IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

MARK DITSWORTH, Petitioner, vs. ICON AG and FEDERATED INSURANCE, Respondents/Cross-Petitioners.	NO. CVCV183838 RULING ON PETITION FOR JUDICIAL REVIEW

Mark Ditsworth, Petitioner, requests the District Court review the final action of the Worker's Compensation Commissioner finding that Petitioner sustained a 50 percent industrial loss as a result of the combined effects of the April 29, 2013, and October 10, 2014, injuries and that Petitioner was entitled to 150 weeks of compensation. Respondents also request review arguing that there was no new injury on October 10, 2014. The issue before the Court is whether the decision of the Worker's Compensation Commissioner ("Commissioner") is supported by substantial evidence on the record and whether he correctly applied the law. The Court affirms the Commissioner's decision.

BACKGROUND FACTS AND PROCEEDINGS

Petitioner sustained two injuries while an employee with Icon Ag. On April 29, 2013, Petitioner injured his back while lifting heavy tractor parts at work. Petitioner settled this claim with Icon Ag and Nationwide. The second, and more serious, injury occurred on October 10, 2014. The second injury is the subject of this administrative review.

Petitioner argues that the Commissioner's decision that Petitioner suffered a new injury on October 10, 2014, should be upheld. Petitioner also argues that the Commissioner erred in reducing the total industrial disability award from 60 percent to 50 percent and that he also erred in reducing the award from 250 weeks to 150 due to the settlement for the April 29 injury with Icon and Nationwide.

Respondents argue that the Commissioner's decision finding a separate and permanent injury on October 10, 2014, is not supported by substantial evidence. In arguing that there was no new injury, Respondents state that Dr. Cederberg's opinion was improperly rejected. The Respondent then argues that the Court cannot substitute its opinion for that of the Commissioner on the percentage of permanent disability that Petitioner sustained as a result of the October 10 injury. Lastly, respondent argues that the Commissioner was correct in reducing the number of week s of compensation from 250 to 150.

I. Review of Medical Records and Exhibits

On April 29, 2013, Petitioner was lifting heavy equipment during work and strained his back. On September 12, 2014, Petitioner applied to Icon Ag for a sales professional position and noted his prior sales experience in his application. *See* Def. Exhibit B. He was not hired for the sales position and continued in his current employment as a technician. On October 10, 2014, Petitioner was loading tires onto a trailer with a coworker. He stepped off the trailer and rolled his ankle. When he rolled his ankle, he tried to catch himself and jarred his back resulting in back pain and pain in both legs.

A. <u>Hearing Before the Deputy Commissioner and Factual Background</u>

On February 22, 2017, a hearing was held before Deputy Commissioner Walshire. Petitioner appeared in person and by his attorney Al Sturgeon, and Respondents appeared through attorney Brian Yung. Petitioner testified that he worked at his father's auto dealership for 18 years. Hearing Tr. at 8. After relocating for his wife's new job, he applied and was hired at Icon Ag in Le Mars, Iowa. *Id*. at 9-10. He testified that his job was to set up John Deere equipment and did reconditioning work on used equipment. *Id*. at 10-11. Petitioner stated that this was a physical position requiring him to perform a lot of climbing, lifting, twisting, crawling, and bending. *Id*. at 11. Petitioner stated that he would sometimes have to lift as much as 130-140 pounds, the weight of a tractor wheel. *Id*.

The first injury sustained by Petitioner occurred on April 29, 2013, when Petitioner and his supervisor were removing a 50-60 pound divider from a trailer. *Id*. at

13. Petitioner testified that when he moved the divider, he heard a pop in his back and experienced immediate pain in his back and shooting pain down his right leg. *Id*.

Petitioner testified that the first treatment he received for this injury was treatment from Dr. De Jong, who he visited nine times for chiropractic services with no improvement in his condition. *Id*. at 14. After a lack of improvement, a representative from Nationwide Insurance referred Petitioner to Dr. Martin, whom he saw between June 10 and September 11 of 2013. *Id*. Dr. Martin treated Petitioner with physical therapy and cortisone shots in his back, again with no relief. *Id*. At this time, Dr. Martin referred Petitioner to Dr. Jensen at CNOS. *Id*.

Petitioner first saw Dr. Jensen on October 2, 2013. *Id*. at 15. Dr. Jensen performed a microdiscectomy on Petitioner on December 5, 2013. *Id*. Petitioner stated that after the surgery he felt "pretty good." *Id*. Petitioner returned to work on light duty with a weight restriction of 20 pounds, which increased at five pounds a week, and eventually Petitioner returned to full duty. *Id*. at 16-17. However, Dr. Jensen prescribed an impairment rating of 10 percent to the body as a whole. *Id*. Petitioner inquired about an opening in sales, but was ultimately not selected for the open position. *Id*. at 21.

