IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

MID AMERICAN CONSTRUCTION LLC and GRINNELL MUTUAL, **Petitioners** **vs.** **MARSHALL SANDLIN** **Respondent.**	**Case No. CVCV061324** **RULING ON PETITION FOR JUDICIAL REVIEW**

Before the Court is Mid-American Construction LLC and Grinnell Mutual's Petition for Judicial Review, filed on February 10, 2021. On July 23, 2021, Petitioners filed their Judicial Review Brief. On August 26, 2021, Respondent filed his Judicial Review Brief. On September 9, 2021, Petitioners filed a Reply Brief. The Court held a hearing on the Petition's merits on September 17, 2021. After hearing the arguments set forth by the parties and reviewing the record, the Court issues its ruling on the Petition.

I. BACKGROUND

On June 18, 2020, the Deputy Commissioner filed an Arbitration Decision, which found that Sandlin sustained a two percent functional loss in his left foot and ankle. Arb. Dec. p. 4. The Deputy ordered Petitioners to pay 4.4 weeks of compensation at a rate of $373.90 per week. *Id.* The Deputy additionally ordered Petitioners to reimburse Sandlin for the costs he incurred in getting an independent medical examination (IME) for $2,020.00. *Id.* The case went on rehearing and on July 13, 2020, the Deputy issued a ruling on Petitioner's Application for Rehearing. The Deputy changed his ruling and ordered Petitioners to pay three weeks of compensation instead of

4.4. Reh'g Dec. p. 2. Petitioners appealed, and Sandlin cross-appealed. On January 21, 2021, following a de novo review of the evidentiary record and the arguments of the parties, the Commissioner issued his Appeal Decision affirming the Deputy's arbitration and rehearing rulings in their entirety. App. Dec. p. 1.

II. FACTS

Marshall Sandlin, Respondent, was born in 1975, and was 44 years of age at the time he testified before the Iowa Workers' Compensation Commission. He was single with no dependents at the time, and the Commissioner found his testimony generally credible. Arb. Dec. p. 1. Sandlin began working for Mid-American Construction (Mid-American), as a general laborer in May 2017. *Id.* When Sandlin began work at Mid-American, he had no impairment, restrictions, or condition in his left foot.

On September 6, 2017, Sandlin was removing rotten boards while working on a ladder. The ladder kicked out and he fell. As Sandlin was falling, his foot entangled in the ladder and hit the concrete. Sandlin claimed that immediately after the fall, he could not place any weight on his left foot. *Id.* He testified that his supervisor advised him to go home. However, after it became apparent to Sandlin that his symptoms would not improve, he told his employer that he needed to seek medical treatment. *Id.*

Dr. Frederick Isaak evaluated Sandlin at Medical Associates Clinic on September 9, 2017. Joint Exhibit (JE) 2, p. 4. Sandlin went through an x-ray, which suggested a fracture at his fifth metatarsal. It read "Impression: Nondisplaced, predominantly transversely-oriented fracture within the proximal [fifth] metatarsal." *Id.* at 6. Dr. Isaak instructed Sandlin to keep his foot

elevated and use ice. Dr. Isaak further recommended that he take ibuprofen and placed restrictions on him. Sandlin was also provided with a post-op shoe. *Id.* at 5.

Respondent was reevaluated two days later by Dr. Theresa Hughes. She prescribed a walking boot, crutches, and restricted him from any weight-bearing. JE 3, p. 9. Sandlin's crutches were not immediately authorized. He returned to Dr. Hughes on September 13, 2017. She instructed him to wear the boot at all times, continue to apply ice, and use the crutches provided to him. *Id.* at 11. Sandlin was reevaluated and the following was documented: "Patient is seen for recheck Jones fracture left foot. He has been wearing the walking boot with all ambulation. He has been mostly using the crutches but at times due to the weather he will forego the crutches so he doesn't fall. He feels great. No pain. No swelling. No other concerns." *Id.* at 14.

