IN THE COURT OF APPEALS OF IOWA

No. 3-690 / 13-0172
Filed October 2, 2013

JBS SWIFT & COMPANY and ZURICH AMERICAN INSURANCE CO.
Petitioners-Appellants,

vs.

MARIA DEL CARMEN RODRIGUEZ CONTRERAS,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Christopher McDonald, Judge.

An employer appeals the district court's decision affirming the Workers' Compensation Commissioner's award of benefits. **AFFIRMED.**

Jennifer A. Clendenin and Nicholas J. Pellegrin of Ahlers & Cooney, P.C., Des Moines, for appellants.

James C. Byrne of Neifert, Byrne & Ozga, P.C., West Des Moines, for appellee.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

JBS Swift & Company and Zurich American Insurance Company ("Swift") appeal the district court's ruling affirming the Workers' Compensation Commissioner's award of benefits to Maria Del Carmen Rodriguez. Swift contends that the commissioner's finding of a sixty percent loss of earning capacity prejudices its substantial rights. Swift asks that we reverse the commissioner's findings and instead reinstate the deputy commissioner's award of twenty percent industrial disability. Because we find the commissioner's award is the result of a decision-process in which the important and relevant matters were considered, and because we find it is supported by substantial evidence in the record when the record is viewed as a whole, we affirm.

I. Background Facts and Proceedings.

Contreras was born and raised in Mexico. She obtained only a sixth grade education before quitting school for economic reasons. In Mexico she worked cutting fish fillet and was a babysitter.

In 1999 Contreras moved to Texas. While there, she was employed in a few unskilled positions. She worked as a babysitter, was employed by Burger King to prepare food, and worked in a factory inspecting the seal on bags of potato chips.

Contreras moved to Iowa in 2007. She began working for Swift as a laborer in the meatpacking plant on March 12, 2007. She worked on a line, removing bone and fat from meat. This job required her to twist her body in order to dispose of the waste and place the meat in the proper containers.

On August 16, 2008, Contreras fell while at work after slipping on a greasy area. She immediately reported the injury and was sent to the plant's nurse. She complained of pain in her lower back and right hip region. At that time, she was given pills and ice but was not sent immediately to a physician. The plant nurse told Contreras to wait a week before seeking medical care. After three days, Contreras sought treatment from her personal primary physician, Dr. Wille. Dr. Wille documented that most of Contreras' pain was in her low back. He advised her to see the doctor authorized to treat injured workers at Swift.

Contreras was first examined by Dr. Mooney, the plant physician, on August 25, 2008. He found that she was tender over the thoracic and lumbar spinal area. He also found that the diagnosis was consistent with a work-related condition. He proscribed medications for inflammation and pain and restricted Contreras from lifting more than ten pounds and bending repetitively. Because of the physical restrictions placed on Contreras, Swift gave her a new "light-duty" position in the factory.

Contreras was seen by Dr. Mooney again on September 4, 2008. Dr. Mooney noted little progress regarding her back pain. He recommended an MRI and continued physical restrictions. Contreras brought her friend, Monique Avalos, to act as a translator because she does not speak or understand English. Both women testified that during the visit Dr. Mooney pulled back Contreras' elastic pants and allowed them to audibly slap against her back. This caused Contreras to cry. Dr. Mooney did not respond.

Contreras underwent an MRI of her lumbar and thoracic spine on September 15, 2008. It showed "a small central subligamentous nuclear herniation at L5-S1, detailed above. No critical spinal stenosis or lumbar nerve root impingement is identified."

Dr. Mooney continued to treat Contreras for more than a year. After a visit in October, 2008, Dr. Mooney noted that Contreras had ongoing pain in her low back, which sometimes radiated toward her right hip and thigh. He reaffirmed the physical restrictions and recommended an epidural steroid injection (ESI). Contreras did receive an ESI at a later appointment, but she reported that it did not provide relief.

