

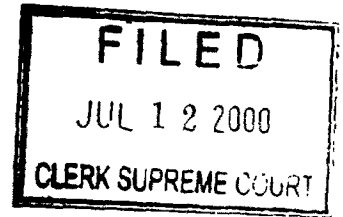
IN THE COURT OF APPEALS OF IOWA

No. 1999-574 (9-835) / 99-0295
Filed July 12, 2000

ROBERT A. PICKERING,
Petitioner-Appellant,

vs.

**SQUEALER FEEDS, Employer, and
LIBERTY MUTUAL INSURANCE CO.,**
Respondents-Appellees.



Appeal from the Iowa District Court for Linn County, Thomas M. Horan,
Judge.

Robert Pickering appeals the district court's ruling affirming the appeal
decision filed by chief deputy workers' compensation commissioner. **AFFIRMED
IN PART, REVERSED IN PART, AND REMANDED.**

Thomas M. Wertz of Wertz & Leehey, Cedar Rapids, for appellant.

Patrick J. McNulty of Grefe & Sidney, P.L.C., Des Moines, for appellees.

Heard by Sackett, C.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Robert Pickering appeals the district court's ruling affirming the appeal decision filed by the chief deputy workers' compensation commissioner. He contends the worker's compensation commissioner erred in refusing to impose penalty benefits because Liberty Mutual Insurance Company denied and delayed his workers' compensation benefits without reasonable cause. We affirm in part, reverse in part, and remand to the Iowa Worker's Compensation Commissioner.

I. Factual Background and Proceedings. Robert Pickering filed a worker's compensation claim against his employer, Squealer Feeds, and its insurer, Liberty Mutual Insurance Company. His claim for weekly benefits and medical benefits arising from an alleged injury sustained in the course and scope of his employment on December 19, 1988, was bifurcated from his claim for penalty benefits. The final agency decision filed December 24, 1991, awarded Pickering permanent partial disability benefits. Liberty Mutual sought judicial review. The agency decision was affirmed by the district court on November 3, 1992.

Pickering subsequently pursued his claim for penalty benefits pursuant to Iowa Code section 86.13, contending the employer and insurance carrier had unreasonably delayed payment of worker's compensation benefits without reasonable or probable cause. The agency appeal decision filed May 18, 1998, denied penalty benefits, and Pickering sought judicial review. The district court affirmed the agency ruling on January 23, 1999, and Pickering now appeals.

A. The Nature of the Employment. Pickering is a high school graduate who began his employment as a livestock production specialist for Squealer Feeds in mid-1987. His duties included livestock feed sales, advising customers on feed rations, and on occasion, sorting customers' livestock. He worked forty to forty-five hours per week. The job required him to drive extensively¹ from farmstead to farmstead as he made calls on customers.

B. Pickering's Preexisting History of Low Back Problems. Pickering was hospitalized for treatment of a low back strain in June of 1979. His diagnosis at that time was mild lumbar spine degeneration with acute strain. The medical records from that hospitalization indicate Pickering gave a history of having some back pain prior to June of 1979.

Pickering experienced severe low back pain again in September of 1987, after lifting a hot dog machine outside the scope of his employment. A physical therapy record generated during that hospitalization reports Pickering had a long history of low back pain. X-ray and CT scan studies from the same period reported narrowing and spurring from the L-2 through the L-4 spinal levels and bulging discs at the L-4 through S-1 levels. During the hospitalization, Pickering reported low back pain (worse on the right side) and bilateral leg pain. He was treated conservatively by his family physician, Dr. Mary Nelson, and was discharged from the hospital on October 1, 1987. An outpatient regimen of physical therapy for his low back concluded on December 17, 1987. On the last

¹ Liberty Mutual's claim file evidences confusion regarding the number of miles Pickering drove in the course of his employment. A memo prepared by the claims adjuster assigned to the file states, "405 miles a month is the very most he drove in 1 month for work. This breaks down to 81 miles a day." (Emphasis supplied).

day of therapy in 1987, the therapist reported Pickering experienced increased pain with "too much time on his feet" and the patient reported a history of having had back pain for ten years.

Pickering resumed his work for Squealer Feeds after his discharge from the hospital. His medical records suggest he responded to conservative care, returned to work "without difficulty" and "did quite well for about six months" prior to December 19, 1988. Squealer notified Pickering his employment would be terminated effective mid-January, 1989.

