IN THE IOWA DISTRICT COURT FOR POLK COUNTY

VARIED INDUSTRIES AND GREAT WEST CASUALTY, Petitioners, v. DYLAN DUNLAP, Respondent.	)))))))))	Case No. CVCV060172 **ORDER ON JUDICIAL REVIEW**

On May 8, 2020, Petitioners Varied Industries and Great West Casualty (together, Petitioner) filed a Petition for Judicial Review (the Petition) of the Iowa workers' compensation commissioner's (the Commissioner) final decision in a review-reopening contested case proceeding. Telephonic oral argument was held on August 14, 2020. Oral argument was not reported.

Petitioner was represented by attorney Tyler S. Smith for attorney Marshall Tuttle. Respondent Dylan Dunlap (Respondent) was represented by attorney James M. Ballard. Oral argument was not reported.

After careful consideration of the respective arguments of counsel, and upon review of the certified agency record and the parties' other filings and in light of the relevant law, the court finds and concludes that the final agency decision should be affirmed in all respects and the Petition should be dismissed for the following reasons.

BACKGROUND FACTS AND PROCEEDINGS

A. <u>Work-Related Injury and Arbitration Decision</u>. On July 23, 2014, Respondent sustained a work-related injury to his right shoulder. Respondent filed his Original Notice and Petition for Arbitration and Medical Benefits on January 26, 2015.

The arbitration hearing was held on April 26, 2016. On August 30, 2016, a deputy workers' compensation commissioner (Deputy I) filed an Arbitration Decision finding Respondent's right shoulder injury sustained on July 23, 2014, arose out of and in the course of his employment by Petitioner. Deputy I ordered Petitioner to pay Respondent's medical costs and authorized further treatment of Respondent's right shoulder. Finally, the Deputy found Respondent was not entitled to temporary benefits after December 16, 2014, because he had been offered suitable light duty work by Petitioner within his restrictions, which he had refused. This decision was not appealed.

B. **Post-Arbitration Hearing Changes in Condition**. Several months after the arbitration hearing, Respondent started a sequence of therapies designed to improve his right shoulder. He underwent two additional surgeries on his right shoulder, received multiple injections, and received physical therapy. The second shoulder surgery was performed on August 31, 2016, by Dr. Nepola. (J. Ex. 2, at p. 24). Respondent reported the second surgery only made his symptoms worse. (Review-Reopen. Tr. at pp. 12-13). Dr. Nepola thought the pain Respondent was experiencing was likely some form of complex regional pain syndrome (CRPS). (J. Ex. 2, at p. 42).

Petitioner referred Respondent to Dr. Simon for further treatment. (Review-Reopen. Tr. at p. 14). Dr. Simon assessed Respondent with complex regional pain syndrome type I of the right upper extremity. (J. Ex. 4, at p. 64). Dr. Simon tried a right stellate ganglion block and trigger point injections, but neither relieved Respondent's pain. (Review-Reopen. Tr. at p. 15). With Respondent's symptoms worsening, Dr. Simon referred Respondent to the Mayo Clinic. (Review-Reopen. Tr. at p. 16).

On October 4, 2017, Respondent was seen by Dr. Elhassan, who recommended performing a third surgery on Respondent's right shoulder. (J. Ex. 6, at p. 81). The surgery was performed on November 27, 2017. (*Id*. at p. 86). Like the second surgery, the third surgery only made Respondent's pain worse. (Review-Reopen. Tr. at p. 21). Dr. Elhassan referred Respondent to Dr. Bengtson for further treatment.

Dr. Bengtson assessed Respondent with CRPS. Dr. Bengtson performed two additional stellate ganglion blocks with no benefit. (J. Ex. 6, at pp. 123-33). Dr. Bengtson referred Respondent to Dr. Hunt to determine whether he was a candidate for a spinal cord stimulator. (J. Ex. 6, at p. 133). After reviewing Respondent's medical records and examining him, Dr. Hunt assessed Respondent with CRPS and determined he was not a candidate for a spinal cord stimulator. (J. Ex. 6, at p. 136). On January 7, 2019, Dr. Bengtson placed Respondent at maximum medical improvement (MMI). (*Id*. at p. 137).

