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IN THE DISTRICT COURT OF IOWA IN AND FOR POLK COUNTY

MEK BACCAM, Petitioner, vs. ACH FOOD COMPANIES, INC., a/k/a TONE'S, and SENTRY INSURANCE, A MUTUAL COMPANY STATE OF IOWA, Respondents.	Case No. CVCV055235 RULING ON PETITION FOR JUDICIAL REVIEW

This matter came before the Court on April 27, 2018, for a hearing on Petitioner Mek Baccam's petition for judicial review. Petitioner is represented by attorney Mark Soldat. Respondents ACH Food Companies, Inc. and Sentry Insurance are represented by attorney Patrick Waldron. Having heard the arguments of counsel, and considered the written arguments and authorities submitted in support thereof, the Court now enters its ruling.

BACKGROUND FACTS AND PROCEDURAL HISTORY

I. RELEVANT BACKGROUND FACTS

At the time of the hearing, Petitioner Mek Baccam was 48-years old. Mr. Baccam has lived in Des Moines, Iowa for the last 35 years, having graduated from high school in 1985 and from Northwest Technical College in 1987. His employment history includes manufacturing, assembly, warehouse work, and as a worker at Respondent ACH Food Companies, Inc. ("ACH Food"), which is insured by Respondent Sentry Insurance ("Sentry").

On June 12, 2012, Mr. Baccam suffered a work-related injury resulting from a brake malfunction in a forklift Mr. Baccam was operating. Mr. Baccam's leg was caught between the

forklift and a door frame and was pinned there for a couple minutes. Mr. Baccam's initial primary treating physician was Dr. Nicholas Bingham, who treated Mr. Baccam through the summer of 2012.

Eventually, after Mr. Baccam continued to complain of edema and loss of sensation even after physical therapy, Sentry arranged for him to be seen by orthopedic surgeon Dr. Joshua Kimelman. Dr. Kimelman examined Mr. Baccam a number of times from late-2012 through June 2013. First, on September 6, 2012, Dr. Kimelman observed that Mr. Baccam had suffered a laceration and contusion, which caused nerve damage to the back of his leg. Dr. Kimelman opined that the nerve damage would heal over time, though some of the damage was likely permanent albeit "cosmetic and superficial." Dr. Kimelman next saw Mr. Baccam on January 31, 2013, during which Mr. Baccam continued to complain of sporadic symptoms, though overall his condition had improved. Dr. Kimelman informed Mr. Baccam that it could 12 to 18 months for his injury to heal, though there was some permanency secondary to discomfort and loss of sensation. Finally, on June 27, 2013, Dr. Kimelman concluded that Mr. Baccam's condition was not likely to change any further. On August 9, 2013, he assigned Mr. Baccam with a 1% impairment rating for his leg.

On August 15, 2013, Sentry sent Mr. Baccam a letter indicating the impairment rating from Dr. Kimelman and containing a check for 2.2 weeks of permanent partial disability benefits, including interest, for the period of June 27, 2013 through July 11, 2013. At the referral of his attorney, Mr. Baccam presented himself on March 25, 2014 for an independent medical evaluation ("IME"), conducted by Dr. Mark Taylor. Dr. Taylor issued his report on April 16,

2014, opining that Mr. Baccam had suffered a 3% impairment. Finally, on October 14, 2014, Dr. Bingham examined Mr. Baccam again, and opined that he had suffered 0% impairment.

II. PROCEDURAL HISTORY

Mr. Baccam filed his petition with the Iowa Workers' Compensation Commissioner ("IWC") on September 13, 2013, naming ACH Foods and Sentry as defendants. On November 17, 2014, a hearing was held, with Deputy Commissioner Erica Fitch ("Deputy") presiding. At the hearing, the parties provided the Deputy with a hearing report containing a number of stipulations, including that Mr. Baccam had indeed suffered a work-related injury, and that he had been paid $1250.92 in permanent partial disability benefits on August 15, 2013.

