IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LANDUS COOPERATIVE **and** **Nationwide Agribusiness INS.,** **Petitioners,** **v.** **AUSTIN HEILMAN** **Respondent.**	**Case No. CVCV058918** **RULING ON PETITION FOR JUDICIAL REVIEW**

This is a petition for judicial review from a final decision of an Iowa Workers' Compensation Deputy Commissioner. The Court heard this matter on January 24, 2020. Petitioners appeared through attorney Jeffrey Lanz. Respondent appeared through attorney Janece Valentine. After considering the arguments of the parties and having reviewed the file and the applicable case law, the Court now enters the following ruling.

INTRODUCTION

A. Factual Background

Petitioners seek review of an alternate medical care decision of Iowa Workers' Compensation Deputy Commissioner Toby Gordon. Respondent Austin Heilman worked for Landus Cooperative. On June 1, 2018, he sustained a workplace injury to his back. Heilman initially saw physician Dr. Vitritto-Khan on June 5, 2018 for low back pain from the injury. She recommended physical therapy and work restrictions. Heilman went to a number of physical therapy appointments and had an MRI taken.

Petitioners later authorized Heilman to receive treatment from Dr. Steven Meyer. Dr. Meyer referred Heilman to E-3 Work Therapy Services for a functional capacity evaluation (FCE), which was

conducted on December 5, 2018. Pet'r's Ex. A. The results of the evaluation indicated that Heilman met "the material handling demands for a Heavy demand vocation…." *Id.*

On December 6, 2018, Heilman slipped on ice at work, twisted and almost fell, apparently reaggravating his previous back injury. On December 8, 2018, Heilman again slipped on ice and fell, this time at his home. This fall also apparently negatively impacted his back.

On December 19, 2018, Heilman saw Dr. Meyer again. In Dr. Meyer's office notes, he noted that since Heilman's FCE, Heilman had the above near and complete falls, and that he subsequently has had severe back pain. Pet'r's Ex. B. Dr. Meyer physically examined Heilman and found that he continued to have "significant tenderness to palpation of lower lumbar spine in the midline and paraspinal lumbar musculature." *Id.* Based on a review of Heilman's MRI, Dr. Meyer concluded that Heilman had "profound L4-L5 and L5-S1 [lumbar] facet arthropathy."*Id.* In the Plan section of his notes, Dr. Meyer opined that they would "proceed with bilateral L4-5 and L5-S1 facet injections" for Heilman's condition and he recommended that Heilman "continue to work on his core strengthening, aerobic exercise program" and return in three to four weeks. *Id.* Dr. Meyer acknowledged that Heilman had a valid FCE but noted that following the evaluation Heilman stated he had profound back pain for several days following the exam. *Id.*

In a January 7, 2019 letter in response to questions submitted to him by Petitioner Nationwide, Dr. Meyer explained that when he examined Heilman on December 19, 2018 "it appeared to me that [Heilman] had an exacerbation of his previous condition consistent with significant lumbar facet arthropathy and degenerative disk disease." Pet'r's Ex. C. He further explained that Heilman's current work restrictions "are based upon a re-aggravation of his previous condition but are related to the injury earlier in the month of December." *Id*. Dr. Meyer noted that Heilman's permanent work restrictions are based on his December 2015 FCE. *Id.* Finally, Dr. Meyer opined that he thought Heilman had reached MMI, with the understanding that he might require a spinal fusion in the future. *Id.*

On February 6, 2019, Heilman saw Dr. Meyer for his followup appointment. Dr. Meyer observed that Heilman did not undergo the facet injections he ordered because "[Heilman's] workplace has now

decided to deny any further treatment of his work related injury." Resp't's Ex. 2. In the Plan section of his notes, Dr. Meyer "highly recommend[ed] that [Heilman] undergo the facet injections that were previously ordered [and] [c]ontinue with his core strengthening and flexibility program." *Id.* Dr. Meyer expressed confidence that, after the injections, Heilman would be able to return to work within the parameters set by his December 2015 FCE. *Id.*

On May 1, 2019, Heilman saw Dr. Meyer again. Per Dr. Meyer's notes, Heilman was back because of "his unremitting, excruciating midline back pain. [Heilman] states that while he was able to do a day of work within the confines of his functional capacity, ever since he took the near fall at work in December, after a day of work that has any type of manual component, he is basically bedridden for the next 2 days. He is quite concerned about his ability to fulfill his employment obligations." Pet'r's Ex. D. Dr. Meyer stated Heilman had "profound tenderness to palpation of the midline and paraspinal lumbar musculature." His assessment was "[o]going repetitive exacerbation of lumbar back pain." And in the Plan section of Dr. Meyer's notes he opined:

> I do not think that [Heilman] is able to function under his current functional capacity, especially since his second injury, so I would recommend that he undergo a repeat FCE to see if things have changed since his injury in December [2018], and then we will make further decision. Once again, I admonished him to try to avoid surgical intervention at all cost, because I do not think he would be a good candidate on the basis of his age and his work requirements.

