IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STEVEN J. BELL, JR., Petitioner, vs. 3E, a/k/a ELECTRICAL & ENGINEERING CO., and TRAVELERS INDEMNITY/CT, Respondents.	))))))))))	Case No. CVCV056348 **ORDER DENYING RENEWED MOTION TO DISMISS, REVERSING AND REMANDING CASE TO AGENCY**

Before the court is Petitioner Steven J. Bell, Jr.'s (Steven) petition for judicial review of final agency action by the workers' compensation commissioner (the commissioner) in a contested case concerning alleged entitlement to workers' compensation benefits arising from an injury to Steven's left wrist, left shoulder, and low back arising out of and in the course of Steven's employment with Respondent 3E Electric & Engineering, Co. (3E), on March 19, 2010.

Oral argument was held on November 30, 2018. Steven was represented by attorney Mark S. Soldat. 3E and Travelers Indemnity/Ct, (together, Travelers), were represented by attorney James M. Ballard. At oral argument Mr. Ballard moved to dismiss. Oral argument was not reported.

Upon careful review of the agency record and the parties' filings and in light of the relevant law, the court finds the following facts, reaches the following conclusions, and enters the following order reversing and remanding the final agency decision by the commissioner regarding the first and second issues Steven raises below for the following reasons. The court also denies Travelers' oral motion to dismiss.

BACKGROUND FACTS AND PROCEEDINGS

On May 14, 2013, Steven filed an original notice and petition with the agency for an injury to his left upper extremity (including wrist and shoulder), and low back. (05/14/13 original notice and petition). On May 16, 2013, 3E and Travelers filed an answer admitting Steven sustained an injury on March 19, 2010. The issues were whether Steven was entitled to additional permanent partial disability compensation, penalty benefits, alternate care, reimbursement or taxation of costs of Dr. Kuhnlein's examination and report fees or just his report fees, and taxation or re-taxation of agency and court costs.

On September 14, 2016, a deputy workers' compensation commissioner, (the deputy), filed a review-reopening decision. In the decision, the deputy found the following facts relevant to this judicial review:

> The claimant was 48 years old at the time of the hearing. His educational background includes graduation from high school and coursework at DMACC from 1994 to 1997. His work history includes working as a plumber's apprentice, inside sales position at a marketing firm, telephone cable technician, and volunteer firefighter.
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> At the time of his injury on March 19, 2010, claimant was working a sales position with the defendant employer. This work was primarily sedentary as he sat at a desk taking orders. Prior to accepting the inside sales position in May of 2002, claimant worked counter sales for five and a half years. Claimant asserts that he has some difficulties performing his current job.
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> The claimant continues to work for 3E. He continues to work in sales and has taken on additional duties of working the sales counter in addition to inside sales. He is earning more than before the original arbitration decision, and is working more hours. (Exhibit E, page 8)
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> The claimant has had no additional restrictions or limitations on his physical activities imposed since the time of the original hearing. Since the original hearing, the claimant has had no significant treatment for the injury of March 19, 2010. The claimant was released to work without restrictions on November 2, 2011.

The claimant saw John D. Kuhnlein, D.O., for an independent medical evaluation on December 4, 2013 (January 20, 2014 report). (Ex. 3, p. 226) This was the second evaluation by Dr. Kuhnlein of the claimant. On February 16, 2016, the claimant was examined by Dr. Kuhnlein a third time. (Ex. 3, p. 268) Dr. Kuhnlein saw nothing to change his earlier opinions as the lumbar impairment was unchanged, other than that the left shoulder had actually improved. (Ex. 3, p. 274) As to cervical complaints there is no medical evidence to support any. Even Dr. Kuhnlein could, or would, not connect any cervical complaints to work. (Ex. 3, p. 278) There has not been a significant change economically or physically to justify a review reopening . . . .

The claimant seeks reimbursement for Dr. Kuhnlein's IME's from December 4, 2013, ($2,525.00), and February 16, 2016, ($1,542.50).

The claimant's weekly benefit rate was established by the prior arbitration decision at $593.69 per week.

The deputy further concluded as a matter of law that:

The issue is whether claimant is entitled to additional permanent disability benefits via a claim for review-reopening . . . .

The claimant has not had a *substantial change* of economic condition as evidenced by his continued employment with the same employer following this work injury. Also it was not established that he had *substantial change* in physical impairment or disability for better or worse.

