

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RATHBUN REGIONAL WATER
ASSOCIATION, INC. and
DAKOTA TRUCK
UNDERWRITERS,

Petitioners/Counterclaim
Respondent,

vs.

MARK MOSLEY,

Respondent/Counterclaim
Petitioner.

Case No. CVCV060580

ORDER ON JUDICIAL REVIEW

Petitioners Rathbun Regional Water Association, Inc, and Dakota Truck Underwriters (together, Rathbun) filed a petition for judicial review and Respondent Mark Mosley (Mosley) filed a counterclaim petition for judicial review of a decision of the Iowa workers' compensation commissioner (the Commissioner) finding Mosley sustained left leg and foot, right hip and back injuries causing him to be permanently and totally disabled, but denied ordering a penalty be paid by Rathbun.

Telephonic oral argument on the cross Petitions was held on March 10, 2021. Appearing for Rathbun was attorney Rachael Neff. Appearing for Mosley was attorney Corey Walker. Oral argument was reported.

Upon review of the cross Petitions and the record in light of the relevant law, and after considering the respective arguments of counsel, the court finds the following facts, reaches the following conclusions and issues the following Order.

BACKGROUND FACTS AND PROCEEDINGS

A prior final agency decision was entered in this case on August 30, 2016. In that decision the Commissioner (1) affirmed that Mosley sustained a right hip injury because of his work injury related left leg condition, and (2) Mosley had not yet reached maximum medical improvement (MMI). An award of running healing period benefits were ordered. Petitioners did not seek judicial review of the 2016 final agency decision.

On March 10, 2017, Rathbun filed a petition for review-reopening seeking a determination that Mosley had reached MMI and requesting that the running award should stop. Mosley filed an answer and counterclaim petition seeking permanent total disability and penalty.

The arbitration hearing was held on April 5, 2018. A deputy workers' compensation commissioner (the Deputy) entered the Arbitration Decision on September 20, 2019. The Appeal Decision at issue was entered on July 17, 2020. The Commissioner affirmed the Deputy's finding that Mosely reached MMI and sustained permanent disability of his body as a whole involving his left knee, his left foot and ankle, his right hip, and his low back as a result of the November 23, 2011, work injury. Further, the arbitration finding that Mosley is permanently and totally disabled was affirmed along with the denial of penalty benefits. (07/17/20 App. Dec.).

The Commissioner discussed the various issues raised by the parties and affirmed the Deputy's "well-reasoned analysis of all of the issues raised in the review-reopening proceeding." (07/17/20 App. Dec. pp. 3-4). The Deputy's factual findings are part of the Commissioner's final agency decision.

On August 14, 2020, Rathbun filed a petition for judicial review of the July 17, 2020, appeal decision. On August 19, 2020, Mosley filed an answer and counterclaim petition for judicial review. Both parties assert that portions of the final agency decision are not supported by

substantial evidence. Mosley further contends that the final agency decision contains errors of law.

STANDARD OF REVIEW

When exercising its power of judicial review under Iowa Code section 17A.19(8), the district court acts in an appellate capacity and its review is limited to corrections of errors of law. *Second Injury Fund v. Klebs*, 539 N.W.2d 178, 179-180 (Iowa 1995). Judicial review of the Commissioner decision is not de novo and Commissioner's findings have the force of a jury verdict. *Holmes v. Bruce Motor Freight, Inc.*, 215 N.W.2d 296 (Iowa 1974). The Commissioner's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Long v. Roberts Dairy Co.*, 528 N.W.2d 122, 123 (Iowa 1995). The court must “broadly and liberally construe the commissioner’s finding to uphold, rather than defeat the commissioner’s decision.” *Second Injury Fund v. Bergeson*, 526 N.W.2d 543, 546 (Iowa 1995) (citation omitted).

The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity. Iowa Code § 17A.19(8)(a). Sections 17A.19(8)(b) and 17A.19(10)(n) authorize the district court to grant appropriate relief from agency action which is “[u]nreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.” *Sands v. Mycogen Seeds/Dow Chem.*, 686 N.W.2d 457, 465 (Iowa 2004) (“An agency’s application of the law to the facts can only be reversed if we determine such an application was “irrational, illogical, or wholly unjustifiable.”); *Wand v. Iowa Dep’t of Transp.*, 304 N.W.2d 236 (Iowa 1981) (deference is given to the agency for factual determinations). The court is not free to interfere with the Commissioner's findings where there is conflict in the evidence or when reasonable minds might disagree about the inferences to be

drawn from the evidence whether disputed or not. *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506 (Iowa 1973).

