IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CENTRAL IOWA FENCING, LTD AND GRINNELL SELECT INSURANCE, Petitioners, **v.** **JOSH HAYS, Claimant/Respondent**	**Case No. CVCV061207** **RULING ON PETITION FOR JUDICIAL REVIEW**

This is a Petition for Judicial Review from a final decision of the Iowa Workers' Compensation Commission. The Court held a hearing on this matter on June 18, 2021. Christopher Spencer represented Petitioners and Nicholas Platt represented Respondent. Petitioners request this Court reverse or modify the decision of the Iowa Workers' Compensation Commissioner and assess costs to Respondent.

I. INTRODUCTION

A. Factual Background

Josh Hays was a 38-year-old man at the time of the Arbitration hearing. Hays does not have a high school education or a High School Equivalency Certificate. After dropping out of high school in the 10th grade, Hays has worked as a general laborer. He has completed machine school through LeafGuard and has obtained a license to drive a straight truck. He has also received certifications in lead removal, basic tool and die, and blueprinting. He has worked as a machinist, a mechanic, a construction crew member, and a production manager. Hays started working for Central Iowa Fencing (CIF) in 2015 and worked there for two seasons. He left for six-eight months to work for Custom Stone and Granite when CIF would close down for the winter. However, he returned to CIF in the fall of 2017 where he worked part-time through March 2018. After March 2018, he began working full-time once fence building season started. His job at CIF required extensive lifting, bending, and twisting. Transcript (Tr.) at 24-25. The material could weigh

anywhere from 20 to 200 pounds. *Id.* at 25. When he left CIF he was making $20-30 per hour. *Id.* at 67.

On April 26, 2018, Hays and another coworker were removing an old fence post. Hays was pushing on the fence post while his coworker was pulling the post out of the ground. Hays felt a pop in his low back and started experiencing immediate pain. He was taken by a coworker to his chiropractor, Dr. Nerem, after the injury occurred. After this incident at work, Hays never went back to the full duties of his job and coworkers would help with the heavy lifting or digging. The owner of CIF, Mark Dunahoo, testified that Hays began requiring accommodations for his back after the April incident. Joint Exhibit (JE) 5-75 at 12. Hays went back to work full-time, however, his back never went back to "feeling 100%." Tr. at 36. He did not return to Dr. Nerem until the beginning of July 2018, when he began having sharp and shooting discomfort in his low back and buttocks. JE 1 at 68.

Between July 23-25, 2018, Hays was working at a job site in Van Meter when he exacerbated his April 2018 back injury. Hays was carrying and pounding fence posts into rocky ground. Tr. at 39-40. The post-pounder he was using and carrying weighed anywhere from 60 to 100 pounds. Tr. at 44; JE 5- 74. On July 25, 2018, Hays had to stop due to the pain in his back. Hays returned to Dr. Nerem on July 25 for the exacerbation of his back pain. JE 1 at 68. He missed work on July 26, 2018. Defendants' Exhibit (DE) J at 4. He then returned to Dr. Nerem on July 27, July 31, and August 8, 2018, reporting similar back pain. JE 1 at 70-74. During the August 8, 2018 office visit to Dr. Nerem, Hays first began to complain of significant pain in his left leg. *Id.* at 74. Hays was moving out of his house in late July and early August. Petitioners believe the moving is how Hays aggravated his back, not the job in Van Meter.

Hays continued to work for CIF until August 8, 2018, but could hardly move and do most of what was required for the job. Tr. at 50. Mark Dunahoo told Hays to take time off and go to a doctor and rest his back. There is a dispute about whether Hays was fired or not at that point. Hays testified that Mark Dunahoo told him they had to part ways because he no longer had work available for him. However, Mark Dunahoo called him that Monday and told him he was not fired and that a workers' compensation claim would be started. *Id.* at 50-53.

On August 14, 2018, Hays went to Dr. Quam for medical treatment that was authorized by CIF. JE 2 at 1-2. An injury date of April 26, 2018, was listed on the workers' compensation forms. *Id.* at 1. Hays said his symptoms would come and go since the April 26, 2018 work injury. He also had "new" symptoms with his low back complaints that involved his left leg. JE 5-45 at 6. At the time, Dr. Quam believed the left leg injury to be inconsistent with injury on April 26, 2018. JE 5-48 at 19. Dr. Quam testified that Hays only gave him a history of the injury on April 26, 2018, and did not mention an injury on July 23-25. JE 5-46 at 12. Dr. Quam diagnosed Mr. Hays with acute left-sided low back pain, with left-sided sciatica. JE 2 at 3. He ordered physical therapy and an MRI. *Id.* Dr. Quam restricted Hays from returning to work and did not release him to light work duty (25-pound restriction) until October 15, 2018. *Id.* at 5, 12.

Hays's claim for workers' compensation benefits was denied after his initial appointment on August 14 with Dr. Quam. Tr. at 54. He had an MRI paid for by a friend after his claim was denied. The MRI showed:

> A small posterior disc bulge, asymmetric to the right, superimposed on endplate spurs, which caused a mild mass effect on the descending left S1 nerve root in the left lateral recess, as well as moderate bilateral foraminal stenosis at L4-L5 and mild bilateral formainal stenosis at L5-S1 and a small central inferior disc extrusion at L4-L5 without nerve compression.

JE 2 at 9-10. Dr. Quam recommended injections for pain relief. *Id*. at 10. Hays went to Broadlawns to be treated by pain specialists and was seen by multiple surgeons. JE 3 at 1; Claimant's Exhibit (CE) 4 at 4. He has continued to be treated by Dr. Nerem. He went for an evaluation at the University of Iowa Neurological Spine Center and it was recommended he obtain an updated MRI and EMG. Tr. 70.

Hays was evaluated by Dr. Kuhnlein on January 10, 2019. CE 1 at 1. Dr. Kuhnlein found that Hays had suffered a work-related injury on April 26, 2018, and also on or about July 23, 2018. His opinion is that the second injury on or about July 23, materially and permanently aggravated the pre-existing lumbar condition. *Id*. at 9. Hays would need to have a surgical evaluation, and if surgery was not needed, he will need ongoing medical care and pain management. *Id.* at 10. Kuhnlein opined that Hays was not at maximum medical improvement (MMI) and restricted Hays to sedentary work with no lifting more than five pounds. He gave a provisional impairment rating of 8% whole person impairment rating pursuant to the AMA guides. *Id.* at 11.

