IN THE COURT OF APPEALS OF IOWA

No. 2-394 / 11-1845
Filed October 17, 2012

VERIZON BUSINESS NETWORK SERVICES, INC., f/k/a MCI WORLDCOM NETWORK SERVICES, INC., d/b/a MCI TELECOMMUNICATIONS CORPORATION,
Petitioner-Appellant/Cross-Appellee,

vs.

MELINDA MCKENZIE,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

An Employer appeals from the district court's ruling on judicial review, which affirmed its payment of the unauthorized medical expenses; the injured worker cross-appeals as to her entitlement to a review-reopening award and the commencement date of any new benefits. **AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED.**

Timothy A. Clausen of Klass Law Firm, L.L.P., Sioux City, for appellant/cross-appellee.

Dennis J. Mahr, Sioux City, for appellee/cross-appellant.

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

VOGEL, P.J.

Verizon Business Network Services, Inc., formally known as MCI Worldcom Network Services, Inc. and doing business as MCI Telecommunications Corp. (MCI), appeals the district court's judicial review ruling of a workers' compensation decision asserting the district court erred in holding it responsible to pay for the unauthorized weight-loss surgery of the injured worker, Melinda McKenzie. McKenzie cross-appeals asserting the district court erred in finding the commissioner (1) improperly applied the review-reopening standard articulated by the supreme court in *Kohlhaas v*. *Hog Slat*, *Inc*., 777 N.W.2d 387 (Iowa 2009), and (2) incorrectly determined the commencement date for the benefits awarded in the review-reopening decision. For the reasons articulated herein, we affirm in part, reverse in part, and remand to the agency.

I. Background Facts and Proceedings.

This case returns for our consideration following this court's remand in November 2010. We previously summarized the facts as follows:

> On December 26, 1999, Melinda McKenzie slipped and fell on a wet floor while working at MCI. She sought medical treatment the next day, complaining of lower back and left leg pain. Her condition did not improve with conservative treatment, and surgery was not recommended. Although only light-duty restrictions were imposed, McKenzie was not able to return to work in any capacity. More than one physician advised her that losing some weight would help combat her persistent pain.
>
> McKenzie filed a petition with the Iowa Workers' Compensation Commissioner in January 2001, alleging she had suffered an injury to her lower back, left leg, and buttock. About a month before the arbitration hearing, McKenzie was referred to pain management specialist Dr. Bruce Keppen. He started her on a low-dose of methadone, a narcotic pain medication. Keppen informed

> her, "Definitely weight loss is the only thing that is going to give . . . long term relief."
>
> Following an arbitration hearing, the deputy workers' compensation commissioner determined McKenzie had suffered a twenty-five percent industrial disability . . . .
>
> McKenzie continued to suffer from lower back and left leg pain. She underwent gastric bypass surgery in [June] 2006, and eventually lost more than two hundred pounds. MCI refused to authorize the surgery and declined to pay for it. Although her pain improved, she had to take a higher dose of narcotic pain medication due to a malabsorption condition caused by the surgery. As a result, McKenzie remained unemployable. She filed a review-reopening petition in February 2007, requesting an increase in compensation as an odd-lot employee, as well as reimbursement for the unauthorized gastric bypass surgery.

Verizon Bus. *Network Servs*., *Inc*. *v*. *McKenzie (McKenzie)*, No. 10-0256, 2010 WL 4867353, at *1 (Iowa Ct. App. Nov. 24, 2010) (footnote omitted).

In the May 2008 review-reopening decision, the deputy commissioner found McKenzie suffered a substantial change in circumstances or condition that was not anticipated at the time of the original arbitration decision, and she sustained a 100% industrial disability entitling her to permanent total disability benefits commencing on September 11, 2002.[1] The deputy also ordered MCI to pay for McKenzie's gastric bypass surgery, along with a subsequent procedure to reshape her skin and muscles, and her follow-up care.

MCI appealed and the deputy's decision was affirmed and adopted by the commissioner. The commissioner expanded the arbitration decision by saying, "it was anticipated at the time of the initial arbitration hearing that weight loss would significantly improve the claimant's pain symptoms, and thus her overall disability." Despite the weight-loss surgery, the commissioner acknowledged

[1] The parties stipulated in the hearing report that the commencement date for permanent partial disability benefits, if any were awarded, would be September 11, 2002, as this was the last day of weekly benefits per the initial arbitration award.