C. Injury of December, 1988. In mid-December,² 1988, Pickering noticed pain in his low back as he was getting into his car after calling on a customer. In a recorded statement given to Liberty Mutual on January 26, 1989, he described the incident as follows:

I stopped and called on a producer, his name was Doug Herder, I made a sales call there, conducted our business and was getting in the car going to go to the second call of the day and like I said earlier, when I got in the car I felt a little, I'm going to call it a pain, it was I noticed kind of an ache in my back but didn't give it a whole lot of thought it wasn't that painful, um on route to the next . . . call . . . I would say a distance of about 8-10 miles, about half way there I got a sudden sharp pain in my back, lower back.

Pickering was unable during the recorded interview to identify any other specific incident or trauma that precipitated the onset of the low back pain on that occasion.

² In a letter of December 29, 1988, Pickering notified the employer of his claim arising from an injury on December 19, 1988. The employer's first report of injury prepared on January 16, 1989, identified December 19, 1988, as the date of injury. Pickering's initial original notice and petition dated August 9, 1989, alleged an injury date of December 6, 1988. The medical records show Pickering contacted his family physician and discussed treatment for low back pain on December 16, 1988.

As noted above, the agency decision, which was affirmed by the district court on judicial review, determined Pickering did sustain a permanent injury and resulting industrial disability in the course and scope of his employment as a result of the incident in December of 1988.

D. Medical Treatment After the December, 1988, Incident. Pickering called Dr. Nelson on December 16, 1988. The doctor's records for that date suggest Pickering called to report his low back symptoms had "recurred . . . like he had before." Consistent with Dr. Nelson's recommendation, Pickering received care in the physical therapy department of Mercy Medical Center on December 19, 1988. The therapist's note for that visit relates the following history:

Has had a reactivation of the low back pain that he experienced 1 year to 1½ years ago when he was placed in the hospital and placed in traction. Wanted to avoid a repeat of that intensity of that discomfort. This episode came on rather gradually but not allowed to get to the intensity that the one of 1 ½ years ago. States that realizes that he is quite a bit over weight. Had lost over 40 pounds at that time but has regained approximately 20 of it in the interim. Pt states that he was interested in getting some kind of a traction setup for use within the home for possible rental for 1 month. States that he has been instructed in ex and has been doing these quite consistently since discharge and these have definitely helped. States he works as a salesman with a lot of driving and getting in and out of the car which he realizes is quite difficult on back problems.

Dr. Nelson examined Pickering on December 30, 1988. In her record of the history taken that day, the doctor wrote, "The most aggravating factor is driving. Although there hasn't been any specific injury, driving is definitely his worst situation." An MRI scan of January 6, 1989, showed degenerative changes consistent with spinal stenosis from L-2-3 to L-4-5, but no definite herniated disc

was noted. After a brief course of conservative care, Dr. Nelson referred him to Dr. Lawrence Strathman, an orthopedist.

In his office note of January 18, 1989, Dr. Strathman described Pickering as "significantly over-weight . . . short and stocky." After conducting an examination on that date, the orthopedist reported:

I think he is too uncomfortable to work at this point. He drives and I am sure that sitting is going to aggravate his symptoms. We are going to . . . get him in the back school and see if we can get this guy started on a rehab program. I do not think surgery is indicated at this time.

E. Response of Employer and Liberty Mutual to Notice of Injury Through March 8, 1989. The employer's first report of injury discloses Squealer Feeds received notice of the injury on December 23, 1988. The record reflects, however, Squealer Feeds failed to notify Liberty Mutual of the claim until January 16, 1989. In his letter to Liberty Mutual on that date, Pickering's supervisor, Ted Wilson, reported:

I first knew that he was suffering back pains, sometime during the week of December 19. At that time he indicated this condition was a continuation of a previous problem that occurred approximately 10 months ago, when he hurt his back picking up a popcorn machine at a sporting event. At a meeting with Mr. Pickering on December 29, he told me that primarily due to his pending termination, he would be better off if this was a Workman's compensation claim. At that time I informed him, "in my opinion" it would not qualify due to the lack of a specific event or accident, but that he should contact Dave Soucy in our risk management department.

Although Squealer Feeds knew of Pickering's claim the injury was work-related by at least December 29, 1998, it delayed preparation of the first report of injury until January 16, 1989.

Liberty Mutual assigned the file to its adjuster, Patrick Duff, who had been working for the company since September of 1988, in his first insurance industry job. Duff took a recorded statement from Pickering on January 26, 1989. Pickering informed Duff he had noticed low back pain as he climbed in his vehicle after making a customer call in mid-December, 1988. Duff also learned from the recorded statement Pickering claimed to have experienced sudden stabbing low back pain a few minutes later as he drove to his next sales call for Squealer Feeds. During the same interview, Pickering disclosed his 1987 back problem had been diagnosed as a herniated disc, and identified the medical care providers including his family physician, Dr. Nelson, and an orthopedist, who treated it. During the recorded interview, the Liberty Mutual adjuster also learned the identity of medical providers for the December of 1988, injury. In addition to Pickering's treating family physician, Dr. Nelson, the list of providers included Dr. Strathman, a member of the same orthopedic group that had provided treatment for the 1987 injury.

