

IN THE COURT OF APPEALS OF IOWA

No. 9-435 / 08-1373
Filed July 22, 2009

THOMAS MILLENKAMP,
Petitioner-Appellant,

vs.

**MILLENKAMP CATTLE CO. and
ALLIED INSURANCE,**
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,
Judge.

Thomas Millenkamp appeals from the district court's ruling on judicial review, affirming the workers' compensation commissioner's denial of his request for post-hearing penalty benefits. **AFFIRMED.**

Dennis Currell of Currell Law Firm, Cedar Rapids, and Ronald Ricklefs,
Cedar Rapids, for appellant.

William H. Grell of Huber, Book, Cortese, Happe & Lanz, P.L.C., West
Des Moines, for appellees.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Thomas Millenkamp (Thomas) appeals from the district court's ruling on judicial review, claiming the district court erred in affirming the workers' compensation commissioner's denial of his request for post-hearing penalty benefits. He argues (1) the commissioner employed an erroneous legal standard and (2) erred in concluding the denial of benefits was fairly debatable. We affirm.

I. Background Facts and Proceedings.

In an earlier appeal, this court affirmed the commissioner's award of permanent disability benefits to Thomas. Our October 1, 2008 ruling contains a detailed factual background concerning Thomas's injuries and workers' compensation benefits, which we reiterate in part:

Thomas, born in 1944, is an employee of the [Millenkamp Cattle, Inc. (Company)] and owns eighty percent of its stock. In February of 2001 he was being treated for bladder cancer. On the 24th of that month he was working for the Company as a cattle buyer and farm manager when, while loading cattle, a cow kicked him in the face. He was knocked down, struck his head on cement, and temporarily lost consciousness. Thomas was taken to a Dubuque hospital where he exhibited some memory loss and was treated and released.

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[On August 22, 2001,] Dr. Sterrett determined "post-concussion syndrome from the fall in February with memory difficulties, headaches related to the trauma, and facial pain related to the fall." He opined that Thomas had memory and directional difficulties, but he was improving and was almost normal.

By September 5, 2001, Dr. Sterrett found Thomas to be at maximum medical improvement, although Thomas still experienced some memory loss.

On April 22, 2002, Thomas returned to Dr. Sterrett for an impairment evaluation. Thomas was again found to be at maximum medical improvement and was given a zero permanent partial impairment rating. Dr. Sterrett found Thomas had no neurological impairment. He noted Thomas reported his memory loss was minimal as was his insomnia. . . .

In May of 2002 Thomas was hunting mushrooms when he blacked out for thirty to forty minutes. Following this incident Thomas began to have problems that he was to claim were related to the work injury. He consulted, as discussed below, a number of medical doctors and other professionals who evaluated his condition and rendered differing opinions as to his injury, disability, and its cause. He saw Dr. Sterrett on June 18 and said his memory problems had returned. Dr. Sterrett did not feel the problems were related to the work injury because of the lapse of time. An MRI and EEG both were normal.

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On September 21, 2004, Glenn F. Haban, Ph.D., neuropsychologist, after giving Thomas a battery of tests, reported that Thomas said he was ninety-five percent improved at the time of the mushroom picking incident, but Haban believed Thomas to be under-reporting symptoms. . . . Haban opined that Thomas suffered a traumatic brain injury from being kicked in the head by a cow and he continues to have cognitive impairment due to that injury that affects his work, social, and leisure activities.

The matter came on for hearing before a deputy commissioner, who carefully reviewed the evidence and found “the claimant [Thomas], as a result of a February 24, 2001 work injury has suffered a traumatic brain injury with resulting cognitive deficits, memory loss, and other symptoms.” The deputy found Thomas had a sixty percent industrial disability, was entitled to 300 weeks of permanent partial disability benefits, denied his claim for disability benefits, and found him not to be an odd-lot employee. On rehearing the deputy made some minor changes to his decision. The deputy’s decision was adopted by the commissioner as the final agency decision.

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. . . Our consideration of the evidence and these factors causes us to find that the percentage of disability determined by the commissioner is supported by substantial evidence and should be affirmed.

