BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ERIC ZALAZNIK, Claimant, vs. JOHN DEERE DUBUQUE WORKS, Employer, Self-Insured, Defendant.	File No. 5066386.02 A P P E A L D E C I S I O N Headnotes: 1402.20; 1402.40;1703; 1801; 1803; 2206; 2501; 2502; 2905; 2907; 4000.2

Defendant John Deere Dubuque Works of Deere & Company, self-insured employer, appeals from a review-reopening decision filed on October 13, 2022, and from a ruling on motion for rehearing filed on November 3, 2022. Claimant Eric Zalaznik cross-appeals. The case was heard on July 12, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 2, 2022.

In the review-reopening decision, the deputy commissioner found claimant met his burden of proof to establish that the symptoms he was experiencing in 2021 were causally related to the original September 5, 2017, work injury. The deputy commissioner found claimant proved he sustained a change of physical condition after the original arbitration proceeding. The deputy commissioner found the doctrine of issue preclusion applies to the opinions of Robert Broghammer, M.D., and, as a result, the deputy commissioner found Dr. Broghammer's opinions are not credible on the issues of causation, permanent impairment, and claimant's need for surgery in August 2021. The deputy commissioner found claimant sustained 37 percent functional impairment, less the 19 percent functional impairment awarded in the January 11, 2022, appeal decision, for an additional 18 percent functional impairment, which entitles claimant to an award of 90 weeks of permanent partial disability benefits. The deputy commissioner found claimant was entitled to healing period benefits from August 19, 2021, through December 12, 2021, based on defendant's stipulation that if claimant established causation in the review-reopening proceeding, claimant would be entitled to healing period benefits for that time period. The deputy commissioner found defendant is responsible for claimant's medical expenses itemized in Exhibit 4. The deputy commissioner found defendant is entitled to a credit under Iowa Code section 85.38(2) in the amount of $7,146.93. The deputy commissioner found that pursuant to Iowa

Code section 85.39, claimant is entitled to reimbursement from defendant for the cost of the independent medical examination (IME) of claimant performed by David Segal, M.D. The deputy commissioner found claimant is entitled to receive penalty benefits from defendant in the amount of $5,700.00 for defendant's failure to timely pay healing period benefits from August 19, 2021, through December 12, 2021, but the deputy commissioner found claimant is not entitled to penalty benefits for defendant's alleged failure to timely pay permanent partial disability benefits. The deputy commissioner found claimant is not entitled to an award for attorney fees based on defendant's denial of requests for admission. The deputy commissioner found that pursuant to rule 876 IAC 4.33, defendant should reimburse claimant for claimant's costs set forth in Exhibit 7. In the ruling on motion for rehearing, the deputy commissioner found claimant is entitled to reimbursement from defendant for the medical mileage itemized in Exhibit 5.

On appeal, defendant asserts the deputy commissioner erred in applying the doctrine of issue preclusion to Dr. Broghammer's opinions. Defendant asserts the deputy commissioner erred in finding claimant proved his 2021 back complaints are causally related to the September 5, 2017, work injury, and defendant asserts the deputy commissioner erred in finding claimant sustained a change of condition after the arbitration proceeding which entitles claimant to receive additional healing period benefits and additional permanent partial disability benefits. Defendant asserts the deputy commissioner erred in finding claimant is entitled to penalty benefits, and defendant asserts the deputy commissioner erred in finding defendant failed to perform a reasonable investigation and evaluation of claimant's claim.

On cross-appeal claimant asserts the deputy commissioner erred in finding claimant is not entitled to receive penalty benefits for defendant's failure to timely pay permanent partial disability benefits. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to an award of attorney fees for defendant's denial of requests for admission. Claimant asserts the remainder of the decision should be affirmed.

