IN THE IOWA DISTRICT COURT FOR POLK COUNTY

EUNICE GRUGAN, Petitioner/Claimant, v. WAL-MART STORES, Respondent/Employer, and NEW HAMPSHIRE INS. CO., Respondent/Insurance Carrier.	)	Case No. CVCV060028 **ORDER ON JUDICIAL REVIEW**

Telephonic oral argument in this judicial review of final agency action by the Iowa workers' compensation commissioner was held on July 17, 2020. Appearing for Petitioner was attorney Richard Schmidt. Appearing for Respondents was attorney Valerie Foote for attorney Lindsey Mills. Oral argument was not reported.

Upon consideration of the Petition, the court file, and the respective statements of counsel, the court enters the following Order.

FINDINGS OF FACT

Petitioner Eunice Grugan (Claimant) sustained injuries to her back and right hip on January 19, 2017, while at work for Wal-Mart, Inc. She filed a workers' compensation claim against Wal-Mart, Inc. and their insurer, New Hampshire Ins. Co. (Respondents). Deputy commissioner James Elliott (the deputy) awarded Claimant a seventy percent industrial disability as a result of her work injury. Respondents sought intra-agency review by the commissioner.

The commissioner's March 16, 2020, appeal decision modified the deputy's decision

regarding Claimant's industrial disability. The commissioner found the deputy's industrial disability determination was excessive, and the evidence instead supported a reduced finding of thirty-five percent industrial disability. The sole issue presented on judicial review is whether the commissioner's decision reducing Claimant's industrial disability from seventy percent to thirty-five percent is supported by substantial evidence and agency precedent.

Claimant was sixty-two years old at the time of hearing. (Hr. Tr. p. 11).[1] She is a high school graduate. (Hr. T. p. 13). She went to a two-year commercial art design school after high school, where she earned a certificate. (Hr. T. p. 13). Claimant worked briefly in ad design, but the bulk of her work experience is in customer service. (*Id.*).

While working for different print shops, Claimant discovered that she was exceptionally good at math. (Hr. T. p. 13). She started taking orders and creating quotes. (Ex. A, pp. 5-6). Claimant also has experience in data entry, working for approximately one year processing life insurance policies. (Hr. Tr. p. 15). Claimant worked for Anthony & Hill, a refrigeration company, for nine years, beginning with processing shelf orders and eventually becoming the assistant manager. (Ex. A, pp. 10-11). When that company closed, Claimant went to work for Menard's distribution, where she would check in trucks and process orders using a computer. (Ex. A, pp. 13-14). Claimant worked for Menard's for approximately four months before leaving to find a job closer to her home. (Ex. A, p. 14). She was then hired at Wal-Mart. (Ex. A, p. 15).

Claimant's first job position at Wal-Mart was as a stocker. (Ex. A, p. 15). She worked as

[1] Several documents within the certified agency record carry multiple page identifiers on each page of the affected documents. The court's citations to these documents are generally within a range of one or two pages, depending upon which page number the reader believes is correct.

a stocker for approximately six months before becoming the department manager of infants and shoes. (*Id*.). On January 19, 2017, Claimant was working in the warehouse in bins that merchandise is pulled from. (Ex. A, p. 25). There were two large boxes, one on top of the other, weighing around forty pounds. (Ex. A, p. 26). When Claimant went to pull the top box off, it started sliding. (*Id*.). She was still holding in to it when it slipped and fell to the ground. Claimant alleges that it "kind of whipped" her back and "it snapped." (*Id*.). Claimant said she experienced an immediate onset of pain in her low back and right hip. (*Id*.). She finished her shift for the day and went home. (Ex. A, p. 27). The next day, Claimant came to work and reported her injury. (*Id*.).

Claimant's medical history is relevant to her industrial disability claim. She had ongoing neck and back issues for years prior to the work injury alleged here. Claimant damaged her neck and upper back in a motor vehicle accident in 1990. She still experiences pain secondary to that accident. (Ex. A, p. 52). In 2000, Claimant was involved in another automobile accident and received chiropractic care. (Ex. A, p. 56). In February 2008, Claimant injured her back after falling on ice. (JE1, pp. 1-2). She had another slip and fall injury on ice in December 2009. (JE2, p. 2). Lumbar and thoracic x-rays demonstrated multilevel hypertrophic osteoarthritis of the lower lumbar spine. (JE2, p. 1). Claimant was referred for a course of physical therapy from January 13, 2010, to February 5, 2010. (JE2, p. 5).

