IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

RANDY NANK, Petitioner/Cross-Respondent, v. UT&F HOLDINGS LLC d/b/a UNIVERSAL TANK & FABRICATION and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Respondents/Cross-Petitioners.	**Case No. CVCV059397** **RULING ON PETITION FOR JUDICIAL REVIEW**

This matter came before the Court in a telephonic hearing on Friday, May 22, 2020. Dirk J. Hamel represented Petitioner and Cross-Respondent, Randy Nank ("Mr. Nank"). Brandon W. Lobberecht represented Respondents and Cross-Petitioners, Travelers Property Casualty Company of America ("Travelers") and UT&F Holdings, LLC d/b/a Universal Tank and Fabrication ("UT&F"). Following the hearing, the parties submitted a stipulated record of the agency proceedings. Having entertained the arguments of counsel, having reviewed the agency file and the applicable law, and being otherwise fully advised in the premises, the Court enters this ruling.

Background Facts and Procedure

The facts in this case are largely undisputed. Mr. Nank was born on December 2, 1958. He is right-hand dominant. Although Mr. Nank never graduated high school, he did earn his GED as well as a mechanist diploma in community college. Over the years, Mr. Nank has amassed a broad skillset and performed various types of work, from tending cattle to operating his own painting business.

Mr. Nank had experienced several injuries prior to working at UT&F. These include a broken pelvis and a damaged sciatic nerve in a motorcycle accident and a fracture in his first cervical vertebra in a car accident. Mr. Nank also suffered a back injury while working for a painting contractor.

Mr. Nank began working for UT&F in January 2013. Like most of his previous employment, the work primarily involved physical labor. Among other tasks, Mr. Nank prepared massive carbon-steel tanks for hydro testing, which included tightening wingnuts that sealed the tanks' openings. To complete this task, Mr. Nank used a pole that was approximately six feet long and three inches in diameter. Properly tightening the wingnuts for hydro testing required a lot of force and, sometimes, more than one person. Once his arms were exhausted from the task, Mr. Nank would squat under the bar, position the pole on his shoulder and stand up with all of his strength. At first, Mr. Nank relied on his right shoulder to bear the force of the bar from tightening the wingnut. This caused pain in Mr. Nank's right shoulder over time, which Mr. Nank testified that he attributed to muscle soreness or an injury that would heal on its own. Mr. Nank did not seek medical attention for the pain that he felt in his right shoulder.

Mr. Nank eventually stopped using his right shoulder and began using his left shoulder to tighten the wingnuts. Then, on January 11, 2015, Mr. Nank had a difficult time sealing a particular tank and overexerted himself to tighten the wingnut, using the pole on his left shoulder. The next day, on January 12, 2015, Mr. Nank noticed "clicking" in his left shoulder. At that point, it also became apparent to Mr. Nank that his right shoulder, which had already been hurting him for several months to a year, was not merely sore but was likely injured and would not heal on its own.

Mr. Nank notified UT&F and requested medical treatment for both of his shoulders by January 20, 2015 and filed a workers' compensation claim against Travelers & UT&F on January 25, 2015.

Mr. Nank visited several doctors for his injuries over the next few years, many of whom provided treatment, opinions on various aspects of his injuries, and prescribed work restrictions. For example, Dr. Robin Sassman provided an independent medical examination and recommended certain work restrictions. Dr. Sassman opined that Mr. Nank should limit the weight he lifts to 20 pounds at waist height but not with his arms extended outwards, and he should not climb ladders or use power tools that vibrate.

Mr. Nank eventually stopped working at UT&F on April 18, 2017.

In June 2017, Lana Sellner performed a vocational assessment on Mr. Nank and provided a report that listed several jobs that she believed Mr. Nank could perform. However, Mr. Nank chose not to seek any employment after he stopped working for UT&F.

On August 9, 2017, Deputy Workers' Compensation Commissioner, James F. Elliott (the "Deputy Commissioner"), arbitrated Mr. Nank's workers' compensation claim. The Deputy Commissioner's June 20, 2018, Decision held, among other things, that Mr. Nank was permanently and totally disabled due to his shoulder injuries and that his right shoulder injury manifested itself on January 12, 2015.

