

IN THE IOWA DISTRICT COURT FOR POLK COUNTY**EAST PENN MANUFACTURING CO.,
INC., Employer, and SENTINEL INS.
CO., LTD., Insurance Carrier,****Petitioners,****v.****KAREN M. FOSTER,****Respondent.****Case No. CVCV061871****RULING ON
PETITION FOR
JUDICIAL REVIEW**

A Petition for Judicial Review came before the Court from a final decision of the Iowa Workers' Compensation Commission. The Court held a hearing on this matter on October 15, 2021. Tiernan Siems represented Petitioners East Penn Manufacturing Company ("East Penn") and Sentinel Insurance Company, LTD. ("Sentinel"). Diana Rolands had a limited appearance on behalf of Karen M. Foster (Foster). Petitioners request that this Court vacate the Appeal Decision of the Iowa Workers' Compensation Commissioner because of the alleged failure to distinguish between Foster's pre-existing injury and work-related injury. Petitioners further request that this Court determine that Foster defaulted in defending this action because no estate has been opened since her passing. After considering the arguments of the parties and having reviewed the file, including the Certified Administrative Record, the Court now enters the following ruling.

I. INTRODUCTION**A. Factual Background**

Foster was 59 years of age when she began working for East Penn in July 2012. (Certified Agency Record (Cert. Rec.) Part 1, 67-68).¹ In December 2012, Foster sustained an injury to her

¹ The certified agency record does not include continuous pagination. Although some documents in the certified record are numbered, the hearing transcript does not include any page numbers. The Court will be citing to the certified agency record PDF pages filed with the Court throughout this ruling.

neck and left shoulder when she was assaulted. (Cert. Rec. Part. 1, p. 162). Foster was treated for this injury and missed a few months of work. (Cert. Rec. Part 2, p. 30). At East Penn's request, Foster presented for a "return to employment physical examination" on May 24, 2013. *Id.* Foster was released to return to work with no restrictions at this time. *Id.* at 33.

The parties stipulated that Foster sustained a right shoulder injury which arose out of and in the course of employment on July 30, 2013. (Cert. Rec. Part I, p. 16). Prior to this injury, Foster returned to working her normal job and shift with East Penn. *Id.* at 163. In the course of her injury, Foster was loading batteries onto a shipping pallet when she felt a pop in her right shoulder. *Id.* at 16. Foster testified that she complained of the pain to the first-shift supervisor, acting supervisor, and third-shift supervisor. *Id.* at 72-73.

The next day, East Penn referred Foster to a physician's assistant at Wayne County Hospital. *Id.* at 163. The physician's assistant diagnosed Foster with a mild right shoulder sprain/strain and gave her work restrictions for two weeks. (Cert. Rec. Part 2, p. 210). East Penn was able to accommodate the work restrictions. (Cert. Rec. Part 1, p.73). Two weeks later Foster returned to the physician's assistant and reported improving symptoms. (Cert. Rec. Part 2, p. 211). The physician's assistant instructed Foster to return to work without restrictions. *Id.* at 213.

After Foster returned to work her symptoms worsened and her work restrictions were renewed for an additional two weeks. (Cert. Rec. Part 1, p. 74-76; Cert. Rec. Part 2, p. 214-216). At the arbitration hearing, Foster testified that she returned to a different physician's assistant who transferred her care to her primary care provider, Deborah Wardlow, ARNP (Wardlow). (Cert. Rec. Part 1, p. 75-76).

On August 26, 2013, Foster was seen by Wardlow regarding her depression and the visit notes do not mention Foster's right shoulder injury or any work restrictions. (Cert. Rec. Part 2, p.

217-220). On September 16, 2013, Foster received an injection for severe neck pain which was performed by Wardlow. *Id.* at 223.

Foster received short-term disability benefits as of September 14, 2013. (Def. Ex. E). The record does not show whether the short-term disability benefits were due to the work-related right should injury or neck injury. (Def. Ex. G). Foster again returned to Wardlow on September 30, 2013, seeking an epidural steroid injection (ESI) for her neck. (Cert. Rec. Part 2, p. 224). The ESI was performed on October 3, 2013, and was charted on October 8, 2013. *Id.* at 227. On October 14, 2013, Foster reported to Wardlow that she “recently had an epidural injection in her right shoulder and she would like to have another one and needs a referral.” *Id.* at 229. However, the record reflects that Foster had received an epidural injection in her neck, not her right shoulder. *Id.* at 227.