Those portions of the proposed review-reopening decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the review-reopening decision filed on October 13, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits from August 19, 2021, through December 12, 2021. I affirm the deputy commissioner's finding that defendant is entitled to a credit under Iowa Code section 85.38(2) in the amount of $7,146.93. I affirm the deputy commissioner's finding that defendant is responsible for claimant's medical expenses and medical mileage itemized in Exhibits 4 and 5. I affirm the deputy commissioner's

finding that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement from defendant for the cost of Dr. Segal's IME. I affirm the deputy commissioner's finding that claimant is entitled to penalty benefits in the amount of $5,700.00 for defendant's failure to timely pay healing period benefits from August 19, 2021, through December 12, 2021. I affirm the deputy commissioner's finding that claimant is not entitled to an award of attorney fees for defendant's denial of requests for admission. I affirm the deputy commissioner's finding that pursuant to rule 876 IAC 4.33, defendant should reimburse claimant for claimant's costs set forth in Exhibit 7.

With the following additional findings and analysis, I reverse the deputy commissioner's finding that the doctrine of issue preclusion applies to Dr. Broghammer's opinions. I affirm the deputy commissioner's finding that claimant proved his 2021 symptoms are causally related to the September 2017 work injury, and I affirm the deputy commissioner's finding that claimant sustained a change of physical condition after the original arbitration proceeding. I affirm the deputy commissioner's finding that claimant sustained 37 percent functional loss, less the 19 percent functional loss awarded in the January 11, 2022, appeal decision, for an additional 18 percent functional loss, which entitles claimant to receive 90 additional weeks of permanent partial disability benefits, commencing on February 19, 2022. I reverse the deputy commissioner's finding claimant is not entitled to penalty benefits for defendant's failure to timely pay permanent partial disability benefits.

I. Causation and Change of Condition

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*" Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

When considering expert testimony, the trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the factfinder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The deputy commissioner found the doctrine of issue preclusion applies to Dr. Broghammer's opinion concerning claimant's permanent impairment in this proceeding and, as a result, the deputy commissioner found Dr. Broghammer's opinions regarding causation, permanent impairment, and claimant's need for surgery in August 2021, are not credible. Defendant asserts the deputy commissioner mistakenly concluded defendant was trying to re-litigate the earlier finding that claimant sustained a work-related back injury. In its post-hearing brief, filed on August 2, 2022, defendant argued that claimant's recent problems in 2021 relate to the natural degenerative process and are not proximately caused by the 2017 injury. Defendant did not challenge causation with respect to the 2017 injury or 2018 need for surgery.

The doctrine of res judicata includes claim and issue preclusion. Pavone v. Kirke, 807 N.W.2d 828, 835 (Iowa 2011). Under issue preclusion or collateral estoppel, if a court has decided an issue of fact or law necessary to the judgment, the same issue cannot be relitigated in a subsequent proceeding. Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 572 (Iowa 2006). The purpose of issue preclusion is to protect litigants from relitigating identical issues with identical parties or with individuals having a significant connected interest to the prior litigation and to "further 'the interest of judicial economy and efficiency by preventing unnecessary litigation.'" Id. Under claim preclusion, "a valid and final judgment on a claim bars a second action on the adjudicated claim or any part thereof." Pavone, 807 N.W.2d at 835. The purpose of claim preclusion is to prevent a party from splitting or trying his or her case piecemeal, thus requiring the party to present his or her entire claim or defense in the case on trial. Lambert v. Iowa Dep't of Transp., 804 N.W.2d 253, 257 (Iowa 2011).

Issue preclusion protects a litigant from having to relitigate identical issues. In the original arbitration proceeding in this matter, the parties stipulated claimant sustained a work-related injury to his back in September 2017. This case concerns whether claimant's 2021 complaints and need for surgery are causally related to the September 2017 injury and whether claimant has sustained a change of condition since the original arbitration hearing. Defendant asserts claimant's symptoms in 2021 and surgery are not related to the original September 2017 injury. The issues are not identical. The doctrine of issue preclusion does not apply.

