IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CHARTWELLS D/B/A AU BON PAIN CAFÉ and NEW HAMPSHIRE INSURANCE CO., **Petitioners,** **v.** **JOAN VOSHELL,** **Respondent.**	**Case No. CVCV059130** **RULING ON JUDICIAL REVIEW**

This judicial review action came on for hearing on January 31, 2020. Nathan McConkey represented petitioners Chartwells d/b/a Au Bon Pain Café and New Hampshire Insurance Co. (jointly referred to as "employer"). Saffin Parrish-Sams represented respondent Joan Voshell (referred to as "claimant").

STATEMENT OF THE CASE

A. Background and facts regarding the injury.

Claimant was 70 years old at the time of the injury claimed in this case. She dropped out of high school during the tenth grade to help care for her father. She has not obtained a GED, but did graduate from Paris Academy of Beauty. She worked as beautician for approximately 28 years until 1991-92. She worked an industrial job and at a fast food restaurant before getting a job as a hostess at Iowa Machine Shed. She worked there for 18 years until 2012, when she took a job as a cashier at Au Bon Pain, which is a restaurant on the campus of Simpson College in Indianola. Claimant's job duties included taking payments, restocking product, sweeping and mopping the floors, cleaning dishes, and carrying out garbage. She also worked some part-time hours as a cashier at a Casey's store from 2012 to 2013. (Tr. pp. 16-17; Cl. Exhibit 5).

As relevant to this case, claimant had a prior workplace injury during a fall at Iowa Machine Shed in 2012. She hurt her elbow and neck. Both were covered by worker's compensation. She saw Dr. Steven Aviles for the elbow and Dr. James Sykes for the neck. The injuries were primarily treated through injections. She last received treatment Dr. Aviles on November 4, 2013. She last saw Dr. Sykes on March 13, 2014. The medical file remained open as to the elbow injury. (Tr. pp. 25-30; Joint Exhibits 3, 5).

After beginning work for Au Bon Pain, claimant developed pain in her right arm, shoulder, and bicep. In May of 2015, she saw her primary care provider, Dr. Sarah Olsasky, regarding the shoulder pain. Dr. Olsasky initially diagnosed her with rotator cuff tendonitis and gave her an injection. This did not resolve the pain. Claimant returned to Dr. Olsasky in August and September of 2015, and on January 8, 2016. She reported that the pain was exacerbated by her work at Au Bon Pain. She received additional injections in September and January, but asked Dr. Olsasky about surgery as an option. By that point, Dr. Olsasky suspected a rotator cuff tear and recommended an MRI. Dr. Olsasky recommended a lift restriction of 20 pounds and to avoid mopping. (Joint exhibit 8).

On Thursday, January 21, 2016, claimant was leaving work at Au Bon Pain when allegedly suffered the injury that is the subject of this judicial review action. Claimant exited the building through an exterior door that she described as "a big heavy door," "not like my home door," and "an industrial door to a building." She said it was cold and windy and that the "wind suction" made the door hard to open. She stated that she "punched the door" to open it and had a pain in her shoulder. At hearing, she described the sensation "like rubber bands snapping in my arm." (Tr. pp. 41-44; Cl. Exhibit 9).

Claimant developed bruises on her arm after January 21, 2016. She went to see Dr. Olsasky on Monday, January 25, 2016. The medical records do not show that claimant mentioned the door incident or the bruising during that appointment. The only recent complaint noted was that claimant felt pain in her upper arm when she turns a doorknob. She also noted that the pain was severe over the bicep and that she had tried resting over the weekend. Dr. Olsasky diagnosed claimant with a bicep tendon tear and recommended that she not work until the consultation with an orthopedic surgeon regarding the shoulder and arm pain or if the pain resolves. Dr. Olsasky referred claimant to Dr. Aviles for the consultation. (Joint exhibit 8).

