
IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**EAST SIDE JERSEY DAIRY, INC., d/b/a
PRAIRIE FARMS DAIRY, AND
INDEMNITY INS. CO. OF N. AMERICA,**

Petitioner,

v.

BRIAN KELLY,

Respondent.

Case No. CVCV065328

RULING ON JUDICIAL REVIEW**I. Introduction**

The Petitioners East Side Jersey Dairy, Inc. and Indemnity Insurance Company of North America, an employer and its workers' compensation carrier (collectively referred to herein as "East Side Jersey Dairy" or "Employer") seek judicial review of a Worker' Compensation Commissioner ("Commissioner") Appeal Decision issued March 7, 2023. In relevant part, the Commissioner found Respondent Brian Kelly ("Kelly") had a permanent disability resulting from an August 30, 2016 work injury that includes not only his right upper extremity but extends into his right shoulder; that Kelly is entitled to receive industrial disability benefits for the injury; and that Kelly's industrial disability is 50 percent.¹

In the proceedings before the Commissioner, East Side Jersey Dairy contended Kelly's work injury was limited to his right upper extremity and did not extend into the shoulder. In this judicial review proceeding, however, the Employer has abandoned the argument Kelly's shoulder was not affected; in other words, the Employer is not now contesting the Commissioner's decision Kelly injured his right shoulder as well as his right arm. The

¹ The Commissioner affirmed without further analysis the decisions of the Deputy Commissioner on these issues. The Deputy issued the Arbitration Decision on November 8, 2022.

Employer's position now is the Commissioner erred in awarding Kelly benefits for permanent partial disability because Kelly's shoulder injury has not reached Maximum Medical Improvement (MMI)². The Employer requests the court to reverse the Appeal Decision awarding Kelly benefits for permanent partial disability/industrial disability and remand the case to the Commissioner to determine what temporary benefits, if any, Kelly is entitled to receive until his shoulder reaches MMI. To the extent Kelly is found in the future to have a permanent disability to his right shoulder because of this injury, the Employer proposes he seek permanency benefits in a review-reopening.

II. Factual and Procedural Background

Kelly worked as a mechanic for East Side Jersey Dairy, on the overnight shift. On August 30, 2016, while working alone, Kelly was removing a transmission from a semi to replace the clutch. Kelly was underneath the truck. A strap holding the transmission broke, which resulted in the 1,200-to-1,500-pound transmission falling on top of him. Kelly was able to move so the transmission did not fall on his chest and crush him. But he could not move his right arm out of the way in time, and the transmission fell on his right forearm and elbow, trapping him there for an hour before being discovered by a co-worker.

Over the course of the next two years, Kelly had three surgeries on his right upper extremity. In February 2017 he underwent a decompression of the radial nerve in this right elbow; in October 2017 a radial nerve neuroplasty and right lateral epicondylectomy and debridement; and in April 2018 a right index, middle, and ring finger flexor tendon sheath incision and release. After the second surgery, Kelly's right arm was immobilized for one

² In its briefing before the Commissioner, the Employer contended the shoulder injury was not the result of the August 30, 2016 accident, but argued in the alternative, should the Commissioner find the shoulder is affected, that Kelly's shoulder has not reached MMI.

month. It was immobilized 2-3 weeks after the third surgery. Kelly underwent physical therapy after each surgery. He was released for the last time from physical therapy in June 2018, and except for two follow up visits thereafter, has had no further medical treatment for his right arm. Kelly left his employment at East Side Jersey Dairy in October 2018 because he thought the work was too heavy with his impaired right upper extremity. He obtained other employment at MH Equipment as a forklift mechanic, which is lighter work than his job at East Side Jersey Dairy.

None of Kelly's treating providers treated him for a right shoulder injury or opined he had permanent impairment to his shoulder. Robin Sassman, M.D., who conducted an Independent Medical Examination on Kelly's behalf in October 2021, is the first physician who diagnosed Kelly with a right shoulder injury. In her report, which Dr. Sassman issued on March 9, 2022, Dr. Sassman described Kelly's diagnosis as, "right shoulder range of motion deficits likely adhesive capsulitis from the immobilization after multiple right upper extremity surgeries but cannot rule out intrinsic injury to the shoulder (rotator cuff or labrum)."