Travelers and UT&F appealed the Arbitration Decision, and Iowa Workers' Compensation Commissioner Joseph S. Cortese II (the "Commissioner") issued his Decision on December 6, 2018. The Commissioner affirmed the Deputy Commissioner's finding as to the manifestation date of Mr. Nank's right shoulder injury but reduced Mr. Nank's award from permanent and total disability to a 75% industrial disability.

Mr. Nank filed his Petition for Judicial Review on December 11, 2019, challenging the Commissioner's reduction of his award. Travelers and UT&F filed a Cross-Petition for Judicial Review on December 31, 2019, challenging the Commissioner's determination that Mr. Nank's right-shoulder injury manifested on January 12, 2015.

Standard of Review

Chapter 17A of the Iowa Code governs judicial review of decisions by the Worker's Compensation Commissioner. *See* Iowa Code § 86.26; *See also Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 768 (Iowa 2016). On judicial review, the district court acts in an appellate capacity to correct errors of law by the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The Court "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19 (10) (a) through (n)." *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc. v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)). The standard of review that the Court applies varies depending on whether the alleged error involves (1) findings of fact, (2) interpretation of law, or (3) application of law to facts. *Burton*, 813 N.W.2d at 256.

When an agency is clearly vested with the authority to make factual findings, the standard of review is whether those findings are supported by substantial evidence in the record. 17A.19(10)(f). "[A] reviewing court can only disturb those factual findings if they are 'not supported by substantial evidence in the record before the court when that record is reviewed as a whole.'" *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Court "is limited to the findings that were actually made by the agency and not other findings the agency could have made." *Id.* "The commissioner, not the court, weighs the evidence." *Ward v. Iowa Dep't of*

Transp., 304 N.W.2d 236, 237 (Iowa 1981). "[C]ourts must not simply rubber stamp the agency fact finding without engaging in a fairly intensive review of the record to ensure that the fact finding is itself reasonable." *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003) (internal quotations and citation omitted).

"Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion." *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002) (citing *Ehteshamfar v. UTA Engineered Sys. Div.,* 555 N.W.2d 450, 452 (Iowa 1996)). The Iowa Supreme Court elaborated on substantial evidence review in the context of workers' compensation cases, stating:

> Mere recognition that there is substantial contrary evidence in the record does not mean that the commissioner's determination may be successfully attacked on appeal. The burden on the party who was unsuccessful before the commissioner is not satisfied by a showing that the decision was debatable, or even that a preponderance of evidence supports a contrary view. The burden is on the unsuccessful party to show that the commissioner's determination is lacking in substantial evidence.

Midwest Ambulance Serv. v. Ruud, 754 N.W.2d 860, 865 (Iowa 2008) (citing *Meyer v. IBP, Inc.,* 710 N.W.2d 213, 218 (Iowa 2006)).

When the reviewing court is asked to review an agency's interpretation of law, the level of deference afforded depends 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) (comparing Iowa Code § 17A.19(10)(*c*) with Iowa Code § 17A.19(10)(*l*)). When the agency has clearly been vested with discretion to interpret a provision of law, the Court must grant appropriate relief when such an interpretation is "irrational, illogical, or wholly unjustifiable" Iowa Code § 17A.19(10)(l). When an agency has not clearly been vested with discretion to interpret a provision of law, however, the Court must grant relief

when the interpretation is "erroneous" and is not required to give any deference to the agency's interpretation. Iowa Code § 17A.19(10(c); Iowa Code § 17A.19(11)(b).

Where an agency has been clearly tasked with the power to make determinations of fact, "it follows that application of the law to those facts is likewise 'vested by a provision of law in the discretion of the agency.'" *Burton*, 813 N.W.2d at 256 (citing *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004)). If "the claim of error lies with the ultimate conclusion reached, then the challenge is to the agency's application of the law to the facts" and the standard of review is for abuse of discretion. *Meyer*, 710 N.W.2d at 219. For example, an agency abuses its discretion if it uses wholly irrational reasoning or ignores important and relevant evidence. *Id.* The Court will only reverse the Commissioner's application of law to the facts if "it is 'irrational, illogical, or wholly unjustifiable.'" *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012) (quoting *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007); *see also Burton*, 813 N.W.2d at 256.

