IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DEBRA STUART, **Petitioner,** **vs.** **DICKTEN MASCH PLASTICS and EMPLOYERS PREFERRED INS. CO.,** **Respondents.**	**CASE NO. CVCV063926** **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 June 15, 2022 in which the commissioner affirmed the deputy's decision that the petitioner had not established that she was entitled to a review-reopening due to a substantial change in condition subsequent to a settlement reached in 2017. The issue before the court on judicial review is whether that decision was correct.

The appropriate standard of review for this court is governed by Iowa Code §17A.19(10). Any factual determinations 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: Stuart was injured while on the job for Dickten Masch Plastics on July 19, 2012; specifically, she sustained a serious injury to her ankle, which ultimately affected her gait and resulted in severe pain in her low back. After extensive treatment and multiple surgeries, her treating physician (Dr. Daniel Miller) deemed her to have reached maximum medical improvement in a note dated April 22, 2015, in which he assessed her as having a permanent impairment of 3% to the whole person and 7% to the lower extremity. She was reevaluated by Dr. Miller on December 7, 2016 at the request of the employer. That evaluation report (dated January 9, 2017) reads in pertinent part as follows:

> It is my opinion that the right hip pain is referred from the back. Ms. Stuart has pre-existing, progressive back issue. Although the back issue is pre-existing to the work injury, I believe that the abnormal gait as a result of the ankle injury from the work accident July 19, 2012, is exacerbating the low back pain. I do not believe that the residual ankle pain is causing aggravation or advancement of her pre-existing back issue. That is, degenerative disk disease of the lumbar back progressed and caused pain/discomfort without the ankle injury.

Dr. Miller found that Stuart had sustained a partial permanent impairment to her low back of 3%. He noted that no new work restrictions or treatment were noted for the low back issue. He confirmed in a follow-up note to counsel for the employer signed January 25, 2017 that Stuart did not have an aggravation of her pre-existing low back condition from her altered gait and her work injury did not cause any structural change in

her underlying back condition. However in a subsequent note to Stuart's counsel signed on February 13, 2017, Dr. Miller agreed that, assuming Stuart's back condition was asymptomatic on the date of her work injury, her altered gait caused an aggravation, lighting up or acceleration of her pre-existing degenerative back condition.

While Stuart's first claim was pending, she was able to return to work with restrictions; specifically, she was advised that she was to do "sit down work only." Specifically, she inspected wires on medical equipment to ensure quality control. At the time she deposed in February of 2017, she testified that there were others who also performed this job; however, at the review-reopening hearing she testified that the job had not previously existed.[1] She did the work from a high back chair on wheels that allowed her to move without standing up. Other employees would bring the equipment to her for inspection and then take them away. She was allowed frequent breaks as the constant sitting would cause her back to get stiff and she would need to get up and walk around; she testified at hearing that other workers were not given breaks as frequently. Her intention was to continue to work with her employer until she was able to retire. She had worked for DMP and its predecessor since 2004; she testified at hearing that she would not have been able to perform any of the other jobs she had done previously for these employers.

On April 5, 2017, the parties entered in to an agreement for settlement pursuant to Iowa Code §85.35(2). In that agreement, the parties stipulated that Stuart had sustained a permanent partial disability for 35% of the body as a whole. Among the supporting documentation for the agreement was the aforementioned evaluation from Dr. Miller

[1] Her hearing testimony was corroborated by Karen Knox-Clinton, a former co-worker.

dated January 9, 2017, as well as her deposition and a functional capacity evaluation (FCE) report dated February 3, 2015. The agreement was approved by the commissioner on May 4, 2017.

The plant where Stuart was employed closed in April of 2020. The present review-reopening proceeding was filed on May 8, 2020. At the review-reopening hearing held on August 10, 2021, Stuart testified at length regarding her educational limitations; she spoke in particular about her inability to comprehend the most basic mathematical functions (specifically fractions used in measures and measurements).[2] She testified that in her opinion she would not have been able to get a job anywhere else in the job market without the accommodations provided to her by her employer.

The deputy commissioner entered her review-reopening decision on February 9, 2022. She concluded that Stuart had failed to establish a change in her functional impairment from the time of the settlement until the hearing. In this regard, she discounted Stuart's testimony and that of her lay witnesses that she had worsened since the settlement and instead relied on the objective findings from two FCEs performed by Dr. Jacqueline Stoken in 2017 and 2021, as well as the results of an independent medical examination performed by Dr. William Boulden in July of 2021. The deputy also concluded that Stuart's economic condition had not changed as a result of her injury:

> Claimant also contends that she sustained an economic change of condition due to the work injury. Ms. Stuart has demonstrated that her economic condition has changed since the AFS. However, I found the reason that her employment ended was because the entire plant closed and this was not related to the original work injury. Furthermore, claimant's argument that termination form an

[2] Her 2017 deposition testimony was much more limited in this regard; she only testified that she dropped out of school in the 10th grade because she "couldn't comprehend what [she] was getting out of it," that she had difficulty in school and may have taken some remedial classes for reading.

> accommodated job amounts to a change of condition is not persuasive. In support of her position, Ms. Stuart relies on Gallardo v. Firestone Tire & Rubber Co., 482 N.W.2d 393 (1992). However, the Gallardo case is distinguishable form Ms. Stuart's case because Mr. Gallardo's condition deteriorated after the time of the initial award. In Ms. Stuart's case, her condition did not deteriorate after the time of the AFS. At the time of the AFS, the parties entered into several stipulations including the amount of Ms. Stuart's loss of earning capacity. At that time, the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer was to be taken into account. Although Ms. Stuart lost her job since the AFS, the facts and circumstances related to her earning capacity remain the same and were known at the time of the original settlement. I conclude Ms. Stuart has failed to demonstrate by a preponderance of the evidence that she sustained an economic change of condition related to the work injury.

