IN THE IOWA DISTRICT COURT FOR POLK COUNTY

HY-VEE, INC., and UNION INSURANCE COMPANY OF PROVIDENCE., Petitioners/Defendants, vs. **CHAD LEWIS,** Respondent/Claimant.	**Case No. CVCV062004** **WCC File No. 19700629.01** **RULING ON PETITION FOR JUDICIAL REVIEW**

A petition for judicial review came before the court from a final decision of the Iowa Workers' Compensation Commission. The court held a hearing on this matter on October 29, 2021. Petitioners Hy-vee and Union Insurance Company of Providence were represented by attorney Lindsey Mills. Attorney David Lawyer appeared for respondent Chad Lewis. Having heard the arguments of counsel and reviewed the court file, including the briefs provided by the parties, the certified administrative record, and being otherwise fully advised in the premises, the court now enters the following ruling.

I. INTRODUCTION

A. Factual Background

Respondent Chad Lewis was a 44-year-old man at the time of the arbitration hearing. (Tr. at 10). He graduated from West Des Moines Valley High School in 1995. (*Id.*). Lewis attended Mount St. Clare College and played soccer. (*Id.*). He only attended for two years and did not graduate. (*Id.*). Lewis returned to Des Moines where he had a full-time position at Wells Fargo in the Home Mortgage. (*Id.* at 11). He worked at Wells Fargo for about ten years before he was laid off. (*Id.*). After he was laid off, Lewis delivered papers for six months. (*Id.*). Lewis was then hired

by Hy-Vee as a part-time kitchen clerk in 2013. (*Id.* at 12). After three years, Lewis was offered a full-time position in the kitchen in the smokehouse area. (*Id*. 12-13).

Lewis's position at Hy-Vee was in the smokehouse area for about two and half years until he was injured in October 2018. (*Id.* 13-15). Part of his job duties required him to unload the pallets of meat and load them onto a metal cart. (*Id.* at 14-15). The pallets and the items he was required to unload could be heavy. (*Id.* at 14). On October 1, 2018, Lewis was unloading boxes from the truck and loading them onto the second level of the metal cart when he felt a sharp pain go through his shoulder area by his shoulder blade and top shoulder area. (*Id.* at 15). It was sore after but he continued working that day because the pain went away. (*Id.* at 16). Lewis did not think much of it because that is what happens when he is lifting heavy boxes. (*Id.*). Two days later, Lewis was unloading another truck and he felt a pain that hurt a little worse. (*Id.*). The pain went away a little bit and it was a dull pain. (*Id.* at 17). However, the pain got worse the more and more he kept unloading the truck. (*Id.*). After a couple of weeks of experiencing pain, Lewis reported the injury to human resources and requested treatment. (*Id.*).

Hy-vee authorized Lewis to see an occupational medicine physician, Dr. Daphney Myrtil. (*Id.* at 18). On November 1, 2018, Lewis presented to Dr. Myrtil at Des Moines Occupational Medicine. Lewis reported his pain as a dull ache and persistent. (Joint Exhibit (JE) 1 at 1). He reported the pain to be a 7/10 intensity that was exacerbated by lifting heavy items. (*Id.*). Dr. Myrtil believed Lewis's left shoulder and upper back pain were due to left rotator cuff tendinitis/impingement syndrome and a thoracic strain involving the left trapezius. (*Id.*). An X-ray of the left shoulder was performed but it demonstrated no acute bony abnormalities. (*Id.*). He was given a prescription for Naprosyn and Flexeril and was shown how to perform several shoulder stretches. (*Id.* at 2). The doctor did note that "this does appear to be a work-related injury." (*Id.*).

Lewis continued to present to Dr. Myrtil for follow-up visits. Dr. Myrtil referred Lewis to physical therapy. (*Id.* at 4). He was also referred for an MRI to evaluate for surgical pathology. (*Id.* at 7). Dr. Myrtil continued to discuss steroid injections with Lewis but he continued to decline. (*Id.* at 7-8). After reviewing his physical therapy notes, Dr. Mytril recommended discontinuing physical therapy because Lewis had little progress. (*Id.* at 8). Work restrictions continued but the weight limit changed depending on his improvement. (Id. at 2, 4, 7, 13). Lewis's MRI showed no rotator cuff or labral pathology. (*Id.* at 11).

