of the categories enumerated in subsection ten, paragraphs "a" through "n." Id.

"District courts exercise appellate jurisdiction over agency actions on petitions for judicial review." Christiansen v. Iowa Bd. of Educ. Exam'rs, 831 N.W.2d 179, 186 (Iowa 2013) (citation omitted). Furthermore, the court's "decision is controlled in large part by the deference we afford to decisions of administrative agencies." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844 (Iowa 2011). For example, when an agency's findings of fact are supported by substantial evidence, "the courts should broadly and liberally apply those findings to uphold rather than to defeat the agency's decision." IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632 (Iowa 2000) (citation omitted).

However, "[b]ecause of the widely varying standards of review, it is essential for counsel to search for and pinpoint the precise claim of error on appeal." Jacobsen Transp. Co. v. Harris, 778 N.W.2d 192, 196 (Iowa 2010) (citation and internal quotations omitted). If the agency's alleged "error is one of fact, [the court] must determine if the [agency's] findings are supported by substantial evidence." Id. (citing Iowa Code § 17A.19(10)(f)). "If the error is one of interpretation of law, [the court] will determine whether the [agency's] interpretation is erroneous and substitute [its] judgment for that of the" agency. Id. (citing Iowa Code § 17A.19(10)(c)). "If, however, the claimed error lies in the [agency's] application of the law to the facts, we will disturb the [agency's] decision if it is '[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact.'" Id. (quoting Iowa Code § 17A.19(10)(m)).

Regarding section 17A.19(10)(f), "[e]vidence is not insubstantial merely because different conclusions may be drawn from the evidence." Pease, 807 N.W.2d at 845. See also Arndt v. City of Le Claire, 728 N.W.2d 389, 393 (Iowa 2007) ("Just because the interpretation of the evidence is open to a fair difference of opinion does not mean the [agency's] decision is not supported by substantial evidence."). "Under chapter 17A, a court's task on judicial review is not to determine

whether the evidence might support a particular factual finding; rather, it is to determine whether the evidence supports the finding made." Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 263–64 (Iowa 2012). Furthermore, the Iowa Supreme Court has found that a "district court exceed[s] the scope of permissible judicial review of agency decisions by making findings" the agency never made. Id. at 264 (citation and internal quotations omitted).

ANALYSIS

Kish alleges that the Commissioner and Deputy Commissioner erred in two ways: (1) failing to apply new agency precedent interpreting Iowa Code section 85.34(2)(v) and (2) declining to award Kish penalty benefits as the result of an unreasonable delay in payment of weekly benefits. Kish appears to seek relief for her first argument pursuant to Iowa Code section 17A.19(10)(c) as an error of law and the second argument pursuant to subsection (f)'s "substantial evidence" standard. Kish requests the court remand this case to the agency for determinations of industrial disability and penalty benefits.

A. Application of Section 85.34(2)(v)

Kish asserts that the Commissioner committed an error of law in failing to apply the agency's past precedent interpreting Iowa Code section 85.34(2)(v) and instead determining that Kish was not entitled to an award of industrial disability. In support of her argument, Kish relies on Vogt v. XPO Logistics Freight, arbitration and appeal decisions filed in 2021 involving the 2017 amendment to section 85.34(2)(v) limiting circumstances under which a claimant qualifies for industrial disability. Vogt v. XPO Logistics Freight, File No. 5064694.01 (Arb. Feb. 17, 2021); Vogt v. XPO Logistics Freight, File No. 5064694.01 (App. June 11, 2021).

The Court "'review[s] the commissioner's interpretation of Iowa Code chapter 85 for correction of errors at law instead of deferring to the agency's interpretation' because the

legislature has not clearly vested the commissioner with authority to interpret that chapter." Chavez v. MS Tech. LLC, 972 N.W.2d 662, 666 (Iowa 2022) (quoting Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 242–43 (Iowa 2018)). See also Westling v. Hormel Foods Corp., 810 N.W.2d 247, 251 (Iowa 2012) ("An examination of chapter 85 does not reveal any basis for concluding that the legislature clearly vested the workers' compensation commissioner with authority to interpret the subsection at issue."); Jacobsen Transp. Co., 778 N.W.2d at 196 ("If the error is one of interpretation of law, [the court] will determine whether the [agency's] interpretation is erroneous and substitute [its] judgment for that of the" agency.) (citing Iowa Code § 17A.19(10)(c)). "Nevertheless, '[courts] accept the commissioner's factual findings when supported by substantial evidence.'" Chavez, 972 N.W.2d at 666 (quoting Gumm v. Easter Seal Soc'y of Iowa, Inc., 943 N.W.2d 23, 28 (Iowa 2020)).

During the 2017 Iowa legislative session, the legislature passed House File 518 amending sections of the Iowa Workers' Compensation Act. As relevant to the present case, the legislature added the following paragraph to section 85.34(2)(v):

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code § 85.34(2)(v). In short, "the legislature introduced a prerequisite before industrial disability is to be considered" for unscheduled injuries. McCoy v. Menard, Inc., File No. 1651840.01, 2021 WL 2624688, at *1 (App. Apr. 9, 2021). The majority of the changes, including this addition, took effect for injuries occurring on or after July 1, 2017. See ConAgra Foods, Inc. v. Moore, 2022 WL 1658707 (Table), at *4 n. 2 (Iowa Ct. App. May 25, 2022) (noting this added

paragraph in section 85.34(2)(v) applies to injuries occurring after July 1, 2017). As Kish's work-related back injury occurred on May 30, 2018, the legislative change applies.

The Commissioner has noted that "[u]nfortunately, the Iowa Legislature provided no guidance as to how or when to measure whether an employee is receiving or is being offered the same or greater salary, wages, or earnings than what he or she was receiving at the time of the injury." McCoy, 2021 WL 2624688, at *2. Rather, "the Legislature left several questions unanswered about how and when to take the snapshot of a claimant's post-injury earnings . . . ." Id. at *2–3. For example, "[t]he Legislature did not indicate when this comparison is supposed to take place . . . ." Id. at *2. There is also no Iowa case law interpreting or clarifying the application of this section when a claimant voluntarily leaves or declines the work.

"When interpreting the statutory provisions contained in chapter 85 of the Iowa Code, our goal is to determine and effectuate the legislature's intent." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016) (citing United Fire & Cas. Co. v. St. Paul Fire & Marine Ins. Co., 677 N.W.2d 755, 759 (Iowa 2004)). Courts "make this determination by looking at the legislature's language rather than speculating about what the legislature might have said." Brewer-Strong, 913 N.W.2d at 249 (citation omitted). "Absent a statutory definition, we consider statutory terms in the context in which they appear and give each its ordinary and common meaning." Ramirez-Trujillo, 878 N.W.2d at 770 (citing Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223, 235 (Iowa 2010)).

