IN THE COURT OF APPEALS OF IOWA

No. 0-213 / 09-1033
Filed May 26, 2010

JOHN McGOWAN,
Petitioner-Appellant/Cross-Appellee,

vs.

BRANDT CONSTRUCTION CO., and
ALLIED INSURANCE,
Respondents-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Workers' compensation claimant appeals from the district court's ruling on judicial review, which affirmed in part, reversed in part, and remanded to the agency for further fact finding. Employer and insurer cross-appeal, challenging the need for remand. **AFFIRMED ON BOTH APPEALS.**

W. Dennis Currell of Currell Law Firm, Cedar Rapids, for appellant.

Richard G. Book of Huber, Book, Cortese, Happe & Lanz, P.L.C., West Des Moines, for appellees.

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

DANILSON, J.

Workers' compensation claimant, John McGowan, appeals from the district court's ruling on judicial review, which affirmed in part, reversed in part, and remanded to the agency for further fact finding. The employer, Brandt Construction, and its insurer, Nationwide Mutual Insurance Co.,[1] cross-appeal from the district court's partial remand. We affirm on both appeals.

I. Background Facts and Proceedings.

John McGowan was involved in a motor vehicle accident on May 16, 2003, while driving a truck for Brandt. Following the accident, McGowan was taken off work for two weeks and was told he could work half-days for the next two weeks. However, he did not return to work for Brandt Construction. McGowan had gross earnings of $1798 from Brandt Construction in the three weeks he worked in 2003.

On April 28, 2004, McGowan filed a petition for workers' compensation benefits. He asserted disability from "DOI [date of injury–May 16, 2003] to present." Brandt filed an answer in which it initially denied the existence of an employer-employee relationship,[2] the time disabled, and the nature and extent of McGowan's injury "as well as other relevant issues."

On July 9, 2004, following initial discovery, Brandt served responses to McGowan's request for admissions, acknowledging an employer-employee

[1] Formerly Allied Insurance. All future references to Brandt will refer to the employer and its insurer collectively, unless otherwise specified.

[2] Brandt informed the insurer that in 2003 McGowan worked during the outdoor construction season and was compensated based upon a percentage of the load he hauled under Brandt's contract with Rausch Brothers Trucking; Brandt expressed its belief to the insurer that McGowan was an independent contractor.

relationship and admitting that McGowan had sustained an injury arising out of and in the course of employment. However, Brandt denied for lack of information that McGowan had sustained any permanent disability or industrial disability.

On August 25, 2004, McGowan filed an application for alternate medical care in which he asserted disagreement with the recommendation of authorized, treating neurosurgeon, Dr. Darren Lovick, that he undergo a myelogram (an invasive diagnostic procedure). McGowan sought a ruling that Dr. Richard Neiman be authorized to examine and diagnose his back injury by noninvasive means.

On September 15, 2004, the deputy commissioner noted Brandt "admitted liability for an injury" to McGowan occurring on May 16, 2003. Following a hearing on the application, the deputy wrote:

> Claimaint [McGowan] testified that on or about May 1[6], 2003, he was injured while driving a truck for defendants. Records indicate [McGowan] was seen by Darren Lovick, M.D., in the neurosurgery outpatient clinic on May 20, 2003. [McGowan] was referred to Dr. Lovick by Gary Lawrence, M.D. [McGowan] testified Dr. Lawrence is his family physician.
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> [McGowan] testified he had a first MRI performed on his back on May 20, 2003. Dr. Lovick's notes indicate the MRI at that time revealed an L5-S1 disc that was degenerating with mild-stenosis. Dr. Lovick diagnosed [McGowan] as having low back pain due to myofascial strain as well as a degenerative disk at the L5-S1 level. Dr. Lovick took [McGowan] off work for two weeks and returned [McGowan] to work for half days the following two weeks. He was also given a prescription for physical therapy.
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> [McGowan] testified he did not treat with a physician for back pain from May 20, 2003, to June 2004. He testified his back still hurt during this period of time. He testified his employer initially denied his May 1[6], 2003 injury as being compensable. [McGowan] testified that he would have gone to a doctor for his back if he could have afforded treatment.
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> [McGowan] testified he had a second MRI in early June 2004. In a letter dated June 8, 2004, Dr. Lovick wrote to Dr. Lawrence indicating [McGowan's] second MRI "demonstrates

