

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

Ronald McDonald,)	
)	
Petitioner,)	
)	No. CVCV079334
vs.)	
)	RULING
EZ Payroll & Staffing Solutions, LLC)	
and Zurich American Insurance)	
Company,)	
)	
Respondents.)	

On this date, the Petition for Judicial Review filed by Petitioner Ronald McDonald (hereinafter Petitioner) came before the undersigned for review. The Court finds a hearing on the Petition is unnecessary. Having considered the file, relevant case law, and written arguments of counsel, the Court hereby enters the following ruling:

FACTUAL AND PROCEDURAL BACKGROUND

On June 21, 2013, Petitioner filed an Original Notice and Petition with the Iowa Workers' Compensation Commissioner, seeking medical benefits for an injury to his left hand, which allegedly was injured when a blade severed it in Petitioner's employment with Respondent EZ Payroll & Staffing Solutions, LLC (insured by Respondent Zurich American Insurance Company). The date of the claimed injury was August 27, 2012. Petitioner indicated the dispute in the case was with regard to the extent of industrial disability. Petitioner also sought benefits from the Second Injury Fund, alleging a first loss to his right arm in April, 2000, which was affected by a permanent hardware implant.

On February 7, 2014, Petitioner filed another Original Notice and Petition with the Iowa Workers' Compensation Commissioner, seeking medical benefits for an injury that took place on or about September 3, 2012, due to "inhalation of pathogen." Petitioner described the parts of his body affected or disabled as being "[e]ntire body secondary to infection & fever; Lesion in brain." Petitioner indicated the dispute in the case was with regard to the extent of industrial disability. This claim also relates to Petitioner's employment through EZ Payroll.

The claims ultimately tracked mostly jointly through the agency decision-making process. An Arbitration Decision was issued by Deputy Workers' Compensation Commissioner James F. Elliott on January 14, 2016. While Deputy Elliott's Arbitration Decision is lengthy, the Court finds it necessary to set forth most of the Decision, in order to provide a context for the claims Petitioner has stated on judicial review. Deputy Elliott set forth the following "Findings of Fact" (references to the agency record are omitted, although the Court has reviewed the entire agency record):

Ronald McDonald, claimant, was 49 years old at the time of the hearing. He graduated high school in Chicago. The only other formal training Ronald has post-high school is

his CNA training and certification. His work history is set forth in two exhibits, Defendants' Exhibit E, pages 5 and 6 and Claimant's Exhibit 6, page 123. (The vocational report, Ex. E, incorrectly states he was a manager at McDonald's. Ronald was a fry cook and was around 19 years old when he worked for McDonald's.) Claimant testified he worked as a security officer in Chicago before moving to Iowa in 2002. Ronald obtained work through temporary work agencies. He worked in a natural food warehouse and then for General Mills. At General Mills he was third shift lead worker. He had a number of other factory, janitorial and security jobs as contract/temp employers around the Iowa City area. He worked for Systems Unlimited as an aide/counselor helping adult individuals with disabilities with their activities of daily living (ADL) skills. He also worked as an aide in a nursing home.

Ronald obtained a job through EZ Payroll and Staffing Solution, LLC working for ALPLA on August 20, 2012. Ronald's job at ALPLA was to disassemble molds, clean them and reassemble the molds and check for leaks. While performing this work, Ronald was exposed to water while cleaning and testing the molds. He would use a presser washer and wire brushes. He would spray into the molds and would be exposed to a water mist. He worked with two other co-workers in the mold department. The claimant testified that the molds were only cleaned on his shift and he was the person using water. His co-workers were working with dry molds and not exposed to water vapor. Ronald would clean the molds near the sink and the other two would calibrate the molds. Ronald testified that the temperature of the water he was using was neither hot nor cold, just the temperature that comes out of a faucet.

On Monday August 27, 2012 Ronald was moving a mold using a hoist when a blade fell and Ronald tried to catch it with his left hand. Ronald's hand was bleeding and a co-worker helped him and contacted some First Responders. He was taken by cab to the emergency room at Mercy Hospital in Iowa City. Ronald was told at the hospital that he was to have surgery to fix his hand on Friday, August 31, 2012. Ronald reported for surgery on August 31, 2012. At that time, he was running a fever and surgery was postponed. Ronald went back home. A neighbor checked on him on September 3, 2012 and called for medical assistance. The ambulance report states that family members reported that Ronald was not acting like himself for the last two days. He was taken by ambulance to Mercy Hospital Iowa City. Andrew Ashby, M.D. wrote, "I think it is likely that [the] pneumonia is severe and he had a significant inflammatory response and had the stroke as a result of this." Dr. Ashby found that Ronald had a corpus callosum stroke and acute kidney injury and low-grade rhabdomyolysis. The discharge note from Mercy Hospital stated the primary diagnosis was Legionella pneumonia and the secondary diagnosis was CNS (central nervous system) infection with Legionella, acute delirium, respiratory failure and HIV positive.

Ronald was transferred to the University of Iowa Hospitals and Clinics (UIHC) on September 4, 2012. Ronald was in UIHC from September 4 through September 12, 2012. While at the UIHC Ronald learned he was HIV positive. Ronald was treated for Legionnaire's disease and a lesion in his brain at UIHC. Ronald testified that the lesion is

gone, but he still has difficulty speaking and memory issues. When he was discharged from UIHC he went to a rehabilitation facility.

The discharge summary from the UIHC of September 12, 2012 reflected that the neurology department considered Ronald to have a Legionella lesion. The report noted Ronald's neurologic symptoms included aphasia and ataxia, with difficulty with gait. Ronald was discharged to inpatient rehabilitation.

Ronald was sent to St. Luke's in Cedar Rapids, Iowa on September 13, 2012. He was discharged on September 20, 2012.

Stanley Mathew, M.D., said that Ronald should not return for work for approximately two weeks from his discharge.

At the time of the hearing, Ronald was still receiving treatment at UIHC for psychological care, cognitive difficulties, depression and for his HIV.

Ronald returned to ALPLA around Thanksgiving and was provided a different job, on the line, checking bottles. Ronald performed this work until he resigned on January 23, 2013. He submitted a resignation letter that stated he was quitting to help his mother, but testified that he resigned for concerns about his ability to continue work at ALPLA. I found this testimony convincing as to why he was no longer working for ALPLA. Ronald's testimony is consistent with the medical and vocational evidence that he has significant deficits in his cognitive abilities as well as some limitation using his left hand. Ronald attempted to work on a cleaning crew at a department store but quit when he could not handle the cleaning machine. Ronald was able to obtain employment at a Super 8 motel. He was working at the Super 8 at the time of the hearing. He cleans rooms and does laundry. He works about 20 hours per week. Ronald was receiving Social Security Disability benefits at the time of the hearing. He started receiving it in April 2013, with an onset date of August 27, 2012. Ronald stated that he is limited in the amount of money he can earn and still be eligible for Social Security Disability and also maintain his health coverage.

On August 27, 2012 Mark Mysnyk, M.D. of Mercy Hospital, Iowa City, provided treatment for Ronald's left hand laceration. Dr. Mysnyk stopped the bleeding and cleaned out the wound. He referred Ronald to Brian Wills, M.D., for additional hand surgery. Dr. Wills examined claimant on August 29, 2012 and recommended surgery, which was scheduled for August 31, 2012. Ronald presented himself to Dr. Wills on August 31, 2012. He was running a fever at that time, so Dr. Wills decided to postpone surgery until September 4, 2012. On September 4, 2012, Ronald was admitted to the hospital for pneumonia and stroke. On September 10, 2012, Dr. Wills wrote to a case manager for Zurich American Insurance, that had the surgery proceeded he would have been off work for 10-14 days and then could have returned to one-handed work. He opined that he would have had unrestricted work within 3 months and would be at maximum medical improvement (MMI) within 9 months. On September 10, 2012, Dr. Wills stated that a

decision was made not to surgically repair his hand and that Ronald could be on accommodated light work.

