IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KOCH BROTHERS, INC. and EMC INSURANCE COMPANY, **Petitioners,** **v.** **PETER LOFTHUS,** **Respondent.**	**Case No. CVCV061999** **RULING ON PETITIONER'S APPLICATION FOR JUDICIAL REVIEW**

Before the court is petitioners' application for judicial review in the above captioned case. The court held a hearing regarding this matter on September 24, 2021. After considering the arguments of the parties, and having reviewed the file and the applicable case law, the court now enters the following ruling:

BACKGROUND FACTS

Respondent was 60 years old at the time of hearing, and is a high school graduate. While Lofthus was working for a music group in Europe, in January of 1992, a car crashed into the back of the vehicle in which he was traveling. The force of the collision caused an injury to his neck which required him to wear a neck brace for a time. Ultimately, Lofthus fully recovered from the neck injury and did not seek treatment for his neck between his recovery and 2013.

Lofthus was involved in another car crash while driving a Koch Brothers vehicle home for lunch on December 6, 2013. Again he was rear ended. The accident totaled the vehicle but Lofthus felt okay right after the crash, so he did not request an ambulance or seek immediate care. Lofthus reported the crash to Koch Brothers who recommended that he report it as a workers' compensation injury. He later developed pain and tightness in his neck and upper back. Lofthus requested care because of his symptoms.

The Koch Brothers arranged care with Richard McCaughey, D.O. On December 9, 2013, Dr. McCaughey examined Lofthus. Dr. McCaughey diagnosed Lofthus with strains to his neck and upper back. He prescribed some gentle independent stretching and for Lofthus to take Advil or Aleve as needed and per label instructions. Lofthus received no work restrictions. Following this appointment, Lofthus went to see his personal physician, Scott Fackrell, D.O., at Lakeview Family Medicine Center on December 12, 2013. He was experiencing pain in the area of his lower neck and upper back. Dr. Fackrell ordered x-rays, which Paul Keller, M.S., M.D., interpreted as:

> FINDINGS: Changes of degenerative disc disease are present at the C5y6 and C6y7 disc levels. The vertebrae are otherwise normal in appearance and alignment. The cervical basilar relationships are normal. The prevertebral soft tissues are normal in appearance.
>
> IMPRESSION: No evidence of acute injury.

Arb. Dec. at 5.

Dr. Fackrell informed Lofthus he had a case of whiplash. Lofthus treated his neck pain with icing and painkillers. Lofthus completed an EMC Employee's Report that is dated December 27, 2013. Lofthus describes neck, shoulder, and right-arm pain in the report. Dr. McCaughey saw Lofthus again on January 27, 2014, with Nurse Case Manager (NCM) Pam Boles present. Lofthus complained of ongoing neck tightness and tenderness. He also noted some radiation of pain down his right arm and some tingling in his right hand. NCM Boles provided Dr. McCaughey the x-ray from December 12, 2013. He noted the "C-spine x-ray report dated 12/12/2013 describes degenerative disk disease, C3-C7." Arb. Dec. 6. Dr. McCaughey prescribed no work restrictions, and set up a follow-up appointment for a week later.

On February 3, 2014, Lofthus followed up with Dr. McCaughey. His symptoms had improved, with little to no tingling in his right upper extremity and less tightness in his upper back and neck. Dr. McCaughey diagnosed him with an improving strain and directed him to continue

to take Advil. On February 17, 2014, Lofthus saw Dr. McCaughey for a follow-up exam. He complained of neck aches and intermittent tingling in his right upper extremity. Dr. McCaughey did not recommend any more medication and ordered magnetic resonance imagining (MRI).

William Young, M.D., performed an MRI of Lofthus's cervical spine on February 24, 2014. His impressions of the MRI were:

> 1. No acute or subacute traumatic injury to the cervical vertebral column.
> 2. Moderately advanced degeneration at C5yC6 where there is pronounced diffuse disc bulging. There is some adjacent space margin spur formation and prepped even a tiny amount of lateral, intraforaminal disc herniation on the right side. There is bilateral neural foraminal narrowing or stenosis enough to cause C6 nerve root rotation radiculopathy especially on the right.
> 3. Disc bulging and mild neural foraminal narrowing at C6yC7, also slightly greater on the right without frank nerve root impingement at this level.
> 4. No central canal stenosis or spinal cord abnormality.