The remaining issues for the Deputy to decide were: (1) whether the injury had caused permanent disability, and if so, whether Mr. Baccam was entitled to permanent partial disability compensation; (2) the amount of compensation Sentry was obligated to pay, including interest; (3) whether Mr. Baccam was owed penalty benefits in accordance with Iowa Code § 86.13(4), due to Sentry's delay in payment; (4) whether Sentry should be ordered to pay for Mr. Baccam's itemized costs; and (5) whether Sentry should be ordered to pay for the transcription costs of the November hearing.[1] On October 16, 2015, the Deputy filed her Arbitration Decision. Among her factual findings and legal conclusions relevant to this judicial review, the Deputy found that Mr. Baccam was a credible witness, though she stated that she generally holds medical evidence as more persuasive regarding the extent of disability/injury than subjective lay evidence. The Deputy found that Mr. Baccam had suffered a 3% permanent impairment, entitling him to 6.6 weeks of permanent partial disability benefits with interest in accordance with Iowa Code §

1 Mr. Baccam made that request in a post-hearing brief.

85.30. The Deputy did not find that Mr. Baccam was entitled to any penalty benefits for the permanent partial disability benefits, finding that Sentry had met its burden of proving a reasonable excuse for the delay in payment. Finally, the Deputy refused to tax Sentry for the costs of transcribing the November 2014 hearing, because the transcript had not been requested by the Deputy and was entirely voluntary on Mr. Baccam's behalf.

On November 10, 2015, Mr. Baccam filed an application for rehearing, which the Deputy denied on November 24, 2015. He then filed a notice of appeal to Commissioner John Cortese on December 7, 2015. On April 13, 2017, Commissioner Cortese delegated his authority to Deputy Commissioner Jennifer Gerrish-Lampe ("Commissioner"). On September 27, 2017, the Commissioner issued her Appeal Decision, affirming the Deputy's Arbitration Decision, except with respect to penalty benefits. There, the Commissioner found that Mr. Baccam was owed 5% of the late benefits due to Sentry's failure to provide contemporaneous communication to Mr. Baccam regarding the delay. On October 17, 2017, Mr. Baccam filed an application for rehearing, which the Commissioner denied on October 31, 2017.

Mr. Baccam then filed this Petition for Judicial Review on November 3, 2017. In his Petition, Mr. Baccam raises five claims of error: (1) that the Deputy's Arbitration Decision violated the requirements of Iowa Code § 17A.16(1); (2) that the Deputy misapplied the law when she declared that she generally held medical evidence as more persuasive regarding the extent of the injury compared to subjective lay evidence; (3) that both the Deputy and Commissioner erred in not specifically enumerating the amount of interest owed by Sentry in the award; (4) that both erred in finding Sentry had met its burden of proof regarding penalty

benefits; and (5) that both erred in not taxing Sentry for the costs of the November 2014 hearing transcription.

STANDARD OF REVIEW

Iowa Code Chapter 17A governs the judicial review of agency action. The district court acts in an appellate capacity and reviews agency action to correct errors at law.[2] The Court "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(*a*) through (*n*)."[3] "The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity."[4] Where an agency has been "clearly vested" with a fact-finding function, the appropriate "standard of review [on appeal] depends on the aspect of the agency's decision that forms the basis of the petition for judicial review" – that is, whether it involves an issue of (1) findings of fact, (2) interpretation of law, or (3) application of law to fact.[5] The role of the Court in judicial review is not to relitigate every fact and issue, but rather to ensure that the agency's decision was legally valid.

The Court is bound by the agency's factual findings if the findings are supported by "substantial evidence in the record made before the agency when the record is *viewed as a whole*."[6] Substantial evidence "means 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

2 *Bearinger v. Iowa Dept. of Transp.*, 844 N.W.2d 104, 105 (Iowa 2014); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).
3 *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc., v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)).
4 Iowa Code §17A.19(8)(a).
5 *Burton*, 813 N.W.2d at 256.
6 *Bearinger*, 844 N.W.2d at 105-06 (emphasis added).

great importance."[7] The decision "does not lack substantial evidence merely because the interpretation of the evidence is open to a fair difference of opinion."[8] The Court gives "deference to the credibility determinations of the presiding officer."[9] As a result, it is incredibly rare for the Court to find an agency's decision unsupported by substantial evidence.[10]

When the agency has been "clearly vested" with the authority to make factual findings, "it follows that application of the law to those facts is likewise vested by a provision of law in the discretion of the agency."[11] If "the claim of error lies with the *ultimate conclusion* reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion, by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence."[12] Iowa Code section 17A.19(10)(i), (j), and (n) are each a type of unreasonable, arbitrary, and capricious agency action.[13] The court will overturn an agency's decision if it is "taken without regard to the law or facts of the case."[14] "Agency action is unreasonable if the agency acted in the face of evidence as to which there is no room for difference of opinion among reasonable minds . . . or not based on substantial evidence."[15]