On October 1, 2012, Dr. Wills noted that, given the time from his injury, he did not believe he should attempt to repair the tendons or nerves in his left hand. He returned Ronald to work for his hand injury with no restrictions and recommended occupational therapy. He was not sure when Ronald would reach MMI. On January 11, 2013, Dr. Wills recommended Ronald use his hand as much as he could and that he had no restrictions. On April 4, 2014, Dr. Wills noted Ronald had been doing relatively well. Ronald continued to note numbness in the palm and also in the distribution of the common digital nerve to the ring and small fingers on the left hand. Ronald also had some hypersensitivity in this area. Dr. Wills stated,

At this point in time he is nearly a year and a half out from his injury, and I feel that he has reached maximum medical improvement. In my opinion, it is impossible to determine how much of the loss of function to the left hand is related to his injury sustained on 8/27/12 versus the stroke that he subsequently sustained. This is in terms of the loss of range of motion and use of the left hand. The loss of sensation, in my opinion, is clearly attributable to the laceration.

On May 4, 2014, Dr. Wills provided an 18 percent rating to the hand.

On April 24, 2014, Peter Pardubsky, M.D., performed an independent medical examination (IME) of Ronald's hand. He stated that, based upon the fact that he did not have detailed range of motion data, he could not put Ronald at MMI until the day of his exam—April 24, 2014. He provided a 16 percent impairment to the hand. The only restriction was to avoid exposure to excessive heat or cold.

On September 27, 2012, Nealy Neukrich, PA-C, wrote that he would not release claimant for work until he had a neurology examination on October 17, 2012. On November 5, 2012, Ronald was released to return to work.

The UIHC released Ronald to return to work on November 4, 2012. On November 17, 2012, Ronald reported to Patricia Davis, M.D., a professor in the department of neurology, that he felt his speech had improved 85 percent and that his walking/ataxia had improved by 95 percent. Dr. Davis reported,

Overall, it appeared that his lesion (sic) secondary to his Legionella pneumonia. There are numerous case studies describing ataxia and delirium with corpus callosum splenium lesions associated with Legionella, which was felt to be due to cytotoxic edema and hypoperfusion. We anticipated gradual improvement of his symptoms with the treatment of the underlying illness.

Dr. Davis said, on November 17, 2012, that Ronald could return to light duty work, in the office and not around heavy machinery.

On December 6, 2012, Ronald was seen by Jack Stapleton, M.D., due to an increase in his ataxia and anxiety. Dr. Stapleton adjusted medication he was taking for his HIV condition. Ronald testified that after the medication was changed he was no longer having problems due to side effects of his HIV medication.

Ronald was seen at the Neurology Department of UIHC on February 27, 2013. The note of the visit recorded that Ronald returned to work in a different department and was having some difficulties and was no longer working. Ronald was still having problems with speech slurring when he was tired or tried to talk quickly.

On October 23, 2013, a psychiatric clinic note from the UIHC reported Ronald had, "Cognitive changes following CNS Legionella involvement associated with his HIV." On February 5, 2015, Susan Duffy, M.D., of the psychiatry department at UIHC examined Ronald. She wrote,

In sum this is a 49 y/o single male who presents with cognitive, physical and associated mood changes related to CNS Legionella. He is currently treated with Lexapro 10mg daily. Pertinent psychosocial factors include: Mood reduced over winter holidays. Improved with increased support and no medication changes. Continues to struggle with cognitive deficits including reduced attention, language, memory as well as physical challenges including gait changes.

On February 17, 2015 and March 4, 2015, David Moser, Ph.D., conducted a neuropsychological examination. Ronald described that he had a poor memory, that he loses his train of thought and sometimes has difficulty in finding the right words. Ronald reported that he stopped driving because he had difficulty finding his way and he felt he was a danger. After testing, Dr. Moser's impression was,

IMPRESSION: Mr. McDonald meets criteria for the diagnosis of Major Neurocognitive Disorder (i.e. Dementia). As noted above, he has HIV but his cognitive decline reportedly began abruptly at the time of his Legionella infection and associated CNS involvement. His current level of cognitive functioning certainly represents a major decline relative to his estimated premorbid abilities.

During today's assessment an indicator of global cognitive functioning placed Mr. McDonald in the impaired range. More specifically, he showed impairment in aspects of verbal and visual memory, attention, processing speed, and visuconstructional ability. Additional areas of weakness, but not frank impairment, are described above. Areas of relative strength included basic reading skill, abstract thinking and problem-solving ability, visuospatial perception, basic naming ability, and verbal fluency. Mr. McDonald reported symptoms of moderate depression without recent suicidal ideation. He is quite distressed regarding the cognitive and physical changes he has experienced and the stigma surrounding these problems and his medical conditions.

Dr. Moser recommended Ronald remain cognitively and physically active. Ronald is able to do his work at the motel, especially when alone and quiet, and that it was very difficult to do if others were around talking or if there was agitation or drama. His supervisor at work is supportive of his work, helps keep track of his hours and assigns work that he can be successful at. Ronald's insight is fair, but he minimizes his deficits. I agree with this April 29, 2015 note from the UIHC that Ronald minimized his deficits. He also minimized his deficits in his testimony.

On December 23, 2014, Dr. Stapleton signed off on a letter prepared by claimant's counsel. In this letter, Dr. Stapleton stated he is a specialist in infectious diseases who provided treatment to Ronald. Dr. Stapleton wrote:

2. Mr. McDonald was hospitalized on September 3, 2012 for Legionnaire's [sic] Disease which manifested in his central nervous system, liver and lungs. It is my opinion that Mr. McDonald was exposed to the Legionella bacterium and contracted Legionella pneumonia during his work at ALPLA while spraying molds during the latter part of August 2012.
3. As a result of the Legionella infection Mr. McDonald sustained a lesion in his brain in the splenium of the corpus callosum extending into the white matter of both occipital lobes consistent with an acute ischemic injury.
4. This Legionella-related brain injury has caused multiple permanent issues for Mr. McDonald, including speech, gait and neurocognitive problems.

On May 3, 2015, Dr. Stapleton was deposed. Dr. Stapleton is board certified in infectious diseases. He is a full professor of microbiology at the University of Iowa and teaches at the medical school. Dr. Stapleton said that the severity of Legionella is influenced by the host's defenses. Immune defects or HIV do not make someone more at risk, but it does make you more at risk at having a more severe disease. The incubation period for Legionnaire's disease is between 2 and 14 days, depending on the exposure. Dr. Stapleton stated that the lesion of the corpus callosum is a recognized complication of Legionella pneumonia. Dr. Stapleton stated that, within a reasonable degree of medical certainty, Ronald's neurological symptoms were causally related to his Legionnaire's disease. When asked as to his opinion as to how Ronald contracted Legionnaire's disease he stated,

Based on the history and the epidemiology and given the exposure to mists—sprays and mists of water, water mist at his employment the week prior to his first fever and the Monday prior to his first fever on Friday before Labor Day, and then diagnosis on—ten days later, the epidemiology strongly supports that the most likely source is from the spray at work.

Dr. Stapleton did not believe that Ronald's cognitive problems would get better. Dr. Stapleton stated that the brain damage was likely to be permanent; those items included balance, speech, cognition and memory problems.

I find that Ronald's neurological symptoms are causally related to his Legionnaire's disease.