However, "[w]hen reasonable persons could disagree as to what a statute means, the meaning of the statute is ambiguous." Id. (citation omitted). "Ambiguity may arise due to uncertainty concerning the meaning of particular words or upon examination of all the statute's provisions together in context." Id. Here, section 85.34(2)(v) may be ambiguous because the

added language creates several important, yet unanswered, questions and reasonable persons can disagree on the section's application in situations such as Kish's. Kish asserts that according to the agency's decision in Vogt, "the post-injury 'snapshot' of claimant's salary, wages or earnings should occur at the time of the hearing, just as industrial disability is measured as the evidence stands at the time of the hearing." Vogt, File No. 5064694.01 (App. Decision), at p. 5. By contrast, the University argues that Kish voluntarily decreased her position from lead custodian to regular custodian, along with the hourly wage decrease, and once it has been established that a claimant returned to work or was offered work at the same wages, it is irrelevant what the claimant's status is at the time of the hearing.

The plain language of the provision at issue in section 85.34(2)(v) does not answer these questions:

> If an employee . . . returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code § 85.34(2)(v). This language provides no time requirements, no indication of what happens when a claimant voluntarily leaves the position at a later date or declines the offer, and no clarification regarding whether an exception exists for a claimant who returns to work/is offered the same position although the claimant is no longer situated for such work.

"[L]egislative intent is expressed by omission as well as by inclusion . . . ." Chavez, 972 N.W.2d at 668 (alterations in original) (quoting In re Guardianship of Radda, 955 N.W.2d 203, 209 (Iowa 2021)). Additionally, "[b]ecause we presume the legislature included every part of the statute for a purpose, we avoid construing a statutory provision in a manner that would make any portion thereof redundant or irrelevant." Ramirez-Trujillo, 878 N.W.2d at 770 (citing Rojas, 779

N.W.2d at 231; Iowa Code § 4.4(2)). Courts "may not extend, enlarge, or otherwise change the meaning of a statute under the guise of construction." Doe v. Iowa Dep't of Hum. Servs., 786 N.W.2d 853, 858 (Iowa 2010) (citing Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004)).

The Vogt Commissioner pointed out that the "agency measures a claimant's industrial disability as the claimant's condition stands at the time of the hearing." Vogt, File No. 5064694.01 (App. Decision), at pp. 5–6. The Commissioner therefore reasoned that "[h]ad the legislature intended to depart from when industrial disability is measured and use a different moment for this snapshot of claimant's post-injury earnings to occur, it could (and should) have said so." Id. at p. 6 (citing Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802, 812 (Iowa 2011) (holding "legislative intent is expressed by omission as well as by inclusion of statutory terms")).

Additionally, the Vogt Commissioner opined that "[p]erforming the comparison based on a claimant's initial return to work could lead to unfair and illogical results," citing case law demonstrating the "'fundamental rule of statutory construction that, if fairly possible, a construction resulting in unreasonableness as well as absurd consequences'" should be avoided. Vogt, File No. 5064694.01 (App. Decision), at p. 5 (quoting Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968)).[3] The Commissioner pointed out that claimants frequently return to work before undergoing surgery or their condition worsens after they return to work. Vogt, File No. 5064694.01 (App. Decision), at p. 5. Therefore, "restrictions often fluctuate as a claimant receives treatment" and restrictions that reduce a claimant's earnings are not imposed until later. Id.

[3] See also Ramirez-Trujillo, 878 N.W.2d at 770 (stating courts "avoid construing statutory provisions in a manner that will lead to absurd results"); Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 427 (Iowa 2010) ("[E]ven in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act.").

At the time of her May 30, 2018 injury, Kish was working as a lead custodian and earning $14.79 per hour. Admin. R. Part 1, pp. 75–76, 81 (Arb. Decision pp. 2–3, 8). After her injury, Kish returned to her job as a lead custodian on June 19, 2019, working the same number of hours and earning the same rate of pay ($14.79 per hour). Id. at p. 81. A regular custodian is paid approximately $1 less per hour than a lead custodian, and Kish therefore had an hourly wage of approximately $13.89 when she became a regular custodian on August 12, 2019. Id. at p. 81 (Arb. Decision p. 8); Admin. R. Part 5, p. 19 (Kish Tr. 31:2–8); id. at p. 37. At the time of the June 25, 2020 hearing before the Deputy, Kish maintained this position as a regular custodian, but was making $14.31 per hour at this point. Admin. R. Part 1, pp. 81–82 (Arb. Decision p. 8). Based on this pre-injury hourly wage of $14.79 and post-injury hourly wage of $14.31, the Deputy found that Kish "was earning less at the time of hearing than she was on the date of injury." Admin. R. Part 1, p. 82 (Arb. Decision p. 9).

However, the Vogt Commissioner continued his analysis and concluded that for the reasons outlined above, "both physicians and th[e] agency wait until a claimant has reached maximum medical improvement (MMI) before addressing the extent of a claimant's permanent impairment and permanent disability." Vogt, File No. 5064694.01 (App. Decision), at p. 5. On June 19, 2019, Dr. Igram placed Kish at MMI and released her to return to work without restrictions. Admin. R. Part 1, pp. 151–52. See also id. at p. 80 (Arb. Decision p. 7) (Deputy's findings consistent with this record evidence). On this same day, Kish did return to her job as a lead custodian, the same position she occupied on the date of injury. Admin. R. Part 1, pp. 80–81 (Arb. Decision pp. 7–8). The Deputy found that Kish "returned to work at the same rate of pay, $14.79 per hour, and was working the same number of hours." Id. at p. 81 (Arb. Decision p. 8).

There are important factual differences between the present case and the Vogt case. The factual findings articulated by the Vogt Deputy do not indicate that Vogt was placed at MMI. Additionally, multiple health care practitioners imposed work restrictions on Vogt. Dr. David Segal conducted an IME of Vogt and "provided a series of work restrictions," though he also "noted that Ms. Vogt's restrictions could change depending on additional treatment that [she] may receive." Vogt, File No. 5064694.01 (Arb. Decision), at pp. 8–9. At some point after that, Dr. James Pape allowed Vogt to return to work with no restrictions, but Physician Assistant Stephanie Vogeler issued work restrictions a week later, which Vogt followed. Id. at p. 12. Six months after that, Dr. Segal affirmed his earlier opinions but added that Vogt "should not be working this job or potentially any job" at the moment and "[i]f she continued to work, Dr. Segal recommended increased restrictions." Id. at pp. 12–13. Dr. Segal reaffirmed his recommendation of work restrictions about 2 months later. Id. at p. 13. Finally, physical therapist Daniel Fog conducted a functional capacity evaluation and imposed restrictions on Vogt as well. Id.