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7 Iowa Code §17A.19(10)(f)(1).
8 *Drake Univ. v. Davis*, 769 N.W.2d 176, 182 (Iowa 2009).
9 *Broadlawns Med. Cntr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010) (citing Iowa Code § 17A.19(10)(f)(3)).
10 *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa Ct. App. 1995); *see also Mccomas Lacina Const. v. Drake*, 2016 WL 2744948, at *1 (Iowa Ct. App. May 11, 2016) (describing a situation where the district court finds an agency decision unsupported by substantial evidence the "Bigfoot" of the legal community).
11 *Burton*, 813 N.W.2d at 256 (quoting *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004)) (internal quotation marks omitted).
12 *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006) (citing Iowa Code §17A.19(10)(i), (j)).
13 *Zieckler v. Ampride*, 743 N.W.2d 530, 532-33 (Iowa 2007).
14 *Dico, Inc., v. Iowa Emp't. Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998).
15 *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 707 (Iowa 2007) (internal quotations omitted).

Finally, if the challenge is to an agency's interpretation of the law, the level of deference afforded will depend on whether the agency had been "clearly vested" with the authority to interpret the law.[16] If the agency has been so "clearly vested," the court reviews the agency's interpretation under the abuse of discretion standard. If the agency has not been so "clearly vested," the court is not bound by the agency's interpretation and must reverse the interpretation if it is erroneous.[17]

ANALYSIS

As previously mentioned, Mr. Baccam raises four claims of error in his Petition. Specifically, Mr. Baccam claims that the Commissioner erred by: (1) misapplying the law to the facts of the case by holding the medical opinions presented in the record as inherently superior to the subjective assessments provided by Mr. Baccam's lay testimony; (2) failing to specify the dollar amount of permanent partial disability compensation awarded; (3) failing to award Mr. Baccam penalty benefits for Sentry's alleged delay of payment of benefits; and (4) failing to tax Sentry with the costs of the hearing transcript requested by Mr. Baccam. Mr. Baccam also repeatedly argues that the Deputy's Arbitration Decision violated the requirement under Iowa Code § 17A.16(1) by not explicitly separating her findings of fact from her conclusions of law. The Court will address each claim separately.

I. WHETHER THE DEPUTY VIOLATED IOWA CODE § 17A.16(1)

Throughout much of his briefs, Mr. Baccam argues that the Deputy violated Iowa Code § 17A.16(1) by failing to explicitly separate her findings of fact from her conclusions of law in her October 16, 2015 Arbitration Decision. § 17A.16(1) states in pertinent part: "A proposed or final

16 *Burton*, 813 N.W.2d at 256.
17 *Id.*

decision shall include findings of fact and conclusions of law, *separately stated*."[18] Here, despite having clearly labeled sections for her findings of fact and conclusions of law, the Deputy partially blended her factual findings with her legal conclusions. However, the Iowa Supreme Court has held that this is not a reversible error, having held that, so long as it is "possible to work backwards and to deduce what must have been [the agency's] legal conclusions and [its] findings of fact," the Court will not find failure to strictly abide by § 17A.16(1) to be a reversible error.[19]

Here, the Court believes that a careful reading of the Deputy's Arbitration Decision makes it clear what are the Deputy's factual findings and what are her legal conclusions. The Court does not find the Deputy committed reversible error on these grounds.

II. WHETHER THE COMMISSIONER ERRED IN HOLDING THE MEDICAL OPINIONS AS INHERENTLY MORE CREDIBLE THAN THE LAY TESTIMONY PRESENTED

Mr. Baccam's first substantive claim of error is that the Deputy, and thus the Commissioner through affirmation, misapplied the law to the facts of his case when she stated in her Arbitration Decision that she "generally views the opinions of the medical providers on the extent of impairment as the most persuasive evidence" and that "physician opinions [are] entitled to greater weight than objectively unquantifiable layperson testimony."[20] According to Mr. Baccam, this represents an unacceptable bias in the Deputy's analysis, and runs contrary to the established law on workers' compensation cases. Specifically, Mr. Baccam argues that the law makes it clear that subjective law testimony must also be considered alongside medical opinions and objective medical reports. In this regard, Mr. Baccam is partially correct. The law is clear

18 Iowa Code § 17A.16(1) (emphasis added).
19 *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 239 (Iowa 1981).
20 Arb. Dec., at 16.