On July 19, 2019, Hays was evaluated by Dr. Chen. DE B at 3. Dr. Chen opined that Hays likely developed "left S1 radiculitis with unknown or idiopathic causation sometime between July 31, 2018, and August 8, 2018." *Id.* at 7. He further stated that Hays had discrepancies that could not be overcome to show whether the back issues were permanently aggravated by the injury on April 26, 2018, or the incident at the job in Van Meter in late July. *Id.* at 6-7. Dr. Chen's opinion was based on Hays's self-reported improvement of low back pain/complaints through July and the new complaints that included left leg pain on August 6, 2018. *Id.* Dr. Chen agreed with Dr. Kuhnlein's recommendations for further pain treatment and agreed with the permanent partial impairment rating pursuant to the AMA Guides 5th Edition. *Id.* at 7-8.

On November 5, 2018, Hays started working part-time at Casey's as a cashier where he makes $11 per hour and works 28-32 hours per week. Tr. at 67; CE 12 at 1. He could not return to his job at CIF due to the employer not accommodating his restrictions or offering him any work. He has special accommodations at his current job, including having to take more frequent breaks than normally allowed and he has to leave work early due to pain two to three times per week. Tr. at 120-21.

B. Procedural History

Hays filed a Petition with the Iowa Workers' Compensation Commission on September 13, 2018. He alleged an injury to this back arising out of and in the course of his employment on April 26, 2018, July 23, 2018, and/or August 9, 2018. The arbitration hearing was heard before Deputy Workers' Compensation Commissioner Michael Lunn, and the Arbitration Decision was filed on May 28, 2020. The Arbitration Decision found that Hays suffered a cumulative injury, from the two work injuries in April 2018 and July 2018, with a manifestation date of August 9, 2018. Arbitration Decision (Arb. Dec.) at 21. Defendants were responsible for the reimbursement or payment of the causally related medical expenses in Claimant's Exhibit 5. *Id.* The Deputy Commissioner also held Hays was not yet at maximum medical improvement (MMI) and his claim for industrial disability was not yet ripe for determination. *Id.* Hays was awarded temporary total disability benefits from August 10, 2018, to November 5, 2018, and temporary partial disability benefits commencing on November 5, 2018, until such time as Iowa Code section 85.33 is met. *Id.* at 22-23, 27. Hays's workers' compensation rate was $525.54 based upon an average weekly wage of $771.69, with Hays's being married and entitled to four exemptions. *Id.* at 24-25. Claimant's request for alternate care was granted and Defendants were ordered to pay for causally related future medical care as recommended by Drs. Nerem, Quam, and Rossi. *Id.* at 25. Hays was

also awarded costs of the medical report by Dr. Kuhnlein in the amount of $2,224 as well as any additional costs associated with the litigation ($100 filing fee). *Id.* at 26. The Deputy Commissioner also denied Claimant's motion to strike Defendants' penalty section of their brief as to industrial disability. *Id.* at 27.

The Employer and Insurance Carrier filed a Notice of Appeal on June 16, 2020, to the Iowa Workers' Compensation Commissioner. The Workers' Compensation Commissioner, Joseph S. Cortese II, filed an Appeal Decision on December 17, 2020, where he affirmed the findings and conclusion of the Deputy Commissioner and adopted them as his own. The Employer and its Insurance Carrier filed a Petition for Judicial Review with the Polk County District Court on January 14, 2021.

II. STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id.* § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002).

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

The application of the law to the facts is also an enterprise vested in the commissioner. *Mycogen*, 686 N.W.2d at 465. Accordingly, the Court will reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." *Id.*; Iowa Code § 17A.19(10)(l). "A decision is "irrational" when it is not governed by or according to reason." *Christensen v. Iowa Dep't. of Revenue*, 944 N.W.2d 895 at 905 (Iowa 2020). A decision is "illogical" when it is

"contrary to or devoid of logic." *Id*. "A decision is "unjustifiable" when it has no foundation in fact or reason" or is "lacking in justice." *Id*. This standard requires the Court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

III. MERITS

A. Did the Commissioner properly determine Hays's injury arose out of and in the course of his employment?

Commissioner in his Appeal Decision filed December 17, 2020, determined Hays sustained a permanent aggravation of his underlying low back condition and it was sustained as a work-related injury at CIF. The Commissioner found the causation opinions of Dr. Kuhnlein and Dr. Quam to be more persuasive than those of Dr. Chen. He held Hays produced evidence of at least two separate incidents while working at CIF and these two incidents were depicted through medical records and testimony. He further determined "the cumulative effects of claimant's work activities, including the two distinct events in April and July 2018, resulted in the development of a permanent low back injury to claimant with a manifestation date of August 9, 2018." Petitioners assert there is no evidence in the record to support this finding, and contends that Hays's injury was caused by his pre-existing back issues caused by multiple non-work-related prior injuries, and most likely aggravated by him moving in July and August 2018.

"It is well settled in Iowa that for an injury to be compensable, it must occur both in the course of and arise out of employment." *Miedema v. Dial Corp.*, 551 N.W.2d 309, 310-11 (Iowa 1996). "An injury occurs 'in the course of employment' when it is 'within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto.'" *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000) (quoting *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150

(Iowa 1996) (citations omitted)). An injury "arises out of" employment when there is a causal connection between the employment and the injury. *Id.* For an injury to arise out of the employment, the employee's injury must be a "rational consequence of the hazard connected with the employment." *2800 Corp. v. Fernandez*, 528 N.W.2d 124, 128 (Iowa 1995) (citing *Burt v. John Deere Waterloo Tractor Works*, 73 N.W.2d 732, 737 (1955)). "[T]he injury must not have coincidentally occurred while at work, but must in some way be related to the working environment or the conditions of . . . employment." *Miedema*, 551 N.W.2d at 311. The employee must prove that a causal relationship was probable rather than merely possible. *Kostelac v. Feldman's Inc.*, 497 N.W.2d 853, 856 (Iowa 1993).

As a claimant, Hays had the burden of proving the existence of the causal connection between "the conditions of his employment and the injury" by a preponderance of the evidence. *Miedema*, 551 N.W.2d at 311. To demonstrate a causal connection, "the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of his employment." *Id.* The issue of whether an injury arises out of the employment is a mixed question of law and fact requiring two separate determinations by the Workers' Compensation Commissioner. *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007). The Commissioner must first determine the operative events giving rise to the injury, and this determination is reviewed by the District Court under a substantial evidence standard. *Id.* The Commissioner must next apply the law to the factual findings he/she has made, and this subsequent conclusion, while afforded some deference, is not afforded the level of deference as is given under the substantial evidence standard. *Id.* The District Court's scope of review with regard to the Commissioner's ultimate conclusion "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.