During his treatment of Contreras, Dr. Mooney recommended four specialists for her to consult with: Dr. Nelson, an orthopaedic spine specialist; Dr. Acosta, a neurologist; Dr. Ledet, a pain specialist; and Dr. Fritz, a chiropractor.

Contreras was evaluated by Dr. Nelson on January 9, 2009. Dr. Nelson diagnosed Contreras with low back pain and a small disk protrusion on L5-S1. Dr. Nelson did not believe surgery was a viable remedy and opined that Contreras would not have lasting problems. Although Dr. Nelson concurred with the restrictions imposed by Dr. Mooney, no other restrictions were advised.

Contreras met with Dr. Fritz several times in February 2009. Dr. Fritz performed spinal manipulation approximately seven times on Contreras. He diagnosed her with lumbar subluxation, lumbar disc, and sciatica. Dr. Fritz contacted Dr. Mooney's office and reported his observation of swelling in the patient's back. Dr. Mooney then prescribed Prednisone for Contreras.

Contreras had another appointment with Dr. Mooney in March 2009. Contreras and Avalos both testified about another issue that Contreras had with her treatment. Avalos was not allowed to act as an interpreter during the appointment and was not allowed into the examination room with Contreras. No other interpreter was provided by Swift or the doctor. Dr. Mooney then gave Contreras an ESI. He could be heard repeatedly yelling at her in English, through the door, "Yes or no?" Contreras did not respond as she could not understand his question.

In April 2009, Swift placed Contreras on medical leave, noting that "extended assignments to all restricted duty job in the plant will be eliminated." The notice also stated that if no positions had opened up after twelve months, her employment with the company would end.

Contreras was evaluated by Dr. Acosta three times between May 2009 and July 2009. Dr. Acosta conducted an EMG test and nerve conduction values. Both studies were normal. In his report he found, "Normal strength, reflexes, and sensation to the lower extremities." He also stated, "I think that Mrs. Contreras continues to have this chronic lower back pain of unclear etiology, probably with neuropathic features. . . . [I] think that there is not much more that we can do from the intervention point of view, except for control of her pain with medication and exercises."

In July 2009, Dr. Mooney again evaluated Contreras. He diagnosed symptoms of persistent low back pain with pseudoradiculopathy and evidence of S1 joint dysfunction. He modified her physical restrictions to lifting no more than

twenty pounds and noted that she should continue with her medication. He also noted that she was approaching her maximum medical improvement.

In September 2009, Contreras returned to the plant from medical leave and was employed in a light-duty position. The position complied with the medical restrictions provided by Dr. Mooney. She continued in the employment through the hearing with the workers' compensation deputy commissioner.

Contreras was evaluated by Dr. Ledet. Dr. Ledet deferred to Dr. Mooney with respect to any permanent impairment. He performed a lumbar facet medium branch block on October 1, 2009. Contreras reported about a fifty percent reduction in symptoms following the procedure.

On October 10, 2009, while at work, Contreras was struck by a box which was being transported by a fork lift. She was struck on the right side of her mid and low back. Once she was struck, she grabbed a part of the table with her arm. She was pulled by the forklift transporting the box, but she did not fall to the floor. She completed a work injury report following the incident. She complained of back pain and stated that she was unable to feel her legs.

Contreras returned to Dr. Ledet on October 15, 2009. He performed a right SI joint injection. Contreras was to follow up with Dr. Mooney for restrictions.

During the winter of 2009, Contreras met with Dr. Mooney several times. In December he prescribed a TENS unit. He recommended Contreras "return to full unrestricted duty by 2/02/10 in a step-wise function with no lifting greater than 10 pounds for the next 2 weeks, and then up to 25 pounds, and then full duty."

On January 14, 2010, he opined that Contreras had reached maximum medical improvement. He diagnosed Contreras with "exaggerated pain response" and saw no reason to impose permanent work restrictions. He returned Contreras to regular activities and referred her to her primary physician for any ongoing pain management.

