IN THE COURT OF APPEALS OF IOWA

No. 7-406 / 06-1334
Filed November 15, 2007

WELDED CONSTRUCTION and
LIBERTY MUTUAL INSURANCE CO.
Petitioners-Appellants,

vs.

WILLIAM G. FINNERTY,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Employer and workers' compensation insurance carrier appeal a district court judicial review decision affirming an award of workers' compensation benefits. **AFFIRMED.**

William H. Grell of Huber, Book, Cortese, Happe & Lanz, P.L.C., West Des Moines, for appellants.

Toby J. Gordon of Schulte, Hahn, Swanson, Engler & Gordon, Burlington, for appellee.

Heard by Mahan, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Welded Construction and Liberty Mutual Insurance Company (Welded) appeal a district court judicial review decision affirming an award of workers' compensation benefits to William Finnerty.

I. BACKGROUND FACTS AND PROCEEDINGS.

Finnerty, a high school graduate, has been employed by Welded since 1983. At the time of his injury, he was working as a fuel truck operator in northern Iowa. Finnerty's job required him to travel to construction sites throughout the United States in a fuel truck that carried roughly 125 foot of hose weighing approximately eight and a half pounds per foot. He refueled various types of heavy machinery at the construction sites by dragging the hose out and often climbing onto the machinery. On August 17, 1999, after refueling an excavator, Finnerty was attempting to climb down the machine while carrying the hose with his left hand. He slipped and kept himself from falling by holding onto the excavator's handrail with his right arm. "So when I came to rest, I was hanging off the side of the machine with . . . my arm fully stretched out holding my body weight."

Finnerty sought medical treatment immediately following the accident complaining of pain in his right shoulder. He was given physical therapy exercises to perform at home, prescribed anti-inflammatories, and allowed to continue working. Welded accommodated his injury by having him only drive the fuel truck and by adding a helper who took over the equipment refueling aspects of the job.

In October 1999, an MRI indicated Finnerty had a partial rotator cuff tear, tendonitis and increased fluid in the joint and tissue. Because Finnerty had significant abnormal findings nearly two months post-injury with continuing pain, the doctor continued his current restriction of "drive only," and referred him to an orthopedist. Finnerty stopped working in November 1999 and returned to his home state of Michigan for further medical treatment.

In December 1999, Finnerty was diagnosed with a partially torn rotator cuff as well as acromioclavicular (AC) joint arthritis by the treating physician authorized by Welded, Dr. Gregory Uitvlugt. He underwent his first arthroscopic surgery on his right shoulder to repair the tear along with AC joint decompression on January 19, 2000. On Feburary 3, 2000, Dr. Uitvlugt wrote a letter detailing Finnerty's work restrictions: from initial consult of December 6, 1999 until surgery, "restricted duties of no overhead work, no work with arms outstretched, no lifting greater than eight pounds, no repetitive reaching or pulling." Further, Dr. Uitvlugt stated Finnerty was off work at his direction post-surgery.

Following the surgery, Finnerty engaged in physical therapy to rehabilitate his shoulder. On April 11, 2000, Dr. Uitvlugt noted Finnerty had made good progress in therapy and felt better than he felt before the surgery. He had almost a full range of motion, but still felt weak and was only doing a two-pound weight in therapy exercises, therefore, therapy was to continue. Dr. Uitvlugt noted Welded had provided some assistance for him on the job and allowed Finnerty to return to work driving the fuel truck on April 17, 2000, with restrictions of no overhead work, no lifting or carrying over fifteen pounds, and limited climbing.

On May 11, 2000, Finnerty informed Dr. Uitvlugt he felt better than before surgery, until about a week before the appointment, when he developed increasing pain and some "crunching" in his shoulder. Dr. Uitvlugt reported Finnerty did not mention a specific antecedent trauma and had symptoms which persisted. For treatment, Dr. Uitvlugt injected his shoulder with xylocaine and cortisone and allowed him to continue working, but with increased restrictions, such as no work greater than fourteen inches from his body and an increased lifting limit of twenty pounds.

