THE IOWA DISTRICT COURT FOR POLK COUNTY

CAROLINA DIAZ, **Petitioner,** **vs.** **TYSON FOODS, INC.,** **Respondent.**	**Case No. CVCV059400** **RULING ON JUDICIAL REVIEW**

INTRODUCTION

Before the Court is a Petition for Judicial Review filed on December 12, 2019. Petitioner Carolina Diaz ("Diaz") filed her brief on February 7, 2020. Respondent Tyson Foods, Inc. ("Tyson"), filed their reply brief on March 6, 2020. The parties also filed a Joint Motion to Vacate Scheduled Oral Arguments on March 31, 2020. Petitioner Diaz is represented by William Bribriesco. Respondent Tyson is represented by Attorney Jason Wiltfang.

FACTS

Diaz ("Diaz") was 42 years old at time of hearing.[1] Diaz was born in Mexico where she attended elementary school through sixth grade.[2] Diaz's primary language is Spanish.

Diaz started working at Tyson on January 19, 2010.[3] Diaz passed a pre-employment physical for Tyson before she started work.[4] Tyson ended Diaz's employment on September 24,

[1] Tr. p. 13.
[2] Tr. pp. 13-14.
[3] Tr. p. 14.
[4] Tr. p. 15.

2014, for attendance-related issues.[5] In July 2015, Diaz began working at HON/Allsteel.[6] Diaz is a Work Cell Operator who does assembly and packaging work.[7] Diaz testified that she does not lift over 20/25 pounds even though, technically, the job description required the ability to lift 40 pounds.[8]

Diaz was working on the ham line or "cushions" job at Tyson on March 12, 2014.[9] The job entailed removing extra fat from pork and throwing the pork pieces on the conveyer.[10] Diaz's job involved cutting the pork with her right arm and throwing the pieces onto a moving band as high as her forehead with her left arm.[11] Diaz also worked a Cryovac machine that would pack loins, starting on March 29, 2013.[12] Diaz filed an injury report on March 12, 2014 where she stated that she was putting loins on the line and carrying trays of meat that caused her pain.[13]

Diaz went to the emergency room at Trinity Hospital due to shoulder pain on January 5, 2012.[14] Diaz told the hospital that she had been experiencing pain for the last month and a half due to work.[15] Diaz was assessed with "left shoulder pain probably impingement syndrome."[16] The following day Diaz saw Dr. Nazee Sarvenaz Jabbari, M.D., for her shoulder pain. Dr. Jabbari gave Diaz work restrictions and a referral to the onsite work physician.[17]

On January 12. 2012, Diaz went and saw Dr. Gregory Clem, M.D., who assessed her with a left shoulder strain.[18] On May 31, 2012, Dr. Clem found that the shoulder strain had been

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[5] Tr. p. 15.
[6] Tr. p. 38.
[7] Tr. p. 39.
[8] Tr. p. 39; JE 17, p. 8.
[9] Tr. p. 15.
[10] Tr. p. 16.
[11] Tr. pp. 17-18.
[12] Tr. p. 45.
[13] JE 13, p. 1.
[14] JE 1, p. 1; Tr. p. 23.
[15] JE 1. p. 1.
[16] JE 1, p. 3.
[17] JE 2, p.3.
[18] JE 3, p.1.

resolved.

On February 3, 2014, Dr. Tulvi Mendel, M.D., saw Diaz for an evaluation of her bilateral shoulder pain.[19] Dr. Mendel found: "bilateral shoulders diffuse overuse with rotator cuff irritability and scapulothoracic musculoskeletal irritability."[20] Dr. Mendel gave Diaz an injection in both her right and left shoulder.[21] On March 14, 2014 PA-C Jennifer Tyler stated that an MRI of Diaz's left shoulder came back essentially normal and assessed her with left scapulothoracic and neck pain.[22]