Wardlow referred Foster to neurosurgery “to see if she needs a cervical fusion” on November 21, 2013. *Id.* at 45. Wardlow’s notes from this visit state that Foster has a history of cervical neck pain as well as left shoulder pain, is going to physical therapy without relief, and she has been off of work for several weeks. *Id.* Wardlow does not mention any work restrictions at this time. *Id.*

On November 26, 2013, Foster was terminated by East Penn. (Cert. Rec. Part 1, p. 86). East Penn Manufacturing Company claims that Foster was terminated for exhausting her allotted leave. (Defs. Br. at 3).

During Foster’s January 24, 2014 appointment with Wardlow, Wardlow wrote, “She has been off of work for several months due to a neck and shoulder injury I previously had told Karen that she would go back to work with a 10 lb. weight lifting restriction. Her current job requires her to lift 50 lb. or more.” (Cert. Rec. Part 2, p. 51). Wardlow noted that “50% of pain

comes from the neck and 50% of pain comes from the shoulder.” *Id.* at 53. Wardlow ordered a MRI of Foster’s right shoulder, which was completed on February 22, 2014. *Id.* at 243.

On April 18, 2014, Foster had her initial appointment with Dr. Jacobson. *Id.* at 295. Dr. Jacobson noted that Foster had “complaints of right shoulder pain” and “unrelated cervical neck issues. *Id.* During this visit, Foster’s workers compensation case manager was present. *Id.* at 296. Dr. Jacobson noted that he gave Foster a note for restrictions at work and she should return in six weeks for a recheck regarding her shoulder. *Id.* at 297. The note for restrictions at work included a maximum lifting capacity of ten pounds. *Id.* Dr. Jacobson then performed a cortisone injection in Foster’s right shoulder. *Id.* At the follow up appointment, Dr. Jacobson recommended right shoulder surgery because Foster’s symptoms did not improve. *Id.* at 298-299.

On September 24, 2014, Foster underwent an Independent Medical Evaluation (IME) with Dr. Mark Kirkland, D.O., prior to Petitioners authorizing the shoulder surgery. (Cert. Rec. Part 1, p. 165). Dr. Kirkland found that Foster’s right shoulder condition was work related. *Id.* Dr. Kirkland determined that Foster “should not be doing any work at shoulder level or above” and “should only be lifting only 5-10 pounds with both hands at the waist level.” *Id.* at 166. He further agreed with Dr. Jacobson’s recommendation for right shoulder surgery. *Id.*

In December of 2014, temporary disability benefits were issued for the period starting September 24, 2014. (Cert. Rec. Part 1, p. 166). The temporary benefits were paid through July 28, 2015. *Id.*

On January 5, 2015, Dr. Jacobson performed right shoulder surgery on Foster. (Cert. Rec. Part 2, p. 285). Foster remained on work restrictions through July 22, 2015, when Dr. Jacobson recommended a functional capacity evaluation (FCE). *Id.* at 308-09. The FCE was completed on August 24, 2015, and determined Foster to be in the “light demand vocation.” *Id.* at 312.

Dr. Jacobson's letter, dated September 25, 2015, stated that Foster had reached maximum medical improvement (MMI) as of September 9, 2015. *Id.* at p. 323. Dr. Jacobson recommended permanent restrictions based on the FCE and assigned a 4% whole person impairment. *Id.*

During the fall of 2015, Foster obtained employment as a checker for Hy-Vee. (Cert. Rec. Part 1, p. 91). Foster testified that she had to quit after a month or so because the pushing and pulling motions of the job caused her too much pain. *Id.*

In November 2017, Foster began receiving Social Security Disability (SSD) benefits. *Id.* at 93. She received SSD because of hearing loss, neck condition, COPD, bipolar depression, anxiety, and right shoulder. *Id.*

At the time of the arbitration hearing Foster was unemployed and living in rural Iowa. *Id.* at 65. On November 27, 2020, Foster died of natural causes unrelated to her work-related injury. *Id.* at 39. No estate had been opened at the time of the hearing. No appellee has appeared since the original appeal to the Industrial Commissioner. Petitioners request dismissal of the underlying petition due to the default on appeal. Diana I. Rolands represented Foster as a Claimant before the Workers' Compensation Commissioner before Foster died.

