IN THE COURT OF APPEALS OF IOWA

No. 3-480 / 12-2008
Filed December 5, 2013

SEARLE PETROLEUM, INC., and
XL ENVIRONMENTAL INS. CO.,
Petitioners-Appellants,

vs.

GAIL MLADY,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

An employer and insurance carrier appeal the district court's denial of their petition for judicial review. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Sara A. Lamme and Tiernan T. Siems of Erickson & Sederstrom, P.C., Omaha, Nebraska, for appellants.

Richard B. Maher, Omaha, for appellee.

Heard by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Searle Petroleum, Inc. and XL Environmental Insurance Co. (the employer) appeal the district court's ruling denying its petition for judicial review filed after the workers' compensation commissioner awarded Gail Mlady permanent total disability benefits based on Mlady's review-reopening petition. The employer asserts on appeal the district court erred in (1) making its own findings of fact, (2) finding substantial evidence supports the agency's findings of fact, (3) affirming the agency's conclusion Mlady demonstrated an economic change in condition since the initial hearing, (4) affirming the agency's conclusion Mlady sustained a physical change in condition, (5) confirming the agency's determination that the change in physical and economic condition was caused by the work injury, (6) finding the agency was correct in concluding Mlady was not barred by the doctrine of res judicata, (7) approving of the agency's decision on the commencement date of permanent total disability benefits, (8) affirming the agency's failure to conclude Mlady's condition actually improved since the initial hearing, and (9) accepting the agency's assessment of costs to Searle in an order nunc pro tunc.

Because we find substantial evidence supports the agency's findings, we affirm the award of permanent total disability benefits, but we reverse the agency's determination as to the commencement date of the benefits and its award of costs.

I. BACKGROUND FACTS AND PROCEEDINGS.

Mlady suffered a low back injury at work in August 2003. He underwent three back surgeries and was released at maximum medical improvement in July 2006. He was given permanent restrictions and placed in the light or sedentary category of labor. He filed a workers' compensation claim, and his case proceeded to hearing on only one issue—the extent of permanent partial disability benefits to which Mlady was entitled. In a decision issued May 15, 2009, the deputy workers' compensation commissioner determined Mlady had a permanent partial disability in the amount of eighty percent. With respect to employment, the deputy found:

> Since the date of his work injury, claimant has not sought employment of any type. The employer has not offered light duty work, meaningful vocational rehabilitation or counseling, whether career counseling or otherwise. Without retraining, rehabilitation or counseling, it is extremely doubtful, claimant will return to gainful employment. He believes he is totally disabled and incapable of functioning in the workplace. Claimant is pessimistic about his ability to rehabilitate himself even though several physicians have advised claimant to find employment in the sedentary to light categories of labor. No physician has precluded claimant from working. Claimant appears to be standing in the way of rehabilitation.

The deputy also acknowledged Mlady was receiving social security disability benefits and was not motivated to find gainful employment because he did not want to lose the benefits he currently received. No one appealed the deputy's decision.

Mlady filed a review-reopening petition in the spring of 2010. The case proceeded to a hearing in front of a different deputy workers' compensation commissioner in December 2010. The deputy issued his decision February 3,

2011, in which he found Mlady demonstrated an economic change in condition since the original decision which resulted in permanent and total disability. The deputy noted,

> It was assumed that the claimant would work if only he demonstrated motivation. This record shows that given the claimant's physical condition caused by the work injury he is unable to secure gainful employment. It has been over seven years since the injury and over a year since the arbitration hearing and there has been no improvement in the claimant's employability.

The deputy ordered the payment of permanent total disability benefits to commence as of the date of the injury with credit for benefits paid under the prior order. After the decision, which taxed costs of the action to the employer, the deputy filed a nunc pro tunc order specifically providing the employer had to pay the cost of an independent medical examination (IME) in the amount of $600, pursuant to Iowa Code section 85.39 (2011); the filing fee and service of process fee totaling $111.08; and a vocational rehabilitation evaluation in the amount of $1410, pursuant to Iowa Administrative Code rule 876–4.33. The deputy denied the application of costs for a functional capacity evaluation as it did not appear to be required as a part of the IME.

