IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BAJRO RIZVIC, Petitioner, vs. TITAN TIRE CORPORATION AND ZURICH AMERICAN INSURANCE COMPANY, Respondents.	)	Case No. CVCV060110 **ORDER ON JUDICIAL REVIEW**

Telephonic oral argument on Petitioner's (Mr. Rizvic) Petition for Judicial Review (the Petition) was held on June 18, 2020. Appearing for Mr. Rizvic was attorney Nicholas Shaull. Appearing for Respondents (together, Titan Tire) was attorney Joni Ploeger. Oral argument was not reported.

Upon review of the certified agency record and the court file, and after considering the respective arguments of counsel, the court enters the following Order.

INTRODUCTION

This judicial review proceeding arises from a workers' compensation agency proceeding. Mr. Rizvic sustained an electrocution injury at work on August 24, 2016. As a result of the work injury, Mr. Rizvic alleged he developed a pain syndrome and was permanently and totally disabled. After an arbitration hearing, a Deputy Workers' Compensation Commissioner (the Deputy) awarded Mr. Rizvic permanent and total disability benefits for the pain syndrome. This award was reversed by the Workers' Compensation Commissioner (the Commissioner) on intra-agency appeal. On judicial review, Mr. Rizvic argues the Commissioner's appeal decision should be reversed, the initial permanent and total disability award should be reinstated, alternate medical care

should be awarded, and costs regarding the agency proceedings should be assessed to Respondents.

BACKGROUND PROCEEDINGS

In the agency proceeding Mr. Rizvic alleged an injury to his neck, upper extremities, lower extremities, nervous system, and body as a whole as a result of the electrocution injury noted above. Titan Tire filed an answer admitting the work injury but denying its nature and extent.[1] An arbitration hearing was held on April 12, 2018, before the Deputy. (Arb. Dec. p. 1).

The Deputy issued an Arbitration Decision on May 31, 2019, finding the work injury caused Mr. Rizvic to develop a pain syndrome. (Arb. Dec. pp. 1, 12). The Deputy further found Mr. Rizvic was permanently and totally disabled due to his work injury. (Arb. Dec. pp. 12-13). Finally, the Deputy awarded alternate medical care, allowed Dr. Barazanji to direct further medical care, and granted reimbursement for certain medical expenses. (Arb. Dec. pp. 13-14). Titan Tire timely filed a Notice of Appeal with the Commissioner. (06/04/19 Notice of Appeal).

In his Appeal Decision filed April 14, 2020, the Commissioner performed the required de novo review of the record and ultimately reversed the Deputy's decision. (App. Dec. p. 2). He concluded Mr. Rizvic was not credible, his alleged pain syndrome was not causally related to the work injury, the work injury did not cause a permanent disability, an award for alternate medical care was moot, and Mr. Rizvic's request for reimbursement of medical expenses related to his work related condition could not be

[1] The certified agency record does not appear to contain a Petition nor an Answer from the agency proceedings.

awarded due to insufficient evidence of a causal connection between the expenses and Mr. Rizvic's work injury. (Ex. 7; App. Dec. pp. 4-5).

Mr. Rizvic filed the instant Petition on April 23, 2020, and Titan Tire filed an Answer on April 28, 2020.[2] (04/23/20 JR Petition; 04/28/20 JR Answer). As noted above, oral argument occurred on June 18, 2020.

BACKGROUND FACTS

On August 24, 2016, Mr. Rizvic was electrocuted while changing a tire roll at work. (App. Dec. p. 1; Arb. Dec. p. 3; Tr. pp. 34-36). Mr. Rizvic was taken to the emergency room at Mercy Medical Center for treatment. (Arb. Dec. p. 3; Ex. JE2 p. 3). He complained of muscle pain, electrical burns, and feeling jittery. (Arb. Dec. p. 3; Ex. JE2 p. 3). His examination was normal, but he was kept overnight for observation. (Arb. Dec. p. 3; Ex. JE2 pp. 5, 7). The next day, his exams were again normal, he had a normal EKG, and he had no obvious signs of a burn injury other than black markings on his palms. (Ex. JE2 pp. 8-10). On August 26, 2016, Mr. Rizvic denied pain and had decreased numbness and tingling in his upper extremities. (Ex. JE2 p.12). Upon examination, he had full range of motion, sensation, and normal strength in his upper extremities. (Ex. JE2 pp. 12-13). He was discharged that date. (Arb. Dec. p. 3; Ex. JE2 pp. 15-16).

Mr. Rizvic followed up with Dr. Judith Nayeri on August 30, 2016. (Arb. Dec. p. 3; Ex. JE3 p. 18). Upon examination, she noted Mr. Rizvic had full range of motion in

[2] In the Petition, Mr. Rizvic asserts error under ten of the bases found in Iowa Code section 17A.19(10). The court only considers the bases argued in Mr. Rizvic's judicial review brief and at oral argument in light of the substantial evidence contained in the agency record establishing the Commissioner's threshold conclusion that Mr. Rizvic was not credible.

the neck and slightly limited range of motion in the shoulders at the extreme ranges. (Ex. JE3 p. 18). She also noted Mr. Rizvic's burn marks had disappeared and his skin was a normal color. (Ex. JE3 p. 18). Dr. Nayeri thought the numbness and weakness would take a little time to resolve, but saw nothing seriously wrong with him. (Arb. Dec. p. 4; Ex. JE3 pp. 18-19). She referred Mr. Rizvic for physical therapy and recommended medication. (Arb. Dec. p. 4; Ex. JE3 p. 19).

Dr. Richard McCaughey evaluated Mr. Rizvic on September 20, 2016. (Ex. JE3 p. 21). Mr. Rizvic complained of tightness and tenderness in his arms, neck, back, and legs. (Arb. Dec. p. 4; Ex. JE3 p. 21). However, Dr. McCaughey noted Mr. Rizvic could get up and down from the chair and table without difficulty and his neck and back exams were unremarkable. (Ex. JE3 p. 21). No abnormalities were seen in the upper extremities and Dr. McCaughey noted inconsistent effort on exam. (Arb. Dec. p. 4; Ex. JE3 p. 21). Dr. McCaughey diagnosed possible myalgias from muscle contraction, but he thought the symptoms should resolve in time. (Ex. JE3 p. 22).

Mr. Rizvic began physical therapy on or about September 2, 2016. (Arb. Dec. p. 4; Ex. JE4 p. 24). Throughout his treatment, the physical therapist noted at different times that Mr. Rizvic exhibited greater range of motion under distraction-based testing as well as self-limited movements. (Ex. JE4 pp. 25, 27-30, 32, 33). Mr. Rizvic's symptoms were also inconsistent from day to day and were wide-ranging. (Ex. JE4 pp. 37, 41). His physical therapy was discontinued on November 22, 2016, due to a plateau in his progress and his ability to perform all job activities without restrictions. The physical therapist thought Mr. Rizvic had reached maximum improvement (MMI) on November 2, 2016. (Ex. JE5 pp. 39, 55).

Mr. Rizvic started treating with Dr. Kurt Smith on October 18, 2016. (Ex. JE5 p. 44). He complained of weakness and pain in his upper extremities, neck, back, and legs. (Ex. JE5 p. 44). Upon examination. Dr. Smith found Mr. Rizvic had normal strength in his upper extremities, but he had decreased range of motion in the neck and lumbar spine. (Ex. JE5, pp. 44, 46). Dr. Smith diagnosed myalgia, neuralgia, and nonfatal effects of electrical current. (Arb. Dec. p. 4; Ex. JE5 pp. 44-46).

As indicated during follow up appointments, Dr. Smith treated Mr. Rizvic conservatively with physical therapy, medications, work restrictions, and trigger point injections. Mr. Rizvic had modest relief despite an essentially normal exam on November 22, 2016. (Arb. Dec. p. 4; Ex. JE5 pp. 46, 49, 53, 55, 59). Dr. Smith ordered an MRI of the cervical spine, which was conducted in December 2016. (Ex. JE5 pp. 60, 63).

