IN THE COURT OF APPEALS OF IOWA

No. 1-279 / 10-1671
Filed June 15, 2011

MC AND R POOLS, INC. and
RISK ADMINISTRATION SERVICES,
Petitioners-Appellants,

vs.

RYAN L. SHEA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

An employer appeals the district court's decision upholding the workers' compensation commissioner's award of penalty and healing period benefits. **AFFIRMED.**

Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., West Des Moines, for appellants.

Dennis J. Mahr, Sioux City, for appellee.

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

DANILSON, J.

MC & R Pools appeals the district court's ruling on its petition for judicial review affirming the workers' compensation commission's final agency decision awarding workers' compensation penalty benefits to Ryan Shea. MC & R argues the district court erred in affirming (1) the commissioner's award of $25,000 in penalty benefits and (2) the commissioner's award of healing period benefits from December 8, 2006, to April 1, 2007. Upon our review, we agree with the district court the record contains substantial evidence to support the commissioner's finding that Shea's claim for benefits was not fairly debatable after June 25, 2008, and we therefore affirm the award of penalty benefits to Shea. We further agree the record contains substantial evidence to support the commissioner's finding that Shea was not medically capable of returning to substantially similar employment from December 8, 2006, to April 1, 2007, and we therefore affirm the award of healing period benefits to Shea for that time period.

I. Background Facts and Proceedings.

Ryan Shea was forty-nine years old at the time of hearing. He is a high school graduate and has taken an auto body repair program at Jackson Vocational Institute. He worked at MC & R Pools from 1993 until August 1, 2006, as a foreman for installation of swimming pools. He had numerous previous work injuries, including injuries to his: back in 1991; arm, shoulder, and neck in February 1996; knee in November 1996; left hand in June 1998; another knee injury in July 1998; left ring finger in July 1998; left hand in October 1998; right wrist/arm in July 1999; left knee in March 2001; and neck in September 2002. As

of December 12, 2005, Shea was working under permanent working restrictions of a twenty-five-pound lifting restriction, no troweling with right arm, and no repetitive motion with right arm. Due to these restrictions, Shea did mainly tile and brick work on the pools.

On December 12, 2005, Shea slipped on an icy driveway while working on a pool in Okoboji. He caught himself and felt a jarring, but returned to work. He sought treatment for back pain from Dr. Greg Alvine, an orthopedic surgeon, who ordered an MRI. Dr. Alvine had previously performed a cervical fusion on Shea's neck. Dr. Alvine opined Shea's work injury on December 12, 2005, aggravated his preexisting lumbar condition. He recommended Shea try Flexeril and Darvocet, light duty work, and epidural floods to avoid surgery. Shea had an epidural flood on February 6, 2006.

On February 17, 2006, MC & R referred Shea to Dr. John Dowdle for an independent medical examination. Dr. Dowdle opined Shea had aggravated his back during "the course of his employment related activities" on December 12, 2005, but as of February 17, 2006, Shea had returned to baseline in accordance with his previous underlying degenerative disc conditions. Dr. Dowdle noted the "temporary aggravation" is not "a cause of his disability, impairment, or need for medical treatment." He recommended "low back support" when doing "heavy physical work" and anti-inflammatory medications. Dr. Dowdle further noted that his "prognosis is guarded," as "Shea has degenerative disc changes, which is a chronic long-standing condition." On March 7, 2006, following Dr. Dowdle's report, MC & R issued a denial letter to Shea refusing any further medical care.

Shea had a second epidural flood on March 31, 2006. Shea had a discogram on April 28, 2006. At this point, because conservative treatments were not successful, Dr. Alvine felt surgery was necessary. On August 2, 2006, Dr. Alvine performed an anterior L4-L5-S1 fusion on Shea. After the surgery, Dr. Alvine placed Shea on a temporary ten-pound lifting restriction. Shea had continued to work for MC & R until that time.

On October 23, 2006, MC & R notified Shea that it did "not have a job available right now with [his] restrictions," but suggested that Shea contact MC & R for a possible job if his restrictions improved.

In December 2006, Dr. Alvine increased Shea's lifting restriction to forty pounds. Restrictions were also placed to limit Shea's "repetitive bending and twisting." Dr. Alvine opined Shea had a twenty-five percent impairment of the body as a whole following the December 12, 2005 injury and reached maximum medical improvement on February 25, 2008.

