**IN THE COURT OF APPEALS OF IOWA**

No. 3-031 / 12-1038
Filed February 27, 2013

**DIANE CECILIA HANSEN,**
Plaintiff-Appellant/Cross-Appellee,

**vs.**

**SNAP-ON TOOLS MANUFACTURING COMPANY,**
Defendant-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Kossuth County, Nancy L. Whittenburg, Judge.

A workers' compensation claimant appeals the district court's order on further review and her employer cross-appeals. **AFFIRMED ON APPEAL; AFFIRMED IN PART, REVERSED IN PART, AND REMANDED ON CROSS-APPEAL.**

Mark S. Soldat of Soldat & Parrish-Sams, P.L.C., West Des Moines, for appellant.

Joseph A. Quinn of Nyemaster Goode, P.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

**VOGEL, P.J.**

Diane Hansen appeals the district court's ruling on her petition for judicial review affirming the Iowa Workers' Compensation Commission's determination of permanent partial disability benefits. Her employer, Snap-On Tools Manufacturing, cross-appeals arguing the district court erred in remanding to the commission to redetermine temporary benefits. Both parties appeal the determination of costs. Because the successive-disability statute is not applicable to "unscheduled permanent partial disability" cases, we affirm on that issue. There is also substantial evidence in the record to support the agency's determination of industrial disability and we affirm there as well. However, contrary to the district court's determination, we find the agency did not abuse its discretion in its determinations of costs under either the Iowa Code or administrative rules. In that same accord, because the district court did not abuse its discretion in ordering the parties evenly split the cost of judicial review, we affirm on that issue. Finally, because a portion of the agency decision is not sufficiently explained, we affirm the district court's remand of the determination of healing period benefits and temporary partial benefits.

## I. Background Facts and Proceedings

We accept the district court's concise fact findings:

> Claimant Diane Hansen has worked at Snap-On and its predecessor since 1971, virtually her entire working life. Hansen worked in various departments, including electrical, pack, and ball slide. The work in the pack department is more physically demanding than the work in the other two departments. Before February 15, 2005 injury, Hansen had health problems including carpal tunnel syndrome, right shoulder overuse problems, diabetes, high blood pressure, fibromyalgia, and a hiatel hernia.

> Hansen filed a petition seeking workers' compensation benefits on July 10, 2008. . . . The parties agree that Hansen sustained two injuries. The first occurred on February 15, 2005, when Hansen injured her left shoulder while working in the pack department at Snap-On. Hansen's second injury occurred on September 11, 2007. Hansen sustained an injury to her right hand/arm, also while working in Snap-On's pack department. In regards to the February 15, 2005 injury, Hansen alleged the injury manifested over a period of time by "microtraumata." Following the February 15, 2005 injury, Hansen had left shoulder arthroscopic surgery, where Dr. Phillip A. Deffer debrided the biceps tendon and decompressed soft tissue within the subacromial space. The surgery was performed on June 3, 2005, and Hansen was returned to work with restrictions on June 10, 2005. Following the surgery, Hansen continued to experience some shoulder pain as well as depression. Dr. Deffer placed Hansen at maximum medical improvement on February 10, 2006. Hansen underwent an independent medical examination conducted by Dr. John Kuhnlein on February 6, 2009. Dr. Kuhnlein concluded, in part, that Hansen had a material change in her left shoulder condition related to the February 15, 2005 injury which he thought was an acute injury superimposed on a cumulative process.
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> On September 11, 2007, Hansen suffered an injury while putting drawers in toolboxes in the pack department at Snap-On. . . . After continuing problems, Dr. Deffer performed a right synovectomy in the right-hand fourth dorsal compartment and side-to-side transfer of the extensor indicis proprius tendon on May 9, 2008. Dr. Deffer opined that Hansen reached maximum medical improvement on July 23, 2008.