On January 9, 2015, Sunil Bansal, M.D., performed an independent medical examination (IME). Dr. Bansal placed Ronald at MMI as of April 24, 2014 for his left hand injury. He placed Ronald at MMI for his Legionnaire's disease as of December 18, 2013. Dr. Bansal opined that Ronald's work cleaning the molds at ALPLA that exposed him to water was the cause of his Legionnaire's disease. Dr. Bansal provided a 17 percent upper extremity, 10 percent impairment to the whole body for his left hand injury. He provided a 9 percent of the whole body rating for the neurological impairments. Dr. Bansal recommended the following restrictions,

I would place a restriction of no lifting greater than 10 pounds occasionally, or 5 pounds frequently with the right arm, and no lifting greater than 10 pounds occasionally, 5 pounds frequently with the left arm.

No frequent turning or twisting with the right arm.

No frequent squeezing, pinching, or grasping with the left hand to keep pain levels in check.

Avoid tasks that required sustained concentration or memory.

Avoid exposure to industrial water systems.

I find that these are Ronald's restrictions.

Kent Jayne, M.A., M.B.A., C.R.C., C.L.C.P., C.C.M., prepared a preliminary vocational assessment on February 26, 2015. Mr. Jayne concluded that if you consider the restrictions recommended by Drs. Pardubsky, Stapleton and Bansal, Ronald would be limited to sedentary work and with his neurological limitations his work would be further restricted. With his poor clerical perception scores, he would be precluded from entry level clerical work as well. Mr. Jayne opined that if Ronald were to lose his current part-time position he most likely would not be competitively employable. On March 16, 2015, Mr. Jayne supplemented his report after reviewing the neuropsychological testing by Dr. Moser. Mr. Jayne said the testing was consistent with his opinions and that Ronald was not capable of full time competitive employment in any reasonable, stable branch of the labor market.

On May 11, 2015, David McKinsey, M.D., provided a report to defendants based upon a review of records. Dr. McKinsey is board certified in infectious diseases. Dr. McKinsey wrote,

Mr. McDonald had confirmed Legionnaire's [sic] disease which was diagnosed on 9/2/12. The infection was complicated by transient rhabdomyolysis and by

encephalitis with a corpus callosum lesion that later resolved. At the same time a new diagnosis of human immunodeficiency virus infection, with modest immunodeficiency, was established.

In retrospect the first symptom that could be attributed to Legionnaire's [sic] Disease was the history of sweats he reported on 8/29. His high fever on 8/31 almost certainly was secondary to Legionnaire's [sic] Disease. When Mr. McDonald presented for medical care on 9/2 he had an extensive pulmonary infiltrate and a brain lesion; these findings would not have been observed until after his infection had progressed for several days.

Human immunodeficiency virus infection is not a risk factor for Legionnaire's [sic] Disease and these two diagnoses are unrelated.

Mr. McDonald's pneumonia responded promptly to treatment but he had residual ataxia which improved substantially over a period of two months. He has had ongoing dysarthria which has improved. He has had ongoing residual memory lapses.

He noted that human immunodeficiency virus is not a risk factor for Legionnaires' disease. He noted that it was likely that Ronald was exposed to Legionnaires' disease sometime between August 19, 2012 and August 27, 2012. Dr. McKinsey said the source of Ronald's exposure could not be identified; that 60-95 percent of Legionnaires' disease is sporadic and not related to an epidemic. He noted that had Ronald had work place exposure to Legionnaires' disease other co-workers would have developed the disease. Ronald testified that his exposure to water was different than others working in his department. He worked primarily with water and the two other workers in his department worked in a drier area.

Dr. McKinsey opined that Ronald's symptoms of encephalitis secondary to Legionnaires' disease have resolved. And that his current medical problems are related to HIV infection and depression, neither one is related to his Legionnaires' disease. Dr. McKinsey stated that Legionnaires' disease was not work related and that other workers would have been exposed as well as the fact that ALPLA practices with water markedly reduced the likelihood of Legionnaires' disease. He said Ronald reached MMI as of April 27, 2013 and that he has no permanent impairment caused by the Legionnaires' disease.

Richard Aiken, environmental health and safety manager for ALPLA, submitted an affidavit. In this affidavit, he stated that ALPLA used water supplied by the City of Iowa City and also uses a "closed circuit water system which is highly controlled and is treated using a product called 'ChemAqua.'" Mr. Aiken said the water used by Ronald was chilled to below 68 degrees. Mr. Aiken affirmed that there was no record of any other employee suffering any health issues related to the water at ALPLA.

On May 15, 2015, Lana Sellner, M.S., C.R.C., prepared a vocational assessment. The assessment was based upon the documents she received. Her conclusion was that Ronald

continues to be employable. She identified a number of employment opportunities in the Iowa City and Cedar Rapids area that she believed Ronald was capable of performing. She reached her conclusion based upon the physical restrictions recommended by Drs. Bansal, Pardubsky and Wills. She also considered the cognitive deficits that were identified by Dr. Moser and recommended certain reasonable accommodations.

Ronald was off work from August 27, 2012 through November 27, 2012 due to his hand injury. He returned to work in a different position, but was unsuccessful due to his work injuries and he resigned.

Defendants submitted records that show that they paid temporary total/healing period benefits from August 8, 2012 through August 31, 2012 and September 2, 2013 through September 24, 2014. From the defendants' records, temporary total benefits were not paid for September 1, 2012.

On May 29, 2015, Lenora Pfeiffer was deposed. Ms. Pfeiffer is the general manager of the Super 8 motel in Coralville, Iowa. She is Ronald's supervisor. Ronald works as a housekeeper. He refreshes the rooms for the next guest to use. The work includes changing linens, dusting, vacuuming, cleaning and bathrooms. Ronald lets other employees know where the dirty linens go and where the clean linens are and what a finished room should look like. Ronald will also do laundry from time to time and coach new employees. Ms. Pfeiffer always follows up on the coaching Ronald does to make sure information was relayed correctly. Ronald works about 20 hours per week. Ms. Pfeiffer allows Ronald extra time to complete his tasks. She described Ronald at work as,

He seems to get confused. He seems to—he needs time to process even sentences when he's trying to relay messages to myself and other people. He is not able to maintain as fast as maybe other people on a busy workday. His speed just isn't quite there.

When asked if she thought Ronald could obtain employment in another motel she stated, "I believe it would be very difficult for him." I find that claimant is currently in accommodated work. While certainly the work he is doing has value, it is not competitive work in the labor market. The limited coaching he does is followed up by his supervisor. Ronald is not in a state of absolute helplessness. He is able to work 20 hours a week, and sometimes more. His work is not competitive. I find that Ronald has a 100 percent loss of earning capacity in the relevant competitive labor market.

Ronald has requested medical expenses in the amount of \$192,916.23 for his treatment at Mercy Hospital in Iowa City, UIHC Johnson County Ambulance and St. Luke's Hospital in Cedar Rapids. I find these expenses to be a direct result of his Legionnaires' disease.

See Arbitration Decision, pp. 2-11.

After citing to applicable Iowa workers' compensation law, Deputy Elliott concluded:

Dr. McKinsey did not examine Ronald. Dr. Stapleton had significant contact with Ronald. He provided treatment as well as conferred with other persons within the UIHC department of infectious diseases concerning Ronald's conditions. He testified and was cross-examined, which in this case is more convincing than a written report.

I find Dr. Stapleton's conclusions concerning causation of the Legionnaires' disease was due to his workplace exposure the most convincing. While Dr. Bansal supports this conclusion as well, it is primarily Dr. Stapleton's expertise and his in-depth knowledge of Ronald's medical conditions that are persuasive. Dr. Stapleton was not hired by either side to provide his opinions in this case, which adds to his credibility.