McKenzie only had a "slight improvement in her pain and she did not improve as had been anticipated in the arbitration hearing deputy's analysis of her disability. . . . Consequently, her disability was not shown to be attributable to obesity and the previous award was appropriately adjusted by the presiding deputy upon review-reopening." The commissioner also refused to address MCI's complaint regarding the deputy's use of the stipulated commencement date for permanent partial disability benefits. The commissioner found that while MCI raised the issue, it failed to discuss the issue in its brief, and therefore, waived its appeal of that issue.

MCI then filed a petition for judicial review. Following a hearing, the district court affirmed the agency's determination that McKenzie had established her current condition warranted an increase in compensation and affirmed the agency's award of permanent total disability benefits. The district court, however, found the agency erred in finding MCI liable for McKenzie's medical expenses relating to the gastric bypass surgery. It also found the issue of the September 11, 2002 commencement date for benefits should have been addressed by the agency on intra-agency appeal and remanded the issue for the agency to address. Both parties appealed, and the case was transferred to this court.

In November 2010, this court affirmed in part, reversed in part, and remanded the case to the agency. *McKenzie*, 2010 WL 4867353, at *7. We found the case needed to be remanded to the agency to apply the proper review-reopening standard the supreme court had recently articulated in *Kohlhaas*. *Id.* at *5. The direction to the agency was to "determine on the record already made

whether McKenzie met her burden of proof under *Kohlhaas*." *Id.* We did not decide the issue of whether McKenzie was entitled to permanent total disability benefits because of the remand on the first issue. *Id.* Our court also directed the agency to re-determine the employer's liability for the gastric bypass surgery as analyzed under the recent case of *Bell Bros*. *Heating & Air Conditioning v*. *Gwinn*, 779 N.W.2d 193 (Iowa 2010). *Id.* at *6. The agency was to address whether the surgery was "beneficial" to McKenzie's work-related injury. *Id.* Finally the agency was directed to reconsider the commencement date for McKenzie's benefits should the agency determine she was entitled to benefits. *Id.* at *7.

On May 10, 2011, the commissioner issued a remand decision. In the decision, the commissioner found:

> At the time of the arbitration decision on February 27, 2003, claimant was found to have a limited 25 percent loss of earning capacity, a finding affirmed on intra-agency appeal. It was noted that at the time that claimant's obesity, coupled with her psychological make-up made assigning her true loss of earning capacity difficult. What is clear is that the agency in 2003 considered claimant significantly employable in the competitive labor market as she was limited to only a 25 percent loss. Claimant has followed medical treatment such that at the time of the review-reopening hearing it is no longer difficult to assign loss of earning capacity as claimant's obesity and psychological makeup are no longer barriers to fully understanding the extent of her low back injury and its impact on her ability to compete for employment. The original presiding deputy suggested that claimant's spinal problems had not improved due to her weight. Now that her weight loss is no longer an issue, it is clear that claimant's loss of ability to perform work in the competitive labor market is due to her back injury. . . . While the original presiding deputy and later the commissioner found the evidence supported a finding that claimant was employable, the facts now establish that claimant has in fact been unable to perform employment at any level of employment for over a decade due to her spine injury. She has cognitive problems, as well as incontinence issues related to her continued use of narcotic

> medications. Due to their duration, those issues are unlikely to subside with time. It is therefore concluded that claimant has proven by a preponderance of the evidence that her condition has changed since the original award, and that change in condition relates back to the original injury.

The commissioner then concluded that because it had already determined in the first review-reopening decision that McKenzie was permanently and totally disabled and this decision was affirmed by the previous district court, that this conclusion would stand without additional commentary.

The commissioner determined the appropriate commencement date for the permanent total disability benefits would be the date of the original injury and MCI was entitled to a credit for any previous benefits paid. *See* Iowa Code § 85.34(3) (2011)[2] (providing in subsection (a) that "weekly compensation is payable during the period of the employee's disability" and in subsection (b) that in the event compensation is paid under any other provision of the workers' compensation statutes for the same injury, "any such amounts paid shall be deducted from the total amount of compensation payable for such permanent total disability"). Finally, the commissioner found MCI responsible for the cost of the gastric bypass surgery along with further medical treatments related to her work injury as McKenzie "has clearly established that the gastric bypass surgery and other treatments were beneficial as it provided a more favorable outcome than would likely have been achieved by care offered by [MCI]—namely because no other treatment was being offered other than continued use of strong, narcotic pain medications." The commissioner acknowledged the authorized treating

[2] No substantive differences exist in the relevant current code sections and those in force at the time the review-reopening petition was filed. Therefore, all references are to the 2011 Iowa Code unless otherwise indicated.

physician recognized the gastric bypass surgery and other treatment was reasonable as it was necessary for her to reduce her weight as a method of controlling the low back pain brought about by the work injury. McKenzie also testified at the review-reopening hearing that her back pain was less after her weight loss though the numbness in her leg was the same.

