IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JAMIE DAVIS, **Petitioner,** **vs.** **GORDON FOOD SERVICE, INC. and STANDARD FIRE INSURANCE COMPANY,** **Respondents.**	**CASE NO. CVCV063594** **RULING ON PETITION FOR JUDICIAL REVIEW**

This is a judicial review proceeding in which the petitioner seeks judicial review of a decision of the worker's compensation commissioner dated April 13, 2022 in which the commissioner affirmed the deputy's decision that the respondents had established the defense of intoxication pursuant to Iowa Code §85.16 and that the petitioner would not receive benefits. The issues before the court on judicial review are: 1) whether the commissioner correctly concluded that Iowa's workplace drug testing statute (Iowa Code §730.5) is not applicable to worker's compensation proceedings; and 2) whether the commissioner correctly determined that the petitioner had failed to overcome the intoxication presumption in Iowa Code §85.16.

The appropriate standard of review for this court is governed by Iowa Code §17A.19(10). Whether an agency's interpretation of statutory language is to be given any deference is dependent upon whether the legislature has clearly vested that agency with interpretive authority:

> When the legislature has clearly vested authority to interpret statutory language in an agency, we will defer to an agency interpretation of that language. Thus, when the legislature has clearly vested the agency with interpretive

> authority, we will reverse an agency decision only when its interpretation of statutory language is irrational, illogical, or wholly unjustifiable. If the legislature did not clearly vest the agency with interpretive authority, however, we review questions of statutory interpretation for correction of errors at law.

Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 768 (Iowa 2016) (internal citations and quotation marks omitted). Iowa courts have repeatedly held that the workers' compensation commissioner has not been clearly vested with interpretative authority over the workers' compensation statutes in chapter 85; the mere fact that the commissioner necessarily must interpret statutory language in carrying out its duties is insufficient to show such authority has been clearly vested in that agency. Id. at 769-70; see also Bluml v. Dee Jay's Inc., 920 N.W.2d 82, 84 (Iowa 2018) ("In recent years, we have repeatedly declined to give deference to the commissioner's interpretations of various provisions in chapter 85") (citation omitted). Likewise, there is nothing in the language of either Iowa Code §85.15 or §730.5 to suggest that either statute should be subject to the special expertise of the commissioner. Id. Accordingly, the commissioner's statutory interpretation will be reviewed for errors at law. Iowa Code §17A.19(10)(c) (2021); Chavez v. MS Technology LLC, 972 N.W.2d 662, 666 (Iowa 2022).

The agency's factual determinations regarding the applicability of the intoxication defense would be clearly vested by a provision of law in the discretion of the agency, as it must make such findings to determine any claimant's rights to benefits under chapter 85. Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 (Iowa 2004); Regional Care Hospital Partners, Inc. v. Marrs, 2021 WL 609072 *1 (Iowa Ct.App., Case No. 19-2138, filed February 17, 2021). Accordingly, the reviewing court is bound by the commissioner's

findings of fact if supported by substantial evidence in the record before the court when that record is viewed as a whole. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 126 (Iowa 1995); Iowa Code §17A.19(10)(f) (2021).

Substantial evidence is defined for purposes of the Administrative Procedure Act as "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code §17A.19(10)(f)(1) (2021). Viewing the record as a whole requires the court to review not only the relevant evidence in the record cited by any party that supports the agency's findings of fact, but also any such evidence cited by any party that detracts from those findings along with any determinations of veracity made by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code §17A.19(10)(f)(3) (2021); Acuity Ins. v. Foreman, 684 N.W.2d 212, 216 (Iowa 2004), abrogated on other grounds in Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391-92 (Iowa 2009).

Substantial evidence is not absent simply because it is possible to draw different conclusions from the same evidence. Id.; see also Riley v. Oscar Mayer Foods Corp., 532 N.W.2d 489, 491-92 (Iowa App. 1995) ("The focus of the judicial inquiry is whether the evidence is sufficient to support the decision made, not whether it is sufficient to support the decision not made."). This would be the appropriate deference afforded to this agency function, as required by Iowa Code §17A.19(11)(c). Mycogen, 686 N.W.2d at 465. Accordingly, the petitioner may not rely upon the argument that his position may

be supported by a preponderance of the evidence; rather, the burden is upon him to show that the commissioner's determination is lacking in substantial evidence. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 865 (Iowa 2008).

The court on judicial review is required to engage in a "fairly intensive review" of the record to ensure the agency's fact finding was reasonable. Neal, 814 N.W.2d at 525; Univ. of Iowa Hosps. v. Waters, 674 N.W.2d 92, 95 (Iowa 2004). However, courts on judicial review may not engage in a "scrutinizing analysis," or something that would resemble de novo review, as such a standard of review "would tend to undercut the overarching goal of the workers' compensation system." Neal, 814 N.W.2d at 525; Midwest Ambulance, 754 N.W.2d at 866. That purpose has been consistently summarized as follows:

> The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.
>
> It was the purpose of the legislature to create a tribunal to do rough justice-speedy, summary, informal, untechnical. With this scheme of the legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality.