In June 2000, Dr. Uitvlugt noted the injections only provided two weeks of relief, Finnerty's shoulder constantly ached, and the pain worsened with activities. Dr. Uitvlugt continued the current work restrictions and prescribed an anti-inflammatory. Finnerty's symptoms continued to worsen during the summer of 2000 and in July, Dr. Uitvlugt reported Finnerty was having the "same type of symptoms: . . . catching with overhead motions, . . . difficulty with overhead work," and "constant aching that is worse with activities." Since it was now six months post-surgery, Dr. Uitvlugt thought it was "less and less likely that his symptoms are going to improve appreciably" and decided to reassess with another MRI.

On August 8, 2000, Dr. Uitvlugt decided to confine Finnerty to a sling, put him at rest, and keep him off work for a couple of weeks, stating: "Bill Finnerty is miserable . . . he is putting in horrendous hours, getting in/out of a truck, shifting it, and it is just aggravating his shoulder. They don't have any restricted duties for him." For treatment, Dr. Uitvlugt elected to do another injection.

Based on Finnerty's slight improvement with rest, at Finnerty's August 22, 2000 appointment, Dr. Uitvlugt decided to continue his "no work" restriction and try physical therapy again before considering another surgery. One month later, in September 2000, Finnerty noticed a slight improvement in his symptoms with the therapy, as well as being off work, but still had crunching of his AC joint and pain. Dr. Uitvlugt decided to continue therapy and released Finnerty to work with restrictions, but noted Welded would not take him back with any restrictions so the continuation of his restrictions currently left him without work.

During the October 17, 2000 exam, Dr. Uitvlugt opined Finnerty had reached a dead-end in therapy, stated he was no longer improving, and recommended Finnerty proceed with an arthroscopy of his shoulder to reevaluate his rotator cuff and remove scar tissue which the doctor believed was causing his residual AC joint symptoms.

Dr. Uitvlugt performed a second arthroscopic surgery on Finnerty's right shoulder on November 10, 2000. During surgery, Dr. Uitvlugt discovered a labral tear of the biceps superior labral complex, which he repaired. Additionally, a revision AC joint resection was also performed. On November 28, 2000, Dr. Uitvlugt ordered Finnerty to remain off work and, on January 25, 2001, ordered him to complete more physical therapy to rehabilitate his shoulder. At the January appointment, Finnerty reported he was getting hassled by his workers' compensation carrier. Dr. Uitvlugt told Finnerty if all went well, Finnerty could be back to his job in three to six months now that his underlying instability problem causing his AC joint dysfunction had been addressed.

In March 2001, Finnerty's shoulder had improved with therapy and Dr. Uitvlugt stated he certainly "could do a sedentary job where he doesn't have to do heavy lifting, overhead work, or heavy reaching or pulling. Unfortunately, no sedentary work is available for him and he remains off work." Dr. Uitvlugt ordered therapy to continue and told both Finnerty and Welded's rehab nurse he was shooting for maximal medical improvement in May.

During Finnerty's April examination, Dr. Uitvlugt noted progress with therapy and told both Finnerty and Welded's rehab nurse he was rapidly reaching maximum medical improvement. Dr. Uitvlught continued restrictions of no overhead work, no work with arms outstretched, and no repetitive reaching or pulling and suggested a functional capacity exam (FCE) would help place him if Welded was unable to meet his current level of restrictions.

On May 15, 2001, Finnerty's passed his FCE, but with endurance concerns. The FCE recommended return to an eight-hour day with time to build to the normal ten-hour day. Additionally, the FCE detailed lifting and push/pull restrictions: (1) Finnerty could only occasionally push/pull in the seated position while he could do so frequently in the standing position; (2) Finnerty should never lift over twenty-five pounds above the shoulder height; and (3) Finnerty should occasionally lift less than twenty-five pounds above shoulder height.

On May 17, 2001, two days after Finnerty's FCE, Dr. Uitvlugt released him to work to his tolerance with protective restrictions of no overhead work, no heavy lifting greater than twenty-five pounds, and no repetitive reaching or pulling, and no reaching greater than fourteen inches. Dr. Uitvlugt conveyed this information to Welded's rehab nurse in a separate meeting and also told her he

would send Finnerty to work hardening (physical therapy designed to transition him back into the physical demands of the job) if Welded wanted, but the doctor thought Finnerty had completed enough therapy.