At Petitioner's request, Dr. Mooney performed an independent medical evaluation (IME) on Respondent on February 22, 2019. Dr. Mooney agreed with the diagnosis of right shoulder injury resulting in labral tear and neuropathic pain most consistent with CRPS. He assigned a 20% whole person impairment rating as a result of the diagnosis of CRPS and a 13% whole person impairment rating to Respondent's right upper extremity. (J. Ex. 7, at p. 146). Dr. Mooney assigned permanent restrictions of no lifting over two pounds. Respondent could perform light activity assist with the right hand while using a sling. (*Id*.)

On March 5, 2019, Dr. Bengtson addressed Respondent's permanent impairment and restrictions. He assigned a 32% impairment rating as a result of Respondent's CRPS. (J. Ex. 8). He also assigned permanent work restrictions of no use of right arm or hand

for work-related activity, in addition to the restrictions of no pushing, pulling, or lifting and rarely bending, stooping, squatting, twisting, or turning up to 5%. Dr. Bengtson further ordered Respondent not to operate power equipment. (J. Ex. 6, at p. 124).

C. Review-Reopening Petition. On October 21, 2016, Respondent filed a Petition for Review-Reopening. The Petition was later dismissed without prejudice. On March 7, 2018, Respondent refiled the Petition for Review-Reopening. This Petition proceeded to hearing before Deputy II on March 5, 2019. Five issues were presented at the hearing. First, whether Respondent had sustained a change in condition warranting an award of industrial benefits. Second, whether Respondent was entitled to intermittent healing period benefits from August 31, 2016, through September 12, 2016, and November 27, 2017, through January 6, 2019. Third, the extent of Respondent's permanent disability. Fourth, whether Respondent had proven he was permanently and totally disabled under the statute. Finally, Respondent's entitlement to recover medical expenses and costs. (Arb. Dec. at p. 3).

D. Review-Reopening Decision. On June 7, 2019, Deputy II issued her Review-Reopening Decision finding Respondent had met his burden of proof that he sustained a change of condition following the April 26, 2016, arbitration hearing. Deputy II also (1) found Respondent permanently and totally disabled under the statute, (2) awarded Respondent healing period benefits for the periods of August 31, 2016, through September 12, 2016, and November 27, 2017, through January 6, 2019, when Respondent was taken completely off work, and (3) found Petitioner responsible for Respondent's medical expenses set forth in Exhibit 3, all causally related medical care, and costs of the hearing. (06/07/19 Review-Reopen. Dec. at pp. 21 – 24).

E. Appeal Decision. Petitioner sought intra-agency appeal. The Commissioner issued his Appeal Decision on April 9, 2020, affirming the Review-Reopening Decision in its entirety.[1]

F. Judicial Review Petition. On May 8, 2020, Petitioner filed the instant Petition seeking reversal of the final agency decision in its entirety.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs appellate review of agency action. Iowa Code section 17A.19(10) provides that the court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other relief if it determines that a party's substantial rights have been prejudiced because of the agency action under enumerated circumstances. Iowa Code § 17A.19(10)(*a*)-(*n*); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218-219 (Iowa 2006); *Sherman v. Pella Corp.*, 576 N.W. 2d 312, 316 (Iowa 1998); *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 264 (Iowa 1995).

The standard of review the court applies varies depending on the type of error allegedly committed by the Commissioner. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). If the claim of error relates to the agency's findings of fact, the scope of review is whether substantial evidence supports the agency's findings. *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(*f*). Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (citing *Ehteshamfar v. UTA Engineered Sys. Div.*, 555 N.W.2d 450, 452 (Iowa 1996)).

[1] Petitioner did not seek judicial review of Deputy II's decision regarding medical expenses and costs.

If the claim of error relates to the agency's interpretation of law, the scope of review is whether the agency's interpretation was erroneous. *Meyer*, 710 N.W.2d at 219. The court will reverse the commissioner's application of the law to the facts only if the commissioner's application is irrational, illogical or wholly unjustifiable. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009); Iowa Code § 17A.19(10)(*m*).

In exercising its judicial review power, the district court acts in an appellate capacity. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). In that capacity, the court must give deference to the commissioner's appeal decision in accordance with the standards stated in Iowa Code section 17A.19(10)(*a*)-(*n*).