Dr. McKinsey noted that Ronald would have been exposed to Legionnaires' disease between August 19, 2012 and August 27, 2012. Ronald was hired to work on August 17, 2012. Ronald's work exposure coincides with the incubation period for Legionnaires' disease. Dr. McKinsey stated that other co-workers would likely have been exposed to Legionnaires' disease if there was a workplace exposure. The claimant testified that the molds were only cleaned on his shift and he was the person using water. His co-workers were working with dry molds. Ronald was working around a sink and drain and had significantly more contact with water than his other co-workers. Claimant also testified he was not working with chilled water, but the temperature was that of regular (cold) tap water. Ronald is able to work 20 hours per week doing laundry and some room cleaning. He has difficulty dealing with others and works best alone. Ms. Sellner acknowledged that Ronald would need some accommodations at work due to his cognitive impairments. I did not find Ms. Sellner's report as convincing as Mr. Jayne's report. I do not believe her report adequately takes into consideration Ronald's cognitive abilities and the fact that his work, as testified to by his current supervisor, is significantly slower than other workers.

Ronald has proven by a preponderance of the evidence that his Legionnaires' disease arose out of and in the course of his work for EZ Payroll. Ronald has also proven that he had permanent impairment due to neurological damage caused by Legionnaires' disease.

See Arbitration Decision, pp. 12-13.

Deputy Elliott next considered Petitioner's entitlement to permanent partial disability benefits, including whether Petitioner is an odd-lot employee:

Ronald is 49 years old. This is not positive for his outlook for employment. Ronald minimizes his impairments. According to neurological testing, Ronald has some dementia. Dr. Stapleton did not believe that there would be improvement in his cognitive functioning. He has limitations as outlined in Dr. Bansal's IME.

He has only a high school diploma. His med aide certification has expired and given his cognitive abilities, it is not certain if he could be recertified or whether it would be wise to recertify him in the healthcare fields. The limited work he does now is accommodated.

While he "coaches" other employees at the Super 8, his supervisor follows up on his coaching to correct information. He works slower than the other employees. He has right elbow and left hand limitations. As I found above, he has a 100 percent loss of competitive employment. This entitled claimant to a finding that he has 100 percent industrial disability. Ronald is entitled to permanent total disability benefits for so long as he remains permanently disabled.

Permanent total disability benefits commence from the date of the injury. Permanent total benefits commence on September 3, 2012.

The parties stipulated in both hearing reports that credit issues are not in dispute, so no decision is made to any credit issue.

Defendants are liable for healing period benefits for the August 27, 2012 hand injury, from August 27 until such time as Ronald was eligible for permanent total benefits, September 3, 2012. Based upon the evidence submitted, the defendants paid healing period benefits for each day but September 1, 2012. Defendants shall pay the healing period for the day that they missed, September 1, 2012.

...

I found that the medical expenses submitted by Ronald in the amount of \$192,916.23 were as a result of Ronald's work injury. As such, defendants shall pay these costs. Defendants shall reimburse any out-of-pocket money claimant has spent directly to him.

...

I award the filing fees and service cost to Ronald in the amount of \$212.98. I award the transcription cost for the deposition of Dr. Stapleton and Ronald in the amount of \$458.00.

Ronald has requested \$5,980.00 for the report of Mr. Jayne. While the report was used for both claims, I do not see in the record a justification of this high of a fee. Mr. Jayne did some testing of Ronald that is not always performed in a vocational assessment which could justify a somewhat higher rate; it does not justify the nearly \$6,000.00 charge by Mr. Jayne. Considering similar claims seen by this agency and using agency experience pursuant to Iowa Code section 17A.14(5), I award \$3,000.00 for Mr. Jayne's evaluation and report.

...

Ronald requested \$700.00 for fees he incurred for Dr. Stapleton's deposition. By rule 876 IAC 4.33(5), the amount that I can award is \$150.00 dollars. Claimant is awarded \$150.00 dollars for this cost.

Dr. Bansal charged claimant \$3,795.00 for his February 20, 2015 IME. Defendants obtained a rating by a physician of their choosing, Dr. Pardubsky, on April 25, 2015. Dr. Pardubsky's IME concerned Ronald's left hand injury. On May 11, 2015 defendants obtained an IME by Dr. McKinsey concerning the Legionnaires' disease. I find that

Ronald is entitled to one-half of Dr. Bansal's IME fees. The portion concerning the Legionnaires' disease for File No. 5048386 was performed before defendants obtained a rating. Defendants shall pay \$1,897.50 for Dr. Bansal's IME. This is the amount defendants stipulated at the hearing they would pay.

See Arbitration Decision, pp. 14-17.

Respondents appealed Deputy Elliott's Arbitration Decision. An Appeal Decision was issued by Iowa Workers' Compensation Commissioner Joseph S. Cortese II on July 27, 2017. Commissioner Cortese entered his own lengthy "Findings of Fact" (references to exhibits are omitted):

As an employee of defendant-employer, claimant worked as a temporary worker at ALPLA in Iowa City. Claimant worked in the mold department at ALPLA as a packaging operator with two other employees. Claimant's job responsibilities at ALPLA involved cleaning molds used in the manufacturing of plastic food and beverage bottles. Claimant's first day of work at ALPLA was August 20, 2012.

At the same time claimant was working for defendant-employer at ALPLA, he also worked a second job as a janitor at Proctor & Gamble (P&G) in Iowa City through Sodexo, a different temporary employment service. At P&G, claimant worked with mops and buckets of water cleaning restrooms. His last day of work at P&G was August 24, 2012. Claimant was terminated by Sodexo because of a "discrepancy" regarding a failed drug test.

On August 27, 2012, while working at ALPLA, claimant sustained a laceration to his left hand. He underwent surgery at Mercy Hospital in Iowa City that same day. He did not work the rest of the week. He was scheduled to be seen in follow-up on August 31, 2012, but this did not occur that day because claimant was experiencing flu-like symptoms.

On September 3, 2012, claimant appeared at the emergency room at Mercy Hospital in Iowa City with significantly abnormal neurologic status. He was transferred to the intensive care unit where he underwent testing which came back positive for Legionella pneumonia. It was noted Legionella comes from contaminated water, but no potential source of contaminated water was identified or discussed.

At that time, claimant was also by coincidence diagnosed with HIV, which is not alleged to be work-related. A brain CT scan showed a lesion which was thought to represent a corpus callosum stroke.

On September 4, 2012, claimant was transferred to the University of Iowa Hospitals and Clinics (UIHC), where he was hospitalized from September 4, 2012, through September 12, 2012. Legionnaires' disease was the diagnosis along with HIV and untreated hypertension. No source for the Legionnaires' disease was identified or discussed. It was noted on discharge that the symptoms of altered gait and slurred speech had improved and were beginning to clear as expected with treatment of the Legionella pneumonia.

Claimant's corpus callosum lesion was identified as not a stroke, but instead as a "reversible" lesion which would improve as the Legionnaires' disease was treated. Claimant was directed to follow up with the neurology clinic at UIHC in three months.

Claimant underwent inpatient rehabilitation at St. Luke's Hospital in Cedar Rapids from September 12, 2012, through September 21, 2012. On discharge, it was noted claimant had made "exceptional gains" but should wait another two weeks to return to work.

On September 26, 2012, claimant was seen in the infectious disease department at UIHC and counseled about his HIV. It was noted, "He is still in shock and disbelief that he has gotten HIV." He was seen by Jack Stapleton, M.D. Claimant reported he was feeling very well. He was "upset about his recent HIV diagnosis." He was given an influenza vaccine and Hep A/B vaccine and he was told to return in one month.

