

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

KAS INVESTMENT CO. INC. d/b/a SWANSON GLASS, INC., and SFM SELECT INSURANCE COMPANY, Petitioners, vs. JOSEPH BUEHLMANN, Respondent.	Case No. CVCV057070 RULING ON PETITION FOR JUDICIAL REVIEW
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The above-captioned matter came before the court on February 1, 2019. KAS Investment Co. Inc. d/b/a Swanson Glass, Inc. and SFM Select Insurance Company, (collectively “Swanson Glass”; “Petitioners”), were represented by Attorney Lee Hook. Joseph Buehlmann, (“Buehlmann”; “Respondent”), was represented by Attorney James Neal. Upon review of the court file and applicable law, the court enters the following order.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Buehlmann was forty-two years old at the time of the hearing. Buehlmann started working at Swanson as a glazier/installer of commercial windows in 2000. Buehlmann left Swanson for a position at another company in 2003 and was rehired by Swanson in 2005. Swanson promoted Buehlmann to manager on May 1, 2014. Buehlmann’s job duties at Swanson included lifting frames into position and lifting and installing glass. Buehlmann’s job duties included lifting weights over fifty pounds. Buehlmann continued working for Swanson until September 21, 2015 when he was laid off.

Buehlmann has a history of medical treatment related to back pain. Though at various times between 1994-2015 Buehlmann had problems with his back, Buehlmann reported that throughout much of 2013 and 2014 his back pain was stable. While working in November 2014, Buehlmann stepped in a hole and his back pain increased, but did not cause radiating pain in his legs. In 2015, Buehlmann's condition began to deteriorate. On April 6, 2015, Buehlmann received his first work restrictions relating to his back condition while working for Swanson. Buehlmann obtained an MRI on June 25, 2015 that concluded:

There is a presumed recurrent slightly downward directed central disc bulge at which touch his [sic] both S1 nerve root sleeves and appears to affect the left S1 nerve root more. Status post L5-S1 discectomy and laminectomy. We can proceed with a referral for a possible epidural injection if he would like.

Ex. 12 at 261.

Buehlmann filed three Workers' Compensation Petitions for injuries that he alleged to have sustained at Swanson. An arbitration hearing was held before the Deputy Worker's Compensation Commissioner ("Deputy Commissioner") on October 12, 2015. The Deputy Commissioner awarded benefits to Buehlmann for injury to his right shoulder and cumulative trauma to his back. Swanson appealed the Arbitration Decision, and the decision was affirmed by Deputy Gerrish-Lampe, by order of delegation from the Worker's Compensation Commissioner ("Commissioner") on August 30, 2018. Swanson filed the present Petition for Judicial Review on September 25, 2018.

II. 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, Inc., 710 N.W.2d 213, 219 (Iowa 2006). Relief is appropriate where “substantial rights of a party have been prejudiced because the agency action [...] is unsupported by substantial evidence, is unreasonable, arbitrary, or capricious, or is affected by other error of law.” *Dico, Inc. v. Iowa Emp’t Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). The standard of review on appeal depends on whether the basis for the petition involves an issue of finding of fact, interpretation of law, or application of law to fact. *Meyer*, 710 N.W.2d at 218-19.

The standard when the claim is that there was an error in finding of fact is whether the agency’s decision is supported by substantial evidence. *Meyer*, 710 N.W.2d at 218. “Substantial evidence is 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.” *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). Further, the question “is not whether the evidence supports different findings than those made by the commissioner, but whether the evidence supports the findings actually made.” *Id.* (internal citations omitted). Evidence may be substantial even if the court would have drawn a different conclusion from the fact finder. *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 192 (Iowa 2013).

III. APPLICABLE LAW & ANALYSIS

First, Swanson argues that the Commissioner’s finding that Buehlmann sustained a work-related cumulative injury to his back with a manifestation date of June 26, 2015 was not supported by substantial evidence. Second, Swanson argues that the Commissioner erred in awarding a penalty of \$1,500 for Swanson’s failure to timely investigate the back injury claim. Third, Swanson argues that the Commissioner erred in awarding \$7,171.89 for costs.

