IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DEN HARTOG INDUSTRIES, Employer, and WEST BEND MUTUAL INSURANCE CO., Insurance Carrier, Petitioners, v. TYLER DUNGAN, Respondent.	)	Case No. CVCV065006 **ORDER ON JUDICIAL REVIEW**

In person oral argument in this judicial review proceeding was held June 9, 2023, Appearing for Petitioners Den Hartog Industries and West Bend Mutual Insurance Company (together, DHI) was attorney Jordan Gehlhaar. Appearing for Respondent Tyler Dungan (Tyler) was attorney Janiece Valentine. Oral argument was reported.

After reviewing the court file and hearing the respective arguments of counsel, the court enters the following Order affirming the final agency decision in its entirety for the reasons stated below.

BACKGROUND FACTS

Tyler Dungan was employed by DHI, which manufactures plastic containers of varying sizes. (Tr. p. 20). Tyler's job at DHI was outdoor loader/material handler. (Tr. pp. 18-19). The job required Tyler to lift, push, pull and/or carry up to 75 pounds. (Tr. p. 19). While loading product onto a truck on July 24, 2019, Tyler injured his back. (Tr. pp. 24-25).

Tyler reported the injury to DHI that same day. (Tr. pp. 25-26). When chiropractic

treatment failed, Tyler was referred to CNOS in Sioux City to see Dr. Klopper, an orthopedic specialist. (Tr. p. 28). Dr. Klopper ordered epidural steroid injections to address Tyler's back pain and DHI paid for that treatment. (Tr. p. 30).

Tyler continued to work at DHI while treating for his injury. However, he missed "a fair bit of work" due to his injury. (Tr. p. 34). Tyler voluntarily separated from his employment with DHI in June 2020 because he had just become a father and wanted to be closer to his family. (Tr. pp. 34-35). He secured a couple of transition positions before landing at GOMACO as a welder. (Tr. p. 36).

Before he could work for GOMACO, Tyler had to convince Dr. Klopper to provide a full release and remove his forty pound weight restriction. (Tr. p. 37; JE 5-21). Tyler testified that his work at GOMACO is much less physically demanding than his work at DHI.[1] (Tr. p. 38).

All medical opinions regarding permanency agree that Tyler's injury is permanent. Dr. Klopper assigned a 5% rating for Tyler's injury. (JE 5-23). Dr. Schmitz agreed with Dr. Klopper and assigned a 5% rating. (I-27). Dr. Broghammer, upon doing a record review, also assigned a 5% rating. (J-4). Dr. Bansal assigned an 8% rating. (Cl. Ex. 1, p. 10).

PROCEDURAL HISTORY

Tyler filed his petition for workers' compensation benefits on March 12, 2021. (Petition). A Deputy Worker's Compensation Commissioner (the Deputy) presided over the Arbitration Hearing held on March 10, 2022. The Deputy filed the Arbitration Decision on September 30, 2022. (Arb. Dec.). The Deputy found that Tyler sustained a nominal loss of earning capacity of 15%, awarded continued medical care with the authorized treating physician selected by the carrier (Dr. Klopper), and awarded costs. (Arb. Dec., pp. 23-24).

[1] Tyler works as a welder at GOMACO without any heavy lifting requirements.

On January 13, 2023, the Workers' Compensation Commissioner (the Commissioner) took final agency action by affirming the entirety of the Deputy's decision. (App. Dec.).

STANDARD OF REVIEW

A party to a workers' compensation action may seek judicial review under Iowa Code section 17A.19(1) if they are "aggrieved or adversely affected by any final agency decision." *Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 841-42 (Iowa 2015). The standard of review is controlled by the existence of a legislative grant of authority to exercise discretion to decide an issue.

"When discretion has been vested in the commissioner, 'we reverse only if the commissioner's application was irrational, illogical, or wholly unjustifiable.'" *Des Moines Area Reg'l Transit Auth.*, 867 N.W.2d at 842 (quoting *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009)); Iowa Code § 17A.19(10)(*l*); Iowa Code § 17A.19(10)(*f*)(1). "Application of workers' compensation laws to facts as found by the commissioner is clearly vested in the commissioner." *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008) (citing *Mycogen Seeds v. Sands*, 700 N.W.2d 328, 330 (Iowa 2005) (reversed on other grounds)).