B. Procedural History

Foster filed a petition in arbitration seeking workers' compensation benefits from East Penn and Sentinel for a right shoulder injury. (Cert. Rec. Part 1, p. 162). The agency hearing occurred on September 4, 2020, with Deputy Commissioner Stephanie Copley. A decision was issued on November 24, 2020. *Id.* Foster received a result in her favor. *Id.* The Deputy first concluded that Foster's work restrictions would preclude her from returning to her regular job with East Penn and therefore Foster sustained a 65% loss of earning capacity as a result of her work injury. *Id.* at 167. She further concluded Foster sustained a 65% industrial disability, which entitled

her to 325 weeks of permanent partial disability (PPD) benefits. *Id.* at 170. Deputy Commissioner Copley ordered Petitioners to pay Foster temporary benefits from April 18, 2014 through September 9, 2015, and that all weekly benefits shall be paid at the stipulated rate of \$458.14 per week. *Id.* Further, Petitioners were ordered to pay accrued weekly benefits in a lump sum together with interest at the rate of 10% for all weekly benefits payable and not paid when due which accrued before July 1, 2017. *Id.* All interest on past due weekly compensation benefits accruing on or after July 1, 2017, were payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus 2%. *Id.* Petitioners were entitled to the stipulated credits of payment of temporary benefits for the period of September 24, 2014 through July 28, 2015. *Id.* at 171. Lastly, Deputy Commissioner assessed the cost of Foster's filing fee against Petitioners. *Id.*

On December 11, 2020, Petitioners appealed Deputy Copley's Arbitration Decision. (Pets. Br. 5). On April 29, 2021, an Appeal Decision was rendered by Joesph S. Cortese II, Workers' Compensation Commissioner. (Cert. Rec. Part 1, p. 7). The Commissioner's Appeal Decision determined that according to Iowa Code section 85.31(4), Foster cannot be awarded benefits for any dates beyond November 27, 2020, when Foster passed away. *Id.* at 8. The Commissioner affirmed the Deputy Commissioner's findings and conclusions except he modified the Arbitration Decision to reflect Iowa Code section 85.31(4). *Id.* The Commissioner ordered Petitioners to pay benefits and Foster's filing fee to Foster's representative. *Id.* at 9.

On May 18, 2021, Petitioner's filed the present Petition for Judicial Review with the Iowa District Court. The Petitioners claim the Commissioner's Appeal Decision was based upon a provision of law that is unconstitutional on its face or as applied and unsupported by substantial evidence in the record. (Pet. for Petitioners ¶ 5). They seek reversal, dismissal, or in the alternative,

modification of the Commissioner's Appeal Decision because they allege the Commissioner's decision was rendered without factual or legal support and Foster has died without an estate. *Id.* at ¶¶ 6, 7.

II. STANDARD OF REVIEW

Petitioners raise three main arguments. First, Petitioners' believe claimant's issues raised within the original underlying petition are moot because claimant failed to open an estate within a reasonable amount of time. Second, Petitioners ask the court to grant judgment for defendants due to claimant's default on appeal. Finally, Petitioners assert claimant has failed to establish entitlement to permanent or temporary benefits in light of her unrelated cervical injury and failing to meet her burden of proof and that the deputy commissioner erred in awarding penalty benefits to the claimant due to a delay in payment because the deputy commissioner's findings were the product of illogical reasoning.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); *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 prejudiced." *Meyer*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id.* §

17A.19(10). 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).

