

IN THE COURT OF APPEALS OF IOWA

No. 0-043 / 09-1391
Filed April 21, 2010

IOWA CONCRETE CUTTING, INC.,
Petitioner-Appellant,

vs.

SHAWN RYAN,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

An employer appeals the district court's decision upholding an award of workers' compensation benefits to an employee, contending (1) the employee failed to prove that he sustained a permanent injury, (2) the commissioner erred in increasing the percentage of disability, and (3) the commissioner erred in awarding penalty benefits. **AFFIRMED IN PART AND REVERSED IN PART.**

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

Thomas A. Palmer of Lawyer, Dougherty, Palmer & Flansburg, P.L.C., West Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

Shawn Ryan was sawing a section of floor while working for Iowa Concrete Cutting, Inc. when he hit two live electric lines. He received a jolt that threw him backwards and brought him to one knee. Ryan informed his boss of the incident.

Two months after the incident, Ryan quit his job because of urinary control problems that he said he began experiencing immediately after the incident. He later obtained employment with another company but left this employment after six weeks, again because of bladder control issues.¹

Ryan filed a petition for workers' compensation benefits. Following a hearing, a deputy workers' compensation commissioner determined that Ryan sustained "a 15% permanent partial disability to the body as a whole," entitling him to seventy-five weeks of permanent partial disability benefits. She found no grounds for awarding penalty benefits for the claimed delay in payment of weekly benefits.

On intra-agency appeal, the commissioner increased the percentage of permanent partial or industrial disability to 40%, which translated to 200 weeks of permanent partial disability benefits. The commissioner additionally awarded Ryan \$1000 in penalty benefits. The district court upheld the commissioner's decision in its entirety and this appeal followed.

On appeal, Iowa Concrete contends (1) Ryan failed to prove that he sustained a permanent injury, (2) the commissioner erred in increasing the

¹ Ryan told his employer he sprained his ankle. He testified he did not want to have to explain the problem.

percentage of disability, and (3) the commissioner erred in awarding penalty benefits. We review all three issues for substantial evidence. Iowa Code § 17A.19(10)(f)(1) (2009); *City of Madrid v. Blasnitz*, 742 N.W.2d 77, 80–81 (Iowa 2007) (“The sole issue on appeal is whether the record before the commissioner provides substantial evidence to support an award of penalty benefits.”); *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005) (stating fact-findings regarding award of benefits are reviewed for substantial evidence).

I. Permanent Injury

Iowa Concrete argues that Ryan failed to prove a causal link between his employment and his injury. The company cites Ryan’s credibility, which, it contends, “is seriously in doubt.”

We are obligated to judge the adequacy of evidence supporting particular fact-findings in light of “any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses.” Iowa Code § 17A.19(10)(f)(3). Given that first-hand ability to observe the witnesses, credibility determinations are for the fact-finder. See *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995).

Iowa Concrete correctly points out that the deputy commissioner, as presiding officer, did not find Ryan credible on key issues. However, Iowa Concrete overlooks the fact that, despite this adverse credibility assessment, the deputy found “sufficient medical evidence to support the conclusion that claimant’s urinary incontinence was caused by the work injury claimant sustained.”

Likewise, the commissioner wrote:

The undersigned shares the presiding deputy's concern with claimant's willingness to put forth honest answers in this contested case. Claimant's multiple theft convictions severely taint his credibility in seeking compensation as he has a clear propensity for taking that to which he is not entitled.

Nonetheless, the commissioner concluded that the deputy's decision on this issue was correct. The commissioner specifically stated:

The finding of the presiding deputy commissioner that claimant sustained his burden of proving the issue of causation for his urinary incontinence is well-reasoned and is supported by the overwhelming evidence in the record. Defendant provides no logical explanation for why the agency should disregard the significant injurious event witnessed by a fellow laborer, the consistent reporting of medical symptoms immediately following the injurious event, the unrebutted testimony regarding the nature of the conversations between claimant and his supervisor, and the unrebutted medical evidence on the issue of causation. The mere fact that claimant was previously convicted of theft and then attempted to shield himself from the implications of those convictions is not a basis to absolve defendant of responsibility for a very clear workplace injury. It is concluded that the presiding deputy's finding that claimant sustained a permanent injury while working on July 17, 2006 is affirmed.

