IN THE IOWA DISTRICT COURT FOR BUENA VISTA COUNTY

PEDRO MERO BUSTOS, Petitioner, vs. TYSON FOODS, INC., Respondent.	NO. CVCV034960 RULING ON PETITION FOR JUDICIAL REVIEW

On the 26th day of August, 2022, the Petition for Judicial Review was submitted to the Court without oral argument. Petitioner Pedro Mero Bustos is represented by Mary Hamilton. The Respondent, Tyson Foods, Inc., is represented by Chris Scheldrup. Petitioner filed a brief in support of his petition on November 9, 2022. The Respondent filed its brief on November 29, 2022. Petitioner's reply brief was submitted to the Court on December 9, 2022. After reviewing the written arguments of the parties and the record on appeal, the Court now rules as follows:

STATEMENT OF FACTS

On May 1, 2019, Pedro Mero Bustos ("Petitioner") was working in salvage, removing defects from turkey, when he suddenly felt pain in his lower back on the right side and right leg radiculopathy to his knee. Petitioner reported the injury to the nurse, who gave him medication and returned him to lighter duty work. Dr. Archer then treated him for the next several months before taking an MRI on August 6, 2019, that revealed a "disc bulge and ligamentous and facet joint hypertrophy causing severe bilateral neural foraminal compromise." Around this time Petitioner began seeing Dr. Veit as his own personal physician. Dr. Archer referred Petitioner to Dr. Johnson. Petitioner reported severe pain which radiated down the right lower extremity, so Dr. Johnson referred Petitioner to Dunes Surgical Hospital for pain management with Dr. Poulson. Dr.

Poulson did a series of injections over the course of several months. Dr. Johnson saw Petitioner again on January 15, 2020. He noted that Petitioner's condition had worsened over time and recommended surgery. Dr. Johnson performed a right lumbar micro foraminotomy on Petitioner on February 3, 2020. Petitioner noticed pain again within a month. Dr. Johnson ordered a second MRI which was taken March 26, 2020. On May 12, 2020, Dr. Johnson put Petitioner at Maximum Medical Improvement ("MMI") and referred him to Dr. Archer to begin the process of returning to work. Petitioner went to physical therapy, where his physical therapist noted increasing symptoms and tendency to shift weight to the left when seated. On March 20, 2020, Pedro reported leg weakness, and the therapist observed increased tension in the soft tissue of the right lumbar spine. Over the next few months, the physical therapist repeatedly noted various symptoms and pains without commenting on symptom exaggeration, even reporting to Respondent's case manager that Petitioner experienced minimal improvement with only short-term relief from therapy.

On June 2, 2020, Petitioner visited Dr. Archer, who noted an exaggerated pain response, but still stated that Petitioner was not at MMI and did not put him back to work. On July 29, 2020, Dr. Archer again saw petitioner and opined that he could not return to work. On September 2, 2020, Dr. Archer states that Petitioner is "at Maximum Medical Improvement for this injury per Dr. Johnson." In August 2020, Petitioner took a Functional Capacity Evaluation ("FCE") conducted by Neal Wachholtz, PT, DPT. Petitioner failed the FCE. During Petitioner's final visit with Dr. Archer, he recommended Petitioner receive pain clinic care.

On June 10, 2020, Petitioner began seeing Dr. Jensen, who expressed concerns over the effects of the surgery and recommended a second surgery. Petitioner asked if Respondent would authorize the surgery, and Respondent refused. Petitioner filed and was denied an alternate care

petition, then went forward with the second surgery under his health insurance. In September of 2020, Petitioner received a letter from Respondent stating that there was work available for him. He did not report to work. The surgery was performed on October 27, 2020. Petitioner reported substantial improvement after the second surgery.

In June 2021, eight months after the second surgery, Petitioner sent Respondent an email asking to return to work. There was no response until three days before the hearing below. In September 2021, the Social Security Administration deemed Petitioner disabled and started giving him disability benefits.

