

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

KARLA R. KERN,

Petitioner,

vs.

FENCHEL, DOSTER, & BUCK, P.L.C.,
and
PHARMACISTS MUTUAL INSURANCE
COMPANY,

Respondents.

Case No. CVCV058695

**RULING ON PETITIONER'S PETITION
FOR JUDICIAL REVIEW**

This matter came before the court on November 22, 2019 for a hearing before the District Court on adjudication of Petitioner's Petition for Judicial Review. Having entertained the arguments of counsel, having reviewed the court file and the applicable law, and being otherwise fully advised in the premises, the court enters the following order.

I. FACTS AND PROCEDURAL HISTORY

Petitioner, Karla R. Kern ("Petitioner"), filed a petition for judicial review in this court arising from a contested case action before the Iowa Workers' Compensation Commissioner ("the Commissioner") seeking entitlement to workers' compensation benefits. Respondent law firm Fenchel, Doster, & Buck, P.C. ("Employer") and their insurance company Pharmacists Mutual Insurance Company ("Pharmacists") (Employer and Pharmacists to be collectively referred to as "Respondents") contest.

Petitioner was, from 1996 through 2003, employed as a legal secretary. In 2003, Petitioner developed pain in her wrists while working in a law office. Petitioner was advised to go to a health care

provider for examination. She visited with Dr. Mark Davis in Algona on April 21, April 30, August 1 and August 21, 2003. She also visited with him on January 6 and August 6, 2004. She was diagnosed with bilateral carpal tunnel syndrome and underwent treatment with Dr. Davis. Dr. Davis opined that Petitioner should be able to handle her bilateral carpal tunnel syndrome with conservative management.

On August 21, 2013, Petitioner started a new job at a new law firm. Her new employment was similar to her previous work as a legal secretary and consisted of many of the same duties.

In what appears to be July of 2014 (the record is somewhat unclear), Petitioner started working at Respondent law firm. Petitioner claims her carpal tunnel continued when she worked at Respondent firm, where she worked as a secretary for at least three attorneys. She continued to work in her secretarial duties even in light of Respondent allegedly claiming they would hire someone to handle those duties.

In May 2016, Petitioner informed Respondent law firm of the toll her secretarial duties were beginning to take on her arms. In particular, her left thumb began locking. On May 20, 2016, Petitioner went back to Dr. Davis for treatment. Dr. Davis opined Petitioner was suffering from trigger thumb, including locking, triggering, and increasing pain. Dr. Davis referred Petitioner to a P.A. Janssen, where Petitioner underwent treatment. She also worked with a Dr. Recinos in undergoing treatment for her trigger thumb.

On June 2, 2016, Petitioner was informed that she could not call Dr. Recinos on her own to schedule surgery. She received a letter on June 8, 2016 from Pharmacists indicating that Pharmacists would involve their partner, Tristar Risk Management ("Tristar"), to investigate the compensability of Petitioner's injury. She received a June 9, 2016 letter from Linda Klein ("Klein"), a Tristar claims examiner, indicating that Petitioner was to complete Tristar's medical records release form and return same to Tristar and Klein.

Petitioner submitted Tristar's report of injury to Klein on June 11, 2016. She listed all medical providers she had seen in the past five (5) years.

On June 29, 2016, Pharmacists' workers' compensation manager, Moisberry, communicated to Klein that a mutual local employee had contacted Klein, asking that Klein reach out to Petitioner. Later the same day Petitioner also re-sent her medical records to Klein.

The record indicates that over the next few days there were inter-office communications exchanged between Klein, Moisberry, and another employee concerning the timing of the information received by Tristar from Petitioner. These included communications indicating Klein needed to do a better job of communicating with Petitioner.

On July 22, 2016, Petitioner received word that Tristar had found her a case manager ("Yanqui"). On July 24, 2016 Petitioner received the case manager's contact information. On July 26, 2016, Yanqui reached out to Petitioner. Over the next few weeks, Petitioner and Yanqui traded communications regarding Petitioner's evaluation, then scheduled an appointment for August 25, 2016. Petitioner's appointment was scheduled in Des Moines while Petitioner lived near Mason City. Petitioner balked at having to spend so much time travelling, but eventually acquiesced.

On August 25, 2016, Petitioner met with Dr. Paulson. Dr. Paulson opined that Petitioner had been diagnosed with bilateral thumb CMC osteoarthritis in addition to left and right trigger thumbs. Concerning causation, he opined, with reasonable medical certainty, that her job working as a legal secretary and typist neither caused nor materially aggravated her diagnosis of carpal tunnel syndrome, thumb osteoarthritis, or bilateral trigger thumbs. On the basis of this examination, on October 3, 2016, Respondent employer denied Petitioner's claim. .

On September 14, 2016, Petitioner filed a petition with the workers' compensation commissioner. Petitioner was seeking workers' compensation benefits for a work injury manifesting on May 9, 2016 resulting from work injuries acquired over a period of time cumulatively and gradually leading to her being disabled in her upper extremities bilaterally.

