

**IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY**

<b>Nikki Behnke,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	<b>No. CVCV095331</b>
<b>vs.</b>	)	
	)	<b>RULING</b>
<b>SP Canterbury, Inc., and Security</b>	)	
<b>National Insurance Company,</b>	)	
	)	
<b>Respondents.</b>	)	

On this date, the above-captioned matter came before the undersigned for review of Petitioner's Petition for Judicial Review. The Court finds a hearing on the Petition is unnecessary. Having considered the file, relevant case law, and written arguments of the parties, the Court hereby enters the following ruling:

**FACTUAL AND PROCEDURAL BACKGROUND**

Petitioner filed a petition seeking workers' compensation benefits on February 13, 2017, seeking workers' compensation benefits from her employer, SP Canterbury, Inc. (d/b/a Subway) and its insurer, Security National Insurance Company. An Arbitration Decision was filed by Deputy Workers' Compensation Commissioner Stephanie J. Copley on May 14, 2019. Deputy Copley considered four issues: 1) whether Petitioner sustained an injury on December 28, 2016 that arose out of and in the course of her employment; 2) if Petitioner sustained a work-related injury, the extent of Petitioner's impairment; 3) if Petitioner sustained a work-related injury, whether Petitioner is entitled to payment of past medical expenses and ongoing medical treatment; and 4) if Petitioner sustained a work-related injury, whether Petitioner is entitled to penalty benefits. Deputy Copley entered the following findings of fact (citations to the agency record are omitted, and references to "Claimant" are to Petitioner):

Claimant alleges she sustained a head injury on December 28, 2016, during her shift as a "sandwich artist." She testified she was making a customer's sandwich when she felt the need to sneeze. She allegedly bent over in an attempt to sneeze into her legs but lost her balance and fell forward into a cupboard. Claimant testified the top of her head hit the cupboard. She described the incident a "bonk to her head." Claimant now attributes numerous symptoms to this alleged incident, including migraines, confusion, memory loss, comprehension problems, dizziness, and hand-eye coordination deficits.

Defendants dispute whether claimant actually injured her head at work on December 28, 2016. They point to several text messages sent by claimant in the hours leading up to the alleged injury.

Prior to claimant's shift on her alleged date of injury, claimant engaged in a text message conversation with her supervisor, JoAnn Miller, which apparently started after Ms. Miller threatened to write up claimant for tardiness and insubordination. Leading up to this text

message exchange, claimant had been given several warnings for tardiness, and claimant was concerned she was going to lose her job.

In response to being threatened with a write up, claimant threatened “going to legal aid” for discrimination. Claimant also referenced a possible work injury, stating, “At any rate, if you write me up for how long it takes me to close its [sic] ageism....So I either take a little longer or I get injured. Where would you like me to place my priority?” This conversation ended at 1:29 p.m.

Then, at 4:20 p.m., after claimant’s shift had started but before her alleged work injury, Ms. Miller sent claimant another text informing her she had a write up on the desk and could contact Ms. Miller with questions. The write up is in the record as Claimant’s Exhibit C, page 13. It indicates it is claimant’s “final” warning and any additional problems would result in “automatic termination.”

Claimant responded at 6:51 p.m., after her alleged work injury: “Yep, we’ll have to talk about it unless that’s my copy. :-)” Then, at 6:52 p.m., Ms. Miller stated, “That is your copy,” to which claimant immediately responded, “Would you like me to start by saying I need to leave tonight? I just hit my head awfully hard on a metal handle, my head ache is increasing and I’m beginning to get dizzy. Should prolly go get checked out...”

Notably, later that evening at 9:39 p.m., claimant sent a text message to her co-worker who apparently witnessed the fall, and she made no mention of the alleged work injury or her alleged symptoms.

These text messages from claimant raise questions about claimant’s motivations leading up to her alleged work injury on December 28, 2016.

After several text messages from claimant, defendant-employer’s owner, Scott Canterbury, sent the following to claimant on December 30, 2016: “Nikki I have watched the video from the night you claimed to hit your head and I see no place on that video where that happened....” Unfortunately, claimant was told the surveillance video from December 28, 2016 no longer exists, and Mr. Canterbury was not present to testify at the hearing, so his statement regarding the video is given little weight.