The Vogt Deputy found that although "Vogt returned to work at the same or greater hourly wage as the time of her injury . . . her earnings were reduced due to the restrictions imposed by her injury and Dr. Segal." Vogt, File No. 5064694.01 (Arb. Decision), at p. 21. The Deputy also noted that despite the defendants' claim that Vogt "made these reductions based upon her own volition," Vogt's "reduced work hours [were] in line with the initial restrictions of Dr. Segal." Id. Therefore, the Deputy concluded that since Vogt "had reduced earnings due to her reduced hours," Vogt "sustained an industrial disability." Id. at p. 22.

In the present case, health care practitioners did recommend temporary physical restrictions, which fluctuated throughout the course of Kish's examinations and treatment. Admin. R. Part 1, pp. 76–79. For example, Dr. Igram imposed restrictions, including not working at all,

during various stages of Kish's injury. Id. at p. 79 ("Claimant was released to return to work with the same restrictions in place and told to return to Dr. Igram following the EMG/NCS. (Jt. Ex. 3, p. 20)"; "There is a note regarding a telephone encounter on November 7, 2018, which indicates that claimant's concerns were relayed to Dr. Igram, and he then took her off work effective November 7, 2018 until her follow up visit on November 28. (Jt. Ex. 3, pp. 32-33)"). This includes instructions from Dr. Igram for Kish to remain off work pending the lumbar discectomy performed on January 10, 2019, and after surgery to recover. Id.

From March through May of 2019, Kish attended multiple follow-up appointments with Dr. Igram and he steadily altered and decreased Kish's work restrictions, including the length of shifts and lifting limitations. Admin. R. Part 1, pp. 79–80 (Arbitration Decision pp. 6–7). On June 19, 2019, Dr. Igram placed Kish at MMI and released her to return to work without restrictions. Id. at pp. 80, 151–52. However, after Kish returned to her job as lead custodian, at the same rate of pay and for the same number of hours, Kish found that she had difficulty performing the duties of a lead custodian and now required several breaks to stretch and rest her back:

> She stated that prior to the injury, she was able to "do it all," but after returning to full duty she had to take several breaks so she could stretch and rest her back. While she was never disciplined or counseled regarding her job performance, she testified that she knew she would not be able to handle the lead custodian position once school was back in session.

Admin. R. Part 1 p. 81 (Arbitration Decision p. 8). Therefore, when a regular custodial position opened in August of 2019, Kish bid for reassignment to the position[4] and was awarded it by seniority. Id.; Admin. R. Part 5 pp. 19, 36. Kish testified to her perceived differences in the job

[4] The Deputy acknowledged that Kish sustained an additional injury on August 1, 2019, which is not part of this litigation. Admin. R. Part 1, p. 81. The Deputy also noted that although Kish applied for her reassignment to regular custodian after her August 1, 2019 injury, Kish "testified that the new injury did not factor into her decision to transfer positions." Id. The Deputy found Kish credible and noted no reason to doubt this. Id. at p. 75.

requirements for the lead custodian versus a regular custodian, as well as the difficulties she was experiencing as a lead custodian after her injury:

> At her deposition, taken August 8, 2019, and again at hearing, claimant testified that in her experience the position of lead custodian was physically more demanding as compared to a regular custodial position. (Testimony; Def. Ex. A, p. 9) Claimant was under the impression that the lead custodian position required the ability to lift up to 70-pounds, while the regular custodian position required lifting up to 40-pounds. (Testimony; Def. Ex. A, p. 9) While this was incorrect, it is true that the lead custodian also has more duties involving set up and tear down of campus events, driving between different buildings to transport employees, and carrying large totes of chemicals. (Testimony) Claimant also testified that when she returned to work, she had difficulty cleaning the carpets.

Admin. R. Part 1, p. 81 (Arbitration Decision p. 8).

In support of her position, Kish points to restrictions imposed by Dr. Kreiter. Dr. Kreiter conducted an IME of Kish on July 31, 2019, and overall noted that Kish "had a good result from surgery" but still experienced "some chronic lumbar discomfort, especially with sitting and standing." Admin. R. Part 4 p. 12, ¶¶ 2, 4. Dr. Kreiter noted that Kish "needs continued low back strengthening" and suggested several treatments such as routine daily exercises, medications, and a custom orthotic or other type of back support to wear while performing her custodial work. Id. at ¶ 2.

Additionally, Dr. Kreiter's report acknowledged that after the surgery, Dr. Igram released Kish to work with no restrictions. Id. at ¶ 5. However, Dr. Kreiter cautioned against this and recommended a number of continuing restrictions:

> Dr. Kreiter further noted that claimant should self-limit her custodial work or she will have increasing symptoms secondary to the disc area or facet problem. He discussed that she must use proper mechanics while lifting, avoid jumping, and avoid forward flexed position with lifting unless done with proper body mechanics. He noted that "any 70-pound lift requirement at the University of Dubuque should be avoided and she should continue to ask for help when doing such activity." Finally, he recommended that she be able to alternate standing, walking, and sitting.

Admin. R. Part 1, p. 80 (Arbitration Decision p. 7) (quoting Admin. R. Part 4, p. 12). In an additional letter to Kish's counsel, Dr. Kreiter reiterated these recommended restrictions. Admin. R. Part 4, p. 16. The Deputy's decision noted all of these factual findings from Dr. Kreiter. See Admin. R. Part 1, p. 80 (Arbitration Decision p. 7).

The Deputy and Commissioner found Dr. Igram's conclusions and opinions more persuasive than those of Dr. Kreiter:

> The two impairment ratings are very close. The main difference appears to be restrictions, as Dr. Kreiter recommended claimant self-limit her work to avoid symptoms and avoid lifting 70 pounds. While I do not discount Dr. Kreiter's opinion entirely, as the surgeon and medical provider who evaluated claimant more frequently during the healing process, I find that Dr. Igram was most qualified to provide a functional impairment rating and opine regarding permanent restrictions.