Claimant initially thought the arm problem may be related to the elbow injury that occurred at Iowa Machine Shed. Claimant's attorney wrote a letter to that insurer to ask for authorization so claimant could see Dr. Aviles. The insurer granted authorization. Claimant saw Dr. Aviles on February 10, 2016. His exam showed the injury was "extremely different" and a new injury from the last time he had treated her. He assessed her with a "traumatic partial tear of right biceps tendon" and right elbow pain. He entered a lift restriction of ten pounds, but felt she could work as a cashier with this type of injury. He also prescribed physical therapy. After receiving this report, the Iowa Machine Shed's insurance carrier refused to provide further medical care because the injury was found to be unrelated to the 2012 injury. (Cl. Exhibit 3; Joint Exhibit 5).

Claimant went back to see Dr. Olsasky on February 15, 2016. On this occasion, she described the injury as a "snapping sensation" with a sudden exacerbation of pain at the elbow. Once Dr. Olsasky had a chance to read Dr. Aviles' notes, she noted that his recommendation for physical therapy. She also noted that claimant could get a second opinion if she wants one. She did, so Dr. Olsasky referred her to Dr. Jason Sullivan. (Tr. pp. 48-49; Joint Exhibits 8-9).

Claimant saw Dr. Sullivan on March 8, 2016. During this appointment, she described the January 21, 2016, work injury similarly to the way she described it at hearing, that is, that it felt like a "big rubber band snapped." She also stated that she had shoulder and elbow pain over the prior two years. Dr. Sullivan ordered an MRI of the shoulder to rule out a rotator cuff tear. The MRI showed tears of the rotator cuff, bicep, and labrum. On April 25, 2016, Dr. Sullivan performed an arthroscopic surgery on the rotator cuff and debridement on the bicep. The surgery was successful and Dr. Sullivan referred claimant to physical therapy. She reached maximum medical improvement (MMI) by October 20, 2016. Dr. Sullivan noted that claimant had minimal complaints and was able to "achieve overhead motion." Claimant indicated she wanted to return to work, although she had not worked since the surgery. Dr. Sullivan approved, subject to a permanent ten pound lift restriction with her right arm, due to her age and the rotator cuff repair. (Joint Exhibit 9).

B. <u>The claim and evidence presented to the agency.</u>

Claimant filed her first report of injury on April 6, 2016. The employer denied the claim on April 14, 2016. The employer stated that the description of the injury, that is, pushing a door open, was "not the type of action that presents an actual risk of injury." The employer also stated that the "right shoulder condition predated the alleged date of injury." (Cl. Exhibits 2, 4).

At hearing, claimant attempted to corroborate her testimony about how the injury occurred by calling her husband, Terry Voshell, as a witness. Terry worked at Au Bon Pain as a supervisor. Terry was not present at the time of the incident, but claimant told him about it after she got home. She described the sensation at that time as like a rubber band had snapped in her arm. Terry was familiar with the door and characterized it as "pretty heavy, even for me." Paul King, a manager for the employer, also testified at the hearing. He characterized the door as "an

office-type building door." He testified that is would be unlocked so anyone leaving would just need to push it open. On cross-examination, he acknowledged that it is a commercial-grade door that is bigger and stronger than what a person would have in their home. (Tr. pp. 117-119, 126, 141).

Dr. Olsasky opined that claimant's rotator cuff injury was probably caused by the repetitive nature of her employment. She stated that the bicep injury was probably caused while pushing open the door on January 21, 2016. Dr. Sullivan gave an opinion stating that the act of pushing open the door could account for both injuries, assuming no symptoms prior to that incident. Claimant obtained an independent medical evaluation (IME) from Dr. Robin Sassman. She opined that the rotator cuff injury was directly and causally related to her work activities. She believes the injury was worsened with the door incident on January 21, 2016. She also believes the door incident caused the bicep tear. (Joint Exhibits 8, 9, 11).

The employer presented medical opinions to rebut claimant's evidence. The employer's attorney authored a letter that was presented to Dr. Aviles, stating his opinion that claimant's injuries were not caused by the door incident on January 21, 2016, or by her cumulative work at Au Bon Pain. Dr. Scott Neff performed an IME for the employer. Dr. Neff personally saw claimant on September 5, 2017, and he reviewed some of her medical records, although not Dr. Sullivan's July 27, 2017, letter concerning causation. He opined that the injury was not caused by the by the act of claimant pushing open the workplace door on January 21, 2016. He described the push on the door as "simply a coincidence of location." He concluded that a rotator cuff tear is "not the mechanism of injury which occurred while pushing on a door." (Joint Exhibits 5, 12, 14).

