IN THE IOWA DISTRICT COURT FOR POLK COUNTY

WALMART, INC. AND ILLINOIS NATIONAL INSURANCE COMPANY, Petitioners, v. MARY COLEMAN DUCHESNEAU, Respondent.	Case No: CVCV061035 **ORDER ON JUDICIAL REVIEW**

Petitioners Walmart, Inc. and Illinois National Insurance Company (together, Walmart) filed the instant Petition for Judicial Review (the Petition) on December 1, 2020, asserting violations of Iowa Code section 17A.19(10)(*a*) – (*h*) by the Iowa workers' compensation commissioner (the Commissioner) in awarding Respondent Mary Coleman Duchesneau (Mary) industrial disability benefits and future medical care for her neck. Mary did not cross appeal.

Telephonic oral argument on the Petition was held on February 26, 2021. Attorney Lindsey Mills appeared for Walmart. Attorney Jenna Green appeared for Mary. Oral argument was not reported.

Upon reviewing the Petition, the certified agency record and the court file in light of the relevant law, and after considering the respective statements of counsel, the court enters the following Order affirming the final agency decision and dismissing the Petition for the reasons stated below.

BACKGROUND FACTS AND PROCEEDINGS

Mary is a 60-year-old woman (51 years-old on the April 2, 2012, date of injury) who works for Walmart. She started working for Walmart in 2003 in various positions until she was promoted to deli manager. Her job duties as deli manager included but were not limited to (1) lifting, carrying, and placing merchandise and/or supplies weighing up to 25 pounds, (2) working freight,

requiring lifting of up to 50 pounds, and (3) using a Gemini machine up to three to four hours per day to price and reprice deli items. (Arb. Dec. 3).

On April 2, 2012, Mary was using the Gemini machine when her fingers locked around the machine and she could not release her grip. (Arb. Dec. 3). She experienced symptoms in her left arm from her hands to her shoulders, and into her neck. (*Id.*) She reported her condition to Walmart, who sent her for medical care. (*Id.*) Mary was treated for injuries to her neck, shoulder, and hands. She ultimately underwent eleven surgeries. (Arb. Dec. 4-5; Joint Ex. 8).

STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A (IAPA) governs the standard of review. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012). The standard of review depends upon the aspect of the agency decision forming the basis for the petition for judicial review. *Id.*; Iowa Code § 17A.19(10). If a determination of fact was clearly vested by law in the discretion of the agency, the court cannot disturb that determination unless it was not based upon "substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(*f*). "Evidence is substantial if a reasonable mind would accept it as adequate to reach a conclusion." *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 849 (Iowa 1995) (citing *John Deer Dubuque Works of Deere & Co. v. Weyant*, 442 N.W.2d 101, 105 (Iowa 1989)). If the agency is applying law to the facts, the court cannot disturb that determination unless it was "an irrational, illogical, or wholly unjustifiable application of law to fact." Iowa Code § 17A.19(10)(*m*). This standard allows some deference to the agency, but less deference than is given to the agency's findings of fact. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

ANALYSIS

Walmart posits two issues. First, whether the Commissioner erred in finding Mary sustained a 55% industrial disability. Second, whether the Commissioner erred in ordering future medical treatment with Dr. Steven R. Quam for Mary's work-related neck condition.

A. Substantial evidence supports the Commissioner's finding of 55% industrial disability for Mary when the record is viewed as a whole, and the agency's *Grugan* decision is materially factually distinguishable. The nature and extent of industrial disability is a question of fact for the industrial commissioner. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 537 (Iowa 1991). "This issue is a mixed question of law and fact, as the determination of industrial disability required the commissioner to apply established law (the factors considered in determining whether an industrial disability occurred) to the facts. *Thorson*, 763 N.W.2d at 856.

Walmart's argument on this issue is twofold: (1) a finding of 55% industrial disability was unsupported by substantial evidence, and (2) the agency's application of the established law to the facts was irrational, illogical and wholly unjustifiable. The court respectfully disagrees with both assertions for the following reasons.

The twelve-page arbitration decision, affirmed by the Commissioner in its entirety, contains a thorough and well-reasoned industrial disability analysis. (03/02/20 Arb. Dec. at 7). The agency considered all of the following factors in making its industrial disability determination:

> 1. Mary's inability to return to positions she held prior to Walmart, including but not limited to carpentry, cashier, fire clean up or janitorial work.
> 2. Mary's inability to return to work at Walmart as a deli manager or in a photo lab due to her restrictions (none of which relate to the neck).
> 3. Mary's increase in actual earnings at Walmart, her limited educational training, and her age.
> 4. Permanent restrictions assigned by Dr. Lawler for Mary's right hand and Dr. Nepola for Mary's left arm. The Deputy did not rely upon the revised restriction of 10 pounds per hand, but instead relied on the 15-pound lifting restriction with the right hand, which is even more limiting.

5. Significant limitations in her employment options if Mary is terminated by Walmart or elects to pursue alternate employment options (as a result of her permanent restrictions).
6. The situs and severity of Mary's injuries, including the numerous surgeries (none of which were to her neck).
7. Mary's motivation to continue working.

