

IN THE COURT OF APPEALS OF IOWA

No. 1-442 / 10-2083
Filed August 24, 2011

**BEEF PRODUCTS INC., and
TRAVELERS INDEMNITY CO. OF CT.,**
Petitioners-Appellees,

vs.

ATIFA RIZVIC,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

A workers' compensation claimant appeals the district court's ruling reversing the commissioner's appeal decision and remanding for further proceedings. **AFFIRMED.**

John Rausch of Rausch Law Firm P.L.L.C., Waterloo, for appellant.

John M. Bickel and Sarah W. Anderson of Shuttleworth & Ingersoll,
P.L.C., Cedar Rapids, for appellees.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Workers' compensation claimant, Atifa Rizvic, appeals the district court's ruling on a petition for judicial review that reversed the workers' compensation commissioner's ruling awarding her sixty percent industrial disability as a result of an injury she received while working for Beef Products Inc. She contends it was error for the district court to remand her case to the agency for consideration of whether she sustained a permanent impairment as a result of her work-related injury. Rizvic also claims the district court erred in finding the commissioner's application of law to facts was irrational, illogical, or wholly unjustifiable under Iowa Code section 17A.19(10)(m) (2009). Although we do not question the commissioner's objectivity, we do not find support for the commissioner's determination of permanency, and we affirm the district court's reversal as to that portion of the commissioner's decision.

I. Background and Proceedings.

A. Arbitration decision by deputy. Rizvic filed a petition for arbitration with the workers' compensation commissioner on February 7, 2008, against Beef Products, claiming she injured her right ribcage area, right shoulder, right elbow, neck, and back in an incident on February 1, 2007. In a hearing before a deputy commissioner, the parties stipulated Rizvic sustained an injury arising out of and in the course of her employment on February 1, 2007. The parties disputed whether the injury was a cause of permanent disability and, if so, the extent of that permanent disability. After listening to testimony and reviewing medical records, the deputy found

the greater weight of the evidence is that the claimant suffered a chest wall and upper back strain that was treated and resolved and that any difficulties she may presently have with her right shoulder are unrelated to her injury of February 1, 2007.

The deputy ruled Rizvic failed to prove the February 1, 2007 injury was the proximate cause of permanent disability and ordered Rizvic take nothing from the proceedings.

B. Intra-agency appeal decision. Rizvic appealed to the commissioner who delegated his authority as provided in Iowa Code section 86.3 to another deputy commissioner. The acting commissioner reviewed the hearing transcript and exhibits de novo and on December 29, 2009, filed a decision finding Rizvic did sustain a permanent injury to her right shoulder.

The commissioner wrote in part:

The claimant had an independent medical evaluation with Farid Manshadi, M.D., a physiatrist in Waterloo, Iowa. He evaluated the claimant on September 26, 2007. According to his report, claimant told Dr. Manshadi that she suffered right shoulder pain immediately, which is not consistent with Dr. McMains's initial treatment records, but is consistent with the report of shoulder pain the next day. In Dr. Manshadi's opinion, the claimant suffered a right rotator cuff injury on February 1, 2007. He assigned a 10 percent impairment of the right upper extremity and recommended that she avoid any activity which required constant reaching, shoulder level or overhead activities. . . .

. . . .
I do not find the views of Dr. McMains convincing and the one line statement of Dr. Miller does little to buttress his views. McMains put a lot of faith on the supposed inconsistencies between the pain drawings claimant completed in the many visits after the injury and the drawing completed a year later. However, my review of those drawings indicates that they are far more consistent than inconsistent and this should be obvious to any objective observer. . . . Therefore, I find the causation views of Dr. Manshadi far more credible. Dr. McMains apparently does not disagree with Dr. Manshadi's disability assessments and these are adopted as well.

The acting commissioner found the February 1, 2007 work injury “is a cause of the right shoulder impingement found by Dr. Manshadi and a cause of a 10 percent permanent partial impairment to the body as a whole.” The commissioner then reviewed the claimant’s age, education, lack of English language skills, work experience as an unskilled laborer, and current work restrictions, and concluded she had suffered a sixty percent loss of earning capacity.