On June 25, 2008, MC & R referred Shea to Dr. Bruce Elkins for an independent medical examination. Dr. Elkins opined the December 12, 2005 work injury was a significant factor in Shea's need for surgery in August 2006. Dr. Elkins assigned a sixteen percent body as a whole impairment rating. He specifically repudiated the view of Dr. Dowdle that Shea had reached maximum medical improvement as of February 17, 2006, and agreed with Dr. Alvine that Shea had reached maximum medical improvement on February 25, 2008. Dr. Elkins's examination records reflect in part: "he has had a preexisting back condition but aggravated it on December 12, 2005, and this would not calm down

with active conservative measures and, therefore, I felt he would benefit from fusion."

On April 2, 2007, Shea began working for the City of Sioux Falls parks department doing seasonal labor, including moving, trimming, planting, watering grounds, and running hoses. MC & R offered employment to Shea after it received the report of Dr. Elkins, but Shea declined. He currently works as an independent contractor. His work includes home repairs, building decks, and tiling work. He earns approximately fifteen to twenty dollars per hour.

Shea filed a petition for workers' compensation benefits. Following a hearing on December 3, 2008, a deputy workers' compensation commissioner determined Shea sustained an injury arising out of and in the course of his employment, awarded 200 weeks of permanent partial disability benefits, and awarded penalty benefits in the amount of $25,000. On intra-agency appeal, the commissioner affirmed the deputy's findings and provided additional analysis finding that penalty benefits were appropriate after June 25, 2008, when MC & R had knowledge of Dr. Elkins's opinion and affirmed the amount of the penalty assessed by the deputy. The district court upheld the commissioner's decision in its entirety. MC & R now appeals.

II. Scope and Standard of Review.

On appeal, MC & R contends (1) the commissioner erred in awarding penalty benefits and (2) the commissioner erred in awarding healing period benefits. We review both 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."); *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 199-200 (Iowa 2010) (stating fact-findings regarding award of healing period benefits are reviewed for substantial evidence).

III. Penalty Benefits.

MC & R argues the district court erred in affirming the commission's $25,000 penalty benefits award to Shea. Penalty benefits in a workers' compensation case are authorized by Iowa Code section 86.13, which provides:

> 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, 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, MC & R never paid any benefits to the date of the arbitration hearing, and the deputy commissioner, commissioner, and district court agreed benefits should have commenced on or before June 25, 2008. If benefits should have begun before the hearing, substantial evidence supports Shea's establishment of a delay in the payment of benefits.

Upon establishing a delay, the burden then shifts to the employer to prove a reasonable excuse for the delay. *Id.* at 334-35. "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." *Blasnitz*, 742 N.W.2d at 81.

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).

The employer must assert facts upon which the commissioner could reasonably find the claim was fairly debatable. *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). Our supreme court has further instructed that an employer's duty to act reasonably is a continuing duty. *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) (stating a denial supportable at the time it is made may later lack a reasonable basis in light of subsequent information).

As MC & R points out, "Dr. Dowdle opined on February 21, 2006, that Shea sustained only a temporary aggravation of his preexisting underlying condition and reached pre-injury status as of February 17, 2006." MC & R contends "the opinion of Dr. Dowdle alone is sufficient to establish a fairly

debatable issue such that a penalty is not warranted" and "nothing occurred to invalidate the basis given by Dr. Dowdle for his opinion." MC & R further alleges other "substantial evidence was presented in addition to Dr. Dowdle's opinion indicating Shea sustained little or no permanent disability as a result of the December 12, 2005 incident."

Shea disagrees and argues, "MC & R was under a duty to have Dr. Dowdle reconsider his initial opinion once it became apparent that there were numerous new medical facts together with doctors' opinions contrary to his." Shea points to the specific facts that occurred after Dr. Dowdle's February 17, 2006 independent medical examination that constituted significant evidence triggering the need for MC & R to reexamine Shea's claim, including:

1) The second epidural flood on March 31, 2006
2) The discogram on April 28, 2006
3) Dr. Alvine's first causation opinion on March 23, 2006
4) The two-level back fusion surgery on August 2, 2006
5) The prolonged recuperation from that surgery
6) Dr. Alvine's main causation opinion on March 3, 2008
7) Dr. Elkins's independent medical examination on June 25, 2008

Shea contends "any one of these seven facts" were grounds to trigger the need for MC & R to reexamine his claim and investigate "whether there really was an ongoing substantial and reasonable basis" for its denial. Shea further asserts, "[c]ertainly, taken as a whole, those seven changes presented compelling grounds for any judge to conclude that the old opinions of Dr. Dowdle were no longer a viable basis" for denying his claim.

