**IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY**

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| **JOSEPH MILLER,**<br><br>Petitioner,<br>v.<br><br>**LENNOX INTERNATIONAL, INC.; ESIS/ACE AMERICAN INSURANCE,**<br><br>Respondents. | Case No. **CVCV063404**<br><br>**RULING ON PETITION FOR JUDICIAL REVIEW FOR REOPENING** |

This matter came before the Court on December 9, 2022, for hearing on Petitioner Joseph Miller's, (Miller), Petition for Judicial Review. The hearing was transcribed. Attorney Nicholas Platt appeared on behalf of Petitioner. Attorney Robert Gainer appeared on behalf of Respondents Lennox International, Inc., and ESIS ACE American Insurance (Lennox International).

## I. BACKGROUNG FACTS AND PROCEDURAL POSTURE.

Miller was an employee of Lennox International for approximately 16 years. His employment was terminated in December 2015. In December 2012, Miller sustained an injury to his cervical spine, right shoulder, and a mental health sequela. After seeking workers' compensation benefits, he was awarded 10 percent industrial disability for his injuries.

Miller filed a review-reopening petition. In November 2017, the Review-Reopening Decision found Miller had suffered a change in condition and increased the industrial disability award to 75 percent. On appeal, this award was reduced to 40 percent due to a finding that Miller was not motivated to work. (Cert. Agy. Rec. p. 338). Miller filed another review-reopening petition in March 2020. The Review-Reopening Decision concluded there had been no change in physical or economic condition and denied increase of the award. The Decision was affirmed on Appeal to the Commissioner.

Miller has appealed to the district court for judicial review claiming the Commission's finding of no change in physical or economic condition is not supported by substantial evidence, is a misapplication of law to the facts, and that the Commission ignored medical evidence in his favor. Cert. Agy. Rec. p. 5-6. Miller is also requesting reimbursement for an independent medical exam (IME) he procured from Dr. Kuhnlein on February 10, 2021, and to be awarded all costs for the proceedings. Cert. Agy. Rec. p. 167-174.

## II. STANDARD OF REVIEW.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2011); Meyer v. IBP Inc., 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we 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, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise, unreasonable, arbitrary, capricious, or an abuse of discretion. Id. at (10). The District Court acts in an appellate capacity to correct errors of law on the part of the agency. Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 748 (Iowa 2002).

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact," when the record is viewed as a whole. Meyer, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so the Court is bound by the commissioner's findings of fact if they are supported by substantial evidence. Mycogen Seeds v.

Sands, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity, "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); Mycogen, 686 N.W.2d at 464.

The application of the law to the facts is also an enterprise vested in the commissioner. Mycogen, 686 N.W.2d at 465. Accordingly, the Court will reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." Id.; Iowa Code § 17A.19(10)(l). This standard requires the Court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009).

## III. CONCLUSIONS OF LAW

### A. The Commission Did Not Improperly Refuse to Consider Medical Evidence

In his brief in support of judicial review, Petitioner asserts the Commission wrongfully refused to consider certain medical evidence in reaching the decision. The records referred to are medical records that were admitted at the first review-reopening hearing on November 16, 2017 but not resubmitted as evidence in the second review-reopening hearing held on April 13, 2021. Miller relies on Iowa Code 17A.12(6) which provides that: "The record in a contested case shall include: … (b). All evidence received or considered and all other submissions." Iowa Code section 17A.12(8) provides that: "Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record." Here, because the documents at issue were not provided as exhibits in the second review-reopening, they are not "evidence received and considered." Further, Miller has not demonstrated that these documents were evidence or officially noticed in the April 2021 review-reopening decision. Miller has not identified any Iowa statute

that would require the Commission to incorporate all previous filings into a later hearing. The Court therefore finds that the Commission did not err on this ground.

**B. The Commissioner's Decision Regarding Miller's Physical Condition.**

Review-reopening is governed by Iowa Code section 86.14 which provides, "[I]n a proceeding to reopen an award for payments or agreement for settlement . . . inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). "The claimant carries the burden of establishing by a preponderance of the evidence that, subsequent to the date of the award under review, he or she has suffered an impairment or lessening of earning capacity proximately caused by the original injury." E.N.T. Assocs. v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994) citing Blacksmith v. All–American, Inc., 290 N.W.2d 348, 350 (Iowa 1980). "While worsening of the claimant's physical condition is one way to satisfy the review-reopening requirement, it is not the only way for a claimant to demonstrate his or her current condition warrants an increase of compensation under section 86.14(2)." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009). "We have stated on several occasions that industrial disability is the product of many factors, not just physical impairment." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999). "Other factors include age, education, experience, and inability, because of the injury, to engage in employment for which the employee is fitted." E.N.T., 525 N.W.2d at 829 (internal citations omitted).