> stenosis but otherwise is not too revealing." Dr. Lovick recommended a myelogram.
>
> . . . .
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> [McGowan] testified he later learned that there was some potential risk of paralysis associated with a myelogram. [McGowan] testified he already has some numbness in his right foot and is concerned a myelogram could result in further paralysis. . . . [McGowan] testified he does not want to have a myelogram.
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> In a letter dated September 9, 2004, to defendants' counsel, Dr. Lovick indicated that there is some "small risk of infection or paralysis with the myelograms. I believe it is small." Dr. Lovick also indicated that to definitively find if [McGowan] has any nerve root compression would require a myelogram and that occasionally, MRIs can miss small disk herniations.
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> An updated note from Dr. Lawrence . . . notes, "I am in agreement with Dr. Lovick that a myelogram should be done. . . ."

For its part, Brandt indicated it was willing to authorize treatment with other neurosurgeons and provided four names.

The deputy ruled that alternate care is available when there is a breakdown in a physician/patient relationship and McGowan had sufficient reason not to undergo a myelogram. However, the deputy concluded that Brandt retained the right to designate medical care with the named alternate neurosurgeons. The deputy ordered Brandt to provide McGowan medical care by one of the alternate named neurosurgeons.

On September 29, 2004, McGowan was evaluated by his chosen neurosurgeon, Dr. Neiman.[3] In a letter to Dr. Lawrence, Dr. Neiman noted that McGowan's "history goes back to May 16, 2003," described the accident, and further noted:

[3] An employee always has the option to see a doctor of the employee's choice; the right to recompense, however, is not a certainty. *See Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 204 (Iowa 2010) (noting "the employer's right to choose medical care does not prevent the employee from choosing his or her own medical care at his or her own expense").

> He was off work about two weeks. Half time for one week. Had MRI scan of the LS spine times two. No steroid injection. He continues to have pain in the lower back. He tried to work for one month, had difficulty with the pain.
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> . . . .
>
> He is quite restricted as far as range of motion of the LS spine. . . .
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> Recommendations: He apparently does have a fair degree of degenerative changes at the L5/S1 disc level. He would probably benefit from an epidural injection. . . . If the symptoms persist EMG studies would be helpful as for as the lower extremities. Repeat MRI scan to see what is going on as far as the foot drop. I placed him on some anti-inflammatory medications as well.

On November 19, 2004, McGowan filed a second petition for alternate care alleging the treatment offered by Brandt "has not materialized or been afforded or provided." McGowan indicated that he had commenced treatment with Dr. Neiman and asked that Dr. Neiman be designated as his authorized treating physician.

On December 8, 2004, the deputy commissioner wrote, in part:

> The sole issue to determine is whether defendants have provided reasonable medical care since September 15, 2004 . . . . Deputy Christenson ordered care with one of the four neurosurgeons previously stated. Promptly, defendants attempted to obtain treatment for [McGowan] with Loren Mouw, M.D. Dr. Mouw was [McGowan's] first selection as a treating neurosurgeon. Once medical records were forwarded to Dr. Mouw, the neurosurgeon declined to treat [McGowan]. Defendants have no control over a physician's decision to treat a particular patient. . . .
>
> Next defendants attempted to arrange treatment with Chad Abernathey, M.D. He too declined to treat claimant. . . .
>
> Defendants have finally convinced Dr. [Thomas] Carlstrom to treat claimant, if necessary. An appointment is scheduled for [McGowan] on January 13, 2005. Dr. Carlstrom has agreed to evaluate [McGowan's] condition and to review the relevant medical records. After the evaluation, Dr. Carlstrom will make recommendations for treatment, if any.
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> Given the facts presented, it is the determination of the undersigned, defendants have acted promptly and reasonably.

The deputy thus denied the application for alternate care.