The claimant chose to get evaluations/examinations to establish whether the injuries arose out of and in the course of employment, and whether they caused permanent impairment or disability. The claimant seeks reimbursement for Dr. Kuhnlein IME's from December 3, 2013 ($2,525.00) and February 16, 2016 ($1,542.50). Claimant is allowed reimbursement by statute for only one examination which here shall be the earlier and more expensive IME of $2,525.00.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997) . . . .

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what

> care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983)....
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> The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior and less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.
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> Claimant seeks an order of alternate medical care for the neck (cervical conditions) which even Dr. Kuhnlein's IME's do not causally connect to the work injury. The request must be denied . . . .
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> In Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:
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> > Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis "for denial of the claim exists if the claim is "fairly debatable . . . ."
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> There does not appear to be unreasonable delay or unreasonable underpayment here. It is not even at this point totally clear exactly what claimant thinks was unpaid or underpaid, and why that is the case. The record does not support a penalty.

(09/14/14 Review-Reopening Decision) (emphasis added).

On September 23, 2016, Steven filed an application for rehearing. (09/23/16 Injured Worker's Rehearing Application). It was deemed denied when the deputy did not rule on it within 20 days after its filing. 876 IAC r. 4.24

On October 14, 2016, Bell filed a notice of appeal to the commissioner. (10/14/16 Notice of Appeal.) On April 10, 2018, the commissioner filed an appeal

decision. (04/10/18 Appeal Decision.) The commissioner affirmed and adopted the deputy's review-reopening decision.

On April 18, 2018, Steven filed an application for rehearing with the commissioner. (04/18/18 Rehearing Application.) It was deemed denied when the deputy did not rule on it within 20 days after its filing. Iowa Code § 17A.16(2).

On May 22, 2018, Steven filed the instant petition for judicial review. (05/22/18 Petition).

APPLICABLE LAW

The Iowa administrative procedure act governs appellate review of agency actions. Iowa Code section 17A.19(10) provides that the court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other relief if it determines that a party's substantial rights have been prejudiced because of the agency action under enumerated circumstances. Iowa Code §17A.19(10)(*a*)-(*n*).

In exercising its judicial review power, the district court acts in an appellate capacity. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). In that capacity, the courts must give deference to the commissioner's appeal decision in accordance with the standards stated in Iowa Code section 17A.19(10)(*a*) – (*n*).

ANALYSIS

Steven asserts four issues. First, whether the commissioner should have reopened the underlying workers' compensation case pursuant to Iowa Code section 86.14(2) because the agency applied the wrong legal standard. Second, whether the commissioner should have approved alternate care for Steven's back injury. Third, whether the commissioner should have awarded Steven the expenses

of his 2016 IME with Dr. Kuhnlein or alternatively should have taxed the 2016 report fees to Steven. Finally, whether the commissioner should have imposed penalties for Travelers' alleged delay in payments following the 2011 decision. Because this matter must be remanded for reconsideration of Steven's petition for review-reopening under the proper legal standard, and for reconsideration of the agency's alternate care decision, the court reaches only the first and second issues.

A. Review-Reopening. Review-reopening law is contained in the following two statutes:

> In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants and end to, diminishment of, or increase of compensation so awarded or agreed upon.

Iowa Code § 86.14(2).

> An award for payments or an agreement for settlement provided by section 86.13 for benefits under this chapter or chapter 85A or 85B, where the amount has not been commuted, may be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under the award of agreement.

Iowa Code § 85.26(2).

The main contention between the parties is whether Steven satisfied the burden of proof for granting a review-reopening petition. The commissioner held that he did not, finding that he failed to demonstrate a "substantial change" in his physical and/or economic condition from the time of the 2011 decision.

Steven refutes this on two grounds. First, a substantial change is the wrong standard for determining whether a review-reopening petition should be granted. Second, there is sufficient evidence to show a change in Steven's condition, both physical and economic.

Steven correctly asserts that the commissioner applied the wrong standard. Case law regarding section 86.14(2) petitions shows that a claimant can take a wide variety of routes to meet his/her burden of proof. These include but are not limited to demonstrating (1) a worsening change in condition; (2) a temporary disability has become permanent; (3) critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior . . . award; and (4) a scheduled injury later caused an industrial disability.[1]

Regarding the second ground—substantial evidence to show a change in Steven's condition—there appears to be valid confusion about what exactly the commissioner found regarding Steven's condition and the reasoning behind those factual findings. A number of medical professionals were involved in assessing Steven's condition over several years. This conundrum is exacerbated by the deputy's arbitration decision, which does not clearly state which assessments the deputy was relying upon and for what reasons. Remand is also appropriate for this reason.