After the text message exchange with Mr. Canterbury, claimant sought medical treatment at the emergency room for what she described as increasing dizziness, headache, and intermittent blurry vision after hitting her head on a door handle while at work. Claimant’s physical examination was normal, as was the CT of her head. She was discharged without restrictions or instructions other than the follow up with a primary care provider if her symptoms worsened. This negative workup two days after the alleged incident casts doubt on claimant’s account of the incident.

Claimant’s testimony regarding the timing and severity of her symptoms in the months following the alleged work injury additionally undercut her credibility. Despite testifying

at hearing that she had daily headaches for roughly a month after allegedly striking her head at work on December 28, 2016, claimant made no mention of headaches during a psychiatric examination at the University of Iowa Hospitals and Clinics (UIHC) on January 5, 2017 or during an examination at an urgent care clinic on January 26, 2017. Several physicians also noted claimant's reported symptoms did not match her presentation during examination. I observed similar inconsistencies at hearing. For example, despite testifying she suffers from memory loss, claimant recounted several stories surrounding her prior head traumas with abundant and colorful detail.

Claimant also has a history of illegal drug usage, including cocaine in the past and methamphetamine more recently, and has exhibited recent prescription-seeking behavior.

Based on claimant's text messages, the inconsistencies between claimant's complaints and her presentation, and claimant's admitted drug use and related behavior both before and after December 28, 2016, I do not find claimant to be a credible witness. Because claimant's account of her alleged injury on December 28, 2016 is not corroborated by other contemporaneous evidence, such as medical records or witness testimony, there is insufficient evidence for me to find claimant sustained an injury during her shift on December 28, 2016.

However, even if I had found sufficient evidence of a work injury on December 28, 2016, there is insufficient evidence to causally relate that work injury to any of claimant's alleged disability, ongoing complaints, or need for medical treatment.

This is, in part, due to claimant's significant history of prior head traumas, which includes a domestic assault in 2000, a fistfight in 2002, a bar fight in 2014, and a battery with a mallet/hammer in 2015. Claimant also dealt with anxiety and depression well before and leading up to her alleged December 28, 2016 work injury. In fact, she requested an evaluation at UIHC for depression on December 14, 2016, just two weeks before the alleged work injury.

Claimant had at least two head traumas after her work injury, including a rollerblading accident in March of 2018 and an altercation with a police officer in November of 2018. In addition to her significant history of head traumas and pre-existing anxiety and depression, claimant also suffers from untreated hyperthyroidism.

In late 2017, after her alleged work injury, claimant began treatment at Physicians' Clinic of Iowa (PCI) for what she believed to be a cerebrospinal (CSF) leak due to head trauma, including her work injury. She also complained of slurred speech, balance and vision issues, and headaches. Claimant was referred for neuropsychological testing.

Before her neuropsychological examination, claimant followed up at PCI for her alleged CSF drainage. She was reassured that her symptoms did not match CSF leak and instead were more consistent with chronic rhinitis.

Claimant returned to PCI on April 20, 2018 for her reported headaches and memory loss. Robert Struthers, M.D., suspected claimant had "some type of mania." He noted that although claimant blamed her symptoms on the head trauma, the head trauma from her work injury was "extremely minor." He again attributed claimant's complaints to mania but also noted her thyroid disease could be the cause. He told claimant he would try to move her neuropsychological appointment up.

Claimant's neuropsychological evaluation was performed on July 13, 2018, by Megan Adams Rieck, Ph.D. Dr. Adams Rieck noted claimant reported slurred speech, cognitive impairment, fatigue, mood swings, irritability, interpersonal problems, dizziness, blurred vision, headaches, imbalance, and photophobia, but these reported symptoms were "inconsistent with her presentation (e.g., speaking clearly while reporting slurring)." Dr. Adams Rieck also indicated claimant's medical workup "has thus far been negative for neurological injury or disorder" and her "[h]ead CTs have been negative," including a scan on November 27, 2017.