Each party retained a vocational expert. Phillip Davis conducted the evaluation for claimant. He opined that he did not think claimant could return to employment such as Au Bon Pain due to the ten pound lift restriction placed by Dr. Sullivan. She would now be limited to the "sedentary" job classification based on that lift restriction. Mr. Davis felt it highly unlikely an employer would hire claimant with her lift restrictions and limited education. Claimant has little to no computer skills, so she would not be able to compete well with other job applicants for those type of jobs. Mr. Davis concluded that claimant was 100 percent precluded in her ability to obtain or maintain competitive employment. (Cl. Exhibit 8).

The employer retained Connie Oppedal. Ms. Oppedal noted the same lift restriction as Mr. Davis, but felt claimant could return to work in several settings, including as a cashier in a restaurant, a receptionist in a beauty salon or spa, a greeter, a sales associate at a retail beauty counter, or a donor recruitment specialist. Ms. Oppedal noted that claimant had worked in some of those settings and had transferrable skills that would make her competitive for those jobs. Ms. Oppedal attached a table with openings of that type. Claimant objected to admission of Ms. Oppedal's report, and to the table in particular. She argued that it was not clear what job openings were referred to and that she did not have sufficient time to perform discovery as to those jobs. The deputy admitted the report and decided to consider claimant's argument when considering what weight to give the report. (Em. Exhibit E; Tr. pp. 14-15).

C. <u>The workers' compensation commission decisions.</u>

Deputy workers' compensation commissioner Toby Gordon (the deputy) conducted the contested case decision. He entered an arbitration decision on February 22, 2018. The deputy found that claimant either substantially aggravated or acutely sustained an injury to her shoulder, bicep, and labrum when she opened the door at her employer on January 21, 2016. He primarily

relied on Dr. Sullivan's opinion. He also relied on Dr. Sassman's opinion and, in part, the opinions of Dr. Neff (as to the worsening of her prior condition), Dr. Olsasky (as to the cause of the bicep injury), and even Dr. Aviles' first opinion that claimant's new condition was different from the old elbow injury he had previously treated.

The deputy found temporary total disability from January 22, 2016 through February 10, 2016, and from April 25, 2016 until Dr. Sullivan placed her at MMI on October 20, 2016. The deputy also found permanent partial disability. He determined the rate of industrial disability based in part on Dr. Sassman's assignment of eight percent impairment to the whole person. He also considered other factors, including claimant's age, limited education, work restrictions, the situs of the injury, the length of healing period, and other factors. He found Dr. Oppedal's vocational opinion more persuasive because she more clearly considered claimant's transferrable skills. He also noted that claimant had not been looking for work, so she had not been turned down for any work. He concluded that claimant's industrial disability would be set at 40 percent.

The deputy made some additional findings that are pertinent to this judicial review action. He ordered the employer to pay claimant's medical bills incurred from the injury. He also ordered the employer to identify a doctor to provide care as needed in the future. The deputy did not order the employer to pay a penalty based on his finding that the employer had a reasonable basis for denying the claim. The deputy entered an order assessing costs, including $150.00 for Mr. Davis' vocation report, even though Mr. Davis' full fee was $1,671.45.

Both parties appealed. The Workers' Compensation Commissioner designated deputy workers' compensation commissioner Stephanie Copley to enter final agency action in this case. She affirmed the finding that claimant's injuries arose out and occurred in the course of her

employment. She also affirmed the finding that claimant suffered a permanent injury and should be awarded industrial disability. However, she increased the rate to 75 percent based on the finding that claimant did not have the ability to return to most, if not all, of the jobs she previously had. She noted that she might have found total disability if claimant had actually applied for and been turned down from employment. Deputy Copley also affirmed the findings as to penalty period, future medical care, and costs.

STANDARD OF REVIEW

Chapter 17A of the Iowa Code governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). 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)." *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)). 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. *Burton*, 813 N.W.2d at 256.

