

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY**ELITE CASINO RESORTS LLC,
ZURICH AMERICAN INSURANCE
COMPANY,****Petitioners****vs.****LINA THIEDE****Respondent.****Case No.: CVCV062571****RULING ON PETITION
FOR JUDICIAL REVIEW**

Before the Court is Elite Casino Resorts LLC and Zurich American Insurance Company's (Petitioner) Petition for Judicial Review, filed on September 27, 2021. On January 11, 2022, Petitioner filed its Judicial Review Brief. On February 23, 2022, Respondent filed his Judicial Review Brief. On February 23, 2022, Petitioner filed a Reply Brief. The Court held a hearing on the Petition's merits on February 25, 2022. Kathryn Johnson appeared for the Petitioner, and Dillon Besser appeared for Respondent Lina Thiede ("Thiede"). After hearing the parties' arguments and reviewing the record, the Court issues its ruling on the Petition.

I. BACKGROUND

Thiede was 60 years old when her case went before the Deputy Workers' Compensation Commissioner. Hr. Tr. p. 9. Thiede was born in China and graduated from high school there. She received a Bachelor of Arts in Dance at Beijing Fine Arts Observatory. Thiede then moved to the United States in 1988 and began taking English classes. She enrolled at the University of Iowa and studied ballet, dance, art, and graphics. *Id.* She sought to get her master's degree and become a dance instructor. *Id.* at 11, 13-14.

Before working at Elite Casino Resorts LLC, Thiede was a stay-at-home mom, teacher's aide, and certified nurse assistant. Thiede finally began working in the casino industry in 2004. First, Thiede worked at WinnaVegas Casino as a waitress, cashier, and dealer. She also worked at Harrah's Casino and Ameristar Casino before finally starting work for Petitioner in 2009. *Id.* at 46-49.

Regarding her medical history, Thiede injured her left wrist in February 2016. Her injury stems from a fall at home while trying to go to the bathroom at night. Cl. Ex. 1, pp. 1-2. On February 22, 2016, Scott Frisbie, P.A., evaluated Thiede and assessed that she had a non-displaced left wrist scaphoid fracture and placed her on a cast. Thiede was restricted from working as a dealer. *Id.*

On April 4, 2016, Thomas Ebinger, M.D., evaluated Thiede. She underwent a CT scan, revealing that her scaphoid fracture was healing. Dr. Ebinger recommended that Thiede take occupational therapy. Joint Exhibit (JE) 2 p. 24. Thiede returned to work with no restrictions, but she was required to wear a brace when she was dealing. Hr. Tr., p. 18; Cl. Ex. 1, p. 2.

On April 27, 2016, Thiede and her supervisor returned from the casino's break room. Her supervisor accidentally stepped on her right foot, which caused her to trip and fall. Thiede said that she felt pain in her left shoulder, left upper extremity, and neck after the fall. Hr. Tr. pp. 18-20; JE 5, p. 147.

Thiede presented to Daniel Hogan, M.D., for her left wrist pain on April 28, 2016. She later returned to Dr. Hogan on May 9 of the same year and had improvement in her left wrist, but still had left shoulder pain. Thiede received a restriction to deal cards for four hours a day. JE 1, p. 9.

Thiede returned to Dr. Ebinger on May 23, 2016, and he determined that Thiede had an excellent range of motion in her left wrist. She was found to have reached maximum medical improvement (MMI) for her wrist and returned to work without restrictions. JE 2, p. 25.

Ernest Perea, M.D., evaluated Thiede on June 16, 2016; she had persistent pain and limited range of motion in her left shoulder. She declined an MRI in favor of using “her own medicine.” JE 1, p. 17. Dr. Perea referred her to Steindler Clinic for an orthopedic evaluation. Thiede no longer dealt in card games. *Id.* at pp. 17, 22.

On August 25, 2016, Thiede took an MRI of her left shoulder. The MRI revealed that she had a 50 percent bursal-sided cuff tear and a labral tear. JE 2, p. 26. Thiede received a cortisone injection on her left shoulder on September 9, 2016. JE 2, p. 26. On January 27, 2017, Mark Mysnyk, M.D., an orthopedic surgeon, evaluated Thiede. Dr. Mysnyk gave her the choice of working eight hours a day without dealing cards for blackjack or receiving surgery. *Id.* at 28-29. Thiede returned to Dr. Mysnyk on April 25, 2017, and opted to undergo surgery. *Id.* at 31.