MCI sought judicial review of the commissioner's remand decision in the district court. The district court found the commissioner "did not conduct a proper analysis under *Kohlhaas* to determine that McKenzie has experienced an economic change sufficient to warrant on review-reopening a finding of permanent and total disability." The district court found the commissioner erred in characterizing "the weight loss as eliminating a factor (obesity) that clouded the ability of the deputy . . . from properly determining McKenzie's disability." The district court found there was no evidence of a change in the work injury or earning capacity of McKenzie since the initial award to justify an increase in the disability. The district court also found the commissioner erred in not evaluating anew on remand the extent of the change and amount of additional compensation due, if any, instead of relying on the initial permanent total disability determination by the deputy.

The district court also found the commissioner erred as to the commencement date. It agreed with MCI's argument that "it defies logic to back date a review-reopening commencement date to the date of the injury, when the initial arbitration decision held that McKenzie was only entitled to 25% permanent partial disability award." The court ruled that the commissioner on remand was to order the benefits, if any, to commence as of February 20, 2007,

the date the review-reopening petition was filed. Finally, the district court concluded the agency properly applied the *Bell Bros*. test when it determined MCI "is obligated to reimburse McKenzie for the unauthorized medical expenses related to the gastric bypass surgery and follow-up procedures." MCI appeals the decision of the district court contending that the district court erred in holding it responsible for the unauthorized weight-loss surgery. McKenzie cross-appeals asserting the district court erred in finding the commissioner incorrectly applied *Kohlhaas* and in determining the date for the commencement of benefits.

II. Standard of Review

Our scope of review in this case is for correction of errors at law. *Kohlhaas*, 777 N.W.2d at 390.

> Iowa Code section 17A.19(10) governs judicial review of agency decision making. We will apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n).

Evercom Sys., *Inc*. *v*. *Iowa Utils*. *Bd*., 805 N.W.2d 758, 762 (Iowa 2011).

"The level of deference afforded to an agency's interpretation of law depends on whether the authority to interpret that law has clearly been vested by a provision of law in the discretion of the agency." *Burton v*. *Hilltop Care Ctr*., 813 N.W.2d 250, 256 (Iowa 2012) (internal quotation marks and citation omitted). "Interpretation of the workers' compensation statute is an enterprise that has not been clearly vested by a provision of law in the discretion of the commissioner." *Gregory v*. *Second Injury Fund*, 777 N.W.2d 395, 397 (Iowa 2010). We will

therefore reverse the agency's decision if it is based on "an erroneous interpretation" of the law. Iowa Code § 17A.19(10)(c).

> To the extent the commissioner's decision reflects factual determinations that are "clearly vested by a provision of law in the discretion of the agency," we are bound by the commissioner's findings of fact if they are supported by substantial evidence. Further, the commissioner's application of law to the facts as found by the commissioner will not be reversed unless it is "irrational, illogical, or wholly unjustifiable."

Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 518 (Iowa 2012) (citation omitted).

III. Permanent Disability

On cross-appeal McKenzie asserts the commissioner properly found her condition had deteriorated such that she had become permanently and totally disabled. Thus, she claims the district court erred in remanding the case to the agency once again for a determination of whether she is entitled to permanent total disability benefits under the *Kohlhaas* decision.

When the original review-reopening decision came up on appeal to this court in 2010, we remanded the case to the agency for the commissioner to determine whether McKenzie met her burden of proof under *Kohlhaas*. *McKenzie*, 2010 WL 4867353, at *5. In his remand decision, the commissioner concluded McKenzie had met her burden of proof that the condition had changed and that the change related back to the original injury. The "change" identified by the commissioner was that at the time of the review-reopening, "it is no longer difficult to assign loss of earning capacity as claimant's obesity and psychological makeup are no longer barriers to fully understanding the extent of her low back injury and its impact on her ability to compete for employment." The question

remains whether this "change" identified by the commissioner justifies a review-reopening award under *Kohlhaas*.