ANALYSIS

Petitioner asserts three issues on judicial review: First, whether the Commissioner's interpretation and application of Iowa Code section 85.33 was erroneous (i.e., unreasonable, irrational, or wholly unjustifiable) in finding Respondent was entitled to healing period benefits for the periods of August 31, 2016, through September 12, 2016, and November 27, 2017, through January 6, 2019. Second, whether the Commissioner's award of permanent and total disability benefits was based upon the odd-lot doctrine. Third, whether substantial evidence supports the Commissioner's award of permanent and total disability benefits.

A. <u>Interpretation and Application of Iowa Code Section 85.33</u>. Section 85.33 governs temporary disability benefits. It states in relevant part:

> 1. Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability, weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

. . . .

> 3. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code §§ 85.33(1), (3). When seeking to disqualify a recuperating employee from weekly benefits under section 85.33(3), the employer has the initial burden of proof to show the work was suitable, in other words, consistent with the disability. When that burden is met, the burden of proof then shifts to the employee to show that the work was actually unsuitable.

The Iowa Supreme Court (the Court) has held there is a two-part test to determine eligibility for temporary partial, temporary total, and healing period benefits under section 85.33(3): (1) whether the employee was offered suitable work, (2) which the employee refused. If both elements are met, benefits cannot be awarded under section 85.33(3). *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 559 (Iowa 2010). If the employer fails to offer the employee suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 519 (Iowa 2012).

In the instant matter, the Commissioner found Respondent was entitled to healing period benefits for the periods of August 31, 2016, through September 12, 2016, and November 27, 2017, through January 6, 2019, when Respondent was taken completely off work. Petitioner contends the Commissioner's interpretation and application of section 85.33(3) and the controlling case law is erroneous.

In *Schutjer* the Court stated:

> [t]he issue was not whether Schutjer voluntarily quit, but whether Schutjer was offered suitable work within her restrictions and whether she refused it. Only if she was offered such work and refused it would she be precluded from receiving temporary partial, temporary total, or healing period benefits.

Schutjer, 780 N.W.2d at 558.

Petitioner relies on *Schutjer* to support its argument. Under Petitioner's interpretation of *Schutjer*, an employee would never be entitled to future healing period benefits, even when the employee continues to receive treatment for his or her work-related injury and the employee's temporary restrictions have changed.

Respondent argues *Schutjer* does not permanently bar a claimant from ever receiving temporary disability benefits, but instead bars the claimant from receiving temporary disability benefits during the period of refusal. In support of his interpretation of *Schutjer*, Respondent relies on *Polaris Industries, Inc. v. Doty*, Case No. 16-0961, 2017 WL 362005 (Iowa Ct. App. Jan. 25, 2017). In *Doty* the Iowa court of appeals affirmed the district court's decision affirming the commissioner's appeal decision awarding temporary total disability benefits to the claimant for the period of time she was unable to work during a period of recuperation following injury. (*Id*. at *3).

In the August 30, 2016, original Arbitration Decision, Deputy I found two things: First, Respondent did return to work on light duty from approximately November 12, 2014. The record suggests claimant worked until sometime before December 16, 2014. (08/30/16 Arb. Dec. at p. 9, ¶ 6). Second, Petitioner had offered Respondent suitable light duty work within his restrictions after December 16, 2014, which he refused to perform. (08/30/16 Arb. Dec. at p. 10, ¶¶ 4 – 6). Deputy I specifically found:

> There are two periods of time at issue in this case, involving light duty. They are the periods between November 12, 3014, to December 16, 2014; and the period of time following December 16, 2014. The record indicates [Respondent] did work light duty at [Petitioner] between November 12, 2014, to on or about December 16, 2014. The majority of [Respondent's] job duties with [Petitioner], during this period of time, involved pushing buttons and monitoring gauges. A small amount of [Respondent's] duties, during this period, could require minimal use of the right hand. Given this record, it is found the light duty given [Respondent] during the period of November 12, 2014, to on or about December 16, 2014, was suitable.
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> [Respondent] was given work restrictions by Dr. Potthoff on December 16, 2014, of no pulling, pushing, or lifting with the right arm. [Respondent] did not return to work after he was given these instructions by Dr. Potthoff. In short, [Respondent] failed to give his employer the opportunity to accommodate the December 16, 2014, work restrictions. As
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> The work restrictions between November 12, 2014, to on or about December 16, 2014, are found suitable, and [Respondent] failed to return to work after given the December 16, 2014, work restrictions, it is found that [Respondent] has failed to carry his burden of proof [that] light duty work given after December 16, 2014, was not suitable.
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> Given this record, [Respondent] is not entitled to temporary benefits by application of Iowa Code section 85.33(3).

