

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

ANNETT HOLDINGS, INC. d/b/a TMC
TRANSPORTATION,

Petitioner,

v.

NICHOLAS ROBERTS,

Respondent.

Case No. CVCV058440

**RULING ON PETITION FOR
JUDICIAL REVIEW**

The above-entitled cause came before the Court on November 26, 2019 for hearing on Petitioner's Petition for Judicial Review. Petitioner Annett Holdings, Inc. d/b/a TMC Transportation (hereinafter "TMC Transportation") was represented by Sasha L. Monthei. Respondent Nicholas Roberts (hereinafter "Roberts"), was represented by Laura Schultes. Having entertained the arguments of counsel, having reviewed the court file and the applicable law, and being otherwise fully advised in the premises, the Court enters this Order affirming all decisions of the Commissioner.

I. FACTS AND PROCEDURAL HISTORY

A. Facts and Medical History

Respondent, a resident of the State of Texas, was employed by TMC as an over-the-road truck driver and driver trainer beginning in August 2008. On November 15, 2010, Respondent picked up a load of sheetrock in Rotan, Texas. He unloaded and unfolded the tarps from his truck, put a tarp over the load, and secured the tarp. The following day, Roberts woke up with pain in his back. He felt ill with flu-like symptoms, including muscle cramping. He continued to work and delivered the load of sheetrock to Dallas. Upon reaching his Dallas destination, he

“untarped” the load, which included dragging the tarp off of the load, folding the tarp, and loading it in the truck. This was concurrent with increased pain in Roberts’ lower back.

Respondent first visited his primary care physician, Dr. Mahmoud, where he reported lower back pain, stiffness, and radicular leg pain. Respondent was diagnosed with low back pain and limb radiculopathy, as well as an acute upper respiratory infection. Dr. Mahmoud also ordered an MRI of the lumbar spine.

On November 20, 2010, Respondent went to the emergency room, reporting low back pain. An MRI was conducted on November 24, 2010, revealing a large medial lateral disc herniation at L5-S1 with significant degenerative disc disease that contacted the left S1 and S2 nerve roots. Respondent received a work release on December 1, 2010.

Respondent returned to Dr. Mahmoud on December 7, 2010, reporting continued pain in his lower back. Additionally, he had tenderness over the left sciatic nerve and a positive straight leg test. Respondent claims that at this point he requested treatment through TMC, however, Petitioner declined to authorize care. Dr. Mahmoud noted that Respondent was not enrolled in physical therapy. He also noted the medications Respondent had been prescribed, including Soma and Hydrocodone, rendering him unable to do his usual function as a truck driver.

Respondent then returned to Dr. Mahmoud on January 26, 2011. Respondent was found to have full active and passive range of motion in flexion, extension, lateral extension, and rotation with negative bilateral straight leg raise tests. Dr. Mahmoud released Respondent to work with light duty requirements and a lifting restriction of 25 pounds, as well as no prolonged standing or sitting. At this point, Respondent discontinued treatment with Dr. Mahmoud as it was financially unfeasible.

Around March 2012, Respondent began working with Reliable Transportation as an over-the-road truck driver. This position did not require Respondent to work with tarps and allowed him to be home every night. Respondent hauled loads to Texas, Oklahoma, and Louisiana.

On May 7, 2012, Respondent saw Dr. Kuhnlein for an independent medical evaluation (“IME”). Respondent reported low back pain. After the examination, Dr. Kuhnlein opined that while Respondent had previous incidents of low back pain, Respondent self-limited and the incidents were short term. There is some question as to what the Dr. Kuhnlein and Respondent discussed at Respondent’s appointment. Dr. Kuhnlein did note, however, that Respondent was able to sort out the flu-like symptoms from the low back symptoms. Dr. Kuhnlein’s report did indicate that Respondent had not reached maximum medical improvement (“MMI”) but needed more care, including physical therapy. Kuhnlein assigned Respondent a 9% whole person impairment and restrictions of lifting no more than 40 pounds occasionally from floor to waist, 50 pounds occasionally from waist to shoulder and 20 pounds occasionally over the shoulder. He also included movement conditions on an as-needed basis.

On March 6, 2013, Respondent underwent another IME with Dr. Mooney at Petitioner’s request. Mooney opined that “if the event of November 15, 2010 now described as folding and throwing tarps weighing 150 pounds is accepted as factual, the incident obviously could have resulted in exacerbation of the preexisting lumbar condition.”

On March 7, 2013, Respondent saw Dr. Tran from Ennis Family Medicine. Respondent reported ongoing chronic low back pain, numbness, and tingling in his left leg. Dr. Tran prescribed pain medication and muscle relaxers, as well as a referral to a specialist.