“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” when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so the Court is bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity “that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1); *Mycogen*, 686 N.W.2d at 464. “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.’” *Cedar Rapids Comm. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (quoting Iowa Code § 17A.19(10)(f)(3)). “Evidence is not insubstantial merely because different conclusions may be drawn from the evidence.” *Pease*, 807 N.W.2d at 845. “To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder.” *Id.* “Judicial review of a decision of the [Commission] is not de novo, and the commissioner's findings have the force of a jury verdict.” *Holmes v. Bruce Motor Freight*, 215 N.W.2d 296, 297-98 (Iowa 1974).

The application of the law to the facts is also an enterprise vested in the commissioner. *Mycogen*, 686 N.W.2d at 465. Accordingly, the Court will reverse only if the commissioner's application was “irrational, illogical, or wholly unjustifiable.” *Id.*; Iowa Code § 17A.19(10)(l). “A

decision is “irrational” when it is not governed by or according to reason.” *Christensen v. Iowa Dep’t. of Revenue*, 944 N.W.2d 895 at 905 (Iowa 2020). A decision is “illogical” when it is “contrary to or devoid of logic.” *Id.* “A decision is “unjustifiable” when it has no foundation in fact or reason” or is “lacking in justice.” *Id.* This standard requires the Court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

III. MERITS

Because Foster is deceased the Court only has Petitioners’ three major arguments from their appellate brief. Foster’s original counsel appeared at the hearing and stated that no estate is open and that she was limited in what she could do because of her client’s death. Petitioners’ believe the claimant’s death and lack of defending the action necessitates a dismissal of the underlying petition. First, they argue that Foster’s issues raised within the original underlying Petition are moot because Foster failed to open an estate within a reasonable amount of time. Second, the Court should grant judgment for Petitioners due to Foster’s default on appeal. Lastly, that the merits of Petitioners’ appeal shows that the underlying award entered by the Commission should be reversed because Foster failed to distinguish between her work related injury and non-work related injury for temporary and permanent disability benefits. The Court will first address the merits argument then the default argument and finally the issue of opening an estate.

A. Whether the Commission’s finding that Foster established entitlement to permanent and temporary benefits is supported by substantial evidence.

First, the Court will address the issue of temporary disability benefits. The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A preponderance of the evidence exists when the causal

connection is probable rather than merely possible. *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148 (Iowa 1997). The question of causal connection is within the domain of expert testimony. *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000). Unrebutted expert medical testimony cannot be summarily rejected. *Poula v. Siouxland Wall & Ceiling, Inc.*, 516 N.W.2d 910 (Iowa Ct. App. 1994). Accordingly, this Court will reverse the Commission's finding of successfully meeting the burden of proof based on expert testimony if it is not supported by substantial evidence. Iowa Code § 17A.19(10).

When a claimant suffers from a prior injury that is “*unrelated to employment, independently produces an ascertainable portion of an injured employee's cumulative industrial disability, the employer is liable for that portion of the industrial disability attributable to the current injury.*” *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 264 (Iowa 1995) (emphasis in original). The industrial disability is “apportioned between that caused by the work-related injury and that caused by the nonwork-related condition or injury.” *Id.*

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. *Ellingson v Fleetguard, Inc.*, 599 N.W.2d 440 (Iowa 1990). Iowa Code section 85.34(1) states that healing benefits are payable to an injured worker who has suffered permanent partial disability until the first of three events occurs. Those events are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Iowa Code § 85.34(1). Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. *Armstrong Tire & Rubber Co. v. Kubit*, 312 N.W.2d 60 (Iowa Ct. App. 1981).

Here, the Commissioner found:

There was insufficient evidence that claimant had any restrictions relating to her right shoulder as of September 13 or September 14, 2014. In fact, there is insufficient evidence that claimant had any such restrictions relating to her shoulder until her initial appointment with Dr. Jacobson on April 18, 2014.

I found the restrictions implemented by Dr. Jacobson would have made her incapable of returning to work with defendant-employer or performing a job substantially similar to her job with defendant-employer. . . . I conclude claimant satisfied her burden to prove she is entitled to healing period benefits starting on April 18, 2014.

I found claimant remained incapable of returning to substantially similar employment through the date of MMI, which was September 9, 2015. Having found claimant achieved MMI on September 9, 2015 and did not return to work and was not capable of performing substantially similar work before this date, I conclude the date of MMI is the first factor in Iowa Code section 85.34(1) to occur.