At his visit on December 13, 2018, Lewis received a steroid injection. (*Id.* at 12). Dr. Myrtil continued Lewis on Naprosyn and Flexeril for pain control and had him continue his home exercise program. (*Id.*). Dr. Myril also referred him for additional sessions of physical therapy. (*Id.* at 13). At his follow-up visit on January 10, 2019, Lewis was to continue his home exercise program and was also referred for an additional four sessions of physical therapy including dry needling. (*Id.* at 16).

On January 25, 2019, Lewis presented to Dr. Myrtil for follow-up after his additional sessions of physical therapy. (*Id.* at 20). He reported experiencing pain that was 2-3/10 in intensity. Lewis reported he experienced temporary improvement of his symptoms after dry needling but it returns after a few hours. (*Id.*). Lewis is tolerating the job duties with the current restrictions. (*Id.*). Dr. Mytril advised him to take over-the-counter ibuprofen for pain control and to continue his home exercise program. (*Id.*). Lewis was discharged from care because he reached maximal medical improvement and was returned to full duty without restrictions. (*Id.*). Dr. Myril advised Lewis that he does not have any surgical pathology and his symptoms are muscular in nature that should improve with his home exercise program. (*Id.*). He met almost all of his goals after 16 sessions of physical therapy. (*Id.*).

Lewis presented to Dr. Kary Schulte at Des Moines Orthopaedic Surgeons (DMOS) for a second opinion. (JE 2 at 23). He stated he had pain in his shoulder, by his shoulder blades, and down his left side for over four months. (*Id.*). Dr. Schulte's assessed that the majority of Lewis's symptoms appear to be coming from the neck rather than the shoulder. (*Id.* at 25). It was recommended Lewis continue his home exercise program for the left shoulder, work on rotator cuff and scapular stabilizer strengthening, and ice the shoulder and use ibuprofen or Tylenol as needed. (*Id.*). He was released to work with full work duty without restrictions. (*Id.*). Dr. Schulte also recommended he be evaluated by the spine screening clinic for further evaluation and treatment options. (*Id.*).

On March 22, 2019, Lewis presented to Dr. Zachary Ries at the spine clinic at DMOS. (*Id.* at 27). Lewis reported that his pain has been persistent despite sixteen rounds of physical therapy. (*Id.*). Lewis stated his pain is worse with activity and rated his shoulder pain 5/10 and his arm pain 2/10. (*Id.*). He reported the pain as sharp, burning, dull, and aching in nature. (*Id.*). Dr. Ries's impression was that his symptoms could be related to disc herniation in the cervical spine with referred pain to the shoulder. (*Id.* at 28). However, he does not have left arm radiculopathy. (*Id.*). Dr. Ries ordered an MRI of the cervical spine to figure out the source of the pain. (*Id.*). On March 27, 2019, Lewis returned to Dr. Ries for a review of his MRI. (*Id.* at 30). The MRI was essentially normal. (*Id.*). There was a mild C6-7 disc bulge but no neural element compression. (*Id.*). Dr. Ries recommended continuing physical therapy and chiropractic care with massage as needed. (*Id.*).

Lewis returned to Dr. Schulte for a follow-up visit on April 11, 2019. (*Id.* at 33). The recommended treatment options were the same. (*Id.*). He was given a work release for full work duty without restriction. (*Id.*). The plan was for Lewis to return to the clinic on an as-needed basis. (*Id.*).

Lewis went to physical therapy 22 times at Athletico Physical Therapy between November 14, 2018, and May 3, 2019. (*See* JE 3). When Dr. Myrtil was his doctor, Lewis had 16 visits between November 14, 2018, and January 24, 2019. (*Id.* at 94). When Dr. Schulte was his doctor, he had six visits between April 15 and May 3, 2019. (*Id.* at 92). At his last physical therapy session, he reported "I feel 60-70% improved because it feels weak. But today the pain is better and I almost wonder if it is gone." (*Id.*). Lewis stated he felt weakness and pain when he lifts heavy objects. (*Id.*). He met all of the goals that were to be achieved between April 15, 2019, and May 3, 2019. (*Id.* at 93).