Diaz saw Dr. Clem again on March 20, 2014 for the periscapular pain.[23] Dr. Clem assessed Diaz with "Left scapulothoracic and neck pain."[24] Dr. Clem continued Diaz on light duty at work.[25] Diaz reported a 50 percent improvement in her pain level on April 4, 2014.[26] Dr. Clem noted on May 1, 2014, that Diaz stated she was 90 percent better.[27] Dr. Clem started Diaz on a two–week work hardening program and found her to be at maximum medical improvement with no disability rating.[28]

On May 19, 2016, Dr. Robert Milas, M.D., performed a onetime examination of Diaz. Dr. Milas stated, "The patient relates a history of several injuries to her cervical region, where she was struck by a piece of meat as well as injuries to both shoulders."[29] Dr. Milas' impression was cervical radiculopathy, most likely secondary to a herniated cervical disk at the C5-C6 level.[30] Dr. Milas found Diaz to have an 18 percent whole body impairment rating and recommend a 10-pound

[19] JE 5, p. 1; Tr. p. 25.
[20] JE 5, p.2.
[21] JE 5, p. 2.
[22] JE 5, p. 5; JE 6 p. 2.
[23] JE 7, p. 1.
[24] JE 7, p. 1.
[25] JE 7, p. 2.
[26] JE 7, p. 3.
[27] JE 7, p 5.
[28] JE 7, pp. 5, 6.
[29] JE. 9, p. 1.
[30] JE. 9, p. 1.

lifting restriction.[31] He also recommend a MRI of the cervical spine. Dr. Milas stated "I do feel that the repetitive nature of her work as well as the numerous injuries sustained by this patient are the direct cause of her condition of ill-being and are directly related to her work related activities."[32]

During Dr. Milas' deposition, he again stated that Diaz was hit by piece of meat.[33] Dr. Milas did not know Claimant was operating a Cryovac machine at the time of her injury.[34] Dr. Milas also stated that Diaz had cervical radiculopathy, secondary to a herniated cervical disk at C5-C6.[35] Diaz, however, testified that she was not hit by a piece of meat.[36]

On April 7, 2017, Dr. Joseph Chen, M.D., of the University of Iowa Department of Orthopedics and Rehabilitation Clinics performed an independent medical examination (IME).[37] Dr. Chen found cervical spine range of motion in full with extension, noting pain in occiput with full flexion and pain in extremes of range of motion.[38] Dr. Chen was not able to relate a causal connection between Diaz's current diagnosis and the injury with her work on March 12, 2014 or with her work with the Cryovac at Tyson.[39] Dr. Clem gave a zero rating and provided no restrictions.[40]

On April 19, 2016, Dr. Richard Kreiter, M.D., also performed an IME. In regards to Diaz's cervical and upper extremity complaints his diagnosis was:

> A) Cervical disc disease with possible radiculopathy; no MRI done. B) Left shoulder pain with degenerative AC joint and impingement of the rotator cuff. C) Possible bilateral carpal tunnel with entrapment of the median nerve. D) Rule out ulnar nerve

[31] JE. 9, p. 2.
[32] JE 9, p. 2.
[33] JE 18, pp. 3, 6.
[34] JE 18, p. 4.
[35] JE 18, p.4.
[36] Tr. p. 21.
[37] JE 10, p. 1.
[38] JE 10, p. 3.
[39] JE 10, p. 4.
[40] JE 10, pp. 4-5.

