

IN THE IOWA DISTRICT COURT FOR POLK COUNTY**BRIAN BARRY****Petitioner,****v.****JOHN DEERE DUBUQUE WORKS OF
DEERE & COMPANY,****Self-Insured Employer, Respondent.****Case No. CVCV062463****RULING ON
PETITION FOR
JUDICIAL REVIEW**

Petitioner's Judicial Review petition came before the Court for consideration. The petitioner, Brian Barry ("Barry") appeals from the denial of his review-reopening petition. Hearing on Barry's judicial review petition was held on March 25, 2022. Mindi Vervaecke represented Petitioner Brian Barry. Dirk Hamel represented Respondent John Deere Dubuque Works of Deere & Company ("Deere"). Barry requests this Court reverse the decision of the Iowa Workers' Compensation Commissioner. Barry asserts the Agency erred in finding he did not establish by a preponderance of the evidence that he has a worsened condition causally related to his work related injury. Deere requests the Court affirm the decision of the Iowa Workers' Compensation Commissioner in its entirety. After considering the arguments of the parties and having reviewed the file and the applicable case law, the Court now enters the following ruling.

I. BACKGROUND FACTS

Barry is 62 years old. (Tr. p. 9). On October 17, 2013, he suffered a bilateral carpal tunnel work-related injury. (Tr. p. 10). On December 13, 2017, Deputy McGovern issued an Arbitration Decision, awarding Barry permanent partial disability benefits of 11% to the body as a whole and ordered Deere arrange for an EMG/NCV test within twenty-one days of the order. (Def. Ex. A). In making this determination, Deputy McGovern adopted Dr. Robin Sassman's findings from her November 2015 independent medical evaluation ("IME") of Barry. (Def. Ex. A, at 9, 11). During

the arbitration hearing, Barry testified he had difficulty gripping, grasping, pushing and pulling with his arms. (Def. Ex. A).

On February 2, 2018, Barry presented to Dr. Ronald Sims for an NCS/EMG test. (Jt. Ex. 3). This was the second time Barry had such a test. (Jt. Ex. 1). On August 11, 2015, Dr. John Kuhnlein performed an NCS/EMG test on Barry. (Jt. Ex. 1). Dr. Kuhnlein found Barry had right median neuropathy at the wrist. (Jt. Ex. 1). Following the February 2018, testing, Dr. Sims found Barry's motor conduction test to be normal in the right median, left median, and left ulnar nerve areas. (Jt. Ex. 3). Dr. Sims' diagnosed Barry with bilateral median neuropathy at the wrist, but involving sensory fibers only. (Jt. Ex. 3). Dr. Hunt, John Deere's occupational health doctor, examined Barry for ongoing bilateral wrist and forearm pain immediately following Dr. Sims' testing. (Jt. Ex. 2). Although Barry reported to Dr. Hunt that his repeat EMG/NCV testing showed worsened results than those on the EMG performed prior to his surgery, that finding was not included in Dr. Sims' record. (Jt. Ex. 2; Jt. Ex. 3).

Dr. Hunt examined Barry twice more in February 2018 concerning Barry's bilateral wrist and forearm pain. (Jt. Ex. 2). Barry's neurovascular examination was within normal limits; he had full range of motion in both wrists. (Jt. Ex. 2). Dr. Hunt's examination was consistent with Barry's history wherein he reported work was not causing him symptoms. (Jt. Ex. 2). Dr. Hunt opined that Barry had stable bilateral wrist and forearm pain, and recommended he continue taking Celebrex, doing home exercises, and applying ice/heat. (Jt. Ex. 2).

