IN THE COURT OF APPEALS OF IOWA

No. 2-943 / 12-0644
Filed January 24, 2013

JOHN WALTER PODGORNIAK,
Petitioner-Appellant,

vs.

ASPLUNDH TREE EXPERT COMPANY and LUMBERMEN'S MUTUAL INSURANCE COMPANY,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

An employee appeals the denial of penalty benefits in a review-reopening proceeding. **AFFIRMED.**

Mark S. Soldat of Soldat & Parrish-Sams, P.L.C., West Des Moines, for appellant.

Richard G. Book of Huber, Book, Cortese & Lanz, P.L.L.C., West Des Moines, for appellees.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

John Podgorniak appeals a decision of the workers' compensation commissioner on his claim for penalty benefits.

I. Background Facts and Proceedings

John Podgorniak injured his left shoulder, neck, and head while working for Asplundh Tree Expert Company. He filed workers' compensation petitions, which culminated in an order requiring the provision of alternate medical care[1] and the payment of "running healing period benefits."[2]

Asplundh referred Podgorniak to certain physicians, who opined he had reached maximum medical improvement.[3] Based on these opinions, Asplundh terminated Podgorniak's healing period benefits.

Podgorniak filed a review-reopening petition raising several claims, including a request for "penalties" based on Asplundh's termination of healing period benefits. On the penalty question, a deputy workers' compensation commissioner determined that Asplundh and its insurer, Lumberman's Mutual Insurance Company, unreasonably delayed the payment of weekly benefits. The

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[1] Iowa Code section 85.27(4) (2009) authorizes the commissioner to order alternate medical care "paid by the employer . . . when the employee is dissatisfied with the care furnished by the employer and establishes the care furnished by the employer was unreasonable." *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 204 (Iowa 2010).

[2] Healing period benefits sustain "the injured employee during convalescence and disability from work." *Waldinger Corp. v. Mettler*, 817 N.W.2d 1, 7 (Iowa 2012); *see also* Iowa Code § 85.34(1) (stating that if "an employee has suffered a personal injury causing permanent partial disability . . . the employer shall pay to the employee compensation for a healing period").

[3] The healing period authorized by section 85.34(1) begins "on the first day of disability after the injury" and lasts until the first of several occurrences. One of those occurrences is that "it is medically indicated that significant improvement from the injury is not anticipated." Iowa Code § 85.34(1). This language has come to be known as maximum medical improvement or "MMI." *Waldinger*, 817 N.W.2d at 6 n.3.

deputy awarded "[a] penalty of 50 percent of all healing period benefits claimant asserts were not timely paid."

On intra-agency appeal, the commissioner sitting by designation reversed the penalty award, reasoning, "The defendants' actions in terminating healing period benefits were fairly debatable." The district court affirmed that decision.

II. Analysis

Seeking further judicial review, Podgorniak now contends the district court erred by: (1) "affirming the commissioner's determination that Lumberman's had proven an excuse which was reasonable for its 10/05/06 unilateral termination of Podgorniak's 'running' healing period compensation"; and (2) "refus[ing] to consider the commissioner's failures to determine the specific payment amounts and dates of healing period compensation, the amounts of healing period compensation still due as of 11/16/09, and the amounts of healing period compensation, the payments of which were delayed and/or underpaid."[4]

The second issue was not preserved for our review. *See Soo Line R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) ("Our review is generally limited to questions raised at or before the hearing held by the agency."); *see also Renewable Fuels, Inc. v. Iowa Ins. Comm'r*, 752 N.W.2d 441, 446 (Iowa Ct. App. 2008) ("In cases involving judicial review of final action of an administrative agency, an issue must generally be presented to the agency to satisfy error preservation requirements."). Accordingly, we begin and end with a discussion of the first issue. Our review of the commissioner's fact findings

[4] These statements were extracted from Podgorniak's briefs. At oral arguments, Podgorniak did not hew to these issues. We will not consider his expanded contentions.

supporting the denial of penalty benefits is for substantial evidence. *See* Iowa Code § 17A.19(10)(f) (2009); *Schadendorf v*. *Snap-On Tools Corp*., 757 N.W.2d 330, 335 (Iowa 2008) (reviewing agency findings supporting penalty decisions for substantial evidence); *City of Madrid v*. *Blasnitz*, 742 N.W.2d 77, 80 (Iowa 2007) ("The sole issue on appeal is whether the record before the commissioner provides substantial evidence to support an award of penalty benefits.").

