

IN THE COURT OF APPEALS OF IOWA

No. 8-083 / 07-0974
Filed February 27, 2008

WEITZ COMPANY,
Petitioner-Appellee,

vs.

MERTON JOHNSON,
Respondent-Appellant.

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

Appeal from the district court's reversal of an award of penalty benefits in
a workers' compensation proceeding. **AFFIRMED.**

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

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

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Merton E. Johnson appeals from a district court decision on judicial review striking a twenty-percent penalty awarded by the workers' compensation commissioner. We affirm.

SCOPE OF REVIEW.

Our review is controlled by Iowa's Administrative Procedure Act, Iowa Code chapter 17A (2005). *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 864 (Iowa 2003). We are bound by the agency's findings of fact if supported by substantial evidence. *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 304 (Iowa 2005); see also *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005). The workers' compensation commissioner has no particular power with respect to the interpretation of the workers' compensation statute. *Keystone Nursing*, 705 N.W.2d at 304; see also *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004). Therefore, we need not give the agency's interpretation of the statute any deference and are free to substitute our judgment for that of the commissioner. *Mycogen Seeds*, 686 N.W.2d at 464. Reversal is appropriate when the agency has applied an erroneous interpretation of the law. *Griffin Pipe*, 663 N.W.2d at 864.

BACKGROUND.

Johnson claimed he was injured on July 17, 2003, while working as an iron worker for Weitz Company (Weitz). He sought workers' compensation and penalty benefits. The case was tried to a deputy workers' compensation commissioner, who in a November 29, 2005 arbitration decision found Johnson was injured while working for Weitz on July 17, 2003, and the injury produced a

thirty-percent permanent partial disability entitling Johnson to 150 weeks of permanent partial disability benefits.

The deputy further found that Johnson was entitled to penalty benefits from November 30, 2004, to June 13, 2005, because Weitz offered no explanation for why it waited approximately four and a half months to obtain an impairment rating by a second physician of its choosing. In a subsequent nunc pro tunc order filed on the December 29, 2005, the deputy sought to clarify the language of its earlier order awarding penalty benefits. The deputy provided that "Claimant has established that he is entitled to payment of additional benefits on account of the unreasonably delayed or denied permanent partial disability benefits in the range of 20 percent."

The decision was appealed to the interim workers' compensation commissioner who affirmed and adopted as final agency action those portions of the proposed decision that related to issues properly raised on intra-agency appeal. From this order Weitz appealed to the district court challenging only the award of penalty benefits.

The district court in a well-reasoned decision reversed the award of penalty benefits finding there was evidence favorable to Weitz that created a reasonable basis for its opinion to deny Johnson's claim for disability benefits and the agency applied the wrong law in addressing this claim. The court also found the agency erred and failed to apply the proper law in finding Weitz's failure to communicate to Johnson the basis for its denial of benefits supported an award of penalty benefits. Johnson challenges these findings.

ISSUE WAIVED.

Johnson first claims the issues relied on by the district court for reversal were either not raised or waived in the district court by Weitz. Weitz disagrees and argues that its petition for judicial review in the district court asserted the decision of the agency was affected by error of law and unsupported by substantial evidence in the record. Weitz further advances that in its brief filed with the district court it specifically argued that the commissioner committed two errors. The first error raised being that the commission committed a legal error in citing Weitz's failure to communicate as the reason for the delay or denial of benefits. The second issue raised being whether the commissioner erred in finding Johnson's entitlement to benefits was not at least fairly debatable. We agree that the issues were before the district court and the district court addressed both issues. Error was preserved.

PENALTY BENEFITS.

Because penalty benefits are a creature of statute, we first examine the statutory parameters for such benefits. Iowa Code section 86.13 (2005), provides in applicable part:

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

A claimant seeking to recover under this statute must establish a delay in the commencement of benefits or a termination of benefits. *Keystone Nursing*, 705 N.W.2d at 307. The burden then shifts to Weitz to prove a reasonable cause

or excuse for the delay or denial. See *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). Johnson has shown a delay.

Weitz has to show a reasonable cause or excuse exists because (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. *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." *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). The "fairly debatable" standard used in the tort of bad faith denial of insurance claims should be used for purposes of section 86.13 penalty benefits in determining whether a workers' compensation insurer had a reasonable basis to deny a claimant's claim. *Id.* If reasonable minds can differ on the coverage-determining facts or law, then the claim is fairly debatable. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473-74 (Iowa 2005). 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. *Id.* The focus is on the existence of a debatable issue, not on which party was correct. *Id.* Whether a claim is fairly debatable can generally be decided as a matter of law by the court. *Id.*

Weitz did not pay permanent partial disability benefits because it believed Johnson had not sustained any industrial disability. Reasonableness of the employer's denial or termination of benefits does not turn on whether the employer was right. The issue is whether there was a reasonable basis for the employer's position that no benefits were owing. *City of Madrid*, 742 N.W.2d at 81. What is determinative is whether Weitz was reasonable in accepting certain

of the doctors' reports and other evidence and concluding Johnson's entitlement to industrial disability was questionable.

In the time between when Johnson claimed injury and when the matter was arbitrated there were a number of conflicting medical opinions, some that supported the agency's decision, others that would support a finding that Johnson did not suffer the claimed industrial disability. There were surveillance videos of Johnson performing a number of tasks such as golfing, doing yard work, and hitting a baseball. There was other evidence of Johnson's performance at another job and his continuing to work, among other things.

In looking at some of the conflicting evidence before Weitz we do not weigh it, but decide whether evidence existed to justify denial of the claim. *Id.* In December of 2003 Dr. David Duran, M.D., gave Johnson a zero percent disability rating as a result of the July 17, 2003 injury. Dr. Kenneth McMains, M.D., after viewing the surveillance tapes and the activities Johnson performed thereon, placed Johnson in the heavy work category, and the doctor believed Johnson appeared to have normal back function, with no evidence of any ongoing chronic condition. The doctor further noted on May 24, 2005, that Johnson showed no pain behavior and had normal motion in the videotapes, which in his medical opinion was in major contrast from Johnson's presentation at the doctor's clinic on April 19 of that year. Dr. McMains further opined that he suspected Johnson could return to full activity with no permanency and no restriction on activity. Dr. Jeffery Westpheling, M.D., made a report stating that his examination of Johnson and the surveillance videos of May 7, 2005, did not appear to show any significant limitation of Johnson's low back range of motion.

In the spring of 2004 Johnson went to work for another employer, working as a regular iron worker and welder without any restrictions.

We agree with the district court that there was substantial evidence to support the employer's reasonable belief that Johnson was not entitled to an penalty benefits and the agency erred in ruling to the contrary.

FAILURE TO COMMUNICATE.

The district court correctly held that failure to communicate a basis for denial of benefits was not a proper basis for an award of penalty benefits.

Keystone Nursing, 705 N.W.2d at 308.¹

AFFIRMED.

¹ This case was filed September 30, 2005, prior to the deputy and commissioner's ruling.