On January 21, 2005, McGowan underwent an MRI examination with Dr. Neiman, which indicated "what appears to be a disc extrusion with tightness at the lateral recess on the left at L5-S1." Dr. Neiman referred McGowan to Dr. Chad Abernathy for a neurosurgical opinion. On February 2, 2005, Dr. Abernathy wrote, "McGowan clinically presents with chronic lumbosacral strain. I do not recommend an aggressive neurosurgical stance due to a paucity of clinical and radiographic findings. His neural elements are well decompressed on his studies and his neurologic function is intact."

McGowan missed the January 2005 appointment with Dr. Carlstrom, but did see him on March 24, 2005. Dr. Carlstrom felt McGowan's neurological examination was "normal though there is some give away weakness of his right leg." Dr. Carlstrom opined that McGowan was experiencing myofascial symptoms. Dr. Carlstrom asked to see the results of an earlier bone scan.

> If the bone scan is not particularly significant, I think this patient should be considered to be at maximum benefits of healing, and he probably has been there for some time. I don't think that there is any likelihood that any further aggression will be beneficial. I think he probably will require some type of voc rehab and possibly a Functional Capacity Evaluation might be worth doing. I will see him back once we get the bone scan report and the MRIs.

On May 5, 2005, Dr. Carlstrom reported he had seen the February 9, 2005 bone scan, which was "entirely normal, more or less eliminating the possibility of any expectation of response to any kind of facet injection or disc space fusion, for his back pain." With respect to the January 21, 2005 MRI report, Dr. Carlstrom noted "several areas of potential nerve root compression," however, "this patient is . . . likely experiencing a set of symptoms that we physicians will have little

success with treating, particularly surgically." Dr. Carlstrom recommended physical therapy, weight loss, and instructions in body mechanics. He further indicated McGowan "will probably need some type of physical restrictions on a permanent basis in the future" and recommended a functional capacity evaluation.

On August 10, 2005, Dr. Carlstrom wrote to Brandt's counsel, indicating he had reviewed McGowan's medical records, including the chiropractic records of Dr. Kurt Sperfslage. Dr. Spersflage's records indicate a history of preexisting back condition dating back to at least 1990. Dr. Carlstrom opined that McGowan's symptoms "being virtually identical to those he was complaining of just before the accident, should be considered not related to the motor vehicle accident. If anything, there could have been a very mild temporary aggravation."

On August 28, 2005, McGowan moved to continue the September 23 hearing on his petition for benefits as he was scheduled for surgery with Dr. Bryan Lynn, an orthopedic surgeon to whom he had been referred by Dr. Neiman. McGowan asserted that proceeding to hearing "prior to development of all the medical record is a denial of due process. . . ." The deputy commissioner denied the motion noting that the "parties filed a prehearing conference report on August 25, 2004 indicating March 1, 2005 as a case preparation completion date. The hearing assignment order in this matter stated a continuance would be granted only in case of an emergency."[4] McGowan then filed a voluntary dismissal without prejudice.

[4] The deputy noted that McGowan had the option of filing a review-reopening.

On October 7, 2005, McGowan submitted another workers' compensation petition relating to the May 16, 2003 accident. The petition asserts disability dates of "5/17/03-06/01/03 then 12/04/03-05/04/04, then from 06/07/04-present."[5] He alleged permanent total disability, "totally disabled per Social Security award." McGowan described the dispute in this case as "nature and extent of disability; 85.27 expenses; temporary benefits."

That same date, McGowan submitted[6] an application for alternate medical care stating his dissatisfaction with the care provided by Brandt/Dr. Carlstrom and requesting an order authorizing the care recommended by Dr. Lynn, which included surgery following a myelogram. In its answer to the application for alternate care, Brandt indicated it "disputes liability of this claim." The deputy commissioner dismissed the application, because the summary procedure of Iowa Code section 85.27(4) (2005) and applicable agency rules[7] "is not available to adjudicate liability or causal connection disputes." The deputy also noted that Brandt had lost the right to choose the care for McGowan's condition and could not assert a lack of authorization defense in response to a subsequent claim for the alternate medical expenses incurred.