On September 3, 2013, Deputy Walshire issued an arbitration decision ordering Petitioner to select an orthopedic specialist in Respondent’s area for further medical treatment

for Respondent's back pain. Walshire's order required Petitioner to authorize treatment options, testing, imaging, or other treatment recommended by that physician. At this point, Petitioner refused to authorize Respondent's care.

On February 18, 2015, Petitioner sent Respondent for another IME with Dr. Hood. Dr. Hood opined that Roberts' condition appeared to have improved, showing "no significant signs of true radiculopathy." Dr. Hood assigned Respondent a 0% impairment rating.

Respondent was terminated from his position with Reliable trucking on July 22, 2015. The parties dispute the reason for Respondent's termination.

On September 22, 2015, Respondent was scheduled for an evaluation with Dr. Fuentes. Dr. Fuentes indicated Respondent would require another MRI of his lower back, as well as a repeat EMG/NCV of Respondent's lower extremities. On December 2, 2015, Respondent sent opinions to Dr. Fuentes for his signature, stating the EMG/NCV was no longer necessary.

Respondent underwent his repeat MRI on December 22, 2015. This scan exposed mild diffuse disc bulge, no spinal canal stenosis, and mild bilateral neuroforaminal stenosis. Respondent then went back to Dr. Fuentes on December 29, 2015. Dr. Fuentes recommended that Respondent be detoxified and concluded that surgery was not required. Petitioner then scheduled Respondent for an appointment with Dr. Foom to obtain an impairment rating.

On February 24, 2016, Respondent underwent an IME with Dr. Foom. Respondent reported his persistent low back pain with radiation into his left lower extremities down his foot. Dr. Foom noted the sporadic treatment since the date of injury. Dr. Foom further opined that Respondent underwent an LS type sensory loss down the left leg and some atrophy of the calf. Dr. Foom placed Respondent on MMI at a 9% impairment rating. Dr. Foom further opined that

Respondent had developed degenerative disc disease, a herniated disc, and an LS radiculopathy on the left.

Respondent followed up his IME with Dr. Foox with a monthly visit with Dr. Tran. On April 1, 2016 Respondent reported increased anxiety and depression. On August 29, 2016, Dr. Tran noted Respondent had increased back pain.

Around this same time, following a bevy of medical treatment received by Respondent over the course of six years, Respondent reported difficulty finding work. He claims to have applied for trucking jobs but was unable to find one. Respondent started his own trucking company, "Nick's Hotshot," in May 2016 in large part due to his inability to find work. During this time Respondent would haul loads daily from Houston to Dallas and back, covering about 260 miles round trip. The company eventually folded due to cash flow issues. Petitioner has been either unable or unwilling to provide him with work accommodations for his injury, and Respondent has been otherwise unable to find work since his company folded.

B. Procedural History

Respondent filed a petition in arbitration alleging work-related injury occurring November 15, 2010. A hearing was held on September 2, 2013. The arbitration decision was entered October 30, 2013, whereby the arbitrator held that Respondent proved his back injury arose out of his employment with Petitioner. It was further held that Respondent was not at MMI, provided no running award of healing period benefits, and ordered Petitioner to pay healing period benefits from November 15, 2010 through January 25, 2011.

Petitioner filed an application for review-reopening, and the case was heard on July 24, 2017. After hearing, the Deputy Commissioner held that Respondent was entitled to additional temporary total disability benefits for the period between July 11, 2015 and December 29, 2015.

She also awarded Respondent 30% industrial disability. Finally, the Deputy Commissioner found that Petitioner was responsible for the costs of Respondent's medications.

The Commissioner's appeal decision was rendered June 28, 2019. The Commissioner affirmed the Deputy Commissioner's award of temporary benefits from July 11, 2015 through December 29, 2015. The Commissioner further affirmed the Deputy's 30% industrial disability award. The Commissioner overturned the Deputy's finding that the Defendant employer was responsible for payment for Respondent's medications, finding insufficient evidence in the record to support the Deputy's finding that the medications prescribed by Dr. Tran were reasonable.

II. APPLICABLE LAW AND ANALYSIS

Iowa Code Chapter 17A governs judicial review of final agency action. "Under the Act, [the Court] may only interfere with the commissioner's decision if it is erroneous under one of the rounds enumerated in the statute, and a party's substantial rights have been prejudiced." Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code §17A.19(8)(a). In exercising the power of judicial review, the district court acts in an appellate capacity. Nance v. Iowa Dept. of Revenue, 908 N.W.2d 261 (Iowa 2018) (quoting Mycogen Seeds v. Sands, 686 N.W.2d 457, 463 (Iowa 2004)).