On May 17, 2001, Welded's rehab nurse wrote a report stating:

> As his current work restrictions to include no push/pull tugging, no work above head level, no reaching with hand greater than 14 inches from body and restriction of 25 pounds are continued by Dr. Utivlugt. *It is obvious he will not be able with those restrictions to return to his pre-injury job*. . . . The only consideration is to place [Finnerty] in work conditioning as this will allow him to improve the endurance with his arm.

(Emphasis added.)

Work conditioning to improve endurance was never ordered by Welded. Finnerty attempted to return to work with these restrictions; however, Welded did not have any restricted work available for him. Welded issued its last check for temporary total disability on June 19, 2001, even though Dr. Uitvlugt had not yet determined Finnerty had reached maximum medical improvement (MMI) and even though Finnerty had not returned to work.

Welded asked Finnerty to return to Dr. Uitvlugt for another assessment which occurred on July 25, 2001. Dr. Uitvlugt noted Finnerty had a full range of motion, but pain with abduction, external rotation, and forced elbow flexion. Dr. Uitvlugt continued Finnerty's restrictions indefinitely and conveyed this information separately to Welded.

On August 28, 2001, Dr. Uitvlugt concluded Finnerty had reached MMI and would have to learn to live with some limitations. He ordered indefinite restrictions of no overhead work, no heavy lifting greater than twenty-five to thirty

pounds, and no work with arms outstretched that involves repetitive reaching or pulling.

Finnerty did not return to work for Welded until October 2001 when, based on dwindling finances, he talked a sympathetic supervisor into letting him come back. Welded employees were familiar with the Finnerty family, since Finnerty's father had worked for Welded for many years as a job estimator. Finnerty knew returning to work was probably not a good idea with his shoulder condition, but he needed the money. This time, Welded did not provide him with a helper to assist him with the refueling equipment aspects of the job. However, Finnerty testified that the majority of the time "when I'd drive up . . . the foreman . . . would have picked somebody out, and they'd come over, get the hose, take care of the fuel, and roll the hose back up for me, and I'd be on my way." He did have to refuel some equipment on his own while attempting to stay within his work restrictions, which was physically a strain. One trick he utilized when he did not have help was to wrap the heavy fuel hose around his waist as he walked to the machine needing fuel.

On November 24, 2001, Finnerty was working in Wyoming for Welded and reinjured his shoulder. Dr. Uitvlugt placed him off work for two weeks on December 4, 2001, and in a follow-up appointment on December 18, 2001, determined Finnerty had re-aggravated his shoulder. Finnerty was again assigned the August 2001 restrictions, which were continued after Finnerty's February 2002 appointment. Dr. Uitvlugt performed a diagnostic arthroscopic surgery on Finnerty's right shoulder in March 2002. During surgery, he found a

fraying of the biceps labrum and proceeded to do a debridement. The same restrictions were continued after appointments in April and May 2002.

On September 12, 2002, Dr. Uitvlugt examined Finnerty for the last time and again ordered essentially the same indefinite physical restrictions. Welded would not employ Finnerty with these restrictions so he was never able to return to work as a fueler.

In October 2002, Finnerty filed a petition with the Iowa Workers' Compensation Commissioner alleging he injured his right shoulder on August 17, 1999, when he fell from the excavator. Following an arbitration hearing, the deputy commissioner concluded Finnerty had incurred a twenty-five percent industrial disability that was causally related to the August 17, 1999 injury. The deputy observed Finnerty's demeanor while testifying and found Finnerty to be credible. The deputy commissioner awarded Finnerty healing period benefits and permanent partial disability benefits, noting Finnerty's restrictions foreclosed access to most of the work he has done in his career.

The deputy commissioner also assessed penalty benefits against Liberty, Welded's insurance carrier, for underpaid and late-paid healing period benefits, for failing to pay any permanent partial disability benefits, and for terminating benefit payments without issuing the required notice.

Welded appealed, and the workers' compensation commissioner reduced Finnerty's weekly rate of compensation and reduced the amount of penalty benefits while affirming the remainder of the deputy's decision. Welded petitioned for judicial review, and Finnerty filed a cross-petition for judicial review. Rejecting the claims of both sides, the district court affirmed the agency decision.