The employer filed an intra-agency appeal to the commissioner who, after a de novo review of the record, on December 15, 2011, affirmed the deputy's finding of permanent total disability based on a change in economic condition and also concluded Mlady proved a change in physical condition, which also warranted an award of permanent total disability benefits. The commissioner noted,

> [C]laimant has provided convincing evidence that his physical condition has also deteriorated since the arbitration hearing. Claimant has provided examples of activities of daily living which are impacted by his pain and he has also developed debilitating headaches and increasing back pain with radiculopathy. As noted in *Kohlhaas*[v. *Hog Slat. Inc.*, 777 N.W.2d 387 (Iowa 2009)] while issues of res judicata still apply in a claim for review-reopening, the agency is charged with determining if the facts and circumstances of claimant's disability have changed since the time of the arbitration hearing. Herein they have clearly substantially changed. The presiding deputy commissioner properly found that claimant cannot obtain employment in the competitive labor market and has sustained a 100 percent loss of earning capacity. Defendants' assertion that claimant's condition has improved since the arbitration hearing is completely without merit on the present record.

The commissioner affirmed the commencement date of the permanent total disability benefits and the assessment of costs from the deputy's nunc pro tunc order.

The employer filed a petition for judicial review of the commissioner's decision with the district court. In October 2012, the district court entered its ruling denying the employer's petition. The district court found substantial evidence to support the commissioner's factual findings that Mlady sought employment after the arbitration hearing and that work outside Mlady's immediate vicinity in Nebraska was not possible as lengthy travel causes his back pain to worsen. The court concluded the agency did not commit error in finding a change in economic and physical conditions. It also found the commissioner's decision on causation of the change in conditions was not erroneous, was not wholly irrational, and did not ignore important and relevant evidence. The court found there was new evidence considered in the review-reopening action, and thus, the action did not violate the principles of res

judicata. The court found substantial evidence supported the agency's decision that the claimant's condition did not improve. Finally, it concluded the commissioner properly ordered the permanent total disability benefits to commence as of the date of the injury and the commissioner properly taxed costs to the employer.

The employer now appeals.[1]

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[1] The employer filed a Motion to Compel/Motion for Amended briefing schedule, asserting Mlady committed perjury and manufactured evidence at the agency hearing. The employer contends that it learned of the perjury and the manufactured false evidence "through discovery in a related matter." This motion was filed June 3, 2013, after the briefing was completed and this case had already been transferred to this court.

Mlady's counsel responded to the motion June 10, 2013, asserting that the parties became aware in a deposition taken July 27, 2012, in a "related matter," that Mlady had sought medical treatment from two providers not previously disclosed at the initial arbitration of this matter. Mlady's counsel attached the medical records from these appointments to his resistance.

The workers' compensation commissioner has adopted the Iowa Rules of Civil Procedure. *See* Iowa Admin. Code r. 876–4.35. Iowa Rules of Civil Procedure 1.1012 and 1.1013 permit parties to file a petition to vacate or modify a judgment based on irregularity, fraud, or newly discovered evidence within a year of the judgment. To the extent the employer desires to vacate or modify the agency's decision because of the fraud the employer claims Mlady committed, the employer's recourse was to file a petition with the agency pursuant to Iowa Rule of Civil Procedure 1.1013 within one year of the decision.

Our review of this case is limited under Iowa Code section 17A.19(10). The evidence the employer seeks to introduce now or have Mlady "correct" was never presented to the agency. *See* Iowa Code § 17A.12(8) ("Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record*."); see also Meyer v. IBP., Inc.*, 710 N.W.2d 213, 225 (Iowa 2006) (criticizing the district court for exceeding the scope of judicial review by making findings that the commissioner never made when the facts in the record supported two reasonable conclusions). Our review is limited to the findings actually made by the agency and not other findings the agency could have made. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012).

It is for the agency to consider this evidence of fraud or newly discovered evidence and determine whether it warrants a new hearing or not. It is not for our court to "correct" or "modify" the agency record now on appeal through judicial review. We therefore deny the employer's Motion to Compel/Motion for Amended Briefing Schedule and proceed to address the issues raised in the briefs based on the record that existed before the agency at the review-reopening hearing.