that the IWC must "consider all evidence, both medical and nonmedical, in arriving at a disability determination."[21] This is because "[l]ay witness testimony is both relevant and material upon the cause and extent of injury" and "[e]xpert medical testimony may be buttressed by supportive lay testimony."[22]

However, this does not mean that the IWC is obligated to give medical and lay evidence equal weight when there is a conflict between the two. As the fact finder, the Deputy and/or Commissioner "has a duty to weigh the evidence and measure the credibility of witnesses."[23] The IWC is not required to accept lay testimony "at face value, especially in view of contrary evidence . . ."[24] What the Iowa Supreme Court has made clear is that the IWC cannot summarily disregard or exclude lay testimony; but this does not mean that a deputy commissioner cannot find medical evidence more persuasive than lay testimony when it comes to the cause and extent of injury. So long as the lay testimony is considered by the deputy commissioner, the requirements are met.

Mr. Baccam argues that the Deputy abused her discretion in failing to exercise discretion and consider Mr. Baccam's testimony regarding his condition. Yet, upon reading the Deputy's decision, it is clear that she did consider Mr. Baccam's testimony. The Deputy directly discussed the testimony in multiple parts of the decision.[25] Further, the Deputy explicitly states that she

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21 *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 273 (Iowa 1995).
22 *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 421 (Iowa 1994) (quoting *McKeever Custom Cabinets v. Smith*, 379, N.W.2d 368, 374 (Iowa 1985)) (internal quotation marks omitted).
23 *Cedar Rapids Cmty. School Dist. V. Pease*, 807 N.W.2d 839, 845 (Iowa 2011); *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996) (". . . the weight of the evidence remains within the agency's exclusive domain"); *see also Terwilliger*, 529 N.W.2d at 272-73 (no finding of error when the Commissioner found the medical opinion presented more credible than the lay testimony).
24 *Kiesecker v. Webster City Custom Meats, Inc.*, 528 N.W.2d 109, 111 (Iowa 1995).
25 *See e.g.*, Arb. Dec., at 8 (containing three paragraphs summarizing Mr. Baccam's testimony on the condition of his leg).

considered Mr. Baccam's testimony "in determining functional loss" to the extent that it "buttresse[d] the medical opinion of Dr. Taylor."[26]

While the Court can understand Mr. Baccam's discomfort with the Deputy explicitly stating that she generally finds medical opinions more persuasive than lay testimony when it comes to the extent of the injury/disability, there is nothing in the case law that suggests that this is a misapplication of the law. As the fact finder, the Deputy is entitled to determine the weight of testimony and evidence presented to her. Had the Deputy simply dismissed Mr. Baccam's testimony without any explanation beyond her statement of her general views, the Court would perhaps be inclined to agree with Mr. Baccam. But that is not what happened here. Following her general statement, the Deputy went on to expressly discuss why, in this specific case, she found Mr. Baccam's testimony less persuasive than the three medical opinions presented to her, despite having also found Mr. Baccam's testimony credible.[27]

As a result, the Court does not find that the Deputy, nor Commissioner through affirmation, misapplied the law in finding that the medical evidence provided in the record was more persuasive than Mr. Baccam's testimony, and thus finding Mr. Baccam had a 3% impairment rating.

III. WHETHER THE COMMISSIONER ERRED IN NOT SPECIFYING THE DOLLAR AMOUNT OF PERMANENT PARTIAL DISABILITY COMPENSATION AWARDED

Mr. Baccam's second claim of error is that the Deputy failed to specify the dollar amount of permanent partial disability compensation awarded to Mr. Baccam. In her Arbitration Decision, the Deputy stated, in relevant part:

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26 *Id.* at 17.
27 *Id.* at 16-17 (finding that Mr. Baccam's testimony ran contrary to all three medical opinions and was unsupported by any additional or objective evidence).