On June 26, 2019, Dr. Schulte drafted an opinion letter to Defendants. (JE 2 at 37). Dr. Schulte found Lewis reached maximum medical improvement on the date of his last clinic visit of April 11, 2019. (*Id.*). Dr. Schulte also found that Lewis has no "measurable impairment" based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, 2000. (*Id.*). Lewis had a full range of motion of his left shoulder and normal motor strength. (*Id.*).

Due to his continued problems with his shoulder, Lewis went to Dr. John Kuhnlein for an independent medical evaluation (IME) on January 14, 2020. (Claimant's Exhibit (CE) 1 at 1). In Dr. Kuhnlein's report dated February 7, 2020, he opined "Lewis has cervical myofascial pain syndrome related to his work activities for Hy-Vee on or about October 1, 2018." (*Id.* at 7). Dr. Kuhnlein also opined that there may be a minor contribution from left impingement syndrome related to the work incident on October 1, 2018. (*Id.*). Dr. Kuhnlein did not recommend surgery and agreed with Dr. Ries regarding conservative treatment measures. (*Id.* at 8). He recommended Lewis receive trigger point injections and that he see a pain management specialist. (*Id.*). Dr. Kuhnlein also recommended chiropractic care and massage therapy. (*Id.*). Dr. Kuhnlein opined "Lewis had not yet reached maximum medical improvement." (*Id.*). "If the course of treatment

above is denied, or if Mr. Lewis decides not to participate, then he reached maximum medical improvement on or about May 3, 2019, his last visit with the therapists for therapy ordered by Dr. Schulte." (*Id.*). Using the AMA Guides, Dr. Kuhnlein assigned "a total 3% upper extremity impairment for deficits in range of motion" to the left shoulder. (*Id.* at 9). However, "this 3% left upper extremeity impairment would convert to a 2% whole body impairment." (*Id.*). Dr. Kuhnlein also placed "Lewis into DRE Cervical Category II and assign 5% whole person impairment for the cervical myofascial pain." (*Id.*).

On June 29, 2020, Dr. Schulte reviewed the medical records for Lewis and the independent medical evaluation performed by Dr. Kuhnlein. (JE 2 at 38). Dr. Schulte "continues to believe the claimant's work injury of October 1, 2018, has resolved and that no further medical care is recommended for the work injury." (*Id.*).

Defendants authorized the recommended trigger point injections with Dr. Mark Fox. (*Id.* at 39). The injections were performed on September 24, 2020. (*Id.*). Injections were to be repeated in six to eight weeks if symptoms return or fail to improve. (*Id.* at 40). However, Lewis stated they failed to solve his issue and he continued to have pain. (Tr. at 20). No additional care has been offered to Lewis since his trigger point injections with Dr. Fox. (*Id.*).

Lewis continued to have problems after his injury and stated the pain would come and go but never went away. (Tr. at 24). In June 2019, he had to switch jobs to the gas station because it was an easier job physically. (*Id.* at 23-24). At the gas station, Lewis did cashier work that required him to stand for long periods but also occasionally stock shelves and cook food. (*Id.* at 24). At the time of the arbitration hearing, he was back working in the kitchen in the Italian area and occasionally doing smoking. (*Id.* at 25). Hy-Vee is accommodating things he cannot do like the heavy lifting of boxes. (*Id.* at 26). However, Lewis is only working 30 hours per week compared

to the full-time with 40 hours per week he was working before his injury. (*Id.*). He was making more per hour at the time of the hearing of $15.90 compared to slightly less than $15.00 per hour. (*Id.* at 37).

At the time of the arbitration hearing, Lewis stated he continues to have pain issues. He describes it as "pain and burning through the muscle" from his neck that radiates down into his shoulder and his upper back. (*Id.* at 20-21). Lewis never had issues with this area of his body before his work incident. (*Id.* at 21). He stated he did have a work injury in 2017 that caused tightness and soreness in his lower back. (*Id.* at 21-22). This injury has impacted Lewis's daily activities at home and work. (*Id.* at 23-29).

