

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LOREN LEE PESICKA, JR., Petitioners, v. SNAP-ON LOGISTICS COMPANY a/k/a SNAP-ON TOOLS MANUFACTURING CO., Respondent.	Case No. CVCV057699 RULING ON JUDICIAL REVIEW
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This judicial review action came on for hearing on June 28, 2019. Petitioner, Loren Lee Pesicka, Jr. (hereinafter “claimant”), was represented by counsel, Mark Soldat. Respondent, Snap-On Logistics Company (hereinafter “employer), was represented by counsel, Joni Ploeger.

STATEMENT OF THE CASE

A. Statement of facts regarding the injury.

Claimant was injured at work on October 3, 2002 when a piece of metal fell on his right foot. Claimant has undergone extensive medical treatment for injuries to his right foot and leg. On December 26, 2006, the parties entered into an Agreement for Settlement stipulating claimant had sustained 13% permanent impairment to his right leg.

Since the 2006 settlement, Claimant has undergone eight additional surgeries including removal of hardware, revision arthrodesis, metatarsal osteotomy, weil osteotomy, correction for forefoot claw deformities,

interphalangeal joint fusions, irrigation/debridement, and amputation of the third through fifth toes. On September 15, 2015, Claimant underwent another amputation surgery to remove his remaining two toes. On February 2, 2016, Claimant was evaluated by Dr. Kuhnlein for an IME at his attorney's request. Kuhnlein assessed 25% permanent impairment to the lower extremity.

On April 15, 2016, claimant was evaluated by Dr. Kimelman for an IME at Snap-on's request. Dr. Kimelman assessed 30% permanent impairment to the lower extremity. As a result of the additional surgeries, Snap-on paid 49 weeks in healing benefits in the amount of \$20,663.89 (at \$423.36 per week). Pursuant to the new expert opinions, Snap-on paid an additional 57.5 weeks of permanent partial disability benefits in the amount of \$24,343.20 (at \$423.36 per week).

Claimant continues to work full-time at Snap-on in his pre-injury job. He is able to work on ladders and traverse stairs. He also has a side business removing snow and working on racecars. He continues to work on his family's cars and trucks and works around his acreage driving end loaders and tractors. His injuries do not prevent him from being able to camp, dance, and race his own car.

B. Proceedings before the agency.

This is a judicial review action on a workers' compensation review-

reopening proceeding. As set out above, on December 26, 2006, the Commissioner approved the parties' settlement agreement stipulating a work injury on October 3, 2002 to claimant's right leg. The parties also stipulated that claimant had sustained 13% permanent impairment to his right leg. On February 15, 2015, Claimant filed a review-reopening petition alleging his right leg condition had worsened. Respondent answered Petitioner's petition admitting the work injury to the right leg, but denying the claimant's condition had worsened since the settlement.

The case was heard by Deputy Toby Gordon on May 18, 2016. The Deputy issued his Review-Reopening Decision on January 20, 2017 and held the following:

- (a) Claimant was entitled to underpayment of healing period benefits in the amount of \$589.96;
- (b) Claimant was not entitled to additional permanent partial disability benefits;
- (c) Employer was entitled to a credit for all weekly benefits paid to date;
- (d) Claimant was entitled to reimbursement for certain medical expenses;
- (e) Claimant was entitled to reimbursement for his IME;
- (f) Claimant was entitled to 50% penalty benefits for the underpaid weekly benefits;
- (g) Claimant was entitled to reimbursement of costs.

On February 13, 2017, Claimant filed a Rehearing Application and Deputy Gordon issued a Rehearing Decision on March 1, 2017. Deputy Gordon confirmed his calculation of the healing period benefit award and his permanent disability award of 25% to the lower extremity. However, Deputy Gordon did find there was an overpayment of 28.9 weeks of permanent partial disability benefits, not 2.5 weeks as he originally found in his Review-Reopening Decision. Deputy Gordon also agreed with claimant that the calculation for underpayment of weekly benefits needed to take into consideration the impact of accruing interest. Deputy Gordon ordered the parties to come to an agreement on the underpayment/overpayment principle and interest amounts, otherwise, the parties were ordered to get a CPA involved to make the calculations.