A. Substantial Evidence of Injury

Swanson claims that the Commissioner erred in finding that Buehlmann established that he sustained a work-related cumulative injury to his back with a manifestation date of June 26, 2015. The question is whether the Commissioner's decision was supported by substantial evidence. "Substantial evidence is 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." *Larson*, 763 N.W.2d at 850. Further, the question "is not whether the evidence supports different findings than those made by the commissioner, but whether the evidence supports the findings actually made." *Id.* (internal citations omitted). The Commissioner affirmed the findings of the Deputy Commissioner. The Deputy Commissioner considered the medical opinions of both Dr. Kuhnlein and Dr. Bansal and ultimately relied upon the analysis of Dr. Bansal.

The Iowa Supreme Court has explained, "[m]edical causation is essentially within the domain of expert testimony. The commissioner, as trier of fact, has a duty to weigh the evidence and measure the credibility of witnesses. The weight given to expert testimony depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances." *Cedar Rapids Community School Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011)(internal citations omitted). The Court went on to say, "an expert's opinion is not necessarily binding upon the commissioner if the opinion is based on an incomplete history. Ultimately, however, the determination of whether to accept or reject an expert opinion is within the peculiar province of the commissioner." *Id.*

The Deputy Commissioner concluded:

The evidence shows that claimant was able to work at the heavy work level until April 2015. It was in April and May of 2015 that claimant's back started to adversely impact claimant's ability to perform work. I find Dr. Bansal's opinion most convincing on causation for this injury. The evidence shows that claimant was able to work for a long period of time doing very heavy work without symptoms that impeded his work. He did have back symptoms when working for Swanson, but it did not become significant for a work until April 2015. The record shows that in April and May of 2015 his radicular symptoms increased. The MRI of June 25, 2015 showed some nerve disk bulge that touched his nerve. I find that June 26, 2015 is the date of injury for claimant's cumulative trauma injury to his back. I find that the work at Swanson lighted-up and permanently aggravated claimant's pre-existing back condition.

Arb. Dec. at 17. The court finds that the Commissioner's findings concerning the cumulative injury were supported by substantial evidence. The question is not whether a different finder of fact could have come to a different conclusion, but whether the evidence in the record supports the findings actually made by the Commissioner. While a different fact finder may have found the opinions of Dr. Kuhnlein to be more persuasive, the Commissioner did not err in finding that the opinions of Dr. Bansal were more persuasive.

On June 25, 2015, an MRI report on Buehlmann's back concluded, "[t]here is a presumed recurrent slightly downward directed central disc bulge at which touch his [sic] both S1 nerve root sleeves and appears to affect the left S1 nerve root more. Status post L5-S1 discectomy and laminectomy. We can proceed with a referral for a possible epidural injection if he would like." Ex. 12 at 261. Following this appointment during the summer of 2015 and thereafter,

Buehlmann's condition continued to worsen. Buehlmann's medical records show that though he may have suffered from back pain in the past, from 2014-2015 his back condition deteriorated significantly. The Deputy Commissioner relied upon the evidence in the record, including Buehlmann's medical records and the medical opinions of Dr. Bansal, in concluding that June 26, 2015 was the date of injury for Buehlmann's cumulative trauma injury to his back. The Commissioner's decision was supported by substantial evidence.

B. Penalty Award

Swanson next argues that the Commissioner's finding that Buehlmann was entitled to a penalty award of \$1,500 was not supported by substantial evidence. In the alternative, Swanson argues that the Commissioner's application of Iowa Code § 86.13 and relevant case law was unreasonable, illogical, and wholly unjustifiable. The Deputy Commissioner assessed a penalty of \$1,500 against Swanson for failure to timely investigate Buehlmann's back injury claim. The Deputy Commissioner used the time frame from August 21, 2015 to March 1, 2016 when the carrier was placed on notice of the back injury and when Dr. Kuhnlein's IME report was issued, respectively. Swanson was penalized for fifteen weeks of the delay. Swanson argues that it conducted a reasonable investigation and that the Commissioner's decision to award a penalty was not supported by substantial evidence and was erroneous.

Iowa Code § 86.13(4) provides:

- a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
- b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

- (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
 - (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
- c. In order to be considered a reasonable or probable cause or excuse under paragraph “b”, an excuse shall satisfy all of the following criteria:
- (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
 - (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
 - (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

The Iowa Supreme Court has held, “any delay without a reasonable excuse entitles the employee to penalty benefits in some amount.” *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 261 (Iowa 1996). The court finds that the Commissioner’s decision to award penalty benefits under Iowa Code § 86.13 was supported by substantial evidence.

