IN THE COURT OF APPEALS OF IOWA

No. 8-403 / 06-1924
Filed October 29, 2008

OAKVIEW, INC. and IOWA LONG TERM CARE RISK MANAGEMENT ASSOCIATION,
Petitioners-Appellants,

vs.

ELIZABETH FERCH,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

In this consolidated appeal, employer and its insurer appeal from the district court's (1) denial of a stay of judgment pending appeal and (2) ruling on judicial review affirming the workers' compensation commissioner's award of permanent disability benefits and penalties. **AFFIRMED IN PART AND REVERSED IN PART.**

Michael L. Mock and Lori A. Brandau of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellants.

Corey J. L. Walker of Walker & Billingsley, Newton, for appellee.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

HUITINK, P.J.

Oakview, Inc. and its insurer, Iowa Long Term Care Risk Management Association, (collectively Oakview) appeal the district court's judicial review ruling affirming the workers' compensation commissioner's award of permanent partial disability and penalty benefits to Elizabeth Ferch. Oakview argues that, as a matter of law, an injured worker cannot prove entitlement to industrial disability benefits under the circumstances presented. Oakview also contends that, as a matter of law, it was fairly debatable whether Ferch sustained any industrial disability related to her June 2001 neck injury and the penalty imposed was therefore improper. Oakview argues that substantial evidence does not support the finding of a causal connection between Ferch's November 2003 back injury and a permanent disability. Finally, Oakview contends Iowa Code § 85.36(9)(c) (2003) (apportionment of benefits)—not the full responsibility rule—governs where two compensable injuries with the same employer result in overlapping periods of disability.

In a separate appeal, Oakview contends the district court erred in refusing to stay enforcement of the agency's award of workers' compensation benefits. Oakview further argues that statutory interest pursuant to Iowa Code section 85.30 does not apply to awards of penalty benefits under section 86.13.

The appeals were consolidated by order of the supreme court. We affirm the district court's denial of a stay. We affirm the commissioner's finding of industrial disability related to the 2001 neck injury and its method of apportioning overlapping permanent partial disability benefits. We reverse the award of penalty benefits.

I. Background Facts and Proceedings

Elizabeth Ferch was born in 1957. She attended high school through the tenth grade. She did not graduate and does not have a GED. She has, however, earned certifications to be a nurse's aid (CNA) in 1978, a medication aid (CMA) in the late 1980s, and a rehabilitation aid (CRA) in 2000. She has worked as an assembler in a factory, and for Oakview as a CNA, a CMA, and as a supervisor in housekeeping and laundry. She received wages for these various positions ranging from $7.40 to $12 per hour.

Ferch began working for Oakview in February 1998 as a nurse's aid and a medications aid. Requirements for those jobs included being able to work with ill, disabled, elderly, and emotionally upset/hostile people within Oakview. She was required to be able to lift seventy-five pounds, and to push, pull, and move equipment and supplies throughout the day.

When Ferch successfully bid for the position of housekeeping supervisor in 1999, her job requirements included that she be able to lift fifty pounds and push, pull, and move equipment and supplies throughout the day. Her beginning salary in this supervisory position was $8.40 per hour. Her performance evaluation covering the period from January 1, 2000, through January 1, 2001, noted she did an "excellent job."

June 4, 2001 Neck Injury. On June 4, 2001, Ferch sustained an injury to her neck. Conservative treatment failed to resolve the complaints she was having in her right arm, shoulder, and neck. She underwent several diagnostic tests, including an EMG, an MRI, and a cervical myelogram. The cervical myelogram revealed a large lateral herniated disc at the C5-6 level, diffuse disc

herniation at the C6-7 level, and minor degenerative changes at the C4-5 level.

On December 3, 2001, Ferch underwent surgery for her neck injury. Dr. K. Douglas Green, a board eligible neurosurgeon, performed the surgery consisting of a C5-6 and C6-7 anterior cervical discectomy, osteophytectomy, fusion, and fixation with iliac crest bone grafting. He provided follow-up care. In his final postoperative follow-up on February 20, 2002, he indicated the x-rays of the cervical spine found the fixation devices were in good position and that Ferch was doing well and was released to return to work without restrictions. Dr. Green noted also that Ferch was having trouble swallowing and referred her to an ENT physician.