> The next issue for determination is whether claimant is entitled to interest on benefits paid. The undersigned determined claimant is entitled to temporary partial disability benefits from June 12, 2012 through July 7, 2012. The undersigned also determined claimaint is entitled to 6.6 weeks of permanent partial disability benefits commencing July 8, 2012. Claimant is therefore entitled to interest on the benefits ordered pursuant to Iowa Code section 85.30. No expert report was submitted computing the precise amount of interest owed on the disability benefits ordered by this decision; therefore, no precise dollar amount will be affixed by this decision on the amount of interest owed.[28]

Mr. Baccam first points to Sentry's November 2014 dispute over the total amount owed. As a result, Mr. Baccam argues that the Deputy's failure to specifically enumerate the amount owed is in violation of the Deputy's duty to "resolve the dispute."[29] He also argues that the Deputy's excuse – a lack of expert report computing the amount – should be viewed as unpersuasive, as "the computation is not rocket science."[30]

In the Appeal Decision, the Commissioner stated that it was not only unnecessary for the Deputy to specifically enumerate the amount awarded – essentially because the Deputy still had the range of the benefits period, the rate of compensation owed, and the rate of interest through citation to Iowa Code § 85.30 – but had she done so, it may have led to an inaccurate award amount. This is because, as the Commissioner stated, "[a] decision is rarely issued the day of its writing" and "given staff shortages, a decision submitted for processing may not be completed until weeks after the submission date."[31] Thus, by the time the decision is finally issued and received by the parties, there may be time unaccounted for by a specified enumeration of interest owed by the defendant-employer/insurer. Instead, the Commissioner argues, by simply and

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28 Arb. Dec., at 18.
29 *Thilges v. Snap-On Tools Corp.*, 531 N.W.2d 644 (Iowa 1995).
30 Pet. Brief, at 26 (Mr. Baccam's attorney
31 App. Dec., at 6.

clearly stating the date range for benefits owed, the rate of compensation owed, and the rate of interest, the parties should be able to adequately compute the total amount awarded themselves.

The Court agrees with the Commissioner on this point. While there was indeed an initial dispute between the parties regarding the amount owed to Mr. Baccam, that dispute mostly rested on what date benefits began to accrue, rather than the rate of benefits or interest. And, as the Commissioner pointed out in the Appeal Decision, the Deputy addressed that issue directly in her decision. The Court does not find Mr. Baccam's argument regarding enforcement concerns persuasive, precisely because the Deputy's decision was clear in the range and rates of compensation owed. If anything, Mr. Baccam's argument is self-defeating on that point, given his prior argument that the Deputy should have done the calculations given how simplistic they are to perform.

Therefore, the Court finds that neither the Deputy nor the Commissioner erred in failing to specifically enumerate the amount of permanent partial disability compensation owed to Mr. Baccam.

IV. WHETHER THE COMMISSIONER ERRED IN NOT AWARDING MR. BACCAM PENALTY BENEFITS FOR SENTRY'S ALLEGED DELAY OF PAYMENT

Mr. Baccam's third claim of error is that the Deputy and Commissioner erred in failing to award Mr. Baccam penalty benefits for Sentry's delay of payment of Mr. Baccam's permanent partial disability benefits. Under Iowa Code § 86.13, an employee is entitled to additional benefits "[i]f a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial,

delay in payment, or termination of benefits . . ."[32] The initial burden of proof is on the employee to demonstrate that such a delay occurred. If the employee meets that burden, then the burden shifts to the employer to demonstrate a "reasonable or probable cause or excuse" for the delay. In order to be considered reasonable or probable, the excuse provided must: (1) be preceded by a reasonable investigation and evaluation by the employer into whether benefits were owed to the employee; (2) the results of said investigation and evaluation must have been the actual basis for the denial or delay in payment; and (3) the employer must have contemporaneously informed the employee of the basis for the delay at the time of the delay.[33]

Ultimately, Mr. Baccam's claim here is a substantial evidence challenge to the Deputy's conclusion. In her Arbitration Decision, the Deputy found two bases for Mr. Baccam to be potentially awarded penalty benefits: the temporary partial disability benefits owed from June 12, 2012 through July 7, 2012, and the 6.6 weeks of permanent partial disability benefits owed. After analysis, the Deputy concluded that Mr. Baccam was entitled to additional penalty benefits for his temporary partial disability benefits. Additionally, she found that Mr. Baccam had met his initial burden of proof regarding penalty benefits for the permanent disability benefits.