First, there seems to be some dispute whether work-related injuries occurred on April 26, and July 25, 2018. Petitioners argue these were non-work-related injuries and are attributable to his pre-existing chronic low back issues and moving out of his home. They state Hays never claimed these as work-related injuries when he presented to Dr. Nerem in April and July 2018. JE 5-2 at 5. Dr. Nerem stated he was under the impression that the April 26, 2018, treatment was the same medical treatment he received before for his back issues. JE 5-3 at 5-6. He was not aware this was a new injury or that it was related to work. As to the injury in July 2018, there is some dispute around whether an injury occurred on that date. There is a dispute whether Hays used the fence pounder or if he just carried the fence pounder. Also, according to Petitioners, he presented to Dr. Nerem's office on July 25, 2018, and he "self-reported" on that date a 25% improvement. JE 1 at 68. In his follow-up visits, he reported a 50% improvement on July 27, 2018, a 65% improvement on July 31, 2018, and a 70% improvement on August 8, 2018. JE at 70-74. Hays did not miss any work until August 9, 2018. DE I at 8. He did not report significant leg symptoms until his August 8, 2018, office visit. JE 1 at 74. Additionally, he was seen by Dr. Quam on August 14, 2018, and only gave him a history of the injury on April 26, 2018, and mentions no injury in July 2018. JE 5-46 at 12. Petitioners argue he was not injured during this job in Van Meter but was injured while moving out of the home he rented.

The Commissioner determined Hays suffered an injury at work on April 26, 2018, when he was removing an old fence post that required him to lean into the post to counteract the effects of the farm jack. Hays felt a "pop" or a shift in his low back and felt immediate pain. Tr. at 34-35. After this injury, he was taken by a co-worker, Nathan Dunahoo, to Dr. Nerem for treatment. Hays

did not remember if he told Dr. Nerem if it was a work injury and Dr. Nerem's records do not reflect it. However, the Commissioner found Dr. Nerem's medical records to be unhelpful. He found Dr. Nerem's medical records were not particularly detailed and were a generic work-up/summary with a large portion of the medical notes being electronically submitted by his patients. Arb. Dec. at 4. Therefore, the lack of record of it being reported as a work injury is not dispositive. Also, Mark Dunahoo testified he was aware of this injury on April 26, 2018, but did not fill out the paperwork. JE 5-75 at 10.

There is also a dispute about whether Hays even referenced the work injury on April 26, 2018, until his recorded statement was taken on August 17, 2018. Petitioners also argue Hays's injury is not work-related and instead is caused by his well-documented history of low back pain. Hays presented to Dr. Nerem on a fairly regular basis between February 2007 and October 2010. Hays also had a series of back issues in 2017 before he started at CIF. However, the Commissioner determined Hays was released by Dr. Nerem and was "pre-accident" status by August 1, 2017. JE 1 at 60. In October 2017, he started at CIF and was not experiencing any back issues at that time. Tr. at 34. Hays was working a full-duty position from November 2017 to April 2018 and no accommodations were needed. The Commissioner acknowledged Hays's pre-existing low back issues, however, he found "there is no evidence he lost significant time from work, job opportunities, or suffered any loss of earning capacity as a result of his low back condition prior to April 2018." Arb. Dec. 13. The mere existence of preexisting injury at the time of the subsequent injury is not a defense. *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 908, 76 N.W.2d 756, 761 (1956). An employee may receive workers' compensation benefits if the work activities aggravate a preexisting condition. *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348, 353 (Iowa 1980).

The Commissioner determined Hays suffered an injury while he was on a job site in Van Meter, Iowa on July 25, 2018. He worked this job on July 24, July 25, and July 27, 2018. Through discovery, the exact date of injury was determined to be July 25, 2018. This job required Hays to pound fence posts into the ground and this job was particularly hard due to the rocky terrain. According to Hays, on July 25, 2018, he was using the pounder on the fence posts but by the third or fourth post he could no longer do it due to the pain in his back. There is some dispute on whether Hays was asked to set posts with the hydraulic post pounder or whether he set stringers or handled other light-duty work on the date in question. Mark Dunahoo, owner of CIF, does not recall whether he was using the hydraulic post pounder that day or if he set stringers. JE 5-77 at 20. However, the Commissioner found Mark Dunahoo, Nathan Dunahoo, and Alan Voshell's testimony to be mostly duplicative of Hays's and no one could exactly recall whether Hays had used the pounder that day. Arb. Dec. at 9. Mark Dunahoo also testified that he recalled Hays telling him that his back was hurting him again after the first day of working at the Van Meter job site. JE 5-77 at 21. Mark Dunahoo even assumed his back had become aggravated at work due to the difficulties of the job site. *Id.* Additionally, Hays's recollection of needing to leave early due to his back was noted on the install acceptance form. The entry notes Hays leaving the job site early on July 25, 2018, due to injury and taking the day off on July 26, 2018. DE J at 4. Nathan Dunahoo also confirmed that the notation on the form showed Hays left the job site early on July 25, 2018. Tr. at 151.

Petitioners allege Hays injured his back when he was moving over five weeks, starting July 2018 until the first week of August 2018. Hays and his wife were separating and moving out of their rented home. Petitioners allege Hays hurt his back when he was rushing to move out of his home. Specifically, that he said, "[my] back is f ---ing killing me" to Mark Dunahoo. DE I at 2.

However, Hays claimed he told Mrs. Hays he would not be able to help her move and had friends help him move due to the condition of his back. Mrs. Hays stated she was completely moved out of the residence by the time her new lease started on or about July 14, 2018, and that she did not witness him lifting any significant weight. JE 5-27 at 8; Tr. at 109. She stated that she had a friend help her move and that she took the majority of the furniture. JE 5-27 at 8. Nathan Dunahoo testified he helped Mrs. Hays move "the big stuff" over to her new apartment. Tr. at 139. Hays testified that he started to move himself out on or about July 28, 2018. He tried to do what he could but ended up asking his friends and coworkers for help. Both Jeff Lemke and Curt Hasty helped Hays move out of his home in either late July or early August. CE 13 at 1, 3. The Commissioner determined "no individual with firsthand knowledge of the move testified to clamant lifting heavy objects or injuring himself in the process of moving." Arb. Dec. at 12. Therefore, the Commissioner concluded that he could not find that Hays suffered a new injury or aggravated his low back condition due to the move in July and August 2018.