On February 25, 2002, the ENT physician noted "mild sensory innervations of pharynx associated with [cervical spine fusion] surgery."

On December 20, 2001, as a result of this neck injury, Oakview issued Ferch a check paying temporary workers' compensation weekly benefits for the period beginning December 3, 2001, through February 20, 2002.

Ferch returned to her job at Oakview as a housekeeping supervisor without restrictions. She also helped doing CNA work when necessary. She testified that after she returned to work she could not tilt her head back to see above her head, she had difficulty writing, and overhead work caused her pain. On April 2, 2002, Ferch received a letter stating that because she had been released to return to work without restrictions, she would not be receiving further weekly benefits. Oakview did not seek an impairment rating for Ferch. No permanent partial disability benefits were paid for the neck injury.

On May 16 and September 18, 2003, Ferch missed work because of back pain.

November 9, 2003 Back Injury. On November 9, 2003, while working at Oakview, Ferch experienced a sharp pain when she squatted down to fill a shelf with linen. She sought medical treatment on November 13 and 18 for back pain which radiated down her left leg. On November 20, 2003, Ferch saw Dr. D.M. Cooper, who ordered a MRI. The MRI showed mild disc bulges at L4-5 and L5-S1 levels. He gave Ferch an epidural injection, placed her on light duty, and told her to see a neurologist if she did not improve. She was released to return to work with restrictions on December 4, 2003.

On December 10, 2003, Ferch was paid temporary weekly benefits for the period of November 18 through December 3, 2003.

The epidural injection did not provide relief, and Ferch went to Dr. Bradley Lister, an orthopedic surgeon, on December 19, 2003. Dr. Lister's report states in part:

> 1. Low back pain status post work activities of October and November 2003.
> 2. Lumbosacral spine strain and muscle pain status post the work injuries of October and November 2003.
> 3. Lumboscral spine degenerative disc disease with disc bulges of L4-L5 and L5-S1, but with no central canal stenosis and no significant neuroforaminal compromise per the MRI of November 24, 2003.
> 4. Status post a caudal epidural injection by Dr. Cooper on December 1, 2003 without significant relief.
>
> . . . .
>
> Today, I had a detailed discussion with Ms. Ferch about her back, about the MRI, about the anatomy and the pain, discomfort and symptoms. These were then correlated. I again went through the MRI report, and this shows only the disc bulges without significant herniations of the disc and without significant nerve impingement. However, with inflammatory response and with the muscle spasms,

> the pain could be identifiable. The patient also has been having a slow return to functional activities. We discussed different treatment options.

Dr. Lister then recommended steroid treatment; cautioned Ferch about heavy lifting and strenuous work; told her to be careful about lifting, twisting, and turning; and continued the light duty restrictions.

On January 6, 2004, Ferch was examined by Dr. Lynn Nelson, an orthopedic surgeon, who noted her continued reports of pain. Nelson recommended a left L4 nerve root injection and a lifting restriction of ten pounds and no repetitive bending or twisting. Dr. Christian Ledet administered the nerve root injection that day.

On January 22, 2004, Ferch reported to Dr. Nelson that the injection had not provided her relief. Dr. Nelson recommended a longer waiting period and released her to work with a thirty-pound lifting restriction.

From February through April 2004 Ferch continued to report pain and saw Dr. Steve Scurr, Dr. Lister, and Dr. Nelson. She continued to be on a thirty-pound weight restriction.

On May 4, 2004, Ferch's attorney wrote to Oakview's insurer requesting a letter to Dr. Green for an impairment rating for the 2001 cervical fusion and noted that "[u]pon receipt of the impairment rating, all accrued benefits should be paid in a lump sum."

