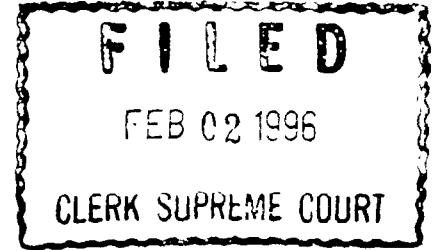


IN THE COURT OF APPEALS OF IOWA

No. 5-533 / 94-1376



**SANDRA KAY ALLEN, Individually and as Executor of the Estate of
Thomas F. Allen,**

Appellant,

vs.

**ALLEN WATER AND WASTEWATER ENGINEERING, INC., and KEMPER
INSURANCE COMPANY,**

Appellees.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

Sandra Allen appeals the district court's order on judicial review affirming the industrial commissioner's finding a penalty was not appropriate and reversing the finding Kemper Insurance Company was not entitled to a credit for amounts she received from a settlement of her wrongful death claim against a third party.

AFFIRMED.

Roger W. Stone and James M. Peters of Simmons, Perrine, Albright & Ellwood,
Cedar Rapids, for appellant.

Craig A. Levien, Jean Dickson Feeney, and Vicki L. Seeck of Betty, Neuman
& McMahon, Davenport, for appellees.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HAYDEN, P.J.

Sandra Allen is the surviving spouse of Thomas Allen who worked for Allen Water and Wastewater Engineering, Inc. Thomas was killed in a car accident on January 13, 1990. Sandra's claim for workers' compensation benefits was denied by Thomas's insurer, Kemper Insurance Company. Sandra then filed a claim with the industrial commissioner. Sandra claimed, on the night her husband was killed, he was going to check the manhole flow rate for Iowa Bottlers plant who had consulted Allen about the work. As such, she argues he was killed in the course of employment entitling her to workers' compensation benefits.

The deputy commissioner concluded the evidence overwhelmingly proved Thomas was killed in the course of his employment and no evidence supported the insurer's claim to the contrary. The deputy found, even if Thomas had some personal reasons to travel to Ottumwa on the night of the accident, he would not have gone had it not been for the business purposes. The deputy also found the business portion of the trip had to be made at some time. The deputy proposed an award of benefits, no "credit" for amounts the estate collected from a settling third-party, and a fifty-percent penalty under Iowa Code section 86.13 because the failure to pay was "without reasonable or probable cause or excuse."

Kemper appealed. The industrial commissioner adopted the deputy's conclusions finding Thomas was killed in the course of his employment and Kemper

was not entitled to credit for amounts received from a third party. The commissioner, however, found the circumstances of Thomas's death "raised significant questions of application of the dual purpose doctrine and other aspects of the issue of whether [his] death was in the course of his employment." Consequently, the commissioner concluded no penalty was appropriate.

Sandra and Kemper sought judicial review. The district court affirmed the rejection of a penalty award. The court, however, reversed and remanded to the commissioner for a determination of the amount of indemnification due the insurer from the proceeds of the third-party action. Sandra now appeals contending Kemper's denial of the claim was unreasonable. She argues, even under the dual purpose doctrine, there was no question Thomas was killed in the course of his employment and therefore a penalty should have been imposed. She also contends Kemper raised the issue of "indemnification" for the first time in the district court.

I. Standard of Review.

The scope of review in cases arising out of the Iowa Administrative Procedures Act is limited to the corrections of errors at law. *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 165 (Iowa 1982). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. *Id.* To make that determination this court applies the standards of section 17A.19(8) to the agency action to determine whether our conclusions are the same as

the district court's. *Jackson County Pub. Hosp. v. Public Employment Relations Bd.*, 280 N.W.2d 426, 429-30 (Iowa 1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 191 (Iowa 1984).

Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence made before the agency when that record is viewed as a whole. *Eaton v. Iowa Dep't of Job Serv.*, 376 N.W.2d 915, 916-17 (Iowa App. 1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. *Id.* at 917. The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 734 (Iowa App. 1986). The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. *Id.*

II. Penalty.

The first issue in this appeal is whether appellee should be penalized under Iowa Code section 86.13 for denying payment of workers' compensation death benefits to Allen in connection with the death of her husband. Iowa Code section 86.13 provides:

If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this

chapter, . . . up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

See Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993). Section 86.13 codifies, in the workers' compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them if their arguments for doing so present fairly debatable issues. *Id.* A party is entitled to raise a viable argument in its favor without suffering a penalty under Iowa Code section 86.13. *Covia*, 507 N.W.2d 411, 417 (Iowa 1993). As such, we must determine whether defendant's challenge to the assertion that Thomas was killed in the course of his employment presents a fairly debatable issue.