While I disagree with the deputy commissioner's finding that the doctrine of issue preclusion applies to Dr. Broghammer's opinion, I agree with the deputy commissioner's finding that Dr. Broghammer's opinions are not persuasive. Following a records review only, Dr. Broghammer, an occupational medicine physician, issued a report on June 25, 2021, opining to a reasonable degree of medical certainty, that claimant's problems that began in February 2021 were not caused by his employment. (Exhibit E, page 64) In reaching his conclusion, Dr. Broghammer noted,

> [f]irst and foremost, there is no evidence of any industrial activities or alleged industrial injuries that caused his recurrent symptoms in February 2021. On a more likely than not basis, these symptoms are due to the natural progressive degenerative condition of the worker's lumbar spine which has occurred naturally with the aging process. I again refer you to the attached reference list. Simply put, just because he had an accepted injury to the lumbar spine in 2017 resulting in surgery, does not mean that the ongoing degenerative process of the lumbar spine would then therefore be related to this remote injury. As stated in a previous Reviewer's Note, there is no reason not to think that the need for surgery could be just as easily due to the original surgery which occurred back in 2015 with Dr. Parvin. In my medical opinion, the accepted injury of 2017 was really a nonevent and in my medical opinion the act of stepping down off of something and jarring one's back would not rise to the level of causing anything more than a lumbar strain or sprain and certainly would not cause a disc extrusion nor would it rise to the level of requiring surgery. In my medical opinion, the 2017 "injury" was really more of a lumbar sprain with subsequent workup demonstrating a disc extrusion, which was a consequence of the degradation of the worker's lumbar spine due to the natural degenerative process and not the alleged 2017 injury.

(Ex. E, pp. 64-65)

Dr. Abernathy, a treating neurosurgeon who performed surgery on claimant in 2018, responded to a letter from claimant's counsel on July 14, 2021, agreeing the September 2017 work injury, including the January 2018 surgery, was a substantial contributing factor in the progression of claimant's low back condition which led him to refer claimant to the University of Iowa Hospitals and Clinics ("UIHC"). (Ex. 1, p. 18) Dr. Abernathy further agreed that the need for ongoing treatment and additional surgery is "more likely than not a continuation of the September 5, 2017, work-related low back injury." (Ex. 1, p. 19)

Matthew Howard, M.D., a treating neurosurgeon at UIHC who performed surgery on claimant, issued a letter on January 21, 2022, opining:

> This patient had sustained work-related injuries, and as a result of the work-related injuries, he underwent surgery with Dr. Abernathy in 2018.

> Over time, he developed progressive symptoms that necessitated us performing an L4-S1 decompression and spinal fusion operation on 08/19/2021.
>
> It is more likely than not, that the work-related injury and the surgery that Dr. Abernathy performed, were substantial contributing factors to the need for the surgery performed in 2021. It is not unusual, for patients in this situation where they have sustained an injury and required decompression surgery, that they would subsequently require a second operation involving a fusion. It is common for older patients to develop degenerative changes in their spine. The clinical significance of these changes can be exacerbated by an injury and by decompression surgery. Many patients with degenerative changes who have no significant symptoms, do not require surgery. In this situation, the patient has degenerative changes, but the necessity for surgery was brought on by the combination of the injury and the prior decompression surgery.

(Ex. 1, p. 22)

David Segal, M.D., a neurosurgeon, conducted an IME for claimant and issued his report on April 7, 2022. (Ex. 1, p. 31) Dr. Segal examined claimant and reviewed his medical records. Dr. Segal found claimant's medical records showed claimant's function deteriorated after his work injury and he experienced a flare-up of symptoms in approximately January 2021, and his symptoms progressed more rapidly. (Ex. 1, p. 44) Dr. Segal opined claimant's September 5, 2017, work injury and the subsequent surgery performed by Dr. Abernathy in 2018 were substantial contributing factors in claimant's need for surgery in August 2021. (Ex. 1, pp. 56-58) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Segal opined claimant sustained 37 percent permanent impairment of the body as a whole and found claimant reached maximum medical improvement on February 19, 2022. (Ex. 1, pp. 59-61)

After reviewing additional medical records, Dr. Broghammer issued a supplemental report on May 6, 2022, again opining the work injury was not a substantial factor in causing claimant's need for surgery in 2018, and opining claimant did not sustain permanent impairment related to the work injury. (Ex. I, pp. 76-88)

As neurosurgeons, Drs. Abernathy, Howard, and Segal have superior training compared to Dr. Broghammer, an occupational medicine physician. Drs. Abernathy and Howard both treated claimant and performed surgery on claimant's spine. Dr. Broghammer performed an IME for defendant without personally examining claimant. Dr. Howard is the Chair of the Department of Neurosurgery at UIHC, a premier tertiary care facility.