On February 15, 2010, Contreras exercised her option to obtain an independent medical examination pursuant to Iowa Code section 85.39 (2007). Dr. Stoken examined Contreras and reviewed various medical records. She found that Contreras suffered from acute thoracic and lumbar strain and right sacroiliac joint dysfunction as a result of the work injury on August 16, 2008. She also noted "chronic low back pain and right sacroiliac joint dysfunction." She opined that Contreras had an eight percent permanent impairment to the body as a whole because of her injury to the lumbar spine. She also imposed work restrictions: refrain from repetitive bending, lifting, and twisting; and avoid lifting more than twenty pounds on a frequent basis, twenty-five pounds on an occasional basis, and lift thirty pounds only rarely.

Following Dr. Mooney's March 18, 2010 release to full, unrestricted duty, Contreras returned to her primary physician, Dr. Wille, for pain medication. Dr. Wille diagnosed chronic back pain. He also agreed with the medical opinion provided by Dr. Stoken. He did not provide a permanent impairment rating, but agreed that Contreras did have some degree of permanent impairment.

Contreras returned to Dr. Wille again in May 2010. He noted ongoing back problems and her continued use of the TENS unit.

Contreras hired a vocational consultant, Barbara Laughlin, in May 2010. Ms. Laughlin issued a report concluding Contreras has sustained ninety to one hundred percent loss of employability.

Swift then hired a vocational consultant, Scott Mailey, in June 2010. His report concluded that Contreras had sustained a forty-five to fifty percent loss of employability.

On June 23, 2010, the deputy commissioner heard the consolidated cases regarding Contreras' two work incidents. Contreras had been living in the United States for approximately eleven years and was forty-one years old at the time. The deputy issued her arbitration decision on March 31, 2011. In it she found that Dr. Stoken's medical opinion was the most reliable. She also found Contreras had sustained a twenty percent industrial disability as a result of the August 16, 2008 incident. All associated costs were assessed to Swift. The deputy did not award any benefits regarding the October 10, 2009 incident.

Contreras appealed the twenty percent award. Swift cross-appealed. Neither party appealed the deputy commissioners' ruling on the October 10, 2009 incident. On May 8, 2012, the Iowa Workers' Compensation Commissioner issued the appeal decision. Contreras' award was increased to sixty percent industrial disability.

Swift filed a petition for judicial review. On January 4, 2013, the district court issued its ruling, affirming the agency decision. Swift appeals.

II. Standard of Review.

On appeal from judicial review, the standard we apply depends on the type of error allegedly committed. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). Our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. Iowa Code § 17A.19(10). Here, Swift raises multiple issues.

Swift's first claim of error is the contention that the commissioner's finding that Contreras is a credible witness was not supported by substantial evidence in the record when the record is viewed as a whole. *See id*. § 17A.19(10)(f). Swift also maintains the finding was a product of a decision-making processing in which the commissioner did not consider "relevant and important" matters. *See id*. § 17A.19(10)(j).

Swift next argues that the commissioner's award of sixty percent industrial disability is not supported by substantial evidence in the record when the record is viewed as a whole. *See id*. § 17A.19(10)(f).

Finally, Swift contends the commissioner's imposition of costs to obtain a vocational report, which included travel costs for the consultant, is based upon an irrational, illogical, or wholly unjustifiable application of law to fact. *See id*. § 17A.19(10)(m).

III. Discussion.

A. Credibility Finding.

Swift contends the commissioner's finding that Contreras was a credible witness is neither supported by substantial evidence in the record when the

record is viewed as a whole nor the result of a decision-making process in which the relevant and important matters were considered. *See id*. § 17A.19(10)(f), (j). We consider each in turn.

> "Substantial evidence" is statutorily defined as:
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> > [T]he quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Id. § 17A.19(10)(f)(1). When reviewing a finding of fact for substantial evidence in the record as a whole, 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." *Id.* § 17A.19(10)(f)(3). "Our review of the record is 'fairly intensive,' and we do not simply rubber stamp the agency finding of fact." *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (quoting *Wal–Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003)).