Respondent received repeat x-rays. *Id.* at 15. Dr. Hughes instructed him to continue using the walking boot for another week. "Then in [one] week get into a good supportive shoe/boot like the Kean's he has on today. Wear these with all weight bearing, ice as needed, increase activities as tolerated . . . .He can work full time without restrictions in [one] week." *Id.* at 14.

On December 14, 2017, Sandlin presented to Dr. Erin Kennedy, a certified medical examiner. JE 4, p. 19. She opined that Respondent suffered zero percent impairment under the AMA Guides. She did document that Sandlin continued to experience minor symptoms associated with the fracture. *Id.*

At his attorney's request, Sandlin secured IME from Dr. Mark Taylor, on June 19, 2018. Claimant's Exhibit (CE) 1 p. 1-3. Dr. Taylor opined that Respondent suffered a two percent functional impairment as a result of his work injury. *Id.* at 7. The Commissioner found that Dr.

Taylor's estimate was more credible, as he spent more time with Respondent and used instruments to test his range of motion in the foot and ankle area. App. Dec. p. 5.

Sandlin testified that he has a dull, throbbing pain in the mid to side of the foot. The pain is not constant, it is more pronounced when he is on uneven surfaces or when he is on his feet for a long time. Cold weather also magnifies his symptoms. Sandlin testified that he usually wears supportive shoes. The Deputy believed Sandlin's testimony that due to his symptoms, he could not engage in hobbies like hiking and fishing as much as he wanted to. Arb. Dec. p. 2.

Ultimately, after reviewing the record, the Commissioner concluded that Sandlin suffered an injury, which arose out of and in the course of his employment on September 6, 2017. The Commissioner adopted Dr. Taylor's impairment rating. App. Dec. p. 2. The Commissioner further determined that an authorized treatment provider referred Sandlin to Dr. Kennedy.

On January 27, 2021, the Commissioner ordered Petitioners to pay Sandlin 4.4 weeks of permanent partial disability benefits at the rate of $373.90 per week commencing October 8, 2017. The Commissioner also ordered Petitioners to reimburse Dr. Taylor's IME expense for $2,020.00. *Id.* at 5. On February 10, 2021, Petitioners filed the present Petition for Judicial Review

III. STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Chapter 17A of the Iowa Code, governs judicial review of administrative agency decisions. The Court shall reverse, modify, or grant other appropriate relief from final agency action if it determines the substantial rights of a petitioner have been prejudiced by any of the means set forth in Iowa Code section 17A.19(10)(a)-(n). Review of agency action is at law, not de novo, and is limited to the record made before the agency. *Taylor v. Iowa Dep't of Job Serv.*, 362 N.W.2d 534, 537 (Iowa 1985). The Court cannot consider

additional evidence or issues not considered by the agency. Iowa Code § 17A.19(7) (2021); *Meads v. Iowa Dep't of Social Servs.*, 366 N.W.2d 555, 559 (Iowa 1985). The Court may not substitute its judgment for that of the agency. *Mercy Health Center v. State Health Facilities Council*, 360 N.W.2d 808, 809 (Iowa 1985). The Court may not usurp the agency's function of making factual findings. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 186 (Iowa 1980).

The Court shall reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. Iowa Code § 17A.19(10)(f). "Record viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact, must be judged in light of all the relevant evidence in the record cited by any party that detracts from the findings, as well as all of the relevant evidence in the record cited by any party that supports it. *Id.* at § 17A.19(10)(f)(3). This includes any determinations of veracity 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. *Id.*

The evidence need not amount to a preponderance in order to be substantial evidence, but a mere scintilla will not suffice. *Elliot v. Iowa Dep't of Transp.*, 377 N.W.2d 250, 256 (Iowa Ct. App. 1985). Substantial evidence means 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). The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 232 (Iowa Ct. App. 1991). The

relevant inquiry is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *Id.*

The Commissioner has a duty to state the evidence relied upon and detail the reasons for any conclusions. *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 392 (Iowa 1993) (citing *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 510 (Iowa 1973)). This requirement is satisfied if the reviewing court is able to determine with reasonable certainty the factual basis on which the administrative officer acted. *Id.* at 393. Courts understand that an administrative agency "cannot in its decision set out verbatim all testimony in a case." *Id.* at 392 (citing *McDowell v. Town of Clarksville*, 241 N.W.2d 904, 908 (Iowa 1976)). "Nor, when the agency specifically refers to some of the evidence, should the losing party be able, ipso facto, to urge successfully that the agency did not weigh all the other evidence." *Id.* An agency decision is final if supported by substantial evidence. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996).

