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IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

JASON DRURY, Petitioner, **W-S INDUSTRIAL SERVICES, INC., COMMERCE AND INDUSTRY INSURANCE CO.,** Respondents.	Case No. **CVCV057533** **ORDER ON JUDICIAL REVIEW**

This is a petition for judicial review from a final decision of the Iowa Workers' Compensation Commission. An unreported hearing was held in this matter on May 10, 2019. Petitioner Jason Drury appeared through attorney Matthew Leddin. Respondents W-S Industrial Services, Inc. and Commerce and Industry Insurance Co., appeared through attorney Jean Dickson. After hearing the arguments of counsel, reviewing the court file, the administrative record, and being otherwise advised in the premises, the court enters the following ruling:

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND.

Drury sustained a work injury on July 14, 2014 to his left shoulder. The Parties stipulated that the July 14, 2014 injury arose out of and in the course of employment with W-S Industrial Services, Inc.. This matter came before Deputy Workers' Compensation Commissioner William H. Grell on February 14, 2017 for Arbitration Hearing. The issues before the Deputy Commissioner were: 1) whether the stipulated injury of July 14, 2014 caused permanent disability, 2) the proper rate at which weekly

benefits were payable, 3) whether Drury was entitled to payment or reimbursement for past medical expenses, 4) whether the third-party settlement Drury entered into was enforcement, 5) whether the respondents were entitled to a credit or indemnification pursuant to Iowa Code Section 85.22(1) up to the amount of the third-party settlement totaling $20,000.00, and 6) whether costs should be assessed against either party.

The Deputy Commissioner found Drury failed to prove by a preponderance of the evidence that the work injury sustained on July 14, 2014 caused permanent disability. He further found that Drury's third-party settlement was enforceable, but the respondents were entitled to indemnification up to the amount of the third-party settlement. Drury appealed. The Appeal Decision issued by Commissioner Cortese adopted the same analysis, findings, and conclusions as the Arbitration Decision. Drury sought judicial review in this Court.

The July 14, 2014 injury occurred when Drury was involved in a motor vehicle accident while operating a semi-truck for his employer, W-S Industrial Services, Inc. On that date, Drury was traveling on US Highway 67, when a passenger car crossed the centerline, hitting Drury head-on. Drury was transported to the hospital emergency department where he presented with left knee and shoulder pain and a headache. Drury was released from the hospital on the same date.

On July 16, 2014, Drury presented to Xerxes Colah, M.D. for follow-up care. Dr. Colah diagnosed Drury with a left shoulder contusion, a thoracic back strain, and an abrasion on his left knee. (Ex B9). On August 6, 2014, Drury presented to Dr. Colah for further medical treatment. Drury had full range of motion in his left shoulder and

reported significant improvement since the accident date. (Ex D14). On August 26, 2014, Dr. Colah examined Drury's left shoulder. (Ex D20). Drury reported that he felt occasional clicking in his left shoulder. (Ex D20). He also stated he observed a burning sensation in the epaulet area of his left shoulder. (Ex D20). The burning sensation was intermittent and appeared to come and go with activity. (Ex D20). Dr. Colah ordered an MRI of Drury's left shoulder, which was performed on October 6, 2014. The MRI showed: (1) no rotator cuff tear or tendinopathy; and (2) irregularity of the superior labrum as well as the upper half of the anterior labrum concerning for labral tearing. (Ex B14). Because of the MRI result, Dr. Colah referred Drury to Dr. Foad, an orthopaedic surgeon. (Ex. D23).

Drury presented to Dr. Foad on October 21, 2014. Dr. Foad diagnosed Drury with a left shoulder SLAP tear and recommended Drury undergo a left shoulder arthoscopic extensor debridement with biceps tenolysis. (Ex E1). Drury agreed, and that procedure was performed on October 24, 2014. (Ex E2). Dr. Foad referred Drury to physical therapy and work conditioning as part of his recovery treatment.(Ex E). On November 18, 2014, Drury presented to Dr. Foad for a follow-up visit. He reported that he was doing well and had no shoulder pain. (Ex E6). Dr. Foad found he had excellent range of motion in the left shoulder. (Ex. E6). Drury returned to Dr. Foad on December 9, 2014. Drury complained he had difficulty doing overhead lifting, but Dr. Foad noted this was unrelated to the SLAP tear, which did not affect his rotator cuff. (Ex E7). Dr. Foad found Drury to have full active range of motion with forward flexion and abduction. (Ex E7). Dr. Foad recommended further work conditioning. (Ex E7). Drury's next appointment with Dr. Foad was on January 6, 2015. (Ex E8). Drury reported he was doing very well.

