

IN THE COURT OF APPEALS OF IOWA

No. 9-844 / 09-0020
Filed January 22, 2010

WEITZ COMPANY,
Petitioner-Appellee,

vs.

MERTON E. JOHNSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Merton Johnson appeals from the district court's ruling on judicial review reversing the workers' compensation commissioner's award of post-hearing penalty benefits. **AFFIRMED AND REMANDED WITH INSTRUCTIONS.**

W. Dennis Currell, Cedar Rapids, for appellant.

Joseph M. Barron and Timothy Wm. Wegman of Peddicord, Wharton,
Spencer, Hook, Barron & Wegman, L.L.P., Des Moines, for appellee.

Matthew D. Dake, Cedar Rapids, for amicus curiae.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

DANILSON, J.

Merton Johnson appeals the district court's ruling on Weitz Company's petition for judicial review reversing the workers' compensation commission's final agency decision awarding workers' compensation post-hearing penalty benefits to Johnson. Johnson argues the district court (1) employed an erroneous legal standard and (2) erred in concluding the denial of benefits was fairly debatable. We affirm and remand with instructions.

I. Background Facts and Proceedings.

Merton Johnson sustained an injury to his back on July 17, 2003, while employed as an iron worker for Weitz Company.¹ Johnson sought workers' compensation and penalty benefits. After a hearing, the deputy workers' compensation commissioner issued an arbitration decision on November 29, 2005, awarding Johnson a thirty percent industrial disability. In reaching its decision, the deputy considered reports and impairment ratings from numerous physicians that examined Johnson over a period of several years: Dr. David Durand assessed a zero percent impairment rating; Dr. R. F. Nieman assessed a thirteen percent impairment rating; Dr. Ray Miller assessed a twenty-one percent impairment rating; and Dr. Kenneth McMains assessed a five percent impairment rating. The deputy found Dr. Miller's impairment rating to be the most credible:

The deputy accepts Dr. Miller's March 17, 2005 impairment rating as the most credible over the other numerous ratings obtained throughout the course of this matter. Dr. Miller is a board certified orthopedic surgeon, medical examiner and occupational medicine physician. Dr. Miller's assessment was completed two days before claimant's second alleged work injury in March 2005. Dr. Miller first treated claimant in October 2004 and re-evaluated

¹ Weitz is a self-insured company.

him for the March 2005 impairment rating. Dr. Miller had available to him all of claimant's prior medical records as well as the records of his partner, Dr. Westpheling. It appeared Dr. Miller thoroughly analyzed the issue of the degenerative change at the two levels based upon pre-injury radiographs. Dr. Miller assigned a 21 percent permanent impairment rating based upon the July 2003 work injury.

The deputy also reviewed reports from Johnson's vocational consultant, Barbara Laughlin, and Weitz's vocational consultant, Susan McBroom. The deputy determined Weitz's vocational expert report was most credible:

It is expressly found that the vocational report of Ms. McBroom will be accorded more weight in assessing claimant's industrial disability. The deputy found Ms. McBroom's report provided greater detail and analysis of all the physical demand categories based upon claimant's current physical abilities, medical history, post-injury work, and motivation, among other factors.

The deputy further concluded Johnson was entitled to penalty benefits from November 30, 2004, to June 13, 2005, in part due to Weitz's failure to offer an explanation for why it waited approximately four and a half months to obtain an impairment rating by a second physician of its choice. The deputy's subsequent nunc pro tunc order clarifying the penalty award provided that "Claimant has established that he is entitled to payment of additional benefits on account of the unreasonably delayed or denied permanent partial disability benefits in the range of 20 percent."

On October 31, 2006, the interim workers' compensation commissioner affirmed the deputy's findings and adopted the decision as final agency action. Weitz filed a petition for judicial review, challenging only the award of penalty benefits. On May 22, 2007, the district court reversed the award of penalty benefits, finding there was substantial evidence to support Weitz's reasonable

belief that Johnson was not entitled to disability benefits. This court affirmed the district court's decision in *Weitz Company v. Johnson*, No. 07-0974 (Iowa Ct. App. Feb. 27, 2008).