In this case the commissioner adopted the deputy commissioner's findings regarding credibility since she "was able to assess claimant's testimony." In doing so the commissioner found Contreras to be a "credible" witness. His determination was based on the deputy commissioner's finding in the arbitration decision, that, "[f]or the most part, claimant was a credible witness." Swift contends that the commissioner's failure to acknowledge that Contreras was only found to be credible "for the most part" subverts the entire appeal decision.

"It is within the province of the industrial commissioner to determine the credibility of the witnesses." *E.N.T. Associates v. Collentine*, 525 N.W.2d 827, 830 (Iowa 1994). It is not the role of the court to reassess the evidence or make its own determination of the weight to be given the various pieces of evidence. *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." *Id*.

The deputy commissioner did state that Contreras was credible "for the most part." While Swift argues this statement evinces the deputy commissioner's belief that Contreras was not completely truthful, the very next sentence in the report explains the slight reservation. The deputy said:

> For the most part, claimant was credible. Unfortunately, many of the questions posed to claimant were leading in nature. The leading questions did not allow this deputy to hear claimant's testimony in her own voice. The undersigned would have preferred that claimant testify in detail rather than to answer merely yes or no to leading questions.

Read in context, any doubt expressed by the deputy involves the form of questioning rather than the resulting answers provided by Contreras. The deputy commissioner did not make any other comments or characterizations regarding Contreras' testimony. Furthermore, portions of Contreras' testimony was corroborated by her friend who was present at several of her doctor appointments and who the deputy commissioner also found to be credible. Upon review, we find there is substantial evidence in the record when viewing the record as a whole to support the commissioner's finding of credibility.

Swift also maintains that the commissioner failed to consider relevant and important facts when determining whether Contreras was a credible witness. More specifically, it contends the commissioner failed to consider Contreras' dismissed shoulder claim when determining her credibility. Contreras filed two worker's compensation claims, one for an injury to her back from an accident on August 16, 2008, and one for an injury to her shoulder from an accident on October 10, 2009. In its decision of the case, the deputy commissioner found that Contreras had sustained a work injury to her low back as a result of the first accident and awarded her permanent partial disability benefits. Regarding her claims resulting from the second incident, the deputy found that, "While [Contreras] sustained a work injury to her low back on October 10, 2009, she incurred noting more than a temporary aggravation of her pre-existing condition." The deputy further stated, "[C]laimant did not sustain a work-related injury to either shoulder as the result of the work injury on October 10, 2009." Swift argues that this determination implicitly means the deputy "found Contreras was less than truthful" about her shoulder injury and that such an implicit determination must be considered by the commissioner as a "relevant and important" matter when determining Contreras' credibility. *See* Iowa Code § 17A.19(10)(j).

We are not convinced that we can subscribe to Swift's claim. A witness's credibility is for the fact-finder, even if a portion of the witness's testimony is impeached. *See e.g.*, *McVay v. Carpe*, 29 N.W.2d 582, 585 (Iowa 1947). Iowa courts have always rejected a rule that one falsehood makes a witness's entire

testimony, as a matter of law, incredible. *See McCrary v. Crandall*, 1 Iowa 117, 120 (1855). Thus, Contreras' credibility is not an all-or-nothing proposition. The deputy and the commissioner could conclude that Contreras was credible as it related to the injury arising from the first accident even if they did not believe her regarding the second injury. Moreover if Contreras was not credible about the second injury, it is speculative to suggest the agency did not consider that fact in determining if she was credible about the first accident.

Typically, we "accord deference to the agency's decision on witness credibility." *Clark v. Iowa Dep't of Revenue & Fin.*, 644 N.W.2d 310, 315 (Iowa 2002). Giving due weight to the commissioner's findings about Contreras' credibility, we cannot, consistent with the limitations imposed on us by Iowa Code chapter 17A, disturb them. Even if we could agree with Swift's characterization of the importance of the deputy's denial of Contreras' second claim, we cannot conclude that the commissioner failed to consider it or that it so undermined Contreras' credibility that she should not have been afforded credibility in regard to her first claim.