With respect to the November 2003 injury, an electromyography study was done on May 19, 2004, showing no clear evidence of electrophysiological evidence for a significant lumbrosacral radiculopathy or entrapment neuropathy

in the left lower extremity. Dr. Scurr saw Ferch on May 20, 2004, and wrote in his office note that he did not think there was anything more he could offer her.

Ferch submitted a letter to Oakview, dated May 20, 2004, in which she resigned her position as housekeeping and laundry supervisor effective June 24, 2004. She stated that she was unable to perform her duties "due to the injury of my back and hip." She noted her willingness to work as a "call in" for all departments "if able." Ferch did continue to work for Oakview on an as-needed basis in various capacities. She was paid $8 an hour as a dietary aid and $10.95 an hour as a medicine aid. She also provided four to twenty-five hours per week unpaid services to her husband's business doing billing and computer work.

On May 27, 2004, Ferch's attorney wrote a letter to Dr. Green requesting that the doctor offer an opinion as to whether Ferch sustained a permanent functional impairment for her cervical injury and surgery, and the extent of impairment. In a letter dated June 23, 2004, Dr. Green wrote that using the AMA Guides, Fifth Edition, Ferch had a twenty-five to twenty-eight percent impairment of the whole person due to the cervical fusion and associated loss of motion at the C5-6 through C6-7 levels.

A subsequent request to Oakview's insurer for permanent partial disability benefits was rejected. Oakview claimed it was not liable for permanent partial disability benefits since Ferch returned to work without restrictions after her neck injury.

On August 4, 2004, Ferch was seen by Dr. John Kuhnlein for an independent medical examination. Kuhnlein's report of August 18, 2004, rated Ferch's impairment at twenty-eight percent to the whole person due to her neck

surgery and difficulty swallowing. He recommended work restrictions relating only to the cervical injury of lifting, pushing, pulling, and various weight restrictions—all under fifty pounds.

On August 10, 2004, Ferch was seen by Dr. Donna Bahls for low back and left leg pains. Bahls is board certified in physical medicine and rehabilitation. Bahls assessment was "post lumbrosacral strain November 9, 2003, with low back and left leg pain" and degenerative disc disease with potential left L3 and L4 nerve root irritation. Bahls prescribed medication and imposed restrictions of lifting more than thirty pounds. Bahls further noted that Ferch was to "[a]void repetitive twisting, bending, and lifting." These restrictions were continued on September 7, 2004, at a follow-up visit.

On October 5, 2004, Bahls's office notes state that Ferch had achieved maximum medical improvement in relationship to her symptoms from the November 9, 2003 injury. Bahls concluded the previous work restrictions were permanent and that Ferch was assigned a whole person impairment rating of five percent.

By letter to Ferch's attorney dated January 11, 2005, Oakview's attorney asserted that Bahls's opinion "raises an issue as to the causal relationship between the November 2003 back strain and the recommended restrictions." Oakview's attorney reasserted Oakview's position "that in the absence of permanent restrictions attributable to a work place injury, an employee may be deemed to have sustained no industrial disability, despite the existence of a functional impairment rating."

On January 14, 2005, the workers' compensation insurer paid Ferch permanent partial disability benefits related to her back injury for the period December 4, 2003, to May 28, 2004.

On January 26, 2005, Bahls signed a document which stated that Ferch's low back pain and left leg symptoms were caused by the November 9, 2003 incident; that Ferch had a five percent whole body impairment because of her low back injury and that Ferch's work injury was a material and substantial factor in placing restrictions on her; that the restrictions were placed in part because of her work injury and in part because of underlying degenerative spine disease; and that Ferch had permanent restrictions of no lifting more than thirty pounds and avoiding repetitive twisting, bending, and lifting.

On January 31, "in response to our recent telephone conference," Dr. Nelson wrote a letter to Oakview's attorney. That letter held Nelson's opinions that "[n]o permanent functional impairment is indicated for the November 9, 2003 back strain"; the "thirty pound lifting restriction is reasonable to lessen the risk of re-injury to Ms. Ferch's lumbar spine"; and no permanent restrictions should be attributed to the November 9, 2003 back strain. Ferch's requests for additional permanent partial disability benefits were rejected. Correspondence between the parties' attorneys was substantial.