Iowa Code section 86.14(2) provides: "In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon." In *Kohlhaas*, the Iowa Supreme Court clarified what was needed to justify a review-reopening claim, stating:

> The workers' compensation statutory scheme contemplates that future developments (post-award and post-settlement developments), including the worsening of a physical condition or a reduction in earning capacity, should be addressed in review-reopening proceedings. The review-reopening claimant need not prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner (in the arbitration award) or the parties (in their agreement for settlement).
>
> A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is proximately caused by the original injury. While worsening of the claimant's physical condition is one way to satisfy the review-reopening requirement, it is not the only way for a claimant to demonstrate his or her current condition warrants an increase of compensation under section 86.14(2).
>
> Therefore, we have held that awards may be adjusted by the commissioner pursuant to section 86.14(2) . . . when a temporary disability later develops into a permanent disability, or when critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award. We have also previously approved a review-reopening where an injury to a scheduled member later caused an industrial disability.
>
> Although we do not require the claimant to demonstrate his current condition was not contemplated at the time of the original settlement, *we emphasize the principles of res judicata still apply—that the agency*, *in a review-reopening petition*, *should not reevaluate an employee's level of physical impairment or earning capacity if all of the facts and circumstances were known or knowable at the time of the original action*. . . . Therefore, once there has been an agreement or adjudication the commissioner,

> absent appeal and remand of the case, has no authority on a later review to change the compensation granted on the same or substantially same facts as those previously considered. For example, a mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review-reopening. Likewise, section 86.14(2) does not provide an opportunity to relitigate causation issues that were determined in the initial award or settlement agreement.

777 N.W.2d. at 392–93 (emphasis added) (internal citations and quotation marks omitted).

The supreme court in *Kohlhaas*, identified five ways the review-reopening requirement can be satisfied: (1) a worsening of the claimant's physical condition; (2) a reduction of the claimant's earning capacity; (3) a temporary disability developing into a permanent disability; (4) a critical fact existed but was unknown or could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award; or (5) a scheduled member injury later causes an industrial disability. *Id.* A review-reopening award cannot be based on a mere difference of opinion by experts as to the percentage of disability or the causation of an injury. *Id.* at 393.

McKenzie asserts on appeal that her case falls within the fourth way to prove entitlement to a review-reopening claim: a critical fact existed but was unknown and could not have been discovered through the exercise of reasonable diligence at the time of the prior settlement award. *Id.* at 392. McKenzie asserts:

> The knowledge that McKenzie's weight loss surgery and years of treatment did not improve her pain condition is the ultimate change in condition enabling her to reopen her case under Iowa Code § 86.14(2).

> In essence, the primary change in McKenzie's life has been a result of the failure of any doctor to bring her pain under control.

The court in *Kohlhaas* cited the case of *Gosek v*. *Garmer & Stiles Co*., 158 N.W.2d 731, 735 (Iowa 1968), in support of the fourth way to prove a review-reopening claim. In *Gosek*, the employee at the first review-reopening hearing had no knowledge or appreciation of an emotional disturbance that was confronting him following a work injury. 158 N.W.2d at 736. The testimony at the second review-reopening revealed the employee had seen a psychiatrist since the initial award who had diagnosed him with "depressed psychosis with paranoid trends" as a result of the work injury. *Id.* The court found this new diagnosis was "sufficient to reveal a probable unknown injury connected neurosis" which was "a new fact neither recognized, appreciated nor considered by the commissioner in adjudicating claimant's first review petition for additional compensation." *Id.* at 737. The court then remanded the case to the agency for a redetermination regarding whether the employee was entitled to additional compensation. *Id.*

Unlike *Gosek*, McKenzie's review-reopening petition was not based on "a new fact neither recognized, appreciated nor considered." She was morbidly obese before her work-related injury and that fact was recognized, appreciated, and considered by the commissioner in adjudicating McKenzie's initial award. Neither is McKenzie seeking compensation for an injury to a different area of the body that was not addressed in the first hearing as was the worker in *Gosek*. 158 N.W.2d at 736–37. Instead, her claim boils down to asserting the commissioner in the initial decision was incorrect in assessing her industrial

disability at only 25%. She asserted then, as she does now, that her back injury entitles her to permanent total disability benefits. She claims her weight loss and subsequent lack of improvement demonstrates the inaccuracy or faultiness of the initial award, and therefore, she is now entitled to permanent total disability benefits from the date of the initial injury. McKenzie claims "the very purpose of review-reopening statutes is to give courts a chance to reanalyze physical and mental conditions where their severity was clearly underestimated to begin with."

