

IN THE IOWA DISTRICT COURT FOR POLK COUNTY**LUTHERAN HOME FOR THE AGED
ASSOCIATION – EAST and ACCIDENT
FUND GENERAL INSURANCE
COMPANY,****Petitioners,****v.****MICHAEL NEWBURRY,****Respondent.****Case No. CVCV065456****RULING ON
PETITION FOR JUDICIAL REVIEW**

The above-captioned matter came before this Court for hearing on September 22, 2023, following a petition from Lutheran Home for the Aged Association – East (“Lutheran”) and Accident Fund General Insurance Company (collectively, “Petitioners”) for judicial review of the Iowa Workers’ Compensation Commissioner’s Decision awarding benefits to Michael Newburry (“Respondent”). Petitioners were represented by Attorney Laura J. Ostrander, and Respondent was represented by Attorney Connor Mulholland. After hearing the arguments of counsel and reviewing the court file, including the briefings and Certified Administrative Record, the Court now enters the following ruling.

FACTUAL BACKGROUND

Respondent, a former employee of Lutheran, filed Petitions for Workers’ Compensation on July 2 and October 31, 2020, alleging that he suffered injuries “to the back and body as a whole as a result of transferring a resident.” Pet’rs’ Br. 1. Lutheran accepted liability for the October injury but denied any liability for the July injury. Just before the Arbitration Hearing held on August 1, 2022, Respondent waived his July 2, 2020, claim.

There were several contested issues at the Arbitration Hearing, including the nature and extent of permanency benefits Respondent is entitled to, the appropriate weekly workers’

compensation rate, underpayment by Petitioner of healing period benefits stemming from the rate dispute, past medical expenses, and the cost of an independent medical examination.

Deputy Workers' Compensation Commissioner Erin Pals ruled that Respondent was entitled to a weekly permanent partial disability benefit rate of \$682.21 for 300 weeks, commencing on September 3, 2021.¹ In doing so, she found that Respondent was entitled to an award of industrial disability and rejected Petitioners' argument that Respondent's compensation was limited by his functional impairment rating. Deputy Commissioner Pals also held that while Respondent was not entitled to recover any past medical expenses, Petitioners were required to reimburse Respondent for the costs associated with his independent medical examination. Petitioners appealed the decision.

The appeal was heard by Workers' Compensation Commissioner Joseph Cortese, who largely affirmed Deputy Commissioner Pals' ruling. The only issue which he reversed was the issue of how much weekly compensation was owed, decreasing it from \$682.21 to \$669.81 per week. Petitioners now seek judicial review of Commissioner Cortese's Appeal Decision.

SCOPE AND STANDARD OF REVIEW

The appropriate standard of review is largely uncontested by the parties. In this administrative proceeding, the Court's review is governed by Iowa Code section 17A.19. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id.* § 17A.19(10).

¹ This included a requirement that Petitioners pay Respondent the amount of underpaid benefits plus interest.

The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). Where the issue is one of fact, the Court must accept the agency's factual findings unless they are "not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f); *see also Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-465 (Iowa 2004). When applying the law to facts, an agency may be given deference if the "legislature clearly vested authority to interpret the provision with the agency." *Iowa Dental Ass'n v. Iowa Insurance Division*, 831 N.W.2d 138, 143 (Iowa 2013) (citing Iowa Code § 17A.19(10)(c)). If the agency has not been given such authority, then its application of law to facts is reviewed de novo. *Bearing v. Iowa Dept. of Transp.*, 844 N.W.2d 104, 106 (Iowa 2014). "The interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency." *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 334 (Iowa 2008). Thus, any application of law to facts in this case is reviewed de novo.

MERITS

Petitioners take issue with several conclusions reached by the Commissioner:

The Petitioners respectfully request that the District Court reverse the Commissioner's Appeal Decision and find the Claimant is entitled to permanent partial disability benefits of 7% to the body as a whole with benefits commencing on September 3, 2021, at the rate calculated by the Petitioners taking into account a credit for the overpayment. The District Court should also find the Claimant is not entitled to full reimbursement of the costs of his expert reports or reimbursement for unauthorized medical treatment.

Pet'rs' Br. 19-20. The Court will address each of these issues in turn.

A. The Uncontested Findings

All parties agree Deputy Director Pals and Commissioner Cortese correctly determined two issues: 1) that Respondent reached maximum medical improvement on September 3, 2021

and 2) that Petitioners were not responsible for Respondent's past medical expenses. Pet'rs' Br. 12, 19; Resp't's Br. 8, 14-15. The Court sees no reason to further investigate these matters nor overturn the Commissioner's decision on these issues.

B. The Rate Calculation

Iowa Code Section 85.36 sets out the rules for the Basis of Computation for workers' compensation:

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar[.]