Petitioner filed his petition on November 7, 2019. The hearing was initially scheduled for January 22, 2021, but later continued based on a joint motion to November 8, 2021. The parties filed the hearing report before the Iowa Workers' Compensation Commissioner on November 3, 2021. The matter was heard as scheduled on November 8, 2021, and the report was accepted. The Deputy Workers' Compensation Commissioner ("The Deputy") filed his ruling on February 14, 2022. The Deputy found against Petitioner on all issues[1]. Petitioner appealed to the Commissioner, who upheld the Deputy's ruling in its entirety in a two-page appeal decision. The appeal decision restated the Deputy's finding in a short summary, then affirmed each issue with a single sentence each before affirming the Deputy's findings, conclusions and analysis.

STANDARD OF REVIEW

A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by a final agency motion is entitled to judicial review. Iowa

[1] The issues were: whether Petitioner's left shoulder injuries were sequela, when the healing period ended, impairment rating, whether Respondent should have to pay for Petitioner's treatment of his left shoulder injuries, and whether Respondent should have to pay for Petitioner's treatment with Jensen.

Code § 17A.19(1) (2007). In exercising the power of judicial review conferred by Iowa Code § 17A.19(8)-(11), the district court acts in an appellate capacity to review agency action and correct errors of law. *Hanson v. Reichelt*, 452 N.W.2d 164, 166 (Iowa 1990). The district court's review is circumscribed. Review of agency action is at law, not *de novo*, and is limited to the record made before the agency. *Taylor v. Iowa Dept. of Job Serv.*, 362 N.W.2d 534, 537 (Iowa 1985). Additional evidence or issues not considered by the agency cannot be considered by the court. Iowa Code § 17A.19(7) (2007); *Meads v. Iowa Dept. of Social Serv.*, 366 N.W.2d 555, 559 (Iowa 1985). The court may not substitute its judgment for that of the agency. *Mercy Health Center v. State Health Facilities Council*, 360 N.W.2d 808, 809 (Iowa 1985). The court may not usurp the agency's function of making factual findings. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 186 (Iowa 1980).

Furthermore, an agency's findings must be supported by substantial evidence in the record when that record is reviewable as a whole. Iowa Code § 17A.19(10)(f) (2007); *Norland v. Iowa Dept. of Job Serv.*, 412 N.W.2d 904, 913 (Iowa 1987). The evidence need not amount to a preponderance in order to be substantial evidence, but a mere scintilla will not suffice. *Elliot v. Iowa Dept. of Transp.*, 377 N.W.2d 250, 256 (Iowa 1985). In determining whether there is substantial evidence, the court must consider all of the evidence in the record, including both that which contradicts the agency decision and that which supports the agency decision. *City of Davenport v. Public Employment Relations Bd.*, 264 N.W.2d 307, 312 (Iowa 1978). Evidence is substantial to support an agency's decision if a neutral, detached, and reasonable person would find the quality and quantity of evidence sufficient to reach that given conclusion, even if a reviewing court would have drawn a contrary inference from the evidence. *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 261 (Iowa 1991); Iowa Code § 17A.19(10)(f)(1) (2007). The

fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. *Moore v. Iowa Dept. of Transp.*, 473 N.W.2d 230, 232 (Iowa 1991). The relevant inquiry is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *Id.* "It is permissible for the reviewing court to determine the commissioner "could have" or "might have" considered certain pieces of supporting evidence." *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 357 (Iowa 1999)

Nearly all disputes are won or lost with the agency. *Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa App. 1995). An agency decision is final if it is supported by substantial evidence and contains no errors of law. *Robbenolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996). In cases alleging legal error, the court's review is confined to determining whether the board committed an error of law, or acted unreasonably, capriciously, or arbitrarily. *Greenwood Manor v. Iowa Dep't of Pub. Health,* 641 N.W.2d 823, 831 (Iowa 2002) (citing *Sindlinger v. Iowa State Bd. of Regents,* 503 N.W.2d 387, 390 (Iowa 1993)). Agency action is considered arbitrary or capricious when the decision was made "without regard to the law or facts" *Greenwood Manor,* 641 N.W.2d at 831 (quoting *Bernau v. Iowa Dep't of Transp.,* 580 N.W.2d 757, 764 (Iowa 1998)). Agency action is unreasonable if the agency acted "in the face of evidence as to which there is no room for difference of opinion among reasonable minds ... or not based on substantial evidence." *Greenwood Manor,* 641 N.W.2d at 831 (quoting *Citizens' Aide/Ombudsman v. Rolfes,* 454 N.W.2d 815, 819 (Iowa 1990) (citation omitted)).

