IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PELLA CORPORATION, **Petitioner,** **vs.** **DIANA G. WINN,** **Respondents.**	**CASE NO. CVCV 53280** **RULING ON PETITION FOR JUDICIAL REVIEW**

This is a judicial review proceeding in which the petitioner seeks judicial review of a decision of the worker's compensation commissioner dated December 5, 2016 in which the commissioner affirmed the deputy's ruling that 1) the respondent's claim for review-reopening was not time barred pursuant to Iowa Code §85.26(2); 2) the respondent had established entitlement upon review-reopening to weekly benefits as a result of a permanent and total disability; and 3) the respondent should receive a 20% penalty benefit pursuant to Iowa Code §86.13(4).

The appropriate standard of review for this court is governed by Iowa Code §17A.19(10). The determination of a permanent disability and the assessment of a penalty benefit present mixed questions of law and fact, in that such determinations require the commissioner to apply the appropriate legal factors to the facts as found. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012); P.D.S.I. v. Peterson, 685 N.W.2d 627, 632 (Iowa 2004). The level of review undertaken by this court depends upon the type of error claimed to have been committed by the commissioner.

The agency's factual determinations regarding the respondent's disability or the assessment of a penalty benefit would be clearly vested by a provision of law in the

discretion of the agency, as it must make such findings to determine any claimant's rights to benefits under chapter 85. Finch v. Schneider Specialized Carriers, 700 N.W.2d 328, 330 (Iowa 2005); P.D.S.I., 685 N.W.2d at 633. Accordingly, the reviewing court is bound by the commissioner's findings of fact if supported by substantial evidence in the record before the court when that record is viewed as a whole. Neal, 814 N.W.2d at 518; Iowa Code §17A.19(10)(f) (2017).

Substantial evidence is defined for purposes of the Administrative Procedure Act as "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." Iowa Code §17A.19(10)(f)(1) (2017). Viewing the record as a whole requires the court to review not only the relevant evidence in the record cited by any party that supports the agency's findings of fact, but also any such evidence cited by any party that detracts from those findings along with any determinations of veracity made by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code §17A.19(10)(f)(3) (2017); Acuity Ins. v. Foreman, 684 N.W.2d 212, 216 (Iowa 2004), abrogated on other grounds in Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391-92 (Iowa 2009).

Substantial evidence is not absent simply because it is possible to draw different conclusions from the same evidence. Id.; see also Riley v. Oscar Mayer Foods Corp., 532 N.W.2d 489, 491-92 (Iowa App. 1995) ("The focus of the judicial inquiry is whether the evidence is sufficient to support the decision made, not whether it is sufficient to

support the decision not made."). This would be the appropriate deference afforded to this agency function, as required by Iowa Code §17A.19(11)(c). Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 (Iowa 2004). Accordingly, the petitioners may not rely upon the argument that their position may be supported by a preponderance of the evidence; rather, the burden is upon them to show that the commissioner's determination is lacking in substantial evidence. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 865 (Iowa 2008).

The court on judicial review is required to engage in a "fairly intensive review" of the record to ensure the agency's fact finding was reasonable. Neal, 814 N.W.2d at 525; Univ. of Iowa Hosps. v. Waters, 674 N.W.2d 92, 95 (Iowa 2004). However, courts on judicial review may not engage in a "scrutinizing analysis," or something that would resemble de novo review, as such a standard of review "would tend to undercut the overarching goal of the workers' compensation system." Neal, 814 N.W.2d at 525; Midwest Ambulance, 754 N.W.2d at 866. That purpose has been consistently summarized as follows:

> The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.
>
> It was the purpose of the legislature to create a tribunal to do rough justice-speedy, summary, informal, untechnical. With this scheme of the legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality.

Zomer v. West Farms Inc., 666 N.W.2d 130, 133 (Iowa 2003) (quoting Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)); see also Arndt v. City of Le Claire, 728 N.W.2d 389, 394 (Iowa 2007) ("Making a determination as to whether evidence 'trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence is not an assessment for the district court or the court of appeals to make when it conducts a substantial evidence review of an agency decision").