On October 7, 2011, Claimant underwent a "physical capacity profile," which was essentially a functional capacity evaluation (FCE), at Cass County Memorial Hospital.[2] (JE3).

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[2] The court will refer to this evaluation as FCE I, and a subsequent FCE discussed later in this Order as FCE II for consistent ease of reference herein.

Claimant's results indicated she was capable of performing in the medium vocational duty work category, exerting up to ten to twenty-five pounds of force frequently. (JE3, p. 1). FCE I also indicated Claimant had a history of prior episodes of back pain in her physical capacity profile. (JE3, p. 2).

About four years before the instant work injury, Claimant fell over some boxes in her garage and injured her back. (Ex. A, pp. 55-56). She received chiropractic treatment after that injury. (Ex. A, p. 56). Claimant admitted she had chronic back pain associated with that fall, as well as aches and pains from old age. (Ex. A, p. 26). Prior to the work injury, Claimant was regularly seeing a chiropractor for monthly adjustments of her neck and back. (Ex. A, p. 51).

On January 20, 2017, the day after the work injury, Claimant presented to Atlantic Medical Center with complaints of low back pain with radiation into her lower leg. (JE1, p. 3). Physician Assistant Scott Hixson (PA Hixson) diagnosed Claimant with low back pain and recommended Claimant apply heat and ice to her back and take over-the-counter ibuprofen as needed. (JE1, p. 4). PA Hixson gave Claimant a light duty work restriction of no lifting more than five pounds and no kneeling, squatting, bending, stooping, pushing, pulling, climbing and overhead reaching. (JE1, pp. 5, 6).

On January 23, 2017, Claimant returned to PA Hixson for follow up. (JE1, p. 6). Claimant reported worsening pain including a cold sensation in her back and inability to stand for long periods of time. (*Id.*). X-ray imaging of Claimant's lumbar spine demonstrated degenerative changes of the lumbar spine. (JE1, p. 8). PA Hixson prescribed Flexeril and Tramadol, referred Claimant to physical therapy, and took Claimant off work. (JE1, p. 7).

Claimant reported continued symptoms with no improvement at her return appointment

with PA Hixson on January 25, 2017. (JE1, p. 11). PA Hixson instructed Claimant to use ice and heat and remain off work. (JE1, p. 12).

Claimant initiated physical therapy on January 30, 2017, at Cass County Memorial Hospital. (JE4, p. 3). Physical Therapist Laura Hickman (PT Hickman) recommended that Claimant participate in therapy two times a week for three weeks. (JE4, p. 4).

On February 1, 2017, Claimant returned to PA Hixson. She was exhibiting improvement in her symptoms. (JE1, p. 16). PA Hixson provided Claimant with light duty work restrictions to begin February 6, 2017, including a maximum lift of five pounds for four hour work days. (JE1, p. 17). He also indicated Claimant should be allowed to stand as needed, with no overhead reaching, no above shoulder work, no squatting, bending, stooping, twisting or pushing and pulling. (*Id*.).

At Claimant's follow up appointment on February 17, 2017, PA Hixon noted Claimant reported (1) continued moderate to severe pain in her low back, and (2) physical therapy was only helping minimally. (JE1, pp. 23-24). PA Hixson referred Claimant for a lumbar spine MRI and provided light duty work restrictions. These restrictions included 50/50 stand and sit with a maximum of six hour days. (*Id*.).

Claimant underwent an MRI of her lumbar spine at Alliance Radiology on March 6, 2017. (JE5, p. 1). Claimant's MRI demonstrated multilevel, mild degenerative spondylosis and a small right, paracentral disc herniation at L1-L2. (JE5, p. 2).

Dr. David Boarini examined Claimant for a neurosurgical consultation on April 12, 2017, at the Iowa Clinic. (JE6, pp. 1-7). Dr. Boarini reviewed Claimant's MRI imaging and observed that she had "significant underlying degenerative changes in her spine." (JE6, p. 5). Dr. Boarini

recommended an epidural steroid injection, nonsteroidal medication and aggressive physical therapy. (*Id*.). He did not recommend surgical intervention. (*Id*.). He imposed a ten-pound lifting restriction and encouraged Claimant to follow up. (JE6, p. 7).