Where an agency has been clearly tasked with the power to make determinations of fact, "it follows that application of the law to those facts is likewise 'vested by a provision of law in the discretion of the agency'." Burton v. Hilltop Care Center, 813 N.W.2d 250, 256 (Iowa 2012) (citing Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 (Iowa 2004)). In reviewing factual findings made by the Commissioner, the question is simply whether there is substantial evidence

in the record to support the Commissioner's findings. Iowa Code §17A.19(10)(f); see also Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). Where the reviewing court is asked to review an agency's interpretation of law, level of deference afforded 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 Center, 813 N.W.2d 250, 256 (Iowa 2012). In reviewing the Commissioner's interpretation of Iowa Code 85.34(1) and related case law, this Court reviews for "correction of errors at law". Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (Iowa 2012).

This Court must first ascertain the basis Petitioner relies on in appealing to this Court for Judicial Review. Petitioner appears to take issue with the Commissioner's interpretation of Iowa Code § 85.34(1) and the related case law, but also appears to have issues with the findings of fact made by the Commissioner. Each claim will be addressed as appropriate.

III. MERITS

There are three contested claims in this appeal: 1) Petitioner claims Respondent was not entitled to healing period benefits from July 11, 2015 through December 29, 2015; 2) Petitioner claims there is not substantial evidence supporting the Deputy Commissioner's award of 30% industrial disability; and 3) Respondent claims that the Commissioner incorrectly found that Respondent's prescription medications were unreasonable medical care.

A. Was Respondent Entitled to Healing Period Benefits from July 11, 2015 through December 29, 2015?

Iowa Code § 85.34(1) governs permanent disabilities, stating that healing period benefits are payable "...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.” Iowa Code § 85.34 (Iowa 2019). In other words, Respondent may receive healing period benefits until 1) he has returned to work, 2) he is medically capable of returning to substantially similar employment, or 3) he has reached maximum medical recovery. The parties do not dispute that Respondent was entitled to temporary benefits from November 15, 2010 through January 25, 2011. The dispute concerns Respondent’s claims for healing period benefits from July 11, 2015 through December 29, 2015.

Petitioner claims the Commissioner erred in awarding Respondent additional intermittent, temporary benefits from July 11, 2015 through December 29, 2015, as there was no new disability that prevented Respondent from returning to work after his July 10, 2015 termination. Petitioner further argues that the Commissioner erroneously relied on Iowa Code § 85.34(1) in that Respondent did not meet any of its enumerated criteria. Additionally, Petitioner claims that the Commissioner misapplied the holding in Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360 (Iowa 2016), in awarding temporary partial disability benefits for Respondent even though permanency benefits had already commenced. The Respondent disagrees.

The holding in Evenson considers multiple possible periods for benefits. Id. at 371-72. Specifically, the Evenson Court held that “when there are multiple healing periods, we must determine whether PPD begins to run from the end of the first healing period or whether the fact finder may choose among the multiple healing periods that are supported by substantial evidence, as occurred here. We hold that the statute clearly states that the healing period lasts until whichever situation occurs first.” Id. at 372. This creates the implication that there are multiple possible periods for benefits, including multiple, intermittent healing periods. Petitioner essentially raises the same arguments that Justices Mansfield and Waterman made in dissent in Evenson. Unless and until Evenson is overruled, this Court is bound by the majority’s holding.

In Evenson, the claimant argued for two separate compensable healing periods, the second of which was to run concurrently with his commencement of permanent benefits. 881 N.W.2d. at 371. The Evenson Court held that it had the option to determine the commencement point for the calculation of benefits. Id. The Court found that their determination that Evenson returned to work, establishing the commencement date for PPD benefits, is not precluded by Evenson being entitled to TPD benefits for subsequent weeks when he was medically restricted from working his regular hours. Id. Specifically, the Court stated: “When there are multiple healing periods, we must determine whether PPD begins to run from the end of the first healing period or whether the fact finder may choose among the multiple healing periods that are supported by substantial evidence, as occurred here. We hold that the statute clearly states the healing period lasts until whichever situation occurs first.” Id. at 372.

In this case, Respondent was awarded temporary healing benefits from November 21, 2010, through January 25, 2011. The commencement date of permanent partial disability benefits (“PPD”) was January 26, 2011. The Commissioner properly concluded that Respondent was entitled to healing period benefits subsequent to the commencement date for permanent benefits, in line with the Evenson decision.