The deputy commissioner concluded the February 15, 2005 injury resulted in Hansen sustaining a fifteen-percent industrial loss entitling her to seventy-five weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u) (2005).[1] The deputy referenced an attached hearing report outlining the temporary benefits Hansen was paid but never expressly accepted or rejected the amounts, but simply stated they were paid. The deputy also found Dr. Kuhnlein's bill for the independent medical evaluation (IME) totaling $9502.50,

[1] The Second Injury Fund's liability was also determined after the September 11, 2007 injury. The Fund is not part of this appeal.

was unreasonable and Snap-On should only be responsible to reimburse Hansen $2890. The commissioner affirmed the deputy's findings with a slight modification to a mileage reimbursement calculation.

On judicial review, finding the deputy failed to analyze or provide rationale for the healing period benefits, the district court remanded to the commission to determine the correct amounts of healing period benefits, the due date of those benefits, the appropriateness of any penalty, and whether interest should be assessed. The district court also remanded for the commission to make the same determinations regarding the award of temporary partial benefits. Lastly, the district court remanded the issue regarding Dr. Kuhnlein's fee, finding the deputy's pathway to the determination of the allowable fee was not clear and a remand was necessary for further findings.

On judicial review, Hansen made extensive argument to the district court regarding the constitutionality of the successive disability statute, the applicability of the statute, and whether there was substantial evidence to support the deputy's industrial disability award. The district court reserved the constitutional issue for an appellate court, and found the deputy's decision was supported by substantial evidence.

Hansen appeals claiming the district court erred by failing to reverse the commissioner for failing to apply the successive-disability statute and all the industrial disability factors. She also claims the district court erred by taxing one-half the costs on judicial review to Hansen and by affirming the commissioner's failure to explain why it did not tax as costs Dr. Kuhnlein's IME fee. Snap-On cross-appeals, arguing the commissioner was correct in its determination

regarding Dr. Kuhnlein's fee and the commissioner was correct in its temporary benefits award, such that the district court should not have remanded for determination of that issue.

**II. Standard of Review**

The standard and scope of review of judicial review of agency action varies with the issue presented. We review an appeal of a workers' compensation decision under the standards set forth in chapter 17A of the Iowa Code. *Xenia Rural Water Dist*. *v*. *Vegors*, 786 N.W.2d 250, 252 (Iowa 2010). We apply the standards "to determine whether the conclusions we reach are the same as those of the district court." *Andover Volunteer Fire Dep't v*. *Grinnell Mut*. *Reins*. *Co*., 787 N.W.2d 75, 79 (Iowa 2010). If we reach the same conclusion as the district court, we affirm, but if we reach a different conclusion, we reverse. *Westling v*. *Hormel Foods Corp*., 810 N.W.2d 247, 251 (Iowa 2012).

It is well settled in Iowa '"[t]he interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency.'" *Schadendorf v*. *Snap-On Tools Corp*., 757 N.W.2d 330, 334 (Iowa 2008) (quoting *Lakeside Casino v*. *Blue*, 743 N.W.2d 169, 173 (Iowa 2007)). "Because the legislature has not clearly vested the agency with the interpretation of the law, we do not give the agency's view of the law any deference and can substitute our own judgment." *Drake Univ*. *v*. *Davis*, 769 N.W.2d 176, 184 (Iowa 2009) (citing Iowa Code § 17A.19(11)(b)). Accordingly, our review of Hansen's claim regarding Iowa Code section 85.34(7), "successive disabilities," is for errors at law and we give no deference to the agency's

interpretation. *See* Iowa Code § 17A.19(10)(c); *see also Evercom Sys*., *Inc*. *v*. *Iowa Utils*. *Bd*., 805 N.W.2d 758, 762 (Iowa 2011).

Determinations of fact, such as the extent of disability, will only be disturbed when they are not supported by substantial evidence. *Westling*, 810 N.W.2d at 251. When a claim is made that the commissioner's decision is not based upon substantial evidence, we must determine if a factual determination made by the commissioner "is not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). Merely because we may draw different conclusions from the record does not mean the evidence is insubstantial. *Arndt v*. *City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007).