This Court concludes there is substantial evidence to support the Commissioner's factual findings in regards to the events that led to the injuries being sustained while at work on April 26, and July 25, 2018. The Commissioner found Hays "did not give the undersigned any reason to question the veracity of his testimony at the evidentiary hearing" and "he appeared sincere in his testimony." Arb. Dec. at 14. This Court gives great deference to the Commissioner's credibility determinations. "It is the commissioner's duty as trier of fact to determine the credibility of witnesses, weight of the evidence, and decide the facts in issue." *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007). There is substantial evidence to support the Commissioner's finding that Hays proved at least two incidents (April 26, 2018, and July 25, 2018) where he sustained a work-related injury.

Having found substantial evidentiary support for the Commissioner's factual determinations, the Court must now determine whether the Commissioner erred in concluding Hays's injury arose out of and in the course of his employment. Because there is substantial evidence to support Hays's injuries were caused by his work-related activities on April 26, and July 25, 2018, the Court must now address the causation link between the employment activities and the injuries. The Court must determine whether the Commissioner abused his discretion when he determined Hays's back injuries were causally connected to the performance of his job duties at CIF. *See Lakeside Casino*, 743 N.W.2d at 173. Petitioners argue there is no causal connection between the injuries and his job at CIF, and Dr. Chen's opinion should be given the greatest weight.

"Whether an injury has a direct causal connection with the employment or arose independently thereof is ordinarily established by expert testimony, and the weight to be given such an opinion is for the finder of fact." *St. Luke's Hosp.*, 604 N.W.2d at 652. The Commissioner, as a trier of fact, has the duty "to determine the credibility of the [expert] and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion." *Arndt*, 728 N.W.2d at 395. The weight to be given to an expert's opinion may depend on the accuracy of the facts relied upon in formulating the said opinion and other surrounding circumstances. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). Additionally, if based on an incomplete history the expert's opinion is not necessarily binding. *Cedar Rapids Comty. School Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). However, the ultimate determination as to whether an expert's opinion should be accepted or rejected rests with the discretion of the Commissioner after a consideration of all the evidence introduced by the parties which bear upon the issue of causation. *Id.* In this case, there are several expert medical opinions regarding whether Hays's low back injury arose out of and in the course of his employment at CIF. There were four

expert opinions regarding the causation: (1) Dr. Nerem; (2) Dr. Quam, (3) Dr. Kuhnlein; and (4) Dr. Chen. Drs. Nerem, Quam, and Kuhnlein ultimately agreed Hays sustained a work-related injury on April 26, 2018, and subsequent work activities exacerbated or aggravated this injury in July 2018. CE 3 at 6-8; CE 4 at 1; CE 1 at 9; *see generally* JE 5.

Dr. Nerem agreed with the opinion that Hays suffered a work-related aggravation of his back injury from April 26, 2018, in July 2018. Dr. Nerem agreed that any treatment since April 26, 2018, was due to Hays's work injury in April and subsequent work-related aggravation in July 2018. Dr. Nerem also updated his opinions and noted Hays reported left lower extremity symptoms throughout July 2018. Dr. Quam drafted a report on September 6, 2018, after reviewing Hays's medical records. His report provided the opinion that Hays's symptoms progressed between his chiropractor appointments on July 31, 2018, and August 8, 2018. DE C at 1. In his deposition, Dr. Quam stated that if it is true Hays did not experience symptoms in his left leg until August 8, 2018, it is unlikely the injury on April 26, 2018, directly caused this symptom. Dr. Quam signed off on a pre-written opinion letter from Hays's attorney on September 12, 2018. Although the letter does not expressly address the July 2018 injury, Dr. Quam believes Hays sustained a work-related injury on April 26, 2018, and subsequently exacerbated it through the continuation of his work activities. Hays also went to Dr. Kuhnlein for an independent medical evaluation (IME) on January 10, 2019. Dr. Kuhnlein reviewed the medical records and examined Hays. Dr. Kuhnlein's opinion was Hays suffered work-related injuries on April 26, 2018, and also on or about July 23, 2018. His opinion stated the July 2018 injury "materially and permanently aggravated claimant's pre-existing lumbar condition." CE 1 at 9.

Petitioners scheduled Hays for an IME with Dr. Chen on July 19, 2019. After examining Hays and reviewing his medical records, Dr. Chen diagnosed Hays with "chronic back and leg

pain, with left-sided nerve tension signs consistent with a left S1 radiculitis." DE B at 6. He also determined Hays did not need surgical intervention and the nerve is irritated but not pinched. *Id.* Dr. Quam also pointed out the discrepancies in Hays's medical records and the oral report provided to him by Hays prior to the examination. *Id.* He opined Hays began experiencing left lower extremity pain between July 31, 2018, and August 8, 2018. Due to this discrepancy, Dr. Chen opined Hays's condition was not causally related to any of the alleged dates of injury. *Id.* at 6-7.

The Commissioner rejected Dr. Chen's opinion and did not find it "particularly persuasive in this instance." Arb. Dec. at 16. He determined Dr. Chen's opinion was based solely on his assumption that Hays did not experience pain in his lower left extremity until August 8, 2018. Dr. Nerem testified in his deposition that Hays began reporting pain in his lower left extremity throughout July 2018 and Hays testified he experienced intermittent pain from this area following the injury on April 26, 2018. The Commissioner found Dr. Chen's opinion as "an assessment of claimant's credibility rather than an assessment of the mechanism of injury." *Id.* Dr. Chen did not offer any opinion about whether the work activities alleged to be performed by Hays on or about July 25, 2018, could have resulted in Hays's condition. Additionally, Dr. Chen's opinion does assert his low back could have been aggravated in the process of moving out of his home and bases this opinion on Hays's deposition. The Commissioner found this opinion to be "purely speculative and dependent upon an ambiguous statement claimant allegedly made to his co-workers." *Id.* He concluded there was no evidence for Dr. Chen to support this opinion that Hays sustained an injury while moving out of his house.

When analyzing the evidentiary record as a whole, the Deputy Commissioner found the opinions of Dr. Quam and Dr. Kuhnlein to be more persuasive than Dr. Chen. He does not expressly reject Dr. Nerem's opinions but he also does not put a significant amount of weight on

Dr. Nerem's physical medical records due to the issues with their reliability and providing sufficient information. Dr. Nerem's records do not bolster any party's timeline due to the medical records noting consistent improvement in lumbosacral function and pain on the four visits at the end of July. It does not seem to match multiple witness accounts from August 2018 of Hays hardly being able to walk. He accepts Dr. Nerem's reports and testimony to the extent it bolsters Dr. Quam and Dr. Kuhnlein's opinions that Hays sustained an initial injury on April 26, 2018, that was exacerbated on or about July 25, 2018, which materially and permanently aggravated Hays's pre-existing condition. *Id.* at 16-17.