Review of findings of fact: The courts use a substantial evidence standard when considering challenges to findings of fact in agency decisions. A reviewing court can only disturb factual findings if they are "not supported by substantial evidence in the record before the court when that record is reviewed as a whole." *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(*f*)). The Iowa Supreme Court has outlined the court's guidelines when reviewing

substantial evidence claims under the 17A.19 standard as follows:

> When reviewing a finding of fact for substantial evidence, we judge the finding in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it. Our review of the record is fairly intensive, and we do not simply rubber stamp the agency finding of fact.
>
> Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.

Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotation marks omitted).

Review of interpretation of law: The courts traditionally have discretion to substitute their interpretations of law for that of the agency when legal challenges are made on review. *Meyer*, 710 N.W.2d at 219. However, the courts are required to give deference to an agency interpretation of law when the agency has been "clearly vested" with authority to interpret a provision of law. *Burton*, 813 N.W.2d at 256. If the legislature has not given the agency clear authority to interpret a provision of law, the courts may reverse the interpretation if erroneous. *Id*.

In *Burton*, the Iowa Supreme Court held the level of deference to the workers' compensation commissioner's interpretations will be determined on a case-to-case basis depending on the "particular phrase under consideration." *Id*. While this appears an arduous standard, the court provided the following guidance:

> When a term is not defined in a statute, but the agency must necessarily interpret the term in order to carry out its duties, we are more likely to conclude the power to interpret the term was clearly vested in the agency. This is especially true "when the statutory provision being interpreted is a substantive term within the special expertise of the agency." However, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency," or when the language to be interpreted is "found in a statute other than the statute the

> agency has been tasked with enforcing," we are less likely to conclude that the agency has been clearly vested with the authority to interpret that provision of the statute.

Id. at 256–57 (cites omitted).

Application of law to fact: When a party challenges the ultimate conclusion reached by the agency, then the challenge is to the agency's application of the law to the facts. In that event, the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence. *Meyer*, 710 N.W.2d at 219. The court will only reverse the agency's application of law to the facts if it is irrational, illogical, or wholly unjustifiable. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012).

CONCLUSIONS OF LAW

A. Whether claimant's injury arose out of her employment.

The employer makes two arguments in support of its claim that claimant's injury did not arise out of and in the course of her employment. First, the employer argued that claimant's injury could not have occurred in the manner she described it. Second, the employer argued that the act of opening a door does not amount to actual risk.

1. Occurrence: The employer argued that it is factually impossible for claimant's injury to have occurred in the manner she described. The employer cites a number of facts in the record, including prior injuries to the arm, that she did not initially describe the injury to the first medical providers she saw after January 25, 2016, and circumstances involving the door.

The court must be mindful that it is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394–95 (Iowa 2007). The deputy heard and watched plaintiff testify. Her testimony about the door was corroborated by testimony from her

husband and a photo of the door. Her testimony about the manner of injury was even corroborated by Mr. King to a degree, as he testified that she could push open the door from shoulder level rather than the handle because the door would have been unlocked. Claimant's report was corroborated by Dr. Sullivan, Dr. Sassman, and Dr. Olsasky, all who believed the injury could be caused by pushing open a heavy door. It is true that claimant did not describe the injury by using the "rubber band" comparison during her first visit to Dr. Olsasky or Dr. Aviles, but that is not a reason to find her wholly incredible in light of the record as a whole. The agency's decision is clearly supported by substantial evidence.

2. Actual risk: It is well settled that for an injury to be compensable under Iowa's workers' compensation statute, the injury must occur both in the course of and arise out of employment. *Miedema v. Dial Corp.*, 551 N.W.2d 309, 310–11 (Iowa 1996) (*citing* Iowa Code § 85.3(1). The first part of the test, whether the injury occurred "in the course of" employment, refers to the time, place, and circumstances of the injury. *See Lakeside Casino v. Blue*, 743 N.W.2d 169, 174 (Iowa 2007). In the present case, there is no question that claimant's injury occurred in the course of her employment. The injury occurred while she was leaving her shift and still on the work premises.