Dr. Hansen provided Claimant a L4-L5 epidural and bilateral L4-L5 facet joint injections on April 27, 2017. (JE6, pp. 11-13).

Claimant returned to the Iowa Clinic on May 18, 2017, for follow up. (JE6, pp. 15-17). ARNP Karla Stapes noted Claimant reported the injections resulted in a fifty percent relief of symptoms. (*Id.* at 15).

On May 24, 2017, Claimant returned to Dr. Boarini for follow up of her back pain with degenerative changes and scoliosis. (JE6, pp. 20-21). Claimant said she felt work aggravated her back symptoms too much to continue with her present work level. (*Id*. at 21). Dr. Boarini suggested Claimant undergo an FCE to get an objective suggestion for limitations on her work activities.[3] (*Id*.).

On June 1, 2017, Claimant underwent FCE II at ARC Physical Therapy. (JE8). Physical Therapist John Kruzich (PT Kruzich) opined Claimant provided a valid effort and demonstrated the physical capability of working in a medium demand vocation. (JE8, p. 1). PT Kruzich recommended Claimant lift up to twenty-five pounds waist to floor occasionally, twenty pounds above shoulder lifting occasionally and up to twenty-five pounds carrying occasionally. (*Id*.).

On June 6, 2017, Claimant returned to Dr. Boarini for follow up, reporting that FCE II had flared up her back pain. (JE6, p. 22). Dr. Boarini noted Claimant's back pain was isolated

[3] It is unclear whether Dr. Boarini was aware of FCE I.

with no radicular component and she was not an operative candidate. (JE6, p. 23). He gave Claimant a fluoroscopy facet block at the lumbar and sacral level. (*Id*.).

Claimant obtained a pre-written opinion letter from Dr. Hansen on June 26, 2017. (CL 1, pp. 1-2). Dr. Hansen checked 'yes' in response to whether he believed the work incident of January 19, 2017, at Wal-Mart was a substantial causal, contributing, or aggravating factor of Claimant's back condition. (*Id*. at p. 1). He also agreed Claimant's need for medical care and treatment is related to that incident. (*Id*. at p. 2). As additional medical care, Dr. Hansen recommended that Claimant continue her medications. (*Id*.).

On August 4, 2017, Claimant underwent right lumbar denervation and radiofrequency ablation with Dr. Hansen. (JE9). On August 16, 2017, Claimant returned to the Iowa Clinic for follow up. Repeat injections were recommended. (JE6, p. 31).

Claimant returned to the Iowa Clinic on September 8, 2017, requesting a repeat injection. (JE6, p. 32). Medical notes from that date indicate Claimant had improved since her radio frequency ablation over the prior month. (JE6, p. 33). Claimant's epidural and facet block injections were repeated. It was noted that if she did not improve, denervation could be repeated. (*Id*.). Dr. Hansen gave Claimant a note detailing work restrictions. These restrictions included a twenty pound lifting limit, avoiding repetitive forward flexion, and alternating sitting and standing every thirty minutes. (JE6, p. 35). Claimant wrote on the note that these were "permanent restrictions from Dr. Thomas Hansen." (*Id*.) However, there is no indication from Dr. Hansen on the note detailing the restrictions or in the notes from Claimant's visit that these were intended to be permanent restrictions by Dr. Hansen.

Claimant underwent an independent medical examination (IME) by Dr. Todd Harbach at Iowa Ortho on October 13, 2017. (Ex. B). Dr. Harbach diagnosed Claimant with degenerative lumbar scoliosis, multilevel degenerative disc disease and right lower extremity radiculitis. (Ex. B, pp. 4-6). Dr. Harbach opined that all of Claimant's diagnoses pre-existed her work injury except for her back pain, which he believed aggravated or lit up her degenerative conditions. (*Id*. at p. 5). Dr. Harbach assigned Claimant a five percent permanent impairment of the whole person and recommended that she follow the permanent restrictions outlined in FCE II. (*Id*.). Because Claimant insisted she had worsening right lower extremity pain and weakness, Dr. Harbach recommended an EMG/nerve conduction study. (*Id*.)