The Court cannot find the Commissioner's decision that Hays's injury arose out of his employment as being irrational, illogical, or wholly unjustifiable, or otherwise tainted by an abuse of discretion. The Court cannot say it was arbitrary or unreasonable for the Commissioner to accept Dr. Quam and Dr. Kuhnlein's opinions as to causation in lieu of those offered by Dr. Chen. According to Hays's testimony, Dr. Chen only met with him for approximately 10 to 15 minutes and did not perform any similar tests to those performed by Dr. Kuhnlein. Tr. at 15. Dr. Chen also based his opinion on speculation about whether Hays's injury was from moving from the records of Hays's deposition. The opinions of Dr. Quam and Dr. Kuhnlein, and to the extent Dr. Nerem, along with Hays's testimony regarding the timeline and extent of his symptoms constitute evidence to support a finding of causation. The question before the Court is not whether the evidence might support different findings than those made by the Commissioner, but whether the evidence supports the findings made by the Commissioner. *St. Luke's Hosp.*, 604 N.W.2d at 649. Thus, although there may be evidence here to support a different finding, there is evidence in the record to support the findings made by the Commissioner that Hays's injury arose out of and in the course of his employment.

B. Whether the Commission erred in finding Hays suffered a cumulative injury on August 9, 2018.

The Commissioner determined Hays's injuries on April 26, and July 25, 2018, resulted in cumulative injury with a manifestation date of August 9, 2018. However, Petitioners claim Hays alleged three injury dates in his Petition, but does not plead that the alleged injury was a cumulative trauma injury that resulted from his employment duties with CIF. Rather, he asserted he injured his back, hip, left lower extremity, and/or whole body on one of the three different dates of injury. The evidence exchanged through discovery and testimony did not sufficiently appraise Petitioners of the possibility that the cumulative injury doctrine might be relied upon. As a result, Petitioners argue Hays has failed to prove any credible medical opinion for the Commissioner to rely upon in finding a cumulative trauma injury.

Whether the Commissioner's decision that Hays's Petition for Workers' Compensation benefits sufficiently informed Petitioners of the possibility of a cumulative injury claim is a matter within the agency's discretion and, therefore, the proper standard of review is an abuse of discretion, not substantial evidence. *See Univ. of Iowa Hosp. & Clinics v. Waters*, 674 N.W.2d. 92, 95 (Iowa 2004). Petitioners rely on *Univ. of Iowa Hosp. & Clinics v. Waters* and *Oscar Meyer Foods Corp., v. Tasler*. 674 N.W.2d. 92; 483 N.W.2d. 824 (Iowa 1992). In both cases, the Iowa Supreme Court held the employers were not prejudiced even when: (1) their employees alleged either multiple specific injury dates or an amended injury date in their pleadings or (2) they also did not specifically state in the pleading that it was a cumulative injury. *Waters*, 674 N.W.2d at 98; *Tasler*, 483 N.W.2d. at 827-28. Petitioners try to distinguish *Waters* and *Tasler* by stating Hays:

> Prosecuted this case based on theory of two acute, traumatic injuries – one on April 26, 2018, and another on July 23 or 25, 2018 – and all the medical opinions, witness affidavits, deposition testimony, hearing testimony, etc., focused on establishing

> acute incident that resulted in the on-going complaints and symptoms for which a running healing period was sought

Petitioners' Brief at 26. As a result, Petitioners argue they suffered actual prejudice from Hays recovering on a theory he did not plead because cumulative and acute injury cases require different elements of proof.

This Court finds that Petitioners cannot show how they were prejudiced by this finding. Petitioners claim Hays's Petition for Arbitration never mentioned a cumulative injury and it is fundamentally unfair to surprise the party at the hearing and not allow them an opportunity to prepare for this theory. However, "an application for arbitration is not a formal pleading and is not to be judged by the technical rules of pleading." *Waters*, 674 N.W.2d at 96-97 (emphasis omitted). Like in *Waters*, the Iowa Supreme Court found that many times these arbitration petitions have "little resemblance to formal pleading—common law *or* notice" and "the form does not ask applicants to state whether their injuries are cumulative or acute." *Waters*, 674 N.W.2d at 98 (emphasis added). The same could be said in regards to the petition in this case. On September 13, 2018, Hays filed an "Original Notice and Petition" where he stated his date of injury as 4/26/2018, 7/9/2018, and 8/9/2018. Like the form in *Waters*, it did not ask him to state whether the injury was cumulative or acute. *See id*.

Also like *Waters*, discovery should have informed CIF's attorney of the cumulative nature of Hays's injury. *See id*. Petitioners argue they were not sufficiently apprised in the discovery of the possibility of a cumulative injury doctrine being relied upon through either medical records, recorded statements, multiple witness depositions/statements/affidavits, or ultimately the testimony at trial. After looking through the record, this Court finds multiple exhibits provided either jointly or by Petitioners and Respondent that could have informed Petitioners of a potential cumulative injury theory. Some of the examples this Court found were: (1) summary of Hays's

Unity Point Office visit with Dr. Quam on 8/14/2018 where his pain "waxed and waned" (JE 2 at 2); (2) Dr. Nerem's deposition where he agrees with Defendants' attorney regarding his opinion that "Mr. Hays suffered a work-related aggravation of his back injury on April 26, 2018, in July 2018" (JE 5-12 at 43); (3) letter signed by Dr. Quam of his medical opinion from 9/12/2018 (CE 4 at 1-2); (4) letter from Nicholas Platt to Steve Spencer from 10/24/2018 (CE 11 at 2-3); (5) Dr. Nerem's signed medical opinion on the letter dated 8/9/2019 (CE 3 at 8-9); (6) medical opinion signed by Dr. Nerem from a letter dated 10/16/2018 (CE 3 at 6-7); (7) WorkWell FCE history from 7/9/2019 (CE 2 at 6); (8) IME by Dr. Kuhnlein (CE 1 at 9); and (9) Claimant's answer to #12 of Defendants' Interrogatories (DE H at 2-3). The only time it was referred to as an "acute" injury is when Dr. Quam diagnosed it as "an acute left-sided low back pain with sciatica" in his narrative section of the MRI report from 9/27/2018. (JE 2 at 9). However, this opinion was before Dr. Quam received the complete record around the injuries, and, in addition, subsequent medical opinions and discovery do not again refer to this being an acute injury. *See generally* JE 2 at 9; JE 5 at 43-52. Therefore, Petitioners had actual notice of development or accumulation of Hays's pain symptoms when: (1) Hays was assigned to light duty because of his ongoing symptoms; (2) Hays's petition alleging three dates; and (3) the employer's access to medical records, deposition testimony, and discovery. *See Larson Mfg. Co., v. Thorson*, 763 N.W.2d 842, 854 (Iowa 2009).