II. SCOPE AND STANDARD OF REVIEW.

Our scope of review in judicial review cases is for correction of errors at law. Iowa R. App. P. 6.907. Iowa Code section 17A.19 governs judicial review of agency decisions. The district court acts in an appellate capacity when it exercises its judicial review power. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012). We apply the same standards of section 17A.19(10) when we review the district court's decision to determine whether we reach the same conclusions as the district court. *Id*. If our conclusions are the same, we affirm; otherwise, we reverse.[2] *Id*.

Our standard of review depends on the issues raised on appeal. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). "Because of the widely varying standards of review, it is 'essential for counsel to search for and pinpoint the precise claim of error on appeal.'" *Id*. The employer first claims the district court erred by concluding substantial evidence supported the agency's findings of fact. When the challenge is to whether substantial evidence supports the agency's decision, our review is governed by section 17A.19(10)(f). As factual findings are clearly vested in the discretion of the agency, "we defer to the commissioner's factual determinations if they are based on 'substantial

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[2] It appears the district court accepted verbatim the proposed judicial review decision submitted by Mlady's counsel. While we discourage the practice of the wholesale adoption of a party's proposed findings of fact and conclusions of law, we do not apply a separate standard of review when the district court does so. *Care Initiatives v. Bd. of Review*, 500 N.W.2d 14, 16 (Iowa 1993). However, we continue to caution trial courts that this practice in some cases hampers our ability to apply the usual deferential standard of review because the ruling reflects the findings of the prevailing litigant rather than the court's own scrutiny of the evidence and articulation of the controlling legal principles. *Rubes v. Mega Life & Health Ins. Co.*, 642 N.W.2d 263, 266 (Iowa 2002).

evidence in the record before the court when that record is viewed as a whole.'" *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009) (quoting Iowa Code § 17A.19(10)(f)). "[T]he question before us is not whether the evidence supports different findings than those made by the commissioner, but whether the evidence 'supports the findings actually made.'" *Id*. (citation omitted). The employer's challenge to the causation finding of the agency is also reviewed for substantial evidence under section 17A.19(10)(f). *See Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844–45 (Iowa 2011) (finding medical causation was a question of fact vested in the discretion of the agency and will be disturbed only if the finding is not supported by substantial evidence).

The employer also challenges the agency's conclusion that Mlady sustained an economic and physical change in condition. This challenge is to the agency's application of law to the facts, which under section 17A.19(10)(m) will be reviewed to determine if it is "irrational, illogical, or wholly unjustifiable." We allocate some deference to the agency, but less than we give the agency's factual findings. *Larson Mfg.*, 763 N.W.2d at 850. This review standard also applies to the employer's claim that the agency erred in failing to apply the doctrine of res judicata to bar Mlady's review-reopening petition because if the change in condition is met, res judicata will not bar the claim, but if Mlady's evidence fails to prove a change in condition, res judicata will apply. *See Kohlhaas*, 777 N.W.2d at 393 (stating the principals of res judicata apply in review-reopening petition and if the employee's level of impairment was known or

knowable at the time of the original action the agency should not re-evaluate the claimant's condition).

The employer's claim that the agency erred in ordering the permanent total disability benefits to begin from the date of the initial injury is a question that implicates the agency's interpretation of law. Our review of an agency's interpretation of the law depends on whether the agency has been clearly vested with the authority to interpret the statute in question. *Burton*, 813 N.W.2d at 256.

> When a term is not defined in a statute, but the agency must necessarily interpret the term in order to carry out its duties, we are more likely to conclude the power to interpret the term was clearly vested in the agency. This is especially true "when the statutory provision being interpreted is a substantive term within the special expertise of the agency." However, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency," or when the language to be interpreted is "found in a statute other than the statute the agency has been tasked with enforcing," we are less likely to conclude that the agency has been clearly vested with the authority to interpret that provision of the statute.

Id. at 257 (quoting *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 12–14 (Iowa 2010)). As this claim involves an interpretation of law that has not been clearly vested by a provision of law in the discretion of the agency, we are free to substitute our own judgment de novo for the agency's interpretation. *See* Iowa Code § 17A.19(10)(c); *Jacobson Transp.*, 778 N.W.2d at 196.