Finally, we review the district court and commissioner's action in taxing costs for an abuse of discretion. Iowa Code §§ 86.32, 40; *Robbennolt v*. *Snap-On Tools Corp*., 555 N.W.2d 229, 238 (Iowa 1996). An abuse of discretion occurs when a court's exercise of discretion is clearly erroneous. *IBP*, *Inc*. *v*. *Burress*, 779 N.W.2d 210, 214 (Iowa 2010). In determining whether an abuse of discretion exists with regard to the assessment of costs, we consider the relative success of the parties on the merits. *Solland v*. *Second Injury Fund of Iowa*, 786 N.W.2d 248, 249 (Iowa 2010).

## III. Iowa Code section 85.34(7)(b)(1) "Successive Disabilities" and Industrial Disability

Hansen's main claim is the agency improperly found Hansen sustained a fifteen percent industrial loss, entitling her to seventy-five weeks of permanent partial disability, by failing to apply the successive-disability statute and the

material principles of industrial disability. Hansen claims the deputy discounted her previous overhead work restriction when he should have "combined" the right-shoulder preexisting restriction with the disability caused in the left shoulder by the February 15, 2005 injury. In essence, Hansen argues all of her previous injuries from her employment at Snap-On needed to be included in the permanent combined disability from which the permanent partial disability compensation award for the February 15, 2005 injury was made.

While Hansen made this argument throughout the pendency of her claim, neither the deputy commissioner, the commissioner, nor Snap-On in its brief ever cite section 85.34(7)(b). Snap-On argues "substantial evidence" supports the award but fails to respond to Hansen's statutory interpretation claim.

Section 85.34(7) was enacted in 2004, and is known as the successive-disability statute. Subsection (b) is the subsection arguably applicable to the case at hand and it provides:

> (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Iowa Code § 85.34(7)(b)(1). Hansen argues the agency erred by not explaining if, and how, it determined the fifteen percent industrial-disability award represented a "combined disability . . . caused by the injuries, [prior to the February 15, 2005 work injury and that injury] measured in relation to the

employee's condition immediately prior to the first injury." She in essence argues had the agency properly considered her prior injuries and medical history, her current disability rating from the February 15, 2005 shoulder injury would be higher.

The district court affirmed the agency's fact-finding that Hansen suffered from a limited industrial loss because she had an overhead restriction before the 2005 injury. If that determination is supported by substantial evidence, it is binding. However, we must be able to identify from the record the pathway followed by the deputy when he made that determination, including an analysis on the successive-disability statute, if applicable, which would be an application of law for which we owe no deference to the agency. Here, the record is not clear if or how the deputy applied the successive-disability statute in making its determination regarding industrial disability. However, even if the agency were to have analyzed these facts under the successive-disability statute, the outcome would not change as the statute is not applicable to Hansen's February 15, 2005 injury.

In interpreting the statute, the stated legislative intent governs. *Auen v*. *Alcoholic Beverages Div*., *Iowa Dept*., *of Commerce*, 679 N.W.2d 586, 590 (Iowa 2004). Here, we are fortunate to have a written legislative intent: "This division does not alter . . . the method of determining the degree of *unscheduled* permanent partial disability . . . ." H. F. 2581, 80th Gen. Assemb., Spec. Sess. (Iowa 2004) (emphasis added). Hansen's February 15, 2005 injury resulted in a fifteen percent industrial disability rating, as an injury to the body as a whole. Therefore Hansen requested the agency do what it was not authorized to do—

determine the degree of her unscheduled disability under Iowa Code section 85.34(7)(b), contrary to the clear legislative intent. Hansen concedes that "prior work-related conditions which are not scheduled under Iowa Code section 85.34(2)(u) may not be 'combined' under Iowa Code section 85.34(7)(b)(1)" but argues "they still had an overt effect on Hansen's overall capacity to earn." We leave this question to another day when it is not the degree of an unscheduled permanent partial disability in dispute.