On the other hand, the application of the law by the commissioner to its own factual determinations requires a different standard upon judicial review. As the application of law to facts is also vested in the discretion of the agency, it is only to be reversed if found to be irrational, illogical or wholly unjustifiable. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 196 (Iowa 2010); Dunlap v. Action Warehouse, 824 N.W.2d 545, 557 (Iowa Ct.App. 2012); Iowa Code §17A.19(10)(m) (2017).

The difference between these varying standards of review was best summarized in this quote from Meyer:

> Although a claim of insubstantial evidence is usually used to challenge findings of fact, we understand how it can be implicated, as in this case, in a challenge to a legal conclusion. Error occurs when the commissioner makes a legal conclusion based on facts that are inadequate to satisfy the governing legal standards. Yet, a claim of insubstantial evidence to support a legal conclusion does not give rise to the standard of review applicable to the claim of substantial evidence to support the factual findings by the commissioner. When the commissioner takes a piece of evidence and uses it to draw a legal conclusion..., we do not review the conclusion by looking at the record as a whole to see if there was substantial evidence that could have supported the ultimate decision, as argued by IBP in this case. Instead, we review the decision made. If the commissioner fails to consider relevant evidence in making

> a conclusion, fails to make the essential findings to support the legal conclusion, or otherwise commits an error in applying the law to facts, we remand for a new decision unless it can be made as a matter of law.

710 N.W.2d at 219-20 n.1. As a result, even where counsel have phrased the issue for the court as whether the commissioner's factual findings are supported by substantial evidence, this is only the beginning of the analysis. If the commissioner's factual findings are upheld, this court must then determine "whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." Id. at 219.

Whether the commissioner's interpretation of Iowa Code §85.26(2) or §86.13 is to be afforded any deference depends upon whether such interpretative authority has been clearly vested in that agency by the legislature. Neal, 814 N.W.2d at 518. "Indications that the legislature has delegated interpretive authority include 'rule-making authority, decision-making or enforcement authority that requires the agency to interpret the statutory language, and the agency's expertise on the subject or on the term to be interpreted.'" Id. (quoting The Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 423 (Iowa 2010)). Since Neal, the Iowa Supreme Court has made it clear that the legislature has not delegated any interpretive authority to the commissioner to interpret Iowa Code chapter 85. See Jimenez, 839 N.W.2d at 648. Accordingly, this court gives no deference to the agency's interpretation of §85.26(2) or §86.13, and will substitute its own judgment if it concludes that the commissioner has made an error of law in determining whether the respondent's review-reopening claim was time-barred or in its assessment of a penalty benefit.

Taking the agency record as a whole, the following facts were available to the commissioner: At the time of the review-reopening hearing, the respondent was 64 years old. She attended high school through the 11th grade; although she does not have her G.E.D., she has taken community college classes in accounting and computers. She began working for the petitioner in 1976; her prior employment included jobs at the V.A. Hospital in the kitchen and for an overall factory sewing collars on shirts. She worked for the petitioner until her employment was terminated in December of 2010; she had been suspended in November for not being truthful over a work absence. Her claim for unemployment benefits was challenged on the grounds of misconduct; she ultimately was awarded benefits.

The respondent injured her left shoulder on August 11, 2008 when she fell off a flatbed trailer while at work. An MRI taken a few days later revealed a full thickness tear of the left rotator cuff. Despite the injury, the respondent continued to work and never initially qualified for temporary total disability benefits. Her initial claim for workers' compensation benefits was met with a denial from the respondent on the basis that it contested whether the injury arose out of or in the scope of her employment. While she was encouraged to seek treatment for her injury through her group medical plan, the respondent never followed through, apparently because she was told that such treatment would not be covered as work-related.