On February 8, 2018, Thiede presented to Elayne Gustoff, ARNP, with increased left elbow pain and paresthesia. Gustoff assessed her as having lateral epicondylitis on her left elbow and cubital tunnel syndrome. Thiede was not allowed to deal blackjack and was told to wear an elbow strap. Thiede was not allowed to work more than four hours per shift. JE 3, p. 73.

Thiede testified that on or about February 16, 2018, Petitioner called her and informed her that it could no longer accommodate her restrictions. Hr. Tr. pp. 25-27. On February 28, 2018, Thiede had an MRI of her left wrist; it showed a positive ulnar variance, mild to severe tendinosis, and left ulnar neuropathy. JE 3, p. 83. Thiede presented to Joseph Buckwalter, M.D., on April 17, 2018, for her left elbow pain. She was recommended to have EMG/NCS tests and

received an ECU injection. Thiede testified that her injection did not improve her symptoms. Hr. Tr. p. 27.

Thiede had nerve conduction studies on her left upper extremities on May 2, 2018. The test had normal results. JE 3, p. 100. She then saw Dr. Buckwalter on June 12, 2018, who found she had reached MMI for her left elbow. She was told to wear her left elbow strap when not dealing blackjack and was restricted to four hours per shift of dealing, with light duty for the remainder of the shift. *Id.* at 118.

Thiede returned to Dr. Mysnyk on June 22, 2018, for an evaluation of her left shoulder. Dr. Mysnyk had no further treatment and did not believe an MRI would be beneficial. He found that Thiede reached MMI for her left shoulder. On July 10, 2018, Thiede underwent a functional capacity evaluation. It found that Thiede could work in the sedentary physical demand level and carry up to 20 pounds. JE 2, p. 40.

On August 29 2018, Thiede was evaluated by Eric Aschenbrenner, M.D. Dr. Aschenbrenner found that Thiede had a 12 percent permanent impairment to the left upper extremity for the shoulder. He further found that she had a two percent impairment to the left upper extremity due to her cubital tunnel syndrome. These ratings resulted in a combined value of 14 percent to the left upper extremity, converting to an 8 percent permanent impairment to the body as a whole. JE 3, pp. 124-27.

On February 14, 2019, Mark Taylor, M.D., gave his opinions on Thiede's condition following an IME. She complained of pain in her left shoulder, hand pain, and pain over her left elbow, wrist, and forearm. Thiede also had pain in the left side of her neck. Dr. Taylor opined that Thiede's shoulder and left upper extremity symptoms were related to her fall at work in

April of 2016. He opined that her neck pain could be related to her shoulder pain. Ex. 1, pp. 1-10.

Dr. Taylor found that Thiede had a 14 percent permanent impairment on her left shoulder. He further found that she had a three percent permanent impairment to the left upper extremity for the ulnar nerve problems. He also opined that Thiede had an initial 3 percent permanent impairment to the left upper extremity for her wrists. Dr. Taylor's combined values resulted in a 19 percent permanent impairment to the left upper extremity and an 11 percent permanent impairment to the body as a whole. Cl. Ex. 1 p. 10. He also gave Thiede a 3 percent "provisional" rating for her cervical spine. *Id.* at 10-11. Dr. Taylor opined that Thiede had reached MMI for her arm on June 12, 2018, and her shoulder on June 22, 2018. Dr. Taylor was unable to place Thiede at MMI for the cervical spine. Dr. Taylor agreed with Dr. Aschenbrenner in regards to Thiede's permanent restrictions. *Id.* at p. 11. Thiede returned to Dr. Mysnyk on April 5, 2019, and reported neck pain and headaches. Dr. Mysnyk found that Thiede was at MMI for the shoulder. JE 2, pp. 41-42.

Benjamin MacLennan M.D. gave his opinions on Thiede's condition following an IME on July 3, 2019. Dr. MacLennan recommended pain management and physical therapy for her neck condition. Dr. MacLennan opined that it was more likely than not that Thiede's April 2016 work injury aggravated a pre-existing condition in her neck. He indicated that Thiede could do light duty and work part-time as a dealer. He could not opine whether she had a permanent impairment for her cervical spine. Def. Ex. F. Thiede also presented to Patrick Hitchon, M.D., on December 5, 2019, for neck pain. Thiede's cervical x-rays showed mild degenerative changes. Dr. Hitchon recommended Thiede for conservative pain management. JE 3, pp. 132-34. On May 11, 2020, letter, Dr. Taylor indicated that he reviewed records from Drs. MacLennan

and Hitchon. Dr. Taylor did not change his opinion regarding his IME following a review of these records. Cl. Ex 1, p. 15.