(03/02/20 Arb. Dec. at 7-8). Nowhere in its analysis does the agency mention Mary's neck injury as a basis for the award of 55 percent loss of future earning capacity as a result of her April 2, 2012, work injury at Walmart. The arbitration decision conclusions of law acknowledge Mary met her burden to prove her neck injury was work-related, but it also recognizes no physician imposed permanent restrictions as a result of her neck injury:

> In this case, I found that the only physician offering a causation opinion pertaining to [Mary's] neck condition was Dr. Quam. Given that Dr. Quam was a long-time treating pain specialist for [Mary's] neck, I found his unrebutted causation opinion credible and convincing. Having found that [Mary] proved she sustained a neck injury as a result of her work duties at Wal-Mart, I conclude [Mary] proved she sustained a neck injury arising out of and in the court of her employment with Wal-Mart on April 2, 2012. The neck injury and resulting condition was considered as part of my analysis of permanent disability, although it was found that no physician imposed permanent restrictions or permanent impairment as a result of the neck condition.

(03/02/20 Arb. Dec. at 9).

It is undisputed that an industrial disability analysis is only appropriate when there is a finding of permanent disability. Permanent disability does not require a finding of 100% disability. Walmart argues that because Mary's injury did not result in permanent injury to her neck, the agency unfairly inflated the percentage of permanent impairment in arriving at Mary's industrial disability rating. It is evident from the passage cited above that the agency considered Mary's neck injury work-related, considered the neck injury in its permanent disability analysis, but did not assign any percent of permanent impairment for this injury.[1]

[1] This is consistent with what the arbitration decision says about this issue in the findings of fact:

Although the agency did not assign any percent of permanent impairment for Mary's neck injury, the agency (1) found Mary sustained an eleven percent whole person functional impairment, and (2) adopted the restrictions assigned by Drs. Lawler and Nepola. These restrictions include (1) no reaching away from her body, (2) no reaching above shoulder height with her left arm, (3) no lifting more than ten (10) pounds with each hand, (4) no repetitive pinching or grasping, and (5) the ability to wear ring splints at all times.[2]

> With respect to [Mary's] alleged neck injury, the only physician that offers an opinion is Dr. Quam. In response to claimant attorney's letter, he includes the neck condition as causally related to work duties. (Claimant's Ex. 9, p. 2). Given the lengthy treatment provided by Dr. Quam for the neck condition, I find his causation opinion credible and convincing. Therefore, I find that [Mary] has proven she sustained a neck injury as a result of her work duties at Wal-Mart. However, no physician has opined that the neck injury resulted in permanent restrictions or permanent impairment.

(03/02/20 Arb. Dec. at 7).

[2] In his de novo review of the record, the Commissioner confirmed the scope of the arbitration decision related to permanent disability as not including Mary's work-related neck injury:

> In the arbitration decision, [the] Deputy . . . found [Mary's] trigger finger, carpal tunnel, and left shoulder conditions are causally related to the repetitive use of her hands at work. The deputy commissioner also found [Mary] sustained a work-related neck injury, though the deputy commissioner also indicated that no physician had assigned any permanent restrictions or permanent impairment for the neck condition. . . .
> . . . .
>
> I affirm the deputy commissioner's finding that [Mary's] trigger finger, carpal tunnel, and left shoulder conditions are causally related to her job with defendant-employer. I affirm the deputy commissioner's finding that those work-related conditions resulted in permanent disability. I affirm the deputy commissioner's finding that [Mary] sustained a work-related injury, though no physician assigned any permanent restrictions or impairment for this condition. I affirm the deputy commissioner's determination that [Mary] failed to prove she sustained a work-related right shoulder injury. I affirm the deputy commissioner's finding that [Mary] sustained a 55 percent industrial disability as a result of her permanent work-related injuries. I affirm the deputy commissioner's award of alternate medical care with Dr. Quam.

Functional impairment is but one factor to be considered in determining a reduction in earning capacity. Additional factors include

> the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; . . . inability, because of the injury, to engage in employment for which the employee is fitted; loss of earnings caused by a job transfer for reasons related to the injury; and the employer's refusal to give any sort of work to an impaired employee.

IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633–34 (Iowa 2000) (citing *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980)).

Substantial evidence in the record as a whole, when considered under the established law set forth above, reasonably supports a finding of 55% industrial disability for Mary. The agency properly considered Mary's inability to return to work for which she is fit (including both her work prior to Walmart and positions within Walmart), her age, her limited training, her education, her motivation to work, her permanent restrictions, and the situs and severity of her injuries, while balancing these factors against her ongoing employment at Walmart and increased earnings.