Respondents' answer was filed on October 3, 2016, the same day Petitioner received her notice that Respondent employer denied her claim.

Petitioner was examined by Dr. Recinos on March 6, 2017. She underwent surgery with Dr. Recinos on March 21, 2017. Dr. Recinos released her to return to work unrestricted on April 20, 2017. Between March 21, 2017 and March 31, 2017, Petitioner continued to receive wages from Respondent employer.

Dr. Bansal conducted Petitioner's IME on June 23, 2017. This was done at her attorney's request. On July 7, 2017, his official signed IME opined that her work materially aggravated her bilateral carpal tunnel syndrome, left side trigger thumb and CMC arthritis.

On August 7, 2017, the parties appeared before a deputy workers' compensation commissioner. On December 18, 2017, the deputy's arbitration decision awarded Petitioner 40 weeks of permanent partial disability benefit but did not award her penalty benefits. Additionally, Petitioner was required to pay for Dr. Bansal's independent medical examination fee ("IME").

On January 4, 2018, Petitioner filed a rehearing application. On January 8, 2018, the deputy enlarged the arbitration decision but denied Petitioner's rehearing application. On January 10, 2018, Petitioner filed a notice of cross appeal, amended to a February 21, 2018 notice of appeal. On August 15, 2019, Petitioner applied for judicial review. Respondents filed their answer on August 20, 2019.

II. STANDARD OF REVIEW

Iowa Code Chapter 17A governs judicial review of final agency action. "Under the Act, [the court] may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code §17A.19(8)(a). In exercising the power of judicial review, the district court acts in an appellate capacity. Nance v. Iowa Dept. of Revenue, 908 N.W.2d 261 (Iowa 2018) (quoting Mycogen Seeds v. Sands, 686 N.W.2d 457, 463 (Iowa 2004)).

Where the reviewing court is asked to review an agency's interpretation of law, the court affords the agency a level of deference dependent on whether the authority to interpret that law has "clearly been vested by a provision of law in the discretion of the agency." Burton v. Hilltop Care Center, 813 N.W.2d 250, 256 (Iowa 2012). Where the legislature has clearly vested the agency with such authority, the court "will only reverse a decision of statutory construction which is irrational, illogical, or wholly unjustifiable." Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 252, 252 (Iowa 2010). If the agency has not been clearly vested with the authority to interpret the law, the court reviews questions of statutory interpretation for correction of errors at law. Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (Iowa 2012). If the alleged error lies in the commissioner's application of the law to the facts, the court will determine whether the commissioner's application of the law to the facts is irrational, illogical, or wholly unjustifiable. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 856-57 (Iowa 2009).

On the contrary, factual determinations made by the Commissioner are vested by a provision of law in the discretion of the agency." Larson, 763 N.W.2d at 850 (quoting Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 [Iowa 2004]). This Court defers to the Commissioner's determinations of fact where they arise from "substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19 (10)(f). Substantial evidence exists where

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. Iowa Code § 17A.19(10)(f)(1); see also Larson at 850.

The court should engage in a "fairly intensive review of the record", rather than "simply rubber stamp the agency fact finding." Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 499 (Iowa 2003). However, this does not require the parties to present a higher threshold of proof to support the agency's decisions nor does it increase the court's obligation to review the case; this is merely a more detailed statement of the law intended not to "...increase the intensity of judicial review...but to ensure that courts actually follow the level of review consistent with the act." Id.

Petitioner fails to clearly identify which of the subsections of Iowa Code § 17A.19(10) she relies on in appealing to this Court for judicial review, but does claim the Deputy Commissioner erred in failing to find substantial evidence supported Petitioner's claimed injury arising out of and in the course of her employment with Respondent. Given Petitioner seems to take issue with the Commissioner's determinations of fact, it appears Petitioner disputes the factual basis and findings underlying her claim and the Commissioner's ruling. As such, this court will only disturb the Commissioner's factual findings if there is not substantial evidence in the record, when viewed as a whole, to support them.

III. MERITS

i. Did the Commissioner Correctly Decline to Award Petitioner Penalty Benefits?

Petitioner asserts that the Commissioner misinterpreted and misapplied the law when he failed to award penalty benefits. Distilling Petitioner's argument down to its essence, Petitioner argues that the Commissioner incorrectly relied on the deputy commissioner's finding that Respondents' delay in investigating Petitioner's symptoms was "reasonable and appropriate in its scope and timeliness".

Petitioner asserts that 1) each period of delay and any reasonable excuse claimed for the delay must be analyzed separately, which she claims the Commissioner did not do; and 2) the excuses presented for the delays are actually unreasonable in violation of the pertinent standards.