Zomer v. West Farms Inc., 666 N.W.2d 130, 133 (Iowa 2003) (quoting Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)); see also Arndt v. City of Le Claire, 728 N.W.2d 389, 394 (Iowa 2007) ("Making a determination as to whether evidence 'trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence is not an assessment for the district court or the

court of appeals to make when it conducts a substantial evidence review of an agency decision").

On the other hand, the application of the law by the commissioner to its own factual determinations requires a different standard upon judicial review. As the application of law to facts is also vested in the discretion of the agency, it is only to be reversed if found to be irrational, illogical or wholly unjustifiable. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 196 (Iowa 2010); Iowa Code §17A.19(10)(m) (2021):

> A decision is irrational when it is not governed by or according to reason. A decision is illogical when it is contrary to or devoid of logic. A decision is unjustifiable when it has no foundation in fact or reason.

The Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 432 (Iowa 2010) (internal quotation marks and citations omitted). The difference between these varying standards of review was best summarized in this quote from the Iowa Supreme Court:

> Although a claim of insubstantial evidence is usually used to challenge findings of fact, we understand how it can be implicated, as in this case, in a challenge to a legal conclusion. Error occurs when the commissioner makes a legal conclusion based on facts that are inadequate to satisfy the governing legal standards. Yet, a claim of insubstantial evidence to support a legal conclusion does not give rise to the standard of review applicable to the claim of substantial evidence to support the factual findings by the commissioner. When the commissioner takes a piece of evidence and uses it to draw a legal conclusion…, we do not review the conclusion by looking at the record as a whole to see if there was substantial evidence that could have supported the ultimate decision, as argued by IBP in this case. Instead, we review the decision made. If the commissioner fails to consider relevant evidence in making a conclusion, fails to make the essential findings to support the legal conclusion, or otherwise commits an error in applying the law to facts, we remand for a new decision unless it can be made as a matter of law.

Meyer v. IBP, Inc., 710 N.W.2d 213, 219-20 n.1 (Iowa 2006). As a result, even if this determines that the commissioner's factual findings are supported by substantial evidence, this is only the beginning of the analysis. If the commissioner's factual findings are upheld, this court must then determine "whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." Id. at 219.

Taking the agency record as a whole, the following facts were available to the commissioner: The petitioner was 49 years of age at the time of hearing before the deputy commissioner. He was hired by Gordon Foods in February of 2018 as a chain delivery truck driver. In that job, he drove a set route between Des Moines and Sioux City; he would leave Des Moines on Sunday evenings at around midnight, after a conduct a pre-trip inspection of the truck. His first stop in Sioux City would be at Mercy Hospital, where he would be required to move 200 to 300 pounds of food up steps using a hand cart. Typically, after the Mercy Hospital stop, he would make additional stops at a college and multiple restaurants before going to a local hotel to sleep. He would then make one more stop in Sioux City the next day (Tuesday) and return to Des Moines. He would have Wednesdays off and then repeat the same route on Thursday and Friday.

On August 23, 2018 (a Thursday), the petitioner was in the midst of his unloading at Mercy Hospital when he felt his back "give out." He testified that he had delivered eight to ten loads up the stairs, and he was at the "very top step [preparing to] go to turn to pull the cart up the last step" when he was injured. He was unable to move, and eventually was assisted back to his truck after 35 to 40 minutes of lying on the ground. He contacted his supervisor, Bob Bonea, over the phone; Bonea told him to call an 800

number to schedule treatment and that someone would be finishing his route. Bonea drove a van to Sioux City yet that day and finished the petitioner's route. The petitioner eventually drove the van back to Des Moines after he evaluated; he had to use his left foot to drive because of his back pain.

The petitioner went to Mercy Business Health Services in Sioux City to be evaluated after calling the 800 number given to him by Bonea. In addition to being evaluated for his injury there, he was also given a drug test. This type of testing is required at Gordon Foods whenever an employee is injured on the job. The Sioux City facility obtained a urine sample from the petitioner, which tested positive for methamphetamine and amphetamines. The test results were communicated on September 4, 2018. The test utilized a single urine sample; the sample was not split. A follow-up report from the author of the report, Dr. Jerome Cooper, dated October 15, 2020 provided that 1) the way the testing was done would eliminate the potential for false positives; 2) other than diet pills, there are no current prescriptions for methamphetamines; 3) methamphetamine is quickly metabolized, which would include 5 days or less; 4) methamphetamine can cause hallucinations, hyperactivity and confusion; 5) he had no concerns regarding the collection methods or chain of custody in regarding to the petitioner's urine sample; and 6) the testing was valid.