Welded then filed this appeal, claiming the commissioner erred in calculating the rate of weekly disability benefits and in finding the healing period benefits should terminate on the date Finnerty reached maximum medical improvement. Welded further claims the commissioner's findings as to the industrial disability are flawed because they include the effects of subsequent injuries in May 2000 and November 2001, and the commissioner erroneously concluded that impairment of physical capacity creates an inference of lessened earning capacity. Welded also claims the commissioner erred in interpreting and applying Iowa Code section 86.13 when awarding penalty benefits to Finnerty. Finally, Welded claims section 86.13 is unconstitutionally vague and violates his due process rights as applied in this case.

II. SCOPE AND STANDARDS OF REVIEW.

The Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, governs the scope of our review in workers' compensation cases. Iowa Code § 86.26 (2001); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been violated." *Meyer*, 710 N.W.2d at 218. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhauser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

"If the claim of error lies with the agency's findings of *fact*, the proper question on review is whether substantial evidence supports those findings of fact." *Meyer*, 710 N.W.2d at 219. If the claim of error "lies with the agency's interpretation of the *law*, the question on review is whether the agency's interpretation is erroneous, and we may substitute our interpretation for the agency's." *Id.* Finally, if the claim of error "lies with the *ultimate conclusion* reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Id.* We allocate some degree of discretion in our review of the agency's application of the law to the facts, but not the breadth of discretion given to the findings of fact. *Id*. "With respect to the workers' compensation statute in particular, we keep in mind that the primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee." *Griffin Pipe Prods. Co. v. Guarino,* 663 N.W.2d 862, 865 (Iowa 2003). Our review of constitutional challenges is de novo. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 202 (Iowa 2002).

III. MERITS.

A. Compensation Rates.

"The basis for an injured employee's compensation under the workers' compensation act is 'the weekly earnings of the injured employee at the time of the injury.'" *Griffin Pipe Products Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003) (quoting Iowa Code § 85.36). Weekly earnings are the

> gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the

> *customary hours* for the full period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . .

Iowa Code § 85.36 (emphasis added). Where an employee is paid on an hourly basis, weekly earnings are calculated "by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury." *Id*. § 85.36(6).

Pursuant to section 85.36(6), the commissioner determined Finnerty was entitled to benefits at a rate based on his actual earnings in the thirteen weeks immediately preceding the injury. Welded focuses on the "customary hours" aspect of the statute and contends the commissioner should have computed Finnerty's compensation rate based on a sixty-hour work week because Finnerty customarily worked sixty hours per week. The district court rejected this assignment of error, concluding "[t]he Commissioner's method of calculation was in accordance with the statute and accurately reflected Finnerty's earnings." We agree with the district court.

Welded first argues Finnerty testified his customary or typical work week at Welded Construction prior to August 17, 1999 was sixty hours per week. Welded's argument is a misstatement of the record. Contrary to Welded's assertion, Finnerty testified he worked sixty hours per week *at a minimum*. He further testified the biggest week he had ever worked for Welded was 110 hours. Moreover, Finnerty presented evidence establishing he worked substantially more than sixty hours per week in the thirteen weeks preceding his injury, with

the exception of two short weeks due to inclement weather. Thus, we reject Welded's argument that Finnerty customarily worked sixty hours per week.

Welded next argues the wages Finnerty actually earned in the thirteen weeks preceding his injury are not representative of his customary and typical annual earnings because, although he had no layoff during those thirteen weeks, he was usually laid off for a period of time each year. The Iowa Supreme Court rejected an employer's similar argument in *Griffin Pipe Products Co. v. Guarino*. In *Griffin*, a yearly, planned, two-week layoff occurred during the thirteen weeks preceding the injury and the court removed those weeks from the calculation stating: "[O]ne must ask whether the *earnings* attributable to a particular week are customary, not whether a particular absence from work is anticipated." 636 N.W.2d at 867. Thus, we reject Welded's argument that a layoff of indefinite length projected to occur at some unknown time in the future requires a different calculation than the one based on thirteen weeks of pre-injury actual earnings utilized by the commissioner and approved by the district court.

IV. HEALING PERIOD TERMINATION DATE.

The ending date of employee healing period benefits is controlled by Iowa Code section 85.34(1), which states the earliest of three options controls the termination date. Since both parties agree that the first option is not applicable, the relevant code section provides the healing period ends when:

> [I]t is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury.

