

IN THE COURT OF APPEALS OF IOWA

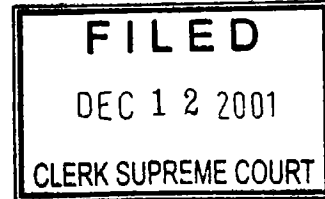
No. 1-463 / 00-1578
Filed December 12, 2001

VOGEL PAINT & WAX CO., INC.,
and CRUM & FORSTER INSURANCE
CO.,

Petitioners-Appellees,

vs.

STEVE MCGINITY,
Respondent-Appellant.



Appeal from the Iowa District Court for Polk County, Gregory A. Hulse,
Judge.

The respondent appeals from the district court's ruling on judicial review reversing the workers' compensation commissioner's award of penalty benefits against the petitioners. **AFFIRMED.**

Andrew S. Hoth of Hoth Law Offices, Burlington, for appellant.

Harry W. Dahl, Burlington, for appellees.

Considered by Zimmer, P J Miller and Hecht, JJ. Huitink, J. takes no
part.

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MILLER, J.

Steve McGinity appeals from the district court's ruling on judicial review reversing the workers' compensation commissioner's award of penalty benefits against his former employer, Vogel Paint & Wax Co., Inc., and its insurance carrier, Crum & Forster Insurance Co. McGinity claims the district court erred in concluding the agency's determination that McGinity was entitled to penalty benefits is not supported by substantial evidence. We affirm.

I. BACKGROUND FACTS

The parties do not substantially dispute the underlying factual findings made by the agency. Rather, it is the agency's conclusion that the facts support an award of penalty benefits, and the district court's contrary conclusion, that give rise to this appeal.

Steve McGinity began employment with Vogel Paint & Wax Co., Inc. (Vogel) in 1995 making and processing bulk paint. On April 4, 1996 McGinity fell on the stairs at work and landed on his left side. He felt pain in his left elbow, the back of his left arm, and felt dizzy. His pain worsened as the day progressed but he did not miss any work immediately after the injury. Over the next few weeks McGinity's left arm pain worsened and began radiating into his left forearm and wrist. Vogel referred McGinity to Koert Smith, M.D., an orthopedic surgeon, on April 26, 1996 for an evaluation of his injury. At that time Dr. Smith noted McGinity localized his pain primarily in the posterior, medial and lateral aspects of his left elbow. Dr. Smith found evidence of epicondylitis, gave McGinity a tennis elbow support to wear, and prescribed medication for the pain.

McGinity continued his treatment with Dr. Smith. Over the following visits to Dr. Smith, McGinity began to complain of pain in his left hand, shoulder and neck and numbness in his left hand. On November 4, 1996 Dr. Smith found McGinity's shoulder to have a full range of motion but reported he did have some crepitus consistent with impingement symptoms. Dr. Smith opined the epicondylitis was slowly resolving but that McGinity might have a little bit of impingement syndrome in the shoulder. He noted that McGinity could continue full work activities.

On January 20, 1997 Dr. Smith noted nerve conduction studies had been performed on McGinity and the results had been found to be consistent with bilateral cubital tunnel syndrome. Dr. Smith referred McGinity to Richard Kreiter, M.D., an orthopedic surgeon. Dr. Kreiter evaluated McGinity on February 2, 1997 and performed another EMG and nerve conduction study on February 14, 1997. Dr. Kreiter noted that the findings were essentially within normal limits.

McGinity was then referred to Eugene Collins, M.D., relating to his shoulder and cervical spine complaints. An MRI of his cervical spine was performed which found definite degenerative change at the C5-6 and C6-7 levels but no significant disc herniation. Dr. Collins opined that the tests performed did not demonstrate McGinity had definite evidence of nerve root impingement and that he was not a surgical candidate.