The petitioner testified at hearing that he was not surprised by the positive drug results, as he admitted to using methamphetamine three to four days prior to the test and he knew that "it takes four to five days to get out of your system." The petitioner had been a methamphetamine user in the past, which resulted in a lengthy incarceration in

federal prison from late 1999 to September of 2016.[1] The petitioner testified that using methamphetamine can cause irritability, loss of equilibrium, fidgeting, as well as the inability to control one's hands or legs; he described these physical reactions as "almost kind of like being—having a—being drunk, unable to control yourself." He denied being high on methamphetamine on the day of the injury, and testified that no one he encountered that day said anything about him being impaired.[2]

As a result of the positive drug test, the petitioner's employment with Gordon Foods was terminated. The use of the drug test in question and the eventual termination of the petitioner's employment was all consistent with the drug testing policy set out in the employee handbook used by Gordon Foods, which the petitioner received when he started there. On September 13, 2018, the petitioner's worker's compensation claim was formally denied on the basis of the positive test result, referencing the language in Iowa Code §85.16.

The matter came to hearing before Deputy Commissioner Heather Palmer on August 2, 2021. An arbitration decision was entered on November 5, 2021; that decision determined that the positive test result created a presumption of intoxication for purposes of §85.16, which had not been rebutted by the petitioner. The deputy rejected the petitioner's argument that the drug testing report was inadmissible as a result of the testing procedures not conforming to Iowa Code §730.5; in so holding, she ruled that recent amendments to §85.16 (which went into effect July 1, 2017), by not referring to

[1] He was placed on probation for 10 years following his release from prison. The positive drug test resulted in him serving four months in prison; he was still on probation at the time of hearing.
[2] He also testified that a methamphetamine "high" usually lasted six to eight hours.

§730.5, referenced a legislative intent to not have the latter statute be applicable in a worker's compensation proceeding:

> Iowa Code section 85.16 does not mention Iowa Code section 730.5, or the requirements of the section for employee drug and alcohol testing. Iowa Code section 85.16 applies to all employers, both public and private. Iowa Code section 730.5 governs drug and alcohol testing in the "private sector." Certainly, when the Iowa Legislature modified Iowa Code section 85.16 in 2017, it was aware of Iowa Code section 730.5 and chose not to include the drug and alcohol testing requirements of that section to be applied to workers' compensation cases.[3]

In coming to this conclusion, the deputy found as follows:

> Davis avers he was not intoxicated at the time of his injury and that he has overcome the presumption. No one was present at the time Davis was injured. Bonea did not physically see Davis on the date of his injury. And while Davis drove the company van back to Des Moines without incident, the fact he did so does not prove he was not intoxicated. Davis presented self-serving testimony that he was not intoxicated. He presented no expert report, expert testimony, or published studies supporting his self-serving testimony. He did not call any witnesses at hearing who observed him on the date of the accident.

The arbitration decision was appealed to Workers Compensation Commissioner Joseph Cortese II, who entered his appeal decision on April 13, 2022. In that decision, the commissioner affirmed the deputy's findings of fact and conclusions of law as "a well-reasoned analysis of all the issues raised in the arbitration proceeding." Specifically, the commissioner held that the respondents had carried their burden of proof to establish

[3] The deputy also distinguished two earlier cases (both pre-amendment to §85.16) that disallowed the use of a drug test obtained in violation of §730.5 in disqualifying an employee from receiving unemployment benefits. Eaton v. Iowa Employment Appeal Bd., 602 N.W.2d 553 (Iowa 1999); Harrison v. Iowa Employment Appeal Bd., 659 N.W.2d 581 (Iowa 2003). The deputy noted, "Again, the Iowa Legislature would have been aware of these cases when it enacted changes to Iowa Code section 85.16. I do not find either case controlling in this workers' compensation case."

that the petitioner was intoxicated when he was injured, and that the petitioner had failed to overcome the presumption that the intoxication was a substantial factor in causing the work injury. Accordingly, the commissioner ruled that the petitioner was to take nothing from this proceeding. A timely petition for judicial review was filed on May 3, 2022.

Applicability of §730.5. When the legislature enacted Iowa Code §730.5 in its original form, the statute explicitly provided that it was not applicable to "drug tests conducted to determine if an employee is ineligible to receive workers' compensation under section 85.16, subsection 2." 1987 Iowa Acts ch. 208, §1. That language was removed when the statute was rewritten in 1998; there is no reference to the worker's compensation process in the current version of §730.5(2). 1998 Iowa Acts ch. 1011, §1. However, the 1998 rewrite provided for the following language in another section, which continues to the present day:

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:
> ….
>
> f. Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

Iowa Code §730.5(8)(f) (2021). The petitioner argues that this language mandates that any drug testing to establish an intoxication defense under §85.16 must comply with the procedures set forth in §730.5 or be excluded as evidence on that issue. While compelling at first blush, the argument fails to recognize the impact of later legislative action taken in 2017 amending §85.16(2). The court agrees with the commissioner's

conclusion that the 2017 amendment evinces a legislative intent that the procedures in §730.5 are not required to establish an intoxication defense under §85.16.