Cert. Rec. Part 1, p. 168.

Petitioners first contend that Foster failed to offer evidence demonstrating that she was entitled to benefits because she returned to work and “but for her unrelated cervical injury, she would have remained employed with Defendant-employer.” (Pets. Br. 11). Petitioners point to the fact that Foster sought “similar” employment by working for Hy-Vee. *Id.*

Additionally, Petitioners argue that Foster is not entitled to temporary benefits because she was offered and accepted temporary work with East Penn. *Id.* The Petitioners point the Court to *Evenson v. Winnebago Indus., Inc.*, to support their argument. *Id.* In *Evenson*, the worker had an injury to the elbow and was awarded PPD benefits beginning on November 30, 2011, based on the impairment rating that placed the worker at MMI on November 29, 2011. *Evenson v. Winnebago Indus., Inc.*, 881 N.W2d 360, 371 (Iowa 2016). The worker argued that the Commissioner should have awarded PPD benefits beginning on September 20, 2010, the day he returned to work after the first healing period, and then suspended those benefits during his second healing period between April 14, 2011, to June 14, 2011, and recommenced PPD benefits on June 15, 2011. *Id.* The Iowa Supreme Court found that the worker returned to work on September 20, 2010, after

several days off, which ended the first healing period. *Id.* at 372. The Iowa Supreme Court went on to state that the determination that the worker's "return to work in September 2010 established the commencement date for PPD benefits is not precluded by the fact that he was entitled to temporary partial disability benefits for subsequent weeks when he was medically restricted from working his regular hours." *Id.*

The Court concludes that working as a cashier and moving groceries is not substantially similar to lifting, pushing and pulling 50 pound batteries. Foster was not able to return to work substantially similar to the job performed at the time of the injury even when she accepted light duty at East Penn. Additionally, Dr. Jacobson's expert report identified that Foster reached MMI of her right shoulder on September 9, 2015. Based on the three events stated in Iowa Code section 85.34(1), the Court agrees with the Commission that Foster achieving MMI was the first to occur and controls the healing period and temporary benefits. The Commission reviewed all of the evidence before it and that evidence is substantial enough to support the agency decision.

Therefore, Foster met her burden of proof for entitlement to healing period benefits from April 18, 2014 through September 9, 2015. Foster's work restrictions limited her ability to obtain prior employment that was substantially similar to the work she did at East Penn.

Next, Petitioners argue that Foster is not entitled to permanent partial disability benefits because she failed to offer any evidence that restrictions related to her cervical injury were separate from her work-related injury. (Pets. Br. 12). Similar to Petitioners argument regarding temporary disability benefits, Petitioners contend that Foster would have remained employed with East Penn but for her unrelated cervical injury. *Id.*

As discussed above, the record as a whole reflects a distinction between Foster's cervical injury and right-shoulder injury as of April 18, 2014. Wardlow stated in her notes that "50% of pain

comes from the neck and 50% of pain comes from the shoulder.” (Cert. Rec. Part 2, p. 53). Petitioners are only liable for the work-related injury. The Court will also not entertain the hypothetical situation where Foster would have remained employed with East Penn but for the unrelated cervical injury. The Court’s duty is to review the record and facts that are before it.

The Commission is in the position to weigh the evidence presented and will be affirmed if there is substantial evidence in support of the Commission’s findings. The record does reflect that Dr. Jacobson distinguished between Foster’s work-related right-shoulder injury and her non-work-related cervical injury when implementing work restrictions, assessing if surgery was appropriate, and assessing when Foster reached MMI. The individual evidentiary situations discussed above are but parts of the whole, that alone, may or may not be sufficient but together they are. Evidence in support of the Commissioner’s decision is not insubstantial merely because it would have supported contrary inferences; nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it. *City of Hampton v. Iowa Civil Rights Comm’n*, 554 N.W.2d 532, 536 (Iowa 1996). Furthermore, when the Court reviews factual questions delegated by the legislature to the Commissioner such as the one here, the question before the Court is not whether the evidence might support different findings than those made by the Commissioner, but whether the evidence supports the findings actually made. *St. Luke’s Hosp.*, 604 N.W.2d at 649. Thus, although there may be evidence here to support a different finding, there clearly is substantial evidence in the record to support the findings made by the Commissioner that Foster was incapable of returning to substantially similar employment through the date of MMI, entitling her to temporary benefits, and that Foster’s entitlement to PPD benefits began on September 10, 2015.