The Court shall also reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(10)(c). The court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency. *Id.* at § 17A.19(11)(b). However, appropriate deference is given when the contrary is true. *Id.* at § 17A.19(11)(c). The agency's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981).

Additionally, a reviewing court must also reverse, modify, or grant other appropriate relief when the agency's decision is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the

agency." Iowa Code § 17A.19(10)(m). "In order to determine an employee's right to benefits, which is the agency's responsibility, the agency, out of necessity, must apply the law to the facts." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004). Because the agency has been entrusted with the responsibility of applying the law to the facts, the "agency's application of the law to the facts can only be reversed if we determine such an application was 'irrational, illogical, or wholly unjustifiable.'" *Id.* (citing Iowa Code § 17A.19(10)(m)).

"The findings of the commissioner are akin to a jury verdict, and we broadly apply them to uphold the commissioner's decision." *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996) (quoting *Second Inj. Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994) (citation omitted)). "We may reverse, modify, affirm or remand the case to the commissioner for further proceedings if we conclude the agency's action is affected by an error at law or if it is not supported by substantial evidence." *Id.* at 150.

IV. ISSUES

A. WHETHER THE CLAIMANT IS ENTITLED TO A REIMBURSEMENT OF COSTS PURSUANT TO IOWA CODE §85.39

Petitioners contend the Commissioner erred when he awarded Sandlin the costs for Dr. Taylor's IME. The relevant section here is Iowa Code section 85.39. It mentions in pertinent part:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost is entitled to have a physician or physicians of the employee's own selection present to participate in the examination . . .
>
> 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 . . .

Id. § 85.39. Petitioners rely on the Iowa Supreme Court's holding in *IBP, Inc. v. Harker,* for the proposition that under section 85.39, someone retains a physician when they choose to have that doctor perform their services. *IBP, Inc. v. Harker*, 633 N.W.2d 322, 327 (Iowa 2001). An employer's acquiescence to pay for an employee's choice of doctor does not amount to a choice exercised by an employer. *Id.* at 327. Notably, in *IBP*, the parties did not dispute the fact that Harker, the employee, chose his physician. *Id.* at 324.

In this case, the parties are in dispute on whether Petitioners chose Dr. Kennedy by following Dr. Hughes' recommendation. As a result, the Commissioner needed to make a factual finding as to which of the parties exercised choice in retaining Dr. Kennedy. Petitioners contend that there are no facts on the record that indicate they chose to retain Dr. Kennedy for Sandlin's impairment rating consult. However, the record indicates that Petitioners exercised choice when they retained Dr. Kennedy.

> 11-15-2017 – MCM maintained contact with Ms. Miller at Grinnell Mutual to clarify/confirm case goals and activities. MCM contacted the medical provider with a request to address MMI/disability as indicated within the client's final office visit notes. Dr. Hughes, podiatrist, indicated she does not address MMI/disability related to workers' compensation claims. Medical Associates staff recommended MCM to contact Occupational Medicine and inquire if Dr. Erin Kennedy would address MMI/disability. Dr. Kennedy requested Mr. Sandlin schedule a 30-minute consultation to address MMI. MCM contacted Mr. Sandlin's attorney, reviewed role related to Mr. Sandlin's claim and clarified the attorney's preferences related to medical case management services. Attorney McCartney requested to speak with Mr. Sandlin prior to MCM contact and agreed to inform MCM following his contact with his client. Ex. B-1.
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> . . .
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> MCM secured a consultation for Mr. Sandlin with Dr. Erin Kennedy to address MMI and assess for disability related to his work injury. Dr. Hughes, podiatrist, who had provided treatment related to Mr. Sandlin's work injury indicated she did not address MMI documentation related to workers' compensation claims. *Id.*