The respondent's initial left shoulder claim came on for arbitration hearing on January 12, 2010. In a decision dated May 21, 2010, the deputy determined that the injury was work-related and that the petitioner should pay her medical expenses from the injury. This decision was affirmed by the commissioner, the district court and ultimately

the Iowa Court of Appeals. Pella Corp. v. Winn, 2013 WL 519972 (Iowa Ct.App., Case No. 12-0592, filed February 13, 2013). There was no determination regarding temporary disability benefits or permanency since the respondent had not been treated surgically (despite having been evaluated as a candidate for surgery, because of the petitioner's denial) and was not yet at maximum medical improvement.

As noted earlier, the respondent continued to work despite her left shoulder injury. She was required to wear a sling on her left arm that prevented her from using that arm while at work. As a result, she began noticing symptoms in her right shoulder in 2010; eventually, she was diagnosed with a tear of her right rotator cuff resulting from work-related overuse of her right arm. Her claim for benefits from this injury was heard by the deputy on February 16, 2012. In a decision dated September 19, 2012, the deputy concluded that the respondent sustained a cumulative injury to her right upper extremity on November 16, 2010 and that she had a resulting permanent partial disability in the amount of 80 percent. The deputy was affirmed by the commissioner on July 1, 2013; as before, this decision was subsequently affirmed by the district court and the Iowa Court of Appeals. Pella Corp. v. Winn, 2015 WL 2089420 (Iowa Ct.App., Case No. 14-0771, filed May 6, 2015).

Once the respondent's left shoulder claim was affirmed by the court of appeals, her attorney contacted counsel for the petitioner to inquire regarding further treatment for the injury and the prospect of permanent partial disability benefits through a review-reopening proceeding. Defense counsel's response was that such benefits would not be available since only medical expenses were awarded in the prior proceeding concerning the left shoulder. A review-reopening proceeding was commenced on September 9,

2013. The respondent was examined by Dr. Sunil Bansal in August of 2014; in his report dated September 9, 2014, Dr. Bansal concluded as follows: 1) the respondent sustained what he described as a "massive left shoulder full thickness rotator cuff tear with retraction;" 2) she had a 21% permanent impairment to her left upper extremity, which translated to a 13% impairment to the whole body; 3) she should be evaluated for surgery at the University of Iowa or Mayo Clinic, but he felt that surgery (even if recommended) "would be extremely challenging" because of "the marked delay in treatment;" 4) she should be placed on permanent restrictions of a) no lifting greater than five pounds occasionally; b) no frequent lifting of the left arm; c) no lifting over shoulder level with the left arm; d) no frequent pushing or pulling with the left arm; and e) no pushing or pulling greater than five pounds with the left arm.

The respondent testified at the review-reopening hearing on January 21, 2015 that she still has pain in the area of the rotator cuff tear and "it hurts all the time." She described it as "[i]t just feels like a sharp pain all the time." This pain increases with activity into her upper back and "down the shoulder" into the arm. She continues to take prescription pain medication for these symptoms. She also testified regarding her efforts at finding work after her employment with the petitioner was terminated in 2010. Her first job after being terminated was working as a part-time cashier at Wal-Mart in 2013. She worked at this job for approximately six months, but had to quit because they could not guarantee her work within her restrictions. In March of 2014, she began working at Head Start in a part-time support position. She works at this job when a teacher or teacher's assistant is absent; she estimated she has averaged approximately five days per month. She occasionally has to lift or reach for objects outside of her restrictions, which

requires her to seek assistance. She is still seeking full-time employment and considering applying for Social Security or Social Security disability benefits. She also described at length regarding how she is limited in performing routine household tasks such as lifting, cleaning, laundry and fixing her hair. She testified that she would be unable to work at jobs similar to the prior work she did before working for the petitioner (the V.A. hospital and the overall factory).