Where the Commissioner has not been given authority to exercise discretion by the Legislature, the review is for errors at law. Iowa Code § 17A.19(10)(*c*). "[I]f the claimed error pertains to the agency's interpretation of law, then the question on review was whether the agency's interpretation was wrong." *Tripp v. Scott Emergency Comm'n Ctr.*, 977 N.W.2d 459, 464 (Iowa 2022) (citing *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006)).

In sum, the Commissioner's findings are only reversed when they are not supported by substantial evidence when the record is viewed as a whole. Iowa Code § 17A.19(10)(*f*). A

finding of substantial evidence is appropriate where a "neutral, detached, and reasonable person" determines that the evidence is sufficient to establish a fact that has serious and important consequences. Iowa Code § 17A.19(10)(*f*)(1). Common law provides additional guidance regarding the substantial evidence standard and the appropriate deference owed to the Commissioner's findings.

"Evidence is not insubstantial merely because different conclusions may be drawn from the evidence." *Cedar Rapids Comm. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (citing *John Deere Dubuque Works of Deere & Co. v. Weyant*, 442 N.W.2d 101, 105 (Iowa 1989)). If the reviewing court reaches a different conclusion on an issue, that disagreement alone is not enough to conclude substantial evidence did not support the Commissioner's decision. *Id*. The Commissioner's findings are only reversed on appeal when a contrary finding is compelled as a matter of law. *Long v. Roberts Dairy Co*., 528 N.W.2d 122, 123 (Iowa 1995).

CONCLUSIONS OF LAW

Before 2017, permanent partial disability to an unscheduled body part was compensated by the industrial disability method which considered the loss of earning capacity. *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 831 (Iowa 1992). In 2017, the Legislature made several changes to Iowa Code chapter 85. Among those changes made by the Legislature was Iowa Code section 85.34(2)(*v*). That section relevantly provides:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's

> functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code § 85.34(2)(*v*).

Here, the Commissioner interpreted this statute to only apply in situations where a worker returns to work for the employer and is later terminated by the employer. The Commissioner found section 85.34(2)(*v*) did not apply to the instant facts because DHI did not terminate Tyler. The court finds the language the Legislature chose in crafting section 85.34(2)(*v*) creates a bifurcated process for assessing industrial disability in cases where an injured worker returns to work for the employer and then is later terminated by the employer.

DHI asks the reviewing court to consider only the first sentence and then stop reading. It is well-settled that Iowa statutes are to be interpreted as a whole, not in part. *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020).

In considering the relevant portions of section 85.34(2)(*v*) together, it is apparent that the Legislature set up a bifurcated litigation process when a worker returns to work for the same or greater wages and is later terminated after being paid for his functional impairment. At that point, a review-reopening procedure is available for considering additional compensation. As the Commissioner said in *Martinez*,

> [w]hen the two new provisions . . . are read together, as they are set forth in the statute, it appears the legislature intended to address only the scenario in which a claimant initially returns to work with the defendant-employer or is offered work by the defendant-employer at the same or greater earnings but is later terminated by the defendant-employer.

(*Martinez*, App. Dec., p. 5).

That interpretation is reinforced by the statutory construction principle holding that

legislative intent is expressed by exclusion and inclusion alike, with the express mention of one thing implying the exclusion of another. *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008). Relying on that principle, the Deputy concluded that

> [t]he statute contains no mention of any other circumstances that mandate a bifurcated litigation process to determine the extent of permanent disability. The legislature could have included such language in the statute but did not. This choice implies that the requirement for a bifurcated ligation process only applies when the defendant-employer discharges the claimant after the agency issues an award or approves the parties' agreement for settlement on the question of permanent disability based on functional impairment.

(Arb. Dec., p. 18).