Arb. Dec. at 6.

Dr. McCaughey discussed the MRI with Lofthus on February 27, 2014. Lofthus informed him that he was still experiencing some neck aches and stiffness as well as some pain down into his right thumb. Dr. McCaughey noted Lofthus's radicular symptoms of the right upper extremity that potentially correlate with the MRI. He discussed Lofthus's options with him, which included doing nothing to see if his symptoms subside, referral to a pain specialist, or referral to a spine surgeon. Lofthus wanted to discuss matters with his wife, so they set up another appointment in two weeks.

On March 13, 2014, Lofthus followed up with Dr. McCaughey. He shared that he continued to be bothered by bouts of neck pain and numbness in his right hand. With Lofthus's permission, Dr. McCaughey included NCM Bolles in the discussion of impression and the treatment plan moving forward. The defendants arranged care with David Hatfield, M.D.

Dr. Hatfield examined Lofthus at Des Moines Orthopaedic Surgeons on May 2, 2014. Dr. Hatfield reviewed imaging of Lofthus's back with him and his wife. They discussed Lofthsus's treatment options, including continuing observation, epidural steroid injection, and surgery. Lofthus opted to give more thought to his choices. Lofthus never followed up with Dr. Hatfield.

On July 23, 2014, Lofthus returned to Dr. McCaughey because he had an increase in neck pain with burning down his right arm after swimming. Dr. McCaughey prescribed pain killers but assigned no work restrictions. Lofthus next saw Dr. McCaughey on August 15, 2014, to follow up after swimming again caused an increase in his symptoms. Lofthus reported practically no residual neck or right upper extremity pain. Dr. McCaughey again assigned no work restrictions, but advised against "extreme activities." Arb. Dec. at 5. Dr. McCaughey discharged Lofthus from his care because he did not anticipate any further difficulties, with the caveat that Lofthus could return for care as needed. Lofthus did not return to Dr. McCaughey for care.

Barbara Geier, a senior claims adjuster with EMC, wrote Dr. Hatfield a letter dated December 1, 2014. She asked questions about Lofthus's injury and care, including whether he had reached maximum medical improvement (MMI), whether he had sustained a permanent impairment resulting from the injury, and whether Dr. Hatfield believed he needed permanent work restrictions. Dr. Hatfield responded in a letter dated January 5, 2015 in which he shared that it was his understanding the symptoms Lofthus was experiencing had resolved and, "[a]lthough imaging shows degenerative change C5y6 and C6y7, if as reflected above symptoms have resolved, I would regard his presenting symptoms as a temporary exacerbation of an underlying degenerative condition." Arb. Dec. at 8. Therefore, according to Dr. Hatfield, Lofthus sustained a zero percent impairment to the body as a whole as related to the 2013 crash.

Lofthus occasionally experienced flare-ups of his symptoms when he would do jobs or an activity with his head tilted up. He typically treated these flare-ups with ice and over-the-counter pain medication for about a week. Lofthus got treatment from Pulley Chiropractic Health Center from January 26, 2016, through November 2, 2016. Pulley made notes for some of these visits but not others. The February 24, 2016, note is, "neck." Arb. Dec. 8. For the June 10, 2016 appointment, Pulley noted, "Onset 6-7-16." There are no notes for any of the other appointments at Pulley.

Lofthus did not miss any time from work due to the 2013 work injury. No doctor prescribed permanent work restrictions necessitated by the injury he sustained in the car crash. Nor did any doctor found Lofthus to have sustained a permanent disability resulting from the 2013 work injury.

On October 25, 2016, Lofthus was working for Koch Brothers at the office of a customer. A conference table had been left in the room, leaning against a wall so that it was blocking Lofthus's access to the jacks he needed to access to connect the computers to the network.