We find there is substantial evidence in the record to support the agency's decision refusing to grant penalty benefits to Allen. There was a legitimate factual dispute in this case regarding whether Allen was killed in the course of his employment. An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *McMullin v. Department of Revenue*, 437 N.W.2d 596, 597 (Iowa App. 1989). Many pieces of evidence supported appellee's contention Allen was not killed in the course of his employment, including: no one at with Iowa Bottlers knew Allen was going to check the meter on the night of the accident; and, Allen did not obtain the special tool normally used to open manhole covers. Although the evidence ultimately proved Allen

was killed in the course of employment. appellee's presented a viable argument to the contrary. Because this case raised a fairly debatable issue as to whether Allen was killed in the course of his employment, penalty benefits were properly denied.

In summary, we determine the industrial commissioner did not err in refusing to award penalty benefits. There is substantial evidence to support the industrial commissioner's decision and, therefore, the decision should not be disturbed on appeal. We affirm.

III. Indemnification.

The second issue in this case is whether the district court erred in remanding this case to the industrial commissioner for a determination of the amount of indemnification to be paid appellee from the proceeds of the third party action. The industrial commissioner, in finding appellee had no basis for indemnification, relied upon *Fisher v. Keller Industries*, 485 N.W.2d 626 (Iowa 1992). The industrial commissioner stated since appellee "denied liability for the claim and made no payment of weekly compensation benefits, they have no basis for indemnification The statute [85.22] provides no provision for future credit for amounts which have not been paid." The **district court** reversed the industrial commissioner's decision and remanded the case. The district court stated reliance on *Fisher* was incorrect and found *Shirley v. Pothast*, 508 N.W.2d 712 (Iowa 1993) controlling. We find the industrial

commissioner erred in relying upon *Fisher* and, therefore, affirm the district court's decision.

Iowa Code section 85.22(1) provides:

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 payments 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.

See *Shirley*, 508 N.W.2d at 717. “A lien is a charge upon property for the payment of a particular obligation that is independent of the lien’ ” *Id.* (quoting *Armour-Dial, Inc. v. Lodge & Shipley Co.*, 334 N.W.2d 142, 145 (Iowa 1983). The obligation secured by a section 85.22(1) lien is the “right of indemnification, the right to recover.” *Id.*

In *Fisher*, the supreme court held:

Iowa Code section 85.22(1) makes no provision for a credit to the employer or worker's compensation insurance carrier against benefits that will be paid in the future. This is in sharp contrast with Iowa Code section 85.22(2), which makes a specific allowance for future worker's compensation benefits.

Shirley, 508 N.W.2d at 718. In *Fisher*, the supreme court made the point that section 85.22(1) **does not** provide indemnitors with a *credit* for payments it is to make in the future. *Id.* The court explained the “credit” referred to in *Fisher* is the sum described in section 85.22(2)(b). *Id.* A “credit,” thus, is an entitlement to an *immediate recovery* which is added to the total amount of recovery of a subrogor. *Id.* (emphasis added). A section 85.22 (1) lien, on the other hand, merely provides security for reimbursement

on benefits for which an indemnitor “is liable.” *Id.* “Section 85.22(1) does not guarantee an indemnitor any immediate recovery (a “credit”) on future payments it will make. However, it does provide indemnitors with a lien to secure reimbursement.” *Id.* The supreme court stated this lien 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.’” *Id.* (quoting *Liberty Mut. Ins. Co. v. Weeks*, 404 A.2d 1006, 1012 (Me. 1979).

We find *Fisher*, like *Shirley*, is distinguishable from the instant case. *See id.* Both *Fisher* and the case at bar dealt with indemnity rights rather than subrogation rights. *See id.* *Fisher*, however, dealt with an indemnitor’s entitlement to a credit against benefits to be paid in the future. *See id.* The case at bar deals with an indemnitor’s entitlement to a lien securing its right to indemnity for benefits to be paid in the future. *See id.* One problem which arose in this case was the use of the word “credit” rather than “lien” throughout the proceedings. Regardless of the choice of noun, it is clear appellees never requested an “immediate recovery” (i.e. a credit) of the amount of future payments it would make. Rather, they have requested reimbursement for any payments which they would make in the future. As such, appellee is entitled to indemnification for amounts which are to be paid in the future.

In summary, we conclude the Iowa Supreme Court has made it clear an employer/insurer is entitled to indemnification from a recovery of a third party

tortfeasor for amounts which are to be paid in the future *Id.* To hold differently would frustrate the dual purpose of the statute -- to prevent double recovery by the worker and to secure total reimbursement for the employer/insurer out of the proceeds of recoveries made against third persons. *Id.* at 718. Furthermore, the date of the third party settlement should not be determinative of the indemnitor's lien. *Id.* The question remains as to the amount of indemnification to which the employer/insurer is entitled. This is a question of fact to be determined by the industrial commissioner. As such, we affirm the district court's decision to reverse and remand on this issue.

AFFIRMED.