C. Judicial review decision. Beef Products sought judicial review of the commissioner’s ruling in the district court pursuant to Iowa Code section 17A.19. On November 18, 2010, the district court ruled there was substantial evidence to support the commissioner’s determination Rizvic sustained a work-related rotator cuff injury on February 1, 2007.¹

However, the court concluded the commissioner’s application of the law to the facts required reversal as it was irrational, illogical, or wholly unjustifiable. The district court found the commissioner embellished the significance of a handful of events and ignored relevant evidence in the record to reach the conclusion he ultimately drew. The court found the process used in choosing to believe the claimant’s doctor was not reasonable and was more likely the result of an approach lacking objectivity. The district court found the commissioner overstepped his role as an impartial arbiter of facts and became an advocate for Rizvic’s position. Because of what the district court determined to be flawed methodology, the district court concluded the case required reversal, writing:

¹ The district court said, “The fact this court might view this evidence differently is not the standard upon judicial review; that standard is whether the evidence before the commissioner supports the conclusion reached by him. The court finds that it does.”

At this point, the court cannot say that the determination of whether [Rizvic] sustained a permanent impairment as a result of her work-related injury on February 1, 2007 can be established as a matter of law. Accordingly, this matter should be remanded to the agency for such a determination.

The district court took no position on whether a different deputy should be involved in the new determination. Because the district court remanded the case, it did not address the sixty percent impairment rating.

Rizvic now appeals.

II. Scope and Standard of Review.

Our review of a workers' compensation matter is governed by Iowa Code chapter 17A, specifically section 17A.19. See Iowa Code § 86.26. We review a district court's decision on a petition for judicial review to determine if we would reach the same result as the district court. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393, 394–95 (Iowa 2007). Under chapter 17A, the district court may reverse, modify, or grant other appropriate relief from an agency action if it determines the agency acted improperly under any of the provisions of section 17A.19(10).

Our review of a decision of the workers' compensation commissioner varies depending on the type of error allegedly committed by the commissioner. If the error is one of fact, we must determine if the commissioner's findings are supported by substantial evidence. Iowa Code § 17A.19(10)(f); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). If the error is one of interpretation of law, we will determine whether the commissioner's interpretation is erroneous and substitute our judgment for that of the commissioner. Iowa Code § 17A.19(10)(c); *Meyer*, 710 N.W.2d at 219. If, however, the claimed error lies in the commissioner's application of the law to the facts, we will disturb the commissioner's decision if it is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact." Iowa Code § 17A.19(10)(m); *Meyer*, 710 N.W.2d at 219. Because of the widely

varying standards of review, it is “essential for counsel to search for and pinpoint the precise claim of error on appeal.” *Meyer*, 710 N.W.2d at 219.

Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 196 (Iowa 2010).

III. Discussion.

A. Claims of error on appeal. Rizvic’s appeal claims the district court erred in finding the commissioner’s application of law to facts was irrational, illogical, or wholly unjustifiable. Rizvic urges us to reverse the district court and uphold the agency decision.

Beef Products claims the district court was correct in ruling the commissioner’s decision-making process was irrational, illogical, or wholly unjustifiable, and urges us to affirm this ruling. Beef Products also claims we should find the district court erred in concluding there was substantial evidence to support the agency’s determination Rizvic sustained a work-related rotator cuff injury on February 1, 2007. Beef Products argues the district court applied the wrong standard of review to the issue and says we should find there is not substantial evidence to support the agency’s factual findings Rizvic exhibited symptoms of a rotator cuff injury soon after the incident and Rizvic was terminated due to her work injury. Finally, Beef Products contends we should find the agency decision that Rizvic suffered a sixty percent loss of earning capacity is not supported by substantial evidence and should be reversed.

B. Preservation of error. Beef Products contends it was not required to cross appeal to preserve error on its claims the commissioner’s decision lacked substantial evidence because it was the prevailing party at the district court. We

recognize *Johnston Equipment Corp. v. Industrial Indemnity*, 489 N.W.2d 13, 16 (Iowa 1992), holds “a successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected by the trial court.” But the court goes on to say, “This is because a party need not, in fact, cannot, appeal from a favorable ruling.” *Id.* Here, the question is whether Beef Products received a favorable ruling with respect to whether there is substantial evidence to support the finding Rizvic suffered a February 1, 2007 work-related rotator cuff injury such that it need not have appealed that finding. We answer that question in the negative.