An employee of the customer asked Lofthus and another individual if they could move the table. They obliged by lifting the table onto a dolly and moving it into a storage area. Lofthus estimated the table weighed about 200 pounds. Lofthus experienced no immediate pain from moving the table. Several days later, however, he felt pain and Lofthus decided to treat it with ibuprofen and ice to see if the injury would improve. Lofthus felt strong pain in the base of his neck, radiating out into his shoulders and down both arms into his wrists and thumbs.

Koch Brothers designated Kent Festvog, the company's treasurer, as the person to whom employees reported injuries at the time in question. On February 13, 2017, Koch Brothers filed a first report of injury (FROI) with the agency for the injury, prepared by Festvog. The FROI identified October 25, 2016, as the date of injury and "APPX" (approximately) February 1, 2017,

as the date on which Koch Brother first knew of the condition. There is no explanation on the FROI for why it uses the qualifier of approximately for the date on which Koch Brothers first knew of the condition.

On February 20, 2017, EMC contacted Lofthus regarding the injury he reported. During this phone call Lofthus claimed he informed Festvog about his injury in January 2017. During a deposition taken on February 12, 2019, Lofthus stated that he first contacted Festvog about his injury in December 2016. Lofthus also said he did not recall whether there was an email exchange or phone call between him and Festvog.

Lofthus went to Regenexx, a clinic specializing in stem cell treatments for a consultation but was turned down. As such, Lofthus received no treatment from this clinic. On August 20, 2017, Lofthus went to Lakeview Family Medicine for a routine physical exam by Brett Stewart, PA-C. Stewart requested an MRI of Lofthus's cervical spine. George Brown compared the MRI to Lofthus's February 24, 2014 MRI and found "[s]lightly worse cervical spondylosis changes namely at the C6yC7 level. Recommend clinical correlation." Arb. Dec. at 12. At the time of the arbitration hearing, Lofthus rated his pain without taking a pain killer as between three and six out of ten.

Charles Mooney, M.D. examined Lofthus on June 21, 2019, and opined:

> It is my opinion that his current complaints are related to his underlying findings of degenerative disc and spondylosis of the cervical spine. It is my opinion that the incident of 12/06/2013 and the undocumented incident of 10/25/2016 would have created only a temporary exacerbation of these underlying findings and the incidence [sic] themselves are not directly causal to his current complaints. Further, there is no objective evidence to conclude that either incident caused an objective advancement of the underlying condition.

Arb. Dec. at 14. Dr. Mooney found Lofthus reached MMI for the 2013 injury on August 15, 2014. On the question of permanent impairment, Dr. Mooney concurred with Dr. Hatfield's assignment

of a zero percent impairment rating for the 2013 injury. Dr. Mooney found Lofthus reached MMI with respect to the 2016 injury on January 25, 2017, assigned Lofthus a zero percent impairment and no permanent work restrictions.

Sunil Bansal, M.D. examined Lofthus on May 25, 2019. Dr. Bansal was unable to provide a permanent impairment from the 2013 injury because he examined Lofthus after the 2016 injury. In regards to the 2016 injury, Dr. Bansal found that it aggravated Lofthus's spine condition, and caused the problems with his left arm. Dr. Bansal also found Lofthus reached MMI on May 15, 2019 and recommended care to manage pain. As for permanent impairment Dr. Bansal opined:

> Based on his current symptomatology and physical examination, he qualifies for a DRE category II impairment. He fits several criteria, including radiculopathic complaints, guarding, loss of range of motion, and considerable pain. He is assigned a **5% whole person impairment based on Table 15-5.**

Arb. Dec. at 15 (emphasis in original).

Lofthus filed a workers' compensation claim against Koch Brothers, Inc. and EMC Insurance Company alleging injury to his neck as the result of a work injury on or about October 25, 2016. This case proceeded to hearing on August 26, 2019, before deputy workers' compensation commissioner Benjamin Humphrey.