On March 15, 2017, claimant filed a Notice of Appeal and Snap-on cross-appealed on March 21, 2017. On January 18, 2019, Commissioner Cortese issued an Appeal Decision in which he held the following:

- (a) Claimant was entitled to underpayment of healing period benefits;
- (b) Claimant was not entitled to additional permanent partial disability benefits;
- (c) Employer was entitled to a credit for all weekly benefits paid to date;
- (d) Claimant was entitled to reimbursement for only half of his IME; and

(e) Claimant was entitled to penalty benefits for 50% of the underpaid weekly benefits.

Claimant filed for rehearing on February 6, 2019, which was denied on February 22, 2019 by Commissioner Cortese. Claimant filed this Petition for Judicial Review on February 25, 2019.

STANDARD OF REVIEW

Chapter 17A of the Iowa Code governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The 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).” *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc. v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)). Where an agency has been “clearly vested” with a fact-finding function, the appropriate “standard of review [on appeal] depends on the aspect of the agency's decision that forms the basis of the petition for judicial review”—that is, whether it involves an issue of 1) findings of fact, 2) interpretation of law, or 3) application of law to fact. *Burton*, 813 N.W.2d at 256.

Review of findings of fact: The courts use a substantial evidence standard when considering challenges to findings of fact in agency

decisions. A reviewing court can only disturb factual findings if they are “not supported by substantial evidence in the record before the court when that record is reviewed as a whole.” *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Iowa Supreme Court has outlined the court’s guidelines when reviewing substantial evidence claims under the 17A.19 standard as follows:

When reviewing a finding of fact for substantial evidence, we judge the finding in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it. Our review of the record is fairly intensive, and we do not simply rubber stamp the agency finding of fact.

Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.

Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotation marks omitted).

Review of interpretation of law: The courts traditionally have discretion to substitute their interpretations of law for that of the agency when legal challenges are made on review. *Meyer*, 710 N.W.2d at 219. However, the courts are required to give deference to an agency interpretation of law when the agency has been “clearly vested” with

authority to interpret a provision of law. *Burton*, 813 N.W.2d at 256. If the legislature has not given the agency clear authority to interpret a provision of law, the courts may reverse the interpretation if erroneous. *Id.*

In *Burton*, the Iowa Supreme Court held the level of deference to the workers' compensation commissioner's interpretations will be determined on a case-to-case basis depending on the "particular phrase under consideration." *Id.* While this appears an arduous standard, the court provided the following guidance:

When a term is not defined in a statute, but the agency must necessarily interpret the term in order to carry out its duties, we are more likely to conclude the power to interpret the term was clearly vested in the agency. This is especially true "when the statutory provision being interpreted is a substantive term within the special expertise of the agency." However, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency," or when the language to be interpreted is "found in a statute other than the statute the agency has been tasked with enforcing," we are less likely to conclude that the agency has been clearly vested with the authority to interpret that provision of the statute.

Id. at 256-57 (cites omitted).

Application of law to fact: When a party challenges the ultimate conclusion reached by the agency, then the challenge is to the agency's application of the law to the facts. In that event, the question on review is whether the agency abused its discretion by, for example, employing

wholly irrational reasoning or ignoring important and relevant evidence. *Meyer*, 710 N.W.2d at 219. The court will only reverse the agency's application of law to the facts if it is irrational, illogical, or wholly unjustifiable. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012).

CONCLUSIONS OF LAW

In his briefing, Claimant raised six separate claims of relief. However, at the oral arguments, Claimant withdrew the claims made in division IV of its brief, so the Court will address the remaining five claims raised by Claimant in his application for judicial review.

DIVISION I

Claimant Contends the Commissioner Erred by Not awarding Healing Period Benefits for 8/5/09

Claimant's claim in Division I relates to a dispute as to Claimant's entitlement to healing period benefits for the single day of August 5, 2009. In essence, Claimant admits that, in the pre-hearing report, the parties stipulated that healing period dates were to include the time period from April 22 through August 4, 2009. Therefore, the date at issue, August 5, 2009, was not included as a date in the date range in the stipulation for which Claimant was seeking recovery for healing period benefits. Claimant claims this omission of the date of August 5, 2009

was simply due to inadvertence or oversight. Claimant now seeks an award of healing period benefits for this single day. Employer resists, claiming that Claimant is bound by his stipulations in the hearing report, which stipulation did not include the date of August 5, 2009 as a date where Claimant was seeking healing period benefits. The Court agrees with Employer.