In arriving at this conclusion we look to Dr. Kitchell’s opinion that Thomas’s February 2001 head injury did not leave him with any major neurologic sequelae, Dr. Sterrett’s August 22, 2001 report that Thomas was improving and was almost normal, Dr. Rizzo’s opinion that Thomas did not have a traumatic brain injury, and Dr. Jones’s December 23, 2003 opinion that it is not possible to ascribe Thomas’s complaints to head trauma or post-concussive syndrome. We also consider the deputy’s findings as incorporated in the final agency decision that Thomas’s demeanor at the hearing showed he was not incoherent, forgetful, or confused; that Thomas came across as an intelligent man who had a good command of himself; that Thomas remembered many details of his business and

answered questions appropriately; that his demeanor at the hearing showed a man who still retains much of his lifelong intelligence and abilities; and that while he may have lost a portion of his business abilities, Thomas had not become mentally incompetent from his injury. We look at testimony from employees of the Company who testified that Thomas went back to work in some capacity and that Thomas was a smart man capable of making good decisions, even after the February 2001 injury. We look also to Thomas's admission he still did work on his farm that he used to pay others to do. We consider an employee's testimony that Thomas returned to his normal job shortly after the injury and was able to perform his regular duties at least through December 2003, when the employee was terminated. We agree with the district court there is substantial evidence to support the agency's findings as to the extent of Thomas's industrial disability.

Millenkamp v. Millenkamp Cattle Co., No. 08-1373 (Iowa Ct. App. Oct. 1, 2008).

The deputy's arbitration decision was filed on February 28, 2005. The commissioner affirmed and adopted the proposed decision on March 15, 2006. The Company paid the industrial disability award to Thomas on March 22, 2006, and paid accrued interest a few days later.¹ Thomas sought post-arbitration hearing penalty benefits for the delay in payment between the arbitration decision and the commissioner's March 2006 ruling.

The deputy commissioner ruled that at the time of the arbitration hearing, Thomas's claim for benefits was fairly debatable, but that the matter was no longer debatable after its February 28, 2005 ruling of liability. The deputy awarded \$20,000 in penalty benefits. On intra-agency appeal, the commissioner first issued a decision in which it concluded, "Based upon the facts of this case, the record is clear that defendants had no reasonable expectation that the

¹ We note that Thomas was paid temporary partial disability benefits from February 24, 2001, through June 4, 2001. The deputy concluded he was not entitled to temporary benefits from March 10, 2001 to April 19, 2004, as he suffered no loss of earnings. The deputy found that defendants were entitled to a credit for the amounts paid against their obligation to pay permanent partial disability benefits.

workers' compensation commissioner would reverse the causation findings made by the presiding deputy." The commissioner thus found the "refusal to commence some payment of indemnity benefits after February 28, 2005, was unreasonable."

On the employer's request for rehearing, the commissioner reversed its penalty assessment, stating in part:

The sole issue was whether an arbitration decision rendered by a presiding deputy workers' compensation commissioner can alone impose a new duty upon the defendant employer and insurer to re-evaluate the denial of weekly benefits during the pendency of a timely appeal to the workers' compensation commissioner where the denial of benefits before the hearing had been held in the arbitration decision to be fairly debatable. After further consideration in light of the parties' arguments presented on rehearing, I no longer agree that such a new duty arose in this particular case.

The commissioner noted that the deputy's decision was a "proposed decision only," which the commissioner was free to change or modify on intra-agency appeal. The commissioner wrote, "if defendants' denial of benefits was fairly debatable before the decision, it was almost certainly fairly debatable after the decision." He disagreed with the deputy's conclusion that the hearing imposed a duty upon the employer to reevaluate the denial where no new information was learned during that hearing. The commissioner mentioned the defendants' reliance upon doctors' views that the work injury did not cause or aggravate the claimant's mental condition. The commissioner noted, however, that

this is not to say that facts and circumstances may arise in other cases after a hearing and proposed decision that would no longer render a denial of benefits fairly debatable and impose a duty upon defendants to re-evaluate their past denial of benefits. A few examples come to mind None of these situations exist herein.

Thomas sought judicial review and the district court affirmed the denial of penalty benefits. On appeal, Thomas contends the commissioner employed an erroneous legal standard. He also argues the commissioner erred in finding the claim was fairly debatable after the deputy's ruling.

II. Scope and Standard of Review.

The Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, governs the scope of our review in workers' compensation cases. Iowa Code § 86.26 (2007); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been violated." *Meyer*, 710 N.W.2d at 218. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

"If the claim of error lies with the agency's findings of *fact*, the proper question on review is whether substantial evidence supports those findings of fact." *Meyer*, 710 N.W.2d at 219. If the claim of error "lies with the agency's interpretation of the *law*, the question on review is whether the agency's interpretation is erroneous, and we may substitute our interpretation for the agency's." *Id.* Finally, if the claim of error "lies with the *ultimate conclusion* reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for

example, employing wholly irrational reasoning or ignoring important and relevant evidence.” *Id.* We allocate some degree of discretion in our review of the agency’s application of the law to the facts, but not the breadth of discretion given to the findings of fact. *Id.* “With respect to the workers’ compensation statute in particular, we keep in mind that the primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee.” *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003).