The deputy filed his review-reopening decision on March 26, 2015. He concluded that the respondent was not precluded from seeking permanent partial disability benefits because she only sought and received medical benefits in her initial proceeding concerning the left shoulder injury, relying on Beier Glass Co. v. Brundige, 329 N.W.2d 280, 287 (Iowa 1983) ("We hold an arbitration award of medical benefits is sufficient to support review-reopening under section 85.26(2)). In addition, the deputy concluded that the respondent had sustained both an economic and physical change in condition since the time of the initial arbitration decision:

> At the time of the arbitration decision, claimant was still employed at Pella. In late 2010, claimant was terminated from her employment. Claimant's unrebutted testimony is she sought jobs in her area at factories and convenience stores. Claimant was able to get a part time job at Casey's in 2013 and part time work at Wal-Mart. Claimant worked both jobs with torn rotator cuffs in both shoulders. Her unrebutted testimony is that she could not continue to work either job due to lifting requirements. At the time of hearing, claimant was working as a substitute with Head Start. Claimant worked approximately one week per month as a substitute. At the time of hearing, claimant was attempting to still find full time work.
> ....
>
> At the time of hearing of the arbitration decision in January 2010, claimant contended she had an injury to her left upper extremity. Since the decision was issued in May of

> 2010, claimant has also gone to hearing regarding a right shoulder injury that occurred on November 16, 2010 (File No. 5035646). The arbitration decision, in that case, found that claimant had an 80 percent industrial disability due to her right shoulder injury. Records from that case, and the arbitration decision regarding her right shoulder injury, found that claimant's right shoulder injury was proximally caused by overuse in guarding the torn rotator cuff on the left.

Review-Reopening Decision, p. 6. The deputy went on to conclude that the respondent had sustained a permanent total disability from her left shoulder injury, based on her age, education, work experience, work restrictions and the likelihood that rotator cuff surgery may not be a viable treatment option as noted by Dr. Bansal. The deputy concluded that the claimant's review-reopening proceeding was not time-barred, again relying on Beier Glass and that less than three years had passed from the final agency decision in the initial left shoulder claim and the commencement of the review-reopening proceeding. The deputy rejected the petitioner's arguments that the respondent was somehow estopped from pursuing a review-reopening, specifically finding that she made no false representations regarding her left shoulder injury or sought to conceal her eventual desire to seek permanent partial disability benefits:

> The record, instead suggests, that the only reason claimant did not seek permanent partial disability benefits in the original arbitration decision, was because defendant was denying and delaying claimant's treatment for her shoulder.

Id. at p. 9. Likewise, the deputy found no basis for the application of judicial estoppel to the circumstances presented by the review-reopening proceeding:

> [T]here is scant evidence that claimant has assumed a position in her review-reopening proceeding that is inconsistent with the position she took in the underlying arbitration case. As noted above, the record suggest the only reason claimant did not seek a claim for permanent

> partial disability benefits in the underlying arbitration proceeding, was because claimant was not at MMI for her left shoulder condition. The reason claimant was not at MMI for the left shoulder is because defendant was denying and delaying treatment for her left shoulder.

Id. Finally, the deputy assessed a penalty benefit of 20% (or $1,707.61) against the petitioner for its delay in paying permanent partial disability benefits for 19 weeks between Dr. Bansal's impairment rating and the date of hearing:

> I appreciate defendant's position that the holding in Beier Glass is incorrect. However, it is not reasonable for defendant to delay payment of claimant's permanent partial disability benefits based upon an interpretation of Iowa Code section 85.26(2), when long-standing case law explicitly holds that position is incorrect.
>
> In a report, dated September 9, 2014, Dr. Bansal found claimant had a 13 percent permanent impairment to the body as a whole. There is no other record in evidence, issued since the May 21, 2010 arbitration decision, that is contrary to the findings that claimant had a 13 percent permanent impairment to the body as a whole due to her left upper extremity injury. Given this, it was unreasonable for defendant not to pay claimant permanent partial disability benefits based on Dr. Bansal's rating.

