

**IN THE COURT OF APPEALS OF IOWA**

No. 8-580 / 08-0057  
Filed December 17, 2008

**BEVERLY MANNES,**  
Petitioner-Appellee/Cross-Appellant,

**vs.**

**FLEETGUARD, INC., and TRAVELERS  
INSURANCE COMPANY,**  
Respondents-Appellants/Cross-Appellees.

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Appeal from the Iowa District Court for Winnebago County, James M. Drew, Judge.

Fleetguard Inc. and Travelers Insurance Co. appeal from the district court ruling on judicial review remanding a decision of the workers' compensation commissioner. **AFFIRMED.**

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

Mark S. Soldat of Soldat & Parrish-Sams, P.L.C., West Des Moines, for appellee-Beverly Mannes.

Thomas J. Miller, Attorney General, and Anne Updegraff, Assistant Attorney General, for appellee-Second Injury Fund.

Heard by Eisenhauer, P.J., and Doyle, J., and Zimmer, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**EISENHAUER, J.**

Fleetguard Inc. and its workers compensation carrier, Travelers Insurance Co., appeal from the district court ruling on judicial review remanding a decision of the workers' compensation commissioner. They contend the court erred as a matter of law in remanding the matter to the commissioner (1) for re-taxation of costs, (2) to determine whether Beverly Mannes is entitled to partial disability benefits, (3) for a determination of whether penalty benefits should be awarded, and (4) to clarify whether the full responsibility rule was followed in determining Mannes's industrial disability. We affirm.

***I. Background Facts and Proceedings.*** Beverly Mannes has been employed by Fleetguard and its predecessor since 1972. She has worked as a product assembler and forklift operator. Over the years, she has suffered a multitude of work-related injuries.

On October 5, 2001, Mannes filed petitions for workers' compensation benefits for two injuries: an overuse injury to both arms alleged to have been suffered on or about May 16, 2000, and an overuse injury to the neck and shoulders alleged to have been suffered on or about September 1, 2001. Following a hearing in March 2003, the deputy commissioner found Mannes was entitled to temporary partial benefits and ten weeks of permanent partial disability benefits with respect to the May 16, 2000 injury. Mannes's claim for benefits relating to the September 1, 2001 injury was denied, as was her claim for penalty benefits.

Following an appeal, the workers' compensation commissioner affirmed the arbitration decision and assessed costs of the appeal to Mannes. Mannes's request for rehearing was denied with the exception of a recalculation of temporary partial disability benefits due.

On judicial review, the district court found the deputy commissioner "failed to decide whether [Mannes] suffered from a cumulative work injury to the neck and back at any time." It reversed the workers' compensation commissioner's appeal decision and remanded to the agency to determine whether and when a cumulative injury occurred to Mannes's neck and back. In *Mannes v. Fleetguard, Inc.*, No. 05-0150 (Iowa Ct. App. Mar. 29, 2006), this court affirmed the district court with slight modification.

On remand to the agency, the deputy commissioner determined that on September 5, 2001, Mannes sustained a cumulative injury to her neck and shoulders. Mannes was found to have sustained a ten percent industrial disability to the body as a whole and was entitled to fifty weeks of permanent partial disability benefits. Mannes's request for rehearing was denied.

Mannes again filed a petition for judicial review. In its decision, the district court found the agency's remand decision failed to address the issues of costs and penalty benefits. The court could not determine if the issues of temporary partial benefits and the full responsibility rule were considered. Accordingly, it remanded these issues to the agency.

**II. Scope and Standard of Review.** We review decisions of administrative agencies for correction of errors at law. *Kostelac v. Feldman's*,

*Inc.*, 497 N.W.2d 853, 856 (Iowa 1993). We are bound by the commissioner's findings of fact if supported in the record as a whole and will reverse the agency findings only if we determine substantial evidence does not support them. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). The definitive question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Id.* at 218.