For their third point of contention, Petitioners argue that it was improper for the Commissioner to award penalty benefits to Foster because East Penn’s delay in payment was due

to its performance of a reasonable investigation of medical evidence. (Pets. Br. 13). An employee is entitled to additional benefits when weekly compensation benefits are not fully paid when due, unless the employer shows reasonable cause or excuse for the delay or denial. *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. *Kiesecker v. Webster City Meats, Inc.*, 528 N.W.2d 109 (Iowa 1995). A reasonable basis for denial of the claim exists if the claim is “fairly debatable.” *Christensen*, 554 N.W.2d at 260. However, an employer must assert facts which the commissioner could reasonably find that the claim was “fairly debatable.” *Meyers v. Holiday Express Corp.*, 557 N.W.2d 502 (Iowa 1996). The commissioner may impose a penalty in an amount up to 50% of the amount unreasonably delayed or denied. *Christensen*, 554 N.W.2d at 261.

After reviewing the record as a whole, the Court concludes there is evidence that Foster failed to distinguish whether her work restrictions were for her work-related right shoulder injury or her unrelated cervical injury. However, there is substantial evidence that agrees with the Commissioner that Dr. Jacobson was treating Foster only for her right-shoulder injury as of April 18, 2014. As of that date, the liability for at least temporary benefits was not fairly debatable. Petitioners began issuing benefits on December 17, 2014. The approximately eight month delay in benefits is unreasonable and warrants the imposition of penalty benefits.

Therefore, Petitioners did not have a “reasonable excuse” for a delay in payment, and the Deputy Commissioner did not improperly award penalty benefits. Because the Court finds that the Commission’s decisions were supported by substantial evidence, the Commission’s award of penalty benefits to Foster was not the product of illogical reasoning.

Therefore, due to the expert report by Dr. Jacobson stating when Foster reached MMI for her right shoulder, permanent restrictions, IME provided by Dr. Kirkland, and testimony regarding future employment, the Court concludes there is substantial evidence in the record to support the Commission's conclusion that Foster met her burden to prove that she was entitled to temporary and permanent partial disability benefits for her right shoulder. Foster is entitled to permanent partial disability benefits from September 10, 2015, through November 27, 2020. Foster is further entitled to the award of penalty benefits based on Petitioners late payment of benefits.

B. Whether Foster defaulted on appeal by not filing a response to Petitioners' appeal to this Court.

Petitioners argue that they should be granted judgment because Foster defaulted on appeal. According to Iowa Rule of Appellate Procedure 6.1202, "when a party fails to comply with an appellate deadline, the attorney will be assessed a fee." Additionally, "when a party to an appeal fails to follow or respond to an appellate court order, the court may dismiss the appeal or impose a penalty." Iowa R. App. P. 6.1202(6).

The rules of civil procedure shall be applicable to proceedings for judicial review of agency action. Iowa R. Civ. P. 1.1601. According to the Iowa Rules of Civil Procedure, the respondent shall, within 20 days from the date of personal service or mailing of a petition for judicial review, serve upon petitioner and within a reasonable time thereafter file a motion or answer. Iowa R. Civ. P. 1.1602. Any party who participated in the hearing forming the basis of the appeal and who wishes to participate in the appeal must file an appearance with the district court within 45 days of the filing of the review petition. Iowa Code § 17A.19(2).

Foster's attorney, Rolands, appeared before both the Deputy Commissioner and Commissioner but did not file a motion or answer to the Petition for Judicial Review filed by Petitioners. Rolands did appear before the Court during the hearing on this matter. Rolands has not

withdrawn as Foster's attorney and still receives electronic notifications regarding this matter. Rolands stated to the Court that an estate was not open. Rolands stated that she believed a response was not mandatory because the appeal is based on the certified agency record, which is before the Court.