On March 5, 2018, Barry presented to Dr. Thomas Ebinger for evaluation. (Jt. Ex. 4). Dr. Ebinger reviewed Barry's entire course of treatment for his bilateral carpal tunnel syndrome, including the reports from his surgeries. (Jt. Ex. 4). Barry reported to Dr. Ebinger that he had ongoing aching in his hands and forearms, stiffness in his hands in the morning, and numbness

and tingling over the dorsum of his thumb and radial aspect of his index finger and middle finger. (Jt. Ex. 4). Dr. Ebinger diagnosed Barry with trigger finger of the bilateral middle and ring fingers, along with “median nerve irritation in the setting of previous carpal tunnel release, and flexor tendinitis likely secondary to overuse.” (Jt. Ex. 4:70). Dr. Ebinger noted a positive Tinel sign at the bilateral carpal tunnel and full extension and flexion of all digits. (Jt. Ex. 4). Dr. Ebinger allowed Barry to continue unrestricted work, and did not schedule a follow-up appointment. (Jt. Ex. 4).

Between March 19 and October 3, 2018, Dr. Hunt examined Barry at least thirteen times. (Jt. Ex. 2). On April 2, 2018, Barry reported he was able to do his job without restrictions but with pain. (Jt. Ex. 2). On April 13, 2018, Barry reported he could perform his job with restrictions. During the same visit, Dr. Hunt changed Barry’s permanent restrictions to include limited fork truck driving at the request of “LR.” (Jt. Ex. 2). On May 9, 2018, Barry reported awakening at night at times with pain in his shoulders. (Jt. Ex. 2). His range of motion had increased, however, and he could do his job with restrictions. (Jt. Ex. 2). Later that same month, Barry noted less pain but was unable to do his job with restrictions. (Jt. Ex. 2). On June 1, Barry reported pain in his shoulders that awakened him five nights per week. (Jt. Ex. 2). Dr. Hunt’s diagnosis continued to be bilateral forearm tendinitis, although his treatment in the summer and fall of 2018 focused on Barry’s increasing shoulder pain. (Jt. Ex. 2).

In August 2018, Barry became a fabrication inspector. (Tr. p. 10-11). During his September 14, 2018, visit with Dr. Hunt, Barry reported that his hands had improved and he had increased range of motion. (Jt. Ex. 2). On October 31, 2018, Dr. Hunt found no tenderness over Barry’s cubital tunnels. (Jt. Ex. 2).

On October 24, 2018, Barry presented to Robert Bartelt, M.D. complaining of numbness and tingling in his right hand as well as locking of some of his fingers. (Jt. Ex. 5). Dr. Bartelt noted Barry's MRI results showed rotator cuff issues in both the left and right shoulders. (Jt. Ex. 5). Dr. Bartelt diagnosed Barry with an incomplete tear of the right rotator cuff, tendinopathy of the left rotator cuff, trigger finger of an unspecified finger, and right hand paresthesia. (Jt. Ex. 5). Dr. Bartelt indicated, however, that Barry could return to work with no modification in restrictions. (Jt. Ex. 5).

On December 10, 2018, Barry began to visit Amanda Addison, N.P. for his bilateral shoulder pain. (Jt. Ex. 2). Addison continued to treat Barry until approximately February 2020 for bilateral shoulder pain. (Jt. Ex. 2). Barry saw Addison at least seventeen times between December 2018 and February 2020. On August 14, 2019, and November 20 2019, Barry reported tingling in his hands and fingers in addition to his shoulder complaints. (Jt. Ex. 2). On March 30, 2020, Dr. Grentz, one of the physicians in Deere's clinic, visited with Barry via telephone where Barry reported that his wrists "do ok" if he followed his permanent restrictions but if he does too much, his wrists swell up. (Jt. Ex. 2).

