IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CONAGRA FOODS, INC. and OLD REPUBLIC INS. CO., Petitioners, vs. LESLIE MOORE, Respondent.	Case No. CVCV060433 **ORDER ON JUDICIAL REVIEW**

Telephonic oral argument in this judicial review proceeding was held on December 11, 2020. Attorney Kent M. Smith appeared for Petitioners ConAgra Foods, Inc. and Old Republic Insurance Company (together, ConAgra). Attorney Charles W. Showalter appeared for Respondent Leslie Moore (Les). Oral argument was not reported.

After reviewing and considering the parties' arguments and briefs, the court file, and the agency record in light of the relevant law, the court enters the following Order:

BACKGROUND FACTS AND PROCEEDINGS

Les was 59 years old at the time of the arbitration hearing. He began working at ConAgra in 2001, and has worked there since. He sustained an admitted injury at ConAgra on June 1, 2016 (the June 1 injury), when he felt a pop in his hip and felt immediate pain. Les later developed severe low back pain from walking with an altered gait. While ConAgra admitted Les sustained an injury, ConAgra denied that any of his ongoing hip or low back symptoms were due to his work injury. Les treated on his own and ConAgra did not voluntarily pay him any workers' compensation benefits for the admitted June 1, 2016, injury.

Les filed a petition for workers' compensation benefits on May 11, 2018. The matter came before a deputy workers' compensation commissioner (the Deputy) on May 22, 2019. The Deputy issued an arbitration decision on September 18, 2019. The Deputy's relevant findings are (1) through medical evidence and his credible hearing testimony, Les proved a permanent injury to his hip and low back as a result of the June 6 work injury, and (2) Les' permanent impairment deserved an award of 40% industrial disability.

ConAgra appealed the Deputy's arbitration decision. Workers' compensation commissioner Joseph S. Cortese II (the Commissioner) performed a de novo review of the case and issued an appeal decision on June 9, 2020, affirming the arbitration decision in its entirety.

ConAgra filed the instant Petition, raising two issues. First, substantial evidence does not support the agency's decision that Les sustained a permanent injury to his hip and low back. Second, the agency's award of 40% industrial disability is irrational, illogical, or wholly unjustifiable.

STANDARD OF REVIEW

Iowa Code chapter 17A governs judicial review of the Commissioner's decisions. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 669 (Iowa 2005). It is "the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Iowa Code § 17A.19. The district court's review authority under chapter 17A is limited, so it 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 v. IBP, Inc.*, 710 N.W.2d 213, 218

(Iowa 2006). The grounds alleged under chapter 17A dictate the standard of review, with different standards applying to different issues.

In cases alleging lack of substantial evidence under Iowa Code section 17A.19(10)(*f*) as the ground for reversal, interpretive case law provides comprehensive guidance. Because the Commissioner is vested with the authority to find facts, the district court's review of his fact finding is limited to deciding whether substantial evidence supports the agency's findings when the agency record is viewed as a whole. Iowa Code § 17A.19(10)(*f*)(1). Under the substantial evidence standard, the question on judicial review is not whether the evidence might support a different finding, but whether the evidence supports the finding actually made. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 237–38 (Iowa 1981).

The reviewing court's duty is to "broadly and liberally apply [the Commissioner's findings] to uphold rather than defeat the agency's decision." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 634 (Iowa 2000). The Commissioner need not "set out verbatim" all the evidence and a party cannot successfully urge "that the [C]ommissioner did not weigh all the other evidence" simply because the Commissioner explicitly refers to only some of the evidence. "It is permissible for the reviewing court to determine the [C]ommissioner 'could have' or 'might have' considered certain pieces of supporting evidence." *Myers v. FCA Servs., Inc.*, 592 N.W.2d 354, 357 (Iowa 1999). The agency's explanation of its rationale is sufficient so long as the court can "'deduce what must have been'" the agency's conclusions and findings. *Al-Gharib*, 604 N.W.2d at 634 (emphasis added). The district court may not interfere with the Commissioner's fact finding simply because reasonable minds could disagree about the conclusions to be drawn from the evidence. *Ward*, 304 N.W.2d at 239.