McGowan filed an application for reconsideration, asserting Brandt had previously admitted liability and could not now deny it. In response, Brandt

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[5] At the time of hearing, however, pursuant to the hearing report, McGowan was seeking either temporary total, temporary partial disability, or healing period benefits from May 18, 2003, through June 10, 2003, and July 17, 2003, through August 8, 2003, and December 5, 2003, through May 4, 2004, and June 7, 2004, to present. Also according to the report, the parties stipulated: "Although entitlement cannot be stipulated, claimant was off work during this period of time."

[6] Both the petition and application for alternate medical care were dated October 7, 2005. However the application for alternate medical care is file-stamped October 7, and the petition is file-stamped October 10, 2005.

[7] *See* Iowa Administrative Code rs. 876-4.1, 876-4.48(7).

contended that while it had previously admitted that the injury was the cause of a temporary aggravation of a preexisting condition, it denied the injury was the cause of any permanent impairment, permanent disability, or the cause of McGowan's current symptoms or requested medical care. The application for reconsideration was denied.

The presiding deputy commissioner entered an arbitration decision in which it was determined that McGowan's May 16, 2003 injury had produced a temporary disability. The deputy awarded temporary total disability benefits at the weekly rate of $366.32 for the periods of May 18, 2003, through June 10, 2003, and from July 17, 2003, through August 8, 2003.[8] The deputy concluded McGowan failed to establish his May 16, 2003 injury caused permanent disability. Finally, the deputy concluded a penalty award was inappropriate because the issues of causation, permanency, and the length of temporary benefits were all fairly debatable. Both parties appealed to the commissioner.

On April 22, 2008, the commissioner issued an appeal decision. The commissioner ruled that Brandt's stipulation that the injury was a cause of some temporary disability did not preclude Brandt from disputing the nature and extent of that disability. The commissioner rejected McGowan's claim that the supreme court's decision in *Winnebago v. Haverly*, 727 N.W.2d 567 (Iowa 2006), precluded Brandt from disputing any issues regarding either his entitlement to indemnity benefits or medical care in the arbitration proceeding. In reaching this conclusion, the commissioner stated:

[8] As noted in footnote 5, the parties stipulated McGowan was off work from July 17, 2003, through August 8, 2003.

> [McGowan's] reading of *Haverly* is overbroad and, if followed, would violate both fundamental fairness and due process. [Brandt's] general admission that claimant sustained a work incident either on or manifesting on a specified date and that that incident had injurious consequences is not the issuance of a "blank check" to claimant, which claimant may then fill in as desired relative to consequences attributable to that condition—whether those consequences be medical conditions requiring treatment or claimed temporary or permanent disability. It is not inconsistent for defendants to acknowledge an injury and their liability for the foreseeable consequences of that injury while reserving the right to question and defend on whether all consequences claimant claims relate to the injury actually result from the injury.

The commissioner also determined that the doctors were "split on whether the accident of May 16, 2003, permanently aggravated the claimant's back." The commissioner found the opinions of Dr. Carlstrom and Dr. Lovick (that McGowan had a temporary aggravation of his back following the accident but returned to baseline relatively soon) to be most consistent with McGowan's symptom presentation both before and after the May 16, 2003 work-related motor vehicle accident. The commissioner further found that McGowan "had returned to his pre-May 16, 2003 baseline at the time of his August 11, 2003 visit with Dr. Sperfslage."

> Claimant is entitled to temporary benefits as sought from May 18, 2003, through June 10, 2003, and also from July 17 through August 8, 2003, if claimant was actually temporarily disabled during that time. Claimant is not entitled to temporary disability benefits during the later time frame if claimant was actually working for and receiving wages from any subsequent 2003 employer in employment substantially similar to his truck driving employment with Brandt Construction. It would appear from the record evidence that claimant's work driving cement truck in the summer of 2003 was substantially similar to claimant's work for Brandt Construction.
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> Medical expenses following August 11, 2003, including all costs related to further evaluation and the March 2006 surgery, are not due to the injury of May 16, 2003.

With respect to McGowan's request that a penalty be imposed, the commissioner found the insurer could not fairly and reasonably rely on Brandt's belief that McGowan was an independent contractor and had a duty to investigate further.