Dr. Sassman's discussion of causation, further treatment, MMI, and permanency included the following:

- [I]t is likely that the range of motion deficit of the right shoulder is due to the prolonged and frequent immobilization of the right upper extremity due to the injury of 8/30/2016 and the multiple surgeries thereafter.
- [O]ne cannot be sure that there is not a rotator cuff tear or a labrum tear without obtaining an MRI. If an MRI of the shoulder shows no structural injury to the shoulder, I would recommend he be seen by a shoulder specialist to address the adhesive capsulitis. Mr. Kelly may also benefit from another opinion from an

orthopedic upper extremity specialist for the right upper extremity symptoms since his symptoms have worsened over the previous few years.

- I would not place him at MMI until the treatment recommendations...are completed. Should he choose not to pursue these recommendations, or they are not approved, I would place him at maximum medical improvement as of...9/15/2021.
- For the right shoulder, the impairment due to range of motion of the right shoulder...[is] a total of 14% upper extremity impairment.

Dr. Sassman's report was issued only one month before the Arbitration Hearing. Even though Dr. Sassman's report was the first time any physician opined Kelly had a right shoulder injury caused by the August 30, 2016 accident, there is no evidence in the record the Employer requested a continuance of the hearing so as to obtain another opinion concerning Kelly's shoulder. There is no evidence the Employer offered since the Arbitration Decision to provide the evaluation or treatment Dr. Sassman recommended.

Kelly testified he started having right shoulder symptoms when he returned to full duty at East Side Jersey Dairy in 2018. He testified that his shoulder symptoms have continued since he started working at MH Equipment, but they have been constant, and not gotten any worse. Kelly also testified he is interested in obtaining a shoulder MRI per Dr. Sassman's recommendation, but there is no evidence that has occurred.

In the Arbitration Hearing, the principal dispute between the parties was whether the effect of Kelly's August 30, 2016 injury extended to his right shoulder. Kelly claimed it did, and therefore he was entitled to benefits for industrial disability. The Employer claimed the

accident did not impact Kelly's shoulder and therefore his permanency benefits are limited to a scheduled member.³

The Deputy concluded, based upon Dr. Sassman's opinion, that Kelly proved his shoulder condition was a sequela of the original accident, and that Kelly has permanent disability to his right shoulder as a result. The Deputy did not expressly analyze, nor did the Commissioner as part of the Appeal Decision, whether Kelly's right shoulder had reached MMI. By awarding benefits for industrial disability, the Commissioner necessarily determined, if only by implication, that Kelly reached MMI.

III. Standard of Review

Chapter 17A of the Iowa Code governs judicial review of administrative agency action. The District Court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP.*, 710 N.W.2d 213, 219 (Iowa 2006). The court "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n)." *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc. v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)). Where an agency has been "clearly vested" with a fact-finding function, the appropriate "standard of review [on appeal] depends on the aspect of the agency's decision that forms the basis of the petition for judicial review"—that is, whether it involved an issue of 1) findings of fact, 2) interpretation of law, or 3) application of law of fact. *Burton*, 813 N.W.2d.

³ Kelly's injury occurred before the 2017 Amendments to Iowa Code § 85.34(2)(n), which made a shoulder injury part of the schedule. Prior to the amendment, shoulder injuries were treated as injuries to the body as a whole, and therefore provided for recovery of benefits for industrial disability.

The Court may reverse, modify, or grant other relief when agency action is based on fact determinations “not supported by substantial evidence in the record before the court when that record is viewed as a whole.” Iowa Code § 17A.19(10)(f)(2001). “Substantial evidence is statutorily defined as

The quantity and quality of evidence 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.

Id. § 17A.19(10)(f)(1). However, if the error is predicated on an erroneous interpretation of the law, we do not give deference to the worker’s compensation commissioner. *Bell Bros. Heating and Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010) (citing, *Schadendorf v. Snap-on Tools Corp.*, 757 N.W.2d 330, 334 (Iowa 2008)).