After the district court’s ruling was filed, Rizvic moved to enlarge the court’s findings of fact and conclusions of law. Beef Products resisted that motion, contending it was unnecessary as the district court ruled in claimant’s favor. Beef Products stated,

the district court’s decision to reverse and remand the case back to the agency was based not on lack of substantial evidence but, rather, on a conclusion the *process* used by the commissioner in applying the law to the facts was “irrational, illogical or wholly unjustifiable.”

As implicitly acknowledged, Beef Products was not successful on the substantial evidence issue. In order to preserve error, it was required to appeal; it has not done so. See *Becker v. Cent. States Health & Life Co.*, 431 N.W.2d 354, 356 (Iowa 1988) (“Failure to cross-appeal on an issue decided adversely . . . forecloses . . . raising the issue on appeal.”).

Beef Products is not asking that we affirm the district court on alternative grounds raised but ignored or rejected by the district court; rather, Beef Products

asks that we alter and expand the scope of its victory by reversing that portion of the district court's ruling finding substantial evidence existed to support the finding of a work-related rotator cuff injury. Beef Products also asks us to find, in contravention to the district court, Rizvic did not sustain her burden of proof on this issue of permanent injury as a matter of law.

We reject Beef Product's claim it was not required to cross appeal to preserve error on this issue. Consequently, for purposes of these proceedings, it is conclusively determined that Rizvic suffered a work-related rotator cuff injury on February 1, 2007.

C. Was the February 1, 2007 work-related rotator cuff injury the proximate cause of permanent impairment? The district court reversed the commissioner's ruling because of the commissioner's "flawed methodology" and concluded the commissioner's application of law to facts was "irrational, illogical, or wholly unjustifiable." See Iowa Code § 17A.19(10)(m). In doing so, the district court disagreed with the commissioner's findings that Dr. McMains was not convincing and the reasons the commissioner enunciated to support that finding; the commissioner's findings that the pain drawings were far more consistent than inconsistent; the commissioner's finding that the claimant suffered shoulder pain immediately at the time of injury; and the commissioner's finding that Dr. Manshadi's opinions are more reasonable. While the district court characterizes its ruling as a finding of flawed methodology, we conclude much of the district court's discussion constitutes an improper re-weighing of the evidence, which invaded the province of the fact-finder. See *St. Luke's Hosp. v.*

Gray, 604 N.W.2d 646, 649 (Iowa 2000) (“The industrial commissioner weighs the evidence, and the court should broadly and liberally apply those findings in order to uphold, rather than defeat, the industrial commissioner’s decision.”); *id.* at 652 (“Whether an injury has a direct causal connection with the employment or arose independently thereof is ordinarily established by expert testimony, and the weight to be given such an opinion is for the finder of fact.”); *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 272 (Iowa 1995) (noting “it is the commissioner’s role as finder of fact to determine the weight to be afforded expert testimony”).

One of the flaws identified by the district court in the commissioner’s analysis related to the commissioner’s criticisms of McMains’ opinion. One aspect of the commissioner’s criticism related to the pain drawings prepared by Rizvic. The district court found the commissioner had a “skewed impression” of Rizvic’s pain drawings because the commissioner determined the drawings were more consistent than inconsistent. The district court also opined that the February 26 and March 5 pain drawings “are inarguably far removed from the location of a rotator cuff injury.” We conclude such opinions are best left to the medical experts and the fact finder rather than trying to re-weigh the evidence here. See *Arndt*, 728 N.W.2d at 394 (noting it is not the role of the district court on judicial review, or this court on appeal, to reassess this evidence). We do observe that the pain drawings were drawn by a layperson only through the assistance of an interpreter, were not marked for pain as the instructions provide, and Rizvic denied ownership of some of the drawings. Unlike the district court,

we do not believe the commissioner's conclusions regarding the pain drawings are indicative of the commissioner's lack of objectivity.

Nonetheless, we acknowledge the commissioner took issue with McMains releasing Rizvic to return to work on March 5, 2007, finding Rizvic "could not even turn her head without pain." We agree with the district court that this finding is not consistent with the medical records on that date, which indicate Rizvic complained only that it was "painful a little to turn head to right." The other medical records from that date indicate her overall pain level had decreased from a ten to a four, she had normal cervical range of motion, had increased her bilateral shoulder range of motion, and she could lift forty pounds without difficulty.