Additionally, the Court concludes the Commissioner did not abuse his discretion when he found Hays suffered a cumulative injury. The Commissioner "is entitled to a substantial amount of latitude" when determining the injury date. *Id.* at 852. He determined Hays initially sustained an injury on April 26, 2018, and Hays exacerbated this injury which materially and permanently aggravated this pre-existing condition on or about July 25, 2018. The cumulative effect of these injuries caused Hays's ultimate injury that manifested on August 9, 2018, when Hays was forced

to take a day off of work and acknowledge the severity of his injuries on August 10, 2018. *See Tasler*, 483 N.W.2d at 829; *See also McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 374 (Iowa 1978). The Commissioner cited Hays's statement at his deposition where he described his low back injury as a natural progression that started in April 2018 and worsened after the Van Meter job in July 2018. This finding is similar to *Tasler*, when the Iowa Supreme Court held the employer was sufficiently appraised of the possibility of a cumulative injury doctrine being relied upon because the employee, in her petition, attributed the cause of her injury to "gradual" and "repetitive use and strain of her back during her employment." 483 N.W.2d at 828. Therefore, the Court affirms the Commissioner's determination that Hays suffered a cumulative injury with a manifestation date of August 9, 2018.

C. Whether the Commission erred in awarding Hays a running healing period and temporary disability benefits.

Petitioners argue the Commission erred in awarding Hays temporary total disability benefits and temporary partial disability benefits. The Commissioner found Hays was not at MMI for his low back condition as of the date arbitration hearing.[1] *See Bell Bros. Heating and Air Conditioning v. Gwinn*, 779 N.W.2d 193, 200 (Iowa 2010). He found that none of the physicians offered expert medical opinions that found Hays's condition had stabilized or, at the least, "not likely remit in the future despite medical treatment." *Id.* Therefore, due to Hays not being at MMI or having a permanent impairment, Hays was awarded temporary disability benefits.

For temporary total disability benefits, under Iowa Code section 85.33(1), the employer shall pay "until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged the time of injury, whichever occurs first." Temporary partial disability benefits are awarded when "the

[1] The Commissioner also refers to total temporary benefits as healing period benefits.

condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). These benefits are "payable . . . to an employee because of the employee's temporary reduction in earning ability as a result of the employee's temporary partial disability." *Id*.

The Court affirms the Commissioner's finding that Hays was not at MMI at the time of the arbitration hearing, and, therefore any award of benefits should be temporary under section 85.33 until the level of permanent disability is determined. The Court will refrain from applying the substantial evidence test and instead, it will be assessed as to whether an award was ripe for adjudication. *Bell Bros. Heating and Air Conditioning*, 779 N.W.2d at 202. The Court agrees with the Commissioner that no relevant evidence was provided at the Arbitration hearing for there to be a full and fair assessment over the existence of permanent impairment. *See id*. at 201. Therefore, it was not ripe at that point for the Commissioner to assess whether MMI had been achieved. *See id. at* 201-02.

The Commissioner awarded temporary total disability benefits between August 10, 2018, and November 5, 2018. Under Iowa Code section 85.33(1), the employer shall compensate the employee for temporary total disability weekly compensation benefits "as provided in section 85.32." When the benefits end should be analyzed under the framework of section 85.34(1) because "temporary total disability compensation and healing-period compensation refer to the same condition." *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 446 (Iowa 1999) (citing *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 391 (Iowa 1993)). As for the end date, the Iowa Supreme Court determined section 85.34(1) provides the healing period lasts until (1) the employee returns

to work, (2) it is medically indicated significant improvement if the injury is not anticipated, or (3) the employee is medically capable of returning to substantially similar employment in which the employee engaged in at the time of the injury. *Evenson v. Winnebago Indus., Inc.*, 881 N.W.2d. 360, 372 (Iowa 2016). The Commissioner found Hays was not medically capable of returning to substantially similar employment and, therefore, the end date for total temporary benefits was November 5, 2018, when Hays began working at Casey's. *See* Iowa Code § 85.33(1); Arb. Dec. at 23. The Court finds substantial evidence to affirm the Commissioner's award of total temporary benefits. Therefore, based on Iowa Code section 85.33, the Court cannot say the Commissioner's decision was irrational, illogical, or wholly unjustifiable

The Commissioner also awarded Hays temporary partial disability benefits from November 5, 2018, and continuing until such time as Iowa Code section 85.33 is met.[2] He started working at Casey's on November 5, 2018, but was making substantially less money than when he was working for CIF. Arb. Dec. at 22. Hays works 30+ hours a week at Casey's. His position at Casey's has been modified for him due to his injury. His employer testified that he needs a break every 20-40 minutes and he cannot always stand while at the register. Tr. at 120, 125. He also needs to leave early due to the pain in his back, sometimes up to two to three times per week. Tr. at 121. The Commissioner found Hays is not at MMI as opined to by Dr. Quam and Dr. Kuhnlein, and will need medical treatment before permanent disability can be determined. Hays has been advised not to go back to working heavy labor and he was placed at the sedentary level of function with a restriction of lifting no more than five pounds. CE 1 at 10-11. Due to the reduction in wages

[2] The Court finds the Commissioner made a typographical error in the order section on pages 2 and 3 of his Appeal Decision. The Commissioner states temporary partial disability benefits commence on November 6, 2018. The Commissioner affirmed the Deputy Commissioner's decision in its entirety and affirmed the Deputy Commissioner's findings of fact and conclusions of law. The Deputy Commissioner found the temporary partial disability benefits commence on November 5, 2018. This is the correct date for these benefits to commence because claimant worked fewer hours and made significantly less money when he started at Casey's.

and because he has not reached MMI, Hays may continue to receive temporary partial disability benefits even though he started working at Casey's on November 5, 2018. He has not been able to find substantially similar work due to his injury. He was only released to work on light duty status on October 14, 2018. The Court concludes there is substantial evidence to support the Commissioner's award of temporary partial disability benefits from August 10, 2018, until such time as section 85.33 is met.

One argument by Petitioners as to why Hays is not entitled to any of these benefits is because he voluntarily quit even after being offered suitable work consistent with his disability. In part, Iowa Code section 85.33(3)(a) provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

The Iowa Supreme Court concluded the correct application of Iowa Code section 85.33(3) is "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 559(Iowa 2010).