The issue in this case concerns the second part of the test, that is, whether the injury arose out of claimant's employment. This requires a distinct and independent inquiry. *Miedema*, 551 N.W.2d at 311. Injuries that occur in the course of employment or on the employer's premises do not necessarily arise out of that employment. *Id*. Rather, the employee must show that the nature of the employment exposes the employee to the risk of such an injury. *Lakeside*, 743 N.W.2d at 174.

In *Miedema*, the worker injured his back while turning to flush a toilet at the workplace. The court held that the worker must prove that a causal connection exists between the conditions of his employment and the injury to his back. *Id*. (cites omitted). As stated by the court, "the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of his employment." *Id*. The court denied Miedema's claim because there is no indication that his injury was caused by the design of the restroom or toilet, nor was he exposed to a risk or hazard that would not be associated with using a toilet elsewhere. *Id*.

The court came to a different outcome in *Lakeside*. In that case, the employee was hurt after she stumbled on the stairs while walking to her work assignment. 743 N.W.2d at 178. The workers' compensation commissioner had found that the injury occurred from a hazard relating to her employment, that is, the act of traversing the stairs to her work station. *Id.* The court distinguished three other cases, including *Miedema*, finding that there was causal connection between the injury and the worker's employment. *Id*. at 177-78.

The *Lakeside* court discussed and distinguished *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 331 (Iowa 2002), to explain the fine line between injuries that are compensable from those that are not. In *McIlravey*, the worker injured his knee while walking across a level floor at work. The court denied the claim. The court found that an injury sustained while walking, without any other evidence connecting the injury to the workplace, is not compensable. In *Lakeside*, the court cited the stairwell as the additional evidence providing the causal connection between injury and employment. The court offered the following language to clarify the distinction:

> If the nature of the employment exposes the employee to the risk of such an injury, the employee suffers an accidental injury arising

> out of and during the course of the employment. And it makes no difference that the risk was common to the general public on the day of the injury.

Lakeside, 743 N.W.2d at 174.

In the present case, accepting claimant's testimony that the injury occurred when she exited the workplace door, her injury arose out of her employment. The door is a commercial-sized door larger than one in place at a person's home. Claimant and her husband both testified that the door was heavy and sometimes hard to open, particularly when there was wind suction. This case is more comparable to the staircase in *Lakeside* than the toilet in *Miedema* and the flat floor in *McIlravy*. The injury arose out of her employment.

B. Whether the agency correctly determined the percentage of industrial disability.

Both parties challenged the percentage of industrial disability awarded in the final agency decision. Iowa Code section 85.34 provides compensation to workers who suffer permanent disabilities from workplace injuries. The statute sets out a schedule for permanent partial disability for loss of function to body parts listed in the schedule. Iowa Code section 85.34(2)(a)-(t); *Second Injury Fund v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994). The statute also allows compensation to injuries that are not listed on the schedule and are based on injury to the body as a whole. Iowa Code section 85.34(2)(u); *Shank*, 516 N.W.2d at 813. Unscheduled injuries are not measured strictly by functional disability, but rather by industrial disability. *Id*.

Industrial disability considers functional limitation as a factor, but goes further to measure the employee's earning capacity. *Id*. Other factors include the employee's age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent that any factor affects the employee's prospects for relocation in the job market. *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596, 605 (Iowa

2005). The focus is not solely on what the worker can and cannot do – rather, the focus is on the ability of the worker to be gainfully employed. *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 157 (Iowa 1996).

The employer challenged the determination of percentage of disability, which is a mixed question of law and fact. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 525 (Iowa 2012). Because the challenge to the agency's industrial disability determination challenges the agency's application of law to facts, the courts will not disrupt the agency's decision unless it is "irrational, illogical, or wholly unjustifiable." *Id*. at 526 (internal quotes omitted). The worker's compensation commissioner is not required to fix the level of disability "with precise accuracy." *Neal*, 814 N.W.2d at 526 (*quoting Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 357 (Iowa 1999)).