(Ex E8). Again, Drury had full range of motion, no pain and excellent strength. (Ex E8). Dr. Foad placed Drury at maximum medical improvement and released Drury from his care. (Ex E8). In 2016, the respondents requested Dr. Foad provide an opinion on whether Drury had a permanent impairment as a result of his left shoulder injury. (Ex E9). Dr. Foad, based on his last visit with Drury, indicated Drury had no permanent impairment of his left shoulder. (Ex E9). This opinion was based upon his January 5, 2016, examination of Drury. (Ex E9). Drury sought no additional medical treatment for his left shoulder after his last visit with Dr. Foad. (Tr. 72).

On March 1, 2015, Drury voluntarily resigned from W-S Industrial Services, Inc. (Tr. 56). He started a job with Behr Iron and Metal as a machine operator/laborer on or about March 7, 2015. (Tr. 72). When he applied for his new position, Drury indicated he was seeking a position consistent with his work skills, which included those of a machine operator, manual labor, operating a sheer and hand jack, and operating a forklift. (Tr. 73; Ex. W). Drury received a copy of the Behr job description during the application process and agreed he perform those functions safely. (Ex. P1; Ex. T; Ex. V; Ex P1, 3). Drury did not report any limitations as to his left shoulder, and he passed the pre-employment physical. (Tr. 73; Ex P4). Since starting his employment at Behr, Claimant has not asked his supervisor for any accommodations and he was not planning on asking for any accommodations. (Tr. 68).

On September 7, 2016, Drury presented for an independent medical examination with Dr. Richard Kreiter. (Ex G). Dr. Kreiter found Drury to have restricted range of motion in the left shoulder. (Ex G). Dr. Kreiter opinioned that Drury had sustained an

8% impairment of the whole person as a result of the July 14, 2014, injury. (Ex G8). Dr. Kreiter's findings were inconsistent with Dr. Foad's findings, Drury's reports to Dr. Foad and his physical therapist, and his testimony about his ability to work at Behr without restrictions. (Ex E, Ex F, Tr. 68).

The Deputy Commissioner found Drury failed to prove he suffered a permanent injury to his left shoulder. With respect to the third-party settlement, he found the settlement for policy limits to be enforceable. He also found, however, that Drury failed to give notice of the settlement offer to the respondents, and that the respondents' statutory lien for indemnification of future benefits remained in place. The Deputy Commissioner was affirmed on appeal by the Commissioner in a final agency decision.

Drury appeals the determination that he failed to prove a permanent injury, and the determination that the respondents' statutory lien was properly preserved. Drury asks this Court to reverse the agency's Appeal Decision.

II. ANALYSIS AND CONCLUSIONS OF LAW.

A. Standard.

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)). This Court may grant relief from an agency action if it determines the substantial rights of the claimant have been prejudiced because the agency action is unsupported by substantial evidence. Iowa Code § 17A.19(10)(f). "Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion." Grundmeyer, 649 N.W.2d at 748. "[The] question is not whether there is sufficient evidence to warrant a decision the commissioner did not make, but rather whether there is sufficient evidence to warrant the decision he did make." Musselman v. Cent. Tel. Co., 154 N.W.2d 128, 130 (Iowa1967).

If the commissioner's interpretation of law is the claimed error, the question on review is whether the commissioner's interpretation was erroneous. See Clark v. Vicorp Rests., Inc., 696 N.W.2d 596, 604 (Iowa 2005). If the commissioner's ultimate conclusion reached is the claimed error, "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, 710 N.W.2d at 219;Iowa Code § 17A.19(10)(i), (j).

B. Permanent Disability.

Drury argues the Commissioner's determination that he did not sustain a permanent partial impairment/disability should reversed. At the commission level, "[a] claimant must prove by a preponderance of the evidence that the injury is a proximate cause of the claimed disability." Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) (quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d

744, 752 (Iowa 2002)). "Ordinarily, expert testimony is necessary to establish the causal connection between the injury and the disability for which benefits are claimed." Id. However, "[t]he commissioner, as the fact finder, determines the weight to be given to any expert testimony." Id. "Because the commissioner is charged with weighing the evidence, we liberally and broadly construe the findings to uphold his decision." Finch v. Schneider Specialized Carriers, Inc., 700 N.W., 2d 328, 331 (Iowa 2005).