On October 10, 2014, Petitioner sustained his second injury, the one at issue in this administrative review. *Id*. at 22. Petitioner stated that he was unloading a trailer when he stepped off the back of the trailer, rolled his ankle, and jarred his back in an attempt to catch himself. *Id*. When Petitioner jarred his back, he experienced instant pain in his back and down both legs. *Id*. Petitioner testified that the pain from this injury was different from the April injury. *Id*. at 23. He testified that this injury was different because he had pain in both legs rather than just his right leg and the pain in his back was more intense. *Id*.

Petitioner went to see Dr. Jensen on October 17, 2014, and this was his first treatment after the injury. *Id*. at 24. Petitioner saw Dr. Jensen's physician's assistant Doug Block, and he performed an MRI. *Id*. At this visit, Petitioner stated he had incontinence issues. *Id*. Based on the MRI, Dr. Jensen recommended a fusion of the L5-S1 and another decompression of the L5-L4. *Id*. at 25. Petitioner testified that he was sent to Dr. Boulden to receive an independent medical evaluation. *Id*. Petitioner

testified that Dr. Boulden did not ask him how his symptomology after the second injury was different from the first. *Id*.

After visiting Dr. Boulden, Nationwide found that the second injury was not a continuation of the first and that they would not cover it, so Petitioner filled out paperwork to submit a claim to Icon Ag's new insurer, Federated Insurance. *Id*. at 27. At this time Petitioner was sent to see Dr. Cederberg for another independent medical examination. *Id*. at 27. After this examination, Petitioner was declined coverage from Federated for his injury. *Id*.

Petitioner then sought treatment from Dr. Asfora in Sioux Falls. *Id*. at 28. Dr. Asfora performed a double fusion of the L5-S1 and L5-L4. *Id*. After the surgery Petitioner was unable to perform certain aspects of his job due to the tight space he was required to work in because of the required twisting and climbing. *Id*. 29-30. Petitioner applied for a sales job and a parts delivery job and was not selected for either of those positions, and so he continued in his position working without restrictions. *Id*. at 32-34. On April 6, 2016, Petitioner was terminated from his employment with Icon Ag after a heated discussion with his supervisor about changes in the employee manual and signing an acknowledgement form. *Id*. 34-38. Petitioner testified that he had no prior written or verbal warnings and he never received a bad annual performance review. *Id*. at 38-39. On May 12, 2016, Petitioner went for a Functional Capacity Examination.

B. <u>Medical Evaluation Incident to the First Injury</u>

On June 11, 2013, Dr. Stephens evaluated Petitioner. Joint Exhibit 2-10. He stated that Petitioner had "[m]ild disc space narrowing at the L5-S1 level. Minimal changes of degenerative disease and facet arthropathy at L4-5 and L5-S1 levels." *Id*. His diagnosis was mild lower lumbar spondylosis. *Id*. On July 1, 2013, Petitioner visited Dr. Martin. *Id*. at 13. Dr. Martin evaluated an x-ray and stated that Petitioner had "some very mild disk space narrowing at the L5/S1 level, but I really do not see any other significant concerns." *Id*. at 13.

Dr. Martin saw Petitioner on July 16, 2013. *Id*. at 14-15. He stated that Petitioner had a herniated disk at L5-S1, which displaced the right S1 nerve root. *Id*. at 14. Petitioner also had a bulge at L4-L5. *Id*. In December of 2013, Petitioner underwent surgery for his L5-S1 herniation. Joint Exhibit 4-31. Dr. Jensen, with CNOS, performed

a microdiscectomy on the right side at the L5-S1 area of the spine. *Id*. After the surgery, Petitioner reported that his right leg pain had been totally abated. *Id*. In a letter dated April 7, 2014, Dr. Jensen opined that he believed that Petitioner had sustained an impairment of 10 percent of the whole body as a result of his April 29, 2013, injury. *Id*. at 41.

In June of 2014, Petitioner returned to Dr. Jensen and reported that he had been experiencing back pain and some pain in his right leg in the previous three weeks. *Id*. at 44. In August of 2014, Petitioner was diagnosed with a recurrent disk herniation at L5-S1. *Id*. at 53. At that time, Petitioner indicated that he did not want to proceed with surgical intervention, and Dr. Jensen found that reasonable. *Id*.