The deputy workers' compensation commissioner provided the following analysis in determining penalty benefits were appropriate:

> [MC & R] never paid [Shea] any benefits and appear to base this denial on a February 17, 2006 opinion of one time evaluator Dr. Dowdle. However, when MC & R's own evaluator [Dr. Elkins] opined that the injury herein caused 16 percent body of the whole disability, MC & R did not request Dr. Dowdle to look at the over two years of new medical records, or they did and found the opinion not helpful to the decision to deny the claim. Whether Shea was injured at work was not fairly debatable, whether Shea was off work due to the work injury was not debatable, and whether Shea had permanent impairment and disability from the work injury was not fairly debatable based on the treating physician [Dr. Alvine] and MC & R's evaluator (Dr. Elkins). MC & R, at a minimum, should have paid the lower permanent partial disability rating of 16 percent (Dr. Elkins versus Dr. Alvine of 25 percent) and the temporary benefits. Therefore, MC & R unreasonably never paid a total of over $50,000 in benefits. A penalty of $25,000, which is in the range of the maximum 50 percent allowable penalty, is in order.

On intra-agency appeal, the commissioner affirmed the deputy's findings, with the following additional analysis:

> [MC & R] asserts on appeal that the medical opinion of John Dowdle, M.D., and Shea's prior injury to his neck and back are sufficient to establish a fairly debatable issue and thus support their denial of benefits. Both bases are inter-related as Dr. Dowdle opined that Shea's workplace injury on December 12, 2005 was a temporary aggravation of his prior neck and back injury. Dr. Dowdle's opinion provided MC & R with a reasonable basis to deny payment to Shea of workers' compensation benefits.
>
> The Iowa Supreme Court has established that the duty of defendants to act reasonably is a continuing duty. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 683 (Iowa 1995). A denial supportable at the time it is made may later lack a reasonable basis in light of subsequent information. MC & R recognized this ongoing duty because on June 25, 2008, they sent Shea to Bruce Elkins, M.D., for a second independent medical examination. In between the initial examination with Dr. Dowdle and the subsequent examination with Dr. Elkins, Shea had ongoing medical complaints and ultimately consented to an anterior L4-L5-S1 fusion on August 2, 2006. MC & R learned on June 25, 2008 from their own selected physician that this injury could no longer be considered a "temporary" condition. Rather, Dr. Elkins clearly set forth in his report that Shea's work related activities on December 12, 2005 were significant contributing factors causing Shea's 2-level lumbar fusion. Had MC & R wished to update Dr. Dowdle's February 17, 2006 opinion, in hopes of reconfirming his medical opinion taking

> into account the subsequent medical history in the claim, they had the opportunity to do so. MC & R chose not to update Dr. Dowdle's outdated medical opinion nor did they further question Dr. Elkins to alter his medical opinion. Therefore it is concluded that subsequent to June 25, 2008 MC & R lacked a reasonable basis to deny Shea's petition for benefits. As of that date it is concluded that MC & R's stated basis for failure to commence benefit payments was not of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code 86.13.

We agree. For more than two years following Shea's work-related injury on December 12, 2005, MC & R had a reasonable basis to contest Shea's claim. During that time, evidence of Shea's preexisting neck and back condition, continued employment after the injury, and Dr. Dowdle's February 17, 2006 opinion that the December 12, 2005 injury caused merely a "temporary aggravation" to Shea's underlying condition created a fairly debatable issue to deny benefits. However, Shea continued to experience pain and receive treatment, and ultimately consented to a two-level fusion. MC & R also subsequently received two opinions from Shea's treating physician, Dr. Alvine, as to his permanent impairment and disability from the December 12, 2005 injury.

Further, on June 25, 2008, MC & R sent Shea to Dr. Elkins for an independent medical examination. Dr. Elkins assigned a sixteen percent body as a whole impairment rating. Importantly, Dr. Elkins specifically repudiated the view of Dr. Dowdle that Shea had reached maximum medical improvement as of February 17, 2006, and agreed with Dr. Alvine that Shea had reached maximum medical improvement on February 25, 2008. He also opined the December 12, 2005 work injury was a significant factor in Shea's need for surgery in August 2006.

MC & R contends it was "entitled to accept the opinion of an evaluating physician at face value" and that "[j]ust because two other physicians disagree, does not mean there was no bona fide dispute regarding causation." However, all physicians, including Dr. Dowdle,[1] causally related Shea's injury to the work incident on December 12, 2005. Therefore, the cause of Shea's injury was not in dispute, and MC & R's denial was not based on an opinion that Shea's injury was unrelated to work. Instead, MC & R's denial was based on the opinion that Shea's work injury was merely temporary.