The amendment to §85.16 added subsection (2)(b), which created the presumption and burden-shifting that is at the heart of the present dispute. That language reads as follows:

> b. For the purpose of disallowing compensation under this subsection, both of the following apply:
>
> (1) If the employer shows that, at the time of the injury or immediately following the injury, the employee had positive test results reflecting the presence of alcohol, or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug which drug either was not prescribed by an authorized medical practitioner or was not used in accordance with the prescribed use of the drug, it shall be presumed that the employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury.
>
> (2) Once the employer has made a showing as provided in subparagraph (1), the burden of proof shall be on the employee to overcome the presumption by establishing that the employee was not intoxicated at the time of the injury, or that intoxication was not a substantial factor in causing the injury.

Iowa Code §85.16(2)(b) (2021). This language would be applicable to the present case, as it applies to injuries occurring on or after July 1, 2017. 2017 Iowa Acts ch. 23, §24.

When the legislature amended §85.16 in 2017, it could have specified that any testing utilized to create a presumption of intoxication had to comply with the requirements of §730.5. Its failure to be so specific is evidence that the legislature did not intend that the provisions of §730.5 were grafted onto the process available to employers under §85.16:

> In the field of statutory interpretation, legislative intent is expressed by omission as well as by inclusion. The express mention of certain conditions of entitlement implies the exclusion of others.

Barnes v. Iowa Dep't of Transp., 385 N.W.2d 260, 263 (Iowa 1986); Baird v. Oldfield, 2006 WL 3615053 *2 (Iowa Ct.App., Case No. 05-2043, filed December 13, 2006) (failure to include mention of a private cause of action for violations of Door-to-Door Sales Act revealed legislative intent to exclude private remedy). The commissioner correctly held that Iowa Code §730.5 does not apply in a worker's compensation proceeding in gauging an employer's intoxication defense.

Evidence of rebutting presumption. There being no other challenge to the test results utilized by Gordon Food herein, they create a presumption that the petitioner was intoxicated at the time of his injury and that this intoxication was a substantial factor in causing his injury. Iowa Code §86.15(2)(b)(1)(2021). The burden then shifts to the petitioner to establish the contrary (either that he was not intoxicated or that the intoxication was not a substantial factor in causing his injury). The only evidence offered by the petitioner in this regard was 1) his own denials of intoxication; and 2) his driving of the company van back to Des Moines after he was evaluated in Sioux City. The commissioner weighed the competing evidence and found the petitioner's lacking in credibility. It is not the job of the district court on judicial review to reweigh that evidence. Westling v. Hormel Foods Corp., 810 N.W.2d 247, 254 (Iowa 2012); Titan Tire Corp. v. Employment Appeal Bd., 641 N.W.2d 752, 755 (Iowa 2002) ("[W]e do not reassess the weight to be accorded various items of evidence. Weight of evidence remains within the agency's exclusive domain").

This is consistent with the longstanding deference given to an agency's credibility determinations in determining whether substantial evidence supports a factual finding:

> It is the commission's role to determine the credibility of the witnesses[, a]nd the reviewing court only determines whether substantial evidence supports a finding according to those witnesses whom the commissioner believed.

ConAgra Foods, Inc. v. Moore, 2022 WL 1658707 *3 (Iowa Ct.App., Case No. 21-0339, filed May 25, 2022) (quoting Arndt, 728 N.W.2d at 394-95). The commissioner found the petitioner's denials to be self-serving and lacking corroboration, and therefore not credible. The court accepts this determination as appropriate, and finds that the commissioner's ultimate conclusion that the petitioner failed to rebut the statutory presumption of intoxication was both supported by substantial evidence and was neither irrational, illogical nor wholly justifiable. That decision will likewise be affirmed.

IT IS THEREFORE ORDERED that the decision of the workers' compensation commissioner previously entered in this matter on April 13, 2022 is affirmed in its entirety. The costs associated with this proceeding are assessed to the petitioner.

In addition to all other persons entitled to a copy of this order, the Clerk shall provide a copy to the following:

Workers' Compensation Commissioner
1000 E. Grand Ave.
Des Moines, IA 50319-0209
Re: File No. 1652763.01

State of Iowa Courts

Case Number	**Case Title**
CVCV063594	JAMIE DAVIS VS GORDON FOOD SERVICE INC ET AL
Type:	OTHER ORDER

So Ordered

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

Electronically signed on 2022-11-15 16:00:52