> entrapment of the left elbow, with mild grip strength weakness. E) Deconditioned upper thoracic and scapular myositis/bursitis, with associated tension headaches.[41]

Dr. Kreiter stated Diaz did not have a cervical MRI and recommended Diaz be evaluated at the University of Iowa Department of Orthopedics.[42] In regards to the causation issue of the cervical and shoulder issues, Dr. Kreiter, in his report stated, "I am concerned that knee surgery prior to full evaluation of the upper extremities and neck may only aggravate the work-related issues."[43]

PROCEEDINGS

Diaz initiated this claim with Original Notice and Petition on October 16, 2015. Diaz alleged she had cumulative injuries to her neck, back, left upper extremity, shoulder, and knee that occurred on March 12, 2014 from an alleged work place injury. On May 23, 2017, the Arbitration Hearing was heard before Iowa Deputy Workers' Compensation Commissioner James Elliot. The decision was issued on February 22, 2018, in which the Deputy Commissioner found that Diaz failed to carry her burden of proof to show that her alleged injuries were caused by her work at Tyson, and that Diaz failed to prove she sustained any permanent impairment due to the March 12, 2014 injury.

Diaz filed a Notice of Appeal on March 8th, 2018. On November 12, 2019, the Commissioner filed the Appeal Decision for this Case in which he found "the same analysis, findings, and conclusions as those reached by the deputy commissioner."[44] The Commissioner affirmed the findings of fact and conclusions of law, including that Diaz failed to carry her burden of proof regarding causation between her injury and any permanent disability.[45]

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[41] JE 11, p. 1.
[42] JE 11, p. 1.
[43] JE 11, p. 1.
[44] App. Dec., p. 2.
[45] App. Dec., p. 2.

Diaz filed a Petition for Judicial Review of the Commissioner's appeal decision on December 12, 2019.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Chapter 17A of the Iowa Code, governs judicial review of administrative agency decisions. The court shall reverse, modify, or grant other appropriate relief from final agency action if it determines the substantial rights of petitioner have been prejudiced by any of the means set forth in Iowa Code section 17A.19(10)(a)-(n). Review of agency action is at law, not de novo, and is limited to the record made before the agency.[46] Additional evidence or issues not considered by the agency cannot be considered by the court.[47] The court may not substitute its judgment for that of the agency.[48] The court may not usurp the agency's function of making factual findings.[49]

The court shall reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole.[50] "Record viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact, must be judged in light of all the relevant evidence in the record cited by any party that detracts from the findings, as well as all of the relevant evidence in the record cited by any party that supports it.[51] This includes any determinations of veracity by the presiding officer who personally observed the

[46] *Taylor v. Iowa Dept. of Job Serv.,* 362 N.W.2d 534, 537 (Iowa 1985).
[47] IOWA CODE section 17A.19(7)(2001); *Meads v. Iowa Dept. of Social Serv*. 366 N.W.2d 555, 559 (Iowa 1985).
[48] *Mercy Health Center v. State Health Facilities Council*, 360 N.W.2d 808, 809 (Iowa 1985).
[49] *McSpadden v. Big Ben Coal Co.*, 388 N.W.2d 181, 186 (Iowa 1980).
[50] IOWA CODE section 17A.19(10)(f).
[51] IOWA CODE section 17A.19(10)(f)(3).

demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.[52]

The evidence need not amount to a preponderance in order to be substantial evidence, but a mere scintilla will not suffice.[53] Substantial evidence means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.[54] The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence.[55] The relevant inquiry is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made.[56]

The commissioner has a duty to state the evidence relied upon and detail the reasons for any conclusions.[57] This requirement is satisfied if the reviewing court is able to determine with reasonable certainty the factual basis on which the administrative officer acted.[58] It is understood that an administrative agency "cannot in its decision set out verbatim all testimony in a case."[59] "Nor, when the agency specifically refers to some of the evidence, should the losing party be able, ipso facto, to urge successfully that the agency did not weigh all the other evidence."[60] An agency decision is final if supported by substantial evidence.[61]

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[52] *Id.*
[53] *Elliot v. Iowa Dept. of Transp.,* 377 N.W.2d 250, 256 (Iowa 1985).
[54] IOWA CODE section 17A.19(10)(f)(l)(2001).
[55] *Moore v. Iowa Dept. of Transp*., 473 N.W.2d 230, 232 (Iowa 1991).
[56] *Id.*
[57] *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 392 (Iowa 1993) (citing *Catalfo v. Firestone Tire & Rubber Co*., 213 N.W.2d 506, 510 (Iowa 1973)).
[58] *Id.* at 393.
[59] *Id.*
[60] *Id.*
[61] *Robbenolt v. Snap-On Tools Corp*., 555 N.W.2d 229, 234 (Iowa 1996).

