

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

GREGORY A. HIMMELSBACH, Petitioner, v. QUAKER OATS COMPANY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and SECOND INJURY FUND OF IOWA, Respondents.	CVCV062981 ORDER ON JUDICIAL REVIEW
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This is a petition for judicial review from a final decision of the Iowa Workers' Compensation Commission. Hearing was held by videoconference on 8/12/2022. The Parties appeared through counsel.

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND.

Petitioner/Workers' Compensation Claimant Gregory A. Himmelsbach (Himmelsbach) sustained a work injury on June 25, 2018 which arose out of and in the course of his employment with Quaker Oats Company (Quaker Oats)¹. Himmelsbach was employed as "Clybourn Operator Relief" and his duties included carrying bags of ingredients up stairs to pour into a hopper, putting together large cardboard totes, and pulling tanks. (Tr. 16-21).

On June 25, 2018, Himmelsbach noticed pain in his right shoulder going down into his right arm while making totes. (Tr. 24). Himmelsbach went to the emergency room and was told to take it easy for a day or two. He took two weeks of vacation to rest. (Tr. 26-27). When he returned, he sought treatment at the health center and was provided ice and massage. He testified the Quaker

¹ Himmelsbach also suffered a knee injury that was addressed by the Workers' Compensation Commission in the same case but is not at issue in this judicial review.

health center would not send him to a doctor because they did not believe anything was wrong with his shoulder. Himmelsbach continued to work. (Tr. 27-28).

Himmelsbach saw his personal physician Dr. Brownell on September 11, 2018, who ordered an x-ray and MRI of the shoulder. (Tr. 31-32, JE2). The MRI revealed a massive full-thickness tear of the supraspinatus tendon. (JE1, at 5). Himmelsbach next saw Dr. Hart on November 5, 2018, who diagnosed a complete tear of the right rotator cuff, recommended surgery, and provided restrictions. (JE4, p.3). Quaker Oats could not accommodate the restrictions so Himmelsbach went on leave. (Tr. 36, JE 4 at 6-8).

By late November 2018, Himmelsbach had not been informed of whether Quaker Oats would accept his claim. Therefore, Himmelsbach filed a workers' compensation claim. (Tr. 36-37). Himmelsbach was then informed by the Commissioner's office that the claim was being investigated by the insurer. (Cl. Ex. 2) Himmelsbach testified he never received any notification from Quaker Oats that his claim was being investigated. (Tr. 38).

Dr. Hart performed shoulder surgery on March 7, 2019. (JE4 at 13). After surgery Himmelsbach received physical therapy for five months. (Tr. 39, JE 5). Himmelsbach returned to work with no restrictions on September 9, 2019. (Tr. 42).

Himmelsbach testified that as of the arbitration hearing date on June 9, 2020, he had never received notification from Quaker Oats as to why they had not accepted liability for his shoulder injury.

Three expert opinions were provided at the hearing. Dr. Manshadi performed an IME in January 2020. He found Himmelsbach's work was a substantial contributing factor to the rotator cuff tear, found a 12% impairment to the right upper extremity, and recommended work restrictions. Dr. Jameson provided an IME report dated January 25, 2020. He opined the rotator

cuff tear was not work-related, but related to a chronic degenerative process. He did not recommend any permanent restrictions or treatment and did not provide an impairment rating. (Def. Ex. A). In April and May of 2020, the treating surgeon, Dr. Hart provided his opinion that it was more likely than not that the work activity was a substantial contributing factor causing the right shoulder injury, agreed with the restrictions recommended by Dr. Manshadi, opined that Himmelsbach's shoulder injury extends into the torso, opined that Himmelsbach reached MMI on August 30, 2019, and provided an impairment rating of 4% to the right upper extremity.