(08/30/16 App. Dec. at p. 10, ¶¶ 4 – 6). Respondent did not appeal or otherwise contest these findings. So it is the law of the case that Respondent worked in a light duty position for Petitioner from November 12, 2014, through December 16, 2014, and did not return to work after that, up to and including the April 26, 2016, arbitration hearing date. But the law of the case as to these facts does not answer the question of whether Respondent experienced a change of condition after the original Arbitration Decision was entered on August 30, 2016, which required more medical interventions aimed at resolving or lessening the effects of the work injury he sustained while employed by Petitioner.

The certified agency record reveals the following relevant facts: Petitioner was ultimately purchased by Church & Dwight Co., Inc. (C & D) sometime in 2014. (04/26/16 Def. Hrg. Ex. O, at p. 1). On December 8, 2014, C & D offered Petitioner employment with that company. (*Id.* at ¶ 1). Petitioner had until December 12, 2014, within which to sign a copy of the letter and return it to C & D's human resources department. (*Id.* at ¶ 5). He admitted at the March 5, 2019, hearing that he did not respond to C & D and that he has not looked for other work since 2014:

Q. Now, my understanding is that you have not worked anywhere since 2014; right?
A. Correct.
. . . .
Q. Well, . . .
. . . the point is that a new employer came in, and you were to fill out an application to go to the new employer, and you did not do that; right?
A. Yes. . . .
. . . .
Q. And since that time you have not even applied for work anywhere else; right?
A. Correct.
. . . .
Q. Would it also be fair to say, you know, you were asked about releasing, not looking for work, but the point is, would it be fair to say that for the last four years that you underwent three shoulder surgeries and multiple injections and
blocks, always with the hope that you would get better, and more functional?
A. Yes. And that's why my depression has gotten worse.
Q. And you simply haven't gotten more functional, have you?
A. No.

(03/05/19 Review-Reopen. Trans. at pp. 63 – 64, 67 – 68).

On August 31, 2016—one day after Deputy I issued his Arbitration Decision—Respondent underwent a second surgery on his right shoulder and was taken off work by the authorizing treating physician from August 31, 2016, through September 12, 2016. (J. Ex. 2 at p. 28). The treating physician took Respondent off work following a third surgery from November 27, 2017, through January 6, 2019. (J. Ex. 6, at p. 92; J. Ex. 6 at p. 125).

The question for the court seems to be this: Did Respondent's condition change after the arbitration hearing such that Petitioner was required to offer him new work that accommodated his new restrictions, or did Respondent voluntarily quit by rejecting suitable work offered by Petitioner, thereby relieving Petitioner from any further responsibility?

Deputy II answered these questions this way:

> [Section 85.33(3)] precludes an employee who refuses suitable work offered by the employer, consistent with the employee's disability, from receiving temporary or healing period benefits during the period of refusal. *Id.*; *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012). The employer bears the burden of providing the affirmative defense. *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 559 (Iowa 2010).
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> The issue of whether an employer has offered suitable work is ordinarily an issue for the trier of fact. *Neal*, 814 N.W.2d at 518. The Iowa Supreme Court has held under the express wording of the statute, the offered work must be suitable and consistent with the employee's disability before the employee's refusal to accept such work will disqualify [the employee] from receiving temporary partial, temporary total, and healing period benefits. *Id.* at 519.
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> In the August 2016 arbitration decision, the deputy workers' compensation commissioner found [Respondent] refused suitable work and denied [Respondent's] request for temporary benefits. *After the original arbitration hearing, [Respondent's] situation changed.* Dr. Nepola found [Respondent] needed additional surgery, he performed surgery on [Respondent] on August 31, 2016, and he restricted [Respondent] from working through September 12, 2016. There is no