Analysis

There are two issues for the Court to decide: (I) Mr. Nank argues in his Petition that the Commissioner erred by decreasing his award in the Arbitration decision, from Permanent Total Disability to a 75% Industrial Disability; and (II) Travelers and UT&F argue in their Cross-Petition that the Commissioner erred in finding that Mr. Nank's right shoulder injury manifested itself on January 12, 2015. As explained below, the Court affirms all of the Commissioner's findings and determinations challenged in this case.

I. Mr. Nank's Petition

Mr. Nank challenges the Commissioner's decision to reduce the Deputy Commissioner's award to a 75% Industrial Disability on the basis that the reduction lacks substantial evidence in

the record, and he petitions this Court to reinstate the Deputy Commissioner's award of Permanent and Total Disability. Mr. Nank is correct in that this issue ultimately comes down to whether there is substantial evidence in the record to support the Commissioner's determination. *Compare St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000) (applying substantial evidence review to the industrial disability determination) *and Trade Professionals, Inc. v. Shriver*, 661 N.W.2d 119, 123 (Iowa 2003) (applying substantial evidence review to the industrial disability determination), *with Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 857 (Iowa 2009) (identifying the industrial disability determination as an application of law to the facts but applying substantial evidence review to the "extent" of the industrial disability).

The Commissioner agreed with the Deputy Commissioner's evaluation of most of the relevant factors in determining the extent of Mr. Nank's disability; however, the Commissioner reduced the award due to Mr. Nank's "lack of motivation" and the availability of other work compliant with his permanent work restrictions. (Appeal Decision at 5-6, 8).

The Commissioner found that Mr. Nank is capable of working with certain restrictions and that Mr. Nank chooses not to seek such employment. Mr. Nank argues that UT&F did not offer him suitable work for him after his injury. An employer is within its rights to pay healing benefits rather than employ someone in a light duty job. Additionally, assuming that no suitable work existed for Mr. Nank at UT&F, it does not mean that no suitable work existed anywhere. The Commissioner specifically noted that Mr. Nank has not applied for any jobs since the date of his left shoulder injury.

In his brief, Mr. Nank also takes issue with the weight that the Commissioner gave to Ms. Sellner's vocational report in light of Dr. Sassman's prescribed work restrictions and Mr. Nank's own testimony. Mr. Nank explains why he feels he could not perform the jobs proposed by Ms.

Sellner.[1] Mr. Nank points to further evidence that supports the Deputy Commissioner's finding of Permanent and Total Disability. However, the evidence that Mr. Nank focuses on does not negate the fact that there is also substantial evidence in the record to support the Commissioner's determination.

For the foregoing reasons, Mr. Nank's request to reinstate the Deputy Commissioner's finding of permanent and total disability is denied.

II. Merits of the Cross-Petition

Travelers and UT&F argue that Mr. Nank's claim for his right-shoulder injury should be barred under Iowa Code § 85.23 because, they argue, Mr. Nank failed to timely notify UT&F of his injury. Iowa Code § 85.23 provides that a workers' compensation claim is barred if the employee does not provide notice of the injury within ninety days of the occurrence of the injury, unless the employer has actual knowledge of the occurrence of the injury.

The Commissioner found that Mr. Nank's right shoulder injury manifested on January 12, 2015 under the cumulative injury rule.[2] The Commissioner also found that Travelers and UT&F had notice of Mr. Nank's right shoulder injury by January 20, 2015, which is well within the ninety-day window. Travelers and UT&F do not dispute that they had notice by January 20, 2015. Instead, they argue that Mr. Nank's obligation under Iowa Code §85.23 began at least six months prior to January 12, 2015, making notice on January 20, 2015 untimely. Travelers and UT&F argue that the Commissioner erred in applying the law to the facts.

[1] Some of Mr. Nank's arguments are not persuasive. For example, his inability to drive more than 90 minutes in a sitting would likely not prevent him from being a delivery driver.
[2] The Courts have also referred to the "cumulative injury rule" as the "manifestation test" as well as the "*Tasler* test" (from *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824 (Iowa 1992)); regardless of the name, this is the standard to be applied to cumulative injuries to determine the "date of injury" in worker's compensation cases.