Desiring to visit a neurologist closer to his home, McGinity began seeing Anil Dhuna, M.D. on August 15, 1997. Dr. Dhuna did a repeat EMG study of McGinity's upper left extremity, which was found to be essentially normal. Dr. Dhuna determined that McGinity's neck pain was primarily from cervical

degenerative disease with a secondary muscle spasm. On November 4, 1997 Dr. Dhuna determined McGinity had reached maximum medical improvement and that his cervical degenerative arthritis had been exacerbated by the work related injury of April 6, 1996. At that time Dr. Dhuna offered permanent work restrictions for McGinity with no lifting overhead more than thirty-five pounds and lifting only up to fifty pounds from waist level. McGinity was also to avoid repetitive neck movements.

On January 21, 1997 McGinity was discharged from Vogel. The reason offered by Vogel was that he failed to report to work the previous Thursday. Vogel asserts the discharge is unrelated to the injury and McGinity does not dispute this on appeal.

By January 1998 McGinity had returned to the clinic where Dr. Smith had practiced and Michael Hendricks, M.D. had assumed his care. Dr. Hendricks felt that Dr. Kreiter's opinion of significant carpal tunnel and nerve entrapment problems would be difficult to confirm because the diagnostic tests did not support those impressions. On January 16, 1998 Dr. Hendricks opined that McGinity had cervical degenerative disc disease and his pain was due to the degenerative disc disease because there was no other objective, recordable source for his pain and discomfort.

On January 27, 1998 McGinity underwent an independent medical examination by Keith Riggins, M.D., an orthopedic surgeon. Dr. Riggins noted that cervical spine x-rays from January and May 1997 and a cervical spine MRI from May 1997 showed degenerative changes and disc prominence and/or spur formation respectively. He determined that no specific organic diagnosis was

available to account for the spectrum of symptoms McGinity reported, stated he was unable to identify any organic conditions which would impose restrictions on McGinity's activities, and stated he was unable to identify any ratable impairment. He did note that McGinity's left grip strength was less than his right and agreed with Dr. Dhuna that McGinity had reached maximum medical improvement in approximately November of 1997. He expressed no opinion that McGinity's difference in grip strengths or continuing pain symptoms were in whole or in part causally related to the April 4, 1996 injury.

On October 2, 1998 Dr. Hendricks opined that McGinity had sustained a work-related injury with the primary diagnosis being lateral epicondylitis of his left elbow. Based on grip tests showing McGinity's left grip strength was eighteen percent less than his right grip strength, Dr. Hendricks determined McGinity had a ten percent upper extremity impairment which was equivalent to a six percent impairment to his body as a whole under the AMA Guide for the Evaluation of Permanent Partial Impairment.

On March 29, 1999 McGinity underwent a second independent examination, by Dr. Jeff Pence, a chiropractor. Dr. Pence's examination and tests indicated the likelihood of lateral epicondylitis of the left elbow and that McGinity had less grip strength in his left hand than his right. Dr. Pence noted McGinity's complaints of pain in the mid portion of his neck and statements that his neck "grinds and pops" a lot. He found loss of grip strength to be a permanent impairment and quantified the impairment at the same ten percent upper extremity impairment and six percent whole person impairment that Dr. Hendricks had found. Although he had reviewed McGinity's file and was

presumably aware of his cervical spine problems, he also expressed no opinion concerning whether McGinity's difference in grip strengths or continuing pain symptoms were in whole or in part causally related to the April 4, 1996 injury rather than the cervical spine problems.

II. PRIOR PROCEEDINGS

McGinity filed a petition with the Iowa Workers' Compensation Commission alleging he had sustained a work related injury and was entitled to permanent disability, healing period, and penalty benefits. McGinity's claim was heard before a deputy commissioner and the deputy issued his arbitration decision on May 25, 1999. He concluded McGinity had suffered a ten percent permanent partial impairment to his left upper extremity and was entitled to twenty-five weeks of permanent partial disability benefits at \$231.79 per week. The deputy further concluded McGinity was entitled to fifty percent penalty benefits under Iowa Code section 86.13 (1997), an amount of \$2897.38. McGinity's claim for healing period benefits was denied.