B. Procedural History

Lewis filed a Petition before the Iowa Workers' Compensation Commissioner on December 5, 2019. The parties filed a hearing report and it was stipulated that "claimant sustained an injury, which arose out of and in course of employment, on the following date: 10/1/2018." (Hearing Report at 1). It was also stipulated that the alleged injury was the cause of temporary disability during a period of recovery. (*Id.*). It was disputed whether the alleged injury caused permanent disability (*Id.*). The parties stipulated the weekly rate of compensation to be $373.58. (*Id.* at 2).

The arbitration hearing was held on December 7, 2020. On March 4, 2021, Deputy Commissioner Stephanie Copley issued an arbitration decision. The Deputy found: (1) Lewis sustained permanent disability both to his shoulder (a scheduled member under the legislature's 2017 amendments) and to his neck, which extends to his injury into the body as a whole; (2) Lewis sustained a 15 percent industrial disability for which he is entitled to 75 weeks of permanent partial disability (PPD) benefits at a rate of $373.58 per week; (3) reimburse Lewis for his IME and

mileage expenses; and (4) that Defendants shall reimburse Lewis for his costs of $113.60. (Arbitration Decision at 6-8).

Defendants appealed the Deputy's arbitration decision. On June 3, 2021, Commissioner Joseph Cortese affirmed the Deputy's findings, conclusions, and analysis regarding the issues presented. (Appeal Decision at 2). The Commissioner affirmed the decision in its entirety filed on March 4, 2021. (*Id.*). Specifically Commissioner Cortese stated that the deputy Commissioner provided a well–reasoned analysis of all of the issues raised in the arbitration proceeding… I affirm the deputy commissioner's finding that claimant proved he sustained permanent disability of both his left shoulder and his neck as a result of the work injury. I affirm the Deputy commissioner's finding that Iowa code section 85.34(2)(v) does not apply in this matter. I affirm the deputy commissioner's finding that claimant sustained 15% industrial disability as a result of the work injury. I affirm the Deputy Commissioner's order that defendants pay claimant's costs of the arbitration proceeding in the amount of $113.60. *Id*.

On July 2, 2021, Defendants filed a Petition for Judicial Review. Petitioners mount a three pronged attack of error against the Agency's Ruling. First, Petitioners argue "the commissioner erred in finding that claimant proved he sustained a permanent injury to his neck, in addition to his left shoulder, as a result of his October 1, 2018 work injury at Hy-Vee and that Claimant was entitled to industrial disability benefits based on a loss of earning capacity evaluation." (Petition at 2). Second, Petitioners allege that substantial evidence does not support the Deputy and Commissioner's determination that Respondent's injury resulted in permanent disability. (Petitioners' Br. at 13). Third, Petitioners assert that the Deputy and Commissioner's holding that Respondent was entitled to industrial disability as a result of his injury was irrational, illogical, and wholly unjustifiable. (Petitioners' Br. at 19).

II. STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. 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). 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).

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so the Court is bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity "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); *Mycogen*, 686 N.W.2d at 464. "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.'" *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (quoting Iowa Code § 17A.19(10)(f)(3)). "Evidence is not insubstantial merely because different conclusions may be drawn from the evidence." *Pease*, 807 N.W.2d at 845. "To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder." *Id.* "Judicial review of a decision of the [Commission] is not de novo, and the commissioner's findings have the force of a jury verdict." *Holmes v. Bruce Motor Freight*, 215 N.W.2d 296, 297-98 (Iowa 1974).

The application of the law to the facts is also an enterprise vested in the commissioner. *Mycogen*, 686 N.W.2d at 465. Accordingly, the Court will reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." *Id*.; Iowa Code § 17A.19(10)(l). "A decision is "irrational" when it is not governed by or according to reason." *Christensen v. Iowa Dep't. of Revenue*, 944 N.W.2d 895 at 905 (Iowa 2020). A decision is "illogical" when it is "contrary to or devoid of logic." *Id*. "A decision is "unjustifiable" when it has no foundation in fact or reason" or is "lacking in justice." *Id*. This standard requires the Court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). However, when the legislature has not vested the agency with such authority, the Court reviews an agency's interpretation of a statute for correction of errors at law. *Westling v. Hormel Foods Corp.*, 810 N.W.2d 247, 251 (Iowa 2012).