As discussed in the subsection below, an estate may be opened yet and a family member dealing with Foster's claim may have someone substitute the decedent with an appropriate representative. Because we may be premature in determining how the estate will progress, dismissal of the underlying Petition would be inappropriate at this time. Attorney Rolands has not abandoned the appellate process on behalf of her deceased client and potential estate. She is in an unusual position without a client and without an appropriate representative. The Court is unaware of authority which demands dismissal of the case on judicial review so in the abundance of caution and in the discretion of the Court, time will be allowed to see if a representative is timely appointed under Iowa law. The Appellate Procedure rule Petitioners cite in their brief is discretionary for the penalties the Court will impose.

C. Whether the underlying Petition in this case is now moot because an estate has not been opened after Foster's death.

Petitioners contend that all issues raised within Foster's original Petition are moot since Foster has "failed to substitute the decedent with an appropriate representative within a reasonable amount of time." (Pets. Br. 6). Petitioners cite Iowa rule of Civil Procedure 1.221 to support their argument. Iowa Rule of Civil Procedure 1.221 states that "[a]ny substitution of legal representatives or successors in interest of a deceased party, permitted by statute, must be ordered within two years after the death of the original party." Petitioners further contend that the party seeking substitution "*must* make such substitution within a reasonable amount of time, even if it's less than two years since the death of the decedent." *Id.* (emphasis added).

Our legislature has expressly stated that an acceptable time for substitution is two years. Iowa R. Civ. P. 1.221. The Court does not need to turn to persuasive authority from other states on what the appropriate time to substitute a party. Iowa does not follow a totality of circumstances review that the State of Kansas uses. *Id.* This Court has a bright line time restriction for the substitution of parties and opening an estate for the purposes of this appeal, which is two years. Although the Court agrees with Petitioners that an estate should have been opened sooner, it is not a legal requirement at this time. A party or legal representative must be substituted within two years after Foster's death.

Petitioners correctly state that interest continues to run for unpaid judgments from the Iowa Industrial Commission. Foster has yet to be substituted by a legal representative and Petitioners did not have a party to pay the ordered benefits stated in the Appeal Decision. However, in the interests of justice the Court concludes that Petitioners should not be assessed a penalty or interest on the unpaid benefits from November 27, 2020 to when a legal representative is substituted or an estate is opened on behalf of Foster. That is incentive for Karen Foster's family to evaluate the current situation in regards to an estate and concluding her affairs.

Therefore, the Court orders that the time of delay from Foster's death until the possible opening of an estate or naming of a legal representative for Foster on or before November 27, 2022 will not negatively impact Petitioners in regards to payment of interest or penalty fees. If an estate is opened and a representative appointed the attorneys will prepare a final payment schedule for court approval taking into account that the delay is assessed to the Foster Representative for their default on this appeal and no penalty or interest is due and owing for that time period (Date of death-Substitution). If no representative is named by November 27, 2022, the Petition previously filed on behalf of the Claimant before her death, should be dismissed.

IV. CONCLUSIONS AND DISPOSITIONS

For all the reasons set forth above, the Court concludes the Commission's finding that Foster sustained 65% industrial disability as a result of the work injury and is entitled to receive temporary disability benefits from April 18, 2014, through September 9, 2015, is supported by substantial evidence. The Court further orders that if an estate is timely opened for Foster before November 27, 2022 Petitioners will pay benefits to the estate. The Court will not impose any penalty fees for benefits not paid to Foster from the date of her death, November 27, 2020, until the estate is opened. If an estate is not opened before November 27, 2022 then Foster will default and the case will be dismissed.

IT IS THE ORDER OF THE COURT that the Iowa Workers' Compensation Commission's decision is **AFFIRMED in all regards.**

Court costs are assessed in full to the Petitioners.



State of Iowa Courts

Case Number
CVCV061871

Case Title
EAST PENN MANUFACTURING CO INC ET AL VS KAREN
FOSTER
Type: OTHER ORDER

So Ordered

William P. Kelly, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2021-12-16 13:10:08