Id.

Petitioners declined to authorize the second FCE recommended by Dr. Meyer and on June 10, 2019, they sent Heilman to Dr. William Boulden for an Independent Medical Examination (IME). Dr. Boulden reviewed Heilman's medical records, including his MRI. Pet'r's Ex. E. Dr. Boulden's diagnosis was low back pain secondary to degenerative disc disease. *Id.* He opined that the pathological processes [i.e. the degenerative changes] were present before Heilman's June 1, 2018 workplace injury. *Id.* He did not think the work injury caused any material aggravation to Heilman's underlying pathology, concluding that Heilman's work injuries were strictly subjective, because there was nothing objective. *Id.*

Dr. Boulden contended, with respect to Heilman's June 1, 2018 injury, that he reached MMI on December 5, 2018. *Id.* Dr. Boulden had similar thoughts concerning Heilman's December 6, 2018 injury,

and opined that Heilman's MMI date was six to eight weeks following the injury. Pet'r's Ex. E. With respect to workplace restrictions, Dr. Boulden noted that Heilman's December 5, 2018 FCE "showed him to be functioning quite well" and recommended the work restrictions therein. *Id.* In his view, the December, 2018 FCE was adequate and Heilman did not need another one. *Id.* Dr. Boulden further opined that he did not think Heilman had adequate physical therapy core strengthening exercises, and recommended that any future treatment should strictly be a core exercise program, of which he "highly recommended the German ball stabilization program." *Id.*

B. Procedural History

On July 1, 2019, Heilman filed an Application for Alternate Medical Care pursuant to Iowa Code Section 85.27. In his application, Heilman requested an order compelling Petitioners to cover the FCE recommended by Dr. Meyer, his authorized treating physician. Deputy Workers' Compensation Commissioner Toby Gordon held a hearing on the matter on July 12, 2019. Petitioners accepted liability for Heilman's June 1, 2018 and December 6, 2018 work injuries and Heilman's condition that was the subject of the alternate care proceeding. Per their hearing testimony, Petitioners explained they denied authorization for the FCE because "[they did not] feel that FCE is medical treatment. It's nothing that's going to help claimant improve his condition at all. It's just a test, so we don't believe that fits under 85.27 as medical treatment." Additionally, they noted that they believed the German stabilization exercise program that Dr. Boulden recommended was not unreasonable. On the other hand, Heilman contended that an FCE fits under Section 85.27 and that it was not appropriate for Petitioners to cut off the treatment recommended by his authorized treating physician with an IME recommendation that suggested an FCE was not needed.

Per his July 15, 2019 decision, the Deputy Commissioner ordered Petitioners to authorize and pay for the FCE recommended by Dr. Meyer. The Deputy Commissioner found Petitioners' argument that tests such as an FCE are not appropriate for an alternate care application unpersuasive.

The Deputy Commissioner then proceeded to the second question presented: whether or not the care authorized by Petitioners was unreasonable. He noted that, to be successful in his application for

alternate care, Heilman bore the burden of establishing the authorized care was unreasonable and identified several rule statements relevant to the issue, stating:

> An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. *Long v. Roberts Dairy Co.*, 528 N.W.3d 122 (Iowa 1995).

In his rule statement, the Deputy Commissioner went on to cite a declaratory ruling and review-reopening decision of the agency, noting:

> An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. *Assmann v. Blue Star Foods*, File No. 866389 (Declaratory Ruling, May 19, 1988).

And that:

> Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgment of its own treating physician. *Pote v. Mickow Corp.*, File No. 694639 (review-reopening decision, June 17, 1986).