The commissioner made the following conclusions: McGowan had established that the May 16, 2003 injury produced a period of temporary total disability in the period immediately subsequent to the injury, but not subsequent to August 8, 2003; McGowan was entitled to temporary total disability benefits from May 18 through June 10, 2003; McGowan's average weekly wage "pursuant to Iowa Code section 85.36(7) and without considering any workweek as non-customary" was $599.33; and he was entitled to payment of medical costs incurred from May 16 through August 11, 2003. The commissioner also concluded that while the issues of causation, permanency, and length of temporary benefits were all fairly debatable, the issue of whether McGowan was an employee or an independent contractor was not, nor was the entitlement to benefits during the period of May 18 through June 10; consequently, a "nominal penalty of $250.00 is warranted and is so ordered." McGowan's rehearing request was denied.

McGowan next filed a petition, and Brandt filed a cross-petition, for judicial review in the district court. Hearing was held on February 6, 2009. In a detailed and well-reasoned opinion, the district court affirmed in part, reversed in part, and remanded to the agency.

First, the district court agreed with the commissioner's determination that Brandt was not judicially estopped from disputing liability for periods of claimed

temporary disability and medical expenses by admissions of liability in the alternate care proceedings, requests for admissions, and responses to interrogatories.

Second, the district court found substantial evidence in the record to support the commissioner's finding that McGowan returned to baseline as of August 11, 2003.

Third, the district court noted that the commissioner found McGowan was entitled to temporary disability benefits from May 18 through June 10, 2003, and also from July 17 through August 8, 2003, but the commissioner denied benefits for the latter period without providing any explanation why temporary benefits were denied.[9] The court found:

> Without an identified basis in the record to support the commissioner's denial of benefits for the period of July 17 through August 8, 2003, the Court is unable to properly serve its function on judicial review. As such the Court must remand the decision to the commissioner for an explanation as to why benefits were denied for the aforementioned period. If the commissioner believes the Petitioner was medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of this injury, the commissioner is directed to so state in his decision, and to further identify the basis for this conclusion.

Fourth, the district court found there was substantial evidence to support both the commissioner's determination of actual earnings by McGowan in the three weeks he worked for Brandt in 2003 ($1798), and that one of the three weeks he worked was not atypical. The court concluded the commissioner's refusal to exclude the one week in which Brandt worked only two days was not

[9] The commissioner ruled that McGowan's employment as a cement truck driver was substantially similar employment. However, McGowan only temporarily held that position and the parties stipulated he was not working from July 17 through August 8, 2003.

illogical, irrational, or wholly unjustifiable given that McGowan was a driver in the outdoor construction industry whose hours and output pay routinely varied because of climate conditions. The district court therefore upheld the commissioner's application of Iowa Code section 85.36(7) in calculating McGowan's average weekly compensation rate.

Fifth, with respect to the commissioner's award of penalty benefits, the district court reversed in part and remanded in part. The court noted that a failure to investigate is generally relevant in bad faith cases only to prove an insurer's subjective knowledge of the absence of a reasonable basis to deny the claim. *See Reuter v. State Farm Mut. Auto. Ins. Co.*, 469 N.W.2d 250, 254 (Iowa 1991). But,

> [s]ection 86.13 does not require that the lack of a reasonable excuse be due to any particular type of conduct by the insurer, whether negligent, reckless or intentional. The focus is on whether timely payment of the benefits due was made and if not, whether there was a reasonable excuse for the failure to make timely payment of the amount owed.

Christensen v. Snap-on Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996). The district court noted that Brandt not only represented that McGowan was an independent contractor, but further supplied compensation information to the insurer that would suggest an independent contractor status. The court found that "[b]ased upon the record evidence, and applying the proper law to the facts of this case, the Court is convinced that [insurer] possessed an objectively reasonable basis to deny the claim prior to June 10, 2003." The district court, however, noted that there were no findings made by the commissioner regarding information possessed by Brandt at the time of their denial relative to *post-*

June 10, 2003 periods of disability, and thus remand for such findings was required.

The district court entered an order affirming in part, reversing in part, and remanding to the workers' compensation commissioner. McGowan moved for reconsideration, which the district court addressed at length and denied.

McGowan now appeals contending: (1) Brandt should be "judicially estopped from denying liability following two alternate medical adjudications wherein they admitted liability without limitation or reservation"; (2) the court erred in denying penalty benefits; and (3) the rate calculation was erroneous. Brandt cross-appeals, the grounds for which will be more fully set forth below.