Id. at 12. The petitioner sought intra-agency review of the deputy's decision. In the appeal decision dated October 19, 2016, the commissioner affirmed and adopted the deputy's decision as the final agency decision; in doing so, the commissioner noted that the deputy had found the respondent to be credible and expanded upon the deputy's analysis regarding the respondent's change in physical condition warranting a review-reopening:

> Given these uncontroverted views [regarding the likelihood that the respondent might not improve with surgery], I find it likely claimant has achieved MMI and current treatment likely is limited to pain management. Unlike at the time of the arbitration hearing, the restrictions on claimant's work

> activity are now permanent. This clearly has changed claimant's employability and prospects for earnings from employment. However, a re-evaluation by an orthopedic specialist, which was agreed to at hearing by defense counsel, would appear reasonable in an attempt to improve claimant's condition. Indeed, if surgery is done, and if it does successfully improve claimant's condition, this agency is available to review the permanent total disability award.

Appeal Decision, p. 3. The commissioner also expanded upon the deputy's analysis regarding the assessment of a penalty benefit:

> The deputy commissioner correctly imposed the penalty because the only stated basis for the denial of weekly benefits was unreasonable. Employers are certainly free to argue the impropriety of long-standing legal precedent in hopes of changing that precedent, but they cannot withhold benefits from an otherwise deserving injured worker while doing so.

Id. at p. 4. The petitioner sought rehearing from the appeal decision. In his rehearing decision dated December 5, 2016, the commissioner reaffirmed his prior decision, with the following notable additions:

1. The decision in Beier Glass was cited with approval by the Iowa Supreme Court in Coffey v. Mid Seven Transp. Co., 831 N.W.2d 81, 92 (Iowa 2013), which reaffirmed the prior holding that the 3-year statute of limitations for a review-reopening proceeding is applicable where the prior award was for only medical benefits; and

2. The respondent could receive concurrent permanent partial and permanent total disability awards for successive injuries sustained with the same employer, relying on recent precedent from both the Iowa Supreme Court and the Iowa Court of Appeals. Drake Univ. v. Davis, 769 N.W.2d 176, 180-81, 185 (Iowa 2009); JBS Swift & Co. v. Ochoa, 2016 WL 3002920

(Iowa Ct.App. 2016, Case No. 15-0840, filed May 25, 2016).[1]

Rehearing Decision, pp. 1-2, 4. A timely petition for judicial review was filed by the petitioner on January 3, 2017.

Review-reopening. The petitioner's primary argument regarding the respondent's ability to pursue a review-reopening proceeding for permanent partial disability benefits is that it would be time-barred as outside the three-year limitation period specified in Iowa Code §85.26(2). The focus of this argument is that since weekly benefits were not awarded as a result of the initial arbitration hearing, the respondent may not pursue those benefits in a review-reopening proceeding. This has been a particularly uphill battle for the petitioner in light of the aforementioned ruling by the Iowa Supreme Court in Beier Glass. That decision unambiguously states, "We hold an arbitration award of medical benefits is sufficient to support review-reopening under section 85.26(2)." 329 N.W.2d at 287.

The petitioner urges this court to somehow revisit the Beier Glass decision as "untenable" and the result of that court's "disconcertation...when it was faced with having to follow the...plain words [of §85.26(2)]." Alternatively, the petitioner strenuously argues that subsequent amendments to §85.26(2) clarify that Beier Glass is no longer good law. These arguments can be dispatched fairly quickly. First, it is not the province of any lower or intermediate court to essentially overrule well-settled precedent handed down from this state's highest court. See State v. Beck, 854 N.W.2d 56, 64 (Iowa Ct.App. 2014) ("We are not at liberty to overrule controlling supreme court precedent").

[1] Ochoa was affirmed by the Iowa Supreme Court subsequent to the rehearing decision, on December 30, 2016. JBS Swift & Co. v. Ochoa, 888 N.W.2d 887 (Iowa 2016).