B. Award of Sixty Percent Industrial Disability.

Swift also maintains that the commissioner's award of sixty percent industrial disability is not supported by substantial evidence in the record when viewing the record as a whole. In support of its contention, Swift enumerates a plethora of evidence that the commissioner relied on in his award of sixty percent industrial disability and argues that the commissioner misconstrued or mis-weighed each piece. Swift acknowledges that our role is to assess "not whether

the evidence would support a different finding than the finding made by the commissioner, but whether the evidence supports the findings actually made," but nonetheless argues that the evidence does not support an increase in the award from twenty percent, as awarded by the deputy commissioner, to sixty percent industrial disability, as awarded by the commissioner. *See Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 557–58 (Iowa 2010).

***1. Contreras' Credibility*.**

Similar to its prior argument, Swift contends the commissioner misunderstood the deputy commissioner's credibility finding regarding Contreras' testimony and thus misused it in awarding sixty percent industrial disability. For the reasons previously stated, we disagree and decline to address the issue again.

***2. Doctors' Expert Opinions*.**

Swift next contends the commissioner erred in his reliance on expert opinions. More specifically, Swift contends the commissioner erred by relying on the medical opinion of Dr. Stoken in reaching his conclusion that Contreras is industrially disabled sixty percent.

Swift first argues that in using solely Dr. Stoken's opinion the commissioner failed to consider the medical opinions of Drs. Nelson, Ledet, and Acosta. We disagree with Swift's characterization of the commissioner's use of the expert reports. The commissioner did review and consider the reports of Drs. Nelson, Acosta, and Ledet. In the appeal decision, the commissioner stated:

> . . . [T]he views of Dr. Nelson and Dr. Ledet are inconsistent with the credible testimony of claimant as to the extent and impact of her

> pain complaints and the impact on her employment. Dr. Nelson opined that claimant would not have lasting problems and that is clearly erroneous. Dr. Ledet, a pain specialist, essentially deferred to the views of Dr. Mooney on permanency, but those views were found unreliable. Additionally, there is no record of the opinions of Dr. Acosta concerning permanent impairment or restrictions. However, in Dr. Acosta's last noted dated July 28, 2009 he indicates that claimant continues to have chronic lower back pain of unclear etiology, probably with neuropathic features. He recommended at that time that claimant should continue with medications and exercise.

While it is true that the commissioner found the opinions of Drs. Nelson, Ledet, and Acosta to be less reliable than that of Dr. Stoken, it is untrue that the commissioner failed to consider them.

Swift also argues that the commissioner should have relied on Dr. Mooney's opinion rather than Dr. Stoken's opinion. The deputy commissioner explicitly found Dr. Mooney's opinion to be unreliable. Both Contreras and her friend, Avalos, testified at trial that during one of Dr. Mooney's examinations of Contreras, he grabbed the elastic on the back of her pants and then "rudely snapped the elastic" against her sore back. This caused Contreras to cry. Dr. Mooney said nothing in reply. They also testified about an incident when Dr. Mooney refused to allow Avalos into the exam room to translate and then yelled at Contreras, in English, while giving her an injection. Dr. Mooney expressed anger that Contreras was unable to communicate to him whether her pain level was better or worse. Because of this credible testimony, the deputy found, ". . . Dr. Mooney did not display much respect for claimant as a patient who had work-related lumbar condition. The doctor's actions displayed utter disregard for claimant's complaints. The doctor did not accept the back pain as legitimate."