Admin. R. Part 1, pp. 80–81 (Arbitration Decision pp. 7–8). As the fact finder, it is the agency's role to "determine[] the weight to be given to any expert testimony" and "the credibility of witnesses . . . ." Sherman v. Pella Corp., 576 N.W.2d 312, 321 (Iowa 1998); Arndt, 728 N.W.2d at 394–95 (citation omitted). Therefore, unlike the Vogt claimant, Kish was placed at MMI and had no practitioner-imposed work restrictions when she was offered, and did return to, her pre-injury job at the same salary, wages, or earnings.

Furthermore, the Commissioner's interpretations of section 85.34(2)(v) in decisions such as McCoy and Vogt are well-reasoned and consistent with principles of statutory interpretation and construction. However, the question and analysis of the statute's ambiguity "pertaining to when and how [a] claimant's post-injury salary, wages, or earnings are supposed to be measured" is ultimately irrelevant in the present case. Vogt, File No. 5064694.01 (App. Decision), at p. 5. Rather, the more pertinent question is what effect Kish's voluntary and requested reassignment to a regular custodian position (and the resulting wage decrease) has on the application of section 85.34(2)(v)'s prerequisite for consideration of industrial disability.

Unfortunately, as previously mentioned, the plain language of the statute does not answer this question. The statute merely states a claimant/employee is not entitled to an award of industrial disability "[i]f an employee . . . returns to work *or is offered work* for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury . . . ." Iowa Code § 85.34(2)(v) (emphasis added). Here, Kish does not dispute that she was offered, and that she did return to work in, the same position receiving the same salary, wages, or earnings at the time of her injury. Rather, Kish asserts that because she was no longer working in that position by the time of the hearing, this language does not apply and she is entitled to industrial disability. However, this does not discount the fact that such an offer was made by the University. Moreover, as concluded by the Deputy and affirmed by the Commissioner, Kish's voluntary request for reassignment to the lower paying regular custodian position was based on her own perceived restrictions and in conflict with the opinions of her treating physician:

> However, claimant voluntarily elected to bid to this position. Claimant returned to her position as a lead custodian without medical restrictions after the date of injury. The University offered and returned claimant to her prior position with the same pay she received on the date of injury.
>
> Claimant elected to bid to a different, lower paying position within the University. No physician has imposed permanent work restrictions on claimant that medically disqualified her from returning and continuing to perform work as a lead custodian. Therefore, I conclude that claimant returned to work and was offered ongoing work by the University at a wage rate in which claimant would receive the same or greater wages as those earned on the date of injury. As such, I conclude that claimant's current recovery is limited to her permanent functional impairment rating resulting from the injury. Iowa Code section 85.34(2)(v).

Admin. R. Part 1, p. 83 (Arb. Decision p. 10).

One of the rules of statutory construction is that courts must "assess the statute in its entirety rather than isolated words or phrases to ensure our interpretation is harmonious with the statute as

a whole." Ramirez-Trujillo, 878 N.W.2d at 770 (citing Schadendorf v. Snap–On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). The text immediately following the debated provision states the following:

> Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and *is terminated from employment by that employer*, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code § 85.34(2)(v) (emphasis added). The statute contemplates a scenario in which the employer terminates an employee after the fact and explains that situation requires reopening the proceedings and determining industrial disability. However, the statute does not provide instructions for what effect a claimant's voluntary departure from the position or request for reassignment/demotion to a position with lower salary, wages, or earnings has on the proceedings and consideration of industrial disability. "[L]egislative intent is expressed by omission as well as by inclusion . . . ." Chavez, 972 N.W.2d at 668 (alterations in original) (quoting In re Guardianship of Radda, 955 N.W.2d at 209). The court agrees that with the added language in section 85.34(2)(v), "the Legislature clearly intended to limit the scenarios under which industrial disability benefits are owed . . . ." McCoy, 2021 WL 2624688, at *2. Kish's argument regarding the timeline reads conditions and situations into the statute that do not exist.

Courts "look only at the actual words of the legislature; we will not speculate as to a statute's 'probable intent,' nor will we substitute our judgment for that of the legislature by considering what it 'might or should have said.'" State v. Alexander, 853 N.W.2d 295, 298 (Iowa

Ct. App. 2014) (quoting State v. Tesch, 704 N.W.2d 440, 451 (Iowa 2005)).[5] See also Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995) ("[I]t is not the province of the court to speculate as to probable legislative intent without regard to the wording used in the statute, and any determination must be based upon what the legislature actually said, rather than what it might or should have said.").[6] The Deputy's findings of fact and application of the statute to these facts (as adopted by the Commissioner) do not conflict with section 85.34(2)(v) or the Vogt decision:

> However, I also find that claimant returned to work after the date of injury as lead custodian, making the same wages she earned on the date of injury. Although claimant later bid into and transferred to a regular custodial position at the University, her decision was voluntary. No physician had imposed permanent work restrictions that would prevent her from continuing to work as lead custodian. The University did not request or require claimant to change positions, and she had not been disciplined or counseled in any way regarding her job performance. Therefore, I find that the employer offered claimant continued employment in a position that paid the same or more than she earned on the date of injury.

Admin. R. Part 1, p. 82 (Arb. Decision p. 9).

Additionally, Kish argues the Deputy and Commissioner erred in accepting Dr. Igram's conclusions over Dr. Kreiter's: "Based upon the evaluation of Dr. Kreiter and the test results from the FCE, it is apparent the release to return to unrestricted work by Dr. Igram was not appropriate." Pet'r's Br. p. 13. Kish contends that the "stringent restrictions" recommended by Dr. Kreiter demonstrate she is unable to return to her prior position as lead custodian. Id. at pp. 12–14. As previously stated, the Deputy and the Commissioner found Dr. Igram's opinions and recommendations more persuasive for the following reasons:

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[5] "We do not speculate as to the probable legislative intent apart from the words used in the statute." IBP, Inc. v. Harker, 633 N.W.2d 322, 325 (Iowa 2001) (quoting State v. Adams, 554 N.W.2d 686, 689 (Iowa 1996)). See also State v. Anderson, 782 N.W.2d 155, 159 (Iowa 2010) (same); City of Cedar Rapids v. James Props., Inc., 701 N.W.2d 673, 675 (Iowa 2005) (same); City of Fairfield v. Harper Drilling Co., 692 N.W.2d 681, 684 (Iowa 2005) (same); Carolan v. Hill, 553 N.W.2d 882, 887 (Iowa 1996) (same).