On February 1, 1989, Liberty Mutual sent correspondence to Dr. Nelson requesting medical records pertaining to the "injury of 12/19/88" and "the same for [the] injury he sustained in 1987 in which he had a herniated disc." This correspondence specifically inquired of Dr. Nelson whether "this current injury [was] work related or a result of his previous back problems?" Dr. Nelson's written response of February 7, 1989, to Liberty Mutual enclosed the patient's records for the period from December 30, 1988, through February 8, 1989, but did not address the issue of causation. Subsequent correspondence confirms

Pickering's medical records relevant to dates before December 19, 1988, were provided by Dr. Nelson to Liberty Mutual on February 13, 1989.

On March 8, 1989, Liberty Mutual solicited the opinion of Dr. Donald W. Blair on the issue of whether Pickering's claimed injury was work related. After reviewing the records of Dr. Nelson in Liberty Mutual's office, and without examining Pickering, Dr. Blair prepared a "medical conference note" on March 8, 1989. The note stated, in relevant part:

By occupation he is a salesman and his complaints were of onset of aching in December of 1988 but without any traumatic episode documented or referred to by the patient. His symptoms were apparently gradual in onset and becoming more acute which caused him to seek medical attention He is significantly overweight with weight of 260 pounds and x-ray studies show changes consistent with a spinal stenosis. It does appear that in the absence of any particular specific trauma that a spinal stenosis would likely be accounting for his back and leg symptoms. His weight would be a counter indication to be considering any elective surgery on the back and as far as the spinal stenosis is concerned. I do not feel that there has been any acute change which would require the consideration of any decompressive procedure. Most likely this man is now considered as having a preexisting condition with some recent flare-up of symptoms and this will probably be his course in the future, and apparently very similar to that which he had in 1987. Based on the history which we have and *which does not include any report from Dr. Strathman* it would not appear to this reviewer that we have [sic] no liability as far as his back condition is concerned and related to his work activities.

(Emphasis added). Dr. Blair's note thus acknowledged he had not reviewed the records of Dr. Strathman, a member of the same orthopedic group that provided treatment to Pickering both for the preexisting problem in 1987 and for the problems he experienced as a result of the December 1988, injury. Liberty Mutual did not request or obtain Dr. Strathman's records before it denied Pickering's claim.

In addition, Dr. Blair testified he was not provided a copy of Pickering's January 26, 1989, statement before he prepared the March 8, 1989, note; nor was he informed of the circumstances surrounding the onset of Pickering's December, 1988, pain before he provided his opinion. Liberty Mutual did not disclose Dr. Blair's note to Pickering and his counsel as required by Iowa Worker's Compensation Commissioner's Rule 873-4.17, and did not offer it as an exhibit in support of its defense in the 1991 hearing on the bifurcated claim for benefits. As a result of the insurance carrier's failure to produce the document authored by Dr. Blair, Pickering was unaware of its existence and unable to promptly challenge its underlying assumptions and conclusions.

During his December, 1995, deposition,³ Dr. Blair was specifically asked whether the history about the onset of Pickering's symptoms supplied to him after March 8, 1989, changed his opinion on the subject of causal connection:

Q. You understand in the worker's compensation setting you do not have to have a trauma such as a fall or a lifting event to aggravate a situation or aggravate a preexisting condition in order for the injury to be compensable? A. Yes, I understand that, yes.

Q. You have already acknowledged I believe getting into a car can cause an aggravation of a preexisting condition, correct? A. Yes, I have said that with qualifications. Getting in and out of a car would be more of an acute episode, more muscular related rather than having a significant change on arthritis and spinal stenosis.

Q. [I]f you have spinal stenosis in your low back such things as driving and getting in and out of cars can aggravate that underlying condition of spinal stenosis, can't it? A. Yes, it theoretically can.

Q. You can say you knew on March 8th of 1989 that the acute episode for which he saw Doctor Nelson in December of

³ Dr. Blair was deposed in Pickering's bad faith litigation against Liberty Mutual.

1988 was, in fact, work related? A. That episode probably was, yes.

Q. And you voiced that in your meeting with the Liberty Mutual people on March 8, 1989? A. I can't say what I stated at that time. I don't recall. But I do know that the impression that I had was that he had a recurring back problem and this was another episode as I just stated in my report and probably the course in the future with recurring episodes.