Factual determinations are clearly vested within the Commissioner's discretion and this Court is therefore required to give "appropriate deference to the view of the agency with respect to [that] particular matter." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004); Iowa Code §§ 17A.19(10)(f), (11)(c). The ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Reed v. Iowa Dept. of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991) (citations omitted). In this case, the claimant's stipulation in the hearing report provides support for the findings made by the agency. The Court also finds persuasive the case of *Burnett v. Webster City Custom Meats, Inc.*, 728 N.W.2d 851 (Iowa Ct. App. 2007)(unreported) where the Iowa Court of Appeals dealt with this very same issue. The Court of Appeals concluded in that case that the healing period dates stipulated to by the parties

should not be altered. *Id.* at *3-4. The same logic applies to the instant case.

DIVISION II

Claimant Contends the Commissioner Erred by Failing to Resolve the Amount of underpayment of Healing Period Compensation and overpayment of Permanent Partial Disability Compensation Due as of the 5/18/16 Hearing

In his second division, Claimant claims that the Deputy Commissioner who presided over the May 16, 2016 hearing erred as a matter of law in not deciding an issue that was properly before him: the amount of underpayment of any healing period compensation and overpayment of any permanent partial disability compensation due as of the hearing date. As the Court understands this issue, Deputy Gordon, in his Rehearing Decision of March 1, 2017, ordered the parties to come to an agreement on the underpayment/overpayment principle and interest amounts, otherwise, the parties were ordered to get a CPA involved to make the calculations. The Commissioner, in the final ruling by the agency concluded as follows on this issue:

Notwithstanding both parties' failure to comply with the Deputy Commissioner's order, I find the method prescribed in the rehearing decision regarding healing period, interest, and criteria for the overpayment of PPD to be sound. This matter is remanded to the deputy commissioner to calculate healing period benefits, interest and the

overpayment of permanent partial disability benefits, using the methods detailed in the rehearing decision.

After the Commissioner issued the Agency's final decision on this matter, the Claimant filed this petition for judicial review. Therefore, no remand of this issue occurred, so there has not been a final agency decision on this issue. The Employer did not address this ground in its briefing, but at the time of the oral argument, counsel for the employer agreed that it would be appropriate for the Court to remand this issue to the agency for final ruling on this issue by the Deputy Commissioner as set forth in the Commissioner's Appeal Decision. The Court also concludes that it is appropriate for the Court to remand this issue to the Agency for final agency action on this issue.

COUNT III

Claimant Contends that the Commissioner Erred by not awarding Permanent Partial Disability Compensation of 100 Weeks Based Upon the Loss of All His Toes

The Commissioner found Claimant was entitled to a permanent disability award based on a 25% impairment rating to Claimant's right leg. Under the prior law in effect at the time (Section 85.34(2)(o)), this meant Claimant was awarded Claimant 55 weeks of permanent partial disability (220 wks. X 25%). The record is clear that Claimant has lost all five of his toes on his right foot by amputation. Claimant contends that

the Commissioner should have awarded him 100 weeks of permanent partial disability. Claimant arrives at his claimed figure of 100 weeks based upon the argument that the Commissioner should have combined the loss of Claimants big toe (40 wks.), with an additional award of 15 weeks for each of his other four lost toes for total award equaling 100 weeks. Claimant contends that the Iowa Code in effect at the time (Sections 85.34(2)(h), (i), (j), and (k)) support his award.