The MRI showed age-indeterminate cervical spondylosis changes, most advanced at C5-6. (Arb. Dec. p. 4; Ex. JE5 p. 63; Ex. JE7 p. 104). Dr. Smith assessed neck pain and disc herniation at C5-6 and Dr. Richard Holt performed a cervical epidural steroid injection on December 15, 2016. (Ex. JE5 p. 65). However, upon follow up with Dr. Smith on January 11, 2017, Mr. Rizvic reported very little relief from the injection. (Arb. Dec. p. 4; Ex. JE5 pp. 63, 65-66). An x-ray of Mr. Rizvic's left shoulder showed no structural abnormalities. (Ex. JE5 p. 68). On February 1, 2017, Dr. Smith noted Mr. Rizvic was not taking his medications as prescribed (by not filling them) and that he had inconsistencies on examination. (App. Dec. p. 2; Ex. JE5 pp. 71-72).

An EMG of Mr. Rizvic's left upper extremity on February 17, 2017, showed C8 radiculopathy and median neuropathy at the wrist. (Arb. Dec. p. 5; Ex. JE5 p. 75). The results did not correlate with the MRI results. (App. Dec. p. 2; Arb. Dec. p. 5; Ex. JE5 p.

78). Dr. Smith referred Mr. Rizvic to Dr. Trevor Schmitz for a cervical spine surgical consultation. (App. Dec. p. 2; Arb. Dec. p. 5; Ex. JE p. 78). On March 1, 2017, Mr. Rizvic was examined by Dr. Schmitz, who had reviewed the imaging and testing and had concluded that the results did not explain Mr. Rizvic's subjective reports of left arm numbness. (App. Dec. p. 3; Arb. Dec. p. 5; Ex. JE5 pp. 80, 82). Dr. Schmitz felt there was a nonanatomic source for Mr. Rizvic's pain and he noted symptom magnification by Mr. Rizvic. (App. Dec. p. 3; Arb. Dec. p. 5; Ex. JE5 pp. 82, 84-85). Dr. Schmitz opined that Mr. Rizvic did not require surgery. (App. Dec. p. 3; Arb. Dec. p. 5; Ex. JE5 pp. 82, 84-85).

Upon follow up with Dr. Smith on March 21, 2017, Mr. Rizvic continued to report diffuse nonspecific pain and weakness. (App. Dec. p. 3; Ex. JE5 p. 86). Dr. Smith noted inconsistencies in the examination where Mr. Rizvic's subjective complaints were not supported by objective findings. (App. Dec. p. 3; Ex. JE5 p. 86). Dr. Smith was again concerned that Mr. Rizvic was not following his medication regimen. (Arb. Dec. p. 5; Ex. JE5 p. 86). Because Mr. Rizvic did not respond to a lengthy course of conservative treatment, was noncompliant with the medication regimen, and was not a surgical candidate, Dr. Smith placed Mr. Rizvic at MMI and ordered a functional capacity evaluation (FCE). (App. Dec. p. 3; Ex. JE5 pp. 85-86).

An FCE was performed on April 4, 2017, which showed Mr. Rizvic could work in the light duty category. (Arb. Dec. p. 6; JE9 p. 127). Dr. Smith reviewed the FCE but determined Mr. Rizvic could perform more from a physical standpoint, as indicated by the self-limiting behaviors on examination and symptom magnification. (App. Dec. p. 3; Arb. Dec. p. 6; Ex. JE5 pp. 90-91). Dr. Smith assessed 0% permanent impairment and

gave Mr. Rizvic temporary restrictions of lifting no more than 30 pounds, occasional walking, and frequent sitting. (App. Dec. p. 5; Arb. Dec. p. 7; Ex. JE5, pp. 93-94).

Titan Tire contacted Mr. Rizvic on March 2, 2017, and again on March 9, 2017, with an offer to return to work. (Arb. Dec. pp. 5-6; Ex. 1 p. 9). Mr. Rizvic did not respond to Titan Tire about this offer. (Arb. Dec. pp. 5-6; Ex. 1 p. 9).

After being placed at MMI, Mr. Rizvic followed up with primary care provider Dr. Majed Barazanji on April 19, 2017, for neck stiffness and headaches. (Arb. Dec. p. 7; Ex. JE8 p. 116). Upon examination that day and through June 13, 2017, Mr. Rizvic's neck was normal. (Ex. JE8 pp. 117, 119, 124). He was referred for another surgical consultation. (App. Dec. p. 3; Arb. Dec. p. 7; Ex. JE5 p. 119). Physician's assistant (PA-C) Amber Buyck examined Mr. Rizvic on May 19, 2017, and agreed that he was not a surgical candidate. (Arb. Dec. p. 7; Ex. JE11 pp. 129-130). In making this determination, she noted Mr. Rizvic's symptoms did not match his radiographic findings and exam. (App. Dec. p. 3; Ex. JE11 p. 130).

Mr. Rizvic was next examined by Dr. Amy Lynch on May 26, 2017, for a physiatry opinion. (Arb. Dec. p. 7; Ex. JE12 p. 134). While Mr. Rizvic demonstrated trembling with grip strength, Dr. Lynch questioned whether this was volitional. (Ex. JE12 p. 135). She assessed Mr. Rizvic with neck pain and numbness and tingling in both hands. (Ex. JE12 p. 135). Dr. Lynch wanted to see the prior medical records and an EMG of the right upper extremity. (Ex. JE12 p. 135).

Mr. Rizvic was then examined by Dr. Steven Adelman on June 26, 2017, for a neurology consult. (App. Dec. p. 3; Arb. Dec. p. 7; Ex. JE13 p. 137). Mr. Rizvic continued to report a multitude of symptoms, including neck pain, weakness, loss of strength, and headaches. (Ex. JE13 p. 137). Upon examination, Mr. Rizvic had cervical dystonia with

side bending to the right and altered sensation through his body. (Ex. JE13 p. 139). Dr. Adelman assessed sensory loss, cervical dystonia, muscle tension headache and recommended Botox injections. (Arb. Dec. p. 8; Ex. JE13 p. 139). Dr. Adelman did not have a good explanation for Mr. Rizvic's symptoms. (App. Dec. p. 3; JE13 p. 139). Mr. Rizvic had the Botox injections on August 22, 2017. They did not work, so Dr. Adelman suggested that Mr. Rizvic follow up with his primary care provider since Dr. Adelman had nothing further to offer him. (Arb. Dec. p. 8; Ex. JE13 pp. 143, 147, 149).

Dr. William Boulden examined Mr. Rizvic on March 29, 2018, at the request of Titan Tire. (Arb. Dec. p. 8, Ex. G p. 25). Mr. Rizvic complained of left-sided neck pain, shoulder pain, and paresthesias in the left arm, both legs, and both hands. (Ex. G p. 25). Upon examination, Mr. Rizvic had give-way weakness in the legs, inconsistency with toe and heel walk, and refused to test neck range of motion. (Ex. G p. 29). Muscle testing of his upper extremities increased the left neck pain and shoulder pain, which is inconsistent. (Ex. G p. 30). Mr. Rizvic could not apply pressure for grip strength testing during the exam, but he was later able to shake Dr. Boulden's hand when he left the examination. (Ex. G p. 30). Dr. Boulden diagnosed myofascial-type neck pain and noted significant nonpathological symptoms. (Arb. Dec. p. 8; Ex. 6 p. 30). He opined that Mr. Rizvic suffered no permanent impairment and did not have any permanent restrictions. (Arb. Dec. p. 8; Ex. G pp. 30-31). He did not recommend any additional medical treatment. (Arb. Dec. p. 8; Ex. G p. 30).

Dr. Irving Wolfe examined Mr. Rizvic on January 11, 2018, at his attorney's request. (Arb. Dec. p. 8; Ex. 6 p. 1). Mr. Rizvic reported having pain throughout his body, numbness and weakness in his hands and feet, neck stiffness, and headaches. (Ex. 6, p. 14). Upon examination, he had slightly decreased motor strength on the left and

diminished pin sensation to the extremities. (Ex. 6 p. 18). He also had head side bending to the right and tight bilateral cervical paraspinal muscles. (Ex. 6 p. 18). Dr. Wolfe diagnosed diffuse electrical injury. (Arb. Dec. p. 8; Ex. 6 p. 20). He assessed 30% to 49% permanent impairment. (Arb. Dec. p. 8; Ex. 6 p. 22). Dr. Wolfe adopted the FCE restrictions as permanent. (Arb. Dec. p. 8; Ex. 6 p. 24).

STANDARD OF REVIEW

On judicial review of agency action, the district court functions in an appellate capacity. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). Nearly all administrative law disputes, including workers' compensation disagreements, are won or lost at the agency level. *Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 412 N.W.2d 600, 604 (Iowa 1987).