There are two main problems with Travelers' and UT&F's arguments in their Cross-Petition. First, Travelers and UT&F overlook how the cumulative injury rule and the discovery rule operate in cases like Mr. Nank's. Second, even if the Commissioner did use the discovery rule in arriving at the January 12, 2015 date, it remains a determination of fact, which will not be disturbed if supported by substantial evidence in the record. Contrary to Travelers' and UT&F's contention, this is not an application of law to the facts subject to the less deferential standard of review.

In *Herrera v. IBP, Inc.*, 633 N.W.2d 284 (Iowa 2001), the Iowa Supreme Court Stated: "The preferred analysis is to first determine the date the injury is deemed to have occurred under the *Tasler* test, and then to examine whether the statutory period commenced on that date or whether it commenced upon a later date based upon application of the discovery rule." *Id.* at 288. The Iowa Supreme Court proceeded to summarize the cumulative injury rule and the discovery rule:

> [A] cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, **i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition.**

633 N.W.2d at 288 (citation omitted) (emphasis added).

The parties agree that for purposes of Iowa Code § 85.23, the 90-day countdown does not begin until the claimant is deemed to have "discovered" the injury under the discovery rule. The parties also agree that Mr. Nank's right shoulder injury would constitute a cumulative injury, the kind of which typically results from repetitive conduct over a period of time as opposed to a

single traumatic event. The Commissioner makes the factual determination of when an injury occurred using the cumulative injury rule before making a determination using the discovery rule, if applicable. Travelers and UT&F failed to acknowledge the distinct roles of these determinations in their argument. [3]

In this case, the Commissioner determined under the cumulative injury rule that Mr. Nank's right shoulder injury manifested on January 12, 2015. The parties agree that Travelers and UT&F had notice of the injury by January 20, 2015, which was eight days after the Commissioner found that Mr. Nank's right shoulder injury manifested itself, well within the 90-day deadline for notice in Iowa Code section 85.23. Thus, it was not necessary for the Commissioner to make a specific determination under the discovery rule. A date determined pursuant to the discovery rule is necessarily on or after the date of manifestation.

In their Cross-Petition, Travelers and UT&F argue that the Commissioner erroneously applied the law to the facts. This is not the appropriate standard of review. Whether Travelers and UT&F purport to challenge the Commissioner's determination under the cumulative injury rule or the discovery rule, the standard of review is the same: both are subject to a substantial evidence review. *See generally Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288-89 (Iowa 2001).

"The Commissioner is entitled to a substantial amount of latitude in making a determination regarding the date of manifestation since this is an inherently fact-based determination." *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 829 (Iowa 1992). The Iowa Supreme Court has established the same standard for evaluation of the discovery rule. "The question of whether a claimant knew, or should have known, of the nature, seriousness, and

[3] To understand how the cumulative injury rule and discovery rule interact in cases like this, it is helpful to note that a person cannot "discover" an injury that has not yet "manifested" itself.

probable compensability of her injury is a question of fact to be determined by the commissioner."[4] *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 865 (Iowa 2008) (citing *Gates v. John Deere Ottumwa Works,* 587 N.W.2d 471, 475 (Iowa 1998). Accordingly, the Court will not disturb the Commissioner's finding that the applicable date of injury is January 12, 2015, if that finding is supported by substantial evidence in the record. *Oscar Mayer* 483 N.W.2d at 830.