Additionally, if the matter turns upon an agency's interpretation of Iowa law, then the review of the Board's interpretation of statutory language depends on whether such interpretation has "clearly been vested by a provision of law in the discretion of the agency." Iowa Code §

17A.19(10)(c), *see also*, *Mycogen Seeds v. Sands*, 686 N.W.2d 457 (Iowa 2004). If such discretion has not been clearly vested with the board, then this Court, "must reverse the board's decision if it is based on 'an erroneous interpretation' of the law." *Id; Doe v. Iowa Bd. of Medical Examiners*, 733 N.W.2d 705 (Iowa 2007). However, if such discretion has been clearly vested in the board, a reversal is appropriate only if the board's interpretation of the statutory language is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(l).

> In making this determination, the Iowa Supreme Court has directed that:
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> [The word 'clearly'] means that the reviewing court, using its own independent judgment and without any required deference to the agency's view, must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.

Mosher, 671 N.W.2d at 509 (*quoting* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 63 (1998)).

RULING

Though it is deeply sympathetic to Petitioner's plight, the Court finds that the Deputy's decision and the decision of the Commissioner are supported by substantial evidence and must be upheld. While the Commissioner essentially did no explicit analysis beyond affirming the Deputy's "findings, conclusions and analysis regarding [the issues on appeal]," "an agency's decision is sufficient if it is possible to work backward [from the agency's written decision] and to deduce what must have been [the agency's] legal conclusions and [its] findings." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 634 (Iowa 2000) (Internal quotations omitted, alteration in original). The Court can determine that the Commissioner's conclusions and findings mirrored

the Deputy's, as the Commissioner explicitly affirmed the Deputy's findings, conclusions, and analysis, and thus the Court will look to the Deputy's ruling for the rest of this ruling.

I. HEALING PERIOD.

"[T]he employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated *or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.*" Iowa Code § 85.34 (Emphasis added). Petitioner argues with conviction that the substantial evidence in fact supports finding that Dr. Jensen was correct about the proper date of MMI. Petitioner points out important details not explicitly present in the Deputy's report, such as that Dr. Archer did *not* state that Petitioner was at MMI on September 2, 2020, just that he was at MMI per Dr. Johnson. Petitioner also argues that the basis on which Dr. Archer's September 2, 2020, opinion rests, the FCE performed by Mr. Wachholtz, was not valid. Respondent argues that the Deputy was correct in ending healing period benefits on September 2, 2020, because the FCE, valid or not, is still the closest thing to objective evidence, and regardless of MMI, Dr. Archer did state on September 2, 2020, that Petitioner was safe to return to work.

The Court finds substantial evidence supports the Deputy's finding that Petitioner's healing period ended on September 2, 2020. While, as Petitioner passionately argues, Petitioner may not have been at MMI on September 2, 2020, that is only one of the three possible events which could end Petitioner's healing period. Dr. Archer, who had seen Petitioner on multiple

occasions, reviewed the FCE and determined that Petitioner was safe to return to work on that date.

Therefore, assuming that determination was valid, Petitioner's MMI ceased to be relevant on that date for the purpose of determining when healing period benefits end under Iowa Code § 85.34. The Deputy found Dr. Archer's opinion on Petitioner's ability to return to work to be convincing, and could have considered supporting evidence such as Dr. Archer's previous meetings with Petitioner and the FCE. The evidence supports a finding that the FCE was invalid as some of the information listed thereon is incorrect and some important details are missing. Mr. Wachholtz reported that Petitioner went to physical therapy for two weeks instead of two months, and noted only summary details of Petitioner's alleged inconsistency of effort during the FCE. These errors do detract from the weight that should be granted to the FCE. However, the Deputy could have considered that reduced weight due to the FCE and still found Dr. Archer's opinion most persuasive for multiple reasons.