FINDINGS OF FACT

A. **Mosley's Medical Care and Expert Medical Opinions.** On November 23, 2011, Mosley sustained traumatic work injuries to his left leg, knee and ankle while working. Rathbun agrees Mosley's left leg injuries were work related and has provided Mosely medical care and weekly workers' compensation benefits for those injuries. On November 24, 2011, Mosley underwent surgery. An external fixator was placed upon his leg. (Ex. 2, p. 6). He then had a second surgery performed by Dr. Nwosa on November 28, 2011, involving placement of screws and other hardware. Mosley was discharged on December 3, 2011, to go live with his parents. He was in a wheelchair. A nurse and a physical therapist came to his parents' home to assist him.

Mosley eventually completed physical therapy and began using a walker along with the wheelchair. Once he got back on his feet, he began having right hip pain as shown by his physical therapy records on March 30, 2012, and in his doctors' records on May 9, 2012.

On May 9, 2012, Dr. Nwosa transferred Mosley's care to Dr. Meyer. Dr. Meyer recommended a third surgery. On May 22, 2012, Dr. Meyer performed a left knee arthroscopic debridement and manipulation under anesthesia and arthroscopic tricompartmental chondroplasty.

After his third surgery, Mosley began physical therapy again, along with additional medical care and treatment with Dr. Meyer. Dr. Meyer found Mosley reached MMI for his left knee as of November 9, 2015, and placed significant permanent work restrictions upon Mosley. These included no lifting of more than 20 pounds, avoiding repetitive kneeling, squatting,

climbing, no ladder climbing, doing setting work 50% of the day and/or 30 minutes off his feet for every hour of work.

On June 29, 2015, after the first arbitration hearing which occurred on March 3, 2014, Mosley had a total right hip replacement. Mosley saw Dr. Meyer on August 15, 2016, for some low back pain and left sacroiliac joint inflammation. Dr. Meyer stated this pain was “likely due to his limping from his left work-related knee pain” and recommended referral to pain management.

Mosley saw Dr. Rayburn who recommended an ablation procedure to treat Mosely’s low back pain. Dr. Meyer provided an opinion letter dated March 5, 2018, stating that because of Mosley’s abnormal gait he was “having increased low back pain in his left sacroiliac joint area” because of his original work injury related left leg injury. Dr. Meyer did not provide an MMI date for Mosley’s back or hip problems.

Mosley was sent to Dr. Kuhnlein for an independent medical evaluation (IME) both before and after the 2018 arbitration hearing. Dr. Kuhnlein’s most recent report contains his causation opinion that the work injury “lit-up” Mosley’s right hip because the gait changes caused by the significant knee injury remained the same. Dr. Kuhnlein agreed with Dr. Meyer that Mosley’s low back pain is related to the work-related knee pain. He provided a 3% whole person impairment rating for the low back injury.

Dr. Kuhnlein further determined that Mosley reached MMI as of June 29, 2016, unless he has treatment for his low back or a total knee replacement in the future. He recommended work restrictions similar to those of Dr. Meyer, but added no work on uneven ground and specifically assigned these restrictions for Mosley’s “back, hip, knee and ankle conditions.”

Rathbun sent Mosley to see Dr. Mooney on February 26, 2018. Dr. Mooney determined Mosley had "significant atrophy of the left lower extremity," his left knee is worse now than it was at the last hearing in 2014, he has significant permanent restrictions including use of an assistive device, limited walking and standing to occasional, no standing greater than 30 minutes per hour, occasionally lift up to 20 pounds, etc. Dr. Mooney did not address the causation issue concerning Mosley's hip or back problems. Dr. Mooney stated that while it is difficult for him to project Mosley's functional abilities after a total knee replacement, he felt Mosely should get better and may be able to walk without an assistive device. He determined Mosley reached MMI as of November 12, 2012.

