

## IN THE IOWA DISTRICT COURT FOR WORTH COUNTY

LORRI HAGEN,  Petitioner,  vs.  SERTA/NATIONAL BEDDING CO., LLC, and SAFETY NATIONAL CASUALTY CORP.,  Respondents.	Case No. CVCV012778  RULING ON PETITION FOR JUDICIAL REVIEW
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This case comes before the Court on the Petition for Judicial Review filed by Lorri Hagen (“Hagen”) on June 10, 2021. Pursuant to a scheduling order entered by the Court, Hagen and Respondents, Serta/National Bedding Co., LLC (“Serta”) and Safety National Casualty Corp., have briefed the arguments in support of their respective positions, and this case was submitted to the Court for its decision on October 1, 2021. After reviewing the briefs of the parties, reflecting on the administrative record of the proceedings conducted before the Workers’ Compensation Commissioner, and considering the applicable law, the Court is prepared to rule.

STATEMENT OF THE CASE

Hagen sustained an injury to her right lower leg and foot on February 21, 2017, arising out of and in the course of her employment with Serta. As Hagen was moving a load of quilt tops for mattresses, a cart weighing about 350 lbs. rolled into the back and over the outside of her right foot. Over the next two years, Hagen sought medical care and treatment for the injury to her lower leg and foot, but was not able to return permanently to her job with Serta. Hagen eventually filed a petition in arbitration against Respondents, seeking workers’ compensation benefits for the injury she suffered on February 21, 2017.

Deputy Workers’ Compensation Commissioner Andrew Phillips conducted a hearing on the claim for benefits made by Hagen on September 25, 2020, and entered his written decision on November 24, 2020. Among other findings and conclusions, Deputy Commissioner Philips determined that Hagen reached maximum medical improvement on July 22, 2019, and was entitled to permanent partial disability benefits based on a 60% industrial disability.

In making his decision, Deputy Commissioner Phillips specifically excluded from the record and gave no consideration to the following two exhibits offered by Hagen at the hearing:

1. Exhibit 10 – a report dated September 10, 2020, which John Kuhnlein, D.O., prepared following an independent medical evaluation of Hagen he performed on June 23, 2020 (hereafter referred to as the “Kuhnlein Report”); and
2. Exhibit 11 – a report dated September 10, 2020, which Tom Karrow, M.Ed., prepared regarding his assessment of the vocational employability of Hagen (hereafter referred to as the “Karrow Report”).

Deputy Commissioner Phillips held that exclusion of the Kuhnlein Report and the Karrow Report was warranted due to the failure of Hagen to provide Respondents copies of them within the deadlines established under Iowa Admin. Code 876 – 4.19(3). Because the Kuhnlein Report and the Karrow Report were excluded from the record, Deputy Commissioner Phillips also decided to exclude exhibits representing, and deny reimbursement to Hagen for, the invoices that Dr. Kuhnlein and Mr. Karrow submitted for their services in preparing their respective reports. The invoice of Dr. Kuhnlein in the amount of \$4,312.50 was offered by Hagen as Exhibit 14. The invoice of Mr. Karrow in the amount of \$3,850.00 was offered by Hagen as Exhibit 15.

Hagen timely appealed from the decision of Deputy Commissioner Phillips. On May 17, 2021, Workers’ Compensation Commissioner Joseph Cortese issued his decision on appeal, in which he affirmed in part, modified in part, and reversed in part the arbitration decision of Deputy Commissioner Phillips. Commissioner Cortese increased the amount of penalty benefits that Respondents must pay Hagen from \$5,394.28 to \$12,171.36 and ordered Respondents to reimburse Hagen \$4,312.50 for the cost of the IME performed by Dr. Kuhnlein, but affirmed all other aspects of the arbitration decision. While he noted that other deputy commissioners in similar circumstances “often” admit late reports from claimants and keep the record open for defendants to acquire responsive reports, Commissioner Cortese affirmed the decision made by Deputy Commissioner Phillips to exclude the Kuhnlein Report and the Karrow Report from the record.

Hagen subsequently filed her Petition for Judicial Review. In her brief, Hagen asserts that Commissioner Cortese erred:

- I. By excluding from the record the Kuhnlein Report, the Karrow Report, and the corresponding invoice from Mr. Karrow;

- II. By declining to assess the costs of the Karrow Report to Respondents; and
- III. By concluding that Hagen only sustained a 60% industrial disability and not finding her permanently and totally disabled under either the statutory analysis or the “odd-lot” theory.

### STANDARD OF REVIEW

Under a petition for review of an administrative action, “the district court acts in an appellate capacity.” *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). The scope of review to be conducted by the Court is governed by Iowa Code Chapter 17A. A district court is authorized to grant relief only if the action of the administrative agency is affected by an error of law, unsupported by substantial evidence in the record, or characterized by an abuse of discretion. *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 151 (Iowa 1997). An abuse of discretion occurs when the agency exercises its discretion on untenable grounds or its exercise of discretion was clearly erroneous. *IBP, Inc. v. Burress*, 779 N.W.2d 210, 214 (Iowa 2010); *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). Because the interpretation of workers’ compensation statutes and related case law has not been clearly vested in the discretion of his office, interpretations of law made by the workers’ compensation commissioner are not entitled to deference. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

### CONCLUSIONS OF LAW

The Court will address only the first assignment of error made by Hagen as it is dispositive of the relief to be granted on judicial review. Hagen asserts that Commissioner Cortese erred in excluding the Kuhnlein Report and the Karrow Report. These reports were excluded because Hagen failed to make a timely certification of Dr. Kuhnlein and Mr. Karrow as her expert witnesses at least 120 days in advance of the arbitration hearing as required by Iowa Admin. Code 876 – 4.19(3)(b) and she did not produce copies of the reports to Respondents at least 30 days before the hearing as required by Iowa Admin. Code 876 – 4.19(3)(c)-(d).