However, she found that Sentry had met its burden of proving a reasonable excuse for the delay in payment of Mr. Baccam's permanent partial disability benefits, and thus held that Mr. Baccam was not entitled to additional penalty benefits on that basis. Specifically, the Deputy found that Sentry had conducted a reasonable investigation into whether Mr. Baccam was owed benefits by requesting an opinion from Dr. Kimelman in August 2012. The Deputy then noted that Dr. Kimelman did not issue his impairment rating for Mr. Baccam until August 9, 2013. On

32 Iowa Code § 86.13(4)(a).
33 Iowa Code § 86.13(4)(c)(1)-(3).

August 15, 2013, Sentry issued payment and provided the results of Dr. Kimelman's report as the reason for the delay. The Deputy also rejected Mr. Baccam's argument that the period between when Dr. Kimelman had first indicated permanent disability was longer than six days – specifically, Mr. Baccam had argued that Dr. Kimelman had initially opined about permanency on June 27, 2013. However, the Deputy pointed out that no impairment rating was issued until August, and that Sentry "act[ed] promptly upon receipt of the opinion, issued payment, and explained the basis for the payment."[34]

Upon intra-agency appeal, the Commissioner affirmed much of the Deputy's findings and conclusions on the issue of penalty benefits. However, the Commissioner did find that since "there was no contemporaneous communication to [Mr. Baccam] as to why there was no payment of permanent benefits until August 15, 2013 . . ." Mr. Baccam was entitled to some additional penalty benefits.[35] The Commissioner awarded Mr. Baccam a penalty benefit of 5% of the permanent benefits, "[b]ecause the primary reason for the penalty benefit is due to the lack of communication rather than a complete dereliction of duty to provide care and treatment . . ."[36]

Mr. Baccam argues that both the Deputy and the Commissioner have misapplied the law in reaching the conclusion that he is not entitled to more extensive penalty benefits, arguing that both erred in finding that Sentry conducted a reasonable investigation into whether Mr. Baccam was owed permanent disability benefits. Specifically, Mr. Baccam points to three instances prior to the August 9, 2013 impairment rating, where Dr. Kimelman indicated that Mr. Baccam suffered permanent disability. First, on September 6, 2012, Dr. Kimelman opined that Mr.

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34 Arb. Dec., at 21.
35 App. Dec., at 7.
36 *Id.*

Baccam's nerve injury "probably [would] not get better"[37] and that if his edema symptoms did not resolve within three months there would be "permanency associated with this."[38] Second, on January 31, 2013, Dr. Kimelman determined that there was "some permanency secondary to discomfort and loss of sensation" in Mr. Baccam's leg.[39] Finally, on June 27, 2013, Dr. Kimelman noted that Mr. Baccam was still experiencing discomfort and loss of sensation in his leg, and that there was "some permanency associated with this."[40] These three instances, according to Mr. Baccam, put Sentry on notice regarding the likelihood that he was owed permanent disability benefits. However, according to Mr. Baccam, Sentry failed to provide any evidence at the hearing demonstrating that the delay in payment was due to a reasonable investigation by Sentry.

Further, Mr. Baccam argues that neither the Deputy nor the Commissioner made a specific finding of fact which explained the finding that Sentry had requested any medical opinion from Dr. Kimelman regarding the extent of permanent disability, or, if assuming such a request was made, that Dr. Kimelman was responsible for the delay from June 2013 to August 2013 in providing that assessment. Accordingly, Mr. Baccam claims that the Deputy and Commissioner "utterly ignored the reason why section 86.13(4)(c) was enacted, namely to prevent defendants from being 'excused' by post hoc fabrications of excuses by employer/carriers, and from the agency making up such hypothetical 'excuses' which may or

37 Though, Dr. Kimelman opined that the nerves in Mr. Baccam's back and leg would "likely" recover.
38 Hearing Ex. 1, at 58.
39 *Id.* at 61. However, Dr. Kimelman also stated that he would assess Mr. Baccam for permanency at his follow-up appointment in June 2013. It was also at this January appointment that Dr. Kimelman informed Mr. Baccam that it would likely to take another 12 to 18 months for his injuries to fully heal. *Id.*
40 *Id.* at 63.

may not have existed, but were never proven to have been the 'actual basis' for the payment delay."[41]

For their part, Respondents largely reiterate the Deputy's findings, without further explanation or citation to the record supporting those findings.[42]

The Court is persuaded by Mr. Baccam's argument regarding the Deputy and Commissioner's failure to explain their findings, despite the evidence pointed to by Mr. Baccam. § 86.13(4) is clear in its burden-shifting once the employee has demonstrated a delay in payment. Given that the Deputy did find that Mr. Baccam had met his burden of showing a delay in the payment of permanent disability benefits, the burden shifted to Respondents to prove a reasonable excuse for the delay, under the three requirements of § 86.13(4)(c). As Mr. Baccam argues, Sentry failed to produce any evidence explaining why it did not request a permanency evaluation following any of the three examinations of Mr. Baccam conducted by Dr. Kimelman. Nor was there any indication in the record that Sentry had requested any opinions from Dr. Kimelman, which would have been evidence of a reasonable investigation by Sentry.