Claimant underwent the EMG/nerve conduction study on November 27, 2017. (JE10). All examined muscles revealed no evidence of electrical instability. (*Id*.). There were no findings to suggest lumbar radiculopathy involving the right lower limb. (*Id*.). However, the right peroneal motor and sural sensory nerve potentials were not recorded. This suggested a sensorimotor neuropathy involving the right lower limb to some extent. However, these findings were of questionable current significance given Claimant's clinical presentation. (*Id*.).

Claimant underwent a second IME with Dr. Robin Sassman on December 20, 2017. (CL 2). Dr. Sassman diagnosed Claimant with low back pain with radiculopathy with MRI evidence of an L1-2 disc herniation. (CL 2, p. 9). She assigned a thirteen percent whole person impairment secondary to Claimant's low back injury, and recommended restrictions including limiting lifting, pushing, pulling and carrying to twenty pounds rarely from floor to waist, twenty pounds occasionally from floor to shoulder, and twenty pounds rarely above shoulder height. (JE2, p. 10). Additionally, Dr. Sassman recommended limiting standing and walking to an

occasional basis and frequent changing of positions. (JE2, p. 10).

On December 29, 2017, Claimant presented to Dr. Angela Weppler with right sided back and leg pain. (JE11, p. 1). Dr. Weppler noted Claimant was struggling with pain control. Dr. Weppler recommended an evaluation and an MRI. (JE11, p. 2). She made no mention of Claimant's prior MRI or prior medical records, so it appears unlikely that she was aware of Claimant's prior imaging or prior medical treatment in making her recommendations.

Claimant is currently back at Wal-Mart, working full time. (Hr. Tr. pp. 41-42). While Claimant was treating for her work injury and was working light duty, Wal-Mart needed to fill her prior job position. Claimant therefore relinquished that position. (Ex. A, p. 16). While on light duty, Claimant gradually increased her hours back at work, per her physician's restrictions, until she was back at her regular forty hours again. (Ex. A, p. 23).

Since the work injury, Claimant has earned a pay raise, from $12.75 per hour to $13.00 per hour. (Hr. Tr. p. 53). Claimant has worked in the fitting room and in the lawn and garden department. (Hr. Tr. pp. 42-43). She has considered transferring to other departments within Wal-Mart, working as either a door greeter or a back-up cashier. (Hr. Tr. pp. 49-50). She testified she intends to continue working for Wal-Mart into the foreseeable future. (Hr. Tr. p. 49).

STANDARD OF REVIEW

In reviewing workers' compensation decisions, the court must apply the standards of judicial review set forth in the Iowa Administrative Procedure Act (IAPA), Iowa Code Chapter 17A. *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 199 (Iowa 2010). Under the IAPA, the court "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 v. IBP, Inc.,* 710 N.W.2d 213, 218 (Iowa 2006).

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. The commissioner's fact findings must be supported by substantial evidence in the record as a whole. *Id.* at 218. 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(*f*)(1); *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004). Put another way, evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). "[The] question is not whether there is sufficient evidence to warrant a decision the commissioner did not make, but rather whether there is sufficient evidence to warrant the decision he did make." *Musselman v. Cent. Tel. Co.,* 154 N.W.2d 128, 130 (Iowa 1967).

In reviewing an agency's finding of fact for substantial evidence, courts must engage in a "fairly intensive review of the record to ensure that the fact finding is itself reasonable." *Neal v. Annett Holdings, Inc.,* 814 N.W.2d 512, 525 (Iowa 2012) (citing *Wal-Mart Stores, Inc. v. Caselman,* 567 N.W.2d 493, 499 (Iowa 2003)). In this fairly intensive review, the court is to view the record as a whole, which includes considering evidence supporting the challenged finding as well as evidence detracting from it. *Id.* (citing Iowa Code § 17A.19(*f*)(3)); *Dawson v. Iowa Bd. of Med. Exam'rs,* 654 N.W.2d 514, 518 (Iowa 2002)). "The question on appeal is not

whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence supports the findings actually made." *Meyer,* 710 N.W.2d at 218.