The record contains substantial evidence to support these fact-findings. We find it unnecessary to recount that evidence, as it is summarized in detail in the district court opinion. We affirm the agency determination that Ryan sustained a permanent injury while working for Iowa Concrete.

II. Forty Percent Industrial Disability

"Industrial disability measures an injured worker's lost earning capacity." *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 265 (Iowa 1995). "Factors that should be considered include the employee's functional impairment, age, intelligence, education, qualifications, experience, and the ability of the employee to engage in employment for which he is suited." *Id.* at 265–66.

Iowa Concrete argues that the commissioner's forty percent finding is unwarranted because Ryan's treating physicians did not restrict his work, Ryan did not follow through with medical testing after sustaining the electrical shock, and he quit two jobs and did not whole-heartedly seek employment after the second quit.

The commissioner acknowledged these facts. The commissioner explained, however, that an independent medical evaluator recommended an award of "30% Impairment of the Whole Person." The commissioner also cited the testimony of Ryan's treating urologist, who stated,

What I do find in many patients who have similar symptoms, maybe a different etiology or cause, is that it interferes with their job performance because they have to use the bathroom frequently. What I have heard from some patients is they're actually threatened with termination because they're in the bathroom so often dealing with this, changing incontinence pads, diapers or having to use the bathroom because of discomfort from the bladder contractions and spasms that they're having.

So in that respect, I imagine it could affect it, but what—his work situation should not make the—should not make his problem worse. The problem he's having may interfere with his ability to do the job to his full capacity.

Based on this and other evidence, the commissioner increased the industrial disability from fifteen to forty percent. While the record contains evidence that detracts from the commissioner's modification, it is axiomatic that judgment calls such as this should be left to the agency. *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 154 (Iowa 1997); see also *Arndt v. City of Le Claire*, 728 N.W.2d 389, 395 (Iowa 2007) (stating substantial evidence review does not entail weighing of the evidence). Accordingly, we conclude the medical records cited by the commissioner amount to substantial evidence in support of his

determination that Ryan sustained forty percent industrial disability. We affirm that determination.

III. Penalty Benefits

Iowa Concrete argues that the commissioner should not have awarded penalty benefits of \$1000. Iowa Code section 86.13 provides in part:

If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

Under this provision, a claimant must first establish "a delay in commencement of benefits or a termination of benefits." *Blasnitz*, 742 N.W.2d at 81 (quoting *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 307 (Iowa 2005)). The burden then shifts to the employer to prove a reasonable excuse for the delay or termination. *Id.* "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 to benefits." *Id.* (quoting *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996)).

Our supreme court has stated:

A reasonable basis exists for denial of policy benefits if the insured's claim is fairly debatable either on a matter of fact or law. A claim is "fairly debatable" when it is open to dispute on any logical basis. Stated another way, if reasonable minds can differ on the coverage-determining facts or law, then the claim is fairly debatable.

The fact that the insurer's position is ultimately found to lack merit is not sufficient by itself to establish the first element of a bad faith claim. The focus is on the existence of a debatable issue, not on which party was correct.

Whether a claim is fairly debatable can generally be decided as a matter of law by the court. That is because “where an objectively reasonable basis for denial of a claim *actually exists*, the insurer cannot be held liable for bad faith as a matter of law.” As one court has explained, “[c]ourts and juries do not weigh the conflicting evidence that was before the insurer; they decide *whether evidence* existed to justify denial of the claim.”

Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 473–74 (Iowa 2005)

(citations omitted).

After the July 2006 accident, the initial medical diagnosis was that the “exact etiology” of Ryan’s complaints was “unclear.” A diagnostic test was ordered, but Ryan did not appear either on the initial testing date or on the rescheduled testing date. Attempts to reach him by phone were unsuccessful. In August 2007, a urologist gave the opinion that Ryan’s problems with incontinence were attributable to the 2006 accident. However, some question remained as to the impact of Ryan’s incontinence on his earning capacity. Ryan eventually went to work for an overhead door installer, continuing at that job until shortly before the November 2007 workers’ compensation hearing. The commissioner acknowledged that “[t]he loss of actual wages is the direct result of claimant’s decision to stay off work due to his own reaction to his urinary incontinence.” This evidence establishes that the claim was “open to dispute on any logical basis.” *Id.* As the record lacks substantial evidence to support the commissioner’s award of penalty benefits, we reverse that award.

AFFIRMED IN PART AND REVERSED IN PART.