C. Medical Evaluation of Treating Doctor, Dr. Jensen

Dr. Jensen evaluated Petitioner on October 17, 2014, following the second injury. Joint Exhibit 4-57. On that date, Dr. Jensen stated that Petitioner had trouble standing erect and Petitioner had two episodes of urinary incontinence and chronic diarrhea following the second injury. *Id*. at 57. At that appointment Dr. Jensen diagnosed Petitioner with lumbar radiculopathy. *Id*. at 59-62. On February 2, 2015, Dr. Jensen diagnosed Petitioner with "L5-S1 degenerative disk disease with recurrent disk herniation and recurrent S1 radiculopathy on the right, symptomatic. . . . L4-5 spinal stenosis, possibly contributing to some of his symptoms." *Id*. at 71.

At that point, Petitioner elected to proceed with surgical intervention. *Id*. at 71. Dr. Jensen also referred Petitioner to the Siouxland Pain Clinic where Petitioner was evaluated by Dr. Poulsen. Joint Exhibit 6-89. During that visit Petitioner described pain in both of his legs as compared to just the right leg previously and that the pain in his legs was in a different location than with the previous injury. *Id*. Dr. Poulsen administered a lumbar transforaminal epidural steroid injection. Joint Exhibit 8-103. On June 18, 2015, Petitioner underwent surgery for a L3-4 and L5-S1 lumbar fusion. Joint Exhibit 5-79.

D. Independent Medical Evaluation of Dr. Boulden

On January 29, 2015, Dr. Boulden prepared a report based on his review of Petitioner's medical file and examination of Petitioner. Joint Exhibit 9-105. Dr. Boulden reviewed the MRI from July 12, 2013, and opined that he believed Petitioner had a

herniated disk at L5-S1 on the right and a protrusion at L4-5. He also opined that he did not believe that the need for surgery was a result of the April 29, 2013, injury. *Id*. at 107. He stated that any recurrent herniated disk that Petitioner had would be attributable to a new injury. *Id*.

E. Independent Medical Evaluation of Dr. Bansal

Dr. Bansal performed an Independent Medical Evaluation and issued a written report after reviewing Petitioner's medical records and examining Petitioner on November 4, 2016. Pet. Hearing Exhibit 1. In his report regarding Petitioner's physical examination, Dr. Bansal noted that there was tenderness to palpation over the lower lumbar paraspinals. *Id*. at 13. In a range of motion test, Petitioner had Flexion of 75 degrees; Extension of 37 degrees; Left Lateral Flexion of 28 degrees; and Right Lateral Flexion of 26 degrees. *Id*. Dr. Bansal also noted that Petitioner had a loss of sensory discrimination over the mid toes. *Id*. Dr. Bansal opined that the second disk herniation, on October 10, was contributed to by the original herniation on April 29. *Id*. at 16. Dr. Bansal reported that he believed Petitioner had a 22 percent whole person impairment. *Id*. at 17.

F. Independent Medical Evaluation of Dr. Cederberg

Dr. Paul Cederberg, an orthopedic surgeon, performed an Independent Medical Evaluation of Petitioner and issued a report containing his findings on April 23, 2015. Def. Exhibit A at 1. Dr. Cederberg conducted a review of Petitioner's prior medical records. *Id*. at 1-3. Dr. Cederberg also conducted a physical examination of Petitioner. *Id*. at 3. Dr. Cederberg stated that Petitioner had "a traced of weakness of his right ankle flexors," and that his knee and ankle reflexes were intact. *Id*. He also stated that Petitioner had "moderate paraspinal spasm," that his side to side bending was "very limited to 10 degrees," and that a lumbar extension was not attempted due to Petitioner's discomfort. *Id*. Dr. Cederberg did not view any imaging studies. *Id*. Dr. Cederberg stated that he believed that Petitioner sustained no new injury on October 10, 2014. *Id*. at 4. Dr. Cederberg placed working restrictions on Petitioner of no lifting over 35 pounds, he could lift 20 pounds frequently, and no restriction on the number of hours that he could work. *Id*. at 5.

II. Prior Proceedings

On February 22, 2017, a hearing was held on Petitioner's claim for workers' compensation benefits before Deputy Workers' Compensation Commissioner Larry Walshire. The matter was fully submitted on March 17, 2017, after the submission of the parties' briefs and argument. The Deputy found that Petitioner had a 60 percent reduction in earning capacity after the October 10 injury. The Deputy ordered that Respondents pay claimant 250 weeks of permanent partial disability benefits and found that Respondents were not entitled to a credit for the settlement of Petitioner's April 29 injury.