In this case, the Commissioner found there was little evidence to support the assertion Hays abandoned his position with CIF. Hays testified that he believed his employment had been terminated in August 2018 after Mark Dunahoo called him and told him he did not have any available work for him and this is where their paths would split. Later, however, Hays stated Mark Dunahoo called and clarified that he was not fired and that he was turning in a workers' compensation claim. Mark Dunahoo told Hays he would need to obtain a medical release or restrictions before he could offer him any additional work. Hays never did return to CIF and took

a cashier position at Casey's on November 5, 2018. The Commissioner found little evidence to support Petitioners assertion Hays abandoned or quit his job at CIF and "when there are two competing accounts of a single event, the commissioner has the responsibility to weigh the evidence and consider the credibility of the witnesses." *Schutjer*, 780 N.W.2d at 559.

Here, the Commissioner found Hays's explanation of the events to be credible. In particular, he determined that Hays believed he was fired and he notified Petitioners of his release to light-duty four days after. Petitioners were aware Hays was released for light-work duty from Hays's testimony in his deposition and from the contested unemployment hearing on November 2, 2018, where the judge ruled Hays had not been offered work even though he had the ability to return on light-duty restriction. The Court finds substantial evidence to support the finding by the Commissioner.

The Commissioner found Petitioners' argument fails regardless of whether Hays quit or abandoned his job. Under Iowa Code section 85.33(3)(b), "The employer shall communicate an offer of temporary work to the employee in *writing*." (Emphasis added). Petitioners assert they verbally offered Hays light-duty work, and this oral offer was evidenced in the phone call from Mark Dunahoo. Mark Dunahoo called him to clarify that he was not being fired but would need a medical release before he could return. Tr. at 51-52. However, the Commissioner concluded this oral offer does not meet the requirements outlined in the amended workers' compensation act for injuries occurring on or after July 2017. The record is void of any written offer of suitable work. Nowhere, in their briefs or through testimony, is there evidence they offered Hays suitable temporary work by a written offer. Therefore, because the employer did not communicate the offer of temporary work in writing, the employer did not satisfy the first part of the test from *Schutjer*. *See Schutjer*, 780 N.W.2d at 559; *See also* Iowa Code § 85.33(3)(b).

Petitioners argue the Commissioner engaged in statutory construction when he found Iowa Code section 85.33 requires the offer to be in writing, and the Iowa Supreme Court has determined the Commissioner does not have the authority to interpret the statutes. Petitioners are correct in their assertion that there is no basis of authority that the legislature vested in the workers' compensation commissioner to interpret Iowa Code chapter 85 and, therefore, any interpretation by the Commissioner will be reviewed for errors at law. *See Brewer-Strong v. HNI Corp*., 913 N.W.2d 235, 243 (Iowa 2018).

This Court, however, does not find any errors at law with the Commissioner's finding that Iowa Code section 85.33(3)(b) requires the employer to communicate any offers of temporary work to the employee in writing, and failing to do so precludes them from arguing they offered the employee temporary suitable work. Statutory construction is used when there is an ambiguity regarding the interpretation of a certain provision. Here, there does seem to be ambiguity regarding "the general scope and meaning of [section 85.33(3)(b)] when all its provisions are examined." *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996). The legislature did not set forth specifically how to treat an employer's failure to comply with this section's prerequisites. Compare this to section 85.33(3)(a), where if the employee fails to accept suitable work, the employee should not be compensated with benefits, and section 85.33(3)(b), where failure by the employee to communicate the reason for the refusal in this manner (in writing at the time the offer is refused), precludes the employee from raising the suitability of the work until such time the refusal is communicated in writing to the employer. Iowa Code § 85.33(3).

As stated by Petitioners in their Reply Brief, "the Court will consider statutory terms in their context and give them their ordinary and common meaning" and will review "the statute as a whole to produce a harmonious result." (Petitioners' Reply Brief at 17 (citing *Ramirez-Trujillo v. Quality*

Egg, LLC, 878 N.W.2d 759, 768-69)). "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*, 878 N.W.2d at 870. Just like the "shall accept" creates a duty on the employee to receive temporary partial benefits, this Court finds, "shall communicate an offer in writing" to create a duty on the employer. The legislature's use of the word "shall" generally imposes a mandatory duty. *See* Iowa Code § 4.1(30)(a) (providing "the word 'shall' imposes a duty"); *In re Detention of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) (providing "in a statute, the word 'shall' generally connotes a mandatory duty"). The common and ordinary meaning of "shall" also generally is known to be mandatory. *See Ramirez-Trujillo*, 878 N.W.2d at 770.

Petitioner asserts that if the Court were to interpret it as being a mandatory requirement on the employer, it would "frustrate those goals by interposing an additional technical requirement." Petitioners' Reply Brief at 19. Petitioner states the legislative intent appears to be:

> To have an employer offer suitable work, and allow an injured worker to return to work to be compensated by temporary partial disability benefits if necessary. It is to reward an employer willing to bring back an injured worker to light duty. It is also to encourage the injured worker to return to work after an injury.

Id. However, Petitioners do not direct this Court to any sort of citation or reasoning as this actually being the intent to explain why the legislature amended section 85.33 in 2017 to add to that "the employer shall communicate an offer of temporary work to the employee in writing." Petitioners claim to require this to "rest upon a technicality" would provide an "absurd result." *Id.* However, if in reverse, Petitioners do not seem to find it to be a technicality that would produce an absurd result when the employee, if they refuse suitable work, would be required to provide their reasoning in writing, or otherwise, be precluded from raising the issue. Petitioners gave no reason why the employer should be distinguished from the employee, and no case law or legislative intent can be provided as to why there is a basis to distinguish them. It is a "well-established chapter 85

is liberally construed in favor of the employee, with any doubt in its construction being resolved in the employee's favor." *Teel v. McCord*, 394 N.W.2d 405, 406-07 (Iowa 1986). Therefore, the Court finds no error of law when reviewing the Commissioner's interpretation of section 85.33(3)(b).

As a result, this Court affirms the Commissioner's finding that Hays is entitled to an award of temporary total and temporary partial benefits.