It is well-established that application of erroneous legal principles mandates reversal. *McSpadden v. Big Ben Coal Company*, 288 N.W.2d 181, 185, 186 (Iowa 1980). The same is true for agency decisions that do not clearly state the facts

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[1] *Kohlhaas v. Hogslat, Inc.*, 777 N.W.2d 387, 392-93 (Iowa 2009). Yet the Iowa Supreme Court in *Kohlhaas* also said:

> Although we do not require the claimant to demonstrate his current condition was not contemplated at the time of the original settlement, we emphasize the principles of res judicata still apply—that the agency, in a review-reopening petition, should not reevaluate an employee'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.

found and the reasoning behind them. The court must reverse the commissioner's review-reopening decision and remand this matter to the agency for application of the appropriate standard to the record made in front of the agency, as well as for a clear statement about which assessments the deputy was relying upon and why in deciding not to grant Steven's review-reopening petition.[2]

B. **Alternate Care**. In the September 14, 2016, review-reopening decision, the deputy found no facts with respect to Steven's request for alternate care for his low back condition. This decision said in relevant part:

> On February 16, 2016, the claimant was examined by Dr. Kuhnlein for a third time . . . . Dr. Kuhnlein saw nothing to change his earlier opinions, other than that the left shoulder actually had improved . . . . As to the cervical complaints there is no medical evidence to support any. Even Dr. Kuhnlein could, or would not connect any cervical complaints to work.

The deputy further concluded that "[c]laimant seeks an order of alternate medical care for the neck (cervical conditions which even Dr. Kuhnlein's IME's do not causally connect to the work injury). The request must be denied."

Yet in his January 20, 2014, IME report, Dr. Kuhnlein appears to question Dr. Troll's treatment of Steven for the following conditions caused by Steven's March 16, 2010, work injury:

> With respect to his low back pain, he has not had adequate medical management of this condition. It is unexplained why Dr. Troll ordered physical therapy in November, but it was not started until the same week that Mr. Bell had left wrist surgery approximately two months later. It is unexplained why Dr. Troll released him to full-duty work, given what should have been obvious circumstances surrounding his wrist surgery. After Mr. Bell recovered completely

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[2] Steven spends much time and effort arguing to the judicial review court the merits of this issue which must be addressed by the agency on remand. The court gives this information no further consideration.

> from his left wrist surgery, he would have been able to participate in a back rehabilitation program, as was noted by Dr. Troll in his January 30, 2012, dictation, but Mr. Bell has never been returned to physical therapy, not that he is able to do so. He should be returned to physical therapy. I would strongly suggest that the long gaps in therapy noted in the record be shortened significantly to bring this case to closure. I would not send him back to Dr. Troll, given the tenor of Dr. Troll's notes. I would suggest a four-week course of aggressive physical therapy directed to his lumbar spine. Mr. Bell should be capable of participating now. He indicated that he had a problem with the occupational therapy after his left wrist surgery, but after he started, it drastically improved his left wrist. He may have initial problems with his low back, but aggressive physical therapy would be to his advantage.
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> If the aggressive physical therapy is not successful, I would then suggest that he be evaluated for participation in the University of Iowa Chronic Pain Program. If he is a candidate, and participates, he would be at maximum medical improvement for his low back at the end of that program.

(01/20/14 IME Report at pp. 11-12; 03/04/16 IME Report at p. 6).

Under this record, the commissioner's denial of Steven's request for alternate care must be reversed and remanded because the commissioner did not explain why he rejected or disregarded the above-stated material information and recommendation for alternate care provided by Dr. Kuhnlein which appears under this record to have been uncontroverted.

The court does not address the remaining issues. These issues may or may not arise on remand depending upon the agency's ultimate conclusion regarding the grant or denial of Steven's review-reopening petition and its reconsideration of the alternate care request.

CONCLUSION

This matter must be remanded to the agency for reconsideration of the review-reopening issue and the alternate medical care issue as discussed in greater detail above.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the commissioner's final decision is **REVERSED** and **REMANDED** for reconsideration under the proper legal standard of the agency's decision denying Steven's petition for review-reopening.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the commissioner's final decision is **REVERSED** and **REMANDED** for reconsideration of the agency's decision denying Steven's request for alternate medical care.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that 3E and Travelers' oral motion to dismiss is **DENIED**.

Costs on judicial review are assessed equally to 3E and Travelers.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV056348	STEVEN BELL VS 3E ET AL

So Ordered

Jeanie Vaudt, District Court Judge,
Fifth Judicial District of Iowa