After a hearing, the Deputy Commissioner credited the opinions of Dr. Hart and Dr. Manshadi and found Himmelsbach's shoulder injury arose out of and in the course of his employment. The Deputy Commissioner awarded healing period benefits, the amount of which was stipulated to by the Parties. The Deputy Commissioner found the injury should be treated as a scheduled member injury to the "shoulder" pursuant to Iowa Code section 85.34(2)(n). The Deputy relied on Dr. Manshadi's impairment rating of 12% because Dr. Manshadi had examined Himmelsbach on January 30, 2020, whereas Dr. Hart's most recent examination was on August 30, 2019. The Deputy Commissioner awarded benefits for 48 weeks at \$983.10 and medical expenses.

Finally, the Deputy Commissioner awarded a penalty benefit pursuant to Iowa Code section 86.13 based on a finding that Quaker Oats did not offer evidence of a reasonable investigation or provide a reasonable excuse for the delay in payment of benefits until the receipt of Dr. Jameson's report, 19 months after the injury was reported. The Deputy Commissioner also found Quaker Oats did not contemporaneously convey the basis for delay of benefits as required by Iowa Code section 86.13(4)(c)(3). The Deputy Commissioner calculated 62 weeks prior to Dr.

Jameson's report at \$983.10 for a total of \$60,952.20 in delayed benefits. The Deputy Commissioner then awarded a penalty of approximately 50% at \$30,000.

Quaker Oats appealed and Himmelsbach cross-appealed to the Commissioner, each raising a number of issues. As relevant here, Quaker Oats argued the Deputy erred in failing to take short-term and long-term disability credits into account in calculating the penalty benefits. Himmelsbach argued the Deputy erred in finding Himmelsbach's injury to be a scheduled injury to the "shoulder."

The Commissioner issued an opinion, on de novo review, on December 7, 2021. The Commissioner affirmed the decision that Himmelsbach's injury was limited to a scheduled member "shoulder" injury and does not extend to the body as a whole. With regard to the penalty, the Commissioner held the penalty should be reduced to account for short and long term disability benefits. The Parties stipulated Himmelsbach had received \$23,926.55 in disability benefits. The Commissioner held that, because the disability benefits are deducted from any weekly compensation, they should be taken into account to calculate the penalty. Therefore, the workers' compensation benefits owed by Quaker Oats was \$60,709.68 minus the disability credit of \$23,926.55, resulting in amount owed of \$36,783.23. The Commissioner ordered a penalty of approximately 50%: \$18,000.

Petitioner sought judicial review, asserting that Himmelsbach suffered a combination of two injuries resulting in a body as a whole injury and that the calculation of penalty benefits should not adjust for paid short or long term disability benefits.

II. ANALYSIS AND CONCLUSIONS OF LAW.

A. Standard of Review.

This Court's review of a workers' compensation action is governed by Iowa Code chapter 17A. Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 748 (Iowa 2002); see Iowa Code § 86.26. The commissioner's factual determinations are "clearly vested by a provision of the law in the discretion of the agency" and this Court will defer to those factual determinations if they are based on "substantial evidence in the record before the court when that record is viewed as a whole." Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 557 (Iowa 2010) (quoting Iowa Code § 17A.19(10)(f)).

If a party challenges the commissioner's ultimate conclusion, "then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." Meyer v. IBP, 710 N.W.2d 213, 219 (Iowa 2006); Iowa Code § 17A.19(10)(i), (j).

If a challenge is to the interpretation of law, the standard of review depends upon whether interpretation of the provision of law at issue has been clearly vested in the discretion of the agency. Compare Iowa Code §17A.19(c) with §17A.19(l). The Iowa Supreme Court has repeatedly found the Iowa Workers' Compensation Commission is not vested with authority to interpret Iowa's workers' compensation statutes. See e.g. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (finding legislature did not vest commission with authority to interpret provision at issue and noting the Court has declined to defer to the commissioner's interpretations of various provisions in recent years). Therefore, review is for correction of errors at law. Id. at 768; Iowa Code §17A.19(c) (court reviews whether agency action was "based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.")