**III. Costs.** In the April 25, 2003 arbitration decision, the deputy commissioner found Mannes failed to prove a cumulative injury to her neck and back. It then taxed costs to Mannes. In the March 5, 2004 appeal decision, the workers' compensation commissioner affirmed the deputy commissioner and ordered Mannes to pay the costs of the appeal. On judicial review, the district court reversed and remanded the decision to determine whether Mannes sustained a cumulative injury and when any such injury manifested. The commissioner was also directed to take "further action consistent with this ruling." This court affirmed.

On remand, the deputy commissioner found Mannes did suffer a cumulative injury to her neck and back and was entitled to compensation. However, the issue of costs was not addressed. Mannes pointed out this deficiency in her rehearing application, which states, "[T]here should be a re-taxation of costs." Her rehearing was denied by operation of law pursuant to Iowa Code section 17A.16(2) (2007) when it was not ruled on within twenty days.

The district court found the decision failed to address the issue and therefore remanded. The appellants contend this was error because Mannes did

not preserve the issue by raising it in a rule 1.904(2) motion. The district court disagreed, finding the remand “for further action consistent with this ruling” made it “implicit in Judge Riffel’s ruling that the issue of costs should have been revisited if an opposite result on the claim was reached as that would have been ‘further action consistent with this ruling . . . .’”

When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The question is whether the district court failed to rule on the issue. We conclude the directive to take further action consistent with the first judicial review ruling authorized the re-taxation of costs should the outcome of the remand differ. It was unnecessary for Mannes to revisit the issue with a motion to enlarge or amend. Accordingly, error was preserved. Furthermore we agree with the court’s conclusion that “further action consistent with this ruling” includes consideration of who pays the costs. We affirm the district court on this issue.

**IV. Temporary Partial Benefits.** The appellants next contend the district court erred in remanding the issue of whether Mannes is entitled to temporary partial benefits.

Mannes made a claim for temporary partial benefits relating to her cumulative neck and back injury for the period of October 11, 2001, through February 21, 2002. The agency found the issue of temporary partial benefits was resolved by file 5000737, the case involving Mannes’s bilateral arm injury of May 16, 2000. In that case, temporary partial benefits were awarded for the

period of time of July 27, 2000, through January 4, 2001. Mannes's application for rehearing on this issue was denied.

On judicial review, the district court held:

The court is unable to determine whether the deputy actually considered Mannes's claim. It appears to the court that the issue was passed over. Either way, remand is appropriate so that the commissioner can directly rule on Mannes's claim for 10/11/01 – 2/21/02 temporary partial benefits.

The appellants contend the district court was in error because there is insufficient evidence to support a finding of a temporary reduction in earning ability as a result of Mannes's September 2001 injury during the time period in question.

Temporary partial benefits are "benefits payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability." Iowa Code § 85.33(2) (2001).

If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits.

*Id.* § 85.33(3).

The appellants argue that regardless of whether the agency erred in failing to consider Mannes's claim for temporary partial benefits, remand is unnecessary because she is not entitled to them as a matter of law. They claim Mannes is not entitled to temporary partial benefits because her wages did not decrease during the time period alleged. However, the statute states temporary partial benefits are payable to employees who suffer a temporary partial reduction "in earning

ability,” not in actual wages. A showing of actual reduction in the employee’s earnings is not always necessary to demonstrate an injury-caused reduction in earning capacity. *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 831 (Iowa 1992). In fact, a reduction in earning capacity can be shown even though the employee’s actual earnings have increased. *St. Luke’s Hosp. v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000).

We agree with the district court that the deputy’s terse statement that the issue of temporary partial benefits was resolved by file 5000737 does not show Mannes’s claim was actually considered. Therefore, remand was appropriate.

**V. Penalty Benefits.** The appellants next contend the district court erred in remanding the issue of whether penalty benefits should be awarded. They argue penalty benefits are not available to Mannes as a matter of law.