Iowa Code § 85.34(1).

The deputy commissioner determined the MMI statutory test was met on August 28, 2001. On that date, Dr. Uitvlugt, the treating physician, specifically found Finnerty had reached MMI and continued him on indefinite restrictions of overhead work, heavy lifting greater than twenty-five to thirty pounds, and work with arms outstretched that involve repetitive reaching or pulling. Additionally, Dr. Jameson placed Finnerty at MMI on August 28, 2001.

Welded first argues the commissioner failed to identify or recognize competing medical opinions resulting in an erroneous factual finding that Finnerty's shoulder gradually worsened leading to the second surgery. Welded contends Finnerty had fully recovered and then sustained a new traumatic injury in May 2000 as a result of non-work activities. To support this claim, Welded's brief cites isolated parts of the medical record and testimony.

In determining the second surgery was related to the August 1999 injury, the deputy discussed the independent medical evaluations conducted by Dr. Jameson and Dr. Riggins, and the reports of the treating physician, Dr. Uitvlugt. The deputy determined Dr. Jameson, Welded's non-treating expert, attributed the second surgery to the August 1999 injury, as did Dr. Riggins, Finnerty's non-treating expert. Further, the deputy noted Dr. Uitvlugt believed each of the three surgeries were related to the original injury of August, 1999.

In discussing Finnerty's May appointment and subsequent surgery, Dr. Uitvlugt stated:

> On May 11, 2000 he returned to the office with a history of increasing complaints of pain in his shoulder that developed approximately one week prior. He did not mention a specific antecedent trauma and had symptoms which persisted. With the chronicity of these symptoms he was re-evaluated with an MRI which was felt to be normal. He seemed to do better with periods

> of rest but continued to have significant limitation and a failure to respond to additional therapy and so he was returned to surgery.

The commissioner determined Dr. Uitvlugt, as the surgeon who performed the first surgery, "is likely in the best position to identify the cause for the second surgery." Iowa law does not require the commissioner to "mention each item of evidence in its decision and explain why it found the evidence persuasive or not persuasive." *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 305 (Iowa 2005). "[T]he question on appeal is not whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence 'supports the findings actually made.'" *Meyer*, 710 N.W.2d at 218.

Dr. Jameson, Welded's non-treating expert, issued a report and was asked for clarification by both parties. In an April 2003 letter to Welded, Dr. Jameson did not connect the labral tear in the November surgery to the August 1999 injury, but stated: "I do feel that the AC resection was necessary and is in relation to the 08/17/99 injury." Dr. Jameson also noted Finnerty's pain returned on April 17, 2000, the day he returned to work.

In a January 2004 letter to Finnerty, Dr. Jameson further explained his opinion, after having the opportunity to review the physical therapy notes: Finnerty's symptoms, with transient waxing and waning with improvements, would be very typical with the type of surgery Finnerty had undergone.

> In regards to the patient's need for the second surgical intervention, I think his ongoing symptoms point to the need for a wider acromioclavicular resection and is likely the cause of his post-operative pain after the first surgery. I do not feel that this is indicative of any re-injury that occurred.

After reviewing the medical testimony, we agree with the district court "this is not an instance where the agency failed to consider relevant facts." We will

not repeat our detailed factual history found earlier in the opinion. The evidence does not indicate Finnerty's symptoms after April 2000 were from a different or unknown injury; rather, substantial evidence supports the conclusion Finnerty's condition gradually worsened to the point where he could no longer work and required a second surgery.

Welded's second argument is, even if we conclude Finnerty's shoulder gradually worsened and the second surgery is causally related to his August 1999 injury, Finnerty was medically capable of returning to work by May 15, 2001. Welded argues the results of the functional capacity evaluation (FCE) on that date show the final prong of the healing period statutory test (medically capable) was met *before* Finnerty was found to reach the maximum medical improvement part of the statute on August 28, 2001. We disagree.

In support, Welded claims the FCE revealed no functional limitations, no loss of strength, and concluded Finnerty could return to his normal work duties. First, we note Welded relies on the physical therapist's overall conclusions while choosing to ignore the therapist's specific limitations within the report as detailed above. In analyzing the appropriate healing period ending date, the deputy commissioner discussed the FCE and, instead of overlooking the restrictions, specifically detailed both the lifting restrictions and the hours per day restrictions imposed by the FCE therapist.