B. Mosley's Work. Mosley returned to work for Rathbun in October 2012. He was provided an ATV gator type vehicle to get around the job site. As noted above, Mosley reached MMI on November 12, 2012. He was terminated by Rathbun effective December 5, 2012.

Since termination, Mosley looked for work as demonstrated by his job search logs and testimony. His past relevant work history is in the construction industry. When the issue of permanent restrictions came up during conversations with potential employers, employers told Mosely they could not accommodate these restrictions.

Mosely has worked extensively with Iowa Vocational Rehabilitation Services and has taken a computer class through his community college. He struggled with keyboarding because he is missing the end of his left middle finger. Mosley cannot type, does not own a computer, and does not have any computer skills. Mosely considered going back to college. Vocational expert Steve Yochum told him that was not a realistic alternative for him. Mosely's high school GPA was 2.34. He had an IQ of 97 according to his high school records.

Mosley previously owned his own construction company. It went out of business. He has no prospect of starting a new one. Even if Mosely could start a new construction business, he could not do the physical work related to construction that he once did.

The Social Security Administration (SSA) found Mosely disabled on June 27, 2014. The only income he has had since his work injury is earning \$500.00 to \$750.00 per year taking out a neighbor's dog when she is required to work overtime.

CONCLUSIONS OF LAW

A. **Whether substantial evidence supports the Commissioner's finding that Mosley's right hip and back injuries are work related.** Rathbun contends substantial evidence does not support the final agency decision finding Mosley's right hip and back injuries are work-related. There is no dispute over his left leg and foot injuries.

Whether an injury has a causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony. The weight to be given to such an opinion is for the finder of fact. *Dunleavy v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The determination of whether to accept or reject an expert opinion is within the "peculiar province" of the Commissioner. *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455, 464 (Iowa 1969). "Strictness in review of the record is not in order." *Id.* at 456-57. Remand is only required if the Commissioner has rejected or disregarded material evidence without stating why. *McDowell v. Town of Clarksville*, 241 N.W.2d 904, 908-909 (Iowa 1976). Furthermore, undisputed/unrebutted expert medical testimony cannot be summarily rejected. *Poula v. Siouxland Wall & Ceiling, Inc.*, 516 N.W.2d 910 (Iowa Ct. App. 1994); *IBP, Inc. v. Al Gharib*, 604 N.W.2d 621 (Iowa 2000).

The final agency decision found the “unrebutted medical evidence in the record demonstrates that claimant has permanent conditions in his left foot and ankle, left leg, left (sic) hip and low back. The only medical evidence in the record since the first hearing regarding causation and permanency is the opinion of Dr. Kuhnlein.” (Arb. Dec. p. 16). This finding is based upon both treating surgeon Dr. Meyer and Mosely’s IME examiner Dr. Kuhnlein agreeing that Mosely sustained injuries to his right hip and back due to his altered gait caused by his admitted work-related left leg injury. Dr. Mooney did not provide a causation opinion addressing these issues. Therefore, there is no adverse medical opinion to consider. Substantial evidence supports the final agency decision determining causation for Mosley’s ongoing right hip and back injuries.

B. Whether substantial evidence supports the Commissioner’s finding that Mosley has reached MMI. Rathbun contends Mosley’s permanency cannot be decided until he has the recommended total knee replacement and/or treatment for his back. Rathbun cites no legal authority for this proposition. Permanent disability is to be evaluated when an injured worker has reached MMI, which is defined as the point at which healing is complete and the extent of disability can be determined. *Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60, 65 (Iowa Ct. App. 1981).

The final agency decision described Rathbun’s argument as “novel and nuanced.” The Commissioner found the evidence “overwhelming that Mr. Mosley is not in a healing period” and that he has “reached maximum medical improvement for all his conditions, with the possible exception of his back.” (Arb. Dec. p. 16). The medical evidence establishes Mosley has reached MMI. The latest date of MMI in evidence is from June 29, 2016, and was provided by Dr. Kuhnlein. Dr. Kuhnlein states that additional treatment for his back and a total knee replacement

may improve his condition in the future. However, there is no evidence in the record that Mosley has been actively treating for his back or has had the total knee replacement.