In support of her claim she cites *Meyers v*. *Holiday Inn*, 272 N.W.2d 24, 26 (Iowa Ct. App. 1978), wherein our court approved of the commissioner increasing a permanent partial disability award when the claimant had not improved as anticipated by the evaluating doctor at the initial hearing. The doctor who had previously evaluated the claimant's injury at 12% testified at the review-reopening hearing that he had made an error in his previous assessment and that the actual disability was 23%. *Meyers*, 272 N.W.2d at 25–26. The question addressed by the court was "whether a mistaken assessment of the extent of a claimant's disability later modified to correspond with findings made in subsequent medical evaluations will support an increased award on review reopening." *Id.* at 26. The *Meyers* court found the question could be answered affirmatively by using the "substantive omission due to mistake" concept recognized in *Gosek*. *Id.* Whether a physical condition failed to improve as anticipated or progressively worsened more than anticipated, the *Meyers* court found "[e]ither situation results in the industrial commissioner being unable to fairly evaluate the claimant's condition at the time of the arbitration hearing." *Id.* The court concluded, "When the passage of time and subsequent events show

the true extent of industrial disability there should be some vehicle for adjusting a prior award." *Id.*

In *McKenzie*, our court noted that *Meyers* had been used by both the agency and the district court to establish the change in condition needed to justify a review-reopening in this case. 2010 WL 4867353, at *5 n.3. However, at that time, neither party had discussed whether *Meyers* continued to be good law after *Kohlhaas*; therefore, our remand decision did not address it. *Id.* The commissioner on remand did not cite *Meyers*, but the district court on judicial review found the commissioner's analysis to be similar to the analysis used in *Meyers* to justify the review-reopening. The district court then concluded the *Meyers* analysis, along with the commissioner's logic on remand, were no longer viable under *Kohlhaas* because the agency can no longer consider what was or was not anticipated at the time of the initial arbitration decision.

We agree with the district court that considering *Kohlhaas*'s removal of the "anticipated" language from the review-reopening standard, *Meyers* is no longer good law. Under *Kohlhaas* the commissioner should not be evaluating in review-reopening cases whether the initial decision anticipated the claimant's condition would improve or deteriorate. In addition, *Kohlhaas* specifically rejected a review-reopening proceeding based solely on a "difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury." 777 N.W.2d at 393. This "difference of opinion" was precisely what the *Meyers* review-reopening claim was based on—the evaluating physician changed his opinion of the disability rating from 12% to 23%. *Meyers*, 272 N.W.2d at 25–26. Now under *Kohlhaas*, the commissioner should only look to

see if there has been a *change* in the claimant's work-related condition or a reduction in her earning capacity. 777 N.W.2d at 392. The question is: has McKenzie's back injury worsened or has her earning capacity been reduced since the original arbitration decision? The evidence currently in the record on appeal indicates she claims a slight improvement in the back pain since the surgery, though she needs more medication, and the leg pain has not changed. She claimed she was not employable in 2003 and she continued to claim she was unemployable at the review-reopening hearing.

We find in this case that the commissioner in the remand decision improperly reevaluated the first arbitration decision, which awarded McKenzie 25% industrial disability. The commissioner's remand decision stated the first decision found it difficult to assign McKenzie her "true loss of earning capacity" due to her obesity and psychological make-up. After the weight-loss surgery, the commissioner found it was "no longer difficult to assign loss of earning capacity as claimant's obesity and psychological makeup are no longer barriers to fully understanding the extent of her low back injury and its impact on her ability to compete for employment." The commissioner found that it is now clear McKenzie's inability to perform work is due only to her back injury. Because of this new clarity, the commissioner found it was the work injury all along that prevented her from working in any capacity; and therefore, McKenzie is entitled to permanent total benefits, which the commissioner concluded should have been awarded from the beginning.

This is precisely what the *Kohlhaas* court warned against. 777 N.W.2d at 391. There the court said, "The commissioner is not supposed to 're-determine

the condition of the employee which was adjudicated by the former award.'" *Id.* (citing *Stice v*. *Consol*. *Ind*. *Coal Co*., 291 N.W. 452, 456 (Iowa 1940)). The loss of earning capacity is to be determined as of the time of the hearing based on factors then prevailing, "not based on what the claimant's physical condition and economic realities might be at some future time." *Id.* at 392.

Thus, the commissioner in this review-reopening must accept the former award as an assessment of McKenzie's physical condition and economic reality at the time it was issued and not attempt to reevaluate now the conditions that existed back then. The commissioner must determine whether there was in fact a change that "warrants an end to, diminishment of, or increase of compensation" previously awarded. Iowa Code § 86.14(2). In making this determination, the commissioner should evaluate whether the change identified was (1) a worsening of the claimant's physical condition; (2) a reduction of the claimant's earning capacity; (3) a temporary disability developing into a permanent disability; (4) an existing critical fact that was unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award; or (5) a scheduled member injury later causing an industrial disability. *See Kohlhaas*, 777 N.W.2d at 392–93.