The commissioner also inaccurately criticized McMains for failing to change his initial assessment in the face of increasing complaints of pain in the shoulder and neck. The record does not show increasing shoulder pain complaints, but rather shows overall decreasing pain complaints.

Further, the commissioner found McMains "apparently does not disagree with Manshadi's disability assessments," but in fact McMains did disagree with Manshadi. McMains stated in his report that Manshadi, when calculating Rizvic's impairment rating, improperly used a table in the AMA Guides that should be used only for nerve damage. In addition, the commissioner stated Manshadi awarded Rizvic a ten percent permanent partial impairment to the body as a whole, but Manshadi's report assessed ten percent impairment to the right upper extremity, not to the body as a whole.

We also agree with the district court that the commissioner's characterization of Rizvic's supervisor as either incompetent or lying may have been somewhat extreme. However, because Rizvic's supervisor was not familiar with the February 8, 2007 nurse's note, and was not involved in the decision to terminate Rizvic, his testimony should not have weighed heavily in the issues before the commissioner.²

Like the district court we are troubled by the commissioner's inaccuracy in the recitation of the facts, although some were perhaps not significant. More troubling is the commissioner's reliance on Manshadi's findings as to impairment.³ The commissioner can determine the weight to be given to medical experts based upon "the completeness of the premise given the expert and surrounding circumstances," *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995); the commissioner cannot substitute his own "medical" opinion for that of an expert.

Although we do not question the commissioner's objectivity, we do not find support for the commissioner's determination of permanency, and we affirm the

² The commissioner also found Rizvic was terminated due to her work injury. It is unclear why the commissioner made a finding with respect to the reason for Rizvic's termination as the only issue in this case was whether or not claimant sustained a permanent impairment and if so, the extent of her entitlement to disability benefits. There was no issue regarding claimant's entitlement to temporary benefits before or after she was terminated. Thus, there was no need to make a finding of the reason for Rizvic's termination.

³ Manshadi stated, "I believe she does have partial permanent impairment in regard to her right upper extremity." He went on to say after referencing the American Medical Association's Guides to Evaluation of Permanent Impairment that "as such, I assign ten (10) percent impairment of the right upper extremity."

In his findings, the commissioner said: "I find the work injury of February 1, 2007, is a cause of the right shoulder impingement found by Dr. Manshadi and a cause of a 10 percent permanent partial impairment to the body as a whole." Manshadi's report provides little to support this finding, if it is intended to be a finding.

district court's reversal as to that portion of his decision. As did the district court, we cannot say the determination of whether Rizvic sustained a permanent impairment as a result of her work-related injury on February 1, 2007, can be established as a matter of law. We affirm the district court and remand to the agency for a determination on this issue.⁴ In addition, because we find the commissioner's permanency determination unsupported by the record, and thus "illogical, irrational, and wholly unjustifiable," we do not address the validity of the disability rating.

AFFIRMED.

Doyle, J., concurs; Sackett, C.J., concurs specially.

⁴ As did the district court, we take no position as to whether a different hearing officer should serve as commissioner as Beef Products can address this issue with the agency.

SACKETT, C.J. (concurring specially)

I concur in result, but write separately to convey I also agree with the district court's criticism of the commissioner's lack of objectivity. Deputy Walshire issued the final agency decision by written delegation of the commissioner. The district court found, after reviewing Walshire's decision and the record, that Walshire lacked objectivity and "overstepped his role as an impartial arbiter of facts and became in essence an advocate for [Rizvic's] position." After reviewing the record, I agree with the district court's characterization. The lack of objectivity can be seen in particular in three areas: Walshire's interpretation of the pain drawings, his finding regarding the reason for Rizvic's termination, and his credibility finding of Rizvic's supervisor, Saric.

A. Pain Drawings. Every time Rizvic had a medical appointment with Dr. McMains, her authorized treating physician for her February 1, 2007 injury, Rizvic was asked to fill out what was called a pain diagram. This diagram was a drawing of the front and back of a person, and Rizvic was asked to indicate on the diagram the location of her pain. In the record before us, we have pain diagrams that were completed during treatment in 2007 on February 7, 14, 19, 26, and March 5, and two diagrams completed when Rizvic saw McMains for a follow-up appointment a year later on February 4, 2008.