Iowa Code section 86.13(4)(b) requires the agency to award a claimant penalty benefits if (1) "The employee has demonstrated a denial, delay in payment, or termination of benefits"; and (2) "The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Podgorniak contends Asplundh and its insurer failed to prove the second prong.

On that question, a 2009 amendment to the statute states:

> In order to be considered a reasonable or probable cause or excuse under paragraph 'b,' an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Id. § 86.13(4)(c).[5]

[5] *See* 2009 Iowa Acts ch. 179, § 110.

Podgorniak first suggests "the appeal deputy erred by applying a non-statutory 'fairly debatable' standard as a *per se* defense to a penalty claim." To the contrary, the commissioner cited section 86.13 as well as established case law that section 86.13(4)(b)(2) essentially codified, such as *Meyers v*. *Holiday Express Corp*., 557 N.W.2d 502 (Iowa 1996), partially abrogated by *Keystone Nursing Care Center v*. *Craddock*, 705 N.W.2d 299 (Iowa 2005); and *Christensen v*. *Snap-on Tools Corp*., 554 N.W.2d 254 (Iowa 1996).

In *Christensen*, the court explained the genesis of the "fairly debatable" language used in its opinions and confirmed that it meant nothing more or less than "reasonable basis" for denial of the claim. 554 N.W.2d at 260. The court stated, "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.*

There is no material difference between the judicially articulated general standards for denial of a penalty claim and the standard set forth in section 85.13(4)(b)(2). While the commissioner chose to characterize the decision to deny benefits as "fairly debatable," the commissioner could have interchangeably used "reasonable basis," "reasonable excuse," or "reasonable or probable cause or excuse."

In a similar vein, Podgorniak suggests the commissioner did not apply the requirements of section 86.13(4)(c). As noted, the commissioner cited *Meyers* and *Christensen*. In those opinions, the court approved delays in the payment of benefits to allow the employer to investigate the claim. *Meyers*, 557 N.W.2d at 505; *Christensen*, 554 N.W.2d at 260. The legislature co-opted much of this

language and placed it in section 86.13(4)(c)(1). The *Meyers* court also discussed the employer's articulation of reasons for the delay. 557 N.W.2d at 504-05. The legislature codified this language in section 86.13(4)(c)(2). Finally, the *Meyers* court discussed the employer's obligation to inform an employee of the reason for the delay contemporaneously with the beginning of the delay. *Id.* The court later narrowed this obligation in *Keystone*, 705 N.W.2d at 308-09. The legislature retained the notification obligation, codifying it in section 85.13(4)(c)(3). In sum, the commissioner did not ignore the substantive requirements of section 85.13(4)(c); the commissioner cited the judicial opinions that generated or confirmed those requirements.

Podgorniak also argues the commissioner erroneously allowed Asplundh and its insurer to establish a reasonable excuse for the denial of healing period benefits by simply submitting "some evidence that some of the conditions proximately caused by the established work injury were at maximum medical improvement, regardless of all the circumstances extant." In fact, the commissioner cited *Meyers* for the proposition that "[a]n employer's bare assertion that a claim is 'fairly debatable' does not make it so." 557 N.W.2d at 505. And, the commissioner required the employer to "assert *facts* upon which the commissioner could reasonably find that the claim was 'fairly debatable.'" *Id.* The commissioner found those facts in the opinions of three physicians. Those opinions furnish substantial evidence in support of the commissioner's finding that the claim was fairly debatable or, in other words, that the employer had "reasonable or probable cause or excuse for the denial" of healing period benefits. Iowa Code § 86.13(4)(b)(2); *Christensen*, 554 N.W.2d at 260 ("We

think there is substantial evidence to support the commissioner's finding there was a legitimate dispute as to the permanency of Christensen's injury.").

In accepting these medical opinions as substantial evidentiary support for the finding, we have considered Podgorniak's contention that the opinions carried no weight because they were rendered before he completed alternate care, as ordered by the commissioner. Podgorniak cites no authority for this proposition and the commissioner's order does not support this contention. The commissioner required the employer to pay for alternate care under the auspices of section 86.27(4), but did not preclude the employer from exercising its statutory right to have Podgorniak submit to other medical examinations. *See* Iowa Code § 85.39 (stating "the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state"); *IBP*, *Inc*. *v*. *Harker*, 633 N.W.2d 322, 327 (Iowa 2001) (acknowledging "the employer is allowed to subject the employee to reasonable medical examinations by other physicians").

We affirm the district court's affirmance of the commissioner's decision denying Podgorniak's penalty claim.

AFFIRMED.