D. Whether the Workers' Compensation Commissioner erred in setting Hays's workers' compensation rate.

The Commissioner found Hays was married on the date of injury and he is entitled to four exemptions in determining the workers' compensation rate. Petitioners argue Hays was separated because he was no longer cohabitating with his wife and they were no longer holding themselves out as husband and wife at the time the injury occurred. *See* Tr. at 116. The Court will review for errors at law regarding the Commissioner's interpretation of section 85.36 and whether Hays was legally separated for the purposes of section 85.37. *See Mycogen*, 686 N.W.2d 457, 464 (Iowa 2004) (overruled on other grounds); *Mercy Medical Ctr. v. Healy*, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The Agency found they were not legally separated based on the definition in chapter 598 and there was no evidence in the record that Hays and his wife petitioned a court to recognize their separation. The Commissioner determined simply living apart is not dispositive of legal separation. Additionally, the Agency also based its decision on agency precedent that held a married but separated individual is entitled to claim the spouse as an exemption. Arb. Dec. at 24. The Court finds no error of law in the Commissioner determining an exemption status of M-4 for his compensation rate under 85.37. Hays was not legally separated from his wife even though they were living apart after July 2018 and Mrs. Hays referred to him as her ex-husband. *See* Iowa Code § 598.28 (2021) (stating "[a] petition shall be filed in separate maintenance and annulment actions

as in actions for dissolution of marriage, and all applicable provisions of this chapter in relation thereto shall apply to separate maintenance and annulment actions"); *In re Estate of Whalen*, 827 N.W.2d 184, 185 n.1 (Iowa 2013) (stating "[u]nder Iowa law, married spouses can legally separate by filing a petition for separate maintenance as provided in Iowa Code section 598.28 without dissolving their marriage") (citing 2 Marlin M. Volz, Jr., *Iowa Practice Series, Method of Practice* § 31:31, at 869 (2012)).

"[T]he determination of whether wages are customary under the circumstances is a matter expressly committed by section 85.36(6) to the discretion of the Commissioner." *Jacobson Transp. Co. v. Harris,* 778 N.W.2d 192, 199 (Iowa 2010). The Court will only reverse if the Commissioner's application was irrational, illogical, or wholly unjustifiable. *Id.* at 196. The Commissioner accepted Petitioners' rate calculation and finds Hays's workers' compensation rate for the manifested injury on August 9, 2018, is $525.54. Arb. Dec. at 25. This was based on Hays's average weekly wages of $771.69 with an exemption status of M-4. *Id.* The Court finds no error in law of the Commissioner's interpretation of section 85.36. He verified Petitioners' calculations and cannot find that Hays's paychecks were abnormally low and found they accurately represent Hays's customary earnings. The factual finding is supported by substantial evidence and the rate of pay selected by the Commissioner fairly represented the employee's customary earnings, therefore, it was not irrational, illogical, or wholly unjustifiable.

E. Whether the Workers' Compensation Commissioner erred in awarding Hays the costs associated with this action.

The Agency awarded Hays reimbursement of the costs of the arbitration proceeding in the amount of $2,324.40. Pursuant to Iowa Code section 86.40 and Iowa Administrative Code rule 876 – 4.33(86), the taxation of costs incurred in the hearing "is a matter specifically delegated by

the legislature to the discretion of the agency." *John Deere Dubuque Works v. Caven*, 804 N.W.2d. 297, 300 (Iowa Ct. App. 2011).

Under rule 876 – 4.33(86), "costs taxed by the workers' compensation commissioner or a deputy commissioner shall be . . . (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate . . . ." Iowa Admin. Code 876 – 4.33(86)(6) and (7). The Agency concluded Dr. Kuhnlein charged $700 for the first hour of drafting his report and an additional $1524.40 for the total time spent drafting his report after the one-hour mark. CE 15 at 2. For a total of $2,234.40. The Agency also included the $100 filing fee for a total reimbursement of $2,324.40. The Commissioner accepted these fees as reasonable under Iowa Administrative Code rule 876 – 4.33(86). Specifically, the Agency found it is a hearing cost under section 86.40, therefore, it is not limited to $150.00 under Iowa Code section 622.72. A doctor's deposition testimony is limited by Iowa Code section 622.72, but no such limitation exists for a doctor's written reports. *John Deere Dubuque Works*, 804 N.W.2d at 299. The Commissioner cites an unpublished opinion to affirm his decision. *See Emco v. Samardzic*, 819 N.W.2d 426 (Table), 2012 WL 1860785 (Iowa Ct. App. May 23, 2012).

The Iowa Supreme Court has held a physician's written report of an IME can be taxed as a hearing cost by the commissioner based on the report being used as evidence in lieu of the doctor's testimony. *Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 846 (Iowa 2015). A distinction was made between the medical examination cost of the IME and the report cost. The medical examination or evaluation cost is not a hearing cost, but the cost for the report can be taxed under administrative rule 876 – 4.33 and section 86.40. *Des Moines Area Reg'l Transit Auth.*, 867 N.W.2d at 846-47. If the examination and report were considered to be a single, indivisible fee then it cannot be taxed as a "cost under administrative rule 876 – 4.33 because the

section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39." *Id.* Here, the examination cost and the report cost were distinguished on the health insurance claim form from Dr. Kuhnlein. CE 15 at 2. Dr. Kuhnlein charged $700 for the first hour of the IME exam and another $656.90 for the time greater than one-hour of the IME exam. *Id.* He charged $700 for the first hour of the IME report and $1524.40 for the time greater than one hour on the IME report. *Id.* The total for the IME examination was $1356.90 and the total for the IME report was $2224.40. *Id.* The Commissioner was correct in finding Dr. Kuhnlein's $2224.40 report and the $100 filing fee for a total of $2324.40 was a taxable cost under administrative rule 876 – 4.33 and section 86.40. *See Des Moines Area Reg'l Transit Auth.*, 867 N.W.2d at 846-47.

Therefore, there is substantial evidence to support the Commissioner's findings and his interpretation of its agency rule is not irrational, illogical, or wholly unjustifiable. *See Zieckler v. Ampride*, 743 N.W.2d 530, 532 (Iowa 2007).

IV. CONCLUSIONS AND DISPOSITIONS

For all the reasons set forth above, the Court concludes there was substantial evidence in the record to support the Commissioner's findings that (1) Hays's injury arose out of an in the course of his employment, (2) he suffered a cumulative injury with a manifestation date of August 9, 2018, (3) awarded Hays temporary total benefits (healing period) and temporary partial benefits, (4) awarded a weekly benefit rate of $525.54, and (5) awarded Hays costs of $2324.40 associated with this action.

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

Costs are assessed in full to Petitioners.

State of Iowa Courts

Case Number	**Case Title**
CVCV061207	CENTRAL IOWA FENCING LTD ET AL V JOSH HAYS
Type:	ORDER FOR JUDGMENT

So Ordered

Scott D. Rosenberg

Scott D. Rosenberg, District Court Judge, Fifth Judicial District of Iowa

Electronically signed on 2021-09-24 15:19:45