Dr. Adams Rieck stated that while it was likely claimant experienced a number of mild traumatic brain injuries, "they are not the likely explanation for her current concerns." Instead, Dr. Adams Rieck attributed claimant's symptoms to claimant's "[p]ast and current substance abuse as well as untreated hyperthyroidism."

On November 28, 2018, Dr. Struthers responded to a letter drafted by defendants' attorney. In it, Dr. Struthers opined that claimant's December 28, 2016 work injury was "at most a temporary aggravation of [claimant's] pre-existing problems/complaints/symptomology." He went on to opine that he did not believe the work injury caused or materially aggravated any neurological or neuropsychological problems or complaints causing permanent impairment or restrictions or the need for treatment.

Defendants obtained a similar letter from Winthrop Risk, M.D., who was claimant's treating neurologist at the time of the hearing. On January 29, 2019, Dr. Risk opined claimant's December 28, 2016 work injury was "at most a temporary aggravation of [claimant's] pre-existing problems/complaints/symptomology." Like Dr. Struthers, he also agreed that claimant's work injury did not cause or materially aggravate any neurological or neuropsychological issues causing permanent impairment or restrictions or the need for treatment.

On March 21, 2019, Dr. Risk responded to a questionnaire drafted by claimant. In question 20, claimant asked, "If this work injury hit to the head caused several *new* symptoms which the worker did not have previously, *and* affected her abilities to function as an adult and in making sound decisions, how is this considered a *mere aggravation* of the previous, non-work injury?" Dr. Risk responded, "Because the previous injuries may have predisposed the person to worsen symptoms that they may not have experienced with a single blow." In question 22, claimant asked "[D]o you still feel that the effects post work injury are merely *temporary* aggravations or do you feel that it

is at least possible that the effects and symptoms I still currently have are due to the work injury...?" Dr. Risk responded, "Yes possible."

Dr. Risk also added an additional comment to his response to defendants' counsel. He provide:

Upon further reflection, it is not an unreasonable argument that one seemingly minor bump to the head on top of prior head injuries is enough to result in effects beyond what one would expect from an otherwise benign bump. This is speculation on my part. Head injuries are complicated and a field of active research.

Importantly, however, when asked by claimant if he had changed his opinions from his January 29, 2019 response to defendants, Dr. Risk did not respond. Thus, I find that while Dr. Risk acknowledged the possibility of the scenarios set forth by claimant, he also indicated that changing his opinions to reflect claimant's theory of causation would be based on speculation.

Ultimately, no physician opined with any certainty that claimant's ongoing symptoms were due to her alleged work injury. Relying on the opinions of Dr. Risk and Dr. Struthers, which were buttressed by the report of Dr. Adams Rieck, I find insufficient evidence that claimant's December 28, 2016 work injury was the cause of claimant's ongoing complaints, alleged disability, or need for medical treatment.

See Arbitration Decision, pp. 2-6.

After citing the applicable law, Deputy Copley went on to conclude:

In this case, I found claimant was not a credible witness. Because her account of her alleged work injury is not supported by evidence other than her own testimony, I found there was insufficient evidence that claimant sustained an injury during her shift at work on December 28, 2016. I therefore conclude claimant did not satisfy her burden to prove she sustained an injury that arose out of and in the course of her employment with defendant-employer. This renders the remaining claims moot.

However, even if claimant had satisfied her burden to prove she sustained an injury that arose out of and in the course of her employment on December 28, 2016, I conclude claimant failed to satisfy her burden that any of her alleged disability, ongoing complaints, or need for medical treatment are causally related to that injury.

...

In this case, no expert opined with any certainty that claimant's ongoing symptoms were related to her alleged work injury. In fact, several physicians opined otherwise. I therefore found insufficient evidence to support claimant's claim that her alleged December 28, 2016 work injury was the cause of any of her ongoing complaints, alleged disability, or need for medical treatment. Thus, even if claimant proved she sustained a

work-related injury, I conclude she failed to satisfy her burden to prove a causal connection between that injury and any of her symptoms, conditions, disability, or medical treatment.