Second, this court is not convinced that the aforementioned amendments change anything regarding the treatment of a medical expenses-only award as providing the predicate for a review-reopening proceeding. The essence of the petitioner's argument in this regard is that the statute now plainly requires an initial award of weekly benefits before a review-reopening proceeding can be commenced to end, increase or diminish those benefits. The foundation of the Beier Glass decision, however, is found within the first sentence of §85.26(2), which read, "Any award for payments...for benefits under the workers' compensation...law may,...be reviewed upon commencement of reopening proceedings...within three years from the date of the last payment of weekly benefits made under such award...." Iowa Code §85.26(2) (1981). The court in Beier Glass went to great pains to analyze this language and expressly reject the argument urged presently by the petitioner:

> Employer focuses on the "weekly benefits" language of section 85.26(2) and argues that because medical benefits do not constitute weekly benefits, there was no award subject to reopening. This construction not only ignores the legislature's addition of the words "for benefits" in the preceding part of the section, but would yield an anomalous result. A worker seeking to recover additional medical benefits beyond the two-year limit on original actions would be required to show an initial award of not only medical benefits, but disability benefits as well, thus penalizing the worker who loses insufficient work time to warrant such an initial award. Employer's construction might also encourage some employers and insurers to quickly settle on medical benefits in hopes the worker will not pursue additional compensation until the two-year limit on original actions has run. We think the legislature used the words weekly benefits, not to restrict the nature of the initial award, but merely to extend the three-year limitation period as far as possible, beyond the last payment of benefits received by the worker.

329 N.W.2d at 286. The only meaningful change resulting from the amendments urged by the petitioner is to replace the word "Any" with "An" at the beginning of the sentence. This does not alter the analysis undertaken by the supreme court in Beier Glass; namely, that the statutory scheme for a review-reopening proceeding allows for the commencement of such a proceeding even where the initial award was for only medical expenses. The proceeding initiated by the respondent in this case is not time-barred.

The purpose of a review-reopening proceeding is to determine "whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code §86.14(2) (2017). The change can be either a change in physical condition or a change in economic condition such as earning capacity. Hernandez v. Osceola Foods, 2013 WL 1751006 *2 (Iowa Ct.App., Case No. 12-1658, filed April 24, 2013); Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 435 (Iowa 1999). A change in physical condition is not required because industrial disability is the product of many factors, not just physical impairment; other considerations would include the claimant's age, education, experience, and inability, because of an injury, to engage in employment for which the employee is fitted. E.N.T. Assocs. v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994). The respondent bears the burden of proving that the change in condition was proximately caused by her original left shoulder injury. Kohlhaas, 777 N.W.2d at 391-92.

The petitioner contends that the commissioner erred in finding both a change in the respondent's physical condition and earning capacity; specifically, it argues 1) any change in the respondent's economic condition after the arbitration hearing was not caused by her left shoulder injury; 2) there was no change in the respondent's physical

condition as measured by a comparison between the 2009 report of Dr. Stoken and the 2014 report of Dr. Bansal; and 3) the commissioner improperly focused on what was described as the petitioner's refusal to treat the respondent's injury rather than her own refusal to obtain treatment through her group insurance plan.

To the contrary, this court finds that the commissioner correctly analyzed whether the respondent had experienced a change in employment condition and will not disturb the ultimate conclusion that such a change in fact has occurred. To the degree the petitioner argues that the respondent's employment was terminated because of her misconduct and not her injury, that argument was tested in the respondent's claim for unemployment benefits and found to be lacking. The respondent's suspension and her ultimate termination all arose from circumstances stemming from her left shoulder injury; the dispute between the petitioner and the respondent dealt with whether the respondent truthfully claimed to be off work because of this injury. The petitioner's purported basis for the termination (providing false information to obtain time off) failed as a challenge to the respondent's claim for unemployment benefits, and is equally lacking on the issue of her change in employment condition.

