

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

PAMELA CARROW,

Petitioner,

vs.

HY-VEE., EMC PROPERTY AND CASUALTY  
COMPANY, (EMC RISK SERVICES, LLC - TPA),

Respondents.

**Case No. CVCV058140**

**RULING ON PETITIONER'S  
PETITION FOR JUDICIAL REVIEW**

This matter came before the court on November 22, 2019 for a hearing before the District Court on Petitioner's Petition for Judicial Review. Having entertained the arguments of counsel, having reviewed the court file and the applicable law, being otherwise fully advised in the premises, the court enters the following order.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff, Pamela Carrow, filed two petitions in arbitration seeking workers' compensation benefits from both her employer, Hy-Vee, and its insurer, EMC Property and Casualty Company. Her claim arises as a result of two injuries she allegedly suffered on August 18, 2015 and on October 9, 2015, both allegedly arising out of and in the course of her employment.

Petitioner, who at the time of hearing was 65 years of age and has her GED, suffers from a long and complicated injury history. Prior to the injury allegedly arising out of and in the course of her employment with Hy-Vee, Petitioner had previously suffered injuries to her feet (including plantar fasciitis and tendonitis in both feet), back, and neck. Petitioner previously cut her left foot with an X-ACTO knife at the end of December, 2014. She was treated at an emergency room and, in either March of 2015 or June of 2015 (the record is unclear), reported this injury to her podiatrist. Petitioner underwent a

surgical procedure to correct her hammertoes in June of 2015. She was released to return to work on July 30, 2015, with the use of a protective boot and restrictions to her walking and standing.

On August 18, 2015, Petitioner injured her left foot while at Hy-Vee. The record concerning this injury is unclear. It appears that Petitioner was resting her foot on a ledge when she was approached by a customer. At this point, her foot slid off of the ledge and her toes bent backward. She heard a crack. It is unclear whether or not Petitioner was wearing her CAM boot at this time. Petitioner claimed in her testimony that she was wearing the boot, but that it left her toes exposed and was flexible. This account is different from her previous descriptions of the same injury. In her account of the injury to Dr. Modlin, her podiatrist, Petitioner indicated that she was not wearing her CAM boot as she was on her left foot and left knee and, when rising, caught her left second and third toes on the surface of the floor. It is further unclear when Petitioner reported her injury to human resources at work, and it does not appear she completed any paperwork with the employer on the day of the injury.

On August 19, 2015, Petitioner went to see her podiatrist, Dr. Modlin. Dr. Modlin informed Petitioner that she had fractured two toes he had previously performed surgery on. Petitioner continued to work at Hy-Vee until October 8, 2015. On October 9, 2015, Petitioner underwent surgery, resulting in the two injured toes being amputated.

December 8, 2015, Petitioner visited Dr. Glenn Hockett for chronic neuropathic pain in her left foot. Dr. Hockett opined that Petitioner was unable to work due to her foot pain. Petitioner visited Dr. Hockett once more on January 25, 2016, again for left foot pain and for acute cervical radicular pain, again opining that Petitioner should be excused from work.

On July 18, 2016, Petitioner saw Dr. Chandan Reddy. Dr. Reddy opined that Petitioner suffered from cervical spondylosis with radiculopathy. He further opined that Petitioner should consider undergoing an anterior cervical discectomy and fusion, but Petitioner chose not to.

On September 23, 2016, Plaintiff filed two arbitration petitions resulting from injuries suffered on August 18, 2015 and October 9, 2015.

On August 24, 2017, Petitioner underwent her first independent medical examination (“IME”) with podiatrist Dr. Lee. Dr. Lee opined that Petitioner’s account of her work injury, either traumatic or cumulative, was not supported by the circumstances. Dr. Lee specifically noted that, after Petitioner’s initial surgery by Dr. Modlin to correct Petitioner’s hammertoe, Modlin’s efforts to correct Petitioner’s toes were already failing. Dr. Lee diagnosed Petitioner with amputation of the second and third toes following the failed hammertoe correction surgery, but did not link the diagnosis back to the alleged work injury in any way. Dr. Lee also diagnosed Petitioner with chronic pain but only minimally attributed it to Petitioner’s foot pain.