III. MERITS

A. Whether the Agency's determination that Lewis sustained an injury to his neck from October 1, 2018, work injury is supported by substantial evidence

The Agency found Lewis sustained an injury to his neck from the work injury on October 1, 2018. 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. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). A cause is proximate if it is a substantial factor in bringing about the result, however, it need not be the only cause. *Ayers v. D & N Fence Co.*, 731 N.W.2d 11, 17 (Iowa 2007). A preponderance of the evidence exists when the causal connection is probable rather than merely possible. *Sherman*, 576 N.W.2d at 321. The question of causal connection is essentially within the domain of expert testimony. *Id.*

Petitioners argue the record lacks substantial evidence to support that Lewis suffered an injury to his neck as a result of his work injury on October 1, 2018. (Petitioner's (Pet.) Brief at 9). Instead, they argue substantial evidence only supports an injury limited to the left shoulder. (*Id.*). Petitioners raise this issue because if the injury is confined to the shoulder, Lewis is entitled to be compensated only on a scheduled member basis of functional impairment to the body. *See* Iowa Code § 85.34(2). If the injury extends to the body as a whole, Lewis is entitled to be compensated based on industrial disability. *See id*.

Petitioners' argument is that Agency's reliance on Dr. Kuhnlein's medical opinion concluding that Lewis's injury extends to his neck is flawed. (Pet. Brief at 10). Petitioners contend Dr. Kuhnlein was not his treating physician. Additionally, they argue his "report begins with a paragraph regarding the workers' compensation system and this being a post-2017 shoulder case, thereby demonstrating his familiarity with the monetary motivation for a Respondent to have their injury classified as a body as a whole injury rather than a scheduled member injury." (*Id.* at 11). Petitioners argue that Dr. Kuhnlein's report "lacks the quality and quantity of information that would rise to the level of substantial evidence." (*Id.* at 12). Petitioners assert that Dr. Kuhnlein's diagnosis of cervical myofascial pain syndrome is not adequately supported and is undermined further by the fact the trigger point injections had no benefit. (*Id.* at 11). One of the problems

Petitioners raise is that the basis for his five percent impairment of the cervical myofascial pain is flawed because Dr. Kuhnlein failed to provide any explanation as to why he placed Lewis in DRE Cervical Category II. (*Id.* at 12). Lewis's imaging did not demonstrate any fractures or disc herniation, therefore, it must be based on muscle guarding or spasm and loss of range of motion. (*Id.*). Dr. Kuhnlein measured Lewis's range of motion but failed to quantify the deficits in his range. (*Id.*). All of these problems are identified through expert testimony.

However, the argument by Petitioners misses the mark because the Agency is not compelled to accept the opinion of any medical expert. *See Hurley v. Sheller-Globe Corp.*, 512 N.W.2d 796, 798 (Iowa Ct. App. 1993). The trier of fact may accept or reject in whole or in part, even if uncontroverted, expert opinion testimony. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa Ct. App. 1991). The weight to give evidence remains within the Agency's exclusive domain. *Titan Tire Corp. v. Emp't Appeal Bd.*, 641 N.W.2d 752, 755 (Iowa 2002). Although he was not not the treating physician, the Agency gave more weight to the opinion of Dr. Kuhnlein than those of the other physicians. (Arbitration Decision at 5). The Agency recognized the opinion of Dr. Ries (neck was not the pain generator) but also found Lewis (credible witness) has continued to have neck pain and symptoms through the date of the hearing. (*Id.*). The Agency referenced Lewis's PT records, which noted "patient points to the medial border of scapula and up into the neck." (JE 3 at 83). Lewis testified to having neck pain in the arbitration hearing and the Agency found him to be a credible witness. (Tr. at 20-21, 29-30; Arbitration Decision at 5). Dr. Schulte opined Respondent sustained no permanent impairment. Although, this Court could come to a contrary inference, "evidence is substantial if a reasonable person would find it adequate for reaching a conclusion." *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 830 (Iowa 1992). Here, the Agency adequately explained the basis for its decision. The Court finds the doctors were

performing diagnostics of the neck and the opinion of Dr. Kuhnlein constituted substantial evidence to support the decision of the Agency that Lewis also sustained an injury to his neck.