[6] See also State v. Haglin, 919 N.W.2d 635 (Table), 2018 WL 2084840, at *2 n. 2 (Iowa Ct. App. May 2, 2018) (same); State v. Nicoletto, 845 N.W.2d 421, 431 (Iowa 2014), *superseded by statute*, Iowa Code § 709.15(f)(1)(b) (same); State v. Haberer, 532 N.W.2d 757, 759 (Iowa 1995) (same).

> While I do not discount Dr. Kreiter's opinion entirely, as the surgeon and medical provider who evaluated claimant more frequently during the healing process, I find that Dr. Igram was most qualified to provide a functional impairment rating and opine regarding permanent restrictions.

Admin. R. Part 1, pp. 80–81 (Arbitration Decision pp. 7–8). See also Resp't's Br. p. 12 ("Dr. Igram was the authorized treating physician. He performed surgery and provided follow up care. Dr. Kreiter provided a one-time evaluation. Dr. Igram's impairment rating was found to be more credible.").

Kish also refers to the Functional Capacity Evaluation (FCE) she underwent on October 3, 2019, which "was determined to be valid." Admin. R. Part 1, p. 81 (Arbitration Decision p. 8); id. at pp. 156–68 (FCE report). The FCE report noted Kish "demonstrated lifting capabilities inconsistent with the demands of the job, diminished functional use of the upper extremities in work above chest, shoulder, and head level, and inability to tolerate sustained sitting." Id. at p. 82 (citing Admin. R. Part 1, p. 157). However, the Deputy stated twice that "the FCE was performed after the August 1, 2019 injury, which is not included in the instant case." Id. at pp. 81–82 (Arbitration Decision pp. 8–9). Kish "testified that she was not fully recovered from the August 1, 2019 injury when she participated in the FCE" and "[a]t the time of hearing, [Kish] was continuing to seek treatment related to that injury." Id. Yet Kish "testified that the [August 1, 2019] injury did not factor into her decision to transfer positions." Id. at p. 81.

"Making a determination as to whether evidence 'trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence is not an assessment for the district court . . . ." Arndt v. City of Le Claire, 728 N.W.2d 389, 394 (Iowa 2007) (citation omitted). Rather, "[i]t is the commissioner's duty as the trier of fact to determine the credibility of witnesses, weigh the evidence, and decide the facts in issue." Id. at 394–95 (citation omitted). "It is not the role of the court to reassess the evidence or make its own determination of the weight

to be given the various pieces of evidence." Cargill Meat Sols. Corp. v. DeLeon, 847 N.W.2d 612 (Table), 2014 WL 1496091, at *4 (Iowa Ct. App. Apr. 16, 2014) (citing Burns v. Bd. of Nursing, 495 N.W.2d 698, 699 (Iowa 1993)). "Where there is a conflict in evidence or reasonable minds might disagree about inferences to be drawn from the evidence, the reviewing court is not free to interfere with the [agency's] findings." Armstrong v. State of Iowa Bldgs. and Grounds, 382 N.W.2d 161, 166 (Iowa 1986).[7] The Court therefore comports with the agency's determination and reaffirms that the University's offer of, and Kish's return to, working in her previous job as lead custodian at the same hourly wage occurred at a time when her treating physician placed her at MMI and imposed no work restrictions.[8]

As a final matter, although Kish raises this portion of her appeal as an error of law under section 17A.19(10)(c) rather than subsection (h), the Court briefly mentions its conclusion regarding whether the Deputy and Commissioner's decisions are inconsistent with the agency's prior practice or precedent. A party seeking judicial review is prejudiced when the agency action "other than a rule . . . is inconsistent with the agency's prior practice or precedents" and the agency has not "justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency." Iowa Code § 17A.19(10)(h). The Iowa Supreme Court has concluded that subsection (h) does not change the law, but rather it "was intended to amplify review under the unreasonable, arbitrary, capricious, and abuse-of-discretion standards." Finch v.

[7] Iowa courts "will not interfere with an agency's decision when reasonable minds might disagree or there is a conflict in the evidence." Tony's Tap, Inc. v. Dep't of Com., Alcoholic Beverages Div., 705 N.W.2d 105 (Table), 2005 WL 1397515, at *3 (Iowa Ct. App. June 15, 2005) (citing Organic Techs. Corp. v. Iowa Dep't of Nat. Res., 609 N.W.2d 809, 815 (Iowa 2000)).

[8] Additionally, even in an analysis determining whether the Deputy/Commissioner committed an error of law, courts nevertheless must "'accept the commissioner's factual findings when supported by substantial evidence.'" Chavez, 972 N.W.2d at 666 (quoting Gumm, 943 N.W.2d at 28). The evidence in the record clearly demonstrates that Dr. Igram placed Kish at MMI on June 19, 2019, and released her to return to work with no restrictions.

Schneider Specialized Carriers, Inc., 700 N.W.2d 328, 332 (Iowa 2005) (citing Arthur Earl Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions 69 (1998)). For the reasons discussed above, the court concludes that the Deputy's decision and the Commissioner's affirmance were not unreasonable, arbitrary, capricious, or an abuse of discretion, nor were they inconsistent with the Vogt decision.

Based on the preceding, the court concludes the agency's interpretation of Iowa Code section 85.34(2)(v) in this case is not erroneous such that the court must substitute its judgment for that of the agency. Jacobsen Transp. Co., 778 N.W.2d at 196; Iowa Code § 17A.19(10)(c). The court also concludes that the agency's action is not inconsistent with its prior practice or precedent, *i.e.*, that the Commissioner failed to apply its reasoning from the earlier Vogt decision. Accordingly, the court denies Kish's petition for judicial review on this ground.