The Commissioner found, and the record reflects, that throughout Mr. Nank's life, his work has primarily consisted of physical labor. Also, Mr. Nank experienced many injuries before starting work at UT&F. A person that has experienced a number of injuries in life and primarily performs physical labor is generally less sensitive to aches and pains. The Commissioner found Mr. Nank's testimony credible when Mr. Nank testified that he initially believed that his right shoulder injury was muscle soreness that would heal on its own. Mr. Nank's testimony was corroborated by evidence that he did not seek medical attention for his right shoulder in the six months to a year that his right shoulder was bothering him. The Commissioner found that Mr. Nank decided to start using his left shoulder to perform his work because of the soreness in the right shoulder. Then, his left shoulder began hurting him and making a clicking noise. The Commissioner found this new development, coupled with the ongoing pain in his right shoulder, made it apparent to Mr. Nank that he was suffering from an injury or condition in his right

[4] This is the discovery rule. To avoid confusion, it is worth noting that in *Midwest Ambulance Serv. v. Ruud*, the Iowa Supreme Court bifurcated their review and applied both substantial evidence review and application of law to fact review to the Commissioner's determination of when the statute of limitations began to run. However, the Supreme Court only applied the less deferential standard of review to the determination of whether the claim was timely. This was a separate and subsequent determination to the factual determination under the discovery rule.

shoulder rather than just muscle soreness. In sum, there is substantial evidence in the record to support the Commissioner's determination under the cumulative injury rule.

Travelers and UT&F argue that a reasonable person in Mr. Nank's position would have recognized the nature, seriousness, and probable compensable nature of his right shoulder injury long before the Commissioner deemed Mr. Nank's right shoulder injury manifested itself. (Respondents/Cross-Petitioners' Brief at 20). As mentioned earlier, the Commissioner's finding was under the cumulative injury rule, not the discovery rule focused on by Travelers and UT&F. Still, Travelers and UT&F focus on the fact that Mr. Nank's right shoulder began hurting him six months to a year before January 12, 2015 and that he knew it was work related. They also focus on the fact that Mr. Nank stopped using his right shoulder for tightening the wing nuts and switched to his left shoulder. These could be valid points to support a contrary finding; however, it does not mean the Commissioner's Decision was unreasonable. The task for the Court is to determine whether substantial evidence in the record supports the Commissioner's determination. The Court finds that it does, whether or not the Commissioner made his determination using the discovery rule.

Mr. Nank had previously sustained injuries from traumatic events. He was in his mid-fifties and had performed physical labor for most, if not all, of his working years. He likely experienced ongoing aches and pains from his previous injuries, his age, and his labor.

It is reasonable to conclude that Mr. Nank did not realize the nature, seriousness, and/or probable compensable nature of his right shoulder injury until he sustained an injury in his left shoulder from performing the same task. Travelers and UT&F further argue that the Commissioner erred by imposing a stricter standard of knowledge, citing a sentence in the fourth full paragraph on page seven of the Commissioner's Decision: "I found [Mr. Nank] did not

recognize that this soreness could be a true "condition" or "injury" until his left shoulder started clicking on January 12, 2015." (Appeal Decision at 7). Travelers and UT&F specifically take issue with the Commissioner's use of the word "true" to describe the words "condition" or "injury." However, it is clear to the Court that the Commissioner used the word "true" in the sense of the words, "actual" or "real," modifying the words "condition" and "injury" from the cumulative injury rule rather than imposing an improper legal standard.

Also, the Commissioner cites the correct standard for the cumulative injury rule two paragraphs earlier in the second full paragraph on page seven: "a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment." (Appeal Decision at 7) (quoting In *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001)). More importantly, when the Commissioner stated "I found" in the sentence that Travelers and UT&F take issue with, it is clear that the Commissioner was referring to his findings of fact section, where, on page four of his Decision, the Commissioner actually applied the cumulative injury rule and wrote:

> Ultimately, I find [Mr. Nank's] right shoulder soreness during the year leading up to January 12, 2015, was not enough to make it plainly apparent to a reasonable person that an injury had been sustained…[it] would not have become apparent to a reasonable person until January 12, 2015, when [Mr. Nank] began experiencing the new clicking in his left shoulder.

(Appeal Decision at 4). In sum, the Commissioner applied the appropriate standard and no enhanced scrutiny is warranted on this issue. Travelers and UT&F's Cross-Petition to bar recovery for Mr. Nank's right shoulder injury is denied.

Conclusion

The Appeal Decision of the Workers' Compensation Commissioner is AFFIRMED in all respects.

IT IS SO ORDERED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV059397	RANDY NANK VS UT AND F HOLDINGS LLC ET AL

So Ordered

David Nelmark, District Judge
Fifth Judicial District of Iowa