Swift argues that the deputy commissioner was wrong to use the women's testimony to discredit Dr. Mooney's expert opinion since Contreras had not communicated any dissatisfaction about her care to Swift. Swift cites Iowa Code section 85.27 for the proposition that such testimony could not be used to impeach Dr. Mooney's credibility because "implicit" in the section is the "requirement" that the claimant "must communicate its grievance to the employer first to provide necessary notification for corrective action prior to litigation." In pertinent part, section 85.27(4) states, "If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury." The statute itself is silent on any consequence which may result from the claimant's failure to notify their employer of their dissatisfaction other than the inability to obtain alternate care. Simply because the claimant does not write to complain of the care provided, and to seek alternate care, does not equate being fully satisfied with the care provided. Swift also failed to cite any case law that supports its conclusion. We refuse to assume any such consequence was "implicitly" intended by the legislature. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 15 (Iowa 2010) (stating that interpreting statutory provisions, we "look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than the one which will defeat it."); *see also McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 188 (Iowa 1980) ("The

primary purpose of the worker's compensation statute is to benefit the worker and his or her dependants, insofar as statutory requirements permit.").

Finally, Swift maintains that the commissioner erred in relying on Dr. Stoken's medical opinion because more experts sided with Swift. As the district court noted in its decision, "The [c]ommissioner is not required to engage in a democratic process and count medical votes." It is the commissioner, as fact finder, who is responsible for determining the weight to be given expert testimony. *See Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). "The commissioner is free to accept or reject an expert's opinion in whole or in part, particularly when relying on a conflicting expert opinion." *Pease*, 807 N.W.2d at 85. In their appellate capacity, courts "are not at liberty to accept contradictory opinions of other experts in order to reject the finding of the commissioner." *Id*.

3. Factors Used to Determine Industrial Disability Award.

Swift next contends the commissioner erred in his consideration of Contreras' lack of education, lack of English-language skills, lack of retraining ability, and lack of vocational history when determining an award of sixty percent industrial disability. Swift argues that the deputy commissioner had already considered each of these factors in making her determination that twenty percent was an appropriate award and thus should not be used to increase the award. Swift further argues that the commissioner gave too much weight to each of these factors, thereby overestimating Contreras' loss of earning capacity.

Our case law requires that consideration be given to the injured employee's "age, education, qualifications, experience and his inability, because

of the injury, to engage in employment for which he is fitted." *McSpadden*, 288 N.W.2d at 192. There are no guidelines establishing the weight each of these factors are to be given in the commissioner's consideration; rather the commissioner must "draw upon prior experience and general and specialized knowledge to make a finding in regard to the degree of industrial disability." *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 68 (Iowa Ct. App. 1991). Thus, even if Swift is correct in its argument that the deputy commissioner considered all of the factors when making her determination that a twenty percent disability award was appropriate, nothing requires the commissioner to apply the same weight to each of the factors. *See id*.

As the commissioner noted, Contreras only obtained an education through the sixth grade in Mexico; she cannot speak, read, or write English and it is unlikely she will be able to learn when she has not after more than a decade in the United States; and her work history consists solely of physically demanding jobs. With the physical restrictions that Dr. Stoken prescribed, Contreras is permanently disqualified from returning to many of her pre-injury occupations, and, due to her educational background, re-training for a different type of position is not a legitimate option. These considerations constitute substantial evidence in the record when viewing the evidence as a whole to support the higher award of sixty percent industrial disability.

4. Vocational Reports

Swift's final argument concerns the commissioner's use of the two vocational reports. Swift argues the commissioner erred by considering portions

of Ms. Laughlin's report after the deputy commissioner "recognized Ms. Laughlin's report is wholly without merit." Swift also argues the commissioner erred by using Mr. Mailey's report, which found that Contreras had lost forty-five to fifty percent of her earning capacity, to come to his determination that she was sixty percent industrially disabled.