Our Supreme Court has recognized that excluding untimely disclosed evidence is a “severe sanction” and is justified only in limited circumstances. *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997). The applicable rule in workers’ compensation proceedings only permits exclusion when the objecting party is able to show that receipt of the evidence would be *unfairly* prejudicial. Iowa Admin. Code 876 – 4.19(3)(e) (emphasis added). In this case, Deputy Commissioner Phillips and Commissioner Cortese both decided to exclude the

Kuhnlein Report and the Karrow Report without first making the necessary finding that admitting these reports would be unfairly prejudicial to Respondents. Instead, both assumed that the prejudice to Respondents inherent in the late disclosure and production of the reports by Hagen was sufficient, in itself, to warrant their exclusion from the record. The Court finds that the reliance of Commissioner Cortese on this assumption constitutes an abuse of discretion and a failure to apply and interpret the law correctly.

Not only did Commissioner Cortese fail to find Respondents would suffer unfair prejudice if the two reports were admitted, there is no evidence in the record to support such a finding. In their arguments before Deputy Commissioner Phillips, Respondents claimed they would suffer two kinds of prejudice if the Kuhnlein Report and the Karrow Report were not excluded. Neither claim of prejudice stands up on closer examination.

At the arbitration hearing, Respondents asserted that if Deputy Commissioner Phillips admitted the Kuhnlein Report and the Karrow Report into evidence, they would have no reasonable opportunity to gather or present evidence to rebut the opinions offered by Dr. Kuhnlein and Mr. Karrow. To address their concern, Hagen offered to have the record left open so Respondents could obtain and file supplemental reports from their experts. Respondents declined this option, arguing that doing so would unduly delay the final disposition of this case. Given that Commissioner Cortese found Respondents to have unreasonably denied or delayed paying Hagen temporary disability benefits for over seven months earlier in these proceedings, the Court questions whether Respondents have any genuine concerns about disposing of this case promptly.

Respondents also asserted that prejudice would result if the Kuhnlein Report and the Karrow Report were admitted because they then would have to bear the cost of obtaining evidence to rebut the opinions set forth therein. As Hagen aptly notes, Respondents would have had this cost even if she had timely certified her experts and timely produced their reports. Given that this is a cost Respondents would have had in the event Hagen had strictly complied with Rule 4.19(3), there is no basis for the Court to view it as a kind of unfair prejudice to Respondents.

It is important to keep in mind that Hagen gave Respondents notice of the involvement of Dr. Kuhnlein and Mr. Karrow in this case before either of them prepared his report and she provided the reports to Respondents as soon as Hagen herself received them. Hagen notified

Respondents of her intent to have Dr. Kuhnlein conduct an IME in November 2019. She also updated her discovery responses to add Mr. Karrow as an expert on August 19, 2020.

Workers' compensation statutes are to be liberally construed in favor of the worker. *Ewing v. Allied Construction Services*, 592 N.W.2d 689-691 (Iowa 1999). "The primary purpose of the workers' compensation statutes is to benefit the worker and his or her dependents, insofar as statutory requirements permit." *McSpadden v. Big Ben Coal Company*, 288 N.W.2d 181, 188 (Iowa 1980). The manner in which Commissioner Cortese interpreted and applied Rule 4.19(3)(e) in this case is contrary to these purposes.

In his decision on appeal, Commissioner Cortese acknowledged that deputy commissioners often admit late reports and keep the record open to allow the other party additional time to obtain responsive reports and that this approach is the "preferred remedy" among many deputy commissioners when dealing with the issue of late reports. In light of this common practice, it strikes the Court as arbitrary for Commissioner Cortese to uphold the exclusion of the Kuhnlein Report and the Karrow Report in this case without any showing of unfair prejudice by Respondents.

Before he could exclude the Kuhnlein Report and the Karrow Report from the record, Rule 4.19(3)(e) required Commissioner Cortese to find that Respondents would be unfairly prejudiced if the reports were received into evidence. Commissioner Cortese did not make this finding, nor could he, as there was no showing by Respondents that they would suffer any prejudice by the admission of the reports, other than the basic prejudice inherent whenever unfavorable evidence comes to light shortly before a trial. After a review of the administrative record, the Court finds that the decision of Commissioner Cortese to exclude the Kuhnlein Report and the Karrow Report from the evidence received at the arbitration hearing constituted an abuse of discretion, which warrants a remand for further proceedings.

#### RULING

THEREFORE, IT IS ORDERED THAT the decision of Commissioner Cortese to affirm the exclusion of the Kuhnlein Report and the Karrow Report is reversed and this case is remanded to Commissioner Cortese for further proceedings. On remand, Commissioner Cortese is to reopen the administrative record, admit Hagen's Exhibits 10, 11, and 15, leave the record open for a whatever length of time he deems sufficient to permit Respondents an opportunity to

file responsive reports, and then revisit and rule on the issues that Hagen raised in her appeal from the decision of Deputy Commissioner Phillips. The costs of this action are taxed against Respondents.

Clerk shall furnish copies to:

John Loughlin  
Lindsey Mills



State of Iowa Courts

**Case Number**  
CVCV012778

**Case Title**  
(CCF)HAGEN V SERTA-SIMMONS & SAFETY NATIONAL  
CASAULTY  
**Type:** OTHER ORDER

So Ordered

A handwritten signature in black ink that reads 'Chris Foy'. The signature is written in a cursive, flowing style.

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Chris Foy, District Court Judge,  
Second Judicial District of Iowa

Electronically signed on 2022-04-11 15:33:33