Like the agency, the reviewing court cannot expand the statute by reading something into it that is not there. *Downs v. A & H Constr., Ltd*., 481 N.W.2d 520, 527 (Iowa 1992). Expanding the statute to include other scenarios aside from termination would be "a far cry from the efficient and speedy remedy envisioned by the general assembly when it adopted the workers' compensation act." *Zomer v. West River Farms, Inc*., 666 N.W.2d 130, 133-134 (Iowa 2003). Nor can the court speculate about the motivation of the Legislature when it passes laws. *See*, *e.g*., *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 749 (Iowa 2022) (McDermott, J., concurring in part and dissenting in part).

Further, this interpretation is consistent with the Iowa Supreme Court's (the Court) mandate to "apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective: the benefit of the worker and the worker's dependents." *Xenia Rural Water Dist. v. Vegors*, 786 N.W.2d 250, 257 (Iowa 2010).

The court has carefully considered the cases cited by DHI to support its position and finds them all factually distinguishable. In every case, the injured worker continued to work for the same employer. This material factual difference distinguishes those cases from *Martinez* and the instant

case where there Tyler voluntarily separated from his employment with DHI.

At oral argument, DHI raised a recent decision by a Deputy. In *Cortez v. Tyson Foods, Inc.*, File Nos. 20700573.02, 20000903.02 (Review-Reopening Dec., 05/10/23), the worker reached a settlement on two separate injury claims. After settlement was reached, the employer no longer accommodated the worker's restrictions. While the worker was to call in to the employer every week to see if work was available, in over fifteen months of calling in every week, no work was ever offered—essentially terminating the worker. This situation is exactly what section 85.34(2)(*v*) contemplates and remedies—a worker getting terminated after reaching a settlement with his employer.

The statute as written applies to the scenario where an injured worker is terminated and does not apply when a worker voluntarily separates from employment with the employer. Given the language of the statute, since Tyler voluntarily left employment with DHI, section 85.34(2)(*v*) does not apply.

Alternatively, the statute as written is ambiguous—requiring the court to invoke liberal construction in favor of the injured worker as required by the Court's long-standing precedent. *Xenia Rural Water Dist.*, 786 N.W.2d at 257.

In determining the extent of industrial disability, the Commissioner must consider the injured employee's functional impairment, age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is suited and the employer's offer of work or lack thereof. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632-33 (Iowa 2000). In looking at these factors to consider in addressing industrial disability, the Commissioner found that Tyler sustained an industrial disability in excess of the impairment ratings provided.

All the doctors offering impairment opinions agree that Tyler's injury is permanent. Dr. Klopper assigned a 5% rating for Tyler's injury. (JE 5-23). Dr. Schmitz agreed with Dr. Klopper and assigned a 5% rating. (I-27). Dr. Broghammer also assigned a 5% rating. (J-4). Dr. Bansal assigned an 8% rating. (Cl. Ex. 1, p. 10).

As amended in 2017, section 85.34(2)(*v*) requires the agency to consider "the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." At the time of his injury in 2019, Tyler was 23. Tyler has decades of work years ahead of him.

Further, the loss of access to the labor market is of paramount importance in determining loss of earning capacity. *Pease*, 807 N.W.2d at 843, 853. The essential element in determining industrial disability is the reduction in value of the general earning capacity of the worker, rather than the loss of wages or earnings, or lack thereof, in a specific occupation or for a specific employer. *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 356 (Iowa 1999).

While Tyler has secured other employment, there are no guarantees assuring Tyler's continued, accommodated employment with GOMACO. In considering the labor market as a whole, rather than just Tyler's welding job with GOMACO, Tyler has lost access to a segment of that market due to his lifting, bending, and twisting limitations.

Since Tyler has an injury to the body as a whole, has a permanent impairment related to that injury, and is no longer working for DHI, his injury must be evaluated industrially. In considering the industrial factors, substantial evidence supports the Commissioner's finding of an industrial loss of 15%. The reviewing court will not disturb that finding.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Commissioner's decision is affirmed in its entirety and the Petition is dismissed.

State of Iowa Courts

Case Number	**Case Title**
CVCV065006	DEN HARTOG INDUSTRIES ET AL VS TYLER DUNGAN
Type:	ORDER FOR JUDGMENT

So Ordered

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

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