An arbitration decision was entered on November 30, 2020. Therein, deputy commissioner Humphrey made the following determinations: (1) Lofthus met his burden of proving he sustained an injury to his neck as a result of the October 25, 2016 work injury; (2) Lofthus claim was barred under Iowa Code § 85.23 based on failure to provide timely notice; (3) Lofthus was entitled to take nothing in terms of industrial disability due to failure to provide timely notice; (4) Lofthus was entitled to the cost of Dr. Bansal's IME; and (5) Lofthus was not entitled to payment of medical benefits or costs.

Lofthus filed a timely notice of intra-agency appeal to the commissioner, and Koch Brothers cross-appealed. On May 25, 2021, the Iowa workers' compensation commissioner, Joseph S. Cortese II, entered an appeal decision affirming in part, modifying in part, and reversing in part deputy commissioner Humphrey's arbitration decision. The commissioner affirmed the deputy commissioner's finding that Lofthus proved that he sustained a work-related injury to his neck on or about October 25, 2016, and that he was entitled to reimbursement of Dr. Bansal's IME fee. The commissioner reversed the deputy commissioner's finding that Lofthus failed to provide timely notice of his injury under Iowa Code section 85.23 and awarded Lofthus 10% industrial disability. The commissioner further awarded Lofthus's requested past medical expenses for a visit with this primary physician, a MRI of his neck, and a consultation with Regenexx, along with corresponding mileage, as well as the costs of the arbitration proceeding and appeal. Koch Brothers timely filed a petition for judicial review and Lofthus cross appealed.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was *ultra vires*; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See*

id. § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co*., 649 N.W.2d 744, 748 (Iowa 2002).

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so the Court is bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1); *Mycogen*, 686 N.W.2d at 464. "When reviewing a finding of fact for substantial evidence, we judge the finding 'in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it.'" *Cedar Rapids Comm. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (quoting Iowa Code § 17A.19(10)(f)(3)). "Evidence is not insubstantial merely because different conclusions may be drawn from the evidence." *Pease*, 807 N.W.2d at 845. "To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder." *Id.* "Judicial review of a decision of the [Commission] is not de novo, and the commissioner's findings have the force of a jury verdict." *Holmes v. Bruce Motor Freight*¸ 215 N.W.2d 296, 297-98 (Iowa 1974).

The application of the law to the facts is also an enterprise vested in the commissioner. *Mycogen*, 686 N.W.2d at 465. Accordingly, the Court will reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." *Id*.; Iowa Code § 17A.19(10). "A

decision is "irrational" when it is not governed by or according to reason." *Christensen v. Iowa Dep't. of Revenue*, 944 N.W.2d 895 at 905 (Iowa 2020). A decision is "illogical" when it is "contrary to or devoid of logic." *Id*. "A decision is "unjustifiable" when it has no foundation in fact or reason" or is "lacking in justice." *Id*. This standard requires the Court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). "A case reversing final agency action on the ground the agency's action is unsupported by substantial evidence or is irrational, illogical, or wholly unjustifiable is the Bigfoot of the legal community—an urban legend, rumored to exist but never confirmed." *McComas Lacina Const. v. Drake*, No. 15-0922, 884 N.W.2d 225 (table) 2016 WL 2744948 at *1 (Iowa Ct. App. May 11, 2016).

MERITS

I. Whether the commission correctly found Lofthus sustained an injury arising out of and in the course of his employment.