B. Whether the Agency Erred in Denying Penalty Benefits

Kish asserts that substantial evidence supports an award of penalties for delayed payment of permanent partial disability benefits and that the Deputy erred in denying Kish penalty benefits.[9] Section 17A.19(10)(f) defines substantial evidence as "the quantity and quality of evidence 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

[9] The court notes that Iowa courts have stated "[a] challenge to the commissioner's decision concerning penalty benefits is a challenge 'to the ultimate conclusion made by the agency and is therefore a challenge to the agency's application of law to the facts.'" City of Maxwell v. Marshall, 967 N.W.2d 566 (Table), 2021 WL 4889238, at *2 (Iowa Ct. App. Oct. 20, 2021) (quoting Dunlap v. Action Warehouse, 824 N.W.2d 545, 557 (Iowa Ct. App. 2012)). See also Cochran v. Quest Liner, Inc., 974 N.W.2d 545 (Table), 2022 WL 122358, at *2 (Iowa Ct. App. Jan. 12, 2022) (citing P.D.S.I. v. Peterson, 685 N.W.2d 627, 633 (Iowa 2004); Dubinovic v. Des Moines Pub. Schs., 928 N.W.2d 885 (Table), 2019 WL 2372903, at *2 (Iowa Ct. App. June 5, 2019)). This implicates a standard of review under Iowa Code section 17A.19(10)(m) rather than subsection (f). However, these same cases acknowledge that "[t]o the extent the court finds it necessary to consider the commissioner's fact findings, review is for substantial evidence." Dubinovic, 2019 WL 2372903, at *2. Other judicial reviews of penalty benefits have applied the substantial evidence standard. Additionally, cases such as Cochran involve circumstances where the parties disagree on the appropriate standard of review. Here, Kish raises the judicial review of this issue under subsection (f) and the University does not advocate for a different standard. The court analyzes the issue with consideration of both standards.

serious and of great importance." Iowa Code § 17A.19(10)(f)(1). "Evidence is not insubstantial merely because different conclusions may be drawn from the evidence." Pease, 807 N.W.2d at 845. See also Arndt, 728 N.W.2d at 393 ("Just because the interpretation of the evidence is open to a fair difference of opinion does not mean the [agency's] decision is not supported by substantial evidence."). "Under chapter 17A, a court's task on judicial review is not to determine whether the evidence might support a particular factual finding; rather, it is to determine whether the evidence supports the finding made." Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 263–64 (Iowa 2012). Furthermore, the Iowa Supreme Court has found that a "district court exceed[s] the scope of permissible judicial review of agency decisions by making findings" the agency never made. Id. at 264 (citation and internal quotations omitted).

Iowa Code section 86.13 governs compensation benefits and provides the following regarding a denial, delay in payment, or termination of benefits:

> If . . . a delay in payment . . . of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the . . . delay in payment . . . the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were . . . delayed . . . without reasonable or probable cause or excuse.

Iowa Code § 86.13(4)(a). The statute therefore states that "[t]he workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:" (1) the employee has demonstrated a delay in payment of benefits and (2) "[t]he employer has failed to prove a reasonable or probable cause or excuse for the" delay in payment. Id. at § 86.13(4)(b)(1)–(2). See also Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005) (describing these two elements as "[t]he prerequisites for the imposition of a penalty under this statute").

As to the second element, the statute states that "[i]n order to be considered a reasonable or probable cause or excuse," an employer's "excuse shall satisfy all of the following criteria:"

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Iowa Code § 86.13(4)(c). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). "Any delay without reasonable excuse entitles the employee to benefits in some amount." Id. at 236–37.

"Section 86.13 recognizes an affirmative obligation on the part of the employer and insurance carrier to act reasonably in regard to benefit payments in the absence of specific direction by the commissioner." Davidson v. Bruce, 594 N.W.2d 833, 838 (Iowa Ct. App. 1999) (citing Boylan v. Am. Motorists Ins. Co., 489 N.W.2d 742, 743 (Iowa 1992)). "The purpose or goal of the statute is both punishment and deterrence." Robbennolt, 555 N.W.2d at 237. Moreover, "the clear purpose of section 86.13 is to penalize employers who do not timely pay workers' compensation benefits." Id. "Included among the circumstances under which the statute was enacted was the recognition that too often employees were not receiving the full amount of the compensation payable to them under the statute." Id. Therefore, "section 86.13 is applicable when payment of compensation is not timely made or when the full amount of compensation is not paid." Id. [10]

[10] See also Pesicka v. Snap On Tools Corp., 2002 WL 31756625, at *3 (Iowa Ct. App. Dec. 11, 2002) ("For the purpose of applying section 86.13, the benefits that are *under* paid as well as *late*-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse.") (emphasis in original).

The Iowa Supreme Court has explained that "[s]ection 86.13 does not require that the lack of a reasonable excuse be due to any particular type of conduct by the insurer, whether negligent, reckless or intentional." Christensen v. Snap–On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996). Rather, "[t]he focus is on whether timely payment of the benefits due was made and if not, whether there was a reasonable excuse for the failure to make timely payment of the amount owed." Id. Furthermore, "it is an unreasonable application of the penalty provision to assume that any delay after the furnishing of the medical evidence is unreasonable." Davidson, 594 N.W.2d at 838 (citing Kiesecker v. Webster City Custom Meats Inc., 528 N.W.2d 109, 111 (Iowa 1995)). See id. at 839 (concluding "that assessment of a penalty is inappropriate until the employer has been informed that an employee has reached maximum medical improvement and then delays in seeking an impairment rating or commencing payment"). See also Cochran v. Quest Liner, Inc., 974 N.W.2d 545 (Table), 2022 WL 122358, at *2 (Iowa Ct. App. Jan. 12, 2022) (same). However, "[i]n the absence of a reasonable excuse for a delay, penalty benefits are mandatory. Only the *amount* is within the discretion of the commissioner." Christensen, 554 N.W.2d at 261 (emphasis added). This is clear based upon section 86.13(4)'s repeated use of "shall."[11] "If no reason is given for the delay or if the 'reason' is not one that a reasonable fact finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13." Pesicka v. Snap On Tools Corp., 2002 WL 31756625, at *3 (Iowa Ct. App. Dec. 11, 2002) (citation omitted).

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[11] Iowa courts have determined that "[i]n a statute, the word 'shall' generally connotes a mandatory duty." In re Detention of Fowler, 784 N.W.2d 184, 187 (Iowa 2010) (citation omitted). See also Ramirez-Trujillo, 878 N.W.2d at 771 ("When the term 'shall' appears in a statute, it generally connotes the imposition of a mandatory duty."). The Iowa legislature has also explicitly stated that "[u]nless otherwise specifically provided by the general assembly . . . [t]he word 'shall' imposes a duty." Iowa Code § 4.1(30)(a).