The court reviews decisions of the Commissioner according to the Iowa Administrative Procedures Act (APA), Iowa Code chapter 17A (2013). *Swiss Colony, Inc. v. Deutmeyer*, 789 N.w.2d 129, 133 (Iowa 2010). Under the APA, the court's standard of review varies depending on the type of alleged error committed by the Commissioner. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). If the error is one of fact, the court must determine whether the Commissioner's findings are supported by substantial evidence. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006); Iowa Code § 17A.19(10)(*f*). If the error is one of interpretation of law, the court determines whether the Commissioner's interpretation is erroneous and substitutes its judgment for that of the Commissioner. *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(*c*). If the error is based on the Commissioner's application of law to facts, the court determines whether the Commissioner's decision is "[b]ased upon an irrational, illogical, or wholly

unjustifiable application of law to fact." *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(*m*).

Factual determinations are clearly vested within the Commissioner's discretion. The court therefore must give appropriate deference to the view of the agency regarding these determinations. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004); Iowa Code §§ 17A.19(10)(*f*), (11)(*c*). The ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991) (citations omitted).

Generally, the agency is not delegated special powers to interpret the law, so the court need not give the Commissioner deference regarding his interpretations of the law. *Mycogen*, 686 N.W.2d at 464; Iowa Code §§ 17A.19(10)(*c*), (11)(*b*). Applying the law to the facts in the case is vested within the Commissioner's discretion and the court should give appropriate deference to the view of the agency regarding this application. *Mycogen*, 686 N.W.2d at 465; Iowa Code §§ 17A.19(10)(*f*), (*m*), (11)(*c*).

ANALYSIS

A. <u>Substantial Evidence – Lack of Petitioner Credibility</u>. The overarching determination in this matter is whether Mr. Rizvic is credible. In reversing the Deputy's decision, the Commissioner concluded Mr. Rizvic was not. Mr. Rizvic argues the Commissioner's reversal of the Deputy's credibility determination is inconsistent with agency precedent given the general historical deference given to Deputy decisions. On intra-agency appeal, the Commissioner reviews the issues presented de novo. Iowa Admin. Code r. 876-4.28(7). The scope of the issue is viewed broadly and de novo review includes reconsideration of all alternatives that were

available to the Deputy. *Id.* With regard to credibility determinations, it is the Commissioner's duty to weigh the evidence and make a determination in that regard. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 420 (Iowa 2001) ("The commissioner as trier of fact has the duty to determine the credibility of the witnesses."). On judicial review, substantial evidence remains the appropriate standard of review for credibility determinations. *Id.*

Mr. Rizvic argues against the well-recognized rule that the agency's decision is final if it is supported by substantial evidence. *Robbennolt v. Snap-on Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996) (citation omitted). The court must not reassess the weight of the evidence because the weight of the evidence remains within the agency's exclusive domain. *Id.* The ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Reed*, 478 N.W.2d at 846 (citations omitted).

Although Mr. Rizvic is correct that deputies are afforded deference in their credibility determinations, complete or absolute deference is not accorded to them under the de novo standard of review. As the case cited by Mr. Rizvic recognizes, if there are enough discrepancies in the record relating to credibility, a reversal by the Commissioner could be justified. *Cortez v. Tyson Fresh Meats, Inc.*, File No. 5044716, 2015 WL 9419947, *1 (Iowa Workers' Comp. Comm'n) (noting some inconsistencies in the record were insufficient to reverse the deputy's credibility findings). Prior agency decisions have indicated that credibility assessments based upon demeanor interpretations are not persuasive without evidence as to the basis of such finding. *Davis v. KPR/Tyson*, File No. 5036477, 2013 WL 604203, *2 (Iowa Workers' Comp. Comm'n) ("Credibility of a claimant's testimony or the testimony of another witness is best done

by examining the whole record and comparing the testimony provided at hearing with material facts in the record as a whole.").

In *Davis*, the Commissioner reversed the deputy's credibility finding when looking at the whole record. *Id.* at *2-3. In *Budd v. Trinity Health Corporation*, the Commissioner entered a similar reversal, specifically noting credibility determinations made by the examining and treating physicians via their records. *Budd v. Trinity Health Corp.*, File No. 5034991, 2013 WL 2450187, *1-2 (Iowa Workers' Comp. Comm'n).

The Commissioner acknowledged this deference regarding a claimant's credibility by saying "I generally give considerable deference to the findings, expressly or impliedly made, by the deputy commissioner who presided at the arbitration hearing." (App. Dec. p. 4). He correctly performed a de novo review to assess whether to reverse or modify any finding of fact (or conclusion of law) if a preponderance of the evidence would support such a determination. Iowa Code § 17A.15; Iowa Admin. Code r. 876-4.28(7). To simply affirm credibility determinations because that is what is often done, as argued by Mr. Rizvic, would render the Commissioner's duty to conduct a de novo review useless.

1. Treating provider observations and conclusions. Mr. Rizvic argues the inconsistencies by him and noted by the medical providers were perceived. (Petitioner Brief p. 32). In making his credibility determination, the Commissioner summarized multiple occasions in the medical records where Mr. Rizvic's credibility was questioned by the medical providers, including symptom magnification, inconsistent symptoms, and lack of objective evidence. (App. Dec. pp. 2-3). The exhibits indicate Mr. Rizvic has treated with, or been examined by, at least thirteen medical providers after his initial emergency room treatment (Dr. Nayeri, Dr. McCaughey, Mr. Timm (PT), Dr.

Smith, Dr. Schmitz, Karen Speicher (OTRL), PA-C Ms. Buyck, Dr. Lynch, Dr. Adelman, Dr. Andersen, Dr. Barazanji, Dr. Boulden, and Dr. Wolfe). Nine of those medical providers, including all but one of those Mr. Rizvic chose on his own, noted symptom magnification and/or inconsistencies between Mr. Rizvic's subjective complaints and their objective findings. Their relevant findings and conclusions are as follows:

a. Dr. Nayeri (authorized treating physician). On August 30, 2016, Mr. Rizvic reported to Dr. Nayeri ten to eleven places on his body where he had reduced strength, general weakness, clicking in his elbows, chest pain, leg numbness/tingling, general body tightness, pain on the right side of his head, decreased range of motion in his neck, and whole body popping and crunching. (Ex. JE3 p. 18). However, his examination showed normal range of motion in the neck, slightly limited range of motion in the shoulders, no burns anywhere on his body, normal sensation in the extremities, negative straight leg rise, and normal straight line and heel to toe walking. Dr. Nayeri ultimately opined that there was nothing seriously wrong with Mr. Rizvic. (Ex. JE3 pp. 18-19).

b. Dr. McCaughey (authorized treating physician). On September 20, 2016, Mr. Rizvic complained to Dr. McCaughey of tightness, tenderness and weakness in his arms, neck, back, and legs. (Ex. JE3 p. 21). Upon examination, Dr. McCaughey noted Mr. Rizvic was normal and he noted inconsistent effort by Mr. Rizvic throughout the exam. Dr. McCaughey found Mr. Rizvic had no serious abnormalities. (App. Dec. p. 2; Ex. JE3 pp. 21-22).

c. Physical Therapist Aaron Timm (authorized treating provider). Mr. Timm made numerous, consistent observations about Mr. Rizvic's presentation. On September 2, 2016, Mr. Timm noted Mr. Rizvic could perform greater range of motion

under distraction-based testing by a significant amount. (Ex. JE4 pp. 24-25). When Mr. Rizvic's cervical range of motion was tested, he demonstrated 10 degrees. However, with distraction-based testing, he demonstrated 70 degrees. (Ex. JE4 pp. 24-25). He also demonstrated cog wheeling. (Ex. JE4 p. 24).

On September 6, 2016, September 9, 2016, September 14, 2016, September 27, 2016, September 28, 2016, October 6, 2016, October 12, 2016, October 31, 2016, November 2, 2016, November 17, 2016, and November 21, 2016, Mr. Timm again noted greater range of motion by Mr. Rizvic with distraction-based testing, self-limiting behavior, and cog wheeling. (Ex. JE4 pp. 27-36, 38, 40, 43). On October 31, 2016, Mr. Timm noted Mr. Rizvic's symptoms were inconsistent day to day, also demonstrating suspicious weakness with grip strength testing and cog wheeling with lower extremity testing. (Ex. JE4 p. 37).