Where an issue is raised regarding the application of the law to the facts, the must reverse if the commissioner's application is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*l*); *Mycogen Seeds,* 686 N.W.2d at 465. The court gives some deference to the commissioner's determination, but less deference than is given to the commissioner's findings of fact. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

CONCLUSIONS OF LAW

A. Whether the Commissioner Erred in Reducing Claimant's Industrial Disability from Seventy Percent to Thirty-Five Percent. Claimant argues there is not substantial evidence to support the commissioner's appeal decision awarding Claimant thirty-five percent industrial disability. She believes the deputy's decision awarding her seventy percent industrial disability is the proper determination. Respondents argue the commissioner's appeal decision is supported by the substantial weight of the evidence when the agency record is viewed as a whole and should therefore be affirmed.

In assessing the extent of a claimant's industrial disability, the factors considered include the extent of the claimant's functional impairment, the claimant's age, intelligence, education, qualifications, experience, and ability to engage in employment for which the claimant is suited. *Diaz v. CRST Int'l., Inc.,* File No. 5018314, p. 14 (Arb. Dec. 07/28/08) (citing *Second Injury Fund of Iowa v. Shank*, 516 N.W 2d 808, 813 (Iowa 1994)). Stated another way, loss of earning capacity is determined by considering the employee's functional impairment, age, education,

work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent any of these factors affect the employee's prospects for relocation in the job market. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998).

Industrial disability is similar to tort damages in that both compare what an injured person can earn before and after an injury. *Diaz,* File No. 5018314 at *14 (citing *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 265-66 (Iowa 1995)). Assessing the loss of earning capacity is "not measured in a vacuum." *Id.* (citing *Ehlinger v. State*, 237 N.W.2d 784, 792 (Iowa 1976)). A claimant's industriousness and manner of living are other factors to be considered. *Id.* A claimant's industrial disability does not increase because a poor economy affects the claimant's ability to obtain employment. *Webb v. Lovejoy Constr. Co.*, 2 Iowa Indus. Comm's Rep. 430 (App. Dec. 1991); *Felderman v. Teledyne Inc./CB Co.,* File No. 1003227 (App. Dec. 07/27/94); *U.S. West Commc'n v. Overholser*, 566 N.W.2d 873, 877 (Iowa 1997).

The certified agency record contains two opinions regarding Claimant's degree of permanent impairment as a result of her January 19, 2017, work injury. These opinions come from Claimant's expert Dr. Sassman and Respondents' expert Dr. Harbach. While both physicians agree Claimant sustained permanent impairment as a result of the work injury, they disagree as to what lumbar category Claimant properly falls under according to the AMA Guides, 5th Edition.

Based upon her conclusion that Claimant's work injury places her in DRE Lumbar Category III, Dr. Sassman assigns Claimant a thirteen percent permanent impairment. (JE2, p. 10). Conversely, Dr. Harbach places Claimant in DRE Lumbar Category II and assigns Claimant a five percent permanent impairment. (Ex. B, p. 5). Prior to her examination, Dr.

Sassman had the opportunity to review Dr. Harbach's report and conclusions, and therefore includes an explanation as to why her conclusions differed from Dr. Harbach's. She indicates she believes Claimant has "significant signs of radiculopathy and has a history of a herniated disc," and that "the Category II definition does not accurately describe Claimant's current situation." (CL 2, p. 10).

Dr. Harbach also had the opportunity to review Dr. Sassman's conclusions, and respond as to whether his conclusions would change in light of her opinions and findings. (Ex. B, pp. 9-10). Dr. Harbach noted he was puzzled as to why Dr. Sassman would conclude Claimant exhibited "significant signs of radiculopathy" when she also had the opportunity to review Claimant's EMG findings—which were negative for objective evidence of radiculopathy. (Ex. B, p. 10). Specifically, there were "no findings to suggest lumbar radiculopathy" on Claimant's EMG. (JE10, p. 2). Dr. Harbach opined that, based upon this reasoning, Dr. Sassman's conclusions were "completely incorrect." (Ex. B, p. 10). Dr. Harbach further opined that Dr. Sassman's clinical diagnosis was not supported by the medical records, and that her opinion regarding impairment was erroneous due to the fact that it was not supported by the objective medical evidence. (*Id.*).