On October 17, 2012, claimant returned to the neurology department at UIHC. He reported he was "overall doing very well. He feels his speech is significantly improved and approximately 85% back to normal." His walking/ataxia was "also significantly improved; he represents this as approximately 95% better. He has even been jogging actually." Claimant reported his breathing "is also significantly improved and he still only gets mildly winded with exercise, but other than that, he feels much better." He denied any headache, weakness, parasthesias or vision changes. He expressed a desire to return to work, but was concerned about his injured hand and being able to handle heavy equipment because of the hand injury. It was noted claimant was "not quite back to 100% of functioning but do expect him to continue to improve."

On November 5, 2012, Dron Lamichhane, M.D., in the department of neurology at UIHC released claimant to perform the work he was doing before being hospitalized. At that time, claimant reported his speech was "his only impairment which is again mostly back to normal." There was "mild dysarthria and minimal to no ataxia." His ataxia had "essentially resolved." He was intact to all motor tasks. He was independent in mobility. His exam was "essentially normal today, though he does tend to stumble on some words from time to time."

Claimant returned to work at ALPLA in November 2012, was given a different job assignment, but quit in December 12 due to a family member's illness and because he was having problems with his injured hand. He also quit a subsequent job at Gordman's due to problems with his hand.

On December 6, 2012, claimant returned to the infectious disease department at UIHC with new onset of headache, imbalance and memory loss. Dr. Stapleton evaluated claimant on that date and opined claimant's new symptoms "may represent a side effect of Rilpivirdine" which was used to treat claimant's HIV. Previously, on November 7, 2012, Dr. Stapleton noted claimant's central nervous symptoms "could be due to HIV." Complera, another of claimant's HIV medications was stopped at that time.

Claimant was re-evaluated in the infectious disease department at UIHC on January 30, 2013. The attending physician, Dr. Meier, noted "...soon after the patient started this regimen, he became quite drowsy his ataxia and dysarthria have been significantly worse with labored breathing, worsening imbalance, headaches and confusion." Claimant reported marked improvement in his symptoms after his HIV medications were changed.

On February 27, 2013, claimant was evaluated in the neurology department at UIHC. It was noted he returned to work at ALPLA but "secondary to some forgetfulness," he had been fired from that employment. He reported some slurring of his speech if he tried to speak too quickly, he was having headaches secondary to anxiety, and he was worried about a relapse of his Legionnaires' disease. He endorsed "subjective problems with minor ataxia" worse with fatigue.

On April 2, 2013, claimant was seen in the psychology department at UIHC. The evaluating practitioner, Colleen Brems, ARNP, noted claimant reported making progress with memory, but not 100 percent. Claimant "quickly feels he is making progress and doesn't want Neuropsych testing at this time." He acknowledged "many worries" specifically pertaining to his HIV status and having to be compliant with treatment regimens. It was also noted claimant was not working and the mother of his children recently passed away.

Claimant was seen again in the psychology department on April 15, 2013, and again related anxiety due to his HIV status. Ms. Brems' impression was "cognitive changes following CNS Legionella involvement associated with his HIV."

On September 11, 2013, claimant was re-evaluated in the psychology department at UIHC with the chief problem of non-compliance with taking his HIV medications since May of 2013. Ms. Brems' diagnosis included "Dementia due to HIV associated with CNS Legionella."

On October 23, 2013, claimant returned to UIHC for his low mood, continued cognitive issues and HIV treatment. He reported he was working, had a new apartment and was feeling much better.

When claimant returned to Ms. Brems again on December 18, 2013, he reported being anxious because he was not taking his HIV medications as prescribed. Over the next year, claimant continued to return to UIHC for medication management for his HIV.

Claimant returned to Ms. Brems in the psychology department on December 31, 2014. He reported decreased mood in connection with coping with his HIV diagnosis and the stigma attached to that condition. Claimant reported he was working 20 hours per week for a motel in housekeeping and moved up to a supervisory position. It was felt claimant was medically stabilized.

At a follow-up with Ms. Brems on January 21, 2015, claimant reported his cognitive issues were mild. He reported he received a raise and was now a team leader in his

employment at the motel. He was capable of checking in guests if needed and was viewed as a resource for newer employees.

Claimant continued to return to UIHC for follow-ups for his HIV treatment as well as continued treatment for mental health and cognitive functioning. On May 13, 2015, claimant reported he was doing well and keeping busy with work, although he indicated he needed to monitor his hours of work and his income so as not to jeopardize his disability benefits.

Dr. Stapleton, the infectious disease specialist at UIHC, who treated claimant for his HIV, but did not treat him for his Legionnaire's disease, signed a report dated December 23, 2014, which was drafted by claimant's counsel. In that report, Dr. Stapleton stated the following with regard to the issue of causation:

2. Mr. McDonald was hospitalized on September 3, 2012 for Legionnaires' Disease which manifested in his central nervous system, liver and lungs. It is my opinion that Mr. McDonald was exposed to Legionella bacterium and contracted Legionella pneumonia during his work at ALPLA while spraying molds during the latter part of August 2012.

Dr. Stapleton's evidentiary deposition was taken by claimant on March 3, 2015. Dr. Stapleton addressed the issue of causation of claimant's Legionnaires' disease during his deposition:

Q. All right. What I want to ask you is within a reasonable degree of medical certainty, do you have an opinion as to how Ronald McDonald contracted Legionnaires' disease?

A. Based on the history and the epidemiology and given the exposure to mists—sprays and mists of water, water mist at his employment the week prior to his first fever and the Monday prior to his first fever on Friday before Labor Day, then diagnosis on—ten days later, the epidemiology strongly supports that the most likely source is from the spray at work.

Q. And the incubation period is—his development of fever would have been right in the middle of the—roughly—

A. Two to 14 days, and he was last at that work on Monday morning, and he had a fever at I believe his surgeon's on the Friday, Friday five days later, and he was then exposed to the spray the entire week before that, so he had a—the timing is—is highly—makes it highly likely that that's the source.

Q. Now, was Ron more susceptible to—not necessarily to contracting Legionnaires' because you've testified that a lot of people can contract it, but the seriousness of the infection is related to the defenses of the host or the person that has contracted

Legionnaires'. So was Ron more likely to get a serious Legionnaires' infection, given aspects of his history?

A. So based on HIV, there's not a lot of data to say yes or no, but based on looking at patients with other immune-compromised situations like hemologic malignancies, for example, those patients do have more severe and it would generally be considered by I think most infectious disease physicians that his risks of acquiring Legionella, there's no evidence that that's increased but that the severity would likely be greater because of HIV infection.

Q. So just to summarize, water vapor in the air, whether, say from a pressurized water system or from being blown into the air by a compressed air system would expose Ron to Legionnaires' if it was in that water and he inhaled it.

A. Correct.

During cross examination by defense counsel, Dr. Stapleton testified as follows:

Q. And as you said, with that water vapor being present at this facility, would there be a likelihood that other people would have contracted it if, in fact, Legionella was present in that water?

A. There would be an increased risk.

Q. And in your practice, have you come across Legionella outbreaks within a workplace?

A. Yes.

Q. And in those incidents, are there often just isolated incidents or do they involve multiple employees when this occurs?

A. Both.

Q. So there is a test that can be conducted that would tell you whether or not the virus or the pathogen's in the water?

A. The bacteria.

Q. The bacteria.

A. Yes.

Q. So if that's something—a test that would have been done during that same period of time, the incubation period of August of 2012, if that test comes back negative, then that mist then would, therefore, be deemed negative as well. Correct?