> evidence the [Petitioner] offered [Respondent] suitable work that he refused after August 31, 2016. [Respondent] is entitled to healing period benefits from August 31, 2016, through September 12, 2016.
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> [Respondent] was also restricted from working by Dr. Elhassan at the time of his surgery on November 27, 2017. No evidence was presented at hearing [that] [Petitioner] offered [Respondent] suitable work that he refused from November 27, 2017, through January 6, 2019, or that he was capable of returning to employment substantially similar to employment in which he was engaged at the time of the injury. [Respondent] is entitled to healing period benefits from August 31, 2016, though September 12, 2016, and November 27, 2017, through January 6, 2019. At the stipulated rate of $311.92 per week.

(06/07/19 Review-Reopen. Dec. at p. 21, ¶¶ 1 – 4) (emphasis added). Deputy II also found Respondent was not motivated to work. (*Id*. at p. 23, ¶ 6).[2]

The Commissioner adopted Deputy's findings, noting that Deputy II provided a well-reasoned analysis of all of the issued raised.[3] The court agrees.

Treating physicians repeatedly took Respondent off work after the arbitration hearing because he underwent surgeries intended to improve his work injury. Like the employee in *Doty*, Respondent could not work after his post-arbitration hearing change in condition because he was medically restricted from doing so.

Unlike the employee in *Schutjer*, there was no finding in the instant matter by the agency either in the arbitration proceeding or the review-reopening proceeding that Respondent was not credible. The *Schutjer* decision suggests it is only possible for an employee to receive temporary benefits if the employee undergoes further treatment and is removed from all employment for the period of healing. Once restricted work is permitted for the employee, the healing period ends. That appears to be exactly what

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[2] Respondent did apply for social security disability benefits, but his Application was denied. (Ex. A, p. 2).

[3] The Commissioner adopted and affirmed Deputy II's June 7, 2019, Review-Reopening Decision as the final agency decision on April 9, 2020.

happened under this record.

When the court considers the agency record as a whole and construes the relevant law for the benefit of Respondent—as the court must—the court finds the Commissioner did not misinterpret or misapply section 85.33, or ignore the *Schutjer* decision and the *Doty* decision.

The Commissioner's interpretation of section 85.33 in determining that Respondent is entitled to healing benefits from August 31, 2016, through September 12, 2016, and November 27, 2017, through January 6, 2019, at the stipulated rate of $311.92 per week is not erroneous (i.e., irrational, illogical, or wholly unjustifiable) and should be affirmed.

B. <u>Permanent and Total Disability – Odd-Lot Doctrine</u>. Petitioner argues the Commissioner based his finding that Respondent was permanently and totally disabled on the application of the odd-lot doctrine, which Respondent did not assert in the Review-Reopening Petition. However, Deputy II clearly states in her Review-Reopening Decision (adopted by the Commissioner) that she found Respondent to be permanently and totally disabled under the statute. (06/07/19 Review Reopening Dec. at p. 23, ¶ 6) ("Considering all of the factors of industrial disability, I find [Respondent] is permanently and totally disabled under the statute, on the stipulated commencement date of January 7, 2019, at the stipulated rate of $311.92 per week."). Deputy II's decision clearly outlines her analysis of the industrial disability factors relevant to Respondent's condition. Based upon those factors, Deputy II reasonably found Respondent permanently and totally disabled under the statute.

As noted above, the Commissioner in his de novo review stated that Deputy II had provided a "well-reasoned analysis" of all issues raised in the review reopening proceeding and reaffirmed that Deputy II had based her finding of permanent and total disability on the industrial disability analysis. (04/09/20 App. Dec. at p. 1, ¶ 4; p. 2, ¶¶ 7 – 8). When this record is considered as a whole, Petitioner has failed to establish the Commissioner based his ultimate finding of permanent and total disability on the application of the odd-lot doctrine.

For the reasons that follow, the Commissioner's findings on this issue should be affirmed.

C. <u>Permanent and Total Disability – Substantial Evidence</u>. Petitioner alternatively argues substantial evidence does not support the Commissioner's finding of permanent and total disability. Petitioner argues the Commissioner failed to consider medical evidence which showed Respondent could use his right arm more than he testified to. Petitioner further argues that Respondent's age, educational history, employment opportunities and testimony do not support a finding of permanent and total disability.