In this case neither party contends a previous temporary disability changed into a permanent injury or that a scheduled member injury later caused an industrial disability. It is also clear, based on the record before the commissioner, that McKenzie's physical condition related to her work injury had not worsened nor had her earning capacity changed since the initial arbitration decision. McKenzie claimed the back pain had actually improved slightly since

the initial arbitration as a result of the weight-loss surgery and the leg numbness had remained unchanged. At the time of the initial arbitration, McKenzie testified she was not able to work and the expert report submitted by her vocational expert indicated McKenzie was unemployable on any basis because of her pain and the side effects of the drugs she was on. At the review-reopening hearing, McKenzie offered an updated vocational report from the same expert, which stated, "it is reasonably likely that she will not be employed in the future and therefore has suffered a 100% loss in earning capacity."

That leaves only the fourth way to satisfy the review-reopening requirement under *Kohlhaas*—the existence of a previously unknown and undiscoverable fact. 777 N.W.2d at 392. Based on the current record, we are unable to determine whether there was an unknown and undiscoverable fact related to McKenzie's work-related disability, nor has McKenzie pointed us to any such fact. Therefore a remand is necessary.

We agree with the district court that the commissioner did not apply the *Kohlhaas* decision properly in determining whether there was a change in McKenzie's work-related disability sufficient to warrant a review-reopening award. In making this determination on remand, the commissioner is not to reevaluate the claimant's condition at the time of the initial arbitration award nor should he attempt to ascertain whether the previous deputy anticipated the claimant would improve or deteriorate in the future, but is simply to determine whether there is a change in McKenzie's *work-related condition* or *earning capacity*. *Id*. at 392 (emphasis added).

IV. Commencement Date for Benefits

McKenzie also contends the district court erred in determining the commencement date for any new benefits would be February 20, 2007—the day McKenzie filed her review-reopening petition with the workers' compensation commissioner. The remand order from our court directed the commissioner to reconsider the commencement date for McKenzie's benefits if it determined on remand she was entitled to additional benefits. The commissioner had initially refused to consider the issue finding it waived by MCI when it appealed the first review-reopening decision. On remand, the commissioner determined because the benefits owed were permanent total disability benefits, the commencement date would be the date of the initial injury in December of 1999. The commissioner stated he based his determination on Iowa Code section 85.34(3)(b).[3] The district court on judicial review relied on *Dickenson v. John Deere Products Engineering*, 395 N.W.2d 644, 649 (Iowa Ct. App. 1986), to find the commencement date for any benefits award in a review-reopening should be the date the review-reopening petition was filed—in this case that would be February 20, 2007. We agree with the district court.

---

[3] It is unclear to this court how Iowa Code section 85.34(3)(b) supports the commissioner's finding that the permanent total disability benefits in this case should commence on the date of the injury. That section provides:

> Such compensation shall be in addition to the benefits provided in sections 85.27 [medical benefits] and 85.28 [burial expenses]. No compensation shall be payable under this subsection for any injury for which compensation is payable under subsection 2 of this section. In the event compensation has been paid to any person under any provision of this chapter, chapter 85A or chapter 85B for the same injury producing a total permanent disability, any such amounts so paid shall be deducted from the total amount of compensation payable for such permanent total disability.

We do note Iowa Code section 85.34(3)(a) provides that permanent total disability compensation "is payable during the period of the employee's disability."

In *Dickenson*, the court addressed the question of when interest payments should begin on new permanent partial disability benefits awarded in a review-reopening proceeding. 395 N.W.2d at 646. The court found the issue was a question of law that could be decided on appeal and not a factual question that required a remand to the agency. *Id.* The court concluded the interest payments should begin as of the date the claimant filed a petition for a review-reopening as this provided adequate incentives for employers to resolve review-reopening cases quickly without unfairly punishing employers who had been prompt in making payments due as a result of the initial arbitration award. *Id.* at 649. It also put injured employees on even footing with non-workers' compensation plaintiffs who received interest on judgments and decrees based on when the petition was filed. *Id.* at 648–49.

Since, under *Dickenson*, interest begins to accrue as of the date of the review-reopening petition, we find weekly benefits awarded as a result of a review-reopening decision should also commence as of the filing of the petition for review-reopening. Under Iowa Code section 85.30, the employer only pays interest on weekly benefits when the employer fails to pay a weekly benefit when it is due. Thus, it is implicit in the *Dickenson* holding that weekly benefits for review-reopening proceedings are not due to be paid until a review-reopening petition has been filed.