In his appeal decision, Walshire found Rizvic's pain drawings are far more consistent than inconsistent, which he says "should be obvious to any objective observer." However, the pain drawings were not found to be consistent by the

treating physician—McMains, Deputy Commissioner Seeck, or the district court; and on reviewing the pain drawings, I too find them inconsistent.

In reviewing the pain drawings, McMains stated,

On the first visit of 02/07/07, Ms. Rizvic noted on a pain drawing pain in the mid thoracic area and along the scapular border on the right and pain in the lower right sternal area with radiation to the anterior ribs and into the upper abdomen with no notation of pain into the neck, shoulder, or arm. A pain drawing noted on the first visit was consistent with a person reaching into a vat and pulling with their right arm while leaning up against the vat causing a myofascial strain in the shoulder girdle area.

On the second visit to our clinic on 02/14/07, Ms. Rizvic was examined by my partner, Dr. Broghammer. On that visit, there was an additional notation of pain from Ms. Rizvic showing pain in the antecubital area of the right arm along with continued pain in the periscapular area on the right

On the 2/19/07 follow-up visit, Ms. Rizvic for the first time reported discomfort in the right upper shoulder area radiating into the lateral aspect of the neck The pain drawing from 02/19/07 was considerably different than the previous drawings, with no further notation of pain in the right antecubital part of the arm . . . and the pain in the periscapular area had now moved to the superior scapular area with radiation up into the neck. . . . On follow-up visits, the pain drawing evolved into continued “left” pectoral pain, right subscapular and supraspinatus pain. . . .

On the 3/5/07 follow-up visit, Ms. Rizvic noted three areas of pain in the right trapezius, one at the subscapular border, the second at the level of the axillary line, and the third in the supraspinatus area forming a triangle

Rizvic was discharged from treatment and returned to full duty work with no restrictions on March 5, 2007, after two weeks of physical therapy. On that day the medical records indicate she was able to complete a forty pound⁵ lift test with no problem and her pain was significantly decreased. Rizvic was able to return to work for three months with no record of complaints to her employer or Dr. McMains. However, she was terminated from Beef Products in

⁵ Her job required lifting of only five to ten pounds.

June 2007 because of absentee problems. Rizvic was then seen by Dr. Manshadi in September 2007 for an independent medical exam (IME) at the direction of her attorney. Dr. Manshadi diagnosed "right shoulder pain with reduced range of motion probably secondary to right rotator cuff impingement syndrome." Rizvic was sent back to McMains for a follow-up appointment on February 4, 2008, to determine whether Dr. Manshadi's diagnosis was related to the February 2007 work injury. At this appointment, Rizvic was asked to complete two more pain diagrams. Based on his examination and review of all of the pain diagrams, McMains was able to conclude the pain drawings during treatment were inconsistent with a rotator cuff injury and were markedly different than the pain drawing Rizvic completed a year later on February 4, 2008. McMains attributed the difference in the pain complaints to inactivity and disuse of her shoulder muscles during the period of unemployment.

Despite the detailed opinion of Rizvic's treating physician, Walshire evaluated the pain drawings and determined based on his own non-medical non-expert opinion, that the drawings clearly show Rizvic identifying her right shoulder as a location of her pain. Because of his difference of opinion with McMains, Walshire determines McMains's report lacks credibility. As the majority states above, the commissioner can determine the weight to be given to a medical expert's opinion, but cannot substitute his own opinion for that of the expert. It is entirely appropriate for Walshire to evaluate competing medical opinions and based on the completeness of the premise given the expert and surrounding circumstances, choose one opinion to accept and one to reject. This

is not what Walshire did in this case. No other medical expert in this case offered an opinion on the consistency, or lack thereof, of the pain drawings. McMains was the only expert to offer any comment on the pain drawings at all. Yet Walshire rejected McMains's expert opinions because he determined the pain drawings were consistent with a rotator cuff injury.