First, the deputy commissioner did not find that Ms. Laughlin's report was "wholly without merit." Although Ms. Laughlin determined that Contreras had lost ninety to one hundred percent of her employability even though she was still employed at a full-time bid job by Swift, the deputy merely stated that Laughlin's opinion was "exaggerated." Also, immediately after stating her disagreement with Laughlin's determination, the deputy commissioner agreed with, and adopted, Laughlin's reasoning for the determination. Specifically, the deputy commissioner stated:

> This deputy finds Ms. Laughlin's opinion is exaggerated. Claimant is still employed at Swift in a regular bid position. She earns less money per hour than she earned on the date of the work injury. She has sustained a loss of actual wages.
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> *It is true*, claimant is unable to read and write English. It is doubtful she will be successful in learning English as a second language. . . . She only attended school in Mexico through the sixth grade. Re-training in this country is unlikely since claimant's academic skills are lacking.[1]

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[1] The deputy commissioner stated that Contreras was unlikely to learn English as a second language since she had already been in the country nearly eighteen years at the time of the hearing. Contreras had actually been in the country eleven or twelve years at the time, but we believe this mistake is inconsequential to the deputy's reasoning. We specifically note that the commissioner only recited that Contreras had "no English language skills" and did not adopt the deputy's conclusion that Contreras was unlikely to learn English. In light of her age, forty-one years, we believe the commissioner more appropriately recited the factor.

(Emphasis added). The commissioner agreed with most of the deputy commissioner's analysis by stating that, while Contreras was "not close to a point of total disability as asserted by Barbara Laughlin," Ms. Laughlin had credibly reported "that the restrictions imposed on claimant are quite significant for a worker with no English language skills, a sixth grade education obtained in Mexico, and a history only physically demanding labor." Thus, we do not agree that the commissioner misconstrued the deputy's findings regarding Ms. Laughlin's report.

Second, Swift concludes the commissioner is wrong to use any of Mr. Mailey's opinion to support his determination that Contreras has lost sixty percent of her earning capacity since Mr. Mailey's determined that she lost only forty-five to fifty percent. Swift appears to argue that Mailey's determination must be the absolute ceiling for any industrial disability award. However, Swift cites no legal support for its conclusion. As stated before, "There are no guidelines establishing the weight to be given to each of the factors. Rather, it is necessary for the commissioner to draw upon prior experience and general and specialized knowledge to make a finding in regard to the degree of industrial disability." *Lithcote Co.*, 471 N.W.2d at 68.

For all of the reasons stated above, even if we disagreed with the level of industrial disability determined by the commissioner, we cannot say that it was a reversible error, as the decision is supported by substantial evidence in the record as a whole.

C. Imposition/Assessment of Costs regarding Vocational Report

Swift's final argument maintains that the commissioner erred by taxing all of the costs incurred to obtain Ms. Laughlin's vocational report against Swift and argues that the decision is irrational, illogical, or wholly unjustifiable application of law to fact. Swift argues that some of the costs associated with obtaining Ms. Laughlin's vocational report were not reasonable and thus should not be imposed against it.[2] We have previously considered Iowa code section 86.40[3] and Iowa Administrative Code rule 876–4.33(86)[4] and determined that the appropriate

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[2] Specifically, Swift argues that they should only be required to pay for the time Ms. Laughlin spent actually writing the report. Swift disputes the reasonableness of the fees associated with her travel time, the time she spent interviewing Contreras, the time she spent conducting research for the report, and her mileage reimbursement.

[3] Section 86.40 states, "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner."

[4] Iowa Administrative Code rule 876–4.33(86) states:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.29 and 622.72(5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code section 622.29 and 622.72(6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.

taxation of costs "is a matter specifically delegated by the legislature to the discretion of the agency." *John Deere Dubuque Works v. Caven*, 804 N.W.2d 297, 300 (Iowa Ct. App. 2011). Thus, the commissioner, at his discretion, could determine that all of the fees incurred in obtaining Ms. Laughlin's report were "reasonable" and tax them to Swift. *Id*. at 300–01. We are unable to conclude the fees assessed viewed individually or as a whole are unreasonable.

Upon our review, we find the commissioner's interpretation and application of its agency rule was not irrational, illogical, or wholly unjustifiable.

IV. Conclusion

After considering each of the errors alleged by Swift, we affirm.

AFFIRMED.