B. Whether the Agency's determination that Respondent sustained permanent disability as a result of the work injury is supported by substantial evidence

The Agency found Lewis sustained permanent impairment of his left shoulder as a result of his work injury on October 1, 2018. (Arb. Dec. at 5). "Expert medical evidence is generally necessary to establish the permanency of an injury." *Haynes v. Second Injury Fund*, 547 N.W.2d 11, 13 (Iowa Ct. App. 1996). Here, the Deputy found Dr. Kuhnlein's opinion to be more persuasive. (Arb. Dec. at 4). The Agency recognized the opinions of Drs. Schulte, Ries, and Fox. However, ultimately Dr. Kuhnlein's opinion was consistent with Lewis's testimony and with the medical records. (*Id.*).

Petitioners contend there was not substantial evidence presented at the arbitration hearing to establish a permanent disability. Instead, the evidence established Lewis's "injury was temporary in nature and resolved without any residual permanent impairment." (Petitioners' Brief at 13). Petitioners raise an issue with the fact Dr. Kuhnlein's opinion does not rise to the level of substantial evidence, and all the treating physicians opined Lewis did not sustain residual impairment. (*Id.*). They argue that Dr. Kuhnlein's opinion, as a hired expert, lacks support and explanation. (*Id.* at 16). Further, it is asserted that the medical records are contrary to Dr. Kuhnlein's opinion because Lewis had a full active range of motion in his left shoulder after his first round of physical therapy. (*Id.*). Lewis had two MRIs (December 6, 2018, and March 27, 2019) with both revealed to be normal and nothing on the MRIs showed anything that could explain Lewis's pain. (*Id.* at 16 (citing JE 1 at 11 and JE 2 at 32, 30).

Additionally, Petitioners argue the more reliable opinions are from the treating physicians who examined Lewis on multiple occasions and monitored his progress. (*Id.* at 14). Dr. Myrtil,

Lewis's first treating physician, discharged Lewis from her care after she placed him at MMI and opined he did not require any work restrictions. (*Id.* at 15). Dr. Schulte noted Lewis had a full active range of motion for both of his shoulders. (*Id.* (citing JE 2 at 25)). Dr. Schulte also opined Lewis did not require any work restrictions for his left shoulder. (*Id.*). Dr. Schulte concluded Lewis had reached MMI as of April 11, 2019, because he had (1) full range of motion of the left shoulder and normal motor strength and (2) according to the AMA Guides he had no measurable impairment. (*Id.* at 16 (citing JE 2 at 37)). Dr. Ries also ruled out any cervical component as the source of Lewis's pain. (*Id.* at 15 (citing JE 2 at 30)). Dr. Fox also recorded Lewis had a normal range of motion and full strength. (*Id.* at 17 (citing JE 2 at 40)).

Petitioners argue that the treating physicians are the more reliable opinions in this case because they had the benefit of examining Lewis. A fact-finder may not give a treating physician's opinion more weight than a physician who examines the patient in anticipation of litigation as a matter of law. *Gilleland v. Armstrong Rubber Co.*, 524 N.W.2d 404, 408 (Iowa 1994). The fact-finder may only take into account the physician's employment in connection with litigation as one of the numerous factors in assessing the value of a physician's opinion. *Rockwell Graphic Sys. V. Prince*, 366 N.W.2d 187, 192 (Iowa 1985).

The Agency evaluated the opinions of all the physicians and came to a reasonable conclusion on why Dr. Kuhnlein's opinion was more persuasive than Drs. Schulte and Dr. Fox. Here, the Deputy found Dr. Schulte's opinion to be contrary to the AMA Guides. (*Id.*). Dr. Schulte did not indicate what the measurements were to support his opinion that Lewis had full range of motion and normal motor strength on April 11, 2019. (*Id.* (citing JE 2 at 37)). On April 15, 2019, Lewis's range of motion measurements were 148 degrees for flexion and 140 degrees for abduction (but increased to 161 and 164 respectively after treatment). (*Id.* (citing JE 3 at 80)). The