Meanwhile, on June 16, 2006, Johnson filed a petition initiating the instant case, in which he sought post-hearing penalty benefits for Weitz's failure to pay benefits during the period the original arbitration was on appeal until the award was paid (from November 29, 2005, to November 28, 2006). After a hearing, the deputy workers' compensation commissioner issued an arbitration decision on March 26, 2007, awarding Johnson \$18,000 in post-hearing penalty benefits. The deputy commissioner ruled that at the time of the arbitration hearing, Johnson's claim was fairly debatable, but that the matter was no longer fairly debatable after its November 29, 2005 ruling of liability. As the deputy commissioner stated:

Defendant offered as evidence to explain its nonpayment of benefits during the pendency of the appeal, a letter from David Durand, D.O., dated December 19, 2003 (Ex. A) and a letter from Kenneth McMains, M.D., dated March 24, 2005 (Ex. B). Dr. Durand opined that claimant sustained no impairment rating to his whole person as a result of the injury in this case. Dr. McMains reviewed a video tape surveillance of claimant's activities and also a functional capacity evaluation conducted on April 19, 2005, which was deemed invalid, pertaining to claimant's working abilities. As a result, Dr. McMains offered the opinion that claimant could return to work at full activity with permanency and no restrictions. It is noted that both of these exhibits were considered by the deputy in the arbitration hearing and were rejected by the deputy in her reasoning.

Claimant offered as an expert witness, Michael Trier. Mr. Trier is a former deputy workers' compensation commissioner as well as the former workers' compensation commissioner. . . . Mr. Trier testified he reviewed the evidence and testimony presented to the deputy workers' compensation commissioner and which was considered by her in her decision. He also reviewed the arbitration decision. Mr. Trier testified that the deputy considered and rejected

Dr. Durand's opinion on the basis that it ignored medical treatment claimant had received and that defendant had an opinion from a subsequent authorized physician which found claimant to have permanent impairment. Mr. Trier further testified that the deputy rejected Dr. McMains' opinions regarding the video tape surveillance of claimant. Mr. Trier testified he agreed with the deputy's conclusions relating to the video surveillance. Mr. Trier concluded defendant in this case had no reasonable basis or excuse for its nonpayment of post hearing benefits to claimant and that defendant's reliance on evidence already submitted to and rejected by the initial arbitration deputy was insufficient to form the basis for a reasonable conclusion that the commissioner would overturn the decision entirely and award no industrial disability benefits.

. . . .

It is concluded that defendant was obligated to conduct further investigation into whether or not benefits should be paid after the arbitration decision was issued. It is determined that defendant was justified in not voluntarily paying any benefits between the arbitration hearing and the issuance of that decision. However, once the arbitration decision was issued, defendant's obligation to re-examine their position in the case recommenced. Based on the foregoing reasoning, it is concluded that a penalty should be assessed to defendant for its unreasonable delay in payment of weekly benefits between the issuance of the arbitration decision and the date that they did make payment of November 28, 2006.

On March 14, 2008, on intra-agency appeal, the arbitration decision was affirmed and adopted as final agency action. As the commissioner further noted in that decision:

The question of whether employers and insurers can rely upon the reasonableness of their actions before an agency or court decision to avoid a penalty after an agency or court decision was put to rest almost five years ago. Defendants are under a continuing duty to evaluate their actions at all stages of the claim proceedings. To avoid penalty defendants must show that they re-evaluated the case promptly after a decision and demonstrate by the evidence that they had a reasonable expectation of success on appeal. *Simonson v. Snap-On Tools*, File No. 851960 (Remand Dec., August 25, 2003) On remand from an unpublished decision of the Court of Appeals, *Simonson v. Snap-On Tools*, No. 2-056 (Iowa Ct. App. Sept. 25, 2002).

While I am not sure that issues of penalty lend themselves to expert opinion, the views of former commissioner, Mike Trier, that there was no reasonable likelihood of success on the merits of the claim (not the penalty issue) on inter agency appeal was uncontroverted. But regardless of the reasonableness of a successful appeal, there was no evidentiary showing at hearing by defendants of any attempt to re-evaluate their position after the arbitration decision was issued, and no showing of the reasons for any expectation of success on judicial review. Defendants, in their defense to this claim, simply desire to improperly rely solely on the reasonableness of their initial decision to deny industrial benefits prior to the first arbitration decision before former deputy commissioner, Anne Garrison.