The Appeal Decision held Miller had not experienced a change in physical condition. This decision relied on the lack of documentation of increase in pain rating or decrease in range of motion in Dr. Scurr's records; lack any recommendations for additional restrictions after the 2017 review-reopening hearing by Dr. Scurr; lack of any change in Dr. Scurr's prescription regime; and Dr. Kuhnlein's 2020 report which opines no change in Petitioner's impairment rating of 13% with

only provisional language for the additional two percent. Dr. Kuhnlein provided for an increase of 2% only "If he has developed adhesive capsulitis" (Cert. Agy. Rec. p. 13, 173).

"Evidence may be substantial even though [the court] may have drawn a different conclusion as fact finder." Cedar Rapids Cmty. Sch. Dist. V. Pease, 807 N.W.2d 839, 845 (Iowa 2011). Weighing of competing expert opinions is within the province of the commission. Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) ("the determination of whether to accept or reject an expert opinion is within the peculiar province of the commissioner.").

Here, the Commission's decision is supported by substantial evidence on the record. The Appeal Decision detailed the specific medical evidence, or lack of medical evidence, relied upon in reaching the decision. Additionally, Dr. Rondinelli's March, 2021 report issued no change in impairment rating. (Cert. Agy. Rec. p. at 239-242). It was Miller's burden to demonstrate a change in physical condition and the Commission identified the basis for its ruling from the submitted medical evidence. The Court finds the Commission's decision was supported by substantial evidence and was not arbitrary, capricious, unreasonable, or irrational.

Miller asserts that the Commission created errors of fact that prohibit a finding of substantial evidence. First, Miller is critical of a sentence in the Appeal Decision that "Some of the findings by the deputy commissioner in the review-reopening decision were based on the deputy commissioner's findings regarding claimant's credibility." (Cert. Agy. Rec. p. 11). While there was no express statement that the Deputy Commissioner found Miller lacking in credibility, it is clear that some findings were based on credibility determinations regarding whether Miller's injuries had worsened and whether his ability to work had decreased. Second, Miller asserts that Dr. Kuhnlein's 2% increase is not conditional. Dr. Kuhnlein's report states "If he has developed

adhesive capsulitis, that would be a sequela to the injury. The following impairment would be provisionally assigned for administrative purposes should no further treatment be approved, or Mr. Miller decides not to participate in further treatment." (Cert. Agy. Rec. 173). This statement, which directly precedes the 2% whole body impairment, is expressly provisional. The Court does not find the Commission relied on a mis-statement of fact that resulted in a decision lacking substantial evidence. The Commission's decision was not arbitrary, capricious, unreasonable, or irrational.

The Court does note that the Review-Reopening Decision cited outdated standards from Bousfield v. Sisters of Mercy, 86 N.W.2d 109 (Iowa 1957) and Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978) which required a claimant to demonstrate their condition "worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement." (Cert. Agy. Rec. p. 102). This anticipatory or contemplative approach for determining a change in condition was abrogated by Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009). As one court has explained:

> [T]he Meyers analysis, along with the commissioner's logic on remand, were no longer viable under Kohlhaas because the agency can no longer consider what was or was not anticipated at the time of the initial arbitration decision.
>
> We agree with the district court that considering Kohlhaas's removal of the "anticipated" language from the review-reopening standard, Meyers is no longer good law. Under Kohlhaas the commissioner should not be evaluating in review reopening cases whether the initial decision anticipated the claimant's condition would improve or deteriorate.

Verizon Bus. Network Servs., Inc. v. McKenzie, 823 N.W.2d 418 (Iowa Ct. App. 2012). In view of Kohlhaas, the anticipatory standard cannot be utilized in review-reopening analysis. However, the Court finds this legal error on the part of the Review-Reopening Decision does not require reversal. The Appeal Decision correctly identified and applied the standard set forth in Kohlhaas

and did not consider the anticipatory standard. Therefore, the Court finds that the Appeal Decision, which is the final agency decision, did not commit an error of law.