The Commissioner's finding of fact that Petitioners exercised choice when they retained Dr. Kennedy is supported by substantial evidence on the record. The correspondence relied by the Commissioner indicates that Petitioners were given a recommendation by Dr. Hughes. The Medical Case Manager (MCM) consulted with a representative for Grinnell Mutual, got in touch with the attorneys from both the employer and employee, and then secured the appointment with Dr. Kennedy. Nothing required Petitioners to follow Dr. Hughes's recommendation. Likewise, the Commissioner's conclusion that the reimbursement provisions of Iowa Code section 85.93 apply was an application of law to facts that is not wholly irrational.

B. WHETHER SANDLIN'S EXAMINATION EXPENSES ARE REASONABLE UNDER IOWA CODE § 85.39

Petitioners contend that the Commissioner committed an error of law when he found that Dr. Taylor's examination fees were reasonable. Petitioners argue that when the legislature amended Iowa Code section 85.39 to include a definition of what would be a reasonable charge for an examination, it limited reasonable costs to only impairment ratings. The 2017 amendments to the Code now require that "[a] determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted." Iowa Code § 89.39(2).

In interpreting a statute, effect must be given to all of the language so none of it becomes superfluous. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). "We determine legislative intent from the words chosen by the legislature, not what it should or might have said." *Auen v. Alcoholic Beverages Div.,* 679 N.W.2d 596, 590 (Iowa 2004). Furthermore, "[w]e liberally construe workers' compensation statutes in favor of the worker" *Ewing v. Allied Constr. Servs*, 592 N.W.2d 689, 691 (Iowa 1999). "Based" is the past tense and past participle of

"base" which is the fundamental part of something. *Base*, MERRIAM-WEBSTER, http://merriam-webster.com/dictionary/base (last visited Feb. 18, 2022). In short, a determination of reasonableness for an examination must account for the impairment-rating fee in the relevant area.

Therefore, while the legislature amended the law so that a reasonableness determination must address impairment ratings, it did not go so far as grant reimbursement *solely* for impairment ratings. As Petitioners point out, IMEs can have components beyond impairment ratings. They may also have opinions on causation, permanent restrictions, additional treatment, and maximum medical improvement for example. Pet. at 21. The 2017 amendments did not exclude these other components, but rather placed impairment ratings as the essential and foremost consideration in a reasonableness determination. Additionally, the amendment added a point of reference for reasonability comparisons, which is "based on a typical fee charged by a medical provider in the local area where the examination is conducted." Iowa Code § 89.39(2). The Commissioner applied facts to law when he determined that Dr. Kennedy's fee breakdown is not an appropriate comparison to Dr. Taylor. He found that Petitioners did not indicate whether Dr. Kennedy had fee-reduction agreements in place, which resulted in an incomplete picture of her fees and thus not a proper point of comparison to Dr. Taylor. App. Dec. p. 5. On the other hand, the Commissioner found Dr. Taylor's fee statement reasonable, including the time spent on the report and time spent reviewing Sandlin's records. *Id.* The Commissioner committed no error of law when he found that Dr. Taylor's full IME charge is allowable under Iowa Code section 85.39. Likewise, the Commissioner's findings of fact and application of law to facts are supported by substantial evidence and are not irrational.

V. RULING

IT IS THEREFORE ORDERED that the Commissioner's Appeal Decision of January 27, 2021 is **AFFIRMED**.

State of Iowa Courts

Case Number	**Case Title**
CVCV061324	MID AMERICAN CONSTRUCTION ET AL V MARSHALL SANDLIN
Type:	OTHER ORDER

So Ordered

Scott D. Rosenberg, District Court Judge,
Fifth Judicial District of Iowa

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