On October 13, 2020, Barry presented to Dr. Stanley Mathew for an IME. (Cl. Ex. 1). Barry reported 6/10 discomfort in his shoulders, wrists, forearms and hands. (Cl. Ex. 1). Dr. Mathew diagnosed Barry with bilateral carpal tunnel syndrome, status post bilateral carpal tunnel decompression surgery, bilateral forearm tendinitis, bilateral multidigit trigger finger, bilateral rotator cuff tendonitis, bilateral upper extremity weakness, and chronic pain in bilateral upper extremities. (Cl. Ex. 1). Dr. Mathew opined that Barry's carpal tunnel syndrome had worsened since the arbitration hearing on December 13, 2017. (Cl. Ex. 1). Further, Dr. Mathew utilized Table 16-18 of the 5th Edition of the AMA Guide to Impairment to evaluate Barry's impairment. (Cl. Ex.

1). Dr. Mathew rated Barry's impairment as 10% to each elbow, 15% upper extremity impairment for the wrists, and 15% as a result of loss of function of his finger joints. (Cl. Ex. 1). Dr. Mathew reported that Barry has "developed chronic pain and weakness that are not adequately considered by the guides [*sic*]". (Cl. Ex. 1). Additionally, he added permanent restrictions including avoiding lifting more than five pounds repetitively, and avoiding repetitive use of the hands, and a keyboard. (Cl. Ex. 1). Lastly, Dr. Mathew indicated that Barry's shoulder complaints were new and separate conditions not attributable to the bilateral wrist, hand, finger, and forearm diagnosis. (Cl. Ex. 1).

On March 24, 2020, one of Barry's medical providers excused him from work due to his high risk of complications from COVID-19. (Jt. Ex. 2). At the time of the review-reopening hearing, Barry remained off work. (Tr. p. 13-14). After his provider excused him from work due to COVID-19, he relocated to Florida where he owns a condominium. (Tr. p. 13).

Barry filed a petition for review-reopening on December 4, 2019, due to the alleged worsening of his bilateral carpal tunnel syndrome. Barry testified at the review-reopening hearing he felt he had a worsening of his condition since the underlying workers' compensation hearing, including increased numbness in his fingers and hands. (Tr. p. 14-15). The Deputy concluded that Barry failed to meet his burden of proof that there was a change in the condition of his work related injury. (Review-Reopening Dec. at 19). The Deputy concluded that Barry's treatment since the 2017 arbitration hearing had focused on his shoulder pain and not his carpal tunnel injury. (Review-Reopening Dec. at 19). The Deputy did not find Dr. Mathew's report persuasive because he "based his rating off an incorrect section of the Guides by using Table 16-18 and Section 16.7 rather than proper sections dealing with carpal tunnel syndrome." (Review-Reopening Dec. at 19).

On May 12, 2021, Barry appealed the decision to the Workers' Compensation Commissioner. (Notice of Appeal). The Commissioner affirmed the Deputy's decision in its entirety. (Ex. A, Appeal Decision).

On September 2, 2021, Barry filed his judicial review petition, arguing (1) that he met his burden of proof for worsening bilateral carpal tunnel injuries since the original Arbitration Decision issued on December 13, 2017, and (2) that the Deputy based his decision on his improper interpretations of the AMA, which was an abuse of discretion. He seeks reversal of the Commissioner's Appeal Decision concerning the issue of the progression of his bilateral carpal tunnel injury. Deere asserts Deputy Phillips neither abused his discretion in rejecting the medical opinions of Dr. Mathew nor utilized agency expertise in rejecting those opinions. Deere additionally argues the agency's conclusion that Barry's bilateral carpal tunnel impairment had not increased since the original proceeding is supported by substantial evidence.

II. 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)(l). “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).

III. MERITS

A. Whether the Agency abused its discretion when rejecting Dr. Mathew’s medical opinion.

The agency may accept or reject expert evidence entirely or in part. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 850 (Iowa 2011). The court is reluctant to allow the commissioner to totally reject expert testimony when is the only medical evidence presented. *Poula v. Siouxland Wall & Ceiling, Inc.*, 516 N.W.2d 910, 911-912 (Iowa Ct. App. 1994). However, “[e]xpert opinion testimony, even if uncontroverted, may be accepted or rejected in whole or in part by the trier of fact.” *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 560 (Iowa 2010) (quoting *Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283, 285 (Iowa Ct.App.1996)).