Further, I note even Rizvic conceded the drawings were inconsistent both in her deposition and at the hearing. Because of the inconsistency she perceived, Rizvic disavowed authorship of all but the February 19, 2007 and February 4, 2008 drawings. Seeck, the hearing officer, found Rizvic's denial of authorship was not credible. However, Walshire, upon reviewing the transcript of the hearing concluded the questions posed to Rizvic were largely misleading.⁶ Seeck, not Walshire, was the hearing officer who was able to observe witness demeanor during testimony. Thus, I give Seeck's credibility assessment more weight than Walshire, who like this court, can only read a transcript of witness testimony. *See Ray v. Iowa Dep't of Job Serv.*, 398 N.W.2d 191, 195 (Iowa Ct. App. 1986) (stating "[t]he hearing officer was in the unique position of being able to judge credibility of witnesses firsthand").

It appears the only observer who found the drawings consistent was Walshire and such a "factual finding" demonstrates to me, he lost his objectivity in reviewing this case on appeal.

⁶ My review of the transcript reveals counsel's questions to Rizvic regarding her authorship of the pain drawings were not misleading. She clearly and unequivocally denied drawing the pain diagrams of February 7, 14, 26, and March 5. Rizvic claimed authorship of only one drawing that occurred during her treatment on February 19 and two drawings completed when she visited Dr. McMains on February 4, 2008, for a follow-up exam after her IME exam with Dr. Manshadi.

B. Reason for Termination. Secondly, I find Walshire's findings regarding the reason for Rizvic's termination unnecessary and gratuitous. Walshire stated he found Rizvic was terminated "due to her work injury." First, the issue in dispute between the parties did not require a finding on the reason for Rizvic's termination. As noted in the majority's footnote, the only issue was whether the claimant sustained permanent impairment as a result of the injury. There was no question about whether the claimant was entitled to temporary benefits, and thus, no reason to even address this issue.

Secondly, Walshire stated without support that one or two of Rizvic's work absences were due to her injury. An objective view of the record does not support such a finding. At Beef Products, each unexcused absence is classified with varying levels of points and once an employee accumulates fourteen points, they are terminated. A review of the attendance detail shows Rizvic received a total of eight absentee points after the injury. One point was assessed against Rizvic on February 24, 2007, due to poor weather conditions. Rizvic called in sick with no sick pay on March 13, March 27, April 13, and June 17. Each of these absences caused her one point. Rizvic is also listed as a no call no show on June 16, and as a result, she was assessed three points.⁷ These eight points along with the six Rizvic received prior to the injury resulted in her termination as she had reached the fourteen point threshold.

⁷ Rizvic maintains she did call in sick this day and should have only been assessed one point instead of three. At an unemployment hearing, the ALJ did find Rizvic did call in establishing Rizvic was not fired for misconduct. This finding made her eligible for unemployment benefits.

At the hearing Rizvic was not clear which of these absences were caused by the work injury saying simply she missed two days which caused her four points. This testimony contradicted her deposition testimony where she claimed she did not miss any work as a result of the injury. She also stated in her deposition she called in sick to work following her physical therapy appointments because she was in too much pain. However, none of the reported sick days occurred during her two weeks of physical therapy. Rizvic also testified in her deposition to calling in sick to work because of stress and menstrual bleeding.

While the reason for an employee's termination may be relevant in some cases, this case had no need for such finding. The fact Walshire would go out of his way to find fault on the employer in this case, again shows me a clear lack of objectivity.

C. Saric's Credibility. Walshire also appears to have lost objectivity in his evaluation of the testimony of Rizvic's supervisor, Asim Saric. Saric testified he saw Rizvic several times a day when she worked at Beef Products. He knew about her injury to her chest, but stated she never told him her shoulder was injured or told him her restrictions were violated. He also testified Rizvic's termination had nothing to do with her work injury. Walshire found after reading a cold transcript that Saric was either "unaware of what is going on in his plant, or he is deliberately lying." Walshire found Saric not credible because of the February 8, 2007 company nurse note. This note mentioned Rizvic's right rear shoulder was sore that morning because she was trying to prevent pain in front. The note also stated Rizvic complained her new restrictions were not followed

when she had to reach up to scrub the night before. There was no testimony offered that would allow one to conclude Saric was aware of the nurse's note or that he should have been aware of Rizvic's complaint. As the district court stated, Walshire's characterization of a Saric as incompetent or lying based on reading a cold transcript with no chance to observe the demeanor of witnesses is a gratuitous characterization that indicates Walshire "overstepped his role as an impartial arbiter of facts and became in essence an advocate for [Rizvic's] position."

I agree with the majority affirming the district court's reversal of Walshire's decision.