Second, two days after the FCE, Dr. Uitvlugt examined Finnerty, discussed the FCE with him, and then returned Finnerty to work *with restrictions*. The fact that Dr. Uitvlugt based his restrictions on subjective complaints is irrelevant. It is undeniable the treating doctor's order returning Finnerty to work

contained specific restrictions, as did the FCE report. On appeal from the deputy's decision, the commissioner noted Dr. Uitvlugt's assessment of Finnerty reaching MMI in August "is more probative of the end of the period of recuperation than the date the [FCE] was performed."

Third, Welded had Finnerty examined by Dr. Grant Hyatt on April 25, 2001, without providing medical records prior to the exam. Dr. Hayatt recommended additional physical therapy, a future FCE, and set out specific restrictions:

> At this point in time, I would recommend that the patient observe restrictions with regard to the use of the right upper extremity, including a lift/carry limit of ten pounds, avoidance in use of the right upper extremity at or above chest level, and avoidance of forceful or repetitive pushing or pulling with use of the right upper extremity. . . . [D]ue to the nature of [Finnerty's] injury, there are concerns with regard to return to repetitive overhead work activities.

Welded next provided Dr. Hyatt with medical records and, in a May 21, 2001 letter, Dr. Hyatt stated his review of the medical records did not change his opinions or recommendations. Therefore, Dr. Hyatt's recommended restrictions continued. Welded's argument that Finnerty could have returned to work in May 2001 *without* restrictions fails.

Despite the above facts and medical information, Welded's last check to Finnerty for healing period benefits is dated June 19, 2001. Welded stopped paying even though Dr. Uitvlugt had not yet stated Finnerty was at MMI and Finnerty had not yet returned to work.

Substantial evidence supports the agency's determination that Finnerty was not able to return to work in May 2001 due to his restrictions. Therefore, Finnerty did not meet the medically capable statutory test in May 2001 and

substantial evidence supports the conclusion Finnerty reached maximum medical improvement on August 28, 2001.[1] We agree with the district court's well-reasoned analysis and conclusion finding no error in the commissioner's determination of the date for termination of healing period benefits and the conversion date to permanent partial disability benefits.

V. INDUSTRIAL DISABILITY.

Welded first argues the commissioner's determination of industrial disability is flawed because it includes the effects of Finnerty's subsequent injuries in May 2000 and November 2001. We have already determined substantial evidence in the record supports the agency's determination that Finnerty's symptoms in May 2000 were related to the August 1999 injury. As noted earlier, Dr. Uitvlugt, the surgeon performing all three arthroscopic surgeries, specifically connected all three surgeries to the August 1999 injury. We therefore agree with the district court's conclusion:

> Substantial evidence exists to support the agency's determination that the November 2001 injury and subsequent symptoms were a temporary exacerbation of the August 1999 injury. Accordingly, [Welded's] argument that the commissioner erred in determining the industrial disability award must fail.

Welded's second argument concerning industrial disability is that the commissioner made an inaccurate conclusion of law that impairment of physical capacity creates an inference of lessened earning capacity. In support, Welded quotes a phrase from the agency's decision, takes it out of its contextual paragraph, and claims reversible error occurred. However, a review of the

[1] After Dr. Uitvlugt placed Finnerty at maximum medical improvement in August 2001, Dr. Hyatt reviewed more medical information in September 2001 and opined Finnerty could be returned to his regular duties, but needed to be monitored upon any return to work to assess his tolerance of work activities.

agency's entire discussion clearly shows physical capacity was not the only factor considered when the agency determined the extent of industrial disability. Welded ignores the deputy's very specific discussion of Finnerty's intelligence, motivation, age, education and work history as elements of industrial disability as well as ignoring the statement: "[c]onsidering these and all other factors of industrial disability, it is concluded that the claimant has sustained a 25% industrial disability." In fact, after his review, the commissioner stated that he viewed the deputy's twenty-five percent award "as favorable to [Welded]." No reversible error is found.