This holding also supports the supreme court's recent decision in *Kohlhaas* that review-reopening proceedings "should not reevaluate an employee's level of physical impairment or earning capacity if all the facts and circumstances were known or knowable at the time of the original action." 777

N.W.2d at 393. By awarding permanent total disability benefits as of the date of the injury, the commissioner reevaluated McKenzie's level of physical impairment that existed at the time of the initial arbitration and found the 25% award was inadequate. We find this is precisely what *Kohlhaas* sought to avoid when it held "a mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review-reopening." *Id.* Therefore, if on remand the commissioner determines McKenzie is entitled to additional weekly benefits in this review-reopening, those benefits should commence as of February 20, 2007, the date the review-reopening petition was filed.

V. Unauthorized Medical Expenses

MCI raises one issue on appeal—that the agency and the district court erred in holding the unauthorized weight-loss surgery should be paid by MCI under the analysis adopted in *Bell Bros*. 779 N.W.2d at 202. MCI specifically alleges that McKenzie has not met her burden of proving the weight-loss surgery was a beneficial treatment for her work-related low back injury.

Iowa's workers' compensation medical-care provision is found in Iowa Code section 85.27 and "requires the employer to furnish a wide range of reasonable medical services for compensable injuries." *Id.* Our supreme court has held that "an employer is not responsible for the cost of alternative medical care that is not authorized by section 85.27." *Id.* at 205. However, it has explained,

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. *In this context*, *unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the employer*. The allocation of this significant burden to the claimant maintains the employer's statutory right to choose the care under section 85.27(4), while permitting a claimant to obtain reimbursement for alternative medical care upon proof by a preponderance of the evidence that such care was reasonable and beneficial.

Id. at 206 (emphasis added).

Although advised by more than one physician that losing weight may help reduce her pain, McKenzie was unable to heed that advice. At issue is whether McKenzie's unauthorized gastric bypass surgery was beneficial to the treatment of her work injury. Thus, we must answer the question whether the gastric bypass surgery "provided a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." *Id.* at 208. In the remand decision, the commissioner stated,

> [D]efendants were offering no other treatment options but using medications and monitoring her pain. Claimant has clearly established that the gastric bypass surgery and other treatments were beneficial as it provided a more favorable outcome than would likely have been achieved by care offered by defendants—namely because no other treatment was being offered other than continued use of strong, narcotic pain medications. Dr. Keppen clearly recognized that the gastric bypass surgery and other treatment was reasonable as it was necessary for her to reduce her weight as a method of control for the low back pain brought about by her work injury. Further, Dr. Peterson testified during his deposition that he felt the weight loss would definitely help with claimant's back. Claimant testified her back pain was less after her weight loss and that the numbness in her leg was the same. For those reasons,

> claimant has shown the treatment for which she seeks reimbursement was beneficial.

The district court affirmed.

MCI finds incompatible McKenzie's assertions that the weight-loss surgery was beneficial and that she at the same time has sustained a permanent total disability—compared to her previous classification of 25% industrial disability.

At the review-reopening hearing on February 14, 2008, the only evidence of the beneficial effects of the surgery was from McKenzie. She testified that following the gastric bypass surgery and subsequent weight loss, "The pain is less. There's less pressure because I've lost the weight. It hasn't made any difference with the numbness in my leg, but it has helped the pain." McKenzie also explained that despite this decreased pain, the amount of pain medication she takes has increased[4] since the surgery, which is attributable to malabsorption problems associated with her decreased stomach size.

The commissioner pointed out the favorable opinions of both Dr. Peterson, and Dr. Keppen that they *anticipated* the weight-loss surgery would help with the back pain. But neither doctor offered an opinion that the surgery actually was beneficial to the claimant's low back pain. However, contrary evidence was submitted. Dr. Keppen reported to the nurse case manager that he was "concerned" that the weight loss had not improved her condition after she had lost 135 pounds. Despite the weight-loss surgery, McKenzie's narcotic medication actually increased due to the malabsorption problems with her new, smaller stomach size. This has increased the employer's liability in paying for

[4] McKenzie stated the medication that was increased was the OxyContin from 320 milligrams before the surgery to 360 milligrams after the surgery.

her narcotic pain medication, not decreased it as the *Bell Bros*. case anticipated. *Id.* at 208. In addition, McKenzie did not obtain the weight-loss surgery as an alternative to the care being offered by the employer but obtained the unauthorized care *in addition to* the care offered by the employer, and she continues to receive the same employer-offered care after the unauthorized weight-loss surgery.