We conclude, upon MC & R's receipt of Dr. Elkins report *more than two years after the injury*, there was no longer an "objectively reasonable basis" for its denial of Shea's claim based on its assertion that Shea's injury was *temporary in nature*. *See Bellville*, 702 N.W.2d at 474. At that point, there was not a good faith dispute over Shea's entitlement to benefits on that basis, and reasonable minds could no longer consider Dr. Dowdle's report a viable argument in favor of MC & R's denial.

These facts are distinguishable from the facts in *Blasnitz*, 742 N.W.2d at 84 and *Keystone Nursing Care Center v. Craddock*, 705 N.W.2d 299, 308 (Iowa 2005), relied upon by MC & R. In *Blasnitz*, our supreme court considered the employee's claim to be fairly debatable where there existed "a genuine dispute" with respect to the causation of the employee's injury. 742 N.W.2d at 84. The court determined the commissioner's rejection of the insurer's evidence did "not

[1] As Dr. Dowdle opined, "Mr. Shea sustained a temporary aggravation of his underlying condition while working at the pool company on December 12, 2005." Dr. Dowdle further stated, "The aggravation arose out of the course of his employment related activities."

negate the existence of a genuine issue of material fact." *Id*. In *Craddock*, the court concluded the employer acted reasonably "in accepting physician's release at face value and concluding the claimant's entitlement to industrial disability was questionable" where the employer was not aware of any permanent disability. *Craddock*, 705 N.W.2d at 308. The court noted that "it was undisputed the employer was informed by the treating physician that the claimant could return to her former employment without restriction." *Id*. The fact that this information was subsequently determined to be incorrect did not establish that the employer lacked a reasonable basis for believing no benefits were owed. *Id*.

Here, unlike the facts known to the employers in *Blasnitz* and *Craddock*, MC & R maintained its reliance on a physician's outdated opinion despite being informed of new medical facts, including a surgery. MC & R's receipt of Dr. Elkins's report that the "aggravation" to the preexisting condition "never calmed down" or responded to conservative treatment extinguished any reasonable beliefs that Shea's injury was temporary in nature.

Although it was not required to do so, MC & R could have sought an updated opinion from Dr. Dowdle in the course of continuing to investigate Shea's claim. MC & R had an ongoing duty to reevaluate Shea's claim as additional information became available. *See Squealer*, 530 N.W.2d at 683. As noted by Shea, that additional information included:

1) The second epidural flood on March 31, 2006
2) The discogram on April 28, 2006
3) Dr. Alvine's first causation opinion on March 23, 2006
4) The two-level back fusion surgery on August 2, 2006
5) The prolonged recuperation from that surgery
6) Dr. Alvine's main causation opinion on March 3, 2008 and,
7) Dr. Elkins's independent medical examination on June 25, 2008

From this information, MC & R could conclude that Shea missed more work days after his attempt to continue to work was unsuccessful and that the surgery performed was intended to alleviate the underlying condition. These facts should be distinguished from the situation where there are conflicting medical opinions concerning the need for the surgery after the physicians have had an opportunity to examine or re-examine the claimant, review the current records, and review the medical records. *See, e.g.*, *Bell Bros.*, 779 N.W.2d at 201 (observing the significance of the opportunity of a medical expert to make the expert's own determination of the diagnostic reliability of tests given and assessment of the need for surgery in determining permanent impairment and benefits.) Under these facts, without further investigation into the claim, MC & R was required to begin paying benefits to Shea.

In sum, the evidence in the record establishes that after June 25, 2008, Shea's claim was not open to dispute on any logical basis. *See, e.g*., *Christensen*, 554 N.W.2d at 260 (instructing that an employer must assert facts upon which the commissioner could reasonably find the claim was fairly debatable). By that date, Dr. Alvine (Shea's treating physician for over two years) and Dr. Elkins (MC & R's own independent medical examiner) had similarly opined Shea had sustained a permanent disability and his injury and continued treatment were causally related to his employment. MC & R's denial of Shea's claim on the basis that the injury was merely a temporary aggravation was no longer objectively reasonable. As the record contains substantial evidence to support the commissioner's award of penalty benefits, we affirm.