Whether an injury arises out of or in the course of employment "presents a mixed question of law and fact. *Meyer*, 710 N.W.2d at 218. "A question of fact is presented by the operative events that give rise to the injury." *Id.* "A question of law is then presented because the commissioner must further determine whether facts, as determined, support a conclusion that the injury arose out of and in the course of employment." *Id.* (internal quotations omitted). Here, neither party disputes that if Lofthus sustained an injury on October 25, 2016, that it would have arising out of and in the court of his employment. Therefore, only the factual question of whether Lofthus sustained a new injury on October 25, 2016, remains. The court will uphold the commission's finding of an injury if the finding is supported by substantial evidence. *Meyer*, 710 N.W.2d at 219. "Medical causation is essentially within the domain of expert testimony." *Pease*,

807 N.W.2d at 845. Here, both parties present their own expert witnesses. While not bound by it, the court gives substantial deference to the commissioner's assessment of witnesses. *Schutjer v. Algona Manor Care Center*, 780 N.W.2d 549, 558 (Iowa 2010). "The determination of whether to accept or reject an expert opinion is within the peculiar province of the commissioner." *Pease*, 807 N.W.2d at 845. "The commissioner may accept or reject the expert opinion in whole or in part." *Sherman,* 576 N.W.2d at 321.

The commissioner found Dr. Bansal to be more credible than Dr. Mooney "[f]or the reasons set forth by the deputy commissioner." App. Dec. at 3. The deputy commissioner found:

> Dr. Bansal's opinion on causation is more credible than Dr. Mooney's. Unlike Dr. Mooney's report, Dr. Bansal's contains discussion of Dr. Brown's findings when comparing Lofthus's 2014 and 2017 MRIs and how they relate to causation. There is no evidence in the record that Lofthus sustained an injury between the 2014 MRI and the 2017 MRI, besides when he lifted the table, that might have caused the observed changes. Bending and lifting is consistent with the type of injury evidenced by Lofthus's symptoms and Dr. Brown's observations. And the weight of the evidence establishes Lofthus experienced radiculopathy and reduced sensation in his upper extremities following the 2016 injury. For these reasons, Dr. Bansal's opinion on causation is more persuasive than Dr. Mooney's.

Arb. Dec. at 17-18.

Koch Brothers contend that Dr. Bansal's opinion alone cannot be considered substantial evidence. However, they do not provide any case citation to support their argument. The commission, as the fact finder, determines the weight to be given to any expert testimony. *Sherman v. Pella Corp*., 576 N.W.2d 312, 321 (Iowa 1998); *Dodd v. Fleetguard, Inc.,* 759 N.W.2d 133, 138 (Iowa Ct. App. 2008). However, such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. *Id*.

The deputy commissioner favored Dr. Bansal's opinion due to the face he considered Dr. Brown's findings when coming to his conclusion on causation. Additionally, the deputy commissioner found that there was no evidence of an injury aside from the incident moving the

table between the 2014 and the 2017 MRI, and there was evidence that Lofthus was indeed injured by moving the table. Therefore, it cannot be said the commission's finding that Lofthus sustained an injury arising out of and in the course of his employment with Koch Brothers was not supported by substantial evidence.

II. Whether the commission correctly found that Lofthus gave Koch Brothers timely notice of his injury.

Iowa law requires an injured employee to inform their employer of their work place injury within 90 days of the injury, "unless the employer or his representative shall have actual notice." Iowa Code § 85.23. Whether an employer's representative was given actual notice of an injury is a question of fact for the commissioner to decide. *Robinson v. Department of Transp.*, 296 N.W.2d 809, 812 (Iowa 1980). A failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. *DeLong v. Iowa State Highway Comm'n*, 295 N.W. 91, 92 (1940). The commissioner found:

> Claimant's testimony regarding his verbal notice of his injury to Mr. Festvog was uncontroverted. Mr. Festvog did not testify, nor did defendants offer any other testimony or evidence to dispute claimant's testimony regarding his verbal discussions with Mr. Festvog in late December of 2016 or early January of 2017. This is significant, as claimant's injury occurred on October 25, 2016, meaning his 90-day notice period ended on January 24, 2017. The latest claimant indicated he verbally gave notice to Mr. Festvog was "about the first week in January." (Cl. Ex. 3, p. 23) While claimant could not recall the exact moment or even week in which he provided verbal notice to Mr. Festvog, the uncontroverted evidence is that claimant provided such verbal notice no later than the first week in January. Thus, I find claimant gave defendant employer verbal notice within the 90-day statutory notice period.

App. Dec., p. 3.