In either scenario, claimant failed to establish her entitlement to disability benefits, payment for past medical treatment, or ongoing medical care, and her claim for penalty benefits is moot.

See Arbitration Decision, pp. 7-8.

Petitioner appealed to the Iowa Workers' Compensation Commissioner, Joseph S. Cortese II. Commissioner Cortese issued an Appeal Decision on March 26, 2020, finding as follows:

The deputy commissioner found claimant was not credible and, as such, the deputy commissioner found claimant failed to carry her burden of proof to establish she sustained an injury as alleged on December 28, 2016, which arose out of and in the course of claimant's employment with defendant-employer. The deputy commissioner found that because claimant failed to carry her burden of proof to establish causation and compensability, all other issues raised in this matter are moot, including claimant's alleged entitlement to disability benefits, alleged entitlement to payment for past medical treatment, alleged entitlement to ongoing medical treatment, and alleged entitlement to penalty benefits. The deputy commissioner found claimant is entitled to receive nothing in this matter.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant was not credible and in finding claimant failed to carry her burden of proof to establish she sustained a work-related injury on December 28, 2016, as alleged. Claimant asserts the deputy commissioner erred in finding all other issues raised in this matter are moot. Claimant asserts the deputy commissioner erred in finding claimant is entitled to receive nothing in this matter.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on May 14, 2019, which related to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

I affirm the deputy commissioner's finding that claimant failed to carry her burden of proof to establish she sustained a work-related injury as alleged on December 28, 2016. I affirm the deputy commissioner's finding that because claimant failed to carry her burden of proof to establish causation and compensability, all other issues raised in this matter are moot, including claimant's alleged entitlement to disability benefits, alleged entitlement to payment for past medical treatment, alleged entitlement to ongoing medical treatment and alleged entitlement to penalty benefits. I affirm the deputy commissioner's finding that claimant is entitled to receive nothing in this matter.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant was not credible. Claimant asserts the deputy commissioner erred in finding claimant was not credible. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed claimant's credibility in this matter. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's finding that claimant was not credible.

I affirm the deputy commissioner's findings, conclusions and analysis regarding the above issues.

See Appeal Decision, pp. 1-2.

Petitioner now seeks judicial review by this Court. Petitioner filed her Petition for Judicial Review documents on April 9 and 21, 2020. Respondents have denied Petitioner's request for relief.

For her legal argument in support of her Petition, Petitioner argues that her injury took place due to pepper that became airborne when a sandwich was being prepared, which caused her to sneeze. Petitioner asserts the sneezing is a natural hazard of pepper exposure, and her injury, which is work-related, should be compensable. Petitioner further asserts Respondents have waived all affirmative defenses by virtue of her supervisor telling her she could not immediately leave work to seek treatment; of Respondents' denial of her claim and refusal to pay her medical bills; and Respondents' failure to preserve video evidence. Petitioner claims the treatment she ultimately received was compromised due to its delay. Petitioner also claims that she offered credible testimony in comparison to that offered by Respondents. Petitioner notes that while she fired one of her attorneys, another was granted leave to withdraw just prior to the workers' compensation hearing, which Petitioner claims prejudiced her. Petitioner outlines her attempt to seek treatment for her claimed injury, and appears to assert that she could have provided additional medical evidence if she had more time to seek treatment.

Respondents argue that the agency correctly determined that Petitioner was not a credible witness, and correctly determined that Petitioner failed to meet her burden to prove a workplace injury occurred on December 28, 2016. Respondents further argue that the agency correctly determined that even if a work incident did occur on December 28, 2016, as alleged, Petitioner failed to meet her burden to prove entitlement to any workers' compensation benefits.