Walmart argues Mary's industrial disability award should be reduced because of the Commissioner's decision in *Grugan v. Walmart Stores*, File No. 5063207, 2020 WL 1659480 (WCC Appeal Dec. Mar. 2020), which Walmart argues is factually very similar to Mary's situation. A review of the *Grugan* ruling reveals some facts in *Grugan* are similar to the instant facts—including the employer and ongoing employment. However, the court finds more of the facts and circumstances presented in the instant case are materially different from those found in *Grugan*. This includes but is not limited to the facts that the *Grugan* employee worked largely in

(11/03/20 App. Dec. at 1, 2).

customer service positions prior to her work injury, while Mary worked in much more physically demanding positions requiring strength and repetitive heavy lifting. These material fact differences reasonably justify the Commissioner's ultimate decision to enter a higher industrial disability award for Mary in the instant case. The Commissioner is aware of his own precedent and could have followed *Grugan* had he determined it applied to this record. The agency's application of law to facts is not irrational, illogical or wholly unjustifiable.

B. **Mary is entitled to alternate medical care with Dr. Quam**. Walmart contends Mary's entitlement to alternate medical care with Dr. Quam is based upon fact findings unsupported by substantial evidence and the agency's application of the law to the facts is irrational, illogical and wholly unjustifiable. The court respectfully disagrees for the following reasons.

Mary first saw Dr. Quam at Metro Anesthesia & Pain Management on September 28, 2012, for a pain management evaluation. (JEx. 1). Walmart authorized and paid for Mary's cervical treatment with Dr. Quam until Walmart sought a defense medical examination by Dr. Charles Mooney on October 5, 2018. Walmart denied Mary additional treatment with Dr. Quam based upon Dr. Mooney's opinion that no additional treatment with Dr. Quam was necessary to treat Mary's work injury. (03/02/20 Arb. Dec. at 10).

Walmart alternatively argues Mary's cervical injury is degenerative in nature. As the agency points out, the only physician offering an opinion regarding Mary's neck injury is Dr. Quam. No doctor rendered an opinion that Mary's neck injury results from degenerative changes and is therefore unrelated to work activities. The court is limited to considering the evidence admitted at the arbitration hearing. Under this record, the agency reasonably found Dr. Quam's causation opinion credible and convincing.

Walmart also argues Mary failed to file a petition for alternate care. A petition for alternate care is inappropriate where an employer/insurer denies liability for a condition. *Trade Prof'ls, Inc. v. Shriver*, 661 N.W.2d 119, 124 (Iowa 1003) (citing Iowa Admin. Code r. 876-4.48(7) (2001)). When the employer denies a causal connection between an employee's injury and the disabling condition, the liability of the employer is at issue. *Id.* "[A]n employer and its insurer have the right to control the care claimant receives . . . [except] where the employer has denied liability for the injury." *Id.*

Walmart finally urges it continues to authorize reasonable and necessary medical care for Mary with Drs. Lawler and Nepola. However, Drs. Lawler and Nepola are not treating Mary for her neck injury. The only doctor treating Mary for her neck injury is Dr. Quam, who recommends ongoing pain management for her symptoms. Dr. Quam has treated Mary for her neck injury since she was first referred to him by Dr. Gaffey for evaluation of her neck in August 2012. (JEx. 5-1). As the agency concluded after citing the relevant law and the Commissioner affirmed in its entirety in his appeal decision,

> [h]aving found that [Mary] proved a causal connection between her work duties at Wal-Mart and her alleged neck injury, I conclude that [Mary] is entitled to ongoing and future medical care for the neck condition. Having found that Dr. Quam was a treating physician for the neck condition and that he causally connected it to [Mary's] work activities, I conclude that [Mary's] request for future medical care through Dr. Quam is reasonable.
>
> [Wal-Mart] denied liability and authorized any further treatment through Dr. Quam based upon the medical opinions of Dr. Mooney. I did not accept or find Dr. Mooney's medical opinions to be convincing in this case. Given that [Wal-Mart is] currently offering no additional treatment and that Dr. Quam recommends additional treatment for the neck, I conclude that [Mary] has established entitlement to an order for alternate medical care. Specifically, I conclude [Mary] is entitled to an order of alternate medical care for future treatment of her neck to be through and at the direction of Dr. Quam.

(03/02/20 Arb. Dec. at 10; *see also* 6).

Walmart lost the right to select the authorized treating physician for Mary's neck injury when it denied the causal relationship between Mary's neck injury and her work activities. Given that Walmart offers no treatment for Mary's causally related neck injury, alternate medical care with Dr. Quam is reasonable and is supported by substantial evidence in the record when the record is considered as a whole. The Commissioner's interpretation of Iowa Code section 85.27(4) regarding the agency's award of alternate medical care to Mary for her work-related neck injury was not irrational, illogical or wholly unjustifiable.

CONCLUSION

Substantial evidence supports the Commissioner's finding of 55% industrial disability for Mary when this record is considered as a whole. Mary is entitled to alternate medical care with Dr. Quam. The final agency decision should be affirmed, the Petition should be dismissed, and costs should be assessed to Petitioners.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the final agency decision assessing Mary with a 55% industrial disability and awarding her alternate medical care with Dr. Quam is affirmed in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petition is dismissed in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs are assessed to Petitioners Walmart, Inc. and Illinois National Insurance Company.

State of Iowa Courts

Case Number	**Case Title**
CVCV061035	WALMART AND IL NATIONAL INS CO V MARY C DUCHESNEAU
Type:	ORDER FOR JUDGMENT

So Ordered

Jeanie Kunkle Vaudt

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

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