First, the Deputy could have found that, despite the reduced weight of the FCE, it was still overall largely medically valid. Second, the Deputy could have found that, even if the FCE was invalid, Dr. Archer's opinion was based on more than just the FCE results, such as his own observations of Petitioner and other appointments, and thus still valid. The Court is not in a position to substitute its factual rulings for those of the Commissioner, and by extension the Deputy. Therefore, the Court finds that Dr. Archer's opinion that Petitioner was able to return to work on September 2, 2020, was valid and upholds the Deputy's finding that healing period benefits ended on September 2, 2020.

II. IMPAIRMENT RATING.

The Court finds that the Deputy's finding of Petitioner's impairment rating, at 10%, is supported by substantial evidence. Two separate doctors found different permanent impairments. Dr. Johnson found 10% by referencing table 15-3, DRE category III of the American Medical Association's ("AMA") Guides to the Evaluation of Permanent Impairment, Fifth Edition ("The Guides"). Dr. Jensen found 16% by methods not explicitly stated in his report. Dr. Jensen lists "lumbar spinal pathology and gender by an [sic] resulting from work-related activity, surgical therapy, and residual paraspinal muscle pain with restricted range of motion within the lumbosacral spine, which impacts his functional capacity and overall ability to perform activities of daily living" as the factors he was considering.

Petitioner contests that Jensen probably used table 15-3 as well to get 13%, then added 3% due to the above listed factors. The Deputy seems to have taken Jensen as having used a range of motion ("ROM") method based on the phrase "with restricted range of motion within the lumbosacral spine." The ROM method may be appropriate "[w]hen there is multilevel involvement in the same spinal region (eg, fractures at multiple levels, disk herniations, or stenosis with radiculopathy at multiple levels or bilaterally)." *The Guides*, at 379. Petitioner had "significant disc disease/degeneration at [the] L5 -S1 lumbosacral segment in association with a right L5 lumbosacral radiculopathic syndrome."

The Deputy thus found that using Dr. Johnson's explicitly DRE based method of determining more persuasive as Petitioner's injury does not have "multilevel involvement in the same spinal region." Both the inference that Dr. Jensen used the ROM method to determine impairment rating and that, given that inference, Dr. Johnson's impairment rating is more persuasive, are both findings of fact on which the Court cannot supplant the Deputy's judgement. There is thus substantial evidence for the finding of 10% impairment.

III. MEDICAL COSTS.

The Court finds substantial evidence supports the Deputy's finding that Respondent is not liable for Petitioner's unauthorized medical costs. "[T]he duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. The allocation of this significant burden to the claimant maintains the employer's statutory right to choose the care under section 85.27(4), while permitting a claimant to obtain reimbursement for alternative medical care upon proof by a preponderance of the evidence that such care was reasonable and beneficial." *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 206 (Iowa 2010).

The Deputy found doubts as to Petitioner's credibility, based on the FCE and instances of symptom magnification. Petitioner and his wife were the only ones who testified to the beneficial medical outcome of the second surgery. Thus, the Deputy found that the Petitioner had not proven by a preponderance of the evidence that the second surgery provided a more favorable medical outcome than the first. Petitioner argues that all evidence of symptom magnification is from the FCE or Respondent's medical providers, and that all other providers of medical care fail to mention any such symptom magnification. Furthermore, all doctors who did not work for Respondent also specifically noted moderate to severe pain in Petitioner. The implication, as the Court understands it, is that only those who had a pecuniary interest in Petitioner having fewer and lesser symptoms found Petitioner to be magnifying the true extent of his symptoms. Those

doctors' testimony, Petitioner argues, is thus not substantial evidence, especially when put up against the other medical professionals.