Secondly, the commissioner's conclusion that the respondent's physical condition had changed from the arbitration hearing was supported by substantial evidence. The report of Dr. Stoken from the arbitration hearing did provide for a permanency rating which matches that of Dr. Bansal; however, this rating was only provided on the assumption that no further treatment would be provided; in actuality, Dr. Stoken did not believe that the respondent had reached MMI by the time of the 2009 report because she had not yet had the recommended surgery on her left shoulder. By the time Dr. Bansal

saw the respondent, the likelihood that any improvement would come about from a surgery was doubtful. The commissioner was correct to conclude that "[u]nlike at the time of the arbitration hearing, the restrictions on claimant's work activity are now permanent." Appeal Decision, p. 3. One of the bases for a finding of a change in employment condition is where a temporary disability has developed into a permanent disability. Kohlhaas, 777 N.W.2d at 393.

Finally, the question of who is responsible for the respondent not getting treatment surgery sooner is frankly not a consideration in determining whether she has now shown a change in her condition warranting an increase in her benefits through a review-reopening. That being said, the court cannot agree with the petitioner that this issue so tainted the commissioner's evaluation of the issue of any change in condition as to warrant a reversal of his determination on that issue. To the degree this issue overlaps with the petitioner's argument regarding the issues of estoppel and/or laches, the court agrees with the commissioner regarding the non-applicability of the former to the facts and circumstances of this case; as to the latter, the court is satisfied that the defense of laches has not been established as a matter of law and will be given no further consideration on this record. See Garrett v. Huster, 684 N.W.2d 250, 255 (Iowa 2004) (party asserting defense of laches has burden to establish all essential elements by clear convincing and satisfactory evidence; "The mere passage of time will not give rise to an inference of prejudice"). The petitioner has not established any grounds for reversing the commissioner's determination that the respondent had proven a change in her employment condition warranting an award of permanent partial disability benefits.

Permanent total disability. In order for the commissioner to conclude that the

respondent was totally and permanently disabled, there would have to have been substantial evidence that her injury wholly disabled her from performing work that her experience, training, intelligence, and physical capacities would otherwise permit her to perform. Acuity, 684 N.W.2d at 219. The comparison in determining industrial disability is the employee's capacity to earn before and after the injury, not her capacity to earn as compared to other workers. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995); Hill v. Fleetguard, Inc., 705 N.W.2d 665, 673 (Iowa 2005). Total disability does not equate with a state of absolute helplessness; rather, the pertinent question is whether there are jobs in the community that the respondent can do for which she can realistically compete. Id.; Second Injury Fund v. Shank, 516 N.W.2d 808, 815 (Iowa 1994). "To establish a total disability, an employee need not look for a position outside the employee's competitive labor market." Gits, 855 N.W.2d at 198 (citation and internal quotation marks omitted).

Appropriate factors to consider in evaluating a claim of industrial disability include the employee's medical condition before and after the injury, the location and severity of the injury, the work experience of the employee before and after the injury and the potential for rehabilitation, the employee's intellectual, emotional, and physical qualifications, her earnings before and after the injury, the employee's age, education, motivation and functional impairment as a result of the injury, as well as the inability as a result of the injury to engage in employment for which the employee is fitted. IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632-33 (Iowa 2000).

A careful review of the petitioner's briefs in this proceeding does not suggest that it is arguing that the respondent's circumstances in the abstract would not generally

qualify for an award of permanent and total disability. To the degree the petitioner is making an argument that an award of permanent total disability is not supported by substantial evidence, such a conclusion is not borne out on this record. Finley Hosp. v. Holland, 2012 WL 170682 *4 (Iowa Ct.App., Case No. 11-0879, filed January 19, 2012) ("The substantial evidence standard also does not permit us to reweigh the evidence").