Also included in Hansen's argument is a claim the agency did not apply all the industrial disability factors in making its determination. In reviewing this issue, we are to broadly and liberally apply the commissioner's findings to uphold rather than overturn the commissioner's decision. *IBP*, *Inc*. *v*. *Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000).

Industrial disability is a reduced earning capacity. *Guyton v*. *Irving Jensen Co*., 373 N.W.2d 101, 103 (Iowa 1985). Bodily impairment is merely one factor in gauging industrial disability. *Id*. Other factors include the worker's age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work. *Quaker Oats Co*. *v*. *Ciha*, 552 N.W.2d 143, 158 (Iowa 1996). While there must be sufficient facts in the record for us to review, the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it. *Terwilliger v*. *Snap-On Tools Corp*., 529 N.W.2d 267, 274 (Iowa 1995).

With deference given to the agency's factual determinations, we agree there is substantial evidence in the record to support the agency's fifteen percent industrial loss determination. Following surgery to her shoulder, Hansen's

treating physician found her to have sustained a five percent impairment to her left upper extremity and restricted her from working over her shoulder level and no more than forty-five hours per week. As the deputy noted, Hansen was already restricted from working above her shoulders for more than ten years before the February 15, 2005 injury. There is no evidence in the record these permanent shoulder restrictions were ever removed. Hansen's own expert, IME physician Dr. Kuhnlein, even suggested fewer current restrictions than Hansen was already under.

There was little, if any, effect of the February 15, 2005 injury on her ability to obtain suitable work as she returned to her same position until she suffered the subsequent 2007 injury. Moreover, Hansen offered no evidence she applied for or had been denied any job since her injury. She did not have a vocational expert testify regarding her employability or earning capacity. The agency properly issued a lengthy decision, detailing Hansen's work, injuries, treatments and results. It considered and weighed the evidence and its decision is supported by substantial evidence.

**IV. Costs**

Hansen next claims the district court erred by affirming the commissioner's award of costs and by taxing one-half the judicial review costs to her. Snap-On cross-appeals, asserting the agency was correct in refusing to order it to pay more than $2890 of Dr. Kuhnlein's IME fee and the district court erred in remanding this issue.

First, we address Snap-On's cross-appeal. Iowa Code section 85.39 permits an employee to be reimbursed for a physical examination when an

employer-related physician has previously evaluated the claimant's disability and the employee believes the initial evaluation is too low. The fee must be reasonable. *Kohlhaas v*. *Hog Slat*, *Inc*., 777 N.W.2d 387, 393 (Iowa 2009). In this case, the agency determined the fee for the IME was unreasonable and ordered Snap-On to reimburse Hansen $2890 of the $9502.50 fee. The district court, however, remanded the issue finding the deputy's pathway to determine the allowable fee was not clear.

An agency must explain how it arrived at its conclusion from the facts before it. *See* Iowa Code § 17A.16(1) (requiring findings of fact and conclusions of law be stated separately and factual findings, "if set forth in statutory language, shall be accompanied by a concise and explicit statement of underlying facts supporting the findings").

The deputy determined $9502.50 for an IME was unreasonable, which we do not necessarily disagree with. Snap-On's expert, Dr. Berg, only billed $1200 for the IME he performed. According to the deputy, the itemization of Dr. Kuhnlein's bill was as follows: $3012.50 for abstracting medical records, $1200 for the independent medical evaluation and report, $4800 for independent medical evaluation hourly rate beyond base allotment, and $490 for knee and hip images. The deputy reasoned abstracting medical records is a normal part of preparing an IME report and did not justify an additional charge. This conclusion is not so unreasonable as to be an abuse of discretion. The deputy also determined since there were two files for this case (February 15, 2005 and September 11, 2007 injuries), two times the "base fee" of $1200 was appropriate. The difference between the $2400 and the amount awarded is the same amount

charged for the imagery, which is generous, considering the images were for her knees and hips, neither of which were taken because of work place injuries. A deputy must make a determination of reasonableness of fees and we find there is sufficient reasoning to show it did not abuse its discretion. We reverse the district court's remand on this issue and affirm the agency's decision.