Petitioner underwent a second IME by Dr. Stoken on September 11, 2017. Dr. Stoken causally related Petitioner’s toe amputations, chronic foot pain, and aggravated back pain to “the work incident referenced in the workers’ compensation Petition.” Dr. Stoken’s report did not go on to explore the cause of Petitioner’s foot injury.

The Deputy Commissioner’s Arbitration Decision, filed August 15, 2018, awarded Petitioner nothing. In his decision, Deputy Commissioner James F. Elliott specifically noted the unclear record regarding the origin of Petitioner’s foot injury. Deputy Commissioner Elliott found Dr. Modlin’s report particularly convincing, noting that Modlin’s analysis was the most contemporaneous report and therefore likely the most accurate. Dr. Modlin’s notes indicated that Petitioner was not wearing her CAM boot and that she injured her left second and third toes when she was on her left foot and left knee and attempted to rise from that position. He concluded that, in light of the credibility of Dr. Modlin’s report, Petitioner had failed to carry her burden of proof that her injury arose out of and in the course of her work, there was no convincing evidence that Petitioner had sustained a qualifying work injury and, as such, denied her request for workers’ compensation benefits.

Petitioner filed her Motion for Rehearing on September 4, 2018. That motion was denied on September 11, 2018. On September 24, 2018, Petitioner filed her Notice of Appeal to the Commissioner. In his decision dated April 17, 2019, The Commissioner entered his decision, ordering that the arbitration

decision filed August 15, 2018 and the ruling on Motion for Rehearing filed on September 11, 2018, were affirmed in their entirety. Petitioner timely filed her Petition for Judicial Review.

## **II. STANDARD OF REVIEW**

Iowa Code Chapter 17A governs judicial review of final agency action. “Under the Act, [the court] may only interfere with the commissioner’s decision if it is erroneous on 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). A party challenging agency action bears the burden of demonstrating the action’s invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). In exercising the power of judicial review, the district court acts in an appellate capacity. Nance v. Iowa Dept. of Revenue, 908 N.W.2d 261 (Iowa 2018) (quoting Mycogen Seeds v. Sands, 686 N.W.2d 457, 463 (Iowa 2004)).

Where the reviewing court is asked to review an agency’s interpretation of law, the court affords the agency a level of deference dependent on whether the authority to interpret that law has “clearly been vested by a provision of law in the discretion of the agency.” Burton v. Hilltop Care Center, 813 N.W.2d 250, 256 (Iowa 2012). Where the legislature has clearly vested the agency with such authority, the court “will only reverse a decision of statutory construction which is irrational, illogical, or wholly unjustifiable.” Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 252, 252 (Iowa 2010). If the agency has not been clearly vested with the authority to interpret the law, the court reviews questions of statutory interpretation for correction of errors at law. Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (Iowa 2012). If the alleged error lies in the commissioner’s application of the law to the facts, the court will determine whether the commissioner’s application of the law to the facts is irrational, illogical, or wholly unjustifiable. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 856-57 (Iowa 2009).

On the contrary, factual determinations made by the Commissioner are vested by a provision of law in the discretion of the agency.” Larson, 763 N.W.2d at 850 (quoting Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 [Iowa 2004]). This Court defers to the Commissioner’s determinations of fact where

they arise from “substantial evidence in the record before the court when that record is viewed as a whole.” Iowa Code 17A.19 § (10)(f). Substantial evidence is

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); see also Larson at 850.

The court should engage in a “fairly intensive review of the record”, rather than “simply rubber stamp the agency fact finding.” Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 499 (Iowa 2003). However, this does not require the parties to present a higher threshold of proof to support the agency’s decisions nor does it increase the court’s obligation to review the case; this is merely a more detailed statement of the law intended not to “...increase the intensity of judicial review...but to ensure that courts actually follow the level of review consistent with the act.” Id.

In ascertaining the grounds underlying Petitioner’s claim, be it on the basis of fact or on issues of law, Petitioner fails to clearly identify which of the subsections of Iowa Code § 17A.19(10) she relies on in appealing to this Court for judicial review. It does appear the gist of her claim is that the Deputy Commissioner erred in failing to find substantial evidence supported Petitioner’s claimed injury arising out of and in the course of her employment with Hy-Vee. Given Petitioner seems to take issue with the Commissioner’s determinations of fact, it appears Petitioner disputes the factual basis and findings underlying her claim and the Commissioner’s ruling. As such, this court will only disturb the Commissioner’s factual findings if there is not substantial evidence in the record, when viewed as a whole, to support them.