In his 2021 reports, Dr. Broghammer opined claimant's symptoms in February 2021 were more likely than not due to the natural progressive degenerative condition of claimant's lumbar spine caused by the aging process. (Ex. E, p. 64) Dr. Broghammer provides no support for his bare assertion in that regard. Dr. Broghammer did not even examine claimant. He then addressed causation with respect to claimant's September 5, 2017 work injury and need for surgery in 2018. (Ex. E, pp. 64-65) Those issues were the subject of the prior arbitration proceeding and resulted in final agency action and are not subject to challenge in this review-reopening action. I do not find Dr. Broghammer's opinion persuasive. I find the opinion of Dr. Segal, as supported by the opinions of treating neurosurgeons, Drs. Abernathy and Howard, to be the most persuasive. I affirm the deputy commissioner's finding that claimant proved his 2021 symptoms and need for surgery were causally related to the September 5, 2017, work injury.

Claimant testified at hearing his symptoms became worse after the original arbitration hearing. This is supported by claimant's medical records. Dr. Segal opined claimant sustained 37 percent permanent impairment when he examined claimant in 2022, an 18 percent increase in functional impairment from the arbitration proceeding. Dr. Segal is the only physician who provided an impairment rating in this case. I find claimant proved he sustained a change of physical condition, entitling claimant to an additional 90 weeks of permanent partial disability benefits, commencing on February 19, 2022.

II. Penalty Benefits for Failure to Pay Permanent Partial Disability Benefits

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's

entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the 11th day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of the delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

The deputy commissioner found claimant is not entitled to an award of penalty benefits for defendant's failure to pay permanent partial disability benefits, finding defendant had reasonable grounds to believe claimant was not entitled to additional permanent partial disability benefits. In reaching that conclusion, the deputy commissioner noted claimant returned to his job as an inspector following the August 2021 surgery without restrictions and his hourly earnings increased pursuant to the collective bargaining agreement. Claimant asserts the deputy commissioner erred in finding he is not entitled to additional penalty benefits because defendant did not have reasonable grounds to believe claimant was not entitled to additional permanent partial disability benefits.

Defendant originally authorized treatment with Drs. Abernathy and Howard. After claimant underwent surgery, defendant did not contact Dr. Howard to investigate the case, even after receiving his causation opinion. (Ex. 1, p. 22) Likewise, defendant did

not contact Dr. Abernathy to discuss current symptoms, even after receiving his causation opinion. (Ex. 1, p. 19) I do not find defendant's conduct reasonable. I find claimant is entitled to an additional $1,800.00 in penalty benefits based on defendant's failure to pay permanent partial disability benefits, to deter defendant and other employers from engaging in similar conduct in the future.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on October 13, 2022, and the ruling on motion for rehearing filed on November 3, 2022, are affirmed in part, and reversed in part, with my additional and substituted analysis.

Defendant shall pay claimant healing period benefits from August 19, 2021, through December 12, 2021, at the weekly rate of seven hundred twelve and 46/100 dollars ($712.46).

Defendant shall pay claimant 90 weeks of permanent partial disability benefits, commencing on February 19, 2022, at the weekly rate of seven hundred twelve and 46/100 dollars ($712.46).

Pursuant to Iowa Code section 85.38(2), defendant shall receive credit in the amount of seven thousand one hundred forty-six and 93/100 dollars ($7,146.93).

Defendant shall pay accrued benefits in a lump sum together with interest 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 two percent.

Defendant shall pay claimant five thousand seven hundred and 00/100 dollars ($5,700.00) in penalty benefits for defendant's failure to timely pay healing period benefits, and defendant shall pay claimant one thousand eight hundred and 00/100 dollars ($1,800.00) in penalty benefits for defendant's failure to timely pay permanent partial disability benefits.

Defendant shall reimburse claimant for the cost of Dr. Segal's IME.

Defendant shall pay claimant's medical bills and medical mileage set forth in Exhibits 4 and 5.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs set forth in Exhibit 7, and defendant shall pay the cost of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 2nd day of February, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)

Dirk Hamel (via WCES)