Q. But it was a work related episode, wasn't it? A. This particular episode was.

Q. All right. When you talk about this particular episode you are talking about the episode that occurred in mid December 1988? A. Yes.

Q. Back in March of 1989 you were aware due to your vast medical/legal experience in the area of worker's compensation that the employer has liability, a term that you have used in your report, when the symptoms began or arise out of in the course of employment, don't you? A. Yes.

Q. And in Mr. Pickering's case his symptoms clearly for this particular episode of pain arose out and in the course of employment? A. In this particular episode I would agree.

Q. If they had reported to you that Mr. Pickering reported to them that he had an acute onset of back pain when he got into his car and was driving you would have certainly told them that that was work related, wouldn't you? A. Yes, as I stated, that wasn't borne out in the history.

Q. That you were given? A. That I was given.

A memorandum prepared by the insurance carrier's adjuster provides documentation of Liberty Mutual's knowledge about causation when it denied Pickering's claim. The memorandum of March 8, 1989, states in relevant part, "Dr. Nelson stated driving is the worst situation [claimant] could be in and that it aggravated his previous back injury of 1987." Notwithstanding the adjuster's memorandum, in a letter dated March 8, 1989, Liberty Mutual informed Pickering his claim for benefits was denied on the ground the injury was not work-related.

F. Liberty Mutual's Response to the Claim After March 8, 1989. Pickering was subsequently referred by Dr. Nelson to Dr. Richard Nieman, a neurologist. On April 4, 1989, Dr. Nieman conducted a physical examination of Pickering and made the following observations in a narrative report to Dr. Nelson:

However, around December he started having some trouble as far as the back again. This seemed to be aggravated while driving the car. On the 15th of December, 1988, while calling on a producer noted shooting pain in the lower back I do think this condition has been aggravated by the driving I do think this injury is at least aggravated by his work condition

Dr. Nieman's report was provided to Liberty Mutual in April of 1989.

In an April 26, 1989, letter to Pickering's counsel, adjuster Duff suggested Pickering should be examined by Dr. Wirtz, a Des Moines physician, "since there is a question as to whether this was a work-related injury." Though it had the right to schedule such an examination pursuant to Iowa Code section 85.39, Liberty Mutual did not schedule an appointment for the examination, and Pickering was not examined by Dr. Wirtz or any other physician chosen by the insurance carrier.

In a supplemental report dated July 5, 1989, addressed to Pickering's counsel, Dr. Nieman reviewed the claimant's history of medical treatment for low back complaints prior to December, 1988, and opined:

Based upon the review of these records it is still my opinion that his work in 1988 aggravated an already present back condition. It is my contention that [Pickering] has indeed suffered a permanent physical impairment due to his back condition.

Dr. Nieman rated Pickering's permanent impairment at ten percent of the body as a whole. In its arbitration decision filed April 30, 1991, the agency determined

Pickering had sustained an industrial disability of thirty percent as a result of the December, 1988, injury. Liberty Mutual sought judicial review and persisted in its denial of the claim. On September 16, 1992, however, the insurance carrier notified the agency it had paid the weekly benefits awarded in the arbitration decision.

II. The Agency Decision. In its appeal decision filed on May 18, 1998, on the claim for penalty benefits, the commissioner found Pickering's claim was fairly debatable. The rationale of the decision denying penalty benefits was stated as follows:

When Liberty denied Pickering's claim, it had investigated the claim, reviewed medical records and had a doctor review the claim. It is clear that Pickering had a preexisting condition. Medical records indicated that Pickering's symptoms could have been attributed to non-work conditions, such as prior non-work injury, spinal stenosis or osteoarthritic changes. The description of the cause of the symptoms varied. Dr. Nelson described no specific injury but suggested a gradual onset caused by driving or sitting. When Duff interviewed Pickering, he suggested specific injury, namely getting into a car. The facts of this case show that the claim was fairly debatable.

The decision also relied in part upon a December 19, 1988, physical therapy record which described the condition as a "reactivation" of the low back pain the claimant had previously experienced; and upon the opinion of Liberty Mutual's attorney-expert Thomas Kamp who opined the insurance carrier had a "better than 50% chance of prevailing" on the worker's compensation claim.