Iowa Code § 85.36. The section continues by listing various calculations to be used depending on the circumstances of the employee:

In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Iowa Code § 85.36(6). Using that calculation method, Deputy Commissioner Pals concluded that the correct rate is \$682.21. However, in doing so, she excluded two pay periods. She excluded the period of August 11 to August 25, 2020 for having too few hours, and she excluded October 11 to October 25, 2020 for having too many hours. On appeal Commissioner Cortese agreed with excluding the period in August but disagreed with excluding the October period. He also found

that Deputy Commissioner Pals had incorrectly calculated Respondent's pay by compensating his overtime hours at a higher rate than his normal hourly wage. Even though this is what Respondent was actually paid at the time, Commissioner Cortese noted that Iowa Code section 85.36 does not take extra overtime pay into account. After making these changes, Commissioner Cortese calculated a new weekly rate of \$669.81.

Petitioners argue that both Deputy Director Pals and Commissioner Cortese incorrectly calculated the weekly rate and that this Court should instead adopt an adjusted rate \$641.78. Petitioners contend that the Commissioner erred by excluding the pay period of August 11 to August 25, 2020, and by committing "an obvious math error." Pet'rs' Br. 14. The Court fails to see where the obvious math error in the Commissioner's calculation lies, and agrees with the Respondent that:

In calculating Mr. Newburry's benefit rate, Commissioner Cortese excluded the pay period spanning from August 11, 2020, through August 25, 2020, because Mr. Newburry only worked for 72.50 hours that pay period when he typically works 80 hours or more in a pay period. [App. Dec. 4.] Commissioner Cortese determined this period constituted 107 days, or 15.29 weeks, and Mr. Newburry made \$15,283.07. *Id.* at 6. Commissioner Cortese then divided \$15,283.07 by 15.29 which equals an average weekly wage for Mr. Newburry of \$999.55 and Commissioner Cortese rounded this figure to \$1000.00. *Id.* Prior to the initial hearing before the deputy commissioner, the parties stipulated that at the time of the injury Mr. Newburry was married and entitled to four exemptions. *Id.* Commissioner Cortese turned to the Rate Book in effect at the time of Mr. Newburry's injury and determined the proper weekly benefit rate for Mr. Newburry to be \$669.81. *Id.*

Resp't's Br. 9. The weekly pay rate calculated by the Commissioner is based on substantial evidence in the record regarding the Respondent's pay, and appears to be in accord with the directions contained within section 85.36. It should not be disturbed.

C. The Finding That Respondent Was Not Offered Suitable Work at His Pre-Injury Earnings

Petitioners assert that the proper award of permanent disability benefits must be limited to the impairment ratings, because they had offered Respondent full-time work in the same position he worked in prior to his injury at equal or better pay. Arb. Dec. 8. Upon review of the statutory language, Deputy Commissioner Pals determined that the position offered by Petitioners did not constitute an actual offer of a job of equal or better pay, because it was impossible for Respondent to work in that position in light of his injury. *Id.* She then correctly followed the guidelines set out by the Supreme Court in determining whether to award industrial disability to Respondent, including factors such as “functional disability ... age, education, qualifications, experience, and inability to engage in similar employment.” *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 526 (Iowa 2012). Commissioner Cortese agreed with this determination. Petitioners argue that the Commissioner erred in finding that Respondent was unable to physically meet the demands of the position offered by Petitioners and not finding the Respondent’s use of a cane as probative of Respondent lying about the state of his health. Pet’rs’ Br. 16. They also disagree with the weight given to the expert testimony presented by Respondent. *Id.* These are issues of fact, and the Court finds there is substantial evidence in the record to support the Commissioner’s findings, *see* Iowa Code § 17A.19(10)(f). The Commissioner’s decision awarding an industrial disability should also not be disturbed.

D. The Award of Reimbursement for an Independent Medical Evaluation

Iowa Code section 85.39 governs the examination of injured employees. The relevant portion states:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee’s own

choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

Iowa Code § 85.39(2). Deputy Commissioner Pals found that the prerequisites of Iowa Code section 85.39 were met because “in the hearing report[,] the defendants stipulated that medical providers would testify to the reasonableness of their fees and that defendants were not offering any contrary evidence.” Arb. Dec. 16. Petitioners had the opportunity to address the reasonableness of Petitioner’s IME fees at the hearing. They failed to do so, and the Commissioner correctly rejected their argument.

Further, neither the Deputy Commissioner nor Commissioner addressed the Petitioners’ request for reimbursement of the cost of the FCE conducted by Mr. Short. The issue, therefore, has not been preserved. *See, Meads v. Iowa Dep’t of Social Servs.*, 366 N.W.2d 555, 559 (Iowa 1985) (“The district court may only review issues considered and decided by the agency.”).

IT IS THE ORDER OF THIS COURT that the Order of the Workers’ Compensation Commission is **AFFIRMED**.



State of Iowa Courts

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CVCV065456

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Type: ORDER FOR JUDGMENT

So Ordered

A handwritten signature in black ink, which appears to read "Joseph Seidlin", is written over a horizontal line.

Joseph Seidlin, District Court Judge
Fifth Judicial District of Iowa

Electronically signed on 2023-11-15 11:29:11