IV. Discussion

A claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved. *Bell Bros. Heating and Air Conditioning v. Gwinn*, 779 N.W.2d 193, 201-202 (Iowa 2010). East Side Jersey Dairy contends there is “no evidence whatsoever that [Kelly] has reached MMI for his shoulder condition,” therefore the Commissioner erred as a matter of law in awarding benefits for permanent partial disability because of the shoulder. Kelly argues, on the other hand, that there is evidence the shoulder reached MMI, in that Dr. Sassman provided a provisional MMI date and rating in the event Kelly did not obtain the future evaluation or treatment she recommended.

MMI generally occurs when the treating physician determines that the employee has recovered as much as possible from the effects of an injury. *Pitzer v. Rowley*, 507 N.W.2d 389 (Iowa 1993); *Armstrong Tire & Rubber Co. v. Kulbi*, 312 N.W.2d 60,65 (Iowa Ct. App. 1981).

Additionally, an anticipated improvement in continuing pain, if medically indicated, may extend the length of the healing period if substantial change in industrial disability is also expected to result. *Id.* If it is not likely further treatment or continuing pain will decrease the extent of industrial disability, then continued pain management should not prolong the healing period. *Id.*

The fundamental component of a permanent impairment is stabilization of the condition or at least a finding that the condition is “not likely to remit in the future despite medical treatment.” *Bell Bros. Heating and Air Conditioning*, 779 N.W.2d at 200 (*quoting* American Medical Association, Guides to Evaluation of Permanent Impairment 27 (6th ed. 2008)). Stabilization is the event that allows a physician determine that a particular medical condition is permanent. *Id.*, *citing*, *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1242 n. 3 (Alaska 1992) (“A physician can determine ... whether or not a particular medical condition has become permanent because it is static or well-stabilized.” (*quoting* American Medical Association, Guides to Evaluation of Permanent Impairment, Preface at x (2d ed. 1984))).

Dr. Sassman expressed two opinions about whether Kelly’s shoulder is at MMI, depending upon whether he chooses to pursue and/or is authorized to pursue her recommendations for further evaluation and future treatment. If Kelly pursues the evaluation and treatment, he will not be at MMI until those efforts are exhausted. If he does not, Dr. Sassman opined Kelly is at MMI as of September 25, 2021. In that case, she also gave him a permanent impairment rating to the shoulder.

There is other evidence, in addition to Dr. Sassman’s opinion, supporting a conclusion Kelly’s shoulder reached MMI. Kelly testified that his shoulder, while continuing to experience symptoms, has been essentially stable since he left employment at East Side Jersey Dairy in October 2018. Even if Kelly pursues further evaluation or treatment, there is no basis to

conclude from the evidence in the record that future treatment will more likely than not materially change his condition. Dr. Sassman's report provides no such assurances. At best, it is speculative based upon this record whether future treatment would make any difference in Kelly's permanent shoulder condition.

In short, there is evidence in the record from which the Commissioner could conclude Kelly's right shoulder has reached MMI, or that he has not. The Commissioner concluded Kelly sustained a permanent shoulder injury and is entitled to benefits for industrial disability for that injury. Such a conclusion necessarily presumes Kelly reached MMI.

The court finds the Commissioner's decision is supported by substantial evidence in the record as a whole. The fact there is evidence that supports East Side Jersey Dairy's position does not mean the Commissioner's ruling is not supported by substantial evidence. Just because the interpretation of the evidence is open to a fair difference of opinion does not mean the Commissioner's decision is not supported by substantial evidence. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 603 (Iowa 2004). "Evidence is not insubstantial merely because it would have supported contrary inferences." *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991). "Nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it." *Id.* The ultimate question for us is not whether the evidence supports a finding different than the agency's but whether the evidence supports the finding the agency actually made. *See id.* On judicial review, we "may interfere with the agency's findings only if the evidence is uncontradicted and reasonable minds could not draw different inferences." *Riley v. Oscar Mayer Foods Corp.*, 532 N.W.2d 489, 491 (Iowa Ct.App.1995).