The court shall also reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.[62] The court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.[63] However, appropriate deference is given when the contrary is true.[64] The agency's findings are binding on appeal unless a contrary result is compelled as a matter of law.[65]

Additionally, a reviewing court must also reverse, modify, or grant other appropriate relief when the agency's decision is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency."[66] "In order to determine an employee's right to benefits, which is the agency's responsibility, the agency, out of necessity, must apply the law to the facts."[67] Because the agency has been entrusted with the responsibility of applying the law to the facts, the "agency's application of the law to the facts can only be reversed if we determine such an application was 'irrational, illogical, or wholly unjustifiable.'"[68]

"The findings of the commissioner are akin to a jury verdict, and we broadly apply them to uphold the commissioner's decision."[69] "We may reverse, modify, affirm or remand the case to the commissioner for further proceedings if we conclude the agency's action is affected by an error

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[62] IOWA CODE section 17A.19(10)(c).
[63] IOWA CODE section 17A.19(11)(b).
[64] IOWA CODE section 17A.19(11)(c).
[65] *Ward v. Iowa Dept. of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981).
[66] IOWA CODE section 17A.19(10)(m).
[67] *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004).
[68] *Id*. (citing IOWA CODE section 17A.19(10)(m)).
[69] *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996) (quoting *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994) (citation omitted).

at law or if it is not supported by substantial evidence."[70]

ANALYSIS

Diaz has the burden of proving by a preponderance of the evidence that the injury both arose out of and in the course of the employment.[71] "The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause."[72] "A preponderance of the evidence exists when the causal connection is probable rather than merely possible."[73]

The Deputy Commissioner stated in the Arbitration Decision:

> The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part."[74]

Medical causation "is essentially within the domain of expert testimony."[75] "The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion."[76] If the commissioner does reject uncontroverted testimony, the commissioner must

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[70] *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996).
[71] *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996).
[72] Arb. Dec. p.4.
[73] *Id.* (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 App. 1997); *Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283 (Iowa App. 1996)).
[74] Arb. Dec. p. 4 (citing *St Lukes Hosp. v. Gray*, 604 N.W.2d 646 (Iowa 2000); *IBP, Inc. v. Harpole*, 621 N.W.2d 410 (Iowa 2001); *Dunleavy v. Economy Fire and Cas. Co*., 526 N.W.2d 845 (Iowa 1995)).
[75] *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995).
[76] *Id*

state on the record why the testimony is rejected with specificity sufficient to allow the reviewing court to determine if the commissioner's decision is arbitrary.[77]

The case presented to the commissioner, also presented to the Court, is a characteristic "battle of the experts" where the commissioner chose between experts with conflicting opinions, necessitating this Court to use the "substantial evidence" standard. [78]

The commissioner, as the fact finder in arbitration, is responsible for determining the weight to be given to expert opinions.[79] The commissioner is empowered to accept or reject an expert's opinion, in whole or in part, especially when confronted with conflicting expert opinion.[80] The courts, in their appellate capacity, "are not at liberty to accept contradictory opinions of other experts in order to reject the finding of the commissioner." [81]

In the case at bar, two opinions directly addressed causation of Diaz's cervical and shoulder impairment.[82] Dr. Milas opined that Diaz's cervical symptoms were caused by her work.[83] Deputy Elliot wrote that while Dr. Milas did note Diaz had multiple work injuries, he also relied on the fact that Diaz was hit by a piece of meat as a part of the cause of her injury.[84] Deputy Elliot also noted that Dr. Milas did not have "clear idea" of the work Diaz was doing at the time of her injury on March 12, 2014.[85] The Deputy Commissioner did not find Dr. Milas' opinion as to the causation of the injury convincing because it was based on inaccurate and incomplete information.[86]