II. Scope of Review.

Our review of workers' compensation actions was recently outlined in *Jacobson Transportation Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010).

> Our review of a decision of the workers' compensation commissioner varies depending on the type of error allegedly committed by the commissioner. If the error is one of fact, we must determine if the commissioner's findings are supported by substantial evidence. If the error is one of interpretation of law, we will determine whether the commissioner's interpretation is erroneous and substitute our judgment for that of the commissioner. If, however, the claimed error lies in the commissioner's application of the law to the facts, we will disturb the commissioner's decision if it is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact." Because of the widely varying standards of review, it is "essential for counsel to search for and pinpoint the precise claim of error on appeal."

(Citations omitted.)

III. Analysis.

A. Judicial estoppel. McGowan claims the positions taken by Brandt in answers to prior alternate medical care petitions and responses to requests for

admissions are inconsistent with the subsequent dispute of liability for temporary and permanent disability benefits and medical expenses. We disagree.

Our workers' compensation law provides for separate awards based on the temporary and permanent nature of a disability. *See* Iowa Code § 85.33 (providing for temporary total disability and temporary partial disability); *id.* § 85.34 (providing for permanent disability); *see also Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 200 (Iowa 2010).

> The difference between awards for temporary and permanent disability can be best illustrated by considering a typical industrial injury.
>
> Normally, an industrial injury gives rise to a period of healing accompanied by loss of wages. During this period of time, temporary benefits are payable to the injured worker. Generally, these benefits attempt to replace lost wages (and provide medical and hospitalization care) consistent with the broad purpose of workers' compensation: to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury. In Iowa, these benefits are spelled out in Iowa Code sections 85.33, 85.34, and 85.37. These temporary benefits include temporary total disability benefits and healing-period benefits. They refer to the same condition, but have separate purposes depending on whether the injury leads to a permanent condition. If the injury results in a permanent partial disability, payments made prior to an award of permanent partial disability benefits are healing-period benefits. If the award does not result in permanent disability, the payments are called total temporary disability benefits. Nevertheless, an award for healing-period benefits or total temporary disability benefits are only temporary benefits and do not depend on a finding of a permanent impairment.
>
> The period of healing is then followed by recovery or stabilization of the condition "and probably resumption of work." Any disability that remains after stabilization of the condition gives rise to "either a permanent partial or a permanent total award." In other words, maximum physical recovery marks the end of the temporary disability benefits, and at that point, any permanent disability benefits can be considered.

Bell Bros., 779 N.W.2d at 200 (citations omitted).

The commissioner concluded McGowan had suffered no permanent disability and awarded only temporary benefits. The commissioner concluded that Brandt's general admission that McGowan sustained a work-related injury on a specified date did not preclude the employer from questioning "whether all consequences claimant claims relate to the injury actually result from the injury." The district court agreed, as do we.

Our supreme court has recently explored the scope of the judicial estoppel doctrine in the workers' compensation context. *See Tyson Foods v. Hedlund*, 740 N.W.2d 192, 195-99 (Iowa 2007); *Winnebago Indus. v. Haverly*, 727 N.W.2d 567, 573-75 (Iowa 2006). "[J]udicial estoppel is a 'commonsense doctrine' that 'prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding.'" *Tyson Foods*, 740 N.W.2d at 195 (quoting *Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987)). It is "designed to protect the integrity of the judicial process." *Id.* The doctrine applies to administrative proceedings as well as court proceedings. *Winnebago Indus.*, 727 N.W.2d at 573-74.