VI. PENALTY BENEFITS.

Penalty benefits under Iowa law are created by Iowa Code section 86.13, which provides two clear prerequisites before penalty benefits can be imposed: (1) "a delay in commencement or termination of benefits" that occurs (2) "without reasonable or probable cause or excuse." *Id.* When the prerequisites have been met, the Iowa Code instructs the commissioner "shall award" penalty benefits "up to fifty percent of the amount of benefits that were unreasonably delayed or denied." Iowa Code § 86.13.

The Iowa Supreme Court has explained the second statutory requirement.

> 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. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Keystone, 705 N.W.2d at 307.

The reasonableness of the employer's actions "does not turn on whether the employer was right. The issue is whether there was a reasonable basis for

the employer's position that no benefits were owing." *Id*. at 307-08. Stated another way, the "focus is on the existence of a debatable issue, not on which party was correct." *Bellville v. Farm Bureau Mut. Ins. Co*., 702 N.W.2d 468, 473-74 (Iowa 2005).

"Section 86.13 does not include a subjective component. Consequently, the focus of a penalty benefits analysis is simply on the facts that existed at the time of the insurer's denial." *City of Madrid v. Blasnitz*, ___ N.W.2d ___, ___ (Iowa 2007) (citations omitted). An employer's bare assertion that a claim is "fairly debatable" does not make it so. *Meyers v. Holiday Express Corp*., 557 N.W.2d 502, 505 (Iowa 1996).

Once the agency has determined penalty benefits are owed, it must consider several factors in determining the amount of the benefits: the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. *Robbennolt v. Snap-on Tools Corp*., 555 N.W.2d 229, 238 (Iowa 1996).

Welded advances three arguments in its attempt to overturn the agency's penalty award. First, Welded asserts the commissioner erred in his interpretation and application of the penalty statute. Citing *Gilbert v.USF Holland*, 637 N.W.2d 194, 199 (Iowa 2001), Welded asserts the commissioner should view the evidence in the light most favorable to Welded. Essentially, Welded is asserting the commissioner must utilize a standard similar to Iowa's summary judgment standard. The *Gilbert* court did not utilize such language and neither did the most recent Iowa Supreme Court discussion of penalty benefits. *See Blasnitz*,

___ N.W.2d at ___. Iowa case law does not support Welded's claim the correct standard when determining penalty benefits includes the premise that all evidence must be viewed in the light most favorable to Welded.

Welded complains the commissioner never recites the legal standard he utilized when considering penalty benefits. This is not reversible error since the deputy awarding the penalty benefits utilized two pages to correctly set out the applicable Iowa law on penalty benefits. The commissioner affirmed the deputy with two changes, neither of which required a restatement of the settled standards for awarding penalty benefits. Therefore, the commissioner adopted the applicable Iowa law as set out by the deputy.

Welded then dissects the record and, by both pulling information out of context and utilizing the standard we have rejected above, argues the record reveals it had a reasonable basis for its position that no benefits were owing because Finnerty returned to work without restrictions. Contrary to Welded's argument, there is not sufficient evidence for a reasonable person to conclude Finnerty returned to work without restrictions. Rather, Finnerty's work restrictions remained relatively unchanged from the time of the August 1999 injury. As stated by the district court, "Finnerty was never able to return to work without accommodation after the August 1999 injury, whether the accommodation was officially provided by [Welded] or provided by Finnerty's co-workers."

In assessing the appropriateness of penalty benefits, the deputy stated Welded underpaid sixty-seven weeks of benefits, paid twenty weeks late, stopped payment of benefits without issuing the required notice, and failed to pay any permanent partial disability. The deputy concluded:

> The underpayment of the rate was due to a failure to make a reasonable investigation of the claim. [Welded has] access to the claimant's wage records and the statute is plain in its instruction on which weeks to replace. The medical opinions of the treating physician and even [Welded's] own independent medical evaluation physician were ignored on issues of causation.

In determining the penalty amount should be the maximum fifty percent, the deputy noted Liberty, Welded's insurer, "has been penalized numerous times and has an extensive record before this agency of not making benefit payments on time."

The commissioner also analyzed the facts supporting a penalty award and stated, "nothing supports the method of computing the weekly gross earnings" proposed by Welded. Since Finnerty was paid by the hour, it is clear section 85.36(6) is controlling and "[t]he method urged by [Welded] has no legal basis."