ANALYSIS

A. Substantial evidence of Les' June 1, 2016, work injury causing permanent impairment in his hip and low back. ConAgra alleges substantial evidence does not support the Commissioner's decision affirming the Deputy's finding that Les' current hip and low back complaints are related to the admitted June 1 work injury. ConAgra argues Les' "ongoing symptoms are due to his personal condition and personal injuries." (Pet. Brief at p. 19).

Although Les had some pre-injury low back complaints for which he received treatment, as discussed below, he did not have pre-injury hip or groin pain. The record does not contain evidence of any pre-injury hip or groin pain. Les' testimony at hearing likewise denied any prior hip or groin complaints. The Deputy "found [Les] to be a credible witness at hearing, considering his eye contact, demeanor, and consistency in his statements and testimony." (Arb. Dec. at p. 15). The Commissioner affirmed the Deputy's fact finding in its entirety. (App. Dec. at p. 2). The agency has the duty in the first instance to assess witness credibility. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394–95 (Iowa 2007).

Three medical providers opined that Les' current hip and groin complaints are causally related to the June 1 work injury. Dr. Roswell Johnston, a board-certified orthopedic specialist who has treated Les since at least 2005, opined that Les' current hip complaints are causally related to the work injury. (CL Ex. 2 at pp. 36–37). He agreed that Les had sustained permanent impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment as a result of the work injury. (*Id.*)

Likewise, Dr. David Segal, a board-certified neurosurgeon who examined Les, opined that Les sustained a permanent injury to his hip and groin as a result of the work

injury, and that it resulted in permanent impairment. (CL Ex. 1 at pp. 29–31). Finally, D.C. Blake Wayson, who is Les' treating chiropractor, agreed that Les sustained permanent impairment to his hip and groin as a result of the work injury. (CL Ex. 3 at pp. 40–41).

Although ConAgra's retained expert Dr. Charles Mooney provided a contrary opinion to those of Dr. Johnston, Dr. Segal, and D.C. Wayson, the court finds substantial evidence supports the Deputy's finding—affirmed by the Commissioner—that Les sustained a permanent injury to his hip and groin as a result of the admitted work injury. Determining whether to accept or reject an expert opinion in a workers' compensation proceeding is within the peculiar province of the workers' compensation commissioner. *Cedar Rapids Comm. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). Courts in their appellate capacity do not have authority to accept contradictory opinions of other experts in order to reject the finding of the Commissioner. *Id.* at 850. Because the court's review is not de novo, the court cannot reassess the weight the agency accords to various items of evidence. *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993).

Regarding Les' low back complaints, both Les' credible testimony and the record evidence shows he did have pre-injury low back pain. However, any of Les' pre-injury low back treatment was non-invasive, consisting only of physical therapy. (JME 4 at p. 28) (2015 treatment note indicating "He does have a history of lower back pain in the past which was treated with physical therapy successfully."); Tr. at pp. 31:21–32:3 ("I'd have a little back spasm or had an issue with a little bit of sciatic nerve, but it would go away and I'd be good for six months, a year. . . . I'd do stretches and physical therapy and stuff . . . and it would go away."). In contrast, Les received invasive treatment post-injury including injections and radiofrequency ablation (JME 9 at p. 63) (08/08/17 lumbar

spine Toradol injection); (JME 10 at p. 90) (Depo-Medrol lumbar facet injections); (JME 10 at p. 104) (radiofrequency ablation); Tr. at p. 35:4–11 (injection into hip tendons)).