### CONCLUSIONS OF LAW

Petitioner is entitled to judicial review of this action pursuant to Iowa Code § 17A.19 (2019). "A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter." Iowa Code § 17A.19(1) (2019). "Iowa Code section 17A.19(8)(g) authorizes relief from agency action that is 'unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.'" Dico, Inc. v. Emp. Appeal Bd., 576 N.W.2d 352, 355 (Iowa 1998). "These terms have established meanings: 'An agency's action is "arbitrary" or "capricious" when it is taken without regard to the law or facts of the case...Agency action is "unreasonable" when it is "clearly against reason and evidence."'" Id. (citing Soo Line R.R. v. Iowa Dep't of Transp., 521 N.W.2d 685, 688-89 (Iowa 1994)). "An abuse of discretion occurs when the agency action 'rests on grounds or reasons clearly untenable or unreasonable.'" Id. (citing Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997)). The Iowa Supreme Court has stated that an "abuse of discretion is synonymous with unreasonableness, and involves a lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence." Id. (citing Schoenfeld, 560 N.W.2d at 598).

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

"Substantial evidence is 'the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.'" University of Iowa Hospitals and Clinics v. Waters, 674 N.W.2d 92, 95 (Iowa 2004). "While "courts must not simply rubber stamp the agency fact finding without engaging in a fairly intensive review of the record to ensure that the fact finding is itself reasonable ... evidence is not insubstantial merely because it would have supported contrary inferences.'" Id. "The substantial evidence rule requires to review the record *as a whole* to determine whether there is sufficient evidence to support the decision the commission made."

Stark Const. v. Lauterwasser, No. 13-0609, 2014 WL 1495479, \*8 (Iowa Ct. App. 2014) (citing Woodbury Cnty. v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 164 (Iowa 1983)).

“[T]he agency is not required to mention each item of evidence in its decision and explain why it found the evidence persuasive or not persuasive.” Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299, 305 (Iowa 2005). “While it is true that the commissioner’s decision must be ‘sufficiently detailed to show the path he has taken through conflicting evidence,’ ...the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it.” Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 274 (Iowa 1995). “Such a requirement would be unnecessary and burdensome.” Id.

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

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

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

Petitioner generally has argued that the agency erred in concluding that her injury was not compensable as a workplace injury. Even if the evidentiary issues raised by Petitioner regarding the presentation of Respondents’ evidence (such as the alleged deleting of the video of the incident) are deemed valid, the Court finds there is substantial evidence in the record to support the agency’s finding that Petitioner is not entitled to benefits for the injury she claims took place on December 28, 2016, and the decision of the agency is not affected by error of law. Deputy Copley was in the best position to assess the credibility of Petitioner, and she clearly found Petitioner was not a credible witness. While Petitioner objects to this finding, the Court finds there is substantial evidence to support the agency’s credibility determination, including that Petitioner had inconsistencies in her testimony; her claimed symptoms were found by health care providers to not match her presentation; and her history of drug usage. Further, there is substantial evidence in the record to support the agency’s finding that Petitioner did not meet her burden of proving a workplace injury, including that Petitioner’s testimony was not credible; her text messages presented questions regarding her motivation for reporting a work injury; she did not have medical evidence to support her claim of a workplace injury; and the medical evidence that was presented did not support a finding that the December 28, 2016 incident was an injury to Petitioner that arose out of and in the course of her employment. Additionally, there is substantial evidence in the record to support the agency’s finding that even if there was a

workplace injury, Petitioner failed to meet her burden of proving she is entitled to workers' compensation benefits. Petitioner simply failed to offer any medical evidence of her need for medical or disability benefits.

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

#### **RULING**

**IT IS THEREFORE ORDERED** that Petitioner's request for relief on judicial review is **DENIED**. The agency's decision is affirmed. This matter is deemed closed and finalized. If there are costs to be assessed, they are assessed to Petitioner.

Clerk to notify.



State of Iowa Courts

**Type:** OTHER ORDER

<b>Case Number</b>	<b>Case Title</b>
CVCV095331	BEHNKE VS SP CANTERBURY INC AND SEC NAT INS

So Ordered

A handwritten signature in cursive script, reading "Fae Hoover Grinde".

Fae Hoover Grinde, District Court Judge,  
Sixth Judicial District of Iowa

CASE NO: 06571 CVCV095331

TITLE: BEHNKE VS SP CANTERBURY INC AND SECURITY NATIONAL INSURANCE

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DIVISION OF WORKERS COMPENSATION  
1000 E GRAND AVE  
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