Under Iowa Code section 85.27(1), an employer is obligated to furnish medical services only for injuries compensable under the workers' compensation statutes. Compensable injuries include "all personal injuries sustained by an employee arising out of and in the course of employment." Iowa Code § 85.3. While losing 241 pounds is undeniably beneficial to McKenzie's overall health, McKenzie offered no evidence beside her own testimony that the surgery was beneficial to the work-related injury. At the same time she claimed this same beneficial surgery justified a new finding increasing her previous industrial disability award from 25% to an award of permanent total disability. Like the court in *Bell Bros*., we find no substantial evidence in the record to support the commissioner's finding that the weight-loss surgery was beneficial. *Id.*

Because the gastric bypass surgery, which corrected her *non-work*-related morbid obesity, did not provide a more favorable medical outcome for the *work injury* than would likely have been achieved by the care offered by the employer and accepted by McKenzie both before and after the weight-loss surgery, we disagree with the district court and the commissioner that the gastric bypass surgery was beneficial to McKenzie and reverse as to this issue.

VI. Disposition

In conclusion, we find the district court correctly found the commissioner failed to properly apply the *Kohlhaas* analysis in the remand decision. Therefore, we affirm the district court's decision remanding this case once again back to the agency. We also agree with the district court's decision that the correct commencement date for any new benefits awarded on remand is the date the review-reopening petition was filed—February 20, 2007. However, we disagree with the district court's finding that the employer is responsible to pay for McKenzie's weight-loss surgery. This surgery was to correct a condition not caused by her work-related injury, and we find there was no substantial evidence to support a finding that the surgery was beneficial to the work-related injury.

AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED.

Mullins, J., concurs, Danilson, J., concurs in part and dissents in part.

DANILSON, J. (dissenting in part)

I concur in all respects except I dissent in regard to the majority's conclusion that McKenzie has failed to meet her burden to reopen her claim. In *Kohlhaas*, our supreme court noted that the review reopening requirement may be satisfied by a worsening of the claimant's physical condition or a diminution of earning capacity. 777 N.W.2d at 392. Here, the commissioner in his remand decision stated:

> At the time of the arbitration decision on February 27, 2003, claimant was found to have a limited 25 percent loss of earning capacity, a finding affirmed on intra-agency appeal. It was noted that at the time that claimant's obesity, coupled with her psychological make-up made assigning her true loss of earning capacity difficult. What is clear is that the agency in 2003 considered claimant significantly employable in the competitive labor market as she was limited to only a 25 percent loss. Claimant has followed medical treatment such that at the time of the review-reopening hearing it is no longer difficult to assign loss of earning capacity as claimant's obesity and psychological makeup are no longer barriers to fully understanding the extent of her low back injury and its impact on her ability to compete for employment. The original presiding deputy suggested that claimant's spinal problems had not improved due to her weight. Now that her weight loss is no longer an issue, it is clear that claimant's loss of ability to perform work in the competitive labor market is due to her back injury. Claimant has presented compelling vocational evidence that she is not capable of employment at the time of the review-reopening hearing solely due to her back injury. Prior vocational evidence at the time of the arbitration hearing supported a finding that she was employable. While the original presiding deputy and later the commissioner found the evidence supported a finding that claimant was employable, the facts now establish that claimant has in fact been unable to perform employment at any level of employment for over a decade due to her spine injury. She has cognitive problems, as well as incontinence issues related to her continued use of narcotic medications. Due to their duration, those issues are unlikely to subside with time. It is therefore concluded that claimant has proven by a preponderance of the evidence that her condition has changed since the original award, and that change in condition relates back to the original injury.

Clearly, the commissioner concluded that McKenzie had a diminution of earning capacity from 25% to 100% and that the loss in earning capacity was proximately caused by the injury. Contrary to the majority, I do not believe the agency has relied on the same facts as the original action. The earning capacity loss was not a difference of opinions between experts, but rather the opinion of the same vocational rehabilitation counselor who assessed the original facts and subsequently assessed the new facts. Facts in the review reopening not existing in the original proceeding were the substantial weight loss by McKenzie, the discovery that her weight was not a significant contributing factor to her pain, the effects of long-term use of narcotic pain medication on McKenzie's cognitive function, and her inability to maintain any employment a decade after her injury. Certainly, it was not contemplated at the time of the original hearing that following the advice of the physicians to lose weight while maintaining the medication regimen would result in McKenzie's inability to be employed. As observed in *Rose v. John Deere Ottumwa Works*, 76 N.W.2d 756, 759 (Iowa 1956) (and cited with approval in *Kohlhass*, 777 N.W.2d at 392), "It seems well settled in other jurisdictions that increased incapacity of the employee, due to the original injury, subsequent to the making of the first award entitles the employee to additional compensation." Accordingly, there is substantial evidence for the commissioner's award and I would reverse the district court on this issue.