Dr. Segal and D.C. Wayson both opined that Les' June 1 work injury and the resulting hip pain caused gait disturbance materially aggravating his low back. (CL Ex. 1 at pp. 29–31; CL Ex. 3 at pp. 40–41). Both opined that the work injury caused a material aggravation resulting in permanent impairment. (*Id.*) Les' credible testimony explained the difference in his pre- and post-injury low back symptoms:

> Q. And how would any of that back pain that you'd had prior to your hip injury compare to what you started experiencing in early 2017?
>
> A. Not even close to the same amount of pain. It would come and go. I'd have a little back spasm or had an issue with a little bit of a sciatic nerve, but it would go away and I'd be good for six months, a year. You know, it really wouldn't bother me any. I'd do stretches and physical therapy and stuff -- or, you know, stretching and that trying to get it out of there and it would go away.
>
> Q. And then what's your back been like since this injury?
>
> A. To put it bluntly, horrible pain. I've had an ablation done in my back where they burnt the nerves, and physical therapy, and I had got so painful here in 2017, I think, in the fall – I can't remember the dates for sure – but I went to a pain clinic and I was off work for four months that time because of my back and my hip. I had so much pain in my groin that I would lift my foot three inches off the floor and I'd lock up . . . .

(Tr. at pp. 31:17–32:14). When the court considers this record as a whole—as it must—this is not a case in which witness testimony is "so impossible or absurd and self-contradictory that it should be deemed a nullity by the court." *Graham v. Chi. & N.W. Ry.*, 119 N.W. 708, 711 (Iowa 1909).

Thus, the court finds substantial evidence—the opinions of Dr. Johnston, Dr. Segal, and D.C. Wayson, plus Les' credible testimony—supports the Commissioner's

finding that Les sustained permanent impairment and has ongoing hip and low back complaints as a result of the June 1 work injury.

B. <u>The Commissioner's award of 40% industrial disability is not irrational, illogical, or wholly unjustifiable under this record</u>. ConAgra asserts the Commissioner's decision affirming the Deputy's decision that Les sustained 40% industrial disability from the work injury is "irrational, illogical, and wholly unjustifiable." (Pet. Brief at p. 29). Specifically, ConAgra asserts the Commissioner erred in awarding 40% industrial disability to Les despite his ability to return to work with no restrictions and with no loss of earnings. (Pet. Brief at p. 31).

Industrial disability is defined as a "loss of earning capacity, and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal [person]." *Diederich v. Tri-City R.R. Co. of Iowa*, 258 N.W. 899, 902 (Iowa 1935). The Commissioner's industrial disability award may consider the following factors:

> the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; inability, because of the injury, to engage in employment for which the employee is fitted; loss of earnings caused by a job transfer for reasons related to the injury; and the employer's refusal to give any sort of work to an impaired employee.

Al-Gharib, 604 N.W.2d at 632–33.

The agency is uniquely suited to comment on the industrial disability sustained by an injured worker. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 68 (Iowa 1991) (noting "it is necessary for the [C]ommissioner to draw upon prior experience and . . . specialized

knowledge to make a finding in regard to the degree of industrial disability" and the reviewing court should view the evidence "in this context"). Chapter 17A specifically acknowledges that the "agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." Iowa Code § 17A.14(5).

Here, in reaching her conclusion regarding Les' 40% industrial disability, the Deputy—whose findings and conclusions the Commissioner adopted—emphasized Les' 19% body as a whole impairment rating. This is a proper consideration under Iowa workers' compensation law. *Ferch v. Oakview, Inc.*, File No. 5010952 (App. 4/13/06) ("in all but the rarest of industrial disability cases, the impairment rating is the minimum level of compensation owed to a claimant by virtue that the impairment rating signifies the extent of the claimant's loss of use of the whole body").