Generally, the commissioner may accept or reject expert testimony in whole or in part. *Lithcote Co. v. Ballenger,* 471 N.W.2d 64, 66 (Iowa Ct. App. 1991). The commissioner may not arbitrarily or totally reject such testimony, but must weigh the evidence and assess the credibility of the witness. *Catalfo v. Firestone Tire & Rubber Co.,* 213 N.W.2d 506, 509 (Iowa 1973). In the arbitration decision, the deputy did not offer an opinion as to which expert's opinion he found more reliable in this case.

Administrative findings of fact must be sufficiently certain to permit a reviewing court to ascertain with reasonable certainty the factual basis upon which the administrative officer or body acted. *Cedar Rapids Steel Transp., Inc. v. Iowa State Commerce Comm'n*, 160 N.W.2d 825, 837 (Iowa 1968), *cert. denied*, 394 N.W.2d 918, 89 S.Ct. 1189, 22 L.Ed. 2d 451 (1969). The commissioner made clear his assessment of the dueling expert opinions in his intra-agency review decision. He found Dr. Harbach's opinion to be more reliable under this record. (Appeal Decision, p. 2). The commissioner stated he "agree[s] with defendants' expert, Todd Harbach, M.D., that the FCE is the best tool to obtain 'objective conclusions' pertaining to Claimant's functional limitations." (Appeal Decision, p. 2). That means the commissioner found Dr. Sassman's clinical diagnosis not supported by the medical records in this case, as Dr. Harbach points out. (Ex. B, p. 10).

Functional capability is one of the factors to be considered in an industrial disability analysis. The commissioner clearly considered both FCE I and FCE II in reaching his conclusion that Claimant's "functional limitations and restrictions did not significantly change after the July 19, 2017, (sic) work injury."[4] (Appeal Decision, p. 2).

Claimant argues the commissioner adopting "the opinion of a one-time evaluating doctor over a treating physician" is "contrary to agency precedent." This is not entirely correct. The weight to be given any expert opinion is for the agency as fact finder. *Rockwell Graphic Sys., Inc. v. Prince*, 366 N.W.2d 187, 192 (Iowa 1985). The Iowa Supreme Court (the Court) has rejected the argument that a treating physician's testimony should be, as a matter of law, given

[4] It is clear that the commissioner's reference in his Order to July 19, 2017, as Claimant's work injury date is a scrivener's error. The record establishes that Claimant's work injury date was January 19, 2017. (Appeal Decision, p. 1).

more weight than that of a later physician who examines the patient in anticipation of litigation. *Id.*

Claimant argues the commissioner should have given greater weight to the opinion of Dr. Hansen, Claimant's treating physician, over Dr. Harbach, an expert. However, as noted above, the weight given to an expert's opinion is for the agency to decide. *Lithcote*, 471 N.W.2d at 66. Therefore, it was both appropriate and compliant with agency precedent for the commissioner to assign greater weight to Dr. Harbach's opinion in this case, agreeing with Dr. Harbach by doing so that Claimant's FCEs are the best objective tool for determining Claimant's functional limitations. (Appeal Decision, p. 2).

The FCE is commonly used in workers' compensation cases to determine a claimant's limitations following a work injury. The agency routinely relies upon the results of FCE testing in making industrial disability determinations because the nature of such testing is objective. Claimant's authorized treating physician, Dr. Boarini, recommended that Claimant undergo an FCE (FCE II) to get an objective determination of the limitations on Claimant's work activities. (JE6, p. 21). Dr. Harbach agreed the FCE is the best tool to obtain objective conclusions pertaining to functional limitations. (Ex. B, p. 10). The commissioner appropriately adopted the limitations set forth in FCE II as Claimant's functional capabilities. (Appeal Decision, p. 2).

It is undisputed that Claimant had issues with her neck and back prior to the January 19, 2017, work injury. As noted above, Claimant underwent FCE I on October 7, 2011. (JE3). FCE I results indicated Claimant was capable of performing in the medium vocational duty work category, exerting up to ten to twenty-five pounds of force frequently. (JE3, p. 1). FCE I also indicated Claimant had a history of prior non-work related episodes of back pain in her physical

capacity profile. (JE3, p. 2).