The Deputy's ruling and the Petitioner's arguments both essentially come down to credibility. The Petitioner finds Respondent's doctors uncredible, whereas the Deputy found Respondent's doctors to be credible, and Petitioner, and perhaps his doctors, to be uncredible. "Credibility questions . . . are best left to the fact finder" *State v. Sinclair*, 622 N.W.2d 772, 779 (Iowa Ct. App. 2000) (Citing *State v. Forsyth*, 547 N.W.2d 833, 837 (Iowa Ct. App. 1996) ("It was the jury's function to determine credibility and resolve conflicts in the evidence.")) *See also* "The commissioner's findings have the effect of a jury verdict." *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428, 432 (Iowa 1984). "We defer to the trier of fact in determining the weight to be given conflicting opinion testimony." *McSpadden*, at 186.

The Deputy could have considered the possible conflicts of interest caused by Dr. Johnson and Dr. Archer working for Respondent, and the aforementioned issues with the FCE and still reasonably find Drs. Johnson and Archer more credible than Petitioner and the other doctors. While perhaps this Court may have made a different decision, the medical reports of two doctors are far more than a scintilla of evidence. The Deputy's finding is thus supported by substantial evidence.

IV. ALTERNATE CARE REQUEST.

The Court finds that the issue of the alternate care request must be remanded to the Commissioner for further explanation of his reasoning. "For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care...[T]he treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code 85.27(4).

"To establish a claim for alternative medical care, an employee must show that the medical care furnished by the employer is unreasonable." *Bell Bros.*, at 209. "[I[t [is] proper to allow medical expenses to an employee treated by a physician of his own choice after the physician selected by his employer has failed or refused to give necessary treatment." *Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2d 433, 437 (Iowa 1997) (quoting with approval 99 C.J.S. Workmen's Compensation § 273 at 933 (1958)).

Remand is "required if the commissioner has rejected or disregarded material evidence without any stated reasons." *McSpadden*, at 186. Furthermore, "the deputy has the duty to state the evidence he relies upon and specify in detail the reasons for his conclusions." *Id.* (internal quotations omitted, citing *Cataolfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 510). "A principal reason for this requirement of specificity in agency findings is to facilitate judicial review. To be able to review an agency decision, a court must know what it means." *Id.*

The Deputy, in disposing of this issue, cites the appropriate statutes and caselaw on the subject of alternate care, then proceeds to dispose of the issue with a scant paragraph that does not address any evidence, which the Court will now quote in full. "I previously ruled on a petition for alternate care in this matter. *There is new evidence in the case since that time.* The claimant requests alternate care via continued appointments with Dr. Jensen. The claimant has not proven that the care offered by Tyson was unreasonable. He has only proven a preference for care with Dr. Jensen. The claimant's request for alternate care is denied." (Emphasis added). The Court cannot tell what evidence the Deputy considered or even whether anything was considered beyond that the Deputy had already ruled on a similar claim with different evidence. The Deputy's ruling is entirely conclusory. Even looking back at the previous decision only tells the Court the reasons for that decision, with that evidence, not this decision, with new, possibly

material evidence. The most striking piece of evidence to the Court is that in the previous decision, the Deputy discussed the fact that Dr. Archer had recommended sending Petitioner to a pain clinic to treat his injury. About a year and a half later, at the time of the ruling at issue, no such pain clinic care had actually been offered by Respondent to Petitioner. Failure to offer such pain clinic care as recommended by Respondent's own doctor would be a failure to promptly offer care as required by Iowa Code 85.27(4), which would be material to determining whether Respondent's offered care was reasonable. While perhaps other evidence could, if considered by the Deputy, overcome that failure, the Court has absolutely no evidence that the Deputy did so. Therefore, the Court finds it must remand this issue for further consideration and explanation.

ORDER

It is therefore ordered that:

1. The rulings of the Commissioner as to the issues of healing period, impairment rating, and medical costs are hereby UPHELD.
2. The ruling of the Commissioner as to the issue of alternate medical care is REMANDED for further consideration and explanation consistent with this opinion.

State of Iowa Courts

Case Number	**Case Title**
CVCV034960	PEDRO MERO BUSTOS VS. IOWA WORKERS' COMPENSATION
Type:	OTHER ORDER

So Ordered

John M. Sandy, District Court Judge
Third Judicial District of Iowa

Electronically signed on 2023-01-18 16:04:34

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