The agency, as the fact finder, determines the weight to assign an expert opinion, by assessing the accuracy of the facts provided to the expert as well as other surrounding circumstances. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998); *see also St. Luke’s Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000) (stating the weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances.)

When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement,

the nature and extent of the examination, the expert's education, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. *Rockwell Graphic Sys., Inc. v. Prince*, 366 N.W.2d 187, 192 (Iowa 1985).

Additionally, while the initial determination of whether an injury has a causal connection with a worker's employment must be supported by expert testimony, "there is no requirement...that medical evidence is necessary to show a change of condition for purposes of awarding additional permanent partial disability benefits in a review-reopening proceeding. In fact, [the court has] considered laywitness testimony in determining the extent of an employee's injury and disability. *E.N.T. Assocs. v. Collentine*, 525 N.W.2d 827, 830 (Iowa 1994)

Here, the Commission found:

Based upon the preponderance of the evidence in the record, I find that Mr. Barry has not proven a change in condition. While Mr. Barry claims a 20 percent worsening of his condition, he has not shown such by an objective measurement. While the claimant argues that an EMG from 2018 showed a worsening of his condition based upon an alleged statement of Dr. Sims, that is not included in Dr. Sims' record. Dr. Ebinger indicated that electrodiagnostic testing remains positive after carpal tunnel release. Mr. Barry testified to some of the same issues during the arbitration hearing and the reviewreopening proceedings. He also sought little treatment for his alleged continued issues.

If he continued to have pain that worsened, it would be reasonable for him to seek treatment. Mr. Barry did not, and instead concentrated his treatment on his shoulders. Further, I did not find Dr. Mathew's report persuasive. Dr. Mathew based his rating off an incorrect section of the Guides by using Table 16-18 and Section 16.7 rather than proper sections dealing with carpal tunnel syndrome.

Review-Reopening Dec. at 19.

Barry first argues the Agency abused its discretion when it rejected Dr. Mathew's expert medical opinion and impairment rating determination. Barry contends Dr. Mathew's opinions, determinations, and impairments are unrebutted. (Petitioner Br. at 7). Barry correctly notes that Deere did not seek an independent medical examination after Barry filed his Petition for Review-Reopening. The record, however, is replete with medical opinions and determinations from

multiple physicians who examined Barry between the Arbitration Decision and filing of the Petition for Review-Reopening. (Review-Reopening Dec. at 6-16). It is within the Agency's purview to consider this medical evidence along with Barry's testimony to determine whether he has met his burden of proof.

The Agency found Dr. Mathew's report unpersuasive. The deputy relied on the other medical reports in the record to find that Barry transitioned to care for his shoulders rather than his bilateral carpal tunnel syndrome. The work related injury at issue here is bilateral carpal tunnel syndrome, however. Any impairment or lessening of earning capacity must be proximately caused by this injury. *Kohlhaas*, 777 N.W.2d at 391. The Agency Decision was determined by weighing the expert testimony found in the plethora of medical history rather than on any untenable grounds. The Court concludes the Agency did not abuse its discretion in rejecting Dr. Mathew's opinion warranting a reversal.

B. Whether the Agency inappropriately used its expertise in rejecting Dr. Mathew's opinions based on his use of the AMA Guides.

Next, Barry argues the Agency violated Iowa Code section 85.34(2)(x) by utilizing its own expertise when it rejected Dr. Mathew's opinions. Iowa Code section 85.34(2)(x) states in relevant part:

“ . . . when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the Guides to the Evaluation of Permanent Impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. *Lay testimony or agency expertise* shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs 'a' through 'u', or paragraph 'v' when determining functional disability and not loss of earning capacity.”

Iowa Code § 85.34(2)(x) (2021) (emphasis added).