Weitz filed a petition to the district court for judicial review. After a hearing, the district court reversed the award of penalty benefits, finding Weitz had a reasonable basis to deny benefits to Johnson under the “fairly debatable” standard, and because the arbitration decision was not yet the “final adjudication in the matter”:

After careful review of the Appeal Decision and the Arbitration Decision and of the briefs by the Petitioner and Respondent, the Court finds that the position of the Petitioner is the correct one. Even after the Arbitration Decision was entered, there still was a reasonable basis for denial of the claim based upon the “fairly debatable” standard. The Arbitration Decision entered by Deputy Commissioner Garrison did not become a final adjudication in the matter as it was further appealed to the Workers’ Compensation Commissioner and then the Iowa District Court. No additional evidence was necessary for the Petitioner to rely upon to maintain its position and argument that there was a reasonable basis for denial of the claim based upon the fairly debatable standard. Again, the focus is on the existence of a debatable issue, not on which party was correct. The Petitioner was entitled to maintain its argument that there was a reasonable basis for denial of the claim based upon the fairly debatable standard until the issue was finally resolved by all the de novo reviews it sought after the Arbitration Decision.

Johnson now appeals.

II. Scope and Standard of Review.

The Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, governs the scope of in workers' compensation cases. Iowa Code § 86.26 (2007); *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). "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 violated." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). 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). In reviewing the district court's decision, we apply the standards of chapter 17A to determine if our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

"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." *Meyer*, 710 N.W.2d at 219. If the claim of error "lies with the agency's interpretation of the *law*, the question on review is whether the agency's interpretation is erroneous, and we may substitute our interpretation for the agency's." *Id.* Finally, if the claim of error

lies with the *ultimate conclusion* reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence.

Id. We allocate some degree of discretion in our review of the agency's application of the law to the facts, but not the breadth of discretion given to the

findings of fact. *Id.* “With respect to the workers’ compensation statute in particular, we keep in mind that the primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee.” *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003).

III. Merits.

Penalty benefits are created by Iowa Code section 86.13, which provides two clear prerequisites before penalty benefits can be imposed: (1) “a delay in commencement or termination of benefits” that occurs (2) “without reasonable or probable cause or excuse.” Iowa Code § 86.13. When the prerequisites have been met, the commissioner “shall award” penalty benefits “up to fifty percent of the amount of benefits that were unreasonably delayed or denied.” *Id.*

“To receive a penalty benefit award under section 86.13, the claimant must first establish a delay in the payment of benefits.” *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 334 (Iowa 2008). Here, there is no doubt Johnson has established a delay in the payment of benefits. “The burden then shifts to the employer to prove a reasonable cause or excuse for the delay.” *Id.* at 334-35.

As our supreme court has stated, “[a] reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee’s entitlement of benefits.” *City of Madrid v. Blasnitz*, 742 N.W.2d 77, 81 (Iowa 2007). A reasonable basis for denial of the claim exists if the claim is fairly debatable. *Id.* at 81-82. The fact the employer’s position is ultimately found to lack merit does not by itself establish the employer had no reasonable basis for its denial of

benefits. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005). Where an objectively reasonable basis for denial of a claim actually exists, the employer cannot be held liable for penalty benefits as a matter of law. *Blasnitz*, 742 N.W.2d at 82. In other words, the “focus is on the existence of a debatable issue, not on which party was correct.” *Bellville*, 702 N.W.2d at 473-74.

In *Rodda v. Vermeer Manufacturing*, 734 N.W.2d 480, 483 (Iowa 2007), the court explained:

A reasonable basis for denying insurance benefits exists if the claim is “fairly debatable” as to either a matter of fact or law. A claim is “fairly debatable” when it is open to dispute on any logical basis. Whether a claim is “fairly debatable” can generally be determined by the court as a matter of law. If the court determines that the defendant had no reasonable basis upon which to deny the employee’s benefits, it must then determine if the defendant knew, or should have known, that the basis for denying the employee’s claim was unreasonable.

(Internal citations and quotations omitted.)

In this case, the medical experts disagreed on the critical issue of Johnson’s impairment rating to his body as a whole. The district court determined that in light of conflicting evidence, Johnson’s claim was fairly debatable even after the arbitration decision. Johnson contends the district court erred in finding that Weitz was not required to provide additional evidence supporting its denial of Johnson’s claim, and in determining Weitz had no duty to pay benefits to Johnson until the “final agency action” by the commissioner.

Final agency action is not required for the right of benefits to accrue. *Boylan v. Am. Motorists Ins. Co.*, 489 N.W.2d 742, 743 (Iowa 1992) (noting a workers’ compensation carrier’s duty to “act reasonably in regard to benefit

payments [even] in the absence of specific direction by the commissioner”). However, where *any* evidence in the record is contradictory and supports a viable argument against the employee’s claim, an employer is justified in delaying payment of benefits until the decision of the commissioner is issued. *See Gilbert v. USF Holland, Inc.*, 637 N.W.2d 194, 199 (Iowa 2001) (noting that where an employee’s claim for benefits is fairly debatable based on a good faith dispute over the employee’s factual or legal entitlement to benefits, the employer may challenge the claim and penalty benefits are not appropriate); *Covia v. Robinson*, 507 N.W.2d 411, 416 (Iowa 1993) (finding the issue of coverage fairly debatable where there are viable arguments in favor of either party).