On November 17, 2016, Mr. Timm stated "[i]t is very difficult to provide consistent and appropriate treatment due to multitude of symptoms reported during each treatment. These at times do not coincide with treatments provided, activities performed or have physiological correlation." (Ex. JE4 p. 41).

d. Dr. Smith (authorized treating physician). Dr. Smith also made numerous observations about Mr. Rizvic's presentation. On January 11, 2017, Dr. Smith noted signs consistent with symptom magnification as well as a give-way response by Mr. Rizvic to strength testing. (App. Dec. p. 2; Ex. JE5 pp. 67-68). Give-way occurs when a patient with normal strength engages in "letting go" of a muscle in an effort to demonstrate pain or weakness that is not present. (App. Dec. p. 3; Ex. JE5 p. 84). On February 1, 2017, Dr. Smith again noted Mr. Rizvic demonstrated inconsistencies upon examination, as corroborated by the physical therapy notes. (Ex. JE5 pp. 71-72). Dr.

Smith also noted Mr. Rizvic was not filling his medications as prescribed. (App. Dec. p. 2; Ex. JE5 pp. 71-72). On February 17, 2017, and March 21, 2017, Dr. Smith noted the EMG evaluation did not correlate with the cervical MRI findings and Mr. Rizvic continued to have the noted inconsistencies upon examination. (App. Dec. p. 2; Ex. JE5 pp. 77-78, 86).

On March 21, 2017, Dr. Smith also found positive giveaway strength testing upon examination and noted Mr. Rizvic complained of diffuse and nonspecific pain and weakness. (App. Dec. p. 3; Ex. JE5 p. 86). Dr. Smith reiterated his concern that Mr. Rizvic was not following his medication regimen. (Ex. JE5 p. 86). On April 12, 2017, after reviewing the FCE, Dr. Smith determined Mr. Rizvic could perform more from a physical standpoint than what was documented given the numerous inconsistences with strength testing as well as range of motion, with objective findings not supportive of Mr. Rizvic's described subjective symptoms. Dr. Smith again noted symptom magnification. (App. Dec. p. 3; Ex. JE5 pp. 91, 94).

e. Dr. Schmitz (authorized treating physician). Like Dr. Smith, Dr. Schmitz noted Mr. Rizvic had significant give-way pain. (App. Dec. p. 3; compare Ex. JE5, pp. 71, 86 - 81). He also noted pain magnification with positive axial compression testing. (App. Dec. p. 3; Ex. JE5 pp. 81-82). The axial compression test involves pressing down on the patient's head. No pain should be felt. However, Mr. Rizvic indicated spinal pain. (App. Dec. p. 3; Ex. JE5 p. 84).

Dr. Schmitz did not find any objective testing consistent with Mr. Rizvic's subjective complaints. (App. Dec. p. 3; Ex. JE5 p. 84). He found Mr. Rizvic's complaints were not credible based upon the objective tests and evidence of symptom magnification. (App. Dec. p. 3; Ex. JE5 pp. 82, 84).

f. PA-C Buyck (Mr. Rizvic's chosen physician). On May 19, 2017, Ms. Buyck noted Mr. Rizvic's symptoms did not match his radiographic findings. (Ex. JE11 pp. 129-30). Upon examination, she noted Mr. Rizvic was self-limiting in his cervical range of motion. (App. Dec. p. 3; Ex. JE11 p. 129-30).

g. Dr. Lynch (Mr. Rizvic's chosen physician). On May 26, 2017, Dr. Lynch noted Mr. Rizvic had trembling with grip strength testing but she questioned whether this was volitional or not. (Ex. JE12, p. 135).

h. Dr. Adelman (Mr. Rizvic's chosen physician). On June 26, 2017, Dr. Adelman noted some embellishment of symptoms by Mr. Rizvic and his variety of symptoms, for which he had no good explanation. (Arb. Dec. p. 8; Ex. JE13 p. 139). On follow up on August 22, 2017, Dr. Adelman again noted a variety of perhaps unusual and functional complaints by Mr. Rizvic that were fairly nonspecific. (Ex. JE13 pp. 142, 144).

i. Dr. Boulden (Respondents' expert). Dr. Boulden noted inconsistencies upon examination of Mr. Rizvic. For example, Mr. Rizvic had give-way weakness in the legs, inconsistency with toe and heel walk, and refusal to test neck range of motion. (Ex. G p. 29). Muscle testing of the upper extremities increased the left neck pain and shoulder pain, which is inconsistent. (Ex. G p. 30). It was noted that when Mr. Rizvic was asked to grip Dr. Boulden's fingers bilaterally, he did not apply pressure, but when he shook Dr. Boulden's hand at the end of the examination, he shook his hand normally. (Ex. G p. 30).

j. Dr. Wolfe and the FCE PT. The only treatment providers post-emergency room who found Mr. Rizvic credible were Dr. Wolfe and the FCE physical therapist. Dr. Wolfe only examined Mr. Rizvic on one occasion and was hired by his attorney. He specifically found Mr. Rizvic did not display any unusual pain behaviors.

(Ex. 6 pp. 17-18). However, he contrarily noted sensory testing did not follow any particular radicular or peripheral nerve distribution. (Ex. 6 pp. 17-18). He also agreed that Mr. Rizvic's cervical MRI and EMG/NCS did not explain his symptomatology. (Ex. 6 p. 24).

Although the FCE was valid, Dr. Smith specifically disputed the findings and said Mr. Rizvic continued to demonstrate inconsistencies in examination and symptom magnification. (App. Dec. pp. 2-3; Ex. JE5 p. 91). Although the FCE physical therapist noted limited cervical range of motion on April 4, 2017, no less than three other providers contrarily noted either normal neck examinations or greater range of motion on exam around this time. (Compare Ex. JE9 p. 127 and Ex. JE10 p. 128 (showing a maximum of 10 degrees range of motion in the neck during the FCE) to Ex. JE8 pp. 106, 109, 112, 117, 119, 124 (finding no neck abnormalities on exam) and Ex. JE4 pp. 25, 28, 30, 32, 33 (showing 70 degrees range of motion in the neck with distraction based testing) and Ex. JE11 p. 129 (finding self-limiting cervical range of motion on exam)).

k. Dr. Barazanji. (Mr. Rizvic's primary care physician). Dr. Barazanji made no credibility findings. However, his notes from February 15, 2017, through May 8, 2017, show Mr. Rizvic had normal neck and upper extremity examinations. (Ex. JE8 pp. 106, 109, 112, 117, 119, 124). This was clearly inconsistent with Mr. Rizvic's subjective symptom reports.

l. Dr. Andersen. Although Mr. Rizvic also treated with Dr. Andersen after the work injury, this was primarily for blood pressure issues. No assessments/diagnoses were made relating to the work injury. (Ex. JE6 pp. 96, 98, 100, 102).

The Commissioner correctly noted Dr. Wolfe's report and the FCE were the outliers regarding Mr. Rizvic's credibility when compared to the other evidence. (App.

Dec. p. 4). Dr. Wolfe failed to adequately address the inconsistencies and findings of symptom magnification by the other physicians in his IME report, as summarized above. (App. Dec. pp. 2-3). Dr. Wolfe instead simply lumped Mr. Rizvic in with individuals contained in his review of the medical literature and he assumed Mr. Rizvic's symptoms were credible. (App. Dec. p. 3).

When this record is reviewed as a whole—as the Commissioner is required to do--reversal of the Deputy's arbitration decision by the Commissioner is supported by substantial evidence. The majority of medical experts who treated Mr. Rizvic consistently found Mr. Rizvic was not credible due to symptom magnification, inconsistencies upon examination, and a lack of objective findings. The Deputy observed Mr. Rizvic's exaggerated behavior at hearing and found it possible Mr. Rizvic was engaging in symptom magnification. (Arb. Dec. pp. 2, 10).

The Commissioner noted the Deputy's finding of fairly dramatic mannerisms by Mr. Rizvic at the hearing and acknowledgement that multiple medical reports from various providers asserting that Mr. Rizvic's complaints were inconsistent, magnified or otherwise not credible was more consistent with an ultimate finding/conclusion of a lack of credibility. (App. Dec. p. 4; Arb. Dec., pp. 2, 8, 10). Upon his de novo review of the record, all of these observations reasonably led to the Commissioner's reversal of the Deputy's credibility determination.