**C. The Commissioner's Decision Regarding Miller's Economic Condition.**

Miller also contends the Commission's finding of no change in economic condition was not supported by substantial evidence. Miller presents the report of Phil Davis, M.S., who opined that Miller is precluded from engaging in greater than 90 - 100 percent of all occupations and noting Miller's rigorous job search and application efforts. (Cert. Agy. Rec. p. 192 – 200).

The Appeal Decision cited a lack of documentation showing Miller applied to any positions between December 2020 and March 2021. The Appeal Decision also relied on the testimony and report of Lisa Sellner, a vocational specialist hired by Lennox International. Ms. Sellner's testimony was critical of Miller, citing delayed responses and lack of follow-up on job leads she provided to him. Id. at 260, 263-267. Ms. Sellner opined that although he is limited to sedentary work, Miller is employable and is simply unmotivated. Id.

The Appeal Decision is supported by substantial evidence. Both Parties presented expert vocational evidence and the Commission found Lennox International's evidence more credible. "The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. The commissioner may accept or reject the expert opinion in whole or in part." Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa 2002). The Court also finds the Commission's explanation of the decision is sufficient. "While it is true that the commissioner's decision must be 'sufficiently detailed to show the path . . . taken through conflicting evidence,' 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." Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 274 (Iowa 1995)

(internal citations omitted). Here, the Appeal Decision identified the testimony of Sellner and the deficiencies in Miller's job applications that led the Commission to conclude his motivation to work was unchanged from the 2017 review-reopening. The Court finds the ruling was supported by substantial evidence and was not arbitrary, capricious, unreasonable, or irrational.

**D. The Commissioner Correctly Denied Petitioner Reimbursement for Dr. Kuhnlein's IME**

Miller argues Respondents should reimburse him for Dr. Kuhnlein's IME performed on February 10, 2021. Miller concedes Lennox International acted within the parameters of the governing statute, Iowa Code section 85.39. However, Miller maintains he should be reimbursed due to Lennox International's delay in providing their own expert report until it was nearly impossible for the claimant to schedule, attend, and get a report of their own.

> Iowa Code section 85.39 provides:
>
> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state …
> …
> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. …

Iowa Code § 85.39

Iowa courts have held the process prescribed in the statute must be followed for reimbursement of IME expense. "The statutory process balances the competing interests of the employer and employee and permits the employee to obtain an independent medical examination at the employer's expense." Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 844

(Iowa 2015) (citing IBP, Inc. v. Harker, 633 N.W.2d 322, 327 (Iowa 200)). "An employer, however, is not obligated to pay for an evaluation obtained by an employee outside the statutory process." Id. The Iowa Supreme Court has emphasized the importance of strict adherence to the statutory process for reimbursement of an IME.

> [S]ection 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing . . . Our legislature established a statutory process to govern examinations . . . Neither courts, the commissioner, nor attorneys can alter that process by adopting contrary practices. If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed.

Des Moines Area Reg'l Transit Auth., 867 N.W.2d at 846–47.

Here, Miller primarily takes issue with the fairness of the process itself and the timing that resulted in this case. A claimant who disagrees with the process is nonetheless required to follow it. "If injured workers believe the battle favors the employer, the change sought must come from the legislature. We cannot interpret the statutory process to undermine or defeat the intent of the legislature." Des Moines Area Reg'l Transit Auth., 867 N.W.2d 839, 847 (Iowa 2015).

Miller acknowledges he did not have Dr. Rondelli's impairment rating when he sought the IME with Dr. Kuhnlein on February 10, 2021. (Cert. Agy. Rec. p. 167). Dr. Rondinelli's examination occurred subsequently on February 23, 2021, with the report issued on March, 9, 2021. Id. at 243-246, 239-242. The Court concludes Miller's IME with Dr. Kuhnlein was obtained outside of the statutory process and Miller is not due reimbursement. The Commission committed no error of law or abuse of discretion in denying Miller reimbursement.

The Court finds Miller has also not demonstrated an error in the assessment of costs. Miller does not identify any legal authority that would require assessment of costs to Lennox International. Further, given this Court's ruling, analysis would not change if based on the

prevailing party.

**IT IS HEREBY ORDERED** that the Workers' Compensation Commission decision is **AFFIRMED.**

State of Iowa Courts

| **Case Number** | **Case Title** |
|---|---|
| CVCV063404 | JOSEPH MILLER VS LENNOX INTERNATIONAL INC ET AL |
| **Type:** | ORDER FOR JUDGMENT |

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

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