A. That would decrease the risks significantly.

On January 9, 2015, claimant underwent an IME with Sunil Bansal, M.D., occupational health physician. In his IME report, Dr. Bansal stated the following with regard to the causation of claimant's Legionnaires' disease:

In my medical opinion, Mr. McDonald contracted his Legionella infection from his work with high pressure water systems. Legionella is a bacteria that multiplies in water systems, and is spread by inhaled droplets. A close examination of Mr. McDonald's job duties indicates a high risk exposure probability.

When he arrived at work each day, he would put the molds on the hoist, bring them to his table, take them apart, and start cleaning them. He checked the molds for leaks using a water hose that was connected to some pipes in the wall at a metal laundry sink that had multiple water connections. He used a coiled blue hose that he would pull over to his table to check the molds for leaks. He would also, he recalls, use compressed air to blow residual water out of the molds which caused water vapor to blow back that he inhaled at times. He stood over a drain and a mat on the floor, and water would drain beneath his feet. His shirt became damp and wet from leaning against the table during the day, although not drenched. He wore no protective gear while cleaning the molds, other than goggles, ear plugs, and a hairnet to cover his long hair. He wore no apron, gloves, coveralls, or anything protecting his skin or clothing during the cleaning process. He did have to wear steel-toed shoes.

Furthermore, the incubation period (time from exposure to disease manifestation) for Legionella is 2 to 14 days. This is important from a causational standpoint related to Mr. McDonald. This literally means that he incurred his exposure somewhere between August 20, 2012, and September 1, 2012.

The main unique exposure that Mr. McDonald had during this time period was inhalation of blown back water droplets secondary to the use of pressurized air to blow residual water out of molds. It should be noted that secondary to Mr. McDonald's HIV status, he is more immunocompromised than the general population and more susceptible to this kind of exposure.

Dr. Bansal's comment in his report quoted immediately above that claimant was more susceptible to contracting Legionnaires' disease because of his HIV is directly contradicted by Dr. Stapleton's deposition testimony quoted above at page seven.

On August 24, 2015, Richard Aiken provided an Affidavit in this matter on behalf of defendants which states the following:

I, Richard Aiken, after first being duly sworn and having personal knowledge of the facts stated herein state as follows:

1. That I am the Environmental Health and Safety Manager for ALPLA and in that capacity I am responsible to manage and mitigate all risks that may be encountered by team members within our facility located at 2258 Heinz Road, Iowa City, IA 52240.
2. One of the responsibilities of my position is to mitigate risks to prevent contaminants from entering our facility or interfere with our manufacturing process.
3. All water within the facility is supplied by the City of Iowa City which contains several additives to control microbes and bacteria as well.
4. Additionally, ALPLA utilizes a closed circuit water system which is highly controlled and is treated using a product called "ChemAqua" to control any biological issues to comply with food grade manufacturing processes.
5. I am aware of Mr. McDonald's claims regarding an alleged legionella exposure on or about September 3, 2012.
6. Mr. McDonald was placed at our facility through a temporary staffing agency and worked in the mold shop at ALPLA starting on approximately August 17, 2012. His job was cleaning disassembled molds so they could be put back into use.
7. This job was performed by other individuals alongside Mr. McDonald as well as on other shifts at the facility during the hours of operation using cold water (below 68 degrees Fahrenheit) in order to further reduce any risk of potential contamination. Mr. McDonald sustained an injury to his left hand on August 27, 2012 and did not return to ALPLA following that incident.
8. After learning of Mr. McDonald's claims regarding his Legionella exposure, I conducted an investigation and reviewed our records dating back to 2010.
9. It is my sworn testimony that ALPLA's water supply has never been compromised with Legionella bacteria at any time to my knowledge. Furthermore ALPLA has no reported cases of Legionella, pneumonia, any respiratory conditions, infections, or exceptional health issues from any team member before, during or after Mr. McDonald's brief period of employment at ALPLA.

Defendants obtained a report from David S. McKinsey, M.D., who is with Infectious Disease Associates of Kansas City, P.C. In formulating his opinions in this matter, Dr. McKinsey reviewed all of the relevant medical records, the depositions of claimant and Dr. Stapleton, and also Mr. Aiken's Affidavit. In his report dated May 11, 2015, Dr. McKinsey stated the following in pertinent part:

Clinical summary and opinions:

Mr. McDonald had confirmed Legionnaire's disease which was diagnosed on 9/2/12. The infection was complicated by transient rhabdomyolysis and by encephalitis with a corpus callosum lesion that later resolved. At the same time a new diagnosis of human immunodeficiency virus infection, with modest immunodeficiency, was established.

In retrospect the first symptom that could be attributed to Legionnaire's Disease was the history of sweats he reported on 8/29. His high fever on 8/31 almost certainly was secondary to Legionnaire's Disease. When Mr. McDonald presented for medical care on 9/2 he had extensive pulmonary infiltrate and a brain lesion; these findings would not have been observed until after his infection had progressed for several days.

Human immunodeficiency virus infection is not a risk factor for Legionnaire's Disease and these two diagnoses are unrelated.

Mr. McDonald's pneumonia responded promptly to treatment but he had residual ataxia which improved substantially over a period of 2 months.

He has had ongoing dysarthria which has improved. He has had ongoing residual memory lapses.

Two weeks after he began taking Complera for his HIV infection he developed drowsiness, headaches and imbalance which improved after the medication was discontinued. These symptoms were attributed to drug toxicity. Subsequently he became depressed and attempted suicide on one occasion. He has been followed in the Psychiatry clinic and has been treated for depression. He has been nonadherent with his HIV treatment regimen on at least one occasion and has not followed up with his neurologist.

The incubation period of Legionnaire's Disease is between 2-10 days with an average of 4-6 days. Given an onset of symptoms on 8/29/12, it can be extrapolated that Mr. McDonald was exposed to Legionella bacteria sometime between 8/19 and 8/27/12.

The source of Mr. McDonald's infection cannot be identified based on the available information. Between 65-95% of cases of Legionnaire's Disease are sporadic, i.e. not associated with an epidemic, as was the case with Mr. McDonald's illness. If Mr. McDonald had a workplace exposure to *Legionella pneumophila*, the causative agent of Legionnaire's Disease, a point-source epidemic likely would have occurred, i.e. multiple individuals with similar exposures would have developed infection. In this case none of Mr. McDonald's coworkers developed Legionnaire's Disease, strongly arguing against an occupational source of his infection.

Concentrations of Legionella bacteria are extremely low in potable city water, as was used in the power washers at ALPLA. Further, Legionella bacteria proliferate in warmer water and ALPLA's practice of cooling its water to temperatures below 68 degrees would have reduced the likelihood of any contamination with Legionella. Many

nonoccupational exposures have been associated with Legionnaire's Disease have been reported including: recent plumbing in a home; disruptions of water supplies leading to "brown" tap water; living in a home with an older water heating system; or proximity to cooling towers, decorative fountains, or whirlpool spas. Thus, it is not possible to determine which of these many possible non-occupational routes of transmission caused Mr. McDonald's infection.

See Appeal Decision, pp. 2-11.

Commissioner Cortese concluded:

Both Dr. Stapleton and Dr. Bansal appear to be entirely unaware of the procedures followed by ALPLA to prevent contamination of its water supply. Nowhere in the record of this case does it appear either doctor was ever provided with this information. The procedures followed by ALPLA at all times, including the short time period during which claimant worked at ALPLA, include using water supplied by the City of Iowa City, which contains several additives to control microbes and bacteria, using a highly-controlled closed-circuit water system inside the facility and treating the water used within that closed-circuit system with a product called ChemAqua "to control any biological issues to comply with food grade manufacturing processes" and using cold water below 68 degrees Fahrenheit. Nothing in the record indicates Dr. Stapleton and Dr. Bansal were ever made aware of this information. This is crucial information which goes to the very heart of the issue of causation in this matter. For the causation opinions of Dr. Stapleton and Dr. Bansal to be persuasive, it not only needs to be shown they were aware of this information, but they would also need to comment why, knowing this information, they would still believe claimant was exposed to the Legionella bacterium while working at ALPLA instead of being exposed elsewhere. None of this is addressed by either Dr. Stapleton or Dr. Bansal. I therefore find the opinions of Dr. Stapleton and Dr. Bansal to be unconvincing, as those opinions pertain to the causation of claimant's Legionnaires' disease, because it appears Dr. Stapleton and Dr. Bansal relied upon incomplete information in formulating those opinions.