Penalty benefits are available where “a delay in a commencement or termination of benefits occurs without reasonable or probable cause or excuse . . . .” Iowa Code § 86.13. An employer and insurance carrier have a duty to act reasonably in paying benefits absent specific direction by the commissioner. *Davidson v. Bruce*, 594 N.W.2d 833, 838 (Iowa Ct. App. 1999). If there has been a delay in the payment of workers’ compensation benefits, an employee is entitled to receive penalty benefits unless the employer proves it had a reasonable cause or excuse to delay payment. *Id.* A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee’s entitlement to benefits. *Id.* Penalties are not only available for willful or reckless

acts, but also for negligent conduct. *Boylan v. American Motorists Ins. Co.*, 489 N.W.2d 742, 744 (Iowa 1992).

Mannes made a claim for penalty benefits for denial of benefits relating to her September 2001 injury. The deputy commissioner did not rule on this claim. Rehearing was denied. On judicial review, the district court remanded, finding “[i]t would not be appropriate for this court to pass on the merits of the claim without first having a ruling from the commissioner.” We concur and affirm.

**VI. Industrial Disability.** Finally, the appellants contend the district court erred in remanding to the agency for a determination of whether the full responsibility rule was followed.

The full responsibility rule provides, “[w]hen there are two successive work-related injuries, the employer liable for the second injury is generally held liable for the entire disability resulting from the combination of the prior disability and the present injury.” *Excel Corp. v. Smithart*, 654 N.W.2d 891, 897 (Iowa 2002). Generally, this rule means a worker will receive greater total compensation for such an injury if the disability results from two separate injuries causing disability as opposed to a single cumulative injury, or the aggravation of a prior work-injury. *Id.*

For example, if a worker sustains a back injury resulting in a permanent partial disability of twenty percent and later, after returning to work, sustains a second separate back injury resulting in a permanent partial disability of forty percent, the worker is entitled to be compensated for the forty percent disability based on the second injury even though the worker has previously received compensation for the twenty percent disability. Although the worker has a forty percent disability, the worker actually receives a total disability award between the two disabilities of sixty percent.

On the other hand, if multiple injuries to a single area of the body are considered to be cumulative in nature, the employer is only required to pay compensation based on the disability resulting from the cumulative injury. In this situation, the compensation is based on the percentage of disability at the time of the cumulative injury.

*Id.*

Mannes has suffered a number of work-related injuries during her employment. Before the remand, it had been determined that Mannes suffered a twenty percent industrial disability resulting from the May 2000 injury and her prior injuries. In the remand decision, the deputy commissioner found,

Considering the claimant's medical impairments, training, age, restrictions and limitations, as well as all other factors of industrial disability, the claimant has suffered a ten percent loss of earnings [sic] capacity from the injury manifesting on September 5, 2001 to her neck and shoulders.

The deputy then later concluded, "Based on the finding that the claimant has sustained a ten percent loss of earning capacity, she has suffered a ten percent permanent partial industrial disability." The deputy did not specifically refer to the full responsibility rule in the decision.

On judicial review, Mannes argued that a twenty percent industrial disability from the May 2000 injury and a ten percent whole body disability from the September 2001 injury could not logically result in ten percent industrial disability when applying the full responsibility rule. In its ruling, the district court recognized that the deputy did reference Mannes's prior injuries in the remand ruling, as well as the appropriate factors for determining industrial disability. However, it refused to speculate on whether the rule had been applied and

instead remanded the issue for clarification on whether the rule was followed and, if not, for a redetermination of industrial disability.

The appellants argue remand is unnecessary because the full responsibility rule does not require that any loss of earning capacity caused by the September 2001 injury be simply added on to the previous disability to calculate the industrial disability. They argue the deputy commissioner considered the appropriate factors and made a finding that is supported by substantial evidence.

Like the district court, we are unable to determine whether the agency followed the full responsibility rule. Therefore, remand was appropriate. We affirm.

**AFFIRMED.**