Agency Proceedings. Ferch filed a petition for workers' compensation benefits on May 19, 2004. A hearing was held before a deputy commissioner. Ferch testified that upon returning to work following her cervical fusion surgery she had increased neck and shoulder pain with overhead work and so she avoided that type of work. She had difficulty writing and had to ask for help doing

work-related tasks. Ferch testified that following her "resignation" in June 2004, she continued to work for Oakview on an as-needed basis. She stated that she was able to do the CMA job without assistance, but needed some assistance to the CNA job because of her back. She also worked as a dietary aid. She stated she provided unpaid assistance to her husband's business. She testified that her current symptoms from her back injury included lower back pain, left upper hip pain, and numbness in the upper left hip and that she continued to take Flexeril, Celebrex, and Trazadone as prescribed by Dr. Bahls. The work restrictions imposed by Bahls continued in effect. She further testified she had been occasionally caring for her mother who was undergoing cancer treatment in Nebraska.

The deputy commissioner submitted an arbitration decision in which she found: (1) Ferch's stipulated injury to her neck on June 4, 2001, caused a permanent disability; (2) "although . . . a close question," Ferch's stipulated injury to her lower back on November 9, 2003 caused permanent disability of the lower back; (3) Ferch has industrial disability related to the neck injury of twenty percent, which entitled her to 100 weeks of permanent partial disability benefits at a stipulated rate of $253.84 per week; (4) Ferch has an industrial disability of thirty percent as a result of her successive work related injuries, which entitled her to 150 weeks of permanent partial disability benefits at a stipulated rate of $284.45; and (5) there was an "overlap" of 6.857 weeks in the permanent partial disability periods and for that overlap period Oakview was to pay Ferch at the higher rate.

The deputy next considered Ferch's claim for penalty benefits for Oakview's refusal to pay any permanent partial disability benefits related to the 2001 neck injury. The deputy wrote:

> Defendants offer no direct evidence other than explanation from their attorney why the benefits were not paid for the neck injury. Claimant had a two level cervical fusion and an approximate two-month healing period. Every doctor that was asked, Dr. Green and Dr. Kuhnlein, opined that claimant had a functional impairment rating of 25-28 percent. Despite claimant's surgery and the ratings from these doctors in 2004, defendants paid no permanent partial disability benefits for the neck injury. Given the facts that claim had a two level fusion and every doctor thought claimant had a cervical functional loss, defendants' reliance on the fact that claimant had no permanent disability because she returned to work with no restrictions is not reasonable. Defendants have failed to demonstrate a reasonable basis for failure to pay permanent partial disability benefits. The delay (three years) in failure to pay … is significant. . . . Claimant is entitled to a 50 percent penalty for failure to pay any permanent partial disability benefits for the June 4, 2001 neck injury.

The deputy found, however, that Ferch's claim for additional permanent partial disability benefits with regard to the November 2003 injury was fairly debatable and no penalty would be awarded.

On inter-agency appeal, the commissioner affirmed the deputy's decision with "additional analysis." With respect to the penalty award, the commissioner noted that "[i]n all but the rarest of industrial disability cases, the impairment rating is the minimum level of compensation owed to a claimant by virtue that the impairment rating signifies the extent of the claimant's loss of use of the whole body." The commissioner concluded that by refusing to investigate whether Ferch had sustained any level of permanent functional impairment, Oakview could not reasonably determine Ferch had not sustained a loss of her earning capacity. He concluded:

> it is not possible to adjust a workers' compensation claim in a reasonable manner without asking the treating physician or other well informed evaluating physician whether a claimant has sustained some level of permanent impairment or disability as a result of an injury and if so, how much, and what activity restrictions are necessary as a result of the injury.