III. Claims of the Parties on Appeal. Pickering challenges both the factual and legal bases for the agency decision. He contends: (1) the commissioner made an error of law in awarding no penalty benefits for the delay

prior to March 8, 1989, despite Liberty Mutual's failure to give a reason for the delay "contemporaneously with the beginning of the delay." *Meyers v. Holiday Express Corp.*, 557 N.W.2d 502, 504-05 (Iowa 1996); (2) the commissioner made both legal and factual errors in determining the claim was fairly debatable; and (3) the commissioner made both legal and factual errors in determining Liberty Mutual conducted a reasonable investigation of the claim before and after March 8, 1989.

In support of his contentions, Pickering notes Liberty Mutual knew he was asserting an "aggravation of preexisting condition claim" at least as early as January 26, 1989, when its adjuster took the recorded statement. He emphasizes, in its denial of the claim, Liberty Mutual: (1) ignored the opinion of the treating family physician, Dr. Nelson, on the causal connection between the employment and the low back symptoms for which he was treated after December 16, 1988; (2) failed to obtain and consider the records of the treating orthopedist, Dr. Strathman; (3) failed to disclose to its consultant, Dr. Blair, the episode of back pain which is the subject of this case had its onset while the claimant was performing a work-related task (driving) of a type which both Dr. Nelson and Dr. Strathman opined would aggravate the preexisting low back condition; and (4) failed to reassess its denial of the claim when, after March 8, 1989, it received additional medical information from his neurologist, Dr. Nieman. Pickering claims these facts require, as a matter of law, a conclusion Liberty Mutual failed to conduct a legitimate investigation and lacked a reasonable basis to deny his claim.

Liberty Mutual asserts the agency correctly determined the claim was fairly debatable. The insurance carrier contends Pickering's documented history of low-back ~~degeneration~~ and pain dating back to 1979, inconsistencies in the record with respect to the date and mechanism of injury, suspicions about the chronological proximity of the claim to the impending termination of employment, and the opinion of Dr. Blair constituted reasonable bases for its denial of the claim. The insurance carrier also relies upon the testimony of its expert, Thomas Kamp, an experienced attorney, who opined the insurance carrier had a better than fifty percent chance of successfully defending the claim when it denied Pickering's claim on March 8, 1989. Kamp testified, had he been asked to advise the insurance carrier on this claim, he would have told Liberty Mutual the case was "a winner" for the defense because of: (1) Pickering's prior medical history; (2) uncertainty in the medical records and the claimant's statement as to the date of the claimed injury; (3) uncertainty in the documents with respect to how the claimed injury was sustained; and (4) suspicions arising from the fact Pickering's employment was in jeopardy at the time he reported the injury unrelated to significant trauma. Kamp further testified his opinion as to defensibility of the claim did not change when he considered the medical records of Dr. Strathman and Dr. Nieman obtained by Liberty Mutual after the initial denial of the claim. In particular, Kamp testified "Dr. Nieman's reports are viewed with suspicion" because the doctor "is known as a claimant's doctor and . . . a very big advocate for claimants."

IV. Standard of Review. Decisions of the worker's compensation commissioner are reviewed by the district court pursuant to Iowa Code chapter 17A. See ~~Iowa Code~~ § 86.26. The district court's scope of review under section 17A.19 and our review under section 17A.20 is at law and not de novo. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993). In our review, we apply the standards of section 17A.19(8) to the agency's actions to determine whether our legal conclusions are the same as those reached by the district court. *Id.* If our conclusions are the same, we affirm; otherwise, we reverse. *Id.* To the extent this appeal requires an interpretation of a worker's compensation carrier's duty pursuant to Iowa Code section 86.13, the issue is one of law. *Id.* Issues of law are determined by the court, and we give only limited deference to an administrative agency's interpretation of law. If the agency action is affected by an error of law, the court shall reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief, if substantial rights of the petitioner have been prejudiced. Iowa Code §17A.19(8)(e) (1997).

The agency's fact determinations are binding on us if they are supported by substantial evidence. *Bridgestone/Firestone, Inc. v. Employment Appeal Bd.*, 570 N.W.2d 85, 90 (Iowa 1997). "Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings." *Eaton v. Iowa Employment Appeal Bd.*, 602 N.W.2d 553, 554 (Iowa 1999) (quoting *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 196 (Iowa 1992)). The issue for the court is not whether the evidence is in conflict or whether reasonable minds

might disagree about the conclusions to be drawn from the evidence; rather, the issue for the court is whether the evidence is so one-sided a finding contrary to that reached by the agency is demanded as a matter of law. *Freeland*, 492 N.W.2d at 197.

V. The Nature and Extent of Liberty Mutual's Duty to Investigate.

The issues in this case concern the application of the penalty provisions of Iowa Code section 86.13, which provides, in relevant part:

If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the worker's 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 unreasonably delayed or denied.