A. Whether Himmelsbach preserved an argument that he sustained two separate scheduled member injuries.

Himmelsbach does not dispute that the torn rotator cuff was an injury to a scheduled member that would be addressed under Iowa Code section 85.34(2)(n), pursuant to Chavez v. MS Technology, 972 N.W.2d 662 (Iowa 2022). However, Himmelsbach argues that he suffered both a right shoulder and right arm injury and should be compensated for two injuries occurring in the same work accident. Iowa Code section 85.34(2)(t) compensates injury to two scheduled members in the same accident, but this code section lists the scheduled members specifically and does not include shoulder. Therefore, Himmelsbach argues Iowa Code section 85.34(2)(v) applies, which serves as a “catch-all” for permanent partial disability not described in the prior statutory sub-parts of Iowa Code section 85.34(2)(a-u).

Himmelsbach’s claim fails because he did not raise this argument below. Himmelsbach did not argue that he had a separate right arm injury that should be compensated under Iowa Code section 85.34(2)(v) in the Workers Compensation Commission. Therefore, he has failed to preserve error on this issue. Judicial review is limited to issues raised and decided before the agency, here, the Workers Compensation Commission. Soo Line R. Co. v. Iowa Dept. of Trans. 521 N.W.2d 685, 691 (Iowa 1994) (holding issue of improper delegation was not raised before the Iowa Dept. of Transportation and, therefore, could not be considered on judicial review); Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839, 853-54 (Iowa 2011) (holding court could not consider employer’s claim for apportionment because it was not raised before the deputy commissioner) (citing Iowa Admin. Code r. 876-4.28(7) (“An issue will not be considered on appeal if the issue could have been, but was not, presented to the deputy.”)).

Here, Himmelsbach argued before the Deputy that the rotator cuff tear should be treated as an injury to the body as a whole and not as a scheduled member injury to the shoulder. (See

Certified Record: Claimant's Post-Hearing Brief dated July 20, 2020 at 15; Claimant's Appellee and Cross-Appeal Brief dated 9/20/2021, at page 3). This argument was considered by the Deputy Commissioner and Commissioner. Himmelsbach agrees the Iowa Supreme Court's ruling in Chavez is controlling on this issue and the injury is treated as an injury to the shoulder as a scheduled member. Although that issue also deals with Iowa Code section 85.34(2)(v) as the catch-all, it is a distinct argument from the one now made on judicial review. At no point before the Deputy Commissioner or Commissioner did Himmelsbach argue he suffered a separate injury to the right arm and that he should be compensated for two injuries pursuant to section 85.34(2)(v).

Notably, Himmelsbach argued that, if the Deputy did find the injury was a scheduled shoulder injury pursuant to section 85.34(2)(n), then the Deputy Commissioner should award Dr. Manshadi's finding of "12% impairment of a shoulder." (See Certified Record: Claimant's Post-Hearing Brief dated July 20, 2020 at 20). The Deputy Commissioner adopted the 12% finding and it was not appealed to the Commissioner. (Arbitration Decision at 12). Dr. Manshadi's report breaks the 12% into two categories: "nine (9) percent impairment to the right upper extremity due to reduced active range of motion" and "three (3) percent impairment of the right upper extremity due to weakness of the right elbow flexors." (Cl. Ex. 4-5). However, he then assigned "total impairment of the right upper extremity" at 12%. (Id.) This impairment rating was related to Dr. Manshadi's finding that Himmelsbach "sustained a partial permanent impairment to his right shoulder as a result of this June 25, 2018 work injury at Quaker Oats." (Id.) Although three percent of the impairment was based on weakness in the elbow flexors, Dr. Manhadi assigned a total impairment of twelve percent to the right shoulder injury. Whether the evidence would have supported a finding of a separate injury to the right arm that could support compensation pursuant

to Iowa Code section 85.34(2)(v) is unknown. That argument was never presented to the Deputy Commissioner or Commissioner.

Himmelsbach argues he was unaware of this potential argument until the Chavez case described, but did not decide, the potential to pursue multiple injuries from the same accident under Iowa Code section 85.34(2)(v). However, the discussion in Chavez would not have prevented Himmelsbach from making a multiple injuries argument in the alternative, a strategy which the claimant in Chavez did pursue, hence its discussion on judicial review. The argument is not preserved for judicial review and, therefore, the Court does not address it and affirms the Workers' Compensation Commission.