2. Deputy observations and conclusions. In his decision, the Deputy found Mr. Rizvic was fairly dramatic in his mannerisms (facial grimacing, stretching, flexing of fingers, etc.). (Arb. Dec. p. 2). He stated "from observing Mr. Rizvic live at hearing, it is also noted that he does exhibit pain behaviors, meaning he is dramatic and demonstrative in his exhibition of his pain." (Arb. Dec. p. 10). In fact, the Deputy felt it

was possible that Mr. Rizvic displayed symptom magnification. (Arb. Dec. p. 10). Despite this, he found Mr. Rizvic was generally credible. (Arb. Dec. p. 2). On intra-agency appeal, the Commissioner noted the Deputy's finding of dramatic mannerisms at hearing and acknowledgement that multiple medical reports from various providers asserting that claimant's complaints were inconsistent, magnified or otherwise not credible was more consistent with an ultimate conclusion of a lack of credibility. (App. Dec. p. 4; Arb. Dec. pp. 2, 8, 10).

Mr. Rizvic implies the Commissioner incorrectly construed the Deputy's noted dramatic nature of Mr. Rizvic's mannerisms against Mr. Rizvic. As cited above, the Deputy found Mr. Rizvic exhibited pain behaviors, meaning he was dramatic and demonstrative in his exhibition of his pain. Pain behaviors are defined by the AMA Guides as the verbal or nonverbal ways that individuals communicate their pain. AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 579 (Linda Cocchiarella & Gunnaer B.J. Andersson eds., 5th ed. 2000). This includes instances where individuals may exaggerate their behaviors to signal pain and distress with the intent to achieve some desired response from those who observe the behaviors. Exaggerated, discordant pain behaviors tend to cast doubt upon the validity of the information that people provide regarding their medical condition. *Id*. When the pain behaviors were described by the Deputy as dramatic, the Commissioner could reasonably conclude this meant Mr. Rizvic was exaggerating his symptoms to the Deputy, just as he did upon examination by most of his medical providers as well.

Further, Mr. Rizvic's hearing testimony was not credible as seen through the following examples of Mr. Rizvic dramatization and magnification of the work injury.

Mr. Rizvic testified at the time of hearing and to his doctors that he in the accident he was shocked by 480 volts, but the emergency room records and incident report say it was 220 volts. (Compare Tr. p. 65 and Ex. JE3 p. 18 to Ex. JE2 p. 3 and Ex. 1 p. 6). At the hearing, Mr. Rizvic disputed the emergency room records notations of his denial of an altered level of consciousness and his normal neurological exam. (Compare Tr. pp. 65-67 to Ex. JE2 pp. 3, 5).

Mr. Rizvic also disputed the emergency records indicating that he denied shortness of breath and that he had normal lung and cardiovascular examinations. (Compare Tr. pp. 67-68 to Ex. JE2 pp. 3, 5). Mr. Rizvic testified he had neck pain and decreased range of motion in his neck immediately after the work injury and continuing thereafter. Yet the emergency room records show no deficits, as did follow-up examinations with Methodist Occupational Health and Wellness. (Compare Tr. pp. 69-70 to Ex. JE2 pp. 5, 13 and Ex. JE3 pp. 18, 21).

Mr. Rizvic testified that he always took his medications and that his prescriptions were not being authorized by workers' compensation. (Tr. pp. 77-79). However, as discussed above, Dr. Smith noted on several occasions that Mr. Rizvic reported he was taking his medications and did not need refills. (Ex. JE5 pp. 86, 72). When Dr. Smith called the pharmacy to check on this, the pharmacy confirmed what the records show: Mr. Rizvic had not refilled his medication for many months. (Ex. JE5 p. 91). The allegation that workers' compensation was not paying for Mr. Rizvic's medication was first made by Mr. Rizvic at the hearing. No evidence in the record supports this allegation.

Mr. Rizvic testified he was unable to work after February 14, 2017, due to his work injury. (Tr. pp. 60-62). Titan Tire employee Michael Gerlach's memo to Mr. Rizvic

indicates Titan Tire had jobs within Mr. Rizvic's restrictions, and he was to work in the assigned positions within those restrictions. (Ex. 1 p. 9). Mr. Rizvic instead decided to stay home and did not provide documentation. Titan Tire consequently Mr. Rizvic to be a voluntary quit.

Mr. Rizvic's subjective testimony, in conjunction with the majority of medical providers' consistent findings regarding Mr. Rizvic's medical condition, show the Commissioner's ultimate finding that Mr. Rizvic lacked credibility was supported by substantial evidence and should be affirmed.

B. <u>Substantial Evidence – No Causal Relationship Between Pain Syndrome and Work Injury</u>. Upon determining Mr. Rizvic lacked credibility, the Commissioner found Mr. Rizvic did not sustain his burden of proof to show the ongoing symptoms/pain syndrome he alleged he suffered from were causally related to the work injury. (App. Dec. p. 4). Mr. Rizvic has the burden to prove by a preponderance of the evidence that the work injury is a proximate cause of the claimed disability. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 752 (Iowa 2002). This burden is met when the causal connection is probable, not merely possible. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). The question of medical causation is essentially within the domain of expert testimony. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). Unrebutted expert medical testimony cannot be summarily rejected. *Poula v. Siouxland Wall & Ceiling Inc.*, 516 N.W.2d 910, 911-12 (Iowa Ct. App. 1994). Also, the weight to be given to an expert opinion is within the discretion of the fact finder and is impacted by the accuracy of the facts relied upon by the expert and other surrounding circumstances. *Id.*

Dr. Wolfe was the only doctor to causally relate a pain syndrome to Mr. Rizvic's work injury. The Deputy gave more weight to this opinion and concluded Mr. Rizvic most likely developed a pain syndrome as a result of the electrocution. (Arb. Dec. pp. 8-9). Yet the Deputy conceded no physician related the cervical MRI findings to the symptoms Mr. Rizvic complained of. (Arb. Dec. p. 4). He also found it was likely Mr. Rizvic had a psychological component to his work injury, including symptom magnification. (Arb. Dec. p. 10).

On intra-agency appeal, the Commissioner performed the appropriate de novo review and reversed the Deputy's causation conclusion. (App. Dec. p. 4). In so doing, the Commissioner gave little weight to Dr. Wolfe's solitary medical opinion finding positive causation, which was dependent upon Mr. Rizvic's subjective reports and credibility. (App. Dec. p. 4). This was contrary to the multiple reports of symptom magnification in the record, as discussed above. (App. Dec. p. 4). Thus, the Commissioner correctly found there was insufficient evidence to support Mr. Rizvic's allegation of a pain disorder causally related to his work injury. (Arb. Dec. p. 4). The Commissioner instead reasonably adopted Dr. Smith's opinion that the objective findings do not support Mr. Rizvic's subjective symptoms. (App. Dec. p. 4).

None of Mr. Rizvic's medical providers, including Dr. Wolfe, actually diagnosed pain syndrome. (Ex. 6 p. 20) (diagnosing diffuse electrical injury). Most of Mr. Rizvic's medical providers were unable to relate his subjective symptoms to any objective, observable pathology (let alone the work injury) with any probability, as illustrated by the following information contained in or arising from their respective medical records for Mr. Rizvic:

1. **Dr. Nayeri**. "[T]he numbness and weakness and feeling abnormal may

take a little bit to resolve, hopefully within the next week or so from the electrical shock, but I cannot find anything seriously wrong with him. . . . We already confirmed through the emergency room reports and emergency room visits that the heart and the muscle did not sustain any permanent lasting damage." (Ex. JE3 p. 19).

2. Dr. McCaughey. Mr. Rizvic's subjective complaints were noted, but Dr. McCaughey said there were no serious abnormalities upon examination. Dr. McCaughey said it was possible Mr. Rizvic had myalgias from the work injury, but his symptoms should resolve with time. (Ex. JE3 pp. 21-22).

3. Mr. Timm. Mr. Rizvic's multitude of symptoms reported by him at each treatment by Mr. Timm "at times do not coincide with treatments provided, activities performed or have physiological correlation." (Ex. JE4 p. 41).

4. Dr. Smith. "There continues (sic) to be inconsistencies in examination where subjective symptoms are not supported by objective findings." (Ex. JE5 p. 86). Dr. Smith noted the EMG and MRI findings did not correlate. (Ex. JE5 pp. 77-78, 86). He opined the left median neuropathy was not work related. (Ex. JE5 p. 86). He could not give any permanent impairment for the work injury. (Ex. JE5 p. 94).

5. Dr. Schmitz. "[A]lthough there was Left C8 neuropathy, this finding does not fit [Mr. Rizvic's] symptoms and may not be clinically relevant." (Ex. JE5 p. 84). Dr. Schmitz found Mr. Rizvic's complaints were not credible based upon the objective testing. (Ex. JE5 p. 84).