Iowa Code § 86.13. This statute establishes an affirmative duty for workers' compensation insurance carriers to act reasonably when a claim is filed. *Boylan v. American Motorists Ins. Co.*, 489 N.W.2d 742, 744 (Iowa 1992). In order to prove entitlement to penalty benefits, a claimant need not prove the delay in payment resulted from bad faith or from intentional, reckless, or negligent conduct on the part of the insurance company. *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). The focus is on whether timely payment of the benefits due was made and if not, whether there was a reasonable excuse for the failure to make timely payment of the amount owed. *Id.*

The issues raised in this appeal require an analysis of the nature and extent of the worker's compensation insurer's duty to investigate claims. The insurance carrier's duty to act reasonably includes the duty to fully and fairly

investigate a claim rather than to stand back and deny a claim simply because they wish to deny it. See *Gamer v. Don's Auto. Supply*, Iowa Indus. Comm'r, No. 1043065 (April 17, 1995). This duty requires the insurance carrier to act reasonably under the circumstances that are known or reasonably available to it. It is an affirmative duty which does not permit a worker's compensation insurance company to deny and refuse to pay a claim without exposure for penalty benefits until ordered to pay by the worker's compensation commissioner. *Christensen*, 554 N.W.2d at 260. It is a continuing duty that requires the carrier to reassess its position on the claim whenever additional information becomes available. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 683 (Iowa 1995) ("In other words, a continued delay in payment may be unreasonable even though the original denial was not Any documents showing new information coming to the attention of Liberty Mutual after its denial would be relevant to whether it was reasonable for the company to persist in its denial of benefits.").

The conduct of the insurance carrier charged with delay in the payment of benefits is not measured against that of a reasonable layperson or a reasonable adjuster with very limited knowledge of workers' compensation laws. See *Pedersen v. Humboldt County Mem'l Hosp.*, Iowa Indus. Comm'r Nos. 965283, 1003241 (May 31, 1994). The agency evaluates the conduct of the insurance adjuster against a standard of "the reasonably competent adjuster." See *Matthiesen v. Hilltop Care Ctr.*, Iowa Indus. Comm'r No. 1058015 (May 29, 1996).

VI. Significance of Pickering's Preexisting Condition. While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence of such injury or disease is not a defense. If claimant proves his preexisting condition or disability was aggravated, accelerated, worsened or lighted up with resulting disability, he is entitled to recover. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 135, 115 N.W.2d 812, 815 (1962). When an aggravation of a preexisting condition occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. *Ziegler v. United States Gypsum Co.* 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960). Thus, it is clear the law does not permit a worker's compensation insurance carrier to deny a claim merely because the claimant has a preexisting condition affecting the part of the body involved in the claim.⁴

To be compensable, the aggravation of a preexisting condition must arise out of and in the course of employment. See *Miedema v. Dial Corp.*, 551 N.W.2d 309, 311 (Iowa 1996). Injuries that occur "in the course of" employment do not necessarily "arise out of the employment." "The injury must be a natural incident of the work[;] . . . it must be a rational consequence of a hazard connected with the employment." *Id.* (quoting *Cedar Rapids Community Sch. v. Cady*, 278 N.W.2d 298, 299 (Iowa 1979)).

⁴ This is demonstrated by the fact Pickering's claim for permanent partial disability benefits was ultimately determined to be compensable notwithstanding the preexisting condition. See *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 680 (Iowa 1995).

VII. Did the Commissioner Err in Failing to Award Penalty Benefits

For the Delay Prior to March 8, 1989? Iowa Code section 86.13 provides, in relevant part:

If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation 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.

Iowa Code § 86.13. This statute has been interpreted and applied by our supreme court in a series of cases decided during the past decade. In *Meyers v. Holiday Express Corp.*, 557 N.W.2d 502 (Iowa 1996), the court reviewed several of those cases and identified principles gleaned from their holdings. Two of these principles are relevant to the determination of Pickering's claim the commissioner erred in failing to impose a penalty for the delay in the commencement of benefits prior to March 8, 1989:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. (Citations omitted).

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. (Citation omitted).

Meyers, 557 N.W.2d at 505-06.