On the other hand, while Dr. McKinsey did not actually evaluate claimant, I find Dr. McKinsey's causation opinion to be persuasive because Dr. McKinsey makes it clear in his report he was aware of the crucial information which was not provided to Dr. Stapleton and Dr. Bansal. Dr. McKinsey provides a logical and credible explanation as to how claimant was exposed elsewhere to the Legionella bacterium if the exposure did not occur at ALPLA. Dr. McKinsey also states if claimant was exposed to the Legionella bacterium at ALPLA "a point-source epidemic likely would have occurred, i.e. multiple individuals with similar exposures would have developed infection. In this case none of Mr. McDonald's coworkers developed Legionnaire's disease, strongly arguing against an occupational source of his infection." Dr. McKinsey's comments in this regard are supported by the following statement made by Mr. Aiken in his Affidavit: "This job was performed by other individuals alongside Mr. McDonald as well as on other shifts at the facility during the hours of operation..."

Because I find Dr. McKinsey's causation opinion to be persuasive, I therefore reverse the finding of the deputy commissioner and I find claimant failed to carry his burden of proof that his Legionnaires' disease arose out of and in the course of his employment with defendant-employer. Because I find claimant failed to carry his burden of proof on the causation issue, I also reverse the deputy commissioner's award of permanent total disability benefits. I find claimant is entitled to nothing in File No. 5048386. I find that claimant is not entitled to payment of past medical expenses totaling \$192,916.23 for treatment of the Legionnaires' disease. I also find claimant is not entitled to payment of future medical expenses necessitated by the Legionnaires' disease.

See Appeal Decision, pp. 12-13.

Commissioner Cortese ordered as follows:

For File No. 5043916 – date of injury August 27, 2012:

Defendants shall pay healing period benefits from August 27, 2012, through September 2, 2012.

Defendants are entitled to a credit for all benefits previously paid.

Defendants shall pay all accrued and unpaid weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall pay one thousand eight hundred ninety-seven and 50/100 dollars (\$1,897.50), one half of Dr. Bansal's IME fee.

Pursuant to rule 876 IAC 4.33, defendants shall pay one hundred twelve and 98/100 dollars (\$112.98) for filing and service fees in the arbitration proceeding.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

For File No. 5048386 – alleged date of injury September 3, 2012:

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, defendants shall pay one hundred fifty and 00/100 dollars (\$150.00) for the deposition appearance of Dr. Stapleton and one hundred and 00/100 dollars (\$100.00) for filing fees in the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

For both files:

Defendant shall pay three thousand and 00/100 dollars (\$3,000.00) for the evaluation and report of Dr. Jayne.

See Appeal Decision, p. 14.

On September 8, 2017, Commissioner Cortese filed a Ruling on Application for Rehearing, denying Petitioner's request for rehearing on his claims. On October 17, 2017, Deputy Workers' Compensation Commissioner Erica J. Fitch filed a Ruling on Defendants' Motion for Rehearing and Motion to Dismiss Partial Commutation Petition, denying both Motions that had been filed by Respondents.

Petitioner has filed a Petition for Judicial Review. Petitioner first has argued that Commissioner Cortese's findings of fact concerning medical causation are not supported by substantial evidence or are otherwise contrary to Iowa Code § 17A.19(10). Petitioner contends that Commissioner Cortese's causation determination was not based on substantial evidence when considering the record as a whole; Commissioner Cortese's application of the law to the facts was irrational, illogical, or was a wholly unjustifiable application of law to fact, and did not consider relevant and important matters; and Commissioner Cortese's interpretation of workers' compensation statutes and case law concerning causation as applied to Petitioner's Legionnaires' claim was erroneous.

Petitioner's second argument is that Commissioner Cortese erred in failing to find unfair prejudice in the admission of undisclosed expert opinions and the Aiken Affidavit. Petitioner contends the Aiken Affidavit was untimely; is expert witness testimony from an expert who was never certified pursuant to agency rule; and is hearsay. Petitioner also contends the report of Dr. McKinsey should have been excluded from evidence because it was untimely; did not address the issue of odd-lot status; and was unreliable due to its reliance on the Aiken Affidavit. Petitioner claims he would have withdrawn his application to amend his petition to assert odd-lot status if he had known that discovery as to all issues was to continue, not just as to the odd-lot claim. Petitioner also claims Respondents used the extra discovery time to make their case on causation.

Respondents resist, arguing that Commissioner Cortese's Findings of Fact with regard to causation are supported by substantial evidence in accordance with Iowa Code § 17A.19(10); Commissioner Cortese's application of the law to the facts was rational and logical; and Commissioner Cortese correctly interpreted statutes and case law in concluding that Petitioner failed to establish his burden of proving that his Legionnaires' disease arose out of and in the course of his employment. Respondents also argue that the admission of the Aiken Affidavit and Dr. McKinsey's report were not errors of law, as Respondents complied with the agency's discovery deadlines in submitting the Affidavit and report.

Petitioner replies that Commissioner Cortese's Findings of Fact are not supported by the evidence, and he improperly shifted the burden of proof by requiring an impossible threshold for any claimant to meet when it comes to establishing how Petitioner contracted Legionnaires' disease.

CONCLUSIONS OF LAW

Petitioner is entitled to judicial review of this action pursuant to Iowa Code § 17A.19 (2017). “A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter.” Iowa Code § 17A.19(1) (2015). “Iowa Code section 17A.19(8)(g) authorizes relief from agency action that is ‘unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.’” Dico, Inc. v. Emp. Appeal Bd., 576 N.W.2d 352, 355 (Iowa 1998). “These terms have established meanings: ‘An agency’s action is “arbitrary” or “capricious” when it is taken without regard to the law or facts of the case...Agency action is “unreasonable” when it is “clearly against reason and evidence.”’” Id. (citing Soo Line R.R. v. Iowa Dep’t of Transp., 521 N.W.2d 685, 688-89 (Iowa 1994)). “An abuse of discretion occurs when the agency action ‘rests on grounds or reasons clearly untenable or unreasonable.’” Id. (citing Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997)). The Iowa Supreme Court has stated that an “abuse of discretion is synonymous with unreasonableness, and involves a lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence.” Id. (citing Schoenfeld, 560 N.W.2d at 598).

“Section 17A.19[10] provides that a party may successfully challenge an agency decision when the party’s substantial rights have been prejudiced because the agency action ‘is unsupported by substantial evidence’ or ‘is affected by other error of law.’” Titan Tire Corp. v. Emp. Appeal Bd., 641 N.W.2d 752, 754 (Iowa 2003). Factual findings are reversed “only if they are unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole.” Loeb v. Emp. Appeal Bd., 530 N.W.2d 450, 451 (Iowa 1995). “Evidence is substantial if a reasonable mind would find it adequate to reach the same conclusion. Id. (citing Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845, 849 (Iowa 1995)). “The agency’s decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence.” Id. (citing Dunlavey, 526 N.W.2d at 849).