### **III. MERITS**

Petitioner bears the burden of proving a compensable injury qualifying for benefits, and that said injury arose out of and in the course of employment by a preponderance of the evidence. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996). “An injury arises out of the course of employment when there is a causal relationship between the employment and the injury.” Id. Petitioner must also prove, by a

preponderance of the evidence, the date on which she, as a reasonable person, would be plainly aware of (1) the injury and (2) the causal relationship between the injury and her employment. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 152 (Iowa 1997).

Petitioner in large part relies on the language of Iowa Code 17A.16(1), stating that the “[a]gency decision shall include an explanation of why the relevant evidence in the records supports each material finding of fact...Each conclusion of law shall be supported by cited authority or by a reasoned opinion.” Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 561-62 (Iowa 2010). On its face, this seems to impose an onerous requirement that the Commissioner make note of every material fact relied on in his decision as well as the relevant evidence underlying that fact. In reality, the requirement is less than that - as interpreted by Iowa courts, the Commissioner’s duty requires the commissioner’s decision to

...be “sufficiently detailed to show the path he has taken through conflicting evidence,” [but] the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it. Such a requirement would be unnecessary and burdensome.

Id.

Here, there is ample indication from both the arbitration decision and the Commissioner’s review that the evidence in the record was considered. The arbitration decision in particular states the material facts relied on by the deputy commissioner, including his consideration of Petitioner’s past injuries, the credibility determination made regarding the multiple conflicting reports concerning causation of Petitioner’s injury, his reliance on reports most contemporaneous with Petitioner’s reported injuries, and how convincing he found the evidence presented to him.

Petitioner takes issue with the deputy commissioner and commissioner finding Drs. Modlin and Nelson credible on the issues of causation and the cumulative nature of Petitioner’s injury. It is the function of the finder of fact to determine witness credibility. See, e.g., State v. Dudley, 856 N.W.2d 668, 677-78 (Iowa 2014). Here, the deputy commissioner, having examined the record, made the following findings regarding the Petitioner’s issues. First, Petitioner found that Petitioner was not credible on the issue of causation of the traumatic injury. Second, he found Dr. Modlin’s report, being the most contemporaneous with the issue, to be the most credible

report concerning causation of the traumatic injury. Third, the deputy commissioner rejected Dr. Stoken's reported causation of Petitioner's traumatic injury based on Stoken's assumption that the injury occurred at work, a fact in dispute between the parties. Based on the evidence, the deputy commissioner was entitled to find that, contrary to the evidence presented by Petitioner, the facts concerning the nature and cause of the injury were different from those assumed to be true by Dr. Stoken, thereby undermining the credibility of Dr. Stoken's testimony. Fourth, the deputy commissioner found that Petitioner's evidence of cumulative injury unconvincing. Fifth, the deputy commissioner specifically noted that he found Dr. Nelson's report most persuasive concerning the possible cumulative nature of Petitioner's injury. Nelson's report indicated his inability to state within a reasonable degree of medical certainty that Petitioner's CAM boot exacerbated her lower back pain. He further opined that there were no cumulative injuries through October 9, 2015. Finally, and perhaps most importantly, the deputy found that the evidence submitted by the Petitioner did not amount to a preponderance of same. The Commissioner echoed the deputy commissioner's sentiments in his appellate ruling. In this instance, the material facts upon which both the deputy commissioner and Commissioner based their rulings constitute, in this court's view, substantial evidence supporting their findings of fact. This Court will not disturb those factual findings.

#### **IV. CONCLUSION**

The Commissioner's ruling is AFFIRMED. The Commissioner's statement and division of costs is likewise AFFIRMED.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV058140  
**Case Title** PAMELA CARROW VS HYVEE INC ET AL

So Ordered

A handwritten signature in cursive script that reads 'Robert B. Hanson'. The signature is written in black ink and is positioned above a horizontal line.

**Robert B. Hanson, District Court Judge,  
Fifth Judicial District of Iowa**