Respondent resists, again contending that Claimant is bound by the stipulations he made before the Commission wherein the parties stipulated Claimant had suffered an injury to his “right leg,” not an injury to each of his toes, foot or body as a whole. The Court agrees. As Respondent correctly point out, this is a review-reopening action, as such, the situs of the injury must necessarily be that as was the subject of the underlying action: the right leg. The parties’ settlement as to the situs of the injury was approved, constituting judicial acceptance of an injury to the right leg. *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 166-67 (Iowa 2003). In the Re-Hearing decision filed March 1, 2017, the Deputy stated as follows:

At the onset of the hearing on May 18, 2016, the undersigned was presented with a hearing report, which stated that the parties’ stipulation that the disability was “a scheduled member disability to the right leg.” (Hearing Report, p. 1) Claimant further asserted his position in the Hearing Report, specifically claiming “permanent disability benefits for 132 weeks for a 60% loss of use of the right

leg.” (Hearing Report, p. 1) Counsel did state at the commencement of the hearing, that the claim “is not based on impairment ratings alone,” and referenced the individual ratings applicable to “all five toes having been amputated.” (Tr. P. 13) However, at no time did claimant move to amend the petition to assert multiple scheduled member claims to claimant’s toes, nor was there any request to amend the hearing report to change the above noted stipulation that the injury was to the claimant’s right leg. Claimant’s argument that the undersigned should now disregard the parties’ stipulation that the permanent impairment is to claimant’s right leg is rejected by the undersigned. Claimant cannot now convert the stipulated single right leg claim to a claim for multiple scheduled member injuries or an industrial disability, and go beyond the scope of the parties’ stipulation.

The Court agrees that Claimant is now estopped from attempting to claim a different injury. *See e.g., Id.; Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 196-99 (Iowa 2007). The Court further concludes that the Commissioner’s award of permanent partial disability benefits based on Claimant’s stipulated right leg injury is supported by substantial evidence. *See, Meyer*, 710 N.W.2d at 219; *Mycogen Seeds*, 686 N.W.2d at 465; Iowa Code §§ 17A.19(10)(f), (11)(c).

DIVISION V

Claimant Contends the Commissioner Erred by Not Imposing Penalties on the Employer for Underpayments

Claimant argues that the Commissioner erred in failing to award penalty benefits on both the underpayment of healing period benefits, and delays in those payments. He also contends that penalty benefits

should have been awarded on the delay in permanent partial disability benefits. Respondent has not contested the 50% penalty award for underpayment of healing period affirmed by the Commissioner (due to the rate issue). The Commissioner denied any additional penalty benefits on permanent partial disability benefits paid because he determined there had been an over-payment. The decision of the Commissioner is well reasoned and the Court concludes that the Commissioner's denial of additional penalty benefits is supported by substantial evidence. *See, Meyer*, 710 N.W.2d at 219; *Mycogen Seeds*, 686 N.W.2d at 465; Iowa Code §§ 17A.19(10)(f), (11)(c).

DIVISION VI

Claimant Contends the Commissioner Erred by Reducing the Reimbursement for I.M.E. by Half

Finally, Claimant contends that the Commissioner erred when it limited reimbursement of claimant's I.M.E. with Dr. Kuhnlein to one-half of his fee. Dr. Kuhnlein charged \$5,321.90 for his independent medical examination. The Commissioner concluded that, relying on the plain language of Iowa Code Section 85.39 and *Dart v. Young*, 867 N.W.2d 839, 847 (Iowa 2015), Claimant was entitled to reimbursement for the cost of the independent medical examination conducted by Dr. Kuhnlein. However, the Commissioner elected to reduce the recovery for the fee by

one-half, reasoning that as part of his examination Dr. Kuhnlein also reviewed records and examined Claimant's left knee during the examination for purposes of Claimant's Second Injury Fund claim.

The Court concludes that the Commissioner's decision to reduce the award is supported by substantial evidence. It is clear that the Commissioner has discretion to determine the extent of a "reasonable fee" under Iowa Code Section 85.39. The standard of review is not whether a different fee could be supported, but whether there is substantial evidence to support the award. The Court concludes that there is sufficient support in the record.

RULING

The Court remands to the agency for a determination of the amount due for healing period benefits, interest, and the amount of the overpayment of permanent partial disability benefits using the methods detailed in the re-hearing decision. All other aspects of the agency's decision are affirmed. The Claimant shall pay the costs of this action.



State of Iowa Courts

Type: OTHER ORDER

Case Number	Case Title
CVCV057699	LOREN LEE PESICKA JR V SNAP ON

So Ordered

A handwritten signature in blue ink, appearing to read "Col. McAllister", is written over a horizontal line.

Coleman McAllister, District Judge
Fifth Judicial District of Iowa