On January 4, 2021, the Deputy Commissioner (Deputy) found that Thiede reached MMI for her cubital tunnel syndrome on May 15, 2018. Arb. Dec. p. 8. The Deputy also found her to be at MMI for her lateral epicondylitis on June 12, 2018, and her shoulder condition on June 22, 2018. *Id.* Regarding her neck injury, the Deputy concluded that Thiede was not yet at MMI for her neck injury but concluded that she is not entitled to healing period benefits or total disability benefits. *Id.*

Thiede applied for rehearing, which the Deputy granted. Regarding the neck injury, the Deputy noted that there is little evidence that Thiede reached MMI for her neck injury. Reh'g Dec. Furthermore, the Deputy opined that there is little evidence in the record that indicates Thiede's neck injury will result in permanent impairment. *Id.* The Deputy further found that there is little evidence on the record regarding permanency, so an adjudication on the neck injury is not yet ripe *Id.*

Thiede appealed, and on September 7, 2021, the Commissioner issued an Appeal Decision. The subject of the appeal was whether Thiede reached MMI for her neck injury and is entitled to receive a running award of healing period benefits. Appeal Decision (App. Dec.) p. 1.

After a de novo review of the record, the Commissioner affirmed the Deputy's finding that Thiede did not reach MMI for her neck as of the hearing. He based his opinion on the reports of Drs. Hitchon and MacLennan that recommended additional treatment for her neck. The Commissioner also noted that Dr. Taylor was the only physician who specifically opined on her neck and opined that she did not reach MMI. *Id.*

However, the Commissioner concluded that it was not appropriate for the Deputy to assess the extent of Thiede's disability from the work injury. He cited *Bell Bros. Heating v. Gwinn*, 779 N.W.2d 193, 201 (Iowa 2010), as support that the agency should not speculate as to the extent of permanent disability before MMI. Accordingly, the Commissioner reversed the Deputy's adjudication of Thiede's permanent/ industrial disability. He found that her claim for permanent disability is not yet ripe and should not be decided until she reaches MMI for her neck condition. Furthermore, the Commissioner found that Thiede was entitled to hearing period benefits, as she did not reach MMI for her neck condition, citing Iowa Code section 85.34(1).

The Commissioner further found that from February 2018 to the time of the hearing, Thiede was not capable of returning to employment substantially similar to her blackjack dealer position with Petitioner. On September 27, 2021, Petitioner filed its Petition for Judicial Review. On February 25, 2022, the Court held a hearing and was informed that Thiede received further medical care and may have reached MMI for her neck condition. Notwithstanding that fact, this Judicial Review analyzes the Commissioner's decision with the record available to him at the time.

II. STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Chapter 17A of the Iowa Code, governs judicial review of administrative agency decisions. The Court shall reverse, modify, or grant other appropriate relief from final agency action if it determines the substantial rights of a petitioner have been prejudiced by any of the means outlined in Iowa Code section 17A.19(10)(a)-(n). Review of agency action is at law, not de novo, and is limited to the record made before the agency. *Taylor v. Iowa Dep't of Job Serv.*, 362 N.W.2d 534, 537 (Iowa 1985). The Court cannot consider additional evidence or issues not considered by the agency. Iowa Code § 17A.19(7)

(2021); *Meads v. Iowa Dep't of Social Servs.*, 366 N.W.2d 555, 559 (Iowa 1985). The Court may not substitute its judgment for that of the agency. *Mercy Health Center v. State Health Facilities Council*, 360 N.W.2d 808, 809 (Iowa 1985). The Court may not usurp the agency's function of making factual findings. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 186 (Iowa 1980).