Vogel filed a notice of appeal with the Iowa Workers' Compensation Commissioner. The only issue Vogel urged in its appeal to the commissioner was that McGinity was not entitled to penalty benefits because his claim was fairly debatable. On February 10, 2000 a chief deputy of the workers compensation commission issued an appeal decision affirming the deputy's conclusion that McGinity was entitled to fifty percent penalty benefits.¹

¹ On February 8, 2000 the Iowa Workers' Compensation Commissioner delegated authority to the chief deputy to issue the final agency action in this matter pursuant to Iowa Code § 86.3.

Vogel filed a petition for judicial review of the agency's appeal decision with the district court. The district court reversed the agency's decision and determined that McGinity was not entitled to penalty benefits because the agency decision that his claim was not fairly debatable was not supported by substantial evidence. McGinity appeals the decision of the district court.

III. STANDARDS OF REVIEW

Our review of a final decision of the workers' compensation commissioner, like that of the district court, is for correction of errors of law. *Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). In determining whether the district court erred in exercising its power of judicial review, we apply the standards of Iowa Code section 17A.19(8) to the agency action to determine whether our conclusions are the same as those of the district court. *Williamson v. Wellman Fansteel*, 595 N.W.2d 803, 806 (Iowa 1999); *E.N.T. Assocs. v. Collentine*, 525 N.W.2d 827, 829 (Iowa 1994). The agency's findings are akin to a jury verdict, and we broadly apply them to uphold the decision. *Shank*, 516 N.W.2d at 812.

We may reverse, modify or remand to the commissioner for further proceedings if that agency's action was affected by an error of law, or if it is not supported by substantial evidence when the record is viewed as a whole. *Quaker Oates Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). Evidence is substantial if a reasonable mind would find it adequate to reach the same findings. *Murillo v. Blackhawk Foundry*, 571 N.W.2d 16, 17 (Iowa 1997). The commissioner's decision does not lack substantial evidential support merely because inconsistent conclusions could be drawn from the same evidence. *Id.*

The ultimate question is not whether the evidence supports a different finding, but whether it supports the finding the commissioner actually made. *Id.*

IV. MERITS

McGinity argues the district court erred in reversing the workers' compensation commissioner's decision to award him penalty benefits. He contends there was substantial evidence in the record to support the commissioner's determination that Vogel's delay in payment of benefits was unreasonable and thus he was entitled to penalty benefits under Iowa Code section 86.13 (1997).

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, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

Thus section 86.13 recognizes an affirmative obligation on the part of the employer and insurance carrier to act reasonably in regard to benefit payments in the absence of specific direction from the commissioner. *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254 (Iowa 1996) (citing *Boylan v. American Motorists Ins. Co.*, 489 N.W.2d 742 (Iowa 1992)). An employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse for such delay. *Id.*

The application of the penalty provision does not turn on the length of the delay in making compensation payments. Any delay without reasonable excuse entitles the employee to penalty benefits in some amount. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 236 (Iowa 1996). "In the absence of a

reasonable excuse for a delay, penalty benefits are mandatory. Only the amount is within the discretion of the commissioner." *Christensen*, 554 N.W.2d at 261. A reasonable cause or excuse exists if either (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. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable," whether the debate concerns a matter of fact or law. *Id.*

The purpose or goal of section 86.13 is both punishment and deterrence. *Robbennolt*, 555 N.W.2d at 237. "However, it is an unreasonable application of the penalty provision to assume that any delay after the furnishing of the medical evidence is unreasonable." *Davidson v. Bruce*, 594 N.W.2d 833, 838 (Iowa Ct. App. 1999).