What the petitioner appears to be arguing in this regard is that an award of permanent total disability cannot be reconciled with the previous award of 80% permanent disability associated with the subsequent right shoulder injury. This argument is met head-on by the decision by the Iowa Supreme Court in Ochoa that an employee is not prohibited from collecting concurrent awards for both permanent partial disability benefits and permanent total disability benefits when the employee suffers successive injuries at the same workplace. 888 N.W.2d at 899 ("Section 85.34(3)(b), on its face, does not prohibit Ochoa from drawing compensation for permanent partial disability and permanent total disability concurrently, so long as the benefit awards do not arise from the same injury"). The fact that the order of injuries and resulting disabilities is reversed in the present case from the order presented in Ochoa is a distinction without a difference. As in Ochoa, the disability awards were each premised on separate, discrete injuries. That decision controls the disposition of the issue; the award associated with the right shoulder has no bearing on the commissioner's ability to award permanent and total disability associated with the left shoulder injury.[2] The commissioner's award of permanent total disability benefits will not be disturbed.

[2] The petitioner cites to a recent legislative enactment in support of its position. Acts 2017 (87th G.A.) H.F. 518 §§9, 10 (eff. July 1, 2017) ("An employee shall not receive compensation for permanent partial disability if the employee is receiving compensation for permanent total disability"). That amendment is not subject to this proceeding. Id. at §24 ("The sections of this Act amending sections 85.16, 85.18, 85.23,

Penalty benefits. The issue of penalty benefits is governed by Iowa Code §86.13, which reads as follows:

> If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

Iowa Code §86.13 (2017). The respondent as the claimant has the initial burden to establish a denial or delay in the commencement of benefits; if established, the burden then shifts to the petitioner as the employer to prove a reasonable cause or excuse for the delay or denial. City of Madrid v. Blasnitz, 742 N.W.2d 77, 81 (Iowa 2007). The most recent pronouncement in this area by the Iowa Supreme Court succinctly sets out the parameters in reviewing these issues:

> We have held that a reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A reasonable basis for denial of the claim exists if the claim is fairly debatable. A claim is fairly debatable when it is open to dispute on any logical basis. Whether a claim is fairly debatable can generally be determined by the court as a matter of law. The reasonableness of the employer's denial or termination of benefits does not turn on whether the employer was right. The issue is whether there was a reasonable basis for the employer's position that no benefits were owing. If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.

85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of this Act").

Burton v. Hilltop Care Center, 813 N.W.2d 250, 267 (Iowa 2012) (internal citations, quotation marks and brackets omitted). A reasonable basis exists for denial of policy benefits if the insured's claim is fairly debatable either on a matter of fact or law. Blasnitz, 742 N.W.2d at 82.

The resolution of this issue brings the court full circle from the initial issue addressed within this ruling: the viability of the holding in Beier Glass. The primary, if not sole, argument by the petitioner regarding its position that penalty benefits were improperly awarded is that its position regarding the application of Beier Glass to the present dispute was fairly debatable. For the reasons noted by this court in dispatching the petitioner's earlier arguments regarding the continued precedential value of this decision, it respectfully disagrees with the petitioner regarding the reasonableness of its dogged refusal to abide by established precedent after Dr. Bansal quantified the extent of the respondent's permanent disability. Should a reviewing court ultimately determine that Beier Glass is no longer controlling precedent as applied to this case, the issue of penalty benefits will be resolved as well. Until then, this court believes the commissioner acted correctly in awarding penalty benefits.

IT IS THEREFORE ORDERED that the decision of the worker's compensation commissioner dated December 5, 2016 is affirmed. The costs of this proceeding are assessed to the petitioner.

In addition to all other persons entitled to a copy of this order, the Clerk shall provide a copy to the following:

Workers' Compensation Commissioner
1000 E. Grand Ave.
Des Moines, IA 50319-0209
Re: File No. 5027519

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV053280	PELLA CORPORATION VS DIANA WINN

So Ordered

Michael D. Huppert, District Court Judge,
Fifth Judicial District of Iowa