Though the language within Iowa Code section 86.13 does not specifically mandate notice be given to the claimant of the reason for a denial or delay in the commencement of weekly benefits at the beginning of the delay, the court's

rationale in *Meyers* for the imposition of penalties if notice is not timely given is obvious. Claimants who are disabled after injury are often without a source of income to pay for the necessities of life when their paychecks cease. Financial vulnerability resulting from delays in the commencement of weekly benefit payments is superimposed upon the bodily impairment arising from an injury. Timely notice of the reason for denial or delay of benefits provides claimant an opportunity to respond to the insurance company's reason(s). If claimant believes the denial is unfounded, he may take issue with it and supply additional information deemed supportive of the claim and ask the company to revisit its decision. If a delay in commencement of benefits is attributed by the insurance company to the need to investigate the claim, the claimant may inquire what additional information is needed and endeavor to promptly supply it. In both instances (denial or delay of benefits), *Meyers* dictates claimant is to be given an explanation at the beginning of the delay of the reason or reasons why benefits are not being paid. If no reason is given, a penalty in some amount will be owed.

Cases interpreting section 86.13 illustrate penalties are designed to promote prompt exchange of information between the parties, discourage delays in the commencement of weekly benefits, and minimize financial stress experienced by injured workers by minimizing delays.

It is undisputed Pickering gave written notice of his claim for worker's compensation benefits to the employer by letter dated December 29, 1988. No reason for a delay in the commencement of benefits was given by Liberty Mutual until March 8, 1989. The company contends this delay attributed to its

investigation of the claim was reasonable. Liberty Mutual cites *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254 (Iowa 1996) (finding a delay of two months for investigation "falls within a reasonable time for . . . investigation") and *Kiesecker v. Webster City Custom Meats, Inc.*, 528 N.W.2d 109 (Iowa 1995) (affirming commissioner's finding insurance company's delay of ninety days to investigate was unreasonable) for the proposition the delay prior to March 8, 1989 was a reasonable period of time for its investigation of Pickering's claim. Liberty Mutual contends it was not required to provide Pickering a reason for the delay during this period of investigation prior to March 8, 1989. We believe *Meyers*, a case decided by our supreme court after its decision in *Christensen*, requires us to reject Liberty Mutual's contention. As noted above, the *Meyers* court enunciated principles intended to clarify the circumstances in which penalties will be imposed. The first of these principles dictates the reason for delay be conveyed to the employee "contemporaneously with the beginning of the delay."

Liberty Mutual contends Pickering's interpretation of the *Meyers* principles is nonsensical because it would expose an employer to liability for penalty benefits for failure to give notice of a reason for delay even if the claimant loses his worker's compensation claim on the merits. This assertion is without merit, however, because the language of Iowa Code section 86.13 permits imposition of a penalty in an amount "up to fifty percent of the amount of benefits that were unreasonably delayed or denied." Accordingly, if a claim is found to be without merit, no benefits are owed and no penalty will be imposed. In the case now

before the court, Liberty Mutual failed to convey a reason for the delay to Pickering contemporaneously with the beginning of the delay and was subsequently found liable for worker's compensation benefits. We conclude the commissioner made an error of law in failing to impose a penalty against Liberty Mutual for the delay prior to March 8, 1989.

VIII. Was Liberty Mutual's Statement of Reason for Denial on March 8, 1989, Insufficient as a Matter of Law? In its March 8, 1989, Liberty Mutual informed Pickering the company would "not be making any payments on [his] claim" because his injury "[was] not work related." Pickering claims this articulation of the insurance company's reason for denial was inadequate and penalty benefits are also owed by Liberty Mutual in some amount for the period after March 8, 1989. In our analysis of this issue, we look to our supreme court's decision in *Meyers*.

As we understand his argument, Pickering claims Liberty Mutual had a duty to disclose more thoroughly the basis for its March 8, 1989, denial; and the company's notice given on that date was so vague as to render it insufficient as a matter of law. We disagree. The insurance company's communication it believed the claim was "not work related" communicated the carrier's ground for the denial. Although not a model of specificity, the reason offered was adequate to notify Pickering of Liberty Mutual's contention there was no causal connection between the employment and the low back condition for which the claim was being treated. Nonetheless, the mere statement of a "reason" will not shield the

insurer from liability for penalty benefits under Iowa Code section 86.13 if it is not one a reasonable fact finder could accept. *Id.*