Koch Brothers' argument is that there is not substantial evidence to support the finding that Lofthus communicated the injury in December 2016, or January 2017, because there is no

corroborating email. Additionally, the employer cites workers compensation cases that say the commissioner should have given weight to the deputy's finding that notice was untimely.

To begin, the substantial evidence standard looks at what is contained in the record not what is missing from the record. *See Pease*, 807 N.W.2d at 845. Additionally, while not bound by it, the court gives substantial deference to the commissioner's assessment of witnesses. *Schutjer v. Algona Manor Care Center*, 780 N.W.2d 549, 558 (Iowa 2010). Here, the commissioner found Lofthus to be credible. Stating that additional corroborating evidence is required would be no different than the court stating they reject the commissioner's assessment of Lofthus. Accordingly, the employer's argument that there is not more corroborating evidence of Lofthus contacting Festvog is without merit.

As for the workers comp cases, they are not from the district court or higher. As such, this court is not bound by the commissioner's interpretation of law, as the legislature has not vested the power to do so in the commissioner. *Neal v. Annett Holdings, INC*., 814 N.W.2d 152 (Iowa 2012). Additionally, the commissioner's review is *de novo*. *Trade Pros., Inc. v. Shriver*, 661 N.W.2d 119, 124-25 (Iowa 2003) (citing Iowa Code § 17A.15). Sufficient to say, there is no support to say the commissioner must follow the findings of the deputy commissioner.

Finally, there is substantial evidence in support of the commissioner's finding of notice. In *E.N.T. Associates v. Collentine*, 525 N.W.2d 827, 831 (Iowa 1994), the court upheld the commissioner's finding when it only relied on the testimony of Collentine. This case is especially informative because Collentine's testimony was on a subject usually reserved for experts, whether an injury has a connection to employment. *Id.* A witness testifying to their own actions is more substantial than a lay witness testifying to what is normally reserved for an expert. Additionally, the commissioner relied on the fact the employer did not call Festvog as a witness to contradict

Lofthus's testimony. Instead, Lofthus's testimony about informing Festvog of his injury, went without contradiction.

Therefore, the commissioner's finding that Lofthus informed the employer of his work place injury within the 90 day time limit, is supported by the substantial evidence of Lofthus's testimony and the fact his testimony went unchallenged.

III. Whether the commission correctly award 10% industrial disability to Mr. Lofthus.

A permanently disabled employee is entitled to compensation Iowa Code § 85.34. The question of industrial disability is a mixed question of both law and fact. *Neal*, 814 N.W.2d at 525. "[I]n, considering findings of industrial disability, we recognize that the commissioner is routinely called upon to make such assessments and has a special expertise in the area that is entitled to respect by a reviewing court." *Id.* at 527. "The amount of compensation for an unscheduled injury resulting in permanent partial disability is based on the employee's earning capacity." *Id.* (citing *Broadlawns Med. Ctr. V. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010). Earning capacity is determined by an evaluation of several factors, including "functional disability ... age, education, qualifications, experience, and inability to engage in similar employment." *Neal*, 814 N.W.2d at 526 (quoting *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 137-138 (Iowa 2010) (internal citations and quotations omitted)).

The commission found:

> That said, claimant, who was 60 years old at the times of the hearing, has sought out and received virtually no treatment for his injury and missed no work due to his injury before being terminated for unrelated reasons. His job search since being terminated by defendant-employer consisted of single application for and IT position. Thought he helps his wife with her interpreting agency business, I find claimant is not significantly motivated to find new employment. Furthermore, there is no evidence claimant would not still be employed with defendant-employer but for his poor performance issues. Even with his lifting restriction, claimant was not

> required top lift more than 20 pounds in his job. While claimant would be precluded from returning to some of his past work due to his limited lifting capacities, he still remains capable of performing IT work. For these reasons, I find claimant sustained a minimal loss of earning capacity. I find claimant's work injury resulted in a ten percent loss of earning capacity.

Arb. Dec. at 4.