IV. Healing Period Benefits.

MC & R also argues the district court erred in affirming the commission's award of healing period benefits to Shea from December 8, 2006, to April 1, 2007. MC & R points out that Dr. Alvine changed Shea's lifting restrictions from ten pounds to forty pounds on December 8, 2006, and alleges at that time Shea was no more restricted than he had been prior to his injury on December 12, 2005.

Healing period benefits are authorized by Iowa Code section 85.34(1), which provides:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

The healing period generally terminates at the time the treating physician determines that maximum medical improvement is reached and the employee has recovered as far as possible from the effects of the injury. *Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60, 65 (Iowa Ct. App. 1981). The healing period can also terminate when the employee is "medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code § 85.34(1); *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 447 (Iowa 1999) ("This statute obviously

recognizes different situations that will result in a termination of healing-period benefits.").

In this case, prior to the December 12, 2005 injury, Shea worked for MC & R with a twenty-five pound lifting restriction and a restriction on repetitive motion with the right arm.[2] He continued to work within the restrictions after the December 12, 2005 injury. His last day of employment with MC & R was August 1, 2006. On August 2, 2006, he underwent a two-level fusion and was placed on a ten-pound lifting restriction. On October 23, 2006, MC & R notified Shea that it did "not have a job available right now with [his] restrictions," but suggested Shea contact MC & R for a possible job if his restrictions improved. On December 8, 2006, Dr. Alvine increased Shea's lifting restriction to forty pounds. Dr. Alvine also gave Shea restrictions on "repetitive twisting and bending." In February 2007, Dr. Alvine changed the lifting restriction to fifty pounds. On April 2, 2007, Shea became employed for the City of Sioux Falls parks department doing seasonal labor.

MC & R agrees Shea was entitled to benefits from August 2, 2006, to December 7, 2008. However, MC & R argues the district court erred in affirming the commission's award of healing period benefits to Shea from December 8, 2006, to April 1, 2007. MC & R contends that after December 8, 2006, when Dr. Alvine increased Shea's lifting restrictions, Shea's work restrictions were "well

[2] Shea received those restrictions after a neck injury he sustained in 1991.

within" his restrictions prior to the injury, and were "consistent with the work activities" he performed at MC & R prior to the injury.[3]

The district court affirmed the commission's findings and observed:

> Shea's 40 pound lifting restriction as of December 8, 2006 would have been no more restrictive than the lifting restriction he had prior to the work injury, but additional restrictions were imposed on him that he did not have prior to the injury. Dr. Alvine recommended that in addition to the 40 pound lifting restriction Shea was also to avoid repetitive bending or twisting. Shea testified that the pain in his back is worse when stands or sits for a long period of time and when he bends. He also testified that he did not believe that he would be able to return to his former position with MC & R because of his restrictions. Nothing in the record indicates that MC & R had a position that could accommodate Shea's restrictions, and he was not offered a position by MC & R until July 2009. There is substantial evidence in the record to support the Commissioner's determination that Shea was entitled to healing period benefits from August 2, 2006 through [April 1, 2007].

We agree.

MC & R also contends Shea never notified them after his surgery or when his restrictions were lessened to discuss returning to work. However, MC & R had previously informed Shea they had no job if he was restricted from repetitive twisting and repetitive bending, and this restriction was never lifted. Thus, any effort by Shea to contact MC & R between December 8, 2006, and April I, 2007, would have been pointless.

Upon our review of record, including medical reports and the testimony of both Shea and the president of MC & R, we conclude substantial evidence supports the finding Shea was not "medically capable of returning to employment

[3] MC & R also points to the fact Shea underwent heart surgery in January 2007, and alleges any reason he could not work during this four-month period was likely due to the heart surgery rather than his back injury. MC & R has not offered any additional evidence in support of its contention. As to this issue, Shea testified he had "stents put in" his heart, and would have been "out of work" for "three to five days."

substantially similar to the employment in which [he] was engaged at the time of injury," during the period from December 8, 2006, to April 1, 2007. See Iowa Code § 85.34(1). We therefore affirm the commissioner's award of healing period benefits to Shea during that time frame.

AFFIRMED.

Doyle, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I respectfully dissent.

I would reverse the penalty award made by the commissioner. I believe the February 21, 2006 opinion of orthopedic surgeon, Dr John Dowdle, that Shea only sustained a temporary aggravation of his preexisting underlying condition, which aggravation was not the cause of any disability or impairment, and that Shea reached pre-injury status on February 17, 2006, coupled with evidence of Shea's preexisting condition and prior surgery, created a fairly debatable issue and provided a reasonable basis for the employer to deny the claim.