The Deputy Commissioner then proceeded to his analysis of the issue, stating

> In this case, the authorized treating physician recommended an FCE, which [Petitioners] have not authorized. The purpose of the recommended FCE is to 'see if things have changed since his injury in December [2018].' This recommendation is based on the concern [that] Dr. Meyer does 'not think that [Heilman] is able to function under his current functional capacity,' which is based on an earlier FCE. In other words the presently recommended FCE is to determine [Heilman's] condition to ensure the present restrictions are appropriate or adjust them according to the new FCE.
> ...
> I conclude based on the above stated law that failure to authorize the FCE as recommended by the authorized treating physician, which will assist with the establishment of current and safe restrictions, is unreasonable.

On September 13, 2019 Petitioners filed for judicial review of the Deputy Commissioner's decision.

STANDARD OF REVIEW

Chapter 17A of the Iowa Code governs judicial review of Iowa Workers' Compensation cases. *Bell Bros. Heating v. Gwinn*, 779 N.W.2d 193, 199 (Iowa 2010). Pursuant to a February 16, 2015 standing

order of the Iowa Workers' Compensation Commissioner, Deputy Commissioners are delegated authority to issue final agency decisions in alternate medical care proceedings. As such, the Deputy Commissioner's decision constitutes a final agency action for the purposes of judicial review.

The district court acts in an appellate capacity to correct errors of law by the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The Court "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19 (10) (a) through (n)." *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc. v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)).

Where an agency has been "clearly vested" with fact-finding authority, the appropriate "standard of review [on appeal] depends on the aspect of the agency's decision that form the basis of the petition for judicial review.". *Burton*, 813 N.W.2d at 256. The standard of review varies depending on whether the alleged error involves an issue of (1) findings of fact, (2) interpretation of law, or (3) an application of the law to facts.

The Court must also grant appropriate relief from agency action if such action was "[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(c). With respect to such provisions of law, the Court is not required to defer to the agency's interpretation. Iowa Code § 17A.19(11)(b). Additionally, the Court must grant relief from agency action that is "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law," based upon a misapplication of law to the facts, or "[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion." Iowa Code § 17A.19(1)(l–n).

If "the claim of error lies with the ultimate conclusion reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Meyer*, 710 N.W.2d at 219. In other words, the Court will only reverse the Commissioner's application of law to the facts if "it is 'irrational, illogical, or wholly unjustifiable.'" *Neal*, 814 N.W.2d at 518 (quoting

Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007); *see also Burton*, 813 N.W.2d at 256 ("When application of law to fact has been clearly vested in the discretion of an agency, a reviewing court may only disturb the agency's application of the law to the facts of a particular case if that application is 'irrational, illogical, or wholly unjustifiable.'").

If the alleged error is one of fact, the standard of review is whether the findings are supported by substantial evidence. *Harris*, 778 N.W.2d at 196; *Schutjer v. Algona Manor Care Ctr.,* 780 N.W.2d 549, 557 (Iowa 2010). "[A] reviewing court can only disturb those factual findings if they are 'not supported by substantial evidence in the record before the court when that record is reviewed as a whole.'" *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Court "is limited to the findings that were actually made by the agency and not other findings the agency could have made." *Id.* "The commissioner, not the court, weighs the evidence." *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 237 (Iowa 1981). "[C]ourts must not simply rubber stamp the agency fact finding without engaging in a fairly intensive review of the record to ensure that the fact finding is itself reasonable." *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003) (internal quotations and citation omitted).

"Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion." *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002) (citing *Ehteshamfar v. UTA Engineered Sys. Div.,* 555 N.W.2d 450, 452 (Iowa 1996)).

ANALYSIS

In this appeal, Petitioners ask the Court to review the Deputy Commissioner's alternate care decision. On appeal, Petitioners make two arguments for error on the part of the Deputy Commissioner. Each will be addressed in turn.

Petitioners first contend the Deputy Commissioner erred in determining that the FCE Heilman sought in his alternate care application was an appropriate subject for an alternate care proceeding under Iowa Code Section 85.27. Petitioners contend the Deputy Commissioner's decision was not supported by substantial evidence and was not consistent with agency precedent.