The commission expressly adopted Dr. Bansal's lifting restrictions as well as took Dr. Bansal's assignment of five percent industrial disability into consideration. Arb. Dec. at 3-4. The commission considered many of the factors listed above such as age and ability to return to his former position, and concluded that Lofthus suffered a "minimal loss of earning capacity" of ten percent. As such, it cannot be said that the commission's finding of industrial disability is not irrational, illogical, or wholly unjustifiable.

IV. Whether the commission erred in awarding medical expenses to Lofthus.

The commission awarded medical expenses to Lofthus for his appointment with his primary physician, an MRI ordered by his primary physician, and consultation with Regenexx, including mileage. App. Dec. at 4-5. Koch Brothers argue that since the examination and subsequent MRI were part of a yearly physical, it is not for the purpose of receiving treatment of the workplace injury. Pursuant to Iowa Code section 85.27, a claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. The Koch Brothers stipulated to the reasonableness and the necessity of the treatments. Pet. Br. at 27. The question that remains then is whether Lofthus was treated for a work related injury. This is a factual question and therefore is governed by substantial evidence. *Paulino v. Chartis Claims, Inc.*, 985 F.Supp.2d 1051, 1060 (S.D. Iowa 2013).

Addressing some of these issues, the commissioner stated:

> However, the treatment note indicates that '1 of the major concerns he [wants] to talk about today is his ongoing neck pain.' Claimant was prescribed a muscle

> relaxer for his neck and was sent for an MRI of the cervical spine. Thus, although the purpose of the appointment was for a physical, claimant received treatment for his work-related neck condition. The same is true for the MRI expenses … and the Regenexx expenses… The MRI was ordered due to claimant's work-related neck condition, and claimant sought a consultation with Regenexx due to his work-related neck condition.

Arb. Dec. 4-5.

The evidence cited by the commission is the physician's note that Lofthus mainly wished to discuss his neck, the fact Lofthus consulted with Regenexx regarding his neck, and the fact the MRI was of his neck. Arb. Dec. at 4-5. This is substantial evidence sufficient to uphold the commissioner's award of medical expenses for these items, as they are medical expenses incurred resulting from a workplace injury.

Additionally, Koch Brothers contend since Lofthus did not receive treatment at Regenexx, he cannot be compensated. This is a question of facts applied to law and is therefore governed by the "irrational, illogical, or wholly unjustifiable" standard. *Mycogen*, 686 N.W.2d at 465; Iowa Code § 17A.19. Iowa Code section 85.27 does not limit reimbursement to treatment. It states the employer "shall furnish…services." Iowa Code § 85.27. Koch Brothers have not demonstrated why a consultation would not be considered a service. As such, they have not carried their burden demonstrating the invalidity of agency action, and the court does not find the commissioner's application of facts to law to be erroneous. Iowa Code § 17A.19(8)(a).

Finally, Koch Brothers argue mileage for the Regenexx appointment is not reimbursable because the Regenexx appointment was not treatment. As a preliminary matter mileage is reimbursable under Iowa Code section 85.27. "The employer, for all injuries compensable under this chapter or chapter 85A…shall allow reasonable necessary transportation expenses incurred for such services." Iowa Code § 85.27. As stated above, the commissioner's award of expenses

for the medical service rendered by Regenexx is not erroneous. Therefore, neither is granting mileage to the appointment.

ORDER

Therefore, for the reasons stated Koch Brother's petition for judicial review is hereby, **DENIED**. This action is dismissed with prejudice, at the cost of the petitioners.

In addition to all other persons entitled to a copy of this order, the Clerk shall provide a copy to the following:

Workers' Compensation Commissioner
1000 E. Grand Ave.
Des Moines, IA 50319-0209
Re: File No. 5064145

State of Iowa Courts

Case Number	**Case Title**
CVCV061999	KOCH BROTHERS INC ET AL VS PETER LOFTHUS
Type:	ORDER FOR JUDGMENT

So Ordered

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

Electronically signed on 2021-10-26 08:50:27