As set forth above, the limited issue before us on appeal is whether we agree with the district court's determination that there was not substantial evidence in the record to support the agency's decision. Evidence is substantial if reasonable minds would find it adequate to reach the same findings. *Murillo*, 571 N.W.2d at 17. The agency's decision does not lack substantial evidential support merely because inconsistent conclusions could be drawn from the same evidence and the ultimate question is not whether the evidence supports a different finding, but whether it supports the finding the commissioner actually made. *Id.*

Based on the standards set forth in the cases above, the specific issue in the case at bar is whether a reasonable person, after examining the evidence as

a whole, would conclude McGinity's claim that he had sustained a permanent partial impairment was not fairly debatable. The district court found that,

no reasonable person could conclude, after examining the evidence of the two opposing physicians' opinions, that the claim was not fairly debatable. Phrased differently, no reasonable person could conclude that Respondent's claim was not fairly debatable when the only two pieces of relevant evidence before Petitioners were the differing opinion of two doctors.

We agree with the district court that the commissioner's determination McGinity's claim was not fairly debatable is not supported by substantial evidence.

Prior to Dr. Hendricks' opinion in October of 1998 which offered the ten percent upper extremity impairment rating the only opinion offered relating to a permanent partial disability rating after McGinity had reached maximum medical improvement in November of 1997, the only relevant time period for our purposes here, was that of Dr. Riggins.² Although McGinity had seen Dr. Hendricks on two occasions prior to seeing Dr. Riggins, Dr. Hendricks did not give any opinion as to an impairment rating as a result of these prior visits.

While noting in his January 27, 1998 report that McGinity's left grip strength was less than his right, Dr. Riggins determined he was unable to give a "specific organic diagnosis" to account for the spectrum of symptoms McGinity reported and stated in his diagnosis that it was "more than likely significant depression exists, and that chronic pain syndrome may be present." Based on

² Permanent partial disability benefits are not payable until the healing period has ended and the healing period did not end here until it was determined McGinity had reached maximum medical improvement. Iowa Code §§85.34(1) and (2); *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 447-48 (Iowa 1999). Nor is an assessment of penalty benefits proper until the employer has been informed that an employee has reached maximum medical improvement. *Davidson*, 594 N.W.2d at 839.

this diagnosis Dr. Riggins imposed no restrictions on McGinity's activities and stated he was "unable to identify ratable impairment."

Then in October of 1998 Dr. Hendricks saw McGinity once again and issued his written report. Dr. Hendricks' report stated, "The primary diagnosis of the problem from the original injury to the current is that of lateral epicondylitis of the left elbow." Hendricks found an eighteen percent difference in grip strength between McGinity's left and right side and determined McGinity had a ten percent upper extremity impairment which was equivalent to a six percent impairment of the whole person.

We agree with the district court's determination that it does not appear from the record one of these doctors' opinions was based on more accurate or complete information or that one was any more or less qualified than the other to make such determinations. Furthermore, there is no evidence in the record indicating Vogel had any reason not to consider Dr. Riggins' opinion or that McGinity's condition changed between the time he saw Dr. Riggins in January of 1998 and Dr. Hendricks in October of 1998. It therefore appears both doctors relied upon the same information in reaching their differing opinions. Thus Vogel had two credible expert opinions and they were in substantial conflict concerning McGinity's diagnosis and, more importantly, whether he had any ratable impairment. (Although not relied on by the district court, we note that Dr. Hendricks never expressed an opinion McGinity's impairment was causally related to his work-related injury, just as Dr. Riggins and Dr. Pence had expressed no such opinion.) Based on the information available to Vogel it was reasonable to delay paying McGinity permanent partial disability benefits

because his claim that he had a ratable permanent partial impairment was fairly debatable.

V. SUMMARY

We agree with the district court's conclusion that after examining the evidence consisting of the two orthopedic surgeons' differing opinions a reasonable person could not conclude the claim was not fairly debatable, and thus there was not substantial evidence to support the agency's determination McGinity's claim was not fairly debatable. We affirm the district court's reversal of the agency's decision.

AFFIRMED.