Next we address Hansen's argument the agency found no facts and made no conclusion for not taxing all or part of Dr. Kuhnlein's report as costs pursuant to Iowa Administrative Rule 876-4.33, thereby rendering the taxation in violation of Iowa Code section 17A.16(1). The duty imposed on the agency by section 17A.16 "is intended to allow a reviewing court 'to ascertain effectively whether or not the presiding officer actually did seriously consider the evidence contrary to a finding, and exactly why that officer deemed the contrary evidence insufficient to overcome the evidence in the record supporting that finding.'" *Schutjer v*. *Algona Manor Care Ctr*., 780 N.W.2d 549, 560 (Iowa 2010) (citation omitted).

This court recently addressed whether an expert's fee reimbursement order could be made pursuant to Iowa Code section 85.39 or rule 876-4.33 in *John Deere Dubuque Works v*. *Caven*, 804 N.W.2d 297, 300-01 (Iowa Ct. App. 2011). While emphasizing that the taxation of costs is within the discretion of the agency and we therefore owe it great deference, we determined an expert's *report* can be taxed as a cost under Rule 876-4.33 because the rule provides "costs taxed by [the agency] shall be . . . the reasonable costs of obtaining no more than two doctors' or practitioners' reports." *Id*.

The agency did show its determination of costs regarding the IME under the section 85.39 part of its decision, and it was therefore unnecessary to

redetermine a payment allocation already made within the decision. Even if the deputy had analyzed Hansen's IME under rule 876-4.33, the standard is still "reasonable," and the agency clearly set forth its reasoning in its decision for reducing the charged amount. We find no abuse of discretion and affirm the agency's determination of costs.

Finally, the district court did not err in taxing its costs evenly between the parties. *See* Iowa Code § 86.29 ("The taxation of costs on judicial review shall be in the discretion of the court.").

**V. Temporary Benefits**

The last issue on review is Snap-On's cross appeal requesting us to affirm the agency's determination all temporary benefits to which Hansen was entitled had been paid. The district court remanded both the healing period compensation award and the temporary partial benefit award for a more thorough determination of why the amounts payable to Hansen were correct, when they should have been paid, and whether any interest or penalties are appropriate.

The agency's decision must be "sufficiently detailed to show the path [it] has taken through conflicting evidence," but the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it. *Terwilliger*, 529 N.W.2d at 274. Such a requirement would be unnecessary and burdensome. *Id*. However, here, the agency only recited what benefits had been paid and never made any determination as to their accuracy or timeliness. The healing period and temporary partial benefits awarded may well be correct, but the agency left the district court without sufficient information for an adequate review. We agree with the district court the

remand to the agency is necessary to "show the path . . . taken through conflicting evidence."

**VI. Conclusion**

Because the clear legislative intent mandates Iowa Code section 85.34(7)(b)(1) is not applicable to "unscheduled permanent partial disability" cases, we affirm on that issue. Moreover, there is substantial evidence in the record to support the agency's determination of industrial disability and we affirm there as well. However, contrary to the district court's determination, we find the agency did not abuse its discretion in its determinations of costs—whether made under Iowa Code section 85.39 or Iowa Administrative Rule 876-4.33(6). In that same accord, the district court did not abuse its discretion in ordering the parties evenly split the cost of judicial review. Finally, we affirm the district court's remand of the determination of healing period benefits and temporary partial benefits as the agency decision is not sufficient under Iowa Code section 17A.16(1).

**AFFIRMED ON APPEAL; AFFIRMED IN PART, REVERSED IN PART, AND REMANDED ON CROSS-APPEAL.**