Penalty benefits are available to Petitioner if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 258 (Iowa 1996). If such a delay occurs, the 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 benefits that were unreasonably delayed or denied. Iowa Code § 86.13; see also Christensen at 258. As jurisprudence concerning penalty benefits has evolved over the years, the Iowa Supreme Court has settled on two reasons why an employee would not be entitled to penalty benefits where an employer delays payment: 1) "the delay was necessary for the insurer to investigate the claim or 2) the employer had a reasonable basis to contest the employee's entitlement to benefits." Id. at 260. The Christensen court excused a two-month

delay between a doctor's report and the employer Snap-On's receipt of a report from its independent medical expert. Id. The court reasoned that the delay fell within the reasonable time for investigation into Christensen's medical evidence claiming permanent impairment. Id. However, the Christensen court was far less lenient concerning a thirteen (13) day delay between the receipt of a further medical report and Snap-On's decision to pay benefits (claiming confusion over the proper wage rate), and a further eleven (11) day delay between when the check should have been issued and mailed and when it was actually mailed. This is a fairly fact intensive inquiry, but essentially boils down to why Respondents did not perform an action where they have a positive obligation to do so.

Both the deputy commissioner and the Commissioner found Petitioner was not entitled to penalty benefits. Petitioner challenges their findings based on five (5) alleged delays in benefits, including alleged delays in requesting medical records and further investigating Petitioner's claim, caused by Respondents' conduct. Petitioner argues that while the delay itself may be reasonable, Respondents' inability to provide reasonable excuses for the delays fails the test set forth in Christensen and exposes Respondents to penalty liability. Yet it is clear from the Court's holding in Christensen that there is leniency while the employer investigates the claimed injury. In the present case, Respondent claims that each of the purported delays in payment arose from Respondent's good-faith investigation into Petitioner's claim. As noted by Respondent in their brief, they were entitled to time to seek medical records and arrange for Petitioner's evaluation by Dr. Paulson as to causation. It was only after that investigation was completed and Respondent relied on Dr. Paulson's opinion that Employer denied benefits. This denial was eventually corrected when the deputy commissioner and the Commissioner assigned greater weight to Dr. Sunil Bansal's report than Dr. Paulson's report, and found that Petitioner's injury did arise out of and in the course of her employment with Respondent. It is clear from Christensen that some delay while investigating Petitioner's claim is allowed. Respondent's investigation is a reasonable excuse under the statute. See Iowa Code § 86.13. As such, penalty benefits should not and will not awarded here.

The other possible fatal flaw with Petitioner's claim is her reliance on Iowa Code § 86.13. Iowa Code § 86.13 deals with the employer or insurance carrier paying weekly compensation benefits to the

employee. (Iowa Code Ann. § 86.13). However, as applied by the Iowa Supreme Court in Klein v. Furnas Electric Company, interest and penalties for delays in payments based on Iowa Code § 86.13 and Iowa Code § 85.30 apply to weekly compensation payments for industrial disability and not for the allowance of interest or penalties for late payment of medical expenses. However, even if Petitioner's penalty benefits claim does survive the possible misapplication of Iowa Code § 86.13, it still likely fails under Christensen.

ii. Did the Commissioner Correctly Convert and Combine Permanent Impairment Ratings to a Whole Body Injury?

Petitioner further claims the Commissioner misapplied the law when he converted permanent impairment ratings to functional disability percentages. The Commissioner is in the best position to ascertain the impairment percentage to be implied to Petitioner, and substantial evidence supports his findings. There is no reason for this Court to overturn his findings.

iii. Did the Commissioner Correctly Decline to Tax or Award Reimbursement to Petitioner for Her Examination with Dr. Bansal?

Petitioner's final claim is that the workers' compensation commissioner misinterpreted and misapplied the law when he failed to order reimbursement of the IME with Dr. Bansal. The rule regarding IME's is explained in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015).

Although the statute sets forth a process to follow in evaluating injured workers following maximum medical improvement, the statute does not preclude an employee from seeking evaluations outside the statutory process at the employee's own expense. Additionally, the process does not preclude a treating physician from offering a disability rating. The statutory process balances the competing interests of the employer and employee and permits the employee to obtain an independent medical examination at the employer's expense. See Iowa Code Ann. 85.39 (Iowa Code Ann. 2019); IBP, Inc., 633 N.W.2d at 327...An employer, however, is not obligated to pay for an evaluation obtained by an employee outside the statutory process. [Internal citation omitted].
Young, 864 N.W.2d at 844 (Iowa 2015).

An employee is entitled to reimbursement or taxation of IME costs only where the evaluation is completed within the statutory process provided for obtaining evaluations. Id. The Commissioner may not

tax physician's fees arising from an evaluation outside of the workers' compensation framework. The record is clear that Petitioner was examined by Dr. Bansal at her attorney's direction, outside of employer's control, and therefore leaves Petitioner responsible for his fees. As such, the Commissioner correctly decided no reimbursement of Petitioner for or taxation to Respondents of Dr. Bansal's fees was necessary.

IV. CONCLUSION

The Commissioner's ruling is AFFIRMED. Costs are assessed to Petitioner.



State of Iowa Courts

Type: OTHER ORDER

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So Ordered

A handwritten signature in cursive script that reads 'Robert B. Hanson'. The signature is written in black ink and is positioned above a horizontal line.

**Robert B. Hanson, District Court Judge,
Fifth Judicial District of Iowa**