The court cannot find the agency's findings to be erroneous as a matter of law or in consideration of the evidence. Claimant carried a permanent ten pound lift restriction from Dr. Sullivan. She is 71 years old and does not have a high school diploma. She does not have any training or real experience with computers (besides operating a cash register), so she has a competitive disadvantage when seeking a truly sedentary job. The biggest problem with claimant's argument for permanent disability is that she had not applied for any jobs so there is a live question whether she is employable at some level. However, the agency considered that issue when setting the level of industrial disability.

The agency's decision is consistent with long-time case law in Iowa. In *Diederich v. Tri-City Ry. Co. of Iowa*, 219 Iowa 587, 258 N.W. 899, 902 (1935), the court considered a finding of permanent total industrial disability of a 59 year old man with little education who had worked for 30 years as a street car motorman. The court stated:

> To say that he might become a stenographer or a lawyer or a clerk or a bookkeeper is to suppose the impossible, for a 59 year old man, with no education, is not capable of securing or filling any such position. His disability may be only a 25 per cent. or a 30 per cent. disability compared with the 100 per cent. perfect man, but, from the standpoint of his ability to go back to work to earn a living for himself and his family, his disability is a total disability, for he is not able again to operate the street car and perform the work which the company demanded of him prior to the time of the accident.

Id. (cited with approval in Neal, 814 N.W.2d at 526). In the present case, the agency did not find claimant to be totally disabled, but the same principles apply to its finding of 75 percent industrial disability. The agency decision must be affirmed.[1]

C. Admission of Oppedal report.

Claimant challenged the admissibility of Ms. Oppedal's vocational report. Ms. Oppedal had been listed as an expert witness, but claimant objected to the report because it referred to four job openings in the local area without listing the names of the employers or other vital information about the jobs. The deputy admitted the report and stated he would consider the objection when considering the weight he would give it. He ended up giving it significant weight, but the commissioner's designee who entered the final ruling did not. The commissioner's designee found that some duties for each of the four jobs would exceed claimant's lift restriction or require knowledge of computers.

Administrative agencies are not bound by the technical rules of evidence. Iowa Code § 17A.14(1); *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262 (Iowa 1991). The agency may base a decision upon evidence that would ordinarily be deemed inadmissible under the rules

[1] The employer made a brief argument regarding apportioning this injury with claimant's prior workplace injuries. The agency found that no apportionment should be granted under the "fresh start" doctrine. *See Roberts Dairy v. Billick*, 861 N.W.2d 814, 823-24 (Iowa 2015). That decision is reasonable and supported by the evidence in the record.

of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue & Fin.*, 644 N.W.2d 310, 320 (Iowa 2002).

In this case, there is no question that the report was material and relevant. The only question was whether it should not be admitted due to some level of surprise or due to late-disclosed discovery. However, claimant was able to respond to at least some of the report. That response satisfied the commissioner's designee, who gave the report little weight. This was an appropriate means to handle the report – admit it into the record but consider the objection when deciding the weight to give the report. The agency did not commit error by admitting the report.

D. Penalty benefits.

Claimant next challenged the agency's failure to enter penalty benefits. Penalty benefits may be paid when an employer improperly denies payment of workers' compensation benefits. The commissioner shall not impose a penalty if the employer proves that it had a "reasonable or probable cause or excuse" to delay or deny paying benefits. Iowa Code § 86.13(4)(b)(2). A reasonable basis exists if the claim is "fairly debatable" whether the debate concerns a matter of fact or law.[2] *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996); *City of Davenport v. Newcomb*, 820 N.W.2d 882, 894 (Iowa App. 2012). "A claim is 'fairly debatable' when it is open to dispute on any logical basis." *Rodda v. Vermeer Mfg.,* 734 N.W.2d 480, 483 (Iowa 2007) (cite omitted).

Both agency decisions denied penalty benefits. The deputy found that the employer had reasonable cause to deny benefits based on claimant's medical history and the options of Dr. Aviles and Dr. Neff. The commissioner's designee affirmed, but not for the same reasons. She

[2] The "fairly debatable" standard derives from an older line of cases, but continues to be used after section 86.13 was amended in 2009. *See City of Davenport*, 820 N.W.2d at 894; *Podgorniak v. Asplundh Tree Expert Co.*, 828 N.W.2d 632, *2 (Iowa App. 2013) (Table).

pointed out that the opinions of Dr. Aviles and Dr. Neff were not known at the time the employer denied benefits. She found that the denial was reasonable based on the actual-risk doctrine. She noted that the case law had been evolving and the "source of significant confusion." She stated that this could serve as a good faith basis to deny the claim. Additionally, she found a second basis to deny the claim after Dr. Aviles did provide his opinion, although that was a year later.