The Deputy Commissioner found that Dr. Chen had more accurate information from both the records and the claimant. The Deputy Commissioner also found Dr. Chen's opinion more

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[77] *Schutjer v. Algona Manor Care Center*, 780 N.W.2d 549, 560 (Iowa 2010).
[78] *Cedar Rapids Community School District v. Pease*, 807 N.W.2d 839, 850 (Iowa 2011).
[79] *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998).
[80] *Id.*; *Huwe v. Workforce Safety & Ins.*, 746 N.W.2d 158, 161-62 (N.D. 2008) ("When confronted with a classic "battle of the experts," a fact-finder may rely upon either party's expert witness.").
[81] *Dille v. Plainview Coal Co*., 250 N.W. 607, 615 (1933); *see Hinrichs v. Davenport Locomotive Works*, 214 N.W. 585, 586 (1927).
[82] Arb. Dec. p.4.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

convincing and was unable to find that Diaz had a permanent impairment due to the March 12, 2014 injury. The Deputy Commissioner found that Diaz failed to carry her burden of proof.

The weight given to expert opinions is determined by the finder of fact and may be affected by the accuracy of the facts relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part.[87] It is not for the Court to determine if the commissioner gave to the testimony the correct weight or if he found the witnesses credible. It is only for this Court to determine if the agency's application of the law to the facts was irrational, illogical, or wholly unjustifiable.

The Deputy Commissioner's application was not illogical, irrational, or wholly unjustifiable. Deputy Commissioner Elliot found Dr. Chen's opinion more convincing based on his testimony and the record, and found that, therefore, Diaz failed to meet her burden of proof. On appeal, Commissioner Cortese II then found that Deputy Elliot provided well-reasoned analysis, and affirmed Deputy Elliot's findings, conclusions, and analysis regarding the issues presented. Again, there is no showing that this was illogical or wholly unjustifiable application of law to facts. A commissioner's decision-making process "can be affected by [various] grounds of error such as erroneous interpretation of law; irrational reasoning; failure to consider relevant facts; or irrational, illogical, or wholly unjustifiable application of law to the facts."[88] Commissioner Cortese II's application of the law in this case to the facts have not been shown to be erroneous and his decision is supported by substantial evidence. The Commissioner's decision was not irrational, or illogical, nor wholly unjustifiable.

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[87] Arb. Dec. p. 4 (citing *St Lukes Hosp. v. Gray*, 604 N.W.2d 646 (Iowa 2000); *IBP, Inc. v. Harpole*, 621 N.W.2d 410 (Iowa 2001); *Dunleavy v. Economy Fire and Cas. Co*., 526 N.W.2d 845 (Iowa 1995)).

[88] *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007) (citing Iowa Code § 17A.19(10)(c), (i), (j), (m) (2001)).

CONCLUSION

The Court finds that Deputy Elliot's rejection of Dr. Milas' opinion, and the adoption of Dr. Chen's opinions, is supported by substantial evidence in the record when viewed in its totality. The Court finds that Deputy Elliot sufficiently described the process of his decision-making and satisfactorily explained why the commission chose one pair of expert opinions over the other.[89] Based on the information above in conjunction with the entire record viewed as a whole, there is substantial evidence to support the commission's determination.

ORDER

IT IS THEREFORE ORDERED that the Commissioner's decision of November 12, 2019 is **AFFIRMED**.

[89] *See Cedar Rapids Community School District v. Pease*, 807 N.W.2d 839, 851 (Iowa 2011).

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV059400	CAROLINA DIAZ VS TYSON FOODS INC

So Ordered

Paul D. Scott, District Court Judge,
Fifth Judicial District of Iowa