Kish's requests for penalty benefits involve payments of her permanent partial disability benefits. "Compensation for permanent partial disability shall begin 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 by use of the [AMA] guides to the evaluation of permanent impairment . . . ." Iowa Code § 85.34(2) (emphasis added). In the present case, Dr. Igram placed Kish at MMI on June 19, 2019. Admin. R. Part 1 pp. 80, 148, 151–52. Upon request, Dr. Igram wrote a letter assigning Kish a permanent partial impairment rating of 10% of the whole person according to the AMA Guides. Id. at p. 154. The letter is dated July 24, 2019, and addressed to the University's insurance carrier, Travelers. Id. However, the University contends that Travelers did not receive Dr. Igram's impairment rating until September 13, 2019. Resp't's Br. p. 16. See Admin. R. Part 5, p. 5 (email exchange between parties' counsel explaining "Dr. Igram did not provide the functional impairment rating until 9/10/19"). In support of this assertion, the University cites Joint Exhibit 3, page 90. Admin. R. Part 1, p. 154; Admin. R. Part 5, p. 6 (same). This is a copy of Dr. Igram's July 24, 2019 letter with the following series of letters and numbers stamped in the top left corner: TRV,GM1925620000025000000,09/13/2019,ECN1925620000076.[12] Id. The University and Travelers assert this date/timestamp demonstrates Travelers' receipt of Dr. Igram's impairment rating on September 13, 2019.

On September 17, 2019, Travelers issued Kish a check for $384.99. Admin. R. Part 5, p. 7. The attached "Explanation of Payment" indicated that the check was for permanent partial disability payments from July 24, 2019 to September 18, 2019, and that the weekly compensation

[12] The filing date of the certified record partially obscures this series of numbers and letters, but the court is able to make it out. See also Admin. R. Part 1, p. 15 (Kish's inter-agency motion for rehearing confirming this series of letters and numbers).

rate was $375.62. Id. This payment is confirmed by Travelers' "Indemnity Payments Log" for Kish, which displays the first permanent partial benefits payment as inputted on September 17, 2019, for $384.99 and from July 24, 2019, to September 18, 2019. Id. at p. 38. Kish argues that the University and Travelers therefore did not pay the remaining 7.286 weeks of benefits, and that the agency erred in declining to award Kish penalty benefits. From July 24 to September 19 is a total of 8.286 weeks. According to the hearing report, the stipulated weekly rate of compensation was $384.99. Admin. R. Part 1, p. 120. Therefore, Kish argues the check she received on September 17 should have been for a lump sum of $3,079.92. Pet'r's Br. P. 14. "Permanent partial disability payments are paid in weekly installments and not in a lump sum, unless the parties so agree in a settlement." Davidson, 594 N.W.2d at 840.

"To receive a penalty benefit award under section 86.13, the claimant must first establish a delay in the payment of benefits." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 334 (Iowa 2008) (citing Keystone Nursing Care Ctr., 705 N.W.2d at 307). "The burden then shifts to the employer to prove a reasonable cause or excuse for the delay." Id. at 334–35 (citing Christensen, 554 N.W.2d at 260). Here, Kish has established a delay in the payment of her benefits. Pursuant to Iowa Code section 85.34(2), her compensation for permanent partial disability should have begun on July 24, 2019, when Dr. Igram had placed Kish at MMI *and* determined Kish's percentage of permanent impairment. Admin. R. Part 1 pp. 80, 148, 151–52, 154. However, Travelers did not issue Kish a check until September 17, 2019. Admin. R. Part 5, p. 7.

The burden now shifts to the University and Travelers to demonstrate that there was a reasonable cause for the delay. "The key to determining whether penalty benefits should be awarded is whether the employer's actions were reasonable." Wal-Mart Stores, Inc. v. Caselman,

657 N.W.2d 493, 501–02 (Iowa 2003) (citing Gilbert v. USF Holland, Inc., 637 N.W.2d 194, 198 (Iowa 2001); Christensen, 554 N.W.2d at 260; Robbennolt, 555 N.W.2d at 236–37). "Section 86.13 does not require that the lack of a reasonable excuse be due to any particular type of conduct by the insurer, whether negligent, reckless or intentional." Christensen, 554 N.W.2d at 260. Rather, "[t]he focus is on whether timely payment of the benefits due was made and if not, whether there was a reasonable excuse for the failure to make timely payment of the amount owed." Id. In the present case, the University and Travelers assert that the delay in payment was due to a factor outside of their control, namely, that Dr. Igram's letter dated July 24, 2019, assigning Kish's percentage of permanent impairment did not reach Travelers until September 13, 2019, for unknown reasons. At the hearing, the Court asked the parties why the letter was delayed from the date of its drafting to its receipt by Travelers. Neither party was able to provide the reason.

In her findings of fact on this issue, the Deputy acknowledged that "Defendants note in their brief that the insurance carrier was not provided with the letter until September 13, 2019" and that "Defendants paid the 10 percent functional impairment rating, which is 50 weeks of permanent partial disability benefits." Admin. R. Part 1, p. 80 (Arbitration Decision p. 7). In her conclusions of law on this issue, the Deputy provided the following (which the Commissioner affirmed):

> Claimant argues that she is entitled to penalty benefits because defendants did not send her first check for permanent partial disability until September 19, 2019. Dr. Igram's impairment rating is dated July 24, 2019. As such, claimant contends that the first benefit check was 8.286 weeks late, and defendants did not provide any reason for the delay.
> . . .
> Defendants note that while Dr. Igram's report is dated July 24, 2019, they did not receive it until September 13, 2019, which was a Friday. (Jt. Ex. 3, p. 90) The first disability check was inputted by the insurance carrier on September 17, 2019, and issued on September 18, 2019. (Def. Ex. C, p. 1) I find that defendants issued payment timely in accordance with Iowa Code section 85.34(2). Claimant is not entitled to an award of penalty benefits.

Admin. R. Part 1, p. 85 (Arbitration Decision p. 12). Although not explicitly stated, it is clear the Deputy found the University and Travelers credible, and that the date-stamped letter from Dr. Igram constituted sufficient evidence that Travelers did not receive the letter until September 13. "It is the commissioner's duty as the trier of fact to determine the credibility of witnesses, weigh the evidence, and decide the facts in issue." Arndt, 728 N.W.2d at 394–95 (citation omitted). "It is not the role of the court to reassess the evidence or make its own determination of the weight to be given the various pieces of evidence." Cargill Meat Sols. Corp., 2014 WL 1496091, at *4 (citing Burns, 495 N.W.2d at 699).

Furthermore, "[j]ust because the interpretation of the evidence is open to a fair difference of opinion does not mean the [agency's] decision is not supported by substantial evidence." Arndt, 728 N.W.2d at 393. "Under chapter 17A, a court's task on judicial review is not to determine whether the evidence might support a particular factual finding; rather, it is to determine whether the evidence supports the finding made." Burton, 813 N.W.2d at 263–64. Although it is not entirely clear exactly what kind of method such a stamp reflects (fax, regular mail, certified mail, etc.), this series of numbers and letters stamped at the top left corner of Dr. Igram's July 24 letter does appear to be an indicium of Travelers' receipt of the letter on September 13, 2019. As the Deputy found and the Commissioner affirmed, the University has met its burden to show a reasonable cause for the delay in payment of benefits such that penalty benefits are not appropriate. The evidence establishes that through no fault of its own, Travelers did not receive Dr. Igram's impairment rating until September 13, a Friday. Travelers input the first permanent partial disability weekly benefits payment on September 17 and issued the check on September 18, 2019. Admin. R. Part 5, pp. 7, 38. These actions were reasonable.