As per the discussion in section A(2) of this decision, the question whether opening a door is more analogous to walking up a staircase or flushing a toilet/walking across flat ground is fairly debatable. While this is a mixed question of fact and law, either can serve as good cause. The employer had reasonable grounds to believe that the alleged injury would not be compensable. The decision to deny penalty benefits is affirmed.

E. Vocational expert costs.

Claimant claimed that the agency erred by only allowing $150.00 reimbursement for the cost of her vocational expert. A successful party to a workers' compensation case can recover costs. Iowa Code § 86.40; 876 IAC 4.33. By rule, the costs shall include the reasonable costs of obtaining the report of a doctor or practitioner. *Id*. A vocational expert report is a recoverable cost. *See* 876 IAC 4.17 (defining "practitioner" to include a person engaged in vocational rehabilitation). Mr. Davis claimed a total expense of $1,671.45. The agency denied recovery for any amount associated with the underlying examination of the claimant. It only allowed an amount associated with preparing the report, that is, $150.00.[3]

The agency relied on *Des Moines Area Regional Transit Authority v. Young*, 867 N.W.2d 839 (Iowa 2015) (hereinafter *DART*) to support its decision. In that case, the Iowa Supreme Court considered whether the workers' compensation commissioner could tax as costs the

[3] It was unclear how the deputy calculated the $150.00 amount. However, that amount was upheld on review by the commissioner's designee because it was not appealed by the employer.

evaluation conducted by a doctor during an IME. The court considered the interplay between Iowa Code section 85.39, which governs the IME process and payment for evaluations, with Iowa Code section 86.40, which governs the taxing of costs incurred in the hearing. *Id*. at 844-47. The court concluded that the expense of the evaluation was covered in section 85.39, so section 86.40 must necessarily be limited to the cost of the hearing. *Id*. at 845-47. Therefore, the agency could not tax the cost of the IME evaluation as part of the cost of the hearing. *Id*.

Claimant first argued that *DART* is distinguishable because the issue involves a vocational expert rather than a doctor's report. If anything, this distinction hurts claimant's argument. The *DART* decision makes clear that employers are not obligated to pay for evaluations outside the statutory process. *Id*. at 844. Section 85.39 specifically provides for the IME process and how those evaluations are paid. There is no similar process for evaluations by vocational experts. The agency rule allows the cost of a vocational practitioner's report to be taxed as costs in the same way as the report of a doctor conducting an IME. That is consistent with the agency's authority under section 86.40 to tax all costs incurred in the hearing.

Claimant next argued that only the expense for the evaluation should be excluded, but not time spent reviewing records and conducting research. The statute allows the commissioner to tax costs "in the discretion of the commissioner." The *DART* decision was limited to the issue of medical evaluations due to the potential conflict between sections 85.39 and 86.40. That decision does not prevent the commissioner from using his discretion to limit taxable costs "incurred in the hearing" to the time spent preparing the report.

Claimant cited *John Deere Dubuque Works v. Caven*, 804 N.W.2d 297 (Iowa App. 2011), in which the Iowa Court of Appeals upheld the taxation of all costs incurred by a doctor during an IME. *Caven* was entered prior to *DART*, so its validity is dubious at this point. In any

event, the *DART* decision caused the commissioner to reassess the awarding of costs. It now limits the costs incurred in the hearing to the time spent preparing the report. That is within his discretion under section 86.40.

RULING

The agency decision is affirmed. The parties shall split the costs of this action.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV059130	CHARTWELLS D/B/A AU BON PAIN CAFE ET AL VS JOAN VOSHELL

So Ordered

Jeffrey Farrell, District Court Judge,
Fifth Judicial District of Iowa