The commissioner found that reliance upon a physician's assistant's return to work without restrictions was unreasonable. In light of the cervical fusion and a two-month healing period and the functional impairment ratings of Drs. Green and Kuhnlein, the commissioner concluded the failure to pay permanent partial disability benefits for the neck injury warranted the penalty imposed.

District Court Proceedings. Oakview sought judicial review of the commissioner's decision in the district court. On March 9, 2007, the district court affirmed in all respects. The district court held there was substantial evidence to support the award of permanent partial disability benefits for the June 2001 neck injury. The district court further ruled the commissioner properly ruled "the insurer did not have a reasonable basis for denial of benefits in this case, but rather took unwarranted actions" to delay or avoid payment. The court also affirmed the award of permanent benefits related to Ferch's November 2003 injury. The district court finally ruled that the commissioner had correctly applied the rules related to successive work-related injuries. Oakview appeals from this ruling on judicial review.

During the pendency of the judicial review action and pursuant to Iowa Code section 86.42, Ferch applied for judgment on the workers' compensation commissioner's ruling. Oakview moved to stay the entry of judgment, claiming

among other things that it would suffer irreparable harm should Ferch not be able to repay any overpayment of benefits. The district court denied the stay.

On October 23, 2006, the district court, citing *Rethamel v. Havey*, 715 N.W.2d 263, 266 (Iowa 2006), denied Oakview's motion to reconsider, stating it was without authority to alter the decision of the workers' compensation commission. Oakview filed a motion for enlargement of findings of fact and conclusions of law, specifically asking the court to address whether interest was to be awarded on the penalty benefits. No ruling was made in the district court prior to Ferch's collection efforts. Oakview appealed.

The supreme court granted limited remand for the purpose of allowing the district court to determine whether interest should apply to the commissioner's award of penalty benefits. The district court concluded that interest pursuant to Iowa Code section 85.30 applies to the award of penalty benefits. The appeal from the ruling on judicial review and the appeal on the denial of motion for stay were consolidated. We begin our discussion with the appeal from the ruling on judicial review.

Scope and Standard of Review. Our scope of review in workers' compensation cases is governed by the Iowa Administrative Procedure Act, chapter 17A of the 2005 Iowa Code. Iowa Code § 86.26; *Meyer v. IBP, Inc*., 710 N.W.2d 213, 218 (Iowa 2006). Our review of the commissioner's decision is for errors at law, not de novo. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005). "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 prejudiced." *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. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). 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).

Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so we are bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds*, 686 N.W.2d at 464-65. Because factual determinations are within the discretion of the agency, so is its application of law to the facts. *Clark*, 696 N.W.2d at 604; *see also Meyer*, 710 N.W.2d at 219 (stating the reviewing court should "allocate some degree of discretion" in considering the agency's application of law to facts, "but not the breadth of discretion given to the findings of facts"). We will reverse the agency's application of the law to the facts if we determine its application was "irrational, illogical, or wholly unjustifiable." *Meyer*, 710 N.W.2d at 218.

Appeal of Workers' Compensation Benefits.

June 4, 2001 Neck Injury. We first address Oakview's challenge to the award of permanent partial disability benefits relating to Ferch's June 4, 2001 neck injury. Oakview contends that following the surgical fusion of her vertebrae, Ferch sustained no industrial disability because she returned to work performing her former duties on a full-time basis without medical restrictions. Relying upon

Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991), Oakview argues that under these circumstances Ferch could not be found to have sustained an industrial disability and we must, as a matter of law, reverse.

We believe Oakview reads *Bearce* too broadly. "*Bearce* does not stand for the proposition that there can be no industrial disability when the employee has returned to the same job." *Keystone Nursing Care Ctr. v. Craddock*, 505 N.W.2d 299, 306 (Iowa 2005). In *Keystone Nursing Care Center*, the employer argued "there is no disability from an injury that results in permanent functional impairment when an employee is able to return back to work at his or her occupation." *Id.* at 305. The court noted that industrial disability does not rest solely on functional impairment. *Id.* at 306. Nor are an employee's post-injury earnings determinative. *Id.* The supreme court reinforced the principle that industrial disability is a multifaceted issue requiring an analysis of the employee's functional impairment, age, education, intelligence, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining. *See id.* at 306. The court in *Keystone Nursing Care Center* held there was substantial evidence in the record to support the agency's fact findings that Craddock had a functional impairment and that the impairment restricted her ability to perform certain customary job duties. *Id.*

Oakview complains there is no evidence to support a finding that Ferch was restricted in her ability to perform her employment duties and thus, as a matter of law, we must reverse. We do not believe the record is so uncontroverted.