The employer's final claim—the agency erred in ordering it to pay certain costs in a nunc pro tunc order—also implicates the agency's interpretation of law. The agency ordered the cost for Mlady's IME to be paid pursuant to Iowa Code section 85.39 and the vocational rehabilitation evaluation to be paid pursuant to Iowa Administrative Code rule 876–4.33(6). The agency has not been vested

with the authority to interpret section 85.39. *See Kohlhaas*, 777 N.W.2d at 394. However, Iowa Administrative Code rule 876–4.33(6) is a rule developed and applied by the agency. Because we find the agency is vested with the authority to interpret its own rules, we will review that portion of the claim to determine whether the interpretation is irrational, illogical, or wholly unjustifiable under Iowa Code section 17A.19(10)(*l*). *See John Deere Dubuque Works v. Caven*, 804 N.W.2d 297, 300 (Iowa Ct. App. 2011).

III. SUBSTANTIAL EVIDENCE TO SUPPORT FACTUAL FINDINGS.

The employer first criticizes the district court's decision asserting it "made its own statement of facts and thus, acted beyond its authority." Instead of analyzing the agency's findings of fact to determine whether they are supported by substantial evidence, the employer contends the district court used its own statement of facts. We disagree with the employer's contention the district court made its own statement of facts. It simply recited the facts from the evidence in the record as any appellate court would do in its review of the agency's decision. *See Neal*, 814 N.W.2d at 518 (stating the district court acts in an appellate capacity when it exercises its judicial review power). In addition, in our review of the district court's decision, we will apply the same standards in section 17A.19(10) to see if we reach the same result as the district court. *Id*. Thus, any error in the district court's conclusions on the substantial evidence claim can be addressed now on appeal, with no need for a remand to the district court.

The employer criticizes a number of factual findings made by the commissioner. Specifically the employer asserts there is not substantial

evidence to support the factual findings that Mlady's ability to drive has decreased, his ability to walk or ambulate has decreased, he now suffers from debilitating headaches and that those headaches are related to the work injury, he can no longer sleep as he could at the time of the initial arbitration hearing, he has lost the ability to bend, his lumbar pain has increased, and he has increasing radiculopathy.

In support of all of these factual findings, the commissioner cited only to Mlady's testimony at the review-reopening hearing. We acknowledge, as did the commissioner, that Mlady has not sought medical treatment for these increasing physical symptoms. The commissioner stated, "Claimant's medications have not changed and he has not sought any significant treatment since the arbitration hearing in this matter." There is no objective medical evidence that Mlady's condition has worsened since the arbitration hearing.

In fact, the only medical evidence offered at the review-reopening hearing that compared Mlady's physical condition before and after the initial arbitration hearing was Dr. Gammel. He reviewed the 2007 functional capacity evaluation (FCE), which was conducted before the 2009 initial arbitration hearing, and compared that evaluation with the 2010 evaluation conducted at the request of Mlady's attorney. After reviewing the differences between the evaluations in a medical records review, Dr. Gammel stated, "Given all the above information, in summary, it is my opinion that there is no indication in the records provided that Mr. Mlady's condition was worsened in 2010 compared to 2007." However, the commissioner did not acknowledge Dr. Gammel's report in his decision. The

commissioner also did not acknowledge the report of Dr. O'Neil, who saw Mlady for an IME in September 2010. Dr. O'Neil agreed Mlady was permanently and totally disabled as a result of chronic back pain. O'Neil went on to say, "I am not sure how the Work Comp Court arrived at an 80% disability in March of 2009, but I believe it should be 100% disability. No one is going to hire a 60-year-old male with chronic back pain requiring 80 mg of OxyContin t.i.d. for pain relief." Dr. O'Neil did not specifically address whether or not Mlady's condition actually worsened after the March 2009 arbitration hearing.

Mlady offered the opinion of a vocational rehabilitation counselor, Alfred Marchisio, who reviewed the FCEs and interviewed Mlady. It was Marchisio's opinion based on his review of the FCEs that Mlady's condition had changed appreciably especially his ability to tolerate prolonged postures. In his summary, Marchisio noted Mlady's pain remains unrelenting, he can no longer tolerate some of his recreational activities, his inability to tolerate prolonged postures renders him unemployable and his geographic realities of living in a very rural area along with his pain and physical restrictions "serve to obliterate the occupational base which may have existed prior to his injury of 8/17/03." It was Marchisio's opinion that "Mlady's current limitations move him from an 80% industrial disability to a total of 100% industrial disability which is permanent." He also found vocational rehabilitation at this time would be unproductive.