The agency's finding of 40% industrial disability is also not irrational, illogical, or wholly unjustifiable simply because Les has returned to work at approximately the same pay. *See, e.g.*, *Arrow-Acme Corp. v. Bellamy*, 500 N.W.2d 92, 95 (Iowa Ct. App. 1993) (finding "no support in the law for this proposition" and finding "an employee may presently earn a higher wage than his or her pre-injury earnings and still have a reduced earning capacity"); *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000) (affirming industrial award where claimant's earnings were higher post-injury than before). As noted by the court in *Bellamy*, the operative phrase in determining industrial disability is loss of earning capacity, not the loss of actual earnings. *Bellamy*, 500 N.W.2d at 95.

Similarly, Les' lack of permanent restrictions does not render the agency's industrial disability finding irrational, illogical, or wholly unjustifiable, despite ConAgra's assertions to the contrary. Les' credible testimony established that he did not ask any

doctors their opinions regarding permanent restrictions because such restrictions would jeopardize his job at ConAgra. (Tr. at p. 73:16–22). As noted above, "it is necessary for the [C]ommissioner to draw upon prior experience and . . . specialized knowledge to make a finding in regard to the degree of industrial disability" and the reviewing court should view the evidence "in this context." *Lithcote Co.*, 471 N.W.2d at 68. To that end, the Commissioner has recognized "the Hobson-like choice of returning to work unrestricted or los[ing] the employment position" and "an employee may be forced to return to work in spite of a need for restrictions." *Jefferson v. Eagle Ottawa*, File No. 5013791 (App. 2/28/07). Thus, Les' lack of permanent restrictions does not render the Commissioner's 40% industrial disability finding irrational, illogical, or wholly unjustifiable.

The proper analysis of Les' industrial disability requires examining his "present ability to earn in the competitive job market." *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995). Les testified that after three days of working 12-hour shifts at ConAgra, he spends the fourth day recuperating at home. (Tr. at p. 43:6–14). It is clear from the Deputy's ruling—affirmed by the Commissioner—that she considered Les' earning capacity because she identified some of the factors that can be considered in evaluating earning capacity and applied them. (Arb. Dec. at pp. 14-15). The agency could reasonably find when this record is considered as a whole that a 59-year-old man working for the same employer for nearly 20 years (and performing the same job for the past ten to twelve years) sustained significant industrial disability from a hip and low back injury arising from his work.

Because the Commissioner's assessment of industrial disability is not an exact science, the 40% industrial disability awarded to Les in this case is within the range of potential conclusions that could be reached on industrial disability. *Myers*, 592 N.W.2d

at 357 ("[t]he industrial commissioner is not required to fix disability with precise accuracy"). So, although reasonable minds might differ on the percentage of industrial disability to be awarded to Les, the agency's 40% industrial disability award is not so "out of plumb" with the facts of this case as to render it irrational, illogical, or wholly unjustifiable. *Id.*

CONCLUSION

The court has reviewed and considered the Deputy's decision and the Commissioner's decision affirming the Deputy's decision, as well as the agency record, briefs and arguments of the parties, and the applicable law. The Commissioner's decision affirming the Deputy's finding of permanent impairment to Les' hip and low back as a result of the June 1, 2016, work injury is supported by substantial evidence. The Commissioner's decision affirming the Deputy's award of 40% industrial disability to Les is not irrational, illogical, or wholly unjustifiable when this record is considered as a whole.

The Commissioner's decision affirming the Deputy's decision should be affirmed in its entirety, the Petition should be dismissed, and costs should be assessed to Respondents ConAgra Foods, Inc. and Old Republic Insurance Company.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Commissioner's final order issued June 9, 2020, is affirmed in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondents' ConAgra Foods, Inc. and Old Republic Insurance Company's Petition for Judicial Review is denied in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs are assessed to Respondents ConAgra Foods, Inc. and Old Republic Insurance Company.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV060433	CONAGRA FOODS AND OLD REPUBLIC INS VS LESLIE MOORE

So Ordered

Jeanie Vaudt, District Court Judge,
Fifth Judicial District of Iowa