In this case, the district court did not recite any specific facts or circumstances (such as the contradicting opinions of doctors) that may have supported Weitz’s position. In reversing a decision of the agency, appellate courts must rely on specific facts to show that the agency decision was erroneous under one of the grounds enumerated in chapter 17A, and determine if a party’s substantial rights have been violated. *See Meyer*, 710 N.W.2d at 218. However, in reviewing the district court’s decision, it is not necessary for us to determine whether the court used an erroneous legal standard in reaching its conclusion. We are to apply the standards of chapter 17A to review the agency’s application of the governing law to the facts to determine if it is “irrational, illogical, or wholly unjustifiable,” and to determine if our conclusions are the same as those reached by the district court. *See Iowa Code § 17A.19(10)(m); Clark*, 696 N.W.2d at 603.

The district court stated in its opinion:

[Weitz] was entitled to maintain its argument that there was a reasonable basis for denial of the claim based upon the fairly debatable standard until the issue was finally resolved by *all the de novo reviews* it sought after the Arbitration Decision.

(Emphasis added.) We agree with Johnson that this statement on its face may be overbroad and the obligation to pay benefits does not depend upon the conclusion of all de novo reviews. We further agree that our supreme court has concluded that an employer has an ongoing duty to reevaluate Johnson's claim as additional information becomes available. See *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 683 (Iowa 1995), *abrogated on other grounds by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 44 (Iowa 2004). Further, each time period (prehearing and post-hearing) requires scrutiny. See *id.*

However, upon our review of the record, we find Johnson's claim remained fairly debatable during the period of time at issue, from the date the original arbitration decision was filed until the award was paid (November 29, 2005, to November 28, 2006). The commissioner's final agency decision was issued on October 31, 2006, a month before Weitz paid benefits payment to Johnson. Therefore, throughout most of the delay, the arbitration decision was not a final decision of the agency. See Iowa Code § 17A.15.

Weitz's position was that the deputy had incorrectly assessed Johnson's impairment rating. During the delay of payment of benefits, Weitz relied on the opinions of Drs. McMains, Durand, and Westpheling (opining that Johnson had a zero percent impairment rating, a five percent impairment rating, and "could return to his full activity with no permanency and no restrictions on activity"). See, e.g., *Blasnitz*, 742 N.W.2d at 83 (noting insurer is not required to ignore

contradictory evidence); *Bellville*, 702 N.W.2d at 479 (stating insurer is not required to view the facts in a light most favorable to the claimant). We find that due to the conflicting evidence on Johnson's impairment rating that Weitz had a viable argument against Johnson's claim. Additionally, no new evidence arose throughout the intra-agency appeal as to the reliability or credibility of the contradicting doctors' opinions, to give Weitz reason to change its position from its initial denial. The fact that the Weitz's position was found to be without merit in the arbitration decision does not by itself establish that Weitz had no reasonable basis for its denial. *Blasnitz*, 742 N.W.2d at 83-84. Because no new evidence arose, Weitz had a "viable argument," "good faith dispute," or "genuine dispute" over Johnson's entitlement to benefits. See, e.g., *Blasnitz*, 742 N.W.2d at 83-84; *Gilbert*, 637 N.W.2d at 199; *Covia*, 507 N.W.2d at 416. Accordingly, Weitz was justified in withholding payment.

Substantial evidence does not support a finding of unreasonable delay during this period. We agree with the district court that the commissioner's decision to award penalty benefits in this case should be reversed. As a matter of law, Johnson's claim was fairly debatable. *Blasnitz*, 742 N.W.2d at 83-84. There is sufficient evidence in the record to conclude that Weitz has carried its burden to show that the delay after November 25, 2005 was reasonable. *Id.*

IV. Conclusion.

We find Johnson's claim remained fairly debatable from November 25, 2005, to November 28, 2006. We therefore affirm the conclusion of the district court that post-hearing penalty benefits were not warranted in this case. We

remand of this case to the district court for entry of an order directing the commissioner to deny Johnson's request for penalty benefits.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.