McGowan reads the doctrine too broadly. "A fundamental feature of the doctrine is the successful assertion of the inconsistent position in a prior action. Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent, misleading results exists." *Tyson Foods*, 740 N.W.2d at 196 (citation omitted). The *Tyson Foods* court stated, "Accordingly when an employer takes a position on liability during the

proceedings on alternate medical care, the commissioner normally relies on that position in disposing of the application." *Id*. at 198-99.[10]

Here, Brandt is not contesting liability *for the injury*, but rather the nature and extent of the injury and any disability resulting therefrom. *Cf. Bell Brothers*, 779 N.W.2d at 207-08 (distinguishing a dispute involving a difference of opinion over the diagnosis and treatment of an employee's medical condition with liability for the injury). Like the commissioner and the district court, we believe an employer may properly admit a work injury arising in and out of the course of employment while still reserving the right to contest liability for all of the consequences and/or disability claimed to have resulted from such injury. McGowan's second workers' compensation petition acknowledges the dispute in this case included the "nature and extent of disability; 85.27 expenses; temporary benefits." Brandt was not judicially estopped from disputing the nature and extent of McGowan's disability. *See Tyson Foods*, 740 N.W.2d at 197 (emphasizing that judicial estoppel is only applicable where there has been prior judicial acceptance of a "previous, inconsistent assertion . . . material to the holding in the first proceedings").

Brandt is only estopped from contesting liability for some injury, in that McGowan suffered an injury of some nature, which arose during the course of his employment, and that he was an employee of Brandt.[11] *See id.* (citing *Wilson v.*

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[10] However, the court reversed the deputy commissioner's determination that Tyson Foods was precluded from contesting liability for the injury after it admitted liability in the first alternate medical care proceeding because there were other grounds that caused the second application to be dismissed. *Tyson Foods*, 740 N.W.2d at 199.

[11] These are the same facts that were also admitted through the responses to McGowan's request for admissions.

Liberty Mut. Group, 666 N.W.2d 163, 166-67 (Iowa 2003), which held that plaintiff was estopped from claiming a bad-faith failure to settle because the court relied on his prior acknowledgement of a bona fide dispute over liability in approving the settlement agreement).

B. Penalty benefits. The district court reversed the commissioner's award of penalty benefits for Brandt's denial of benefits prior to June 10, 2003, and remanded for findings related to Brandt's denial of benefits after June 10, 2003. McGowan asserts the court erred in its reversal.

McGowan's brief focuses on Brandt's belief that he was independent contractor, asserting the belief was at best unreasonable.[12] He asserts the "district court's adoption of Mrs. Brandt's subjective reason clearly results from application of erroneous legal standards governing matters on judicial review from final agency action." This is a mischaracterization of the district court's review.

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." 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*

[12] He implies Brandt's assertion may have had other motives.

Tools Corp., 757 N.W.2d 330, 334 (Iowa 2008). "The burden then shifts to the employer to prove a reasonable cause or excuse for 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.

The district court properly outlined the relevant statutory provision and applicable case law, and concluded Allied possessed an objectively reasonable basis to deny the claim prior to June 10, 2003, on the belief that McGowan was an independent contractor. The court noted that Brandt represented to Allied that McGowan was an independent contractor and explained McGowan's compensation structure, including the fact that McGowan received compensation from Brandt without any deductions for federal and state income tax, and that an Internal Revenue Service 1099 form was used for reporting his income, rather

than a W-2 form. Thus, the court concluded that the commissioner's grant of penalty benefits in the amount of $250 should be reversed. We find no error.

Whether a person is an independent contractor or an employee is a "'factual determination based on the nature of the working relationship and many other circumstances, not necessarily on any label used to identify the parties in the contract.'" *Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 813 (Iowa 2002) (quoting *Harvey v. Care Initiatives, Inc.,* 634 N.W.2d 681, 684 n.2 (Iowa 2001)). Many factors are relevant in determining employment status, including the parties' intent. *Id*. The employer's conduct in complying with federal tax laws is probative of the employer's intent to create an employer/employee relationship. *Iowa Mut. Ins. Co. v. McCarthy,* 572 N.W.2d 537, 542-43 (Iowa 1997); *see, e.g., Parson v. Proctor & Gamble Mfg. Co.,* 514 N.W.2d 891, 896 (Iowa 1994) (considering filing of wage withholding forms); *D & C Express, Inc. v. Sperry,* 450 N.W.2d 842, 844 (Iowa 1990) (listing "withholding of federal income and social security taxes" as a factor in determining whether relationship is employer/employee or independent contractor); *LaFleur v. LaFleur*, 452 N.W.2d 406, 408-09 (Iowa 1990) (considering failure to withhold tax and social security); *Peterson v. Pittman,* 391 N.W.2d 235, 237 (Iowa 1986) (listing several factors relevant to the inquiry, including whether the employer made the proper withholding for taxes and social security from the employee's compensation). We agree with the district court that the insurer had objective facts from which it could deny coverage prior to June 10, 2003.