The deputy's decision was appealed to the commissioner, who affirmed the decision in its entirety after adopting the deputy's analysis, findings and conclusions after a de novo review. The commissioner specifically affirmed the deputy's credibility findings regarding the testimony of Stuart and her witnesses, presumably on the issue of the claimed deterioration of Stuart's condition since the settlement. The commissioner's appeal decision was filed on June 15, 2022; a timely petition for judicial review was commenced on June 23, 2022.

In a review-reopening proceeding arising from either an award or an agreement for settlement, "the inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon." Iowa Code §86.14(2) (2021). When an employee seeks an increase in compensation, the employee bears the burden of establishing by a preponderance of the evidence that her current condition was proximately caused by the original injury.

Kohlhaas, 777 N.W.2d at 391. The change can be brought about because of a deterioration in the claimant's physical condition or a change in earning capacity without a change in physical condition. U.S. West Communications, Inc. v. Overholser, 566 N.W.2d 873, 875 (Iowa 1997). In the present case, Stuart is not contesting the commissioner's determination that her physical condition had not deteriorated since the settlement; her sole focus in seeking judicial review is the decision that the closing of the plant (and resulting removal of the accommodated job) by itself does not trigger a right to a review-reopening. As such, the issue is whether that decision (and its necessary application of law to facts) was irrational, illogical or wholly unjustifiable, as defined above.[3]

When a settlement is reached in a workers' compensation case, the claimant's loss of earning capacity is properly viewed in terms of her present ability to earn in the competitive job market without regard to the accommodation furnished by the employer. Overholser, 566 N.W.2d at 876 (citing Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995)). Absent some indication that the commissioner's approval of the agreement for settlement adjusted Stuart's disability rating downward because of her employer's accommodation, see Gallardo v. Firestone Tire & Rubber Co., 482 N.W.2d 393, 396 (Iowa 1992); Overholser, 566 N.W.2d at 876, a reexamination of an employee's earning capacity should not be based on that same accommodation. See Kohlhaas, 777 N.W.2d at 391 (commissioner may not redetermine condition of employee established in prior award).

[3] There is no dispute as to whether the factual determinations used by the commissioner to conclude that no change in earning capacity had occurred were supported by substantial evidence.

In the present case, there is no indication that the agreement for settlement was based on a lesser disability rating resulting from the accommodation provided by Stuart's employer. Therefore, the mere fact that this accommodation ended with the plant closing does not entitle Stuart to a review-reopening. There is nothing within the present record that would allow for the conclusion that the earlier settlement was "a distortion of [Stuart's] true earning capacity."[4] Accordingly, the commissioner's decision to deny Stuart's request for a review-reopening on the basis that the plant closing ended her accommodated job was a correct application of the law to the facts at hand. As this is the only basis upon which Stuart seeks judicial review,[5] the commissioner's decision will be affirmed.

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[4] There is authority for the proposition that providing an accommodation can "cast light on the injured worker's ability to earn a living in the market place." Murillo v. Blackhawk Foundry, 571 N.W.2d 16, 18 (Iowa 1997). Specifically, the court in Murillo established the rule that "an employer's special accommodation for an injured worker can be factored into the award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity….[and that t]o qualify as discernible, it must appear that the new job is not just 'make work' provided by the employer, but is also available to the injured worker in the competitive market." Id.; see also Norton v. Hy-Vee, Inc., 2017 WL 5178989 **6-7 (Iowa Ct.App., Case No. 16-1299, filed November 8, 2017). To the degree that Stuart is attempting to fit within this analysis by arguing that she is presumably totally disabled with the end of her accommodated job, she is not assisted by these cases. While Murillo was remanded back to the commissioner, that was the result of a new rule of law being promulgated, an argument not available to Stuart. 571 N.W.2d at 19. Likewise, in Norton, the court found that the commissioner had not artificially adjusted the claimant's disability rating downward based on the accommodation, but had "wanted to assure Norton that a review-reopening proceeding would be available should her earning capacity change in the future" for reasons not attributable to her present condition. 2017 WL 5178989 at *7. These cases support the contention that the examination of the impact of an accommodation on an injured worker's earning capacity must be addressed at the time the award or settlement is reached, and not in a subsequent review-reopening proceeding pertaining only to the accommodation. "[O]nce there has been an agreement or adjudication the commissioner, absent appeal and remand of the case, has no authority on a later review to change the compensation granted on the same or substantially same facts as those previously considered." Kohlhaas, 777 N.W.2d at 393 (citation omitted); see also Anderson News v. Reins, 2014 WL 5862155 *3 (Iowa Ct.App., Case No. 14-0038, filed November 13, 2014).

[5] Stuart did include a brief point regarding the quality of the opinions provided by the vocational expert retained by the respondents, Julie Svec. However, the commissioner never looked at Svec's opinions in addressing whether review-reopening was appropriate; therefore, it is not before the court on judicial review. See Interstate Power Co. v. Iowa State Commerce Comm'n, 463 N.W.2d 699, 701 (Iowa 1990) ("[A] party is precluded from raising issues in the district court that were not raised and litigated before the agency").

IT IS THEREFORE ORDERED that the decision of the workers' compensation commissioner previously entered in this matter on June 15, 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. 5056493.01

State of Iowa Courts

Case Number	**Case Title**
CVCV063926	DEBRA STUART VS DICKTEN MASCH PLASTICS LLC ET AL
Type:	OTHER ORDER

So Ordered

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

Electronically signed on 2022-12-13 10:51:35