B. The Commission Correctly Determined the Parameters for Penalty Benefits.

The Deputy Commissioner awarded penalty benefits to Himmelsbach, against Quaker Oats, under Iowa Code section 86.13 due to failure to conduct a reasonable investigation, failure to provide a reasonable excuse for delay in payment of benefits for the 19 months after the injury was reported until receipt of Dr. Jameson's report, and failure to contemporaneously convey their bases for delay of benefits. (Arbitration Decision at 17-18). The decision to award penalty benefits is not in dispute, only the amount of penalty benefits.

Iowa Code section 86.13(4) provides for penalty benefits "up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse." Both the Deputy Commissioner and Commissioner held that a penalty of approximately 50% was appropriate. The dispute surrounds the amount of delayed benefits against which to apply the 50% penalty.

The amount of benefits that were delayed or denied totaled \$60,709.78. However, Himmelsbach received short and long-term disability benefits in the amount of \$23,926.55. Iowa

Code section 85.38(2)(a) provides that amounts paid to an employee from a disability plan that should not have been paid if rights of recovery existed under the workers' compensation statute are treated as a credit against any compensation benefits. Therefore, Himmelsbach's disability benefits of \$23,926.55 were applied as a credit to Quaker Oats to reduce the amount of compensation for the 19 months at issue from \$60,709.78 to \$36,783.23. The Commissioner held that the appropriate figure from which to assess penalty benefits was, therefore, \$36,783.23.

This Court finds the correct interpretation of Iowa Code sections 86.13 and 85.38 is to award up to 50% penalty benefits on any amount of benefits delayed, denied, or terminated, after applying credit for short or long-term disability benefits as required under section 85.38. "To ascertain the meaning of the statutory language, we consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole." State v. Pickett, 671 N.W.2d 866, 870 (Iowa 2003) (citation omitted). Although section 86.13 does not expressly refer to the credit allowed under section 85.38, that credit impacts the amount of "benefits delayed, denied, or terminated." Iowa Code section 85.38(2) only provides credit when the short or long-term disability benefits are paid pursuant to a plan "contributed to wholly or partially by the employer." Section 85.38(2) then requires that any amounts so paid "shall be credited to or against any compensation payments" and "shall be deducted from the payments made under these chapters." Section 85.38(2) expressly gives employers credit (thereby encouraging employers to maintain such benefit plans) in calculating any workers' compensation payments. In determining which benefits were "delayed, denied, or terminated" it is, therefore, required by Iowa Code section 85.38(2) to consider whether the employer had any credit toward such benefits. Iowa Code section 86.13 provides for penalty benefits for benefits that are partially delayed, denied or terminated. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa

1996). Therefore, if there is a gap between the amount of employer credit and the benefits owed, like there is here, the employer can be assessed a penalty up to fifty percent of that amount.

Although entitled to no deference, see e.g. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 518 (Iowa 2012), this interpretation is consistent with agency precedent. See e.g. Ainesworth v. Envipco, 2006 WL 2528600 (Iowa Workers' Comp. Com'n Aug. 14, 2006); Dewitt v. AT&T, 1994 WL 16035063 (Iowa Workers' Comp. Com'n Feb. 28, 1994); Moon v. AT&T, 1993 WL 13016150 (Iowa Workers' Comp. Com'n Sept. 21, 1993). In addition, the Iowa Court of Appeals has twice, in unpublished opinions, affirmed this interpretation. Jenson v. Commins Filtration-Lake Mills, 862 N.W.2d 413, at *4 (Iowa Ct. App. Jan. 14, 2015) (Table); Vermeer Manufacturing v. Hartney, 2002 WL 1756322, at *4-5 (Iowa Ct. App. July 31, 2002).

IT IS HEREBY ORDERED that the Appeal Decision of the Iowa Workers' Compensation Commission is AFFIRMED. Costs are assessed to Petitioner.

IT IS SO ORDERED.



State of Iowa Courts

Case Number
CVCV062981

Case Title
GREGORY HIMMELSBACH VS QUAKER OATS COMPANY
ET AL
Type: OTHER ORDER

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

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