IX. - Did the Agency Err When it Concluded Pickering's Claim was Fairly Debatable After March 8, 1989? Pickering contends the affirmative duty of Liberty Mutual required it to do more than simply determine whether Pickering had a history of low back problems prior to December, 1988. He argues it was obvious to the insurance carrier at least as early as January 26, 1989, when adjuster Duff took the claimant's recorded statement, the claim involved a preexisting low back condition; and Liberty Mutual was obligated to evaluate whether that condition was aggravated by Pickering's work activity in December of 1988. Dr. Blair, the only medical expert who rendered an opinion the claim was not work related, was not provided important factual information about the onset of Pickering's symptoms in the course and scope of his employment even though Liberty Mutual had such information in its possession. The significance of the historical information that was either negligently or intentionally withheld by Liberty Mutual from the doctor is illustrated by Dr. Blair's subsequent testimony. After learning Pickering's history with respect to the onset of severe low back pain while driving in the course of employment, the doctor conceded Pickering's claim was work related. Under the circumstances presented in this record, Pickering correctly asserts the commissioner could not, solely on the basis of the existence of the preexisting condition, conclude Pickering's claim was fairly debatable after March 8, 1989. There was no question facing the insurance carrier as to whether Pickering had a history of a non-work injury or suffered from

spinal stenosis or osteoarthritic changes prior to December of 1988. Clearly he did. This prior medical history did not excuse Liberty Mutual from conducting a reasonable investigation of whether Pickering's preexisting condition was aggravated in the course and scope of employment; nor did it excuse Liberty Mutual's decision to deny benefits without a reliable medical opinion supporting a finding there was no causal connection between Pickering's low back pain and his work activities.

Although we find no substantial evidence in the record to support a conclusion Liberty Mutual conducted a meaningful investigation on the issue of whether Pickering's preexisting condition was aggravated by his work for Squealer Feeds in December of 1988, we must nonetheless affirm the commissioner's denial of penalty benefits for the period after March 8, 1989. Liberty Mutual presented evidence tending to prove Pickering's preexisting low back condition was not the only reason it believed the claim was debatable. Expert witness Kamp testified the claim was "a probable winner" for the defense in part because of: (1) the claimant's uncertainty about the date of injury; and (2) inconsistencies in historical information reported in the medical records and Pickering's recorded statement with respect to the circumstances surrounding the onset of the low back pain. Liberty Mutual presented evidence tending to prove Pickering had given a history of "a gradual onset" of symptoms that were "a continuation" of his preexisting low back problem. The insurance carrier correctly asserts such inconsistency is commonly considered by the commissioner in assessing a claimant's credibility. The commissioner clearly

found Kamp's testimony to be credible. In addition, Liberty Mutual claims, and expert Kamp testified, the denial of Pickering's claim was reasonable because the company ~~was~~ suspicious of the timing of the claim received in close chronological proximity to the impending termination of claimant's employment.

Pickering notes the commissioner did not expressly rely upon these factors as reasonable excuses for the denial of the claim; and Liberty Mutual did not communicate them to him on March 8, 1989, as reasons for the denial. Nonetheless, we are unable within the constraints of our standard of review to reject them as a matter of law because we are not permitted to substitute our judgment for the commissioner's on such matters. "Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings." *Eaton*, 602 N.W.2d at 554; *Freeland*, 592 N.W.2d at 196. We cannot say the evidence supporting Liberty Mutual's claimed excuses for denial after March 8, 1989, is so one-sided a finding contrary to that reached by the agency is demanded as a matter of law. *Freeland*, 492 N.W.2d at 197.

Pickering also contends the commissioner failed to correctly apply the law that imposes a continuing duty on insurance carriers to reevaluate claims in light of subsequent information. See *Squealer Feeds*, 530 N.W.2d at 686. As noted above, Liberty Mutual received medical information bearing upon the compensability of Pickering's claim after the March 8, 1989, denial. In April, 1989, it received the opinion of Dr. Nieman, a treating neurologist who opined Pickering's preexisting condition was aggravated by his work activities. There is no evidence in the record tending to prove Liberty Mutual reconsidered its denial

after receipt of this new medical information. Pickering contends the commissioner erred in its application of the law to the facts when it failed to hold Liberty Mutual to its duty to reevaluate the denial of the claim after the insurance carrier received Dr. Nieman's opinion. Notwithstanding this, however, we are unable to conclude as a matter of law Liberty Mutual did not have a reasonable excuse for its denial of Pickering's claim after March 8, 1989. Though it was unreasonable to rely upon the opinion of Dr. Blair because of its obvious unreliability, the other contested matters relied upon by expert Kamp in support of his opinion the claim was fairly debatable appear in the record and constitute minimally sufficient bases for the commissioner's determination the claim was fairly debatable. The question, of course, is not whether we would have reached the same findings of fact and conclusions of law had we been the fact-finders. The evidence is not so one-sided we are free to substitute our judgment for that of the commissioner. Accordingly, we affirm the decision of the commissioner and the district court denying penalty benefits for the period after March 8, 1989.

X. Conclusion. We affirm the commissioner's decision denying penalty benefits for the period after March 8, 1989; we reverse and remand to the commissioner for determination of the penalty to be imposed for the period prior to March 8, 1989.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.