As noted above, about four years prior to the arbitration hearing, Claimant fell over some boxes in her garage and injured her back. (Ex. A, pp. 55-56). She received chiropractic treatment after that injury. (Ex. A, p. 56). Claimant admitted she had chronic back pain associated with that fall, as well as aches and pains from old age. (Ex. A, p. 26). Prior to the work injury, Claimant was regularly seeing a chiropractor for monthly adjustments of her neck and back. (Ex. A, p. 51). This pre-work-injury history establishes a baseline from which Claimant's industrial disability can be determined, because industrial disability compensates a claimant for loss of earning capacity following a work injury.

The instant matter is somewhat unique because of claimant's 2011 evaluation resulting in FCE I. FCE I clearly delineates Claimant's pre-work-injury physical capabilities. And, FCE I in conjunction with FCE II permits a direct comparison between Claimant's physical capabilities before and after the January 2017 work injury. Although this information was available to the deputy, he did not address Claimant's pre-injury capabilities in comparison with her post-injury restrictions in his decision.

On intra-agency appeal, the commissioner appropriately compared FCE I with FCE II, ultimately finding "claimant's functional limitations and restrictions did not significantly change after the July 19, 2017, (sic) work injury." (Appeal Decision, p. 2). While Claimant argue FCE II aggravated her symptoms, the commissioner identified and considered this fact by specifically noting: "I recognize claimant reported an increase in her symptoms after the FCE [meaning FEC II]." (Appeal Decision, p. 2).

The commissioner appropriately determined the best way under this record to ascertain Claimant's physical capabilities prior to and after the work injury is by comparing Claimant's October 2011 FCE I results with her June 2017 FCE II results. (JE3; JE8). Claimant's physical strength abilities were measured in FCE I. (JE3, p. 4). The results of Claimant's 2011 examination placed her in the medium duty vocational category of work, restricting her from lifting greater than ten to twenty-five pounds of force. (JE3, p. 1).

FCE II conducted after Claimant's work injury also placed her in the medium duty vocational category, restricting her from lifting greater than twenty-five pounds of force. (JE8, p. 1). From an objective viewpoint, Claimant started in the medium duty vocational category prior to the work injury, and demonstrated through undisputed testing that she remained in the medium duty vocational category after the work injury. The commissioner therefore rationally concluded Claimant's "functional limitations and restrictions did not significantly change after the July 19, 2017, (sic) work injury." (Appeal Decision, p. 2).

Industrial disability within the meaning of the worker's compensation statute means reduced earning capacity. *Guyton v. Irving Jensen Co.,* 373 N.W.2d 101, 103 (Iowa 1985). The factors the court considers are noted above on page 11. There are no guidelines establishing the weight to be given to each of these factors. So it is necessary for the commissioner to draw upon prior experience and general and specialized knowledge to make a finding in regard to the degree of industrial disability. *Lithcote*, 471 NW.2d at 68.

Applying that expertise, the commissioner reasoned in this case that although Claimant's functional limitations did not significantly change after the January 19, 2017, work injury, (1) her symptoms worsened, (2) she did not return to the job she held at the time of her injury, and

(3) some of the job duties in the position she held at the time of hearing were difficult for her. (Appeal Decision, p. 2). "Even so, claimant was working full-time and continued to earn her pre-injury pay at the time of hearing." (*Id.*). Claimant's continued employment with Wal-Mart in multiple departments is a testament to her ability to continue to engage in similar employment. In assessing Claimant's ultimate industrial disability, the commissioner referenced the relevant factors he considered and concluded:

> Claimant, who was 62 years old at the time of hearing, has worked primarily in customer service positions. (See Tr., pp. 13-16) While claimant's subjective complaints may limit her ability to perform some of those jobs, claimant's ongoing work with defendant-employer indicates she continues to have the skills and physical ability to engage in the employment for which she is fitted. For these reasons, I find claimant sustained 35 percent industrial disability."

(Appeal Decision, p. 2).