Agency found these measurements were not full ranges of motion according to the AMA's Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Arb. Dec. at 4). Dr. Kuhnlein measured Lewis's left shoulder flexion range of motion at 130 degrees and his abduction at 125 degrees which indicated Lewis sustained a reduction in his shoulder range of motion. (*Id.* (citing Cl. Ex. 1 at 6)). Lewis also reported his symptoms and range of motion worsened in April 2019, after he stopped physical therapy. (*Id.* (citing JE 3 at 80). As to Dr. Fox, the Agency gave Dr. Fox's measurements less weight because Dr. Fox's appointments were "solely for purposes of administering an injection" and were not for purposes of determining whether Lewis sustained a permanent impairment. (Arb. Dec. at 4).

The question this Court must resolve is not whether there is substantial evidence to support a conclusion the Agency did not make but whether there is substantial evidence for the conclusion the Agency did make. *Honeywell*, 506 N.W.2d at 437. There was expert testimony on both sides with many facts to consider in the record. The Court finds there is substantial evidence in the record to support the Agency's finding that Lewis sustained permanent disability as a result of the work injury.

C. Whether the Agency's determination that Lewis sustained 15 percent industrial disability is irrational, illogical, or wholly unjustifiable

Petitioners have two arguments: (1) Lewis is not entitled to receive industrial disability and (2) Lewis has sustained little to no industrial benefits beyond the seven percent impairment rating issued by Dr. Kuhnlein. Therefore based on these assertions, Petitioners believe the Agency's decision to award him an industrial disability of 15 percent as a result of his injury was irrational, illogical, and wholly unjustifiable. (Pet. Brief at 19).

First, Petitioners argue even if the Agency's holding is affirmed that Lewis's injury extends to his neck, he is still only entitled to receive compensation for functional impairment under Iowa

Code § 85.34(2)(x). Lewis is only entitled to functional impairment rather than industrial disability because Lewis has returned to full-time work at Hy-Vee and earns more than his pre-injury wages. (Pet. Brief at 19 (citing Tr. at 37)). Lewis worked in the kitchen when he sustained his injury and was moved to the gas station after his injury to accommodate him. (Tr. at 23-24). However, at the time of the arbitration hearing, he was transferred back into the kitchen. (*Id.* at 25). He is performing the same job duties as before except for the heavy lifting. (*Id.* at 25). Lewis was making $14.65 per hour at the time of his work injury on October 1, 2018. (Defendant's Exhibit (Def. Exh.) H at 26). Prior to the arbitration hearing, Lewis was earning $15.90 per hour. (Def. Exh. H at 29). Lewis reported he is only working 30 hours per week, but Petitioners argue he did not attribute this to his work injury. (Pet. Brief at 20). His hours did not change until January 2020 through November 2020. (*Id.* (citing Def. Exh. H at 27-29)).

Second, Petitioners argue Lewis has not sustained a 15 percent industrial disability. Petitioners contend "the objective, credible medical evidence establishes that Respondent requires no permanent restrictions, and even if Dr. Kuhnlein's permanent restrictions are accepted as accurate, they do not preclude his employment in jobs for which he is suited, including dealing with default claims on home mortgages." (Pet. Brief at 21). Lewis only vaguely stated how the injury has impacted his ability to engage in activities with his son but these vague limitations cannot be the basis for an increased award of industrial disability. (*Id.*).

Whether the commissioner erred in awarding Lewis industrial benefits of 15 percent is an issue that is a mixed question of law and fact. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 856 (Iowa 2009). "The determination of industrial disability requires the Agency to apply established law (the factors considered in determining whether an industrial disability occurred) to the facts."

Id. The Court reviews a challenge to the agency's application of law to the facts under the irrational, illogical, or wholly unjustifiable standard. *Id.* at 856-57.