The court also concluded the commissioner failed to provide an analysis for the denial of penalty benefits for the claimed period of disability following

June 10, 2003. We agree that without a statement of the underlying facts supporting this decision we are unable, as was the district court, to review this determination and a remand is appropriate for the commissioner to recite such findings.

Brandt argues that the district court's remand for further findings with respect to the appropriateness of penalty benefits post-June 10, 2003, was unnecessary. However, this argument requires that we accept the premise that McGowan, as a matter of law, was not entitled to benefits after returning to work in June 2003 whether the attempt to return to work was successful or not. Because we reject Brandt's premise for the reasons that follow, we need not further address this argument.

C. Rate Calculation. McGowan contends the district court erred in affirming the commissioner's calculation of McGowan's earnings. He argues that the commissioner "improperly included inappropriate numbers of weeks," including weeks after which McGowan no longer worked for Brandt, and the matter must therefore be remanded to the agency with specific directions to recalculate the rate on the existing record evidence.

The district court found there was substantial evidence to support both the commissioner's determination of actual earnings by McGowan in the three weeks he worked for Brandt in 2003 ($1798), and that one of the three weeks he worked was not atypical. The commissioner calculated McGowan's wages pursuant to Iowa Code section 85.36(7) and determined his average weekly compensation was $599.33 ($1798 ÷ 3). The district court upheld the commissioner's calculation as it was not wholly illogical, irrational, or

unjustifiable. *See Jacobsen Transp*. *Co. v. Harris*, 778 N.W.2d 192, 200 (Iowa 2010) (noting review was for whether the commissioner's decision with respect to section 85.36 earnings was illogical, irrational, or wholly unjustifiable). We reach the same conclusion, and therefore affirm.

D. Cross-appeal. On cross-appeal, Brandt asserts that remand for fact finding on the issue of whether McGowan is entitled to temporary total disability benefits from July 17, 2003, until August 8, 2003, is unnecessary because the reviewing court can determine the facts as a matter of law. Brandt asserts that because McGowan returned to work driving a cement truck, his entitlement to benefits ended. McGowen responds that there are numerous factual disputes at the core of his return to work and subsequent inability to *retain* employment that require remand.

The district court noted that a failed attempt to return to work during a period in which an employee is still temporarily totally disabled will not terminate the employee's entitlement to temporary disability benefits. *See Lithcote v. Ballenger*, 471 N.W.2d 64, 67 (Iowa Ct. App. 1991) (noting healing period extended beyond period in which an attempt to return to work was unsuccessful). The commissioner concluded McGowan had established that the May 16, 2003 injury produced a period of temporary total disability in the period immediately subsequent to the injury, but that McGowan had returned to baseline by August 11, 2003. The parties stipulated McGowan was off work during the periods from May 18, 2003, through June 10, 2003, *and* July 17, 2003, through August 8, 2003. Yet, the commissioner made no findings with respect to McGowan's asserted disability during that second period of stipulated

unemployment. Consequently, the district court did not err in remanding to the commissioner for such findings.

IV. Conclusion.

McGowan's Appeal: The district court did not err in rejecting McGowan's claim that Brandt should be judicially estopped from denying liability following two alternate medical adjudications wherein it admitted liability for the work-related injury. The district court properly determined the commissioner's award of penalty benefits prior to June 10, 2003, was unwarranted where there was a reasonable basis for denying liability. We affirm the district court in remanding this action to the commissioner to recite findings for the denial of penalty benefits for the claimed post-June 10, 2003 disability. We uphold the district court's affirmance of the commissioner's rate calculation as it was not wholly illogical, irrational, or unjustifiable.

Brandt's Cross-Appeal: The district court did not err in its remand for further fact findings with respect to McGowan's entitlement to temporary benefits for the period July 17 to August 8, 2003.

AFFIRMED ON BOTH APPEALS.