This determination by the commissioner is supported by the substantial weight of the evidence in this case when the agency record is considered as a whole. Claimant testified at the arbitration hearing that she has many transferable skills and varied work experience, and would be physically capable of returning to multiple jobs similar to those that she has held in the past. (Ex. A, pp. 46-48). Claimant has proven her continued employability by continuing to work for Wal-Mart in multiple departments. Additionally, Claimant admitted she would be physically capable of returning to jobs similar to her previous employment, including taking and processing shelf orders for a distribution company, working as an assistant manager, working on a computer, and performing data entry. (Ex. A, pp. 46-48). Because Claimant is capable of returning to work that she was accustomed to performing, continues to work presently, and is currently earning wages comparable to her pre-injury wages (albeit slightly higher, given her raise in April 2017), the commissioner's determination of thirty-five percent industrial disability

is supported by the substantial weight of the evidence in the instant record.

Claimant also argues the commissioner erred in not giving appropriate deference to the deputy's credibility findings regarding her testimony. However, there is no evidence that the commissioner called Claimant's credibility into question or indicated that he disagreed with the deputy's assessment of Claimant's credibility. The commissioner's findings and conclusions are directly contrary to that assertion because he cites Claimant's testimony to support his conclusions. The commissioner specifically recognized Claimant's symptoms that worsened after the work injury and did not question the credibility of her testimony regarding these symptoms. (Appeal Decision, p. 2).

Claimant also alleges the commissioner failed to review her testimony. However, as already noted, the Appeal Decision includes multiple direct citations to the transcript of Claimant's testimony. (Appeal Decision, p. 2). There is no evidence the commissioner called Claimant's credibility into question in his intra-agency review. Instead, he applied his expertise in analyzing all of the evidence, made a finding of thirty-five percent industrial disability, and detailed his rationale behind that conclusion.

Further, the commissioner's finding of thirty-five percent industrial disability is not insignificant. This award is well beyond the impairment ratings assigned by the experts for both Claimant and Respondents. It appropriately contemplates Claimant's loss of access to the labor market despite the fact that Claimant's earnings were not actually reduced after the January 2017 work injury.

The contested assignment of industrial disability awards Claimant 175 weeks of benefits. This is substantial given that (1) Claimant continues to work at Wal-Mart full time, (2) Claimant

is earning more than she did prior to the work injury, and (3) Claimant's functional capabilities were not significantly reduced by the January 2017 work injury. Claimant argues the commissioner's decision is "against" her. She contends it goes against the purpose of workers' compensation statutes, which is to benefit the worker. The commissioner's award of thirty-five percent industrial disability to Claimant still serves to benefit her significantly by providing 175 weeks of benefits for an injury that had little overall impact upon her ability to earn. Claimant's disagreement with the commissioner's decision does not mean his decision is wrong or unsupported by substantial evidence.

The review required for substantial evidence challenges is well-settled. The issue is not whether the record contains evidence that might support a different finding, but whether the record contains evidence supporting the finding actually made by the agency. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731, 734 (Iowa Ct. App. 1986). The possibility that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. *Id.* Further, the requirement that a reviewing court take all record evidence into account in reviewing administrative findings does not detract from the court's duty to grant appropriate deference to the agency's expertise. *Cerro Gordo Cty. Care Facility v. Iowa Civil Rights Comm'n,* 401 N.W.2d 192, 195–96 (Iowa 1987). While Claimant presented various arguments as to evidence supporting her position, this does not mean the commissioner's findings are unsupported by substantial evidence in the agency record when that record is considered as a whole.

CONCLUSION

The sole question presented here is whether the March 16, 2020, appeal decision of the

Iowa workers' compensation commissioner is supported by substantial evidence. It is. In coming to his ultimate conclusion, the commissioner considered the agency record as a whole. The appeal decision was direct, thorough, well-reasoned, and relies upon established precedent consistent with prior agency action. The substantial weight of the evidence supports the commissioner's conclusion that Claimant sustained thirty-five percent industrial disability as a result of her January 2017 work injury.

The appeal decision should be affirmed in its entirety and costs should be assessed to Claimant.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the final agency ruling entered by the Iowa workers' compensation commissioner assessing Claimant a thirty-five percent industrial disability for her January 2017 work injury is affirmed in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs are assessed to Claimant (Petitioner).

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV060028	GRUGAN V WALMART AND NEW HAMPSHIRE INS CO

So Ordered

Jeanie Vaudt, District Court Judge,
Fifth Judicial District of Iowa