While there is no medical support for a change in physical condition and the commissioner did not acknowledge in his decision the medical evidence that detracted from Mlady's contention, "there is no requirement either in the workers'

compensation or the industrial services division statutes that medical evidence is necessary to show a change of condition for purposes of awarding additional permanent partial disability benefits in a review-reopening proceeding." *E.N.T. Assocs. v. Collentine*, 525 N.W.2d 827, 830 (Iowa 1994). Lay witness testimony, including an injured worker's testimony, regarding the extent of the injury or disability can be considered substantial evidence. *See id*. "It is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue. The reviewing court only determines whether substantial evidence supports a finding 'according to those witnesses whom the [commissioner] believed.'" *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007) (citations omitted).

It is clear the commissioner believed Mlady's testimony regarding the worsening of his physical condition and Marchisio's opinion regarding the change in Mlady's economic prospects. We are bound by that credibility assessment and therefore find substantial evidence supports the commissioner's factual findings.

IV. CAUSATION.

Next, we address the employer's claim the agency erred in finding the change in Mlady's condition was causally related to his work injury. Factual causation deals with whether an employee's injury is casually connected to the employee's employment—medical causation. *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). Whether an injury has a connection to the employment is essentially within the domain of expert testimony. *Id*. The

weight to be given the expert opinion is for the finder of fact, in this case the commissioner, and the weight can be affected by "the completeness of the premise given the expert and other surrounding circumstances." *Id*. If the expert opinion is based on an incomplete history, the opinion is not necessarily binding on the commissioner. *Id.* It is the commissioner's duty to determine credibility, weigh the evidence, and then to accept or reject the opinion. *Id*.

The employer claims in this case that there is no medical opinion at all that relates Mlady's new complaints to the original work injury in 2003. The IME conducted by Dr. O'Neil, the employer points out, does not find there has been a change in condition, but instead Dr. O'Neil criticizes the initial arbitration decision for not finding permanent total disability in March of 2009. The employer also contends the opinion of Marchisio should be given no weight in light of the fact Marchisio is not a medical doctor and is not otherwise qualified to compare the two FCEs to determine if Mlady's condition has worsened. Finally, the employer states there is not substantial evidence to support the conclusion that Mlady did not obtain employment because of his work injury. Mlady was the only person to testify regarding his efforts to find employment from thirteen different employers, and Mlady was never told by any employer that they could not or would not hire him because of the injury, his restrictions, or his level of medication.

We note many of the physical ailments Mlady complained of at the review-reopening hearing were also problems at the arbitration hearing. The arbitration hearing found those physical ailments to be related to the work injury and this conclusion was not appealed. There also was no evidence of a subsequent

injury that could have caused the increased symptomology. At the review-reopening hearing, Mlady testified the problems simply have gotten worse—increasing back pain, further difficulty walking and ambulating, more difficulty sleeping, further extension of the radiculopathy, and decreasing ability to bend. In addition, as stated above, while determining whether an injury or disease has a direct causal connection with employment is within expert testimony, there is no requirement for medical evidence to show a change in condition for review-reopening decisions. *E.N.T. Assocs.*, 525 N.W.2d at 830.

V. CHANGE IN CONDITION.

Next, the employer challenges the agency's determination that Mlady sustained an economic and physical change in condition. This is a challenge to the commissioner's ultimate conclusion, and thus, is a challenge to the commissioner's "application of law to the facts." The commissioner's conclusion will only be reversed if it is "irrational, illogical, or wholly unjustifiable." *See* Iowa Code § 17A.19(10)(m). To prove a change in condition in order to support a review-reopening petition, an injured worker must prove by a preponderance of the evidence that his current condition is proximately caused by the original injury. *Kohlhaas*, 777 N.W.2d at 392.

The worsening of the worker's physical condition is one way to satisfy the burden as is the reduction in the worker's earning capacity in an industrial disability claim. *Id*. However the burden is met, the agency "should not reevaluate an employee's level of physical impairment or earning capacity if all the facts and circumstances were known or knowable at the time of the original

action." *Id*. at 393. If the facts and circumstances alleged at the review-reopening were either known or knowable, the principle of res judicata applies to prevent relitigation of the issue. *Id*. "A 'mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review-reopening.'" *Id*. (quoting *Bousfield v. Sisters of Mercy*, 86 N.W.2d 109, 113 (Iowa 1957)).