Industrial disability measures an employee's lost earning capacity. *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 265 (Iowa 1995). There are several factors to be considered by the fact-finder when determining such a loss. "An assessment of industrial disability implicates all the factors that bear on [the claimant's] *actual employability*." *Larson Mfg.*, 763 N.W.2d at 857 (citing *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 616 (Iowa 1995)) (internal citations omitted). These factors include "the employee's functional impairment, age, education, intelligence, work experience, qualifications, ability to engage in similar employment, and adaptability." *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 306 (Iowa 2005). Although functional impairment is important, industrial disability does not rest solely on this factor. *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 356 (Iowa 1999). A comparison of actual earnings before and after the injury is significant but an employee's post-injury earnings are not determinative. *Keystone Care Ctr.*, 705 N.W.2d at 306. A reduction in earning capacity can still be shown even when the employee's actual earnings have increased. *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000).

In this case, the Agency considered Lewis's age, impairment rating given by Dr. Kuhnlein, history of work restrictions, continued pain, ability to work a lesser amount of hours, and lesser earnings per week. (Arb. Dec. at 5-6). Specifically, in arriving at industrial disability determination, the Agency stated:

> Claimant, who was 44 at the time of the hearing, has a combined seven percent whole person impairment along with lifting restrictions that preclude him from performing the full extent of his regular job with defendant-employer. He also continues to have pain.

> Claimant continued to be employed by defendant-employer at the time of the hearing and indicated he loves his job. To defendants' credit, they are accommodating claimant's restrictions and limitations, and there is no indication the relationship between claimant and defendant-employer has soured in any way.
>
> Still, I find claimant was earning less per week at the time of the hearing than he was at the time of the injury. The parties stipulated claimant's gross earnings on his date of injury were $525.00 per week. At the time of the hearing, however, at 30 hours per week at the rate of $15.90 per hour, claimant was earning roughly $477.00 per week at the time of the hearing. This represents a loss of weekly earnings of about 10 percent since the date of the injury.
>
> Considering these and all relevant factors, I find claimant sustained a 15 percent loss of earning capacity as a result of his non-surgical work-related injuries.

(Arb. Dec. at 5-6).

The factors emphasized by Petitioners (absence of permanent work restrictions by treating physicians, similar job duties as pre-injury job duties, only a recent reduction of hours, increase in hourly wage after work injury) certainly mitigates the extent of industrial disability in this case. There is other substantial evidence in the record to support the determination made by the Agency. As detailed, Lewis's age, impairment rating, lifting restrictions that preclude him from performing the full extent of his regular job, continued pain as testified to at the arbitration hearing, and earning less per week due to fewer hours because of injury are factors supporting the agency's industrial disability determination. The Agency considered "these and *all relevant factors*" when making the determination. (Arb. Dec. at 5) (emphasis added). Although reasonable minds may differ on the measurement of the extent of Lewis's industrial disability, there is substantial evidence found in the record to support the Agency's decision. In short, the Court cannot say the Agency's resolution of this issue on remand was irrational, illogical, or wholly unjustifiable, and the Court affirms on this issue. *See Wal–Mart Stores, Inc. v. Caselman,* 657 N.W.2d 493, 501 (Iowa 2003) ("The fact that different inferences could be drawn from the same record does not diminish the soundness of

the deputy commissioner's findings and conclusions when that record is viewed as a whole." (internal quotations omitted)).

III. CONCLUSIONS AND DISPOSITIONS

For all the reasons set forth above, the Court concludes there is substantial evidence to support the Agency's findings as to the determination that (1) Lewis sustained an injury to his neck from the work-related injury on October 1, 2018, and (2) Lewis sustained a permanent disability as a result of the injury. The Court also concludes the Agency's finding Lewis sustained a 15 percent industrial disability is not irrational, illogical, or wholly unjustifiable.

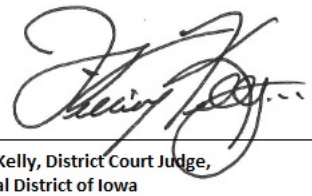
IT IS THE ORDER OF THE COURT that the Iowa Workers' Compensation Commission's decision is **AFFIRMED.**

Costs are assessed to Petitioners.

State of Iowa Courts

Case Number	**Case Title**
CVCV062004	HYVEE AND UNION INS CO OF PROVIDENCE V CHAD LEWIS
Type:	OTHER ORDER

So Ordered



William P. Kelly, District Court Judge,
Fifth Judicial District of Iowa

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