STANDARD OF REVIEW

The standard of review applicable to agency action is delineated at Iowa Code Section 17A.19. The section provides that the reviewing district court shall grant "appropriate relief from agency action" if the court has decided that the agency action is based upon the occurrence of any one of several factors. Iowa Code § 17A.19(10) (2018). One occurrence that mandates relief is when an agency's decision is "[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." *Id.* § 17A.19(10)(c). Relief from an agency's decision is also appropriate when the agency's interpretation of law or application of law to fact is "[b]ased upon an irrational, illogical, or wholly unjustifiable" interpretation or application. *Id.* § 17A.19(10)(l), (m). Additionally, relief from an agency decision should be granted when the agency's decision was "[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion." *Id.* § 17A.19(10)(n).

The district court is "bound by the agency's fact findings if those findings are supported by substantial evidence. Evidence is substantial if a reasonable person would find it adequate for reaching a decision." *Fairfield Toyota, Inc. v. Bruegge*, 449 N.W.2d 395, 397 (Iowa Ct. App. 1989).

> 'The mere possibility that the record would support another conclusion does not permit the district court or this court to make a finding inconsistent with the agency findings so long as there is substantial evidence to support it.' While the substantiality of evidence must take into account whatever in the record fairly detracts from its weight, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. The question is not whether there is sufficient evidence to warrant a decision the agency did not make, but rather whether there is substantial evidence to warrant the decision it did make.

Peoples Mem'l Hosp. v. Iowa Civil Rights Comm'n, 322 N.W.2d 87, 91 (Iowa 1982) (citing *Woods v. Iowa Dept. of Job Service*, 315 N.W.2d 383, 841 (Iowa Ct. App. 1981); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, (1951); *City of Davenport v. PERB*, 264 N.W.2d 307, 311 (Iowa 1978); *Reisner v. Board of Trustees of Fire Retirement System*, 203 N.W.2d 812, 814 (Iowa 1973)).

ANALYSIS

The Commissioner found the opinions of Drs. Bansal and Boulden to be more credible than the opinion of Dr. Cederberg. While the Respondents argue that the opinion of Dr. Cederberg was improperly rejected, it is for the factfinder, the Commissioner, to assign value to the testimony and opinions before the agency. . *See Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007) ("It is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue."). The Commissioner found that Petitioner sustained a new injury on October 10, 2014, which was separate from the April 29, 2013, back injury. This is supported by substantial evidence in the record in that Dr. Jensen opined after the first injury that he found it reasonable for Petitioner to not seek surgical treatment at that time, but after October 10, 2014, surgical intervention became needed.

Dr. Bansal found that Petitioner had a permanent impairment of the body as a whole of 22 percent after the second incident and resulting surgery. Respondents acknowledge in their brief that Petitioner had received a 10 percent impairment rating before the second injury and that Petitioner did not have formal restrictions after his first surgery. The Court finds that the Commissioner's finding that the October 10 incident constituted a separate injury from the April 29 incident is supported by substantial evidence in the record.

In determining Petitioner suffered a 50 percent industrial disability from the combined effects of the April 29 and October 10 injuries, he considered all of the relevant factors. He considered that Petitioner was 47 at the time of the hearing; that he had a high school education; and that prior to working at Icon, he had held employment selling used cars at his father's dealership. *See Polaris Industries, Inc. v. Hesby*, 881 N.W.2d 471 (Table), No. 15-0629 2016 WL 541081, *5 (Iowa Ct. App. Feb. 10, 2016). The Commissioner considered the relevant factors and his determination is supported by substantial evidence in the record.

The Commissioner applied the law correctly when he credited Respondents for benefits paid for Petitioner's April 29, 2013, back injury, which was settled between

Petitioner; Icon Ag; and Icon's insurer at the time, Nationwide. *See* IOWA CODE §85.34(7)(b) (2017); *Polaris*, 881 N.W.2d at *6. Section 85.34 states:

> If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

IOWA CODE §85.34(7)(b). Here the Commissioner did exactly what the statute required. He subtracted the percentage of industrial disability attributable to the first back injury, which Petitioner settled, from the total industrial disability of Petitioner, which the Commissioner found was 50 percent. Therefore the Court finds there was no error in the Commissioner crediting Icon Ag for its prior compensation of Petitioner for his prior injury.

CONCLUSION

There was sufficient evidence in the record for the Commissioner to find that there was a second injury on October 10, 2014. The Commissioner also considered the correct factors in determining Petitioner sustained a total industrial disability of 50 percent, and that determination is supported by substantial evidence in the record. Lastly, the Commissioner correctly applied the statute in effect at the time of the Deputy's decision and correctly credited Icon Ag for the compensation paid Petitioner in the settlement of his first injury.

IT IS THEREFORE ORDERED that the decision of the Commissioner is AFFIRMED.

SO ORDERED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV183838	DITSWORTH, MARK V. ICON AG & FEDERATED INSURANCE

So Ordered

Jeffrey L. Poulson, District Court Judge,
Third Judicial District of Iowa