The delay was reasonable and the Deputy found that Kish has received 50 weeks of permanent partial disability payments, in accordance with the 10 percent functional impairment rating assigned by Dr. Igram. Regrading whether Kish received 50 weeks of payments, the only relevant document in the record is Travelers' "Indemnity Payments Log" for Kish, which shows 40 entries of weekly benefit payments for permanent partial disability, and the 40th entry states "4 payments remaining." Admin. R. Part 5, p. 38. However, there is no date or timestamp on this log demonstrating when it was generated and the last input date is June 15, 2020. During the June 25, 2020 hearing, the Deputy noted that the University's payment of 50 weeks of benefits was "currently ongoing and [would] continue until the full 50 weeks have been paid voluntarily." Admin. R. Part 1, p. 58 (Hr'g Tr. 6:24–25, 7:1–6). In her July 29, 2021 arbitration decision, over a year later, the Deputy stated that "Defendants paid the 10 percent functional impairment rating, which is 50 weeks of permanent partial disability benefits." Id. at p. 80 (Arbitration Decision p. 7). A "district court exceed[s] the scope of permissible judicial review of agency decisions by making findings" the agency never made. Burton, 813 N.W.2d at 264 (citation and internal quotations omitted). Furthermore, Kish's arguments do not assert that she has not been paid 50 weeks and the court therefore accepts the Deputy and Commissioner's finding.

Additionally, Kish argues that the parties stipulated to a commencement date of June 19, 2019, for permanent partial disability benefits in the hearing report,[13] yet Travelers "did not issue a check until July 24, 2019 at which time they issued a check for one week." Pet'r's Br. P. 15. As there is no other indication in the record of a check issued on July 24, 2019, the court believes

[13] The administrative rules adopted by the Commissioner regarding prehearing procedures includes a requirement that the parties file a hearing report: "At least 14 days before the hearing, counsel of record and pro se litigants shall prepare and file a joint hearing report that defines the claims, defenses, and issues that are to be submitted to the deputy commissioner who presides at the hearing. . . . The hearing report shall be signed by all counsel of record and pro se litigants and submitted to the deputy." Iowa Admin. Code r. 876-4.19(3)(f).

Kish is referring to the September 17, 2019 payment that designates a payment period of June 24 to September 18. See Admin. R. Part 5, p. 7. Kish argues that the time period between June 19 until July 24 is five weeks and the check therefore should have been issued for $1,924.95. Kish contends the agency should have awarded her penalty benefits for this time period as well.

The hearing report does indicate the parties stipulated that "[t]he commencement date for permanent partial disability benefits, if any are awarded, is June 19, 2019." Admin. R. Part 1, p. 120. Furthermore, when the Deputy summarized the hearing report at the hearing, neither party raised an issue with that particular stipulation nor clarified that this stipulation had been amended. Id. at pp. 57–58 (Hr'g Tr. 4:24–25, 5–6, 7:1–17). See Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 657 (Iowa 2013) (discussing situation in which parties amended hearing report). In the arbitration decision, the Deputy ordered that "Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits, commencing June 19, 2019." Admin. R. Part 1, p. 85.

However, at the hearing before the Deputy, Kish argued that "she was not 'eligible for compensation' at the time she returned to work on June 19, 2019 . . . because she was not 'eligible for compensation' until September 10, 2019, when defendants received Dr. Igram's impairment rating" pursuant to section 85.34(2). Admin. R. Part 1, p. 84 (Arbitration Decision p. 11). Kish cannot have it both ways. This argument reflects Kish's acknowledgement that the stipulation contradicts the parameters set forth in section 85.34(2) regarding when compensation for permanent partial disability shall begin. "Compensation for permanent partial disability shall begin 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 by use of the [AMA] guides to the evaluation of permanent impairment . . . ." Iowa Code § 85.34(2)

(emphasis added).[14] It is not unreasonable for an employer to receive notification that claimant has reached MMI, seek a percentage of permanent impairment,[15] and delay payment of benefits until receiving this information. Once the extent of loss was determined, payment was timely issued.

The court concludes the Deputy and Commissioner did not err in denying Kish's requests for penalty benefits. "The key to determining whether penalty benefits should be awarded is whether the employer's actions were reasonable." Caselman, 657 N.W.2d at 501–02 (citations omitted). Substantial evidence supported the Deputy's finding (and the Commissioner's affirmance) that the respondents' actions were reasonable and a reasonable cause existed for the delay in permanent partial disability benefits. Iowa Code § 17A.19(10)(f). The agency's application of Iowa Code sections 86.13(4) on penalty benefits and 85.34(2) on compensation for permanent partial disability to the facts of this case was not irrational, illogical, or wholly unjustifiable. Iowa Code § 17A.19(10)(m). Accordingly, the court denies Kish's petition for judicial review on this ground.

RULING

Based on the preceding, the court concludes petitioner's petition for judicial review must be **DENIED** and the agency's action is affirmed in its entirety.

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[14] In a case before the Iowa Supreme Court, the parties stipulated to a commencement date for permanent partial disability. Mycogen Seeds v. Sands, 686 N.W.2d 457, 467 (Iowa 2004), *superseded by statute on other grounds as recognized in* JBS Swift & Co. v. Ochoa, 888 N.W.2d 887, 890, 898–900 (Iowa 2016)). However, the court found "[t]he commissioner correctly disregarded this stipulation because the statute" required a different date. Id. The court concluded that "[t]herefore, by law, permanent partial disability commenced on" a date earlier than the date stipulated to by the parties. Id.

[15] At the hearing before the court, the parties agreed that it is the insurance company's obligation to request an assessment of impairment, but indicated that when the request was made by Travelers for an impairment rating was not part of the record. The court confirms it can find no such documentation in the record.

State of Iowa Courts

Case Number	**Case Title**
CVCV063017	WENDY KISH V UNIVERSITY OF DUBUQUE AND TRAVELERS
Type:	OTHER ORDER

So Ordered

Michael D. Huppert, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2022-07-27 09:29:09