“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.’” University of Iowa Hospitals and Clinics v. Waters, 674 N.W.2d 92, 95 (Iowa 2004). “While “courts 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 ... evidence is not insubstantial merely because it would have supported contrary inferences.”” Id. “The substantial evidence rule requires to review the record *as a whole* to determine whether there is sufficient evidence to support the decision the commission made.” Stark Const. v. Lauterwasser, No. 13-0609, 2014 WL 1495479, *8 (Iowa Ct. App. 2014) (citing Woodbury Cnty. v. Iowa Civil Rights Comm’n, 335 N.W.2d 161, 164 (Iowa 1983)).

“[T]he agency is not required to mention each item of evidence in its decision and explain why it found the evidence persuasive or not persuasive.” Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299, 305 (Iowa 2005). “While it is true that the commissioner’s decision must be ‘sufficiently detailed to show the path he has 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). “Such a requirement would be unnecessary and burdensome.” Id.

A claimant has the burden of establishing causal connection between his condition and his injury or treatment for the condition. Yount v. United Fire & Cas. Co., 129 N.W.2d 75, 77 (Iowa 1964).

Generally, expert testimony is essential to establish causal connection. Bodish v. Fischer, Inc., 257 Iowa 516, 521, 133 N.W.2d 867, 870 (1965). The commissioner must consider the expert testimony together with all other evidence introduced bearing on the causal connection between the injury and the disability. Id. The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Id. Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. Id.; see Sondag v. Ferris Hardware, 220 N.W.2d 903, 908 (Iowa 1974) (holding deputy commissioner disregarding uncontroverted expert testimony must state why). The commissioner may accept or reject the expert opinion in whole or in part. Sondag, 220 N.W.2d at 907.

Sherman v. Pella Corp., 576 N.W.2d 312, 321 (Iowa 1998).

In reviewing the admission or exclusion of evidence at trial, the reviewing court applies an abuse of discretion standard. State v. Jones, 490 N.W.2d 787, 797 (Iowa 1992). Rulings on admissibility of reports in workers’ compensation proceedings are discretionary. Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa 2003).

The Court first considers Petitioner's argument that Commissioner Cortese's findings of fact concerning medical causation are not supported by substantial evidence or are otherwise contrary to Iowa Code § 17A.19(10). The Court concludes there is substantial evidence in the agency record to support Commissioner Cortese's Findings of Fact with regard to causation. Petitioner had the burden of establishing causal connection between his condition and his injury or treatment for the condition.

The Aiken Affidavit and Dr. McKinsey's report provided substantial evidence to Commissioner Cortese to conclude that the water at ALPLA was not contaminated, and that Petitioner did not contract Legionnaires' disease from his employment at ALPLA. The Aiken Affidavit provided extensive information regarding the lack of contamination in ALPLA's water supply, and Dr. McKinsey's opinion was formed based in part on his reliance on the Aiken Affidavit. While Aiken and Dr. McKinsey offered opinions different from those offered by Dr. Stapleton and Dr. Bansal, Aiken and Dr. McKinsey provided opinions that constitute substantial evidence for Commissioner Cortese to conclude that Petitioner's Legionnaire's disease was not related to his work at ALPLA. It is clear to the Court that Commissioner Cortese considered the opinions of all medical providers who Petitioner either saw or who reviewed Petitioner's medical records, and found the Aiken Affidavit and report of Dr. McKinsey to be more persuasive. The Court finds nothing about Commissioner Cortese's application of the law to the facts that is irrational, illogical, or is wholly unjustifiable. While Petitioner claims there are relevant and important matters in the record that support entry of judgment in Petitioner's favor, the opinions

and testimony of Aiken and Dr. McKinsey also can be said to be relevant and important in providing a basis for Commissioner Cortese's decision. Further, the Court finds no error in Commissioner Cortese's interpretation of workers' compensation statutes and case law concerning causation as applied to Petitioner's Legionnaires' claim. It was Petitioner's burden to prove causation, and the Court finds nothing in the record to suggest that Commissioner Cortese improperly applied or shifted this burden. Petitioner did not present any specific evidence to show that the water at ALPLA was contaminated and was the source of his Legionnaires' disease.

The issue is not whether this Court would have reached a different decision if it had been the initial decision-maker on Petitioner's claim or if the decision of Deputy Elliott is supported by substantial evidence; the issue is whether there is substantial evidence to support Commissioner Cortese's decision. There is substantial evidence to support a finding that Petitioner's exposure to Legionnaires' disease did not occur at ALPLA, and there is no error of law in Commissioner Cortese's decision.

The Court next considers Petitioner's argument is that Commissioner Cortese erred in failing to find unfair prejudice in the admission of undisclosed expert opinions and the Aiken Affidavit, and that the report of Dr. McKinsey should have been excluded from evidence because it was untimely, did not address the issue of odd-lot status, and was unreliable due to its reliance on the Aiken Affidavit. Petitioner's arguments on these issues stem from Deputy Elliott's decision to allow the Aiken Affidavit and Dr. McKinsey's report into evidence, over the objection of Petitioner. There had been initial hearing deadlines that were extended following a continuance and Petitioner's amendment to add his odd-lot claim. In reviewing the record, the Court finds that Deputy Elliott specifically stated, at page 16 of the hearing transcript, that she did not limit the parties' discovery efforts when she granted Petitioner's motion to amend, and all parties could continue to develop their cases following the continuance in proceedings. The record does not reflect that Petitioner sought to have a narrower continuance order, in light of filing his amendment to pursue the odd-lot claim, or that Petitioner specifically sought to limit discovery following the continuance. Additionally, Petitioner had access to the Aiken Affidavit and Dr. McKinsey's report more than thirty days before the agency hearing. It does not appear that Petitioner conducted additional discovery or investigation after receipt of these materials, but prior to the agency hearing date.

While Petitioner has argued that Aiken was an undisclosed expert, the Court agrees with Respondents that Aiken provided only fact testimony regarding water within ALPLA's facility. Nothing about Deputy Elliott's decision to continue the case precluded Respondents from engaging in additional investigation of their claims during the continuance period, and this includes evidence regarding the water within ALPLA's facility. It does not appear that Petitioner made any attempt to question or contact Aiken prior the agency hearing date. To the extent that Petitioner claims Aiken's testimony is hearsay, the Court notes that hearsay generally is admissible in administrative proceedings. See McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234, 236-37 (Iowa 1982). To the extent that Petitioner claims Aiken's testimony lacks credibility, the Court finds that Aiken's affidavit indicates it is based on his personal knowledge, and it was appropriate for Commissioner Cortese to find the contents of the affidavit to be credible and persuasive.

Turning to Dr. McKinsey's report, the Court finds, for the same reasons it did with the Aiken Affidavit, that Dr. McKinsey's report is not untimely. Further, the Court has concluded that the Aiken Affidavit does not lack in credibility. The Court finds no error or lack of reliability in Dr. McKinsey's report due to its reliance on the Aiken Affidavit. Additionally, Dr. McKinsey's report is based on his own conclusions, and does not simply echo the contents of the Aiken Affidavit.

The Court finds no error in the admission of the Aiken Affidavit and Dr. McKinsey's report into evidence.

Petitioner's requested relief on judicial review should be denied, and the agency's decision should be affirmed.

RULING

IT IS THEREFORE ORDERED that Petitioner's request for relief on judicial review is denied, and the agency's decision is affirmed. If there are costs to be assessed, they are assessed to Petitioner.

Clerk to notify.



State of Iowa Courts

Type: OTHER ORDER

Case Number	Case Title
CVCV079334	RONALD N. MCDONALD V. EZ PAYROLL & STAFFING SOLUTI

So Ordered

A handwritten signature in cursive script that reads "Lars B. Anderson".

Lars Anderson, District Court Judge,
Sixth Judicial District of Iowa