As a result, the Court will remand this issue to the Commissioner, requiring the Commissioner to either explain the finding that Sentry conducted a reasonable investigation and had requested the opinions of Dr. Kimelman, or reevaluate Mr. Baccam's award for penalty benefits on his permanent partial disability benefits.

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41 Pet. Brief, at 31.
42 Resp. Brief, at 9-11.

V. WHETHER THE COMMISSIONER ERRED IN NOT TAXING SENTRY WITH THE COSTS OF THE HEARING TRANSCRIPT

Mr. Baccam's final claim of error is that the Commissioner erred in not taxing Sentry with the costs of transcribing the November 17, 2014 hearing. Under Iowa Administrative Code Rule 876-4.33(86), the Commissioner is authorized to tax the costs of transcriptions "when appropriate."[43] Mr. Baccam argues that this language is unconstitutionally vague, as it gives no indication to workers' compensation claimants that if the agency does not request a transcript, the costs cannot be taxed. The Court is unpersuaded by this claim, given the case law which makes it clear that the Iowa courts have long considered the "appropriate taxation of costs [as] a matter specifically delegated by the legislature to the discretion of the agency."[44]

Alternatively, Mr. Baccam also argues that the Deputy should have adhered to a "success of the party on the issues" standard in determining whether taxation of the transcript costs was "appropriate." To support his argument, Mr. Baccam cites *Robbennolt v. Snap-On Tools Corp.*, in which the Iowa Supreme Court noted that, in its abuse of discretion review of agency taxation decisions, the Court "consider[s] the success of the applicant on the issues raised on appeal as shown by the record."[45] Under this standard, Mr. Baccam argues that, due to his partial success on a number of the issues presented to the Deputy, as well as Sentry's respective lack of success, it was "appropriate" to tax the transcription costs to Sentry.

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43 Iowa Admin. Code r. 876-4.33(86).

44*JBS Swift & Co. v. Contreras*, 840 N.W.2d 726, 2013 WL 5498154, at *11 (Iowa Ct. App. October 2, 2013) (quoting *John Deere Dubuque Works v. Caven*, 804 N.W.2d 297, 300 (Iowa Ct. App. 2011) (internal quotation marks omitted); *see also Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 261 (Iowa 1996) ("Such an allocation of costs clearly falls within the realm of the commissioner's discretion.)"; Iowa Code § 86.40 ("All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.").

45 555 N.W.2d 229, 238 (Iowa 1996)

However, nothing about *Robbennolt* indicates that the Supreme Court considers success of the parties to be dispositive to the issue of costs. Rather, it is a guidepost for determining whether the agency has abused its discretion in its costs assessments. Further, it appears that the Deputy and Commissioner did consider the success of the parties, given that both taxed Sentry with virtually the entire cost of the proceedings aside from the transcription costs.[46] Additionally, the Court does not find that the Deputy or Commissioner abused their discretion in failing to tax Sentry with the costs of a transcript which Mr. Baccam was not required to request at the time. Finally, given that Mr. Baccam would have had to pay for the costs of a transcript initially for his intra-agency appeal,[47] it was not an abuse of discretion for the Commissioner to not reassess the transcription costs to Sentry following appeal.

Therefore, the Court does not find that the Deputy or Commissioner abused their discretion in failing to tax Sentry with the costs of transcribing the November 17, 2014 hearing.

ORDER

IT IS THEREFORE ORDERED that Petitioner's Petition for Judicial Review should be, and is hereby, GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED, the Appeal Decision of the Iowa Workers' Compensation Commissioner should be and is hereby AFFIRMED in part, and REMANDED in part, in accordance with the previously stated conclusions of this Court. Costs assessed three-fourths to Petitioner and one-fourth to Respondents.

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46 Arb. Dec., at 22; App. Dec., at 8.
47 Iowa Admin. Code r. 876-4.30(86,17A) ("The appealing party shall bear the initial cost of transcription on appeal . . .").

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV055235	MEK BACCAM VS ACH FOOD COMPANIES AKA TONES

So Ordered

Paul R. Huscher, District Court Judge,
Fifth Judicial District of Iowa