The Deputy discussed Barry's medical history in detail throughout his entire decision. Additionally, Deputy Phillips referenced Dr. Sassman's opinions and assessment of Barry's

impairment rating at the time of the 2017 decision. Dr. Sassman's report contained a well-detailed analysis of the AMA Guides for carpal tunnel and an upper extremity impairment rating. The deputy compared Dr. Sassman and Dr. Mathew's reports and references to the tables in the AMA Guides and concluded the proper tables were the ones referenced in Dr. Sassman's IME. This is not the agency using its expertise to determine the proper percentage of permanent impairment. The Deputy weighed the medical reports from two physicians and found one more persuasive than the other.

Therefore, the Court concludes the Agency did not go beyond its authority or use improper agency expertise when it rejected Dr. Mathew's testimony based on certain sections of the AMA Guides.

C. Whether the Agency's conclusion that Barry's bilateral carpal tunnel impairment had not increased is supported by substantial evidence in the record.

Iowa Code section 86.14(2) governs review-reopening proceedings. The inquiry in such a proceeding is whether the employee's condition warrants an end to, diminishment of, or increase of compensation previously awarded. Iowa Code § 86.14(2) (2021). A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is "proximately caused by the original injury." *Kohlhaas*, 777 N.W.2d at 392.

As stated in section A, the agency, 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). Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. *Id.* The commissioner may accept or reject the expert opinion in whole or in part. *Sherman*, 576 N.W.2d at 321.

Making a determination as to whether evidence “trumps” other evidence or whether one piece of evidence is “qualitatively weaker” than another piece of evidence is not an assessment for the district court or the court of appeals to make when it conducts a substantial evidence review of an agency decision.

Arndt v. City of Le Claire, 728 N.W.2d 389, 394 (Iowa 2007). Evidence is substantial if a reasonable person would find it adequate to reach a conclusion. *U.S. West Communications Inc. v. Overholser*, 566 N.W.2d 873, 875 (Iowa 1997).

Barry contends there is not substantial evidence in the record to support the Commission’s finding he failed to prove a worsening of his carpal tunnel since the 2017 arbitration decision. It is undisputed that Barry continues to suffer from bilateral carpal tunnel. The issue is whether substantial evidence exists in the record to support the Commission’s conclusion that this condition has not worsened since 2017. Deputy Phillips weighed medical records and Barry’s testimony during the review-reopening hearing. Barry testified regarding his subjective pain and suffering and used a similar illustration to explain the nature of his current bilateral carpal tunnel syndrome. Barry has been receiving the same care for his bilateral carpal tunnel since 2017; he has declined any future surgery. He continues to wear braces on his hands, take pain medication, and now is not working due to COVID-19. Prior to COVID-19 Barry became an inspector, which helped, rather than exacerbated, the pain and numbness from the carpal tunnel. Since the arbitration hearing, Barry’s treatment has focused on his shoulders rather than his carpal tunnel injury.

It is not for this Court to step in and make its own opinion weighing the testimony, experts and evidence. Instead, it is a question of whether substantial evidence supports the Agency Decision. Given the evidence outlined above, the Court finds there is substantial evidence to support the Agency Decision that Barry failed to prove a worsening of his carpal tunnel injury.

CONCLUSIONS AND DISPOSITIONS

For the reasons set forth above, the Court concludes the Agency's finding that Barry failed to meet his burden that his bilateral carpal tunnel syndrome has worsened since 2017 is supported by substantial evidence. The Court further concludes that the Commission's finding that Dr. Mathew's report was unpersuasive is not an abuse of discretion and in rejecting it, the Deputy did not utilize agency expertise as prohibited by Iowa Code §85.32(2)(x).

IT IS THE ORDER OF THE COURT that the Iowa Workers' Compensation Commission's decision is **AFFIRMED**. Costs are assessed to the petitioner.



State of Iowa Courts

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OTHER ORDER

So Ordered

Heather Lauber, District Judge,
Fifth Judicial District of Iowa

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