Numerous deputy commissioner decisions have considered this question over the years. Petitioners highlight *Heitman* where a deputy workers' compensation commissioner faced a similar issue and reviewed past deputy commissioners' decisions. *See Heitman v. Seaton Corp.*, File No. 506002 (Alternate Medical Care, Sept. 2015). The *Heitman* deputy commissioner concluded that whether an FCE is properly considered medical treatment under Iowa Code section 85.27 is a fact-specific determination. The deputy commissioner then outlined the agency's precedent on the matter, explaining:

> If the [FCE] is conducted for purposes of determining ranges of motions and other factors necessary for rendering a permanent impairment rating or establishing (or defending) a claim for permanent disability, the functional capacity evaluation is not likely to be considered medical treatment pursuant to Iowa Code section 85.27. *Crawford v. Maytag Co.*, File No. 5022533 (Alternate Medical Care February 2008).
>
> On the other hand, if the purposes of the [FCE] is to help the treating physician to diagnose, or quantify, claimant's residual functional abilities for purposes of assisting the physician to outline permanent work restrictions, then the [FCE] is more like treatment and is compensable pursuant to Iowa Code section 85.27. *Sears v. Midwest Continental, Inc.*, File No. 5029555 (Alternate Medical Care July 2009).

In *Heitman,* the deputy commissioner found that the purpose of the FCE at issue was to assess the claimant's residual physical and functional capabilities to outline medical restrictions for employment activities, or in other words "to assist in establishing [the] claimant's work restrictions," and concluded the FCE was treatment or diagnosis under Iowa Code section 85.27.

While the Deputy Commissioner did not cite to previous agency precedent on the FCE issue here, he found the FCE in this case similar to an x-ray, in that it is used to assess the patient's existing condition and may or may not lead to any additional treatment or change in treatment. Additionally, the Deputy Commissioner identified Dr. Meyer's basis for recommending the FCE to support his determination. To reiterate the facts section above, Dr. Meyer explained he recommended the FCE because:

> I do not think that [Heilman] is able to function under his current functional capacity, especially since his second injury, so I would recommend that he undergo a repeat FCE to see if things have changed since his injury in December [2018], and then we will make further decision.

Petitioners suggest the clear purpose of the FCE Dr. Meyer recommended was to determine the permanent disability level that Heilman will contend he is entitled to from his second work injury, and

concluded this case was more similar to *Crawford* where the deputy commissioner determined that the FCE was not medical care under section 85.27. Petitioners posit that "[t]here is no mention in Dr. Meyer's notes indicating the FCE is for another purpose, and he makes no mention of any additional treatment." The Court does not find this argument or the facts cited to support it persuasive. Dr. Meyer's notes from Heilman's May 1, 2019 appointment make no suggestion that the FCE was to determine Heilman's permanent disability level.

Petitioners also point out that the Deputy Commissioner stated the purpose of the FCE was to determine Heilman's present capabilities, and to see if things have changed since his December injury, based on Dr. Meyer's concern that Heilman might not be able to function under his current functional capacity. Immediately after this, the Deputy Commissioner also stated that "[i]n other words the presently recommended FCE is to determine [Heilman's] condition to ensure the present restrictions are appropriate or adjust them according to the new FCE." Rather than supporting the Petitioners' argument, the Court finds these facts support the Deputy Commissioner's finding that the FCE recommended by Dr. Meyer was appropriately categorized as medical treatment under Section 85.27. This is because the Court finds the basis for the FCE at issue in this case, to assess Heilman's then-current condition to better inform his work restrictions, to be similar to the bases in the agency decisions in *Heitman* and *Sears,* where the agency found the FCE's to be medical treatment under Iowa Code section 85.27. As such, the Court concludes that the Deputy Commissioner's decision is supported by substantial evidence and is consistent with the agency's prior practices and precedent.[1]

[1] As noted in *Cannon v. Whited*, 810 N.W.2d 532 n.2 (Iowa Ct. App. 2012), this Court also recognizes that the "'controlling legal standards are those set out in the workers' compensation statutes and in this court's opinions, not in prior agency decisions.' *Finch v. Schneider Specialized Carriers, Inc*., 700 N.W.2d 328, 332 (Iowa 2005); accord *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 304 n.2 (Iowa 2005) ('[T]he commissioner's final decision is judged against the backdrop of the workers' compensation statute and the Iowa appellate cases interpreting it, not previous agency decisions.'). But see Iowa Code § 17A.19(10)(h) (authorizing reversal on '[a]ction other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency')."

Next, Petitioners assert that, in finding that Heilman was entitled to alternate medical care, the Deputy Commissioner's decision was erroneous as a matter of law and his application of law to facts was irrational, illogical, and wholly unjustifiable. Petitioners also take issue with the Deputy Commissioner's apparent reliance on *Pote*, an agency-review reopening decision.