A. Economic Change in Condition.

Here, the employer asserts Mlady offered all the same evidence with respect to his economic condition except for his list of thirteen employers he claims to have contacted seeking employment. At the initial arbitration hearing, the deputy noted Mlady had not sought employment of any type. Mlady was pessimistic about his ability to rehabilitate himself, and he believed he was totally disabled and incapable of functioning in the workplace. The deputy also noted no physician had precluded him from working and Mlady was standing in the way of his own rehabilitation.

The commissioner in the review-reopening decision described the deputy's finding as, "it was believed that claimant could work again if only he demonstrated some motivation." Mlady explained his failure to conduct a job search earlier was based on his belief up until the arbitration hearing that the employer was still holding a position for him, a conclusion he realized was incorrect only after the deputy issued the arbitration ruling in which it stated the employer had terminated his employment. The commissioner accepted as

credible Mlady's explanation of his lack of a job search prior to the arbitration hearing.

The list Mlady compiled of thirteen employers from whom he sought work did not indicate the reasons the prospective employers decided not to hire Mlady. Mlady asserted at the review-reopening hearing it was because of his injury and the amount of medication he was taking. Marchisio supported this conclusion finding Mlady's inability to maintain prolonged posture rendered him unemployable in the light and sedentary categories; it was work in these work categories that the deputy in the initial arbitration decision found that Mlady could perform. Marchisio also found Mlady's pain and physical restrictions, along with the geographic realities of where he lived, obliterated the occupational base that existed prior to the work injury. Dr. O'Neil also supported this conclusion in the IME when he stated, "No one is going to hire a 60 year-old male with chronic back pain requiring 80 mg of OxyContin t.i.d. for pain relief."

We do not find the commissioner's conclusion that Mlady has experienced an economic change in condition warranting an award of permanent total disability benefits on this record "irrational, illogical, or wholly unjustifiable."

B. Physical Change in Condition.

The employer next challenges the agency's conclusion that Mlady experienced a physical change in condition warranting an award of permanent total disability benefits. Because we have already affirmed the permanent total disability award based on the economic change in condition, we need not address the support for an award on this alternative ground. *See Kohlhaas*, 777

N.W.2d at 392–93 (listing the various ways a workers' compensation claimant can satisfy the review-reopening requirement).

VI. BENEFIT COMMENCEMENT DATE.

Next, the employer contends the agency erred in concluding Mlady's permanent total disability benefits should commence as of the date of the injury in August 2003. The agency stated that the August 2003 commencement date for permanent total disability benefits does not result in a double recovery here because Mlady has already received benefits since that date and the employer has been given a credit for all weekly benefits previously paid. The district court affirmed this conclusion.

Mlady has been off work since the injury receiving full benefits. At the initial arbitration hearing, he was awarded 80% industrial disability entitling him to 400 weeks of permanent partial disability benefits. The deputy ordered these benefits to commence August 1, 2006, the date stipulated by the parties to begin these benefits. Mlady filed a review-reopening petition in the spring of 2010, approximately four years before the permanent partial disability benefits were set to cease. Our court has addressed the issue of the commencement date of permanent total disability benefits on a review-reopening petition in the past, and we follow the reasoning of that decision here: the date of the commencement of additional weekly benefits in a review-reopening case is the date the review-reopening petition was filed. *See Verizon Bus. Network Servs., Inc. v. McKenzie*, No. 11-1845, 2012 WL 4899244, at *9–10 (Iowa Ct. App. Oct. 17, 2012)

As we stated in *McKenzie*, in *Dickenson v. John Deere Products Engineering*, our court addressed the question of when interest payments should begin on new permanent partial disability benefits awarded in a review-reopening proceeding. 395 N.W.2d 644, 646 (Iowa Ct. App. 1986). The court concluded the interest payments should begin as of the date the claimant filed a petition for a review-reopening as this provided adequate incentives for employers to resolve review-reopening cases quickly without unfairly punishing employers who had been prompt in making payments due as a result of the initial arbitration award. *Id*. at 649. It also put injured employees on even footing with non-workers' compensation plaintiffs who received interest on judgments and decrees based on when the petition was filed. *Id*. at 648–49.