The Court should reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. Iowa Code § 17A.19(10)(f). "Record viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from the findings, as well as all of the relevant evidence in the record cited by any party that supports it. *Id.* at § 17A.19(10)(f)(3). This includes any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. *Id.*

The evidence need not amount to a preponderance to be substantial evidence, but a mere scintilla will not suffice. *Elliot v. Iowa Dep't of Transp.*, 377 N.W.2d 250, 256 (Iowa Ct. App. 1985). Substantial evidence means the quantity and quality of evidence that a neutral, detached and reasonable person would be deemed sufficient 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). The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 232 (Iowa Ct. App.

1991). The relevant inquiry is not whether the evidence might support a different finding but whether the evidence supports the findings made. *Id.*

The Commissioner has a duty to state the evidence relied upon and detail the reasons for any conclusions. *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 392 (Iowa 1993) (citing *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 510 (Iowa 1973)). This requirement is satisfied if the reviewing court can determine the factual basis on which the administrative officer acted with reasonable certainty. *Id.* at 393. Courts understand that an administrative agency “cannot in its decision set out verbatim all testimony in a case.” *Id.* at 392 (citing *McDowell v. Town of Clarksville*, 241 N.W.2d 904, 908 (Iowa 1976)). “Nor, when the agency specifically refers to some of the evidence, should the losing party be able, ipso facto, to urge successfully that the agency did not weigh all the other evidence.” *Id.* An agency decision is final if supported by substantial evidence. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996).

The Court shall also reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the agency’s discretion. Iowa Code § 17A.19(10)(c). The court shall not give deference to the agency’s view concerning particular matters that a provision of law has not vested in the agency’s discretion. *Id.* at § 17A.19(11)(b). However, appropriate deference is given when the contrary is true. *Id.* at § 17A.19(11)(c). The agency’s findings are binding on appeal unless a contrary result is compelled as a matter of law. *Ward v. Iowa Dep’t of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981).

Additionally, a reviewing court must also reverse, modify, or grant other appropriate relief when the agency’s decision is “[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of

the agency.” Iowa Code § 17A.19(10)(m). “In order to determine an employee’s right to benefits, which is the agency’s responsibility, the agency, out of necessity, must apply the law to the facts.” *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004). Because the agency has been entrusted with the responsibility of applying the law to the facts, the “agency’s application of the law to the facts can only be reversed if we determine such an application was ‘irrational, illogical, or wholly unjustifiable.’” *Id.* (citing Iowa Code § 17A.19(10)(m)).

“The findings of the commissioner are akin to a jury verdict, and we broadly apply them to uphold the commissioner’s decision.” *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996) (quoting *Second Inj. Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994) (citation omitted)). “We may reverse, modify, affirm or remand the case to the commissioner for further proceedings if we conclude the agency’s action is affected by an error at law or if it is not supported by substantial evidence.” *Id.* at 150.

III. ISSUES

A. WHETHER THE COMMISSIONER ERRED IN APPLYING IOWA CODE SECTION 85.34(1) WHEN HE DECIDED THAT THIEDE IS ENTITLED TO RUNNING HEALING PERIOD BENEFITS

Petitioner contends that the Commissioner erred when he found that Thiede did not reach MMI in her neck condition and that “none of the factors of Iowa Code section 85.34(1) had occurred starting in February 2018, when claimant was restricted from working, through the time of the hearing.” App. Dec., p. 4. The Commissioner purportedly erred when he awarded Thiede a running award of healing period benefits. The condition for healing period awards is controlled by Iowa Code section 85.34. It states:

1. **Healing period.** If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee

compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee 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.

Healing period compensation benefits involve permanent partial disability. If permanent partial disability results from an injury, the payments made prior to the payment for permanency are healing period benefits. *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596, 604 (Iowa 2005).

“The healing period may be characterized as that period which there is a reasonable expectation of improvement of the disabling condition, ‘and ends when maximum medical improvement is reached.’” *Dunlap v. Action Warehouse*, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012) (citations omitted).