III. Analysis.

Penalty benefits are created by Iowa Code section 86.13, which provides two clear prerequisites before penalty benefits can be imposed: (1) “a delay in commencement or termination of benefits” that occurs (2) “without reasonable or probable cause or excuse.” Iowa Code § 86.13. When the prerequisites have been met, the Iowa Code instructs the commissioner “shall award” penalty benefits “up to fifty percent of the amount of benefits that were unreasonably delayed or denied.” *Id.*

“To receive a penalty benefit award under section 86.13, the claimant must first establish a delay in the payment of benefits.” *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 334 (Iowa 2008). There is no doubt that Thomas has established a delay in the payment of benefits. “The burden then shifts to the employer to prove a reasonable cause or excuse for the delay.” *Id.* at 334-35. The Iowa Supreme Court has explained this second statutory requirement:

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. A “reasonable basis” for denial of the claim exists if the claim is “fairly debatable.”

Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005).

The reasonableness of the employer's actions "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." *Id.* at 307-08. Stated another way, the "focus is on the existence of a debatable issue, not on which party was correct." *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473-74 (Iowa 2005). In *Rodda v. Vermeer Mfg.*, 734 N.W.2d 480, 483 (Iowa 2007), the court explained:

A reasonable basis for denying insurance benefits exists if the claim is "fairly debatable" as to either a matter of fact or law. A claim is "fairly debatable" when it is open to dispute on any logical basis. Whether a claim is "fairly debatable" can generally be determined by the court as a matter of law. If the court determines that the defendant had no reasonable basis upon which to deny the employee's benefits, it must then determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.

(Internal citations and quotations omitted.) In *City of Madrid v. Blasnitz*, 742 N.W.2d 77, 84 (Iowa 2007), the court ruled, "In view of the facts that created a genuine dispute with respect to the cause of the claimant's rotator cuff tear, we conclude the claimant's claim was fairly debatable as a matter of law."

Here, the medical experts disagreed on the critical issue of causation: whether the February 2001 work injury caused Thomas's mental condition upon which he based his claim for benefits. The commissioner found that in light of that conflicting evidence, Thomas's claim was fairly debatable even after the arbitration hearing. Thomas argues that the commissioner erred in so finding.

A. Legal Standard. Thomas contends the commissioner erroneously determined that an employer can await the final agency decision before paying workers' compensation benefits. He argues that the commissioner's denial of penalty benefits is contrary to "the duty and on-going obligation to act reasonably in regard to the statutorily mandated payments," which "is not predicated upon a final determination of entitlement from the commissioner."

We believe Thomas reads too much—and yet too little—into the commissioner's ruling. Final agency action is not required for the right of benefits to accrue. However, whether or not there has been final agency action is a legitimate factor in determining whether delay in making such payments is reasonable, particularly where the evidence in the record is contradictory. The commissioner did not conclude as a matter of law that there was no duty to pay until final agency action. Rather, the commissioner found no "new duty arose in this particular case."

B. Was the Claim Fairly Debatable? Thomas contends that the commissioner based his decision on an erroneous general rule—if a denial of benefits is fairly debatable before a deputy's decision, it is fairly debatable thereafter. Thomas's contention is belied by the commissioner's ruling itself. The commissioner determined that penalty benefits were not warranted here because the Company's denial of benefits was based upon a claim that was fairly debatable under the circumstances presented. The commissioner cited the

opinions of doctors that supported the Company's position.² The commissioner also noted that the matter was subject to de novo determination on intra-agency appeal. The commissioner correctly stated, however, that post-hearing penalty benefits might be warranted under different circumstances.

The Company states:

[T]he question being debated by the parties is whether an employer can reasonably rely upon evidence that was rejected by a Deputy Commissioner, but which would support a contrary finding and decision by the Commissioner, to continue a denial of a claim throughout a de novo intra-agency appeal.

We believe this is an appropriate statement of the issue. The evidentiary record in the underlying case, some of which we have set forth above in the background facts, contains competing medical opinions as to causation. The commissioner found that the genuine dispute with respect to the cause of Thomas's mental condition made the claim fairly debatable. We conclude the district court did not err in affirming the finding of reasonable cause for the delay in payment.

In light of our conclusions, we need not and do not address the Company's asserted alternative grounds for affirmance.

IV. Conclusion.

The commissioner did not employ an improper legal standard in its denial of penalty benefits, nor err in finding that the question whether the 2001 injury

² In fact, the deputy denied pre-hearing penalty benefits noting that the defendants "did have two experts supporting their position. They also had a normal MRI and normal EEG." The deputy also noted that "the mushroom incident clearly appears in all written records of the claimant's medical providers, indicating the claimant himself traced the increase in his symptoms to this time period."

caused Thomas's industrial disability was fairly debatable. We therefore affirm the commissioner's denial of penalty benefits.

AFFIRMED.