The record shows a twenty-seven week delay between the time when Swanson became aware of Buehlmann’s injury and when Swanson started its investigation of his injury through the IME report of Dr. Kuhnlein. Swanson argues that the time gap was not unreasonable because Swanson wanted to obtain more information about Buehlmann’s alleged new injury before the IME was conducted. The record, however, does not contain evidence of an investigation by Swanson until the IME report was conducted. The Commissioner’s decision to award penalty benefits was supported by substantial evidence and was not in error.

C. Costs

Finally, Swanson argues that the Commissioner erred in awarding \$7,171.89 for costs. Specifically, Swanson takes issue with the \$3,690 that was awarded as costs for Dr. Bansal’s

IME report. Swanson asserts that the Commissioner's finding that Buehlmann was entitled to costs for Dr. Bansal's IME was erroneous and was unreasonable, illogical, and wholly unjustifiable. Swanson asserts that a claimant's right to an IME exam under Iowa Code § 85.39 is triggered only once an authorized physician assigns a permanency rating, and that a causation opinion is not equivalent to a permanency rating. Swanson's argument is that Dr. Kuhnlein did not produce an IME report until March 1, 2016 and Dr. Bansal's IME on behalf of Buehlmann took place on February 5, 2016. Since Dr. Bansal's IME report took place before Dr. Kuhnlein's, Swanson argues that Buehlmann is not entitled to costs, as an IME cannot be assessed unless there has been a prior evaluation of permanent disability made by a physician retained by the employer.

The Deputy Commissioner found that since Swanson had retained Dr. Fish to assess a permanent disability rating regarding Buehlmann's right shoulder injury, Buehlmann's right to an IME had been triggered. This led Buehlmann to obtain the IME from Dr. Bansal on February 24, 2016 and sustain the cost of the report at \$3,690.00. Buehlmann also argues that Swanson's unreasonable delay in its investigation of Buehlmann's injury is the cause for Dr. Bansal's IME taking place before Dr. Kuhnlein's IME, and that Swanson should not now benefit from said delay.

Swanson relies upon *Des Moines Area Regional Transit Authority v. Young*. In that case, the Iowa Supreme Court explained the process for reimbursement of costs under Iowa Code § 85.39. *See generally, Des Moines Area Regional Transit Authority v. Young*, 867 N.W.2d 839 (Iowa 2015). The Court explained:

We agree that a physician's written report of an examination and evaluation under section 85.39 would be a reimbursable expense under section 85.39, just as an

unreimbursed written report of an examination and evaluation, like deposition testimony and witness fees, could be taxed as hearing costs by the commissioner. Yet, a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony. The underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition.

Id. at 846. The Court went on to explain, “[w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report.” *Id.* at 846-47. Buehlmann argues that *Young* is distinguishable from the current case. Buehlmann asserts that in *Young*, the claimant was attempting to get full reimbursement for an IME under Iowa Code § 86.40 as a case cost, whereas here Buehlmann was awarded reimbursement under Iowa Code § 85.39.

The court finds that the Commissioner did not err in awarding Buehlmann \$3,690 as reimbursement for Dr. Bansal's IME. On March 14, 2014, Swanson obtained an IME from Dr. Fish specifically in regards to a claim of a right shoulder injury from Buehlmann. Buehlmann therefore had the right under Iowa Code § 85.39 to obtain his own evaluation. Further, in regard to Buehlmann's back injury, Buehlmann obtained the IME from Dr. Bansal prior to the IME by Dr. Kuhnlein because of the unreasonable delay by Swanson to investigate Buehlmann's claim. The Commissioner did not err in finding that Buehlmann was entitled to reimbursement for the cost of Dr. Bansal's IME.

IV. ORDER

IT IS THEREFORE ORDERED that the Petition for Judicial Review is DENIED and the decision of the Iowa Worker's Compensation Commissioner is AFFIRMED.

Costs to Petitioner.



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
CVCV057070 KAS INVESTMENT CO ET AL VS JOSEPH BUEHLMANN

So Ordered

A handwritten signature in cursive script that reads 'Scott D. Rosenberg'. The signature is written in black ink and is positioned above a horizontal line.

**Scott D. Rosenberg, District Court Judge,
Fifth Judicial District of Iowa**