Petitioner argues that the Commissioner erred when he found that Thiede did not reach MMI for her neck condition. The Commissioner affirmed the Deputy’s finding that Thiede did not reach MMI for her neck at the arbitration appeal hearing. The Commissioner reached this conclusion based on the recommendations of Drs. Hitchon and MacLennan recommend additional treatment for Thiede’s neck. The Commissioner also mentioned Dr. Taylor as the only physician to opine whether Thiede reached MMI and found that she did not reach it for her neck. App. Dec. p. 2. The Commissioner ultimately reversed the Deputy’s industrial disability determination as he found it was not yet appropriate to assess industrial disability before MMI was reached for the neck injury. *Id. Bell Bros. Heating v. Gwinn*, 779 N.W.2d at 201. The Deputy and the Commissioner essentially agreed that Thiede did not reach MMI for her neck. The Deputy thought that notwithstanding that he could decide on her industrial disability, the Commissioner opted to err on the side of caution and wait for a formal MMI rating for Thiede’s neck. Petitioner contends that the evidence on the record leads to the unavoidable conclusion that

Thiede's condition stabilized and she reached full MMI for all of her injuries. For its analysis, this Court notes:

As the finder of fact, the agency determines the weight to assign an expert opinion, 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). The agency may reject or accept the expert evidence entirely or in part. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 850 (Iowa 2011). In our appellate posture, we “ ‘are not at liberty to accept contradictory opinions of other experts in order to reject the finding of the commissioner.’ ” *Id.* (citation omitted). Thus, whether a piece of evidence trumps another or is qualitatively weaker is not an assessment for either the district court or the court of appeals to make when reviewing an agency's decision on the basis of substantial evidence. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394 (Iowa 2007). *Dunlap*, 824 N.W.2d at 555.

The Commissioner's finding that Thiede did not reach MMI for her neck is supported by substantial evidence. Dr. Hichon diagnosed Thiede with neck pain and noticed mild degenerative changes. JE 3 p. 134. Dr. MacLennan's report likewise noted degenerative changes on her neck. D. Ex. F, p. 48. Dr. Taylor assigned a provisional rating on her spine and stated that he was unable to place Thiede at MMI concerning her cervical spine condition. Cl. Ex. 1, p. 10. By relying on the reports set forth by Drs. Hitchon, MacLennan, and Taylor, a reasonable fact finder could determine that MMI has not been reached. Accordingly, the Commissioner's factual finding of no MMI in tandem with section 85.34(1) is a good application of facts to the law. The Commissioner's decision to err on the side of caution instead of running the risk of having his decision undermined by later relevant evidence is rational.

B. WHETHER THE COMMISSIONER ERRED WHEN HE FOUND THAT THIEDE DID NOT RECEIVE ANY FORMAL OFFERS OF WORK

Petitioner additionally avers that the Commissioner's finding that Thiede did not return to work at the time of the hearing and did not refuse any offers of suitable work is not supported by substantial evidence. The Commissioner reached this conclusion based on the hearing testimony

from Anna Cavanaugh, Petitioner's human resources contact, and Thiede's testimony. At the hearing, Cavanaugh testified on various positions within the Casino. She testified that within the positions in the Casino, the only available to someone with Thiede's restrictions is as hostess, and even that would need accommodations. Hr. Tr. p. 105. The Commissioner found insufficient evidence to determine whether the work that was offered was suitable and within Thiede's restrictions. He determined that Thiede had discussions with Cavanaugh, but ultimately Thiede received no official offers, which she refused.

The Commissioner also found it significant that Petitioner's counsel admitted in a letter addressed to Thiede's counsel that there is no work available within her restrictions. Cl. Br. in Resp. to Def's Cross Appeal p. 5; Cl. Ex. 5. Furthermore, Petitioner could not produce a written offer of work when asked by Thiede's counsel. Accordingly, the Commissioner's finding is supported by substantial evidence, and its application to section 85.34 was sound.

C. ON WHETHER THE PETITIONER IS ENTITLED TO CREDIT FOR PERMANENCY BENEFITS

Petitioner's last point is that it is entitled to credit for payments made. Thiede replies that the parties are not adversarial as to that point. The Court takes this argument to mean that if the Commissioner erred in not an industrial disability rating, then under Iowa Code section 85.34(4), Petitioner would be entitled to credit from the date the Commissioner should have assigned Thiede a disability rating. Having determined that the Commissioner committed no error, the classification of those payments as healing period benefits stands.

IV. RULING

The Commissioner's findings of fact are supported by substantial evidence on the record, and his application of facts to the law was rational. It is therefore ordered that the Commissioner's Appeal Decision be **AFFIRMED**.



State of Iowa Courts

Case Number
CVCV062571
Type:

Case Title
LINA THIEDE V ELITE CASINO RESORTS LLC ET AL
OTHER ORDER

So Ordered

Scott J. Beattie, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2022-04-29 10:57:08