We agree with the district court's conclusion that substantial evidence supports the agency's finding Welded's position on rate calculation was not fairly debatable and had no reasonable basis.

The commissioner also rejected [Welded's] arguments concerning industrial disability:

> [Finnerty] could not return to the full range of his pre-injury work. His attempt to do so resulted in an exacerbation and that occurred when he was not performing the full range of pre-injury activities. He had two surgeries and did not experience a good result from either. He has few qualifications for work that is not dependent upon physical labor and his ability to perform physical labor is considerably impaired. I view the deputy's award of 25 percent as favorable to [Welded]. A reasonable adjuster could not conclude that [Finnerty] sustained no industrial disability.

In its review, the district court also rejected Welded's argument. The court noted Welded's attempt to convince the court the FCE was a reasonable basis to determine Finnerty had no residual job restrictions is without merit because the

FCE clearly states Finnerty should never lift over twenty-five pounds from waist height to above his shoulder.

Likewise, our review of the medical testimony demonstrates there was no objective, reasonable basis for Welded contesting Finnerty's entitlement to permanent partial disability benefits. On August 28, 2001, significant permanent restrictions were assigned by the authorized treating physician, Dr. Uitvlugt. On April 15, 2003, Welded sought an impairment rating from Dr. Jameson. Dr. Jameson opined Finnerty needed restrictions of no lifting greater than ten pounds above shoulder height, no lifting greater than twenty-five pounds, and no repetitive pushing or pulling. He further reported: "I do feel that the patient has permanent impairment as a direct result of the 1999 injury," and assigned a rating of two percent upper extremity. Welded did not pay any PPD benefits owing after the impairment rating assigned by their own evaluator.

Next, Finnerty was evaluated by Dr. Riggins on July 30, 2003. Dr. Riggins determined Finnerty had permanent restrictions and stated Finnerty had a twenty-five percent permanent impairment to the right upper extremity as a result of the work injury and a fifteen percent whole person rating.

Dr. Jameson was asked by Welded to give another opinion after reviewing Dr. Riggins' report and on April 15, 2004, Dr. Jameson stated Finnerty's permanent impairment to the whole person was in the range of seven to nine percent. Welded had permanent impairment ratings from two physicians and permanent restrictions assigned by three physicians and paid no industrial disability.

The facts that existed at the time of Welded's denial did not allow a reasonable person to conclude Finnerty returned to work without restrictions and suffered no industrial disability. The issue is not fairly debatable. The agency's award of penalty benefits under Iowa Code section 86.13 is supported by substantial evidence.

Second, Welded attempts to overturn the penalty award by claiming Iowa Code section 86.13 is unconstitutionally vague because it fails to give sufficient and definite warnings of the conduct to be proscribed to avoid a penalty. We disagree. "Due process requires no more than a reasonably ascertainable standard of conduct." *Knight v. Iowa Dist. Court*, 269 N.W.2d 430, 432 (Iowa 1978). Section 86.13 requires that a denial of benefits be reasonable to avoid a penalty. The Iowa Supreme Court has further clarified that a reasonable basis for denial exists if the claim is "fairly debatable." *Christensen v. Snap-On Tools Corp*., 554 N.W.2d 254, 260 (Iowa 1996). Welded was not required by the statute to make a precise determination of the exact benefits owing in order to avoid a penalty. Rather, Welded was required by the statute to act reasonably in investigating the claim and in determining industrial disability. This statutory requirement is a definite warning and constitutes a reasonably ascertainable standard of conduct. The penalty statute is not unconstitutionally vague and Welded's rights were not violated by the agency's application of the statute in awarding penalty benefits.

Welded's third and final argument is that the commissioner should not have awarded penalty benefits on the *entire* permanent partial disability award.

Welded cites no case law for this contention. We reject Welded's argument and agree with and adopt the findings and conclusions of the district court:

> [Welded] cannot now rely on a hypothetical "reasonable award" to reduce the amount of penalty benefits awarded based on [its] own unreasonable conduct when [it] failed to pay *any* benefits. [Welded] wrongfully withheld permanent partial disability benefits. The statute allows for the agency to award penalty benefits up to 50 percent of the benefits wrongfully withheld. The agency determined an amount around 50% was appropriate.

AFFIRMED.