Since, under *Dickenson*, interest begins to accrue as of the date of the review-reopening petition, we conclude weekly benefits awarded as a result of a review-reopening decision should also commence as of the filing of the petition for review-reopening. Under Iowa Code section 85.30, the employer only pays interest on weekly benefits when the employer fails to pay a weekly benefit when it is due. Thus, it is implicit in the *Dickenson* holding that weekly benefits for review-reopening proceedings cannot be due before a review-reopening petition has been filed.

This holding is consistent with the supreme court's decision in *Kohlhaas* that review-reopening proceedings "should not reevaluate an employee's level of physical impairment or earning capacity if all the facts and circumstances were known or knowable at the time of the original action." 777 N.W.2d at 393. By

awarding permanent total disability benefits as of the date of the injury, the commissioner essentially reevaluated Mlady's level of physical impairment that existed at the time of the initial arbitration and found the 80% award was inadequate. That conclusion is precisely what *Kohlhaas* sought to avoid when it held "a mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review reopening." *Id*. Therefore, Mlady is entitled to permanent total disability benefits in this review-reopening to commence as of the date the review-reopening petition was filed. We reverse the district court's decision affirming the agency's ruling on this issue, and remand to the agency to enter an order providing that the proper date to begin weekly benefits for the permanent total disability award is the date the review-reopening petition was filed.

VII. COSTS.

Finally, the employer asserts the agency erred in awarding Mlady certain costs in a nunc pro tunc order entered after the deputy's review-reopening decision. First, the agency awarded Mlady the cost of an IME performed by Dr. O'Neil in September of 2010. The agency ordered the cost to be paid pursuant to Iowa Code section 85.39, which reads in part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Iowa Code § 85.39. A condition precedent to an employee being reimbursed for the cost of an IME under this section is for the employer first to obtain an evaluation of permanent disability that the employee believes to be too low. *See Kohlhaas*, 777 N.W.2d at 394. In this case the employer did not first obtain an evaluation of Mlady's permanent disability during the course of the review-reopening proceeding. Therefore, the employer cannot be ordered to pay the cost of Dr. O'Neil's IME under Iowa Code section 85.39. The commissioner's ruling affirming the deputy's nunc pro tunc order is reversed on this issue.

However, the award of the cost associated with vocational rehabilitation evaluation was not awarded under section 85.39, but under Iowa Administrative Code rule 876–4.33. S*ee Caven*, 804 N.W.2d at 300. Iowa Code section 86.40 provides that all costs incurred in a workers' compensation hearing shall be taxed in the discretion of the commissioner. Iowa Administrative Code rule 876–4.33 was intended by the agency to implement section 86.40. This administrative rule provides in part:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be: . . . (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports. . . . Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.

Iowa Admin. Code r. 876–4.33.

The employer insists it should not be responsible to reimburse Mlady for litigation expenses because he obtained the report not to rebut the employer's evidence but to prosecute his own review-reopening claim. While section 85.39

requires the employer to first obtain a doctor's report before being obligated to pay for the employee's rebuttal report, no such requirement is found in rule 876–4.33. It is solely the deputy's or commissioner's discretion to tax these costs to one party. *See* Iowa Admin. Code r. 876–4.33. We do not find the agency abused its discretion in ordering the employer to pay the costs associated with obtaining the vocational rehabilitation evaluation under rule 876–4.33, which played a key role in the agency's finding of permanent total disability. We affirm the agency's assessment of this cost.

VIII. CONCLUSION.

As we find substantial evidence supports the agency's decision that Mlady suffered an economic change in his condition and that this change has rendered him permanently and totally disabled, we affirm the district court's judicial review order affirming the agency's decision. However, we reverse the district court's decision with respect to the awarding of the costs associated with Mlady's IME under section 85.39 because the statutory requirements for such an order were not satisfied, and we also reverse the agency's order that the permanent total disability benefits are to commence as of the date of the injury. We remand the case to the district court to remand to the agency for the entry of an order providing that the benefits should commence as of the date the review-reopening petition was filed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.