In the evaluation performed September 8, 2016, Dr. Kreiter opined that Drury had sustained a permanent injury to his left shoulder as a result of his work injury. (Ex. G p. 8). On the other hand, Dr. Foad opined that Drury had no permanent impairment as a result of his left shoulder injury. (Ex. E, p.9). The Deputy Commissioner found Drury had failed to meet his burden of proving a permanent injury because Dr. Foad had released him back to work in January 2015 with no restrictions. (Arbitration Decision at 5-6). The Deputy Commissioner specifically stated he found Dr. Foad's opinion to be entitled to the greatest weight because he had treated, examined and evaluated Drury on a number of occasions. Dr. Foad was Drury's treating surgeon; he was more familiar with Drury's injury, treatment and recovery than Dr. Kreiter who performed an IME for purposes of litigation. The Deputy Commissioner also noted Dr. Foad's opinions were corroborated by other evidence in the record, including physical therapy records and the claimant's own testimony. (Arbitration Decision at 5-6).

Drury criticizes Dr. Foad's opinion and the Deputy Commissioner's reliance on it for two reasons. First, Drury argues the Deputy Commissioner improperly relied on this evidence because Dr. Foad had not treated him for a year-and-a-half when Dr. Foad

issued his report giving Drury a 0% impairment rating. Instead, Drury asserts the Deputy Commissioner should have relied on Dr. Kreiter's opinion, which was based on more recent contact with him. The Deputy Commissioner did specifically consider Dr. Kreiter's opinion. However, the Deputy Commissioner found Dr. Foad's opinion to be entitled to greater weight because it was consistent with the other evidence produced at the hearing.

Drury also takes issue with the Deputy Commissioner's failure to accept his testimony as well as that of his mother and neighbor as it related to his condition and restrictions. The Deputy Commissioner did consider this evidence. He found, however, that it was not credible and was in direct contradiction to other evidence, including contemporaneous medical records.

Finally, Drury also complains the Deputy Commissioner improperly found he could perform his job duties at Behr without accommodation or medication. Once again, the Deputy Commissioner considered all of the evidence, including Drury's assertions to the contrary, in reaching his conclusion. Specifically, the Deputy Commissioner considered Drury's job application where he certified he could perform all job duties and the opinion of Behr's physician, who reached the same conclusion after examining Drury. This evidence directly contradicts Drury's stated position.

The Deputy Commissioner carefully considered the evidence and weighed the credibility of all evidence presented at the agency level. Each of Drury's criticisms may be responded to with contradictory evidence in the record. The Deputy Commissioner was entitled to weigh the expert opinions and accept the opinion he found credible. The

Deputy Commissioner and Commissioner's decisions are supported by substantial evidence and are not arbitrary, unreasonable, irrational, or illogical.

C. Statutory Lien and Indemnification Issues.

Drury argues the Commissioner erred in finding both that the respondents have a statutory lien against his settlement with the third-party tortfeasor and are entitled to indemnification for past and future medical expenses or weekly benefits payable out of his settlement proceeds.

Iowa Code §85.22 governs an employer's indemnification and lien rights when an employee's injury is caused by a third-party. It provides in relevant part:

> If compensation is paid the employee…under this chapter, the employer…or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made…and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

Iowa Code Ann. § 85.22(1) (2019).

Under this provision, "'the lien is incident to and dependent upon the right of the employer to recover, but the right to recover provided by indemnification is not dependent upon the lien. Thus, the 'failure of the lien does not prevent recovery on the obligation.' The right to indemnification exists independently, even 'without the security the lien provides.'" Shirley v. Pothast, 508 N.W.2d 712, 717 (Iowa 1993) (quoting Armour-Dial, Inc. v. Lodge & Shipley Co., 334 N.W.2d 142, 145 (Iowa 1983)).