6. PA-C Buyck. "His symptoms do not well match his radiographic findings given bilateral upper and lower extremity symptoms and marked limitations in cervical ROM." Ms. Buyck felt the C5-6 degenerative changes well predated the work injury. (Ex. JE11 p. 130).

7. Dr. Lync. Dr. Lync did not give an opinion on causation and indicated she did not have the medical records to determine Mr. Rizvic's past treatments and test results. (Ex. JE12 p. 135).

8. Dr. Adelman. He requested to review the MRI of the cervical spine to correlate possible cervical dystonia. However, cervical dystonia is a rare disorder, of an unknown cause, and is likely genetic in nature. (Ex. G p. 28). There was no evidence Dr. Adelman was given the MRI results. He did not have a good explanation for [Mr. Rizvic's] sensory loss which is nonanatomic. (Ex. JE8 p. 126).

9. Dr. Barazanji. Although Mr. Rizvic reported neck pain, stiffness, and upper and lower extremity symptoms to Dr. Barazanji, his neck and extremity exams were normal. (Ex. JE8 pp. 106, 109, 112, 117, 119, 124).

10. Dr. Boulden. "There does not seem to be any type of injury to the upper extremity in the muscles and, once again, there are inconsistencies as previous physicians have noted throughout the MRI findings, in my opinion, were all pre-existing and none of the pathology, in my opinion, was caused by the injury." (Ex. G p. 30).

11. Dr. Wolfe. Even Dr. Wolfe could not identify any objective, pathological source of Mr. Rizvic's pain. Although he diagnosed diffuse electrical injury, he also noted that "[d]iffuse electrical injury appears to be appropriate to encompass the vague and nonspecific nature of the sequelae of electrical injury . . . described in the literature." (Ex. 6 p. 21). He agreed the MRI and EMG did not explain Mr. Rizvic's presenting symptomatology. (Ex. 6 p. 24). Upon examination, he also noted that the diminished sensation in the extremities did not follow a particular radicular or peripheral nerve distribution. (Ex. 6 p. 18).

Mr. Rizvic argues Dr. Wolfe's opinions should have been accepted by the Commissioner because Dr. Wolfe was the only medical expert who specifically addressed electrical injuries, performed a thorough examination, and cited relevant medical sources. Mr. Rizvic's treating and examining physicians were obviously aware that Mr. Rizvic sustained an electrocution injury and they considered this in their diagnoses and treatment recommendations. Mr. Rizvic reported an electrocution injury to every treating and examining physician. (Ex. JE2 p. 3; Ex. JE3 p. 18; Ex. JE4 p. 24, Ex. JE5 p. 44; Ex. JE6 p. 96; Ex. JE8 p. 105; Ex. JE11 p. 129; Ex. JE12 p. 134; Ex. JE13 p. 137; Ex. G pp. 25-28). Mr. Rizvic was referred to specialists by Dr. Smith. He also went to specialists on his own to address his electrical injuries. He saw occupational medicine doctors, physical therapists, orthopedic surgeons (specializing in the spine), a physiatrist, and a neurologist. He underwent physical therapy, injections, medications, and diagnostic tests, among other things.

Dr. Adelman, like Dr. Wolfe, is a neurologist and has experience dealing with electrical injuries. Yet, Dr. Adelman, consistent with the other treating providers already discussed, found Mr. Rizvic had embellished his symptoms and reported unusual and unspecific complaints. (App. Dec. p. 3; Ex. JE13 pp. 139, 142, 144). For Mr. Rizvic to argue only Dr. Wolfe specifically addressed the electrical nature of the injury suggests the other doctors shirked one of their primary obligations as doctors to treat their patients conscientiously. Given the numerous modalities of treatment offered by the various specialized physicians, under this record this was not the case.

All of Mr. Rizvic's treating and examining physicians performed thorough examinations. Dr. Smith treated Mr. Rizvic no less than seventeen times. (Ex. JE5). The physical therapist treated Mr. Rizvic no less than twelve times. (Ex. JE4). Dr.

Adelman saw Mr. Rizvic at least three times. (Ex. JE13). These physicians were in a much better position than Dr. Wolfe to evaluate Mr. Rizvic's credibility and the nature and seriousness of his condition given they had the advantage of seeing Mr. Rizvic over a much longer period of time and at several different junctures during his course of treatment, unlike the one-time examination of Dr. Wolfe.

Further, the physical therapist, Dr. Smith, and Dr. Adelman all had consistent opinions relating to the credibility, nature, and seriousness of Mr. Rizvic's condition, in contrast to the opinion of Dr. Wolfe given after one examination. The one medical source cited by Dr. Wolfe itself acknowledges the unreliability of its findings:

> The purpose of this review of a subset of the literature is to summarize the current evidence-based knowledge regarding long-term sequelae of injuries from electrical current. This is not a meta-analysis or systemic review. . . . Of these retrieved articles, only 24 addressed the spectrum of long-term outcomes of man-made electrical injury and were considered relevant to the scope of the defined topic. The quality of medical literature affects the application of results to clinic practice. The strongest medical evidence that is free of medical bias is derived from prospective, blinded, placebo-controlled randomized trials. Retrospective studies are less rigorous, and case reports and expert opinion offer little in the way of proof, and have less effect on evidence-based medicine. For obvious reasons, it is unethical to randomly study electrical injury in controlled clinical trials. By necessity, this topic is addressed in less-rigorous observational and retrospective work and case studies. Therefore, the strength of the literature pertaining to the long -term sequelae of electrical injury is impaired by the necessity of retrospective methods and case studies that typically described small cohorts.

Marni L. Wesner & John Hickie, Long-Term Sequelae of Electrical Injury, 59 CAN. FAM. PHYSICIAN 935 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3771718.

It is clear from the paragraph cited above (the research relied upon by Dr. Wolfe) that research on electrocution injuries is limited and retrospective in nature. The Commissioner noted the unreliability of this medical literature and found Dr. Wolfe

simply lumped Mr. Rizvic in with individuals contained in his review of the medical literature after assuming Mr. Rizvic's symptoms were credible. (App. Dec. p. 3).

Mr. Rizvic cites several cases he contends shows the difficulty and contentious nature of an electrocution injury. These cases are distinguishable from the instant matter because none of them involved a claimant that was allegedly not credible due to inconsistencies between subjective complaints and objective findings. Further, although electrical injuries may be difficult to address, this does not mean that every subjective complaint allegedly related to an electrical injury is compensable. Mr. Rizvic must still meet his burden of proof by a preponderance of the evidence. In *Myles v. Labor World of Iowa*, File No. 5045097, 2015 WL 3533731, *9 (Iowa Workers' Comp. Comm'n), the Deputy explained that opinions relating to electrical injuries based upon what happens in the general population do not satisfy the claimant's burden of proof. Rather, the medical opinions must apply directly to the claimant's own situation. As warned in *Myles*, Dr. Wolfe did not apply his cited medical research to the instant matter, as he did not address the repeated references in the medical records to symptom magnification by Mr. Rizvic and how Mr. Rizvic's credibility impacted the documented inconsistent symptomatology that was not supported by objective findings. (App. Dec. p. 4).

In his judicial review brief Mr. Rizvic does not address the notations by Mr. Rizvic's treating and examining providers questioning his credibility. Instead, Mr. Rizvic focuses on his contention that the medical providers noted similar symptoms of left-sided neck pain, stiffness, and tingling in the upper extremities after the date of injury. Although at times Mr. Rizvic had similar symptoms, there were also many times where he reported a variety of nonspecific symptoms and had normal objective findings, as specifically noted by Dr. Adelman and Dr. Smith. (Ex. JE5 p. 86; Ex. JE13 pp. 139,

142, 144). Even Dr. Barazanji, Mr. Rizvic's chosen treating physician, noted Mr. Rizvic's neck was normal on exam. (Ex. JE8 pp. 117, 119, 124).

Mr. Rizvic urges that the MRI and EMG evidenced his left-sided radicular symptoms, but no physician thought those findings were significant or correlated those findings to the subjective complaints. (App. Dec. p. 4). For example, the MRI showed age-indeterminate changes. (Arb. Dec. p. 4; Ex. JE5 p. 63; Ex. JE7 p. 104). Although the EMG of the left upper extremity showed C8 radiculopathy and median neuropathy at the wrist, these results were inconsistent with the MRI results. (Arb. Dec. p. 5; Ex. JE5 pp. 75, 78). Even Dr. Wolfe agreed the cervical MRI and EMG/NCS did not explain the symptomatology. (Ex. 6 p. 24). The Deputy conceded no physician related the cervical MRI findings to the work injury. (Arb. Dec. p. 4).