In deciding whether substantial evidence supports the Commissioner's findings, the court can only grant relief from the Commissioner's decision if a determination of fact by the Commissioner is not supported by substantial evidence in the record before the court when that record is viewed as a whole. *Gits Mfg. Co. v. Frank*, 855 N.W.2d 195, 197 (Iowa 2014); Iowa Code § 17A.19(10)(*f*). Petitioner at length highlights evidence in the record the Commissioner did not rely upon in reaching his ultimate conclusion regarding the extent of Respondent's disability.

A fair difference of opinion about interpretation of the evidence does not mean the Commissioner's decision is not supported substantial evidence. It is well-settled that a reviewing court should not consider evidence insubstantial merely because the court may draw different conclusions. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007). A claim of insubstantial evidence is not a question about what the Commissioner could have found. It is a question about what the Commissioner did find.

Here, the Commissioner reasonably adopted Deputy II's decision. Deputy II's decision provides a detailed review and analysis of Respondent's medical history, employment history, educational background, and physical limitations. At the time of the review-reopening hearing Respondent was twenty-eight years old. (Review-Reopen. Tr. at p. 8; 06/07/19 Review-Reopen. Dec. at p. 23, ¶ 3). He graduated from high school with a C average. (Review-Reopen. Tr. at pp. 38-39; 06/07/19 Review-Reopen. Dec. at p. 23, ¶ 4). He attended community college for six months, earning C and D grades. (Review-Reopen. Tr. at pp. 38-39; 06/07/19 Review-Reopen. Dec. at p. 23, ¶ 4). Respondent testified he has not received any specialized training. (Review-Reopen Tr. at p. 8; 06/07/19 Review-Reopen. Dec. at p. 23, ¶ 4). His computer skills are limited to playing videos on YouTube and checking his email. (Review-Reopen. Tr. at pp. 38-39; 06/07/19 Review-Reopen. Dec. at p. 23, ¶ 4). He has no formal experience using computer software such as Microsoft or PowerPoint. (Review-Reopen. Tr. at p. 38; 06/07/19 Review-Reopen. Dec. at p. 23, ¶ 4).

Respondent's past employment history consists of working as a road construction flagger and heavy equipment operator, a general laborer on a farm, and as a laborer/supervisor for Petitioner. (Review-Reopen. Tr. at pp. 39-47; 06/07/19 Review-

Reopen. Dec. at p. 23, ¶ 5). He has never worked in an office setting or performed sedentary work. (06/07/19 Review-Reopen. Dec. at p. 23, ¶ 5).

Deputy II also outlined in her opinion the years of medical treatment Respondent has undergone, as well as the functional impairment and permanent restrictions assigned to him by Dr. Bengtson and Dr. Mooney. Respondent's inability to use his right arm is well-documented in the medical records and hearing transcript. As ultimately found by the Commissioner, under the industrial disability analysis, Respondent is not capable of returning to similar employment he previously performed. (06/07/19 Review-Reopen. Dec. at p. 23, ¶ 5; 04/09/20 Appeal Dec. at p. 2, ¶ 8).

When this record is considered as a whole, the court finds substantial evidence supports the Commissioner's ultimate finding that Respondent is permanently and totally disabled. In making this finding the Commissioner adopted Deputy II's well-reasoned and detailed opinion reflecting Deputy II's consideration of Respondent's extensive medical treatment, his physical inability to use his dominant right arm, and his employment and educational background. The Commissioner's decision finding Respondent permanently and totally disabled should be affirmed.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Commissioner's award to Respondent of additional intermittent healing period benefits from August 31, 2016, through September 12, 2016, and from November 27, 2017, through January 6, 2019, at the stipulated rate of $311.92 per week is the result of a correct interpretation and application of section 85.33 by the Commissioner and is affirmed in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commissioner's final decision finding Respondent permanently and totally disabled resulted from the application of the industrial disability analysis under section 85.34 and not the application of the odd-lot doctrine.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that that the Commissioner's final decision finding Respondent permanently and totally disabled is supported by substantial evidence and is affirmed in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petition is dismissed and costs are assessed to Petitioner.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV060172	VARIED INDUSTRIES ET AL VS DYLAN DUNLAP

So Ordered

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