Indemnification without a proper lien, however, only allows an employer to recover monies actually paid to the employee at the time of the third-party settlement. See Pothast, 508 N.W.2d at 718 (stating it is the "lien [that] provides security for 'all payments, even those made to satisfy the carrier's periodically-accruing liability after the disposition of the action against the third person…'") (quoting Liberty Mut. Ins. Co. v. Weeks, 404 A.2d 1006, 1012 (Me. 1979)). In this case, the parties agree that the respondents had made no payments to Drury at the time he settled with the third-party tortfeasor. The respondents, therefore, are only entitled to recoup their future medical and weekly benefit payments from Drury's settlement if they have a proper statutory lien.

Iowa Code Section 85.22 governs an employer's statutory lien rights. Under the plain language of the statute, an employer is granted an automatic lien against any monies the employee receives from a third-party tortfeasor. See Iowa Code Section 85.22(1) (stating the employer shall have a lien). If the employee initiates a lawsuit against the third-party to obtain compensation, the employer is required to take additional action to protect its lien. Pursuant to Section 85.22(1), "[i]n order to continue and preserve the lien, the employer or insurer shall, within thirty days after *receiving notice of such suit* from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien." Iowa Code § 85.22(1) (2019) (emphasis added).

Here, Drury did not filed suit against the third-party tortfeasor. The question then becomes whether an employer is required to take additional action to preserve its lien when the employee negotiates a pre-suit settlement of his third-party claim. The plain

language of 85.22 reveals the employer is not required to take any additional action to preserve its lien. The legislature had the opportunity to impose such a requirement on the employer; however, it chose not to do so.

This may be because the legislature mandated that all parties, including an employer or its insurer, be at the settlement table. Iowa Code Section 85.22(3) governs settlements with a third-party tortfeasor. It provides:

> Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; *and the consent of the employer or insurer*, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, then upon the written approval of the workers' compensation commissioner

Iowa Code § 85.22 (3) (2019) (emphasis added). If given proper notice, an employer has the right to protect its lien by refusing to consent to a settlement. In that case, the employee could request written approval of the settlement by the workers' compensation commissioner. The employer would be a party to the approval proceeding and would have the ability to assert its position, and consequently, protect its lien rights. In contrast, the employer may not be a party to the lawsuit between the employee and the third-party tortfeasor. The additional action required by 85.22(1) would alert the court to the presence of the non-party lien holder. An employer could forfeit this right by not properly notifying the court of its lien.

While the court could conceive of a situation where an employer may forfeit its lien rights under 85.22(3), perhaps by failing to timely refuse its consent to a settlement, there is no evidence in the record to support the respondent forfeited its lien rights.

Here, the Deputy Commissioner found, and the substantial evidence in the record supports, that Drury did not obtain his employer's consent before settling with the third-party tortfeasor. His testimony to the contrary was not credible. The respondents were not given the notice required under 85.22(3) to object to the settlement, or to take action in the settlement process to protect their automatic statutory lien. The record reflects, however, that they continued to assert their lien rights upon notification of the settlement both prior to and during the agency proceeding. (Ex O4). Viewing the record in conjunction with the applicable law, the court concludes the respondents have a proper statutory lien, and therefore, a right to indemnification against Drury's third-party settlement. The Deputy Commissioner's decision was supported by substantial evidence, was not contrary to the law, unreasonable, or arbitrary and capricious, and was not based on an erroneous interpretation and application of Iowa Code 85.22.

D. Costs.

In its Petition for Judicial Review, Drury argued the agency erred in not taxing his costs against the respondents. Iowa Code Section 86.40 provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code Ann. § 86.40 (2018). The Deputy Commissioner found that neither party entirely prevailed and declined to assess either parties' expenses as costs. Upon a careful review of the record, the court cannot conclude that his decision was not was supported by substantial evidence, contrary to the law, unreasonable, or arbitrary and capricious. The agency's findings as to taxation of costs is affirmed.

Order

IT IS HEREBY ORDERED that the decision of the Worker's Compensation Commission is AFFIRMED. Costs are assessed to Petitioner.

In addition to all other persons entitled to a copy of this order, the Clerk shall provide a copy to the following: Workers' Compensation Commissioner 1000 E. Grand Ave. Des Moines, IA 50319-0209.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV057533	JASON P DRURY VS W S INDUSTRIAL SERVICES ET AL

So Ordered

Heather Lauber, District Judge,
Fifth Judicial District of Iowa