Titan Tire does not dispute that Mr. Rizvic sustained an electrocution injury. Rather, Titan Tire denies that the work injury caused the alleged ongoing symptoms or pain syndrome. None of Mr. Rizvic's medical providers, including Dr. Wolfe, even diagnosed pain syndrome. (Ex. 6 p. 20) (diagnosing diffuse electrical injury). Most of Mr. Rizvic's medical providers were unable to relate his ongoing subjective symptoms to any objective, observable pathology, let alone the work injury, with any probability. The lack of any specific diagnoses, causally related to the work injury, and the substantial references in the record to a lack of objective and observable pathology by a majority of Mr. Rizvic's physicians, support the conclusion that his ongoing symptoms and pain syndrome are not work related. Again, the ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Reed*, 478 N.W.2d at 846 (citations omitted). Because the Commissioner's conclusion is supported by substantial evidence, it should be affirmed on judicial review.

C. <u>Substantial Evidence – No Permanent Disability</u>. The bulk of Mr. Rizvic's arguments on judicial review relate to whether his work injury caused a permanent disability. Mr. Rizvic argues that the Commissioner should have used an industrial disability analysis in addressing permanency. This argument puts the cart before the horse.

Two determinations must be made in assessing industrial disability: (1) the injury caused a permanent disability, and (2) the extent of permanent disability. *Westling v. Hormel Foods Corp.*, 797 N.W.2d 623, fn. 1 (Iowa Ct. App. 2011) (noting the threshold question is whether there is a causal connection between a work injury and claimed disability, not the extent of that disability). The question of the extent of permanent disability is not reached if there is a finding that no permanent disability was caused by the work injury. *Grundmeyer*, 649 N.W.2d at 752 (citing *Sherman*, 576 N.W.2d at 321) (noting a claimant must prove by a preponderance of the evidence that the injury is a proximate cause of the claimed disability). If a permanent disability is in fact indicated for an unscheduled injury, only then is an industrial disability analysis used to determine the extent of permanent disability/loss of earning capacity. *See, e.g.*, *Thilges v. Snap-on Tools Corp.*, 528 N.W.2d 614, 616 (Iowa 1995).

Both the Commissioner and the Deputy acknowledged the law on this matter. (App. Dec. p. 4) (citing *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148 (Iowa 1997)); *Frye v. Smith-Doyle Contractors*, 569 N.W.2d 154 (Iowa Ct. App. 1997); *Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283 (Iowa Ct. App. 1996); (Arb. Dec. p. 11) (citing *Oldham v. Scofield & Welch*, 266 N.W. 480, 481 (Iowa 1936) (noting the burden of proof is on the claimant to show, by a preponderance of the evidence, that the disability resulted from the original work injury)).

The Deputy also acknowledged the expert opinions were split in that regard. (Arb. Dec. p. 11). The Commissioner ultimately reversed the Deputy's determination of permanent disability accepting Dr. Wolfe's opinion, relying instead upon Dr. Smith's opinion, which is supported by substantial evidence. (App. Dec. p. 5).

The majority of Mr. Rizvic's treating physicians noted (1) normal examinations, (2) no objective evidence of an ongoing injury, and (3) any disability was temporary. For example, Mr. Rizvic's examination in the emergency room on the date of injury and the day after were normal. (Arb. Dec. p. 3; Ex. JE2 pp. 5, 8-10). The only signs of a burn injury were black markings on his palm. (Ex. JE2 pp. 8-10). By August 30, 2016, Mr. Rizvic had no evidence of burn marks upon examination with Dr. Nayeri, and the doctor felt there was nothing seriously wrong with him. (Ex. JE3 pp. 18-19). On September 20, 2016, Dr. McCaughey did not see any serious abnormalities upon examination, noted inconsistent effort, and opined the alleged symptoms should resolve in time. (Arb. Dec. p. 4; Ex. JE3 pp. 21-22). Physical therapy was discontinued on November 22, 2016, due to a plateau in Mr. Rizvic's progress. (Ex. JE5 p. 39; Ex. JE5 p. 55). Dr. Smith assessed 0% permanent impairment. (App. Dec. p. 5; Arb. Dec. p. 5; Ex. JE5 pp. 78, 86, 93-94). Dr. Boulden assessed 0% permanent impairment. (Arb. Dec. p. 8; Ex. G p. 29-31). These records show Mr. Rizvic's injury was temporary in nature.

Only one physician, Dr. Wolfe (who was Mr. Rizvic's IME expert), opined that Mr. Rizvic's ongoing symptoms caused permanent disability. (App. Dec. pp. 3-4; Ex. 5 pp. 21-24). For the reasons set forth and discussed above, the Commissioner properly gave Dr. Wolfe's opinion little weight. (App. Dec. pp. 4-5). As to permanency, the Commissioner specifically found Mr. Rizvic's lack of credibility and the lack of objective evidence supporting Mr. Rizvic's subjective complaints lent less weight to Dr. Wolfe's

opinions. (App. Dec. pp. 4-5). He noted Dr. Wolfe's report was especially troublesome given the warning in the AMA Guides regarding credibility when assigning ratings for pain under Chapter 18. (App. Dec. p. 3).

The AMA Guides indicate how pain-related impairments relying on subjective reports are particularly problematic in a case where the patient lacks credibility. AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 566 (Linda Cocchiarella & Gunnaer B.J. Andersson, eds. 5th ed. 2000). The AMA Guides rejects rating permanent impairment based upon pain when the patient has low credibility. Since the assessment of pain related impairment depends heavily upon verbal reports of individuals, examiners must be careful to provide ratings only for those who provide information that appears to be reasonable and accurate. *Id*. at 571. Pain that is not substantiated by clinical findings is not a substitute for impairment. *Lagos v. IBP, Inc.*, File No. 5000782, 2004 WL 1467299, *5 (Iowa Workers' Comp. Comm'n); *Nelson v. Meredith Corp*., File No. 993986, 1994 WL 16015337 (Iowa Workers' Comp. Comm'n). Pain is not a compensable disability in the absence of objective findings. *Deanda v. Hometown Plumbing & Heating*, File No. 1199287, 2000 WL 33992980, *3 (Iowa Workers' Comp. Comm'n).

While the FCE did give restrictions in the light demand category, Dr. Smith specifically found these were more restrictive than Mr. Rizvic' s capabilities. (App. Dec. p. 3; compare Ex. JE9 p. 127 with Ex. JE5 p. 91). Dr. Smith only gave temporary restrictions of no lifting more than 30 pounds and walking/sitting restrictions. (Ex. JE5 pp. 91, 93) (marking the temporary restriction box). Contrary to Mr. Rizvic's contentions, Dr. Smith did not give permanent restrictions. Nor did Dr. Smith ever give

permanent restrictions that he causally related to Mr. Risvic's work injury. As did the Commissioner, he specifically rejected the FCE restrictions. (App. Dec. pp. 3-5).

Again, there are numerous references in the medical records indicating Mr. Rizvic could move/function more than he showed upon examination. Dr. Smith assessed 0% permanent impairment. The Commissioner accepted his opinion. (App. Dec. pp. 4-5; JE5 p. 94). The Commissioner's acceptance of this opinion was based upon the lack of objective findings to support Mr. Risvic's subjective symptoms. (App. Dec. p. 4; JE5 p. 94). The Commissioner specifically concluded:

> I reject the opinions of Mr. Rizvic's expert, Dr. Wolfe, I am not persuaded by Mr. Rizvic's FCE, and I reverse the deputy commissioner's finding that Mr. Rizvic was generally credible. Instead, I adopt the expert opinion of Dr. Smith, who opined that Mr. Rizvic did not sustain any permanent impairment as a result of his work-related electrocution. For these reasons, I find Mr. Rizvic failed to carry his burden of proof to establish he sustained any permanent disability as a result of the work injury.

(App. Dec. p. 5).