Petitioner also claims the Commissioner misinterpreted the language of Iowa Code § 85.34(1) to provide that a healing period automatically restarts if the Respondent becomes unemployed because he is no longer “returned to work.” Petitioner cites to Waldinger as support for the proposition that the Commissioner’s interpretation of Iowa Code § 85.34(1) was not vested in the Commissioner by the legislature and, as such, on appellate review the District Court should review the Commissioner’s interpretation for correction of errors at law. Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012). This Court agrees with that standard of review, but also

agrees with the Commissioner's interpretation of Iowa Code 85.34(1) based on the Court's holding in Evenson, allowing for multiple intermittent healing periods. The Commissioner's finding that Respondent is entitled to benefits for the period from July 11, 2015 through December 29, 2015 is **AFFIRMED**.

B. Was There Substantial Evidence for the Commissioner to Affirm the Deputy Commissioner's 30% Industrial Disability Award?

Petitioner argues that the Deputy Commissioner erred in finding a 30% industrial disability rating when Dr. Foxx and Dr. Kuhnlein concluded Respondent had a 9% functional impairment rating. These are two different measures, however. The Deputy Commissioner fully addressed the distinction at page 13 of her Review-Reopening Decision. The Court sees no reason to disturb that analysis.

Petitioner also argues that the objective medical testing does not support Respondent's subjective complaints to his medical providers and notes Respondent's lack of credibility. The Deputy Commissioner was aware of both of these points, but still found a 30% impairment was appropriate. The Commissioner agreed with this holding. The Commissioner provided additional detail regarding Respondent's lifting restrictions in his subsequent discussion about temporary benefits.

Petitioner also points out that Respondent continued working as an over-the-road truck driver for three years. Assuming without deciding that Respondent's jobs with Reliable Transport and Nick's Hotshot were substantially similar to his job with Petitioner, Respondent does not have such a job currently. Whether Respondent is currently able to perform such a job is a disputed fact. The Court is not inclined to punish someone for having attempted to work while his workers compensation claim progressed through the system.

In reviewing the Deputy Commissioner's findings, this Court looks to whether there is substantial evidentiary support in the record. Iowa Code §17A.19(10)(f); see also Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). The Court finds that there is such substantial evidence.

The Deputy Commissioner's finding of 30% industrial disability, affirmed by the Commissioner, is **AFFIRMED**.

C. The Commissioner's Decision to Declare Respondent's Prescription Medications Unreasonable Medical Care

Respondent claims that the Commissioner incorrectly overturned the Deputy Commissioner's ruling that Respondent was entitled to have Petitioner pay for his ongoing medications. Iowa Code § 85.27 requires Petitioner to provide "reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services..." Iowa Code § 85.27. The Commissioner found that the medications being prescribed were not reasonable. The Commissioner based his decision on the opinions of two physicians that disagreed with Dr. Tran, the prescribing physician.

It is clear from the record that, at times, Petitioner has gone out of its way to avoid providing Respondent with reasonable medical care. However, it is equally clear from the record that there are serious concerns about the reasonableness of the care actually provided to Respondent by Dr. Tran. While "reasonable" does not require unanimous agreement, it requires more than a lone doctor's viewpoint when there are multiple contrary opinions. As the Commissioner noted, Dr. Tran's records did not provide a strong basis for his treatment plan or strong evidence of appropriate monitoring.

The reasonableness of medications depends, in part, on their efficacy. Here, the record contains evidence that the medications at issue may not be helpful and may, in fact, be harmful. Additionally, the results of a toxicology screen show that Respondent was not taking the

prescriptions as prescribed. This is especially troubling in light of the finding that Respondent had low credibility. Petitioner should not have to pay for medications that Respondent is not actually taking.

The Court finds there is substantial evidence supporting the Commissioner's decision in this regard and that the Commissioner did not abuse his discretion in finding that Petitioner does not have an obligation to pay for these ongoing prescriptions. As such, the Commissioner's ruling denying the Respondent's request that Petitioner pay for his medication expenses is **AFFIRMED**.

IV. CONCLUSION

IT IS ORDERED THAT the Commissioner's finding awarding Respondent healing benefits for the period of July 11, 2015 through December 29, 2015, is **AFFIRMED**.

IT IS FURTHER ORDERED that the Commissioner's award of 30% industrial disability is **AFFIRMED**.

IT IS FURTHER ORDERED that the Commissioner's finding that Petitioner does not need to pay for Respondent's ongoing medications is **AFFIRMED**.



State of Iowa Courts

Type: OTHER ORDER

Case Number	Case Title
CVCV058440	ANNETT HOLDINGS INC VS NICHOLAS ROBERTS

So Ordered

A handwritten signature in blue ink that reads "David Nelmark". The signature is written in a cursive style with a large, stylized "D" at the beginning.

David Nelmark, District Judge
Fifth Judicial District of Iowa