Moreover, making a determination as to whether evidence "trumps" other evidence or whether one piece of evidence is "qualitatively weaker" than another piece of evidence is not an

assessment for the district court to make when it conducts a substantial evidence review of an agency decision. It is the agency's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue. The reviewing court only determines whether substantial evidence supports a finding according to those witnesses whom the agency believed. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394–95 (Iowa 2007) (citations and quotations omitted).

Bell Bros. Heating and Air Conditioning, the case upon which East Side Jersey Dairy principally relies, is factually different than this case and does not support the conclusion the Commissioner erred in awarding benefits for permanent disability for Kelly's right shoulder. In *Bell Bros.*, there were competing medical opinions on whether the claimant had an Achilles tendon tear. *Id.* at 198. One physician, based upon an ultrasound test administered in his office, opined the claimant had a tear and had permanent impairment as a result. *Id.* Another physician who examined the claimant after the ultrasound test found the Achilles tendon was intact, the muscle normal, and there was no permanent impairment *Id.* Six days before the Arbitration Hearing, the claimant underwent surgery by the first physician, ostensibly to repair the torn tendon. *Id.* However, because the surgery had occurred so close in time to the hearing, there was no evidence of what was found in the surgery.

The Commissioner ruled the injury caused permanent impairment, based upon the opinion of the physician who did the surgery. *Id.* But the Commissioner found it was premature to award benefits for permanent partial disability because the results of the surgery were then unknown, and suggested permanency could be an issue for review-reopening. *Id.*

On judicial review, the Iowa Supreme Court acknowledged it is possible in many cases to decide the existence of permanent impairment in advance of a finding of MMI and before the

claim for permanent disability benefits is ripe for adjudication. *Id.* at 201. It was error in that case, however, because the Commissioner relied upon the ultrasound test results “as the justification to accept the medical opinion of [the claimant’s doctor] over the other medical opinions, without evidence from the surgery confirming the existence of a tear and without giving the other doctors an opportunity to review the ultrasound test results.” *Id.*

The premature resolution of the issue of whether [claimant] suffered permanent impairment undermined Bell Brothers' evidence of no permanent impairment by leaving it with no meaningful opportunity to challenge the diagnostic reliability of the ultrasound test or assess whether the surgery performed less than a week before the arbitration hearing confirmed the presence of a tendon tear. More importantly, the commissioner knew evidence would be forthcoming relevant to the nature and extent of Gwinn's permanent impairment and a resolution of the conflicting medical opinions.

Id.

In this case, unlike in *Bell Bros*, the Employer offered no medical evidence to contest Dr. Sassman’s opinions concerning Kelly’s right shoulder. Nor did Kelly undergo medical treatment just before the Arbitration Hearing, the outcome of which would affect the determination of whether his right shoulder was injured and whether it sustained permanent impairment. The evidence in this case shows Kelly’s last medical treatment for his work-related injury was in 2018, approximately four years before the Arbitration Hearing. Kelly’s right shoulder was essentially stable since 2018. The Employer does not contend the Commissioner’s finding of permanent disability was premature because it was denied the opportunity to challenge Dr. Sassman’s opinions at the hearing. The Employer simply contends the Commissioner should have accepted the medical opinion Kelly had not reached MMI, rather than the opinion that he had. It is not for the court on judicial review to weigh which of view of the evidence was more credible under the circumstances. It is the Commissioner's responsibility to weigh

conflicting evidence and accept that which he finds most credible. *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 307 (Iowa 2010).

V. Ruling

The Workers' Compensation Commissioner's Appeal Decision issued March 7, 2023, is AFFIRMED, in its entirety.



State of Iowa Courts

Case Number
CVCV065328
Type:

Case Title
EAST SIDE JERSEY DAIRY ET AL VS BRIAN KELLY
ORDER FOR JUDGMENT

So Ordered

A handwritten signature in black ink, appearing to read "Patrick D. Smith".

Patrick D. Smith, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2023-11-13 14:06:48