Petitioners first contend the Deputy Commissioner erred as a matter of law by not applying the proper legal test in granting Heilman's alternate care application. The Court first notes the controlling case law on the matter, as succinctly summarized in *Lynch Livestock, Inc. v. Bursell*, 870 N.W.2d 274 (Table) (Iowa Ct. App. 2015), is as follows:

> The employee requesting the care has the burden to prove the care being offered by the employer is unreasonable. *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 196-96 (Iowa 2003). '"Determining what care is reasonable under the statute is a question of fact.'" *Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2d 433, 436 (Iowa 1997) (quoting *Long v. Roberts Dairy Co*., 528 N.W.2d 122, 123 (Iowa 1995)). But, if the employee proves the care authorized by the employer has not been effective and that the care is inferior or less extensive than the care requested by the employee, the agency is justified in ordering the alternate care. *Id*. at 437.

Additionally, as cited by the Deputy Commissioner in *Long*, unreasonableness can be shown where the claimant shows either that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. *Long v. Roberts Dairy Co*., 528 N.W.3d 122, 123 (Iowa 1995).

As an initial matter, the Court finds that the Deputy Commissioner cited the correct case law with respect to the burden of proof in alternate medical care proceedings. Nevertheless, Petitioners observe that in this case the Deputy Commissioner determined that the failure of Petitioners to authorize the FCE recommended by Heilman's authorized treating physician was unreasonable. They contend that the finding the Deputy Commissioner needed to make was that the care being offered to Heilman, in the form of physical therapy recommended by Dr. Boulden, was unreasonable, and because he did not, he committed an error of law.

On this point, the Court disagrees. While the Deputy Commissioner's ultimate finding was not stated with perfect clarity, by finding Petitioners' failure to authorize the FCE was unreasonable, the logical

complement of that proposition is that the care the Petitioners offered, which did not include provisions for an FCE, was unreasonable. The Court finds this case is distinguishable from *Bursell* where the Iowa Court of Appeals found fault with the application of law to fact of the agency's alternate care decision because "[n]owhere in the decision did the deputy commissioner conclude that the care being offered by the employer was unreasonable, had not been effective, or was inferior or less extensive." *Bursell*, 870 N.W.2d at 274.

Nevertheless, the Court does take issue with whether the Deputy Commissioner applied the correct law to the facts in reaching his ultimate determination which, as noted above, was phrased appropriately. In applying the law to the facts the Deputy Commissioner stated:

> I conclude based on the above stated law that failure to authorize the FCE as recommended by the authorized treating physician, which will assist with the establishment of current and safe restrictions, is unreasonable.

In the Court's view, the above-stated law the Deputy Commissioner was relying on and the law the agency's decision rested on were the prior agency rulings in *Assman* and *Pote*, and not case law of Iowa courts, such as *Long*, which provides Court sanctioned grounds for establishing the care authorized by the employer is unreasonable. In Respondent's brief, Heilman apparently agrees, citing *Pote* and *Assmann* as the law on which the Deputy Commissioner reached his conclusion. *Pote* explains that employers cannot interfere with the medical judgment of their own treating physician and that reasonable care includes care necessary to diagnose the claimant's condition. In *Bursell*, the Iowa Court of Appeals encountered a similar situation, observing that the agency cited *Pote* in its alternate medical care decision for the proposition that an employer is "not entitled to interfere with the medical judgment of its own treating physician." The Court pointed out that the *Pote* case itself was not an alternate medical care decision and explained it was "not bound by the agency's precedent and offer[s] no opinion on whether this is a correct statement of the law as that issue is not before us on appeal." This court observes that the "controlling legal standards are those set out in the workers' compensation statutes and in this court's opinions, not in prior agency decisions." F*inch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005). As such, this Court finds the Deputy Commissioner's over-reliance on *Assmann* and *Pote* in reaching its ultimate conclusion to be

misplaced. Because the agency failed to apply the correct legal standard to the facts of the case, i.e. the legal standards set out in the workers' compensation statutes and Iowa courts' opinions, the Court finds the agency's decision was irrational, illogical, and wholly unjustifiable and must be remanded to the agency to apply the correct standard to Heilman's application for alternate medical care.

CONCLUSION

IT IS THEREFORE ORDERED the Deputy Commissioner's alternate care decision is AFFIRMED in part and REMANDED back to the agency to rule on Respondent's alternate medical care application consistent with the Court's ruling.

Costs of the appeal are taxed to Petitioners.

State of Iowa Courts

Type: OTHER ORDER

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So Ordered

Robert B. Hanson

Robert B. Hanson, District Court Judge,
Fifth Judicial District of Iowa