As already stated, the Commissioner on de novo review determines the credibility of the witnesses and the weight to be given to expert testimony. *Sherman*, 576 N.W.2d at 321 (citation omitted). The weight to be given to expert testimony depends upon the accuracy of the facts relied upon by the expert and other surrounding circumstances. *Id*. The agency is free to accept or reject any expert opinion in whole or in part. *Id*. The Commissioner may adopt opinions of permanent impairment using the AMA Guides and can use his experience, technical competence, and specialized knowledge to evaluate that evidence. Iowa Code § 17A.14(5); Iowa Admin. Code r. 876-2.4; *Sherman*, 576 N.W.2d at 322-23. The Commissioner's conclusion that Mr. Rizvic did not suffer a permanent

disability caused by the work injury is supported by substantial evidence and should be affirmed.

Mr. Rizvic alternatively argues that even if he did not sustain any permanent functional impairment, that finding alone does not preclude a finding that he suffered an industrial disability. This would be a correct statement if a finding of permanent disability has been made, but the Commissioner's decision in this case based upon his acceptance of Dr. Smith's opinions is still supported by substantial evidence regarding the extent of permanency. For example, in *Hill v. Fleetguard, Inc.*, the Iowa Supreme Court upheld a decision declining to award permanency for a chest injury. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 674 (Iowa 2005). The agency decision was supported by substantial evidence given a 0% impairment rating and the lack of any work restrictions specifically identified as permanent or causally related to the work injury. In the instant matter, there was a lack of any permanent impairment ratings or permanent restrictions from Dr. Smith, whose opinion the Commissioner accepted over that of Dr. Wolfe. So the industrial disability analysis, assuming for the sake of argument that it was required, showed no permanent disability and was supported by substantial evidence.

Mr. Rizvic failed to provide any expert opinions (vocational or medical) that he could no longer work at all based upon his permanent restrictions from Dr. Wolfe and the FCE. Titan Tire offered Mr. Rizvic a job on March 2, 2017, and again on March 9, 2017, when he was on restrictions from Dr. Smith and Dr. Schmitz. (Compare Ex. JE5 pp. 73, 79, 83, 88 to Ex. N, p. 24 and Ex. 2, p. 19). This job offer was made after Mr. Rizvic attempted to perform a forklift job at Titan Tire. (Compare Ex. 2 p. 3 to Ex. N p. 24). Mr. Rizvic never responded to the job offer.

Further, Mr. Rizvic provided no evidence or testimony that he looked for subsequent jobs. He has taken no steps to find new employment, including but not limited to putting together a resume or applying for jobs. He is clearly able to work in some capacity given he was doing work at Job Service for a time. (Tr. p. 83).

One of the principal factors in assessing permanency is whether the claimant is motivated to return to work. *Christianson v. Snap-on Tools, Inc.*, File No. 5038898, 2017 WL 950979, *2, *4 (Iowa Workers' Comp. Comm'n) (reversing a permanent and total disability award on appeal given the lack of evidence showing the claimant applied for jobs since the work injury and the lack of expert opinions that the claimant could not work). Under this record, it is unreasonable to find that Mr. Rizvic is highly motivated to return to work when he failed to contact Titan Tire after it made him a job offer. (Arb. Dec. p. 13).

Further, Mr. Rizvic fails to explain how his lack of a job search after the work injury supports his motivation to return to work. The record is devoid of Mr. Rizvic's efforts to find new employment. He appears able to work in some capacity given that he was working at Job Service for a time. (Tr. p. 83). For all of the reasons discussed above, Mr. Rizvic did not sustain his burden of proof of permanent disability. The Commissioner did not fail to correctly interpret the relevant law or apply the relevant law to the facts. When this record is considered as a whole, the Commissioner's determination on this issue should be affirmed.

D. **Denial of Alternate Medical Care**. Alternate medical care can only be awarded if the claimant's symptoms/conditions are accepted as compensable or found to be work related. Iowa Code § 85.27(4); *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 196-97 (Iowa 2003); *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 773

(Iowa 2016). Neither requirement is met here. Because the Commissioner's ultimate conclusion that Mr. Rizvic's ongoing symptoms are unrelated to his work injury is supported by substantial evidence, alternate medical care must be denied as the Commissioner determined.

Further, Mr. Rizvic presented no evidence that he expressed his dissatisfaction with the lack of treatment after being released from Dr. Smith, as required by Iowa Code section 85.27(4) and Iowa Administrative Code rule 876-4.48(4). *Ramirez-Trujillo*, 878 N.W.2d at 773 fn. 8 (noting the Commissioner has adopted rule 876-4.48(4) making the communication of dissatisfaction in section 85.27(4) mandatory); *Clark v. Baxter Int'l Inc.*, File No. 5050684, 2014 WL 12693575 (Iowa Workers' Comp. Comm'n). The lack of communication of dissatisfaction by Mr. Rizvic denied Titan Tire the opportunity to direct additional medical care. The Deputy made no finding that Mr. Rizvic satisfied his statutory obligation to show he expressed his dissatisfaction. (Arb. Dec. pp. 13-14).

Even if the alternate medical care analysis applied to this case, Mr. Rizvic carries the burden to prove the care provided by Titan Tire was unreasonable. Iowa Code § 85.27; *Long v. Roberts Dairy Co.*, 528 N.W.2d 122, 123 (Iowa 1995). The employer's obligation under the statute turns on the question of reasonable necessity, not desirability. *Id.* at 124.

Titan Tire has provided all care as recommended by the authorized physicians. (Ex. K). This includes physical therapy, injections, surgical consultations, a neck MRI, an EMG, and medication (not taken by Mr. Rizvic), as well as other things. Dr. Smith's notes indicate all of the following: Mr. Rizvic underwent extensive, reasonable care. His treatment included the medications tizanidine, Lyrica, Elavil, Cymbalta, gabapentin, diazepam, nabumetone, cyclobenzaprine, ibuprofen, and Aleve), physical therapy (two

separate courses with different therapists), cervical injections, and work modifications. (Ex. JE5 p. 86). There was no indication for surgery. (Ex. JE5 p. 86). Mr. Rizvic's EMG showed left C8 radiculopathy, which is not supported by a structural lesion on MRI. Left median neuropathy is not work-related. (Ex. JE5, p. 86). There was no improvement in Mr. Rizvic's subjective symptoms through treatment. (Ex. JE5 p. 86).

It was not unreasonable to stop treatment given that Mr. Rizvic was at MMI, he had already undergone extensive treatment, and numerous doctors and providers noted inconsistent symptoms and efforts by Mr. Rizvic. This is especially true given that Mr. Rizvic's subsequent treatment with Dr. Barazanji did not provide any relief. (Ex. JE8 pp. 108, 116, 118, 123; Ex. JE13 pp. 143, 147, 149) (noting continued symptoms and lack of improvement). Thus, even if the alternate medical care analysis could be applied, Mr. Rizvic's request for alternate medical care should be denied because the care provided by Titan Tire for his alleged ailments has not been unreasonable.

E. **Costs**. The Commissioner ordered the parties to pay their own costs related to the arbitration proceeding and assessed costs to Mr. Rizvic for the intra-agency appeal proceeding. Mr. Rizvic's instant request that all costs at the agency level be assessed to Respondents could be granted only if the court reversed the Commissioner's decision. The Commissioner's assessment of costs should be affirmed. Costs on judicial review should be assessed to Mr. Rizvic.

CONCLUSION

While workers' compensation statutes should be construed liberally in favor of claimants, this obligation only arises where the record supports such a construction. The instant record contains multiple valid observations of symptom magnification by Mr. Rizvic and consistent inconsistencies noted by medical providers who treated and

examined Mr. Rizvic. These opinions were summarily rejected by the Deputy at the arbitration hearing despite his misgivings about Mr. Rizvic's credibility.

The Commissioner correctly reversed the Deputy's decision on intra-agency appeal given the substantial amount of evidence substantiating the Commissioner's credibility conclusion. The Commissioner's credibility conclusion provided the basis for reversing the Deputy's award for causation for the pain syndrome and permanent total disability. Because substantial evidence also supports the reversal of those awards and there was no error committed by the Commissioner in interpreting the relevant law and applying the relevant law to the facts, the Commissioner's decision denying alternate medical care should be affirmed as well, including his assessment of costs at the agency level. In other words, the Commissioner's decision should be affirmed in its entirety, the Petition should be dismissed and costs in the instant proceeding should be assessed to Petitioner.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the final agency decision is affirmed in its entirety, including the assessment of costs at the agency level, and the Petition is dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs on judicial review are assessed to Petitioner.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV060110	BAJRO RIZVIC V TITAN TIRE CORPORATION

So Ordered

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