The court is not free to choose a potential MMI date because the agency decision is supported by substantial evidence. If future medical care positively changes Mosley's medical condition, the proper remedy would be for Rathbun to file a petition to review-reopen instead of extending the MMI date for years in opposition to the medical evidence in the record. When this record is considered as a whole, there is substantial evidence that Mosely has reached MMI. It was appropriate for the Commissioner to determine permanency.

C. **Whether substantial evidence supports the Commissioner's finding that Mosley is permanently and totally disabled.** The final agency decision found Mosley's restrictions "preclude him from all of his past employment" and while he "does have some skills he developed while running his own business" the Deputy agreed with vocational expert Davis that "that even while running his own business, Mr. Mosely was a hands-on construction worker." (Arb. Dec. p. 20). The Deputy considered "all the factors of industrial disability" and found Mosley "permanently and totally disabled." (Arb. Dec. p. 20).

As noted above, Mosley's past relevant work involves construction. This includes owning his own construction company, which required him to do physical manual labor.

Mosely was terminated by Rathbun within weeks of receiving his permanent work restrictions. His work restrictions preclude him from returning to past relevant work. His job search efforts for finding gainful employment have not been successful. The only vocational expert reports in evidence both conclude Mosley is not capable of gainful employment. The SSA determined Mosely was disabled just over two months after he applied finding him to be disabled

as of the date of the work injury at issue. When this record is considered as a whole, substantial evidence supports the final agency finding that Mosley is permanently and totally disabled.

D. Whether substantial evidence supports the Commissioner's denial of Mosley's request for penalty benefits. Under Iowa Code section 86.13, the employer or insurance carrier bears the burden of proving that its denial of benefits had a reasonable basis or the Commissioner "shall award benefits." Iowa Code § 86.13(4); *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). The duty to act reasonably is a continuing duty. *Squealer Feeds v. Pickering*, 530 N.W. 2d 678, 683 (Iowa 1995) (a denial supportable at the time it is made may later lack a reasonable basis in light of subsequent information).

In order to avoid a penalty, defendants had the burden to prove that they promptly reevaluated the claim as additional information became available to them and that they paid compensation equal to the least amount they could reasonably expect to be awarded following a hearing in which all the material evidence was considered.

Simonson v. Snap-On Tools Corp., File 851960 (Remand Dec. Aug. 25, 2003).

The final agency decision found Rathbun provided contemporaneous excuses for not paying industrial disability because if Mosley followed the treatment recommendations (total knee replacement), his hip symptoms may improve. (Arb. Dec. p. 22). Further, while the agency rejected Rathbun's defenses, the agency could not find Rathbun's defense was per se unreasonable and declined to order a penalty. (Arb. Dec. p. 22).

In *Christensen v. Snap-On Tools Corporation*, 554 N.W.2d 254, 260 (Iowa 1996) and *Robbennolt v. Snap-On Tools Corporation*, 555 N.W.2d 229, 236 (Iowa 1996), the Iowa Supreme Court stated the framework for determining whether to award penalty benefits. When that framework is applied here, Rathbun came to a reasonable basis for not paying industrial disability benefits. Rathbun supported this basis with medical evidence and relevant case law.

Rathbun contemporaneously communicated its decision to Mosley's counsel each time Mosley asked for additional benefits. Rathbun asserted facts upon which the agency could reasonably find Mosley's claim was fairly debatable, satisfying its obligation. *Christensen*, 554 N.W.2d at 260 (insurer is not required to accept the evidence most favorable to the claimant and ignore contrary evidence). *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 479 (Iowa 2005) (insurer is not required to view the facts in a light most favorable to a claimant). When this record is considered as a whole, substantial evidence supports the agency's determination not to award penalty benefits to Mosley.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the agency's final decision is affirmed as to the issues raised by Rathbun and Rathbun's Petition is dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the agency's final decision is affirmed as to the issue raised by Mosely and Mosley's Petition is dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs are assessed equally to all parties.



State of Iowa Courts

Case Number
CVCV060580

Case Title
RATHBUN REGIONAL WATER ASSOCIATION ET AL VS
MARK MOSLEY
Type: OTHER ORDER

So Ordered

A handwritten signature in cursive script, reading "Jeanie Vaudt".

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

Electronically signed on 2021-05-09 21:21:34