The commissioner adopted the findings of the deputy which note that Ferch did have mobility limitations following her return to work after surgery, that she had difficulty writing, and overhead work caused her pain. In light of these facts, as well as the other factors relevant to the industrial disability determination, the district court correctly concluded that substantial evidence supported the commissioner's finding of industrial disability.

Because the commissioner considered the proper factors in assessing Ferch's industrial disability and because those factors are supported by substantial evidence, there is no basis to reverse the commissioner's award of permanent partial disability benefits.

Penalty Award for June 4, 2001 Injury. We find, however, that the *Keystone Nursing Care Center* opinion requires reversal of the award of penalty benefits.

Iowa Code section 86.13 (2003) provides: "*If a delay in commencement or termination of benefits occurs without reasonable or probable cause*, the industrial commissioner shall award [penalty] benefits." *Id*. para. 4 (emphasis added). A "reasonable cause" exists if "the employer had a reasonable basis to contest the employee's entitlement to benefits." *Keystone Nursing Care Ctr.*, 705 N.W.2d at 307. A reasonable basis for denial of the claim exists if the claim is "fairly debatable." *Id.*

In *Keystone Nursing Care Center*, the supreme court found that penalty benefits were not appropriate where the employer was informed by the employee's treating physician that the employee could return to her former employment without restriction. *Id*. at 308. The court stated,

> "Whether this information ultimately turned out to be correct in view of [the doctor's] oral instructions … is unimportant. What is determinative is whether the employer was reasonable in accepting the physician's release at face value and concluded the claimant's entitlement to industrial disability was questionable. . . . . .[I]n view of the employer's reasonable belief that the claimant could perform her pre-injury job without limitation, the issue of industrial disability was fairly debatable as a matter of law.

Id. (internal quotation omitted). We therefore reverse the commissioner's award of penalty benefits.

We note that this ruling may seem incorrect in light of the district court's conclusion that the employer appears to have taken unwarranted action to delay or avoid payments. *See id.*, 705 N.W.2d at 310-11 (Cady, J. specially concurring) (noting that an employer may have a reasonable basis to contest a claim, but can still unreasonably delay the claim by engaging in delay tactics). However, we feel required to reach the conclusion in light of the above quoted holding in *Keystone Nursing Care Center*.

Because we reverse the award of penalty benefits, we do not address the issue of whether interest is properly applied to the penalty benefits.

November 9, 2003 Back Injury. Oakview argues that substantial evidence does not support the finding of a causal connection between Ferch's November 2003 back injury and a permanent disability. Oakview asserts, "the greater weight of the medical evidence, however, indicates there is not causal relationship between the November 9, 2003 back strain, any need for permanent restrictions, and any associated impact of the restrictions on Ferch's employment status."

We must examine whether the commissioner's conclusions are supported by substantial evidence in the record made before the agency when the record is viewed as a whole. *Finch*, 700 N.W.2d at 331. Evidence is substantial if a reasonable mind would accept it as adequate to reach a conclusion. *Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397, 400 (Iowa Ct. App. 2007). An agency's decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence. *Id*. We broadly and liberally construe the commissioner's finding to uphold, rather than defeat the decision. *Id*.

Here the record, when viewed as a whole, contains substantial support for the agency's finding of permanent disability resulting from Ferch's November 2003 back injury. Oakview argues that even if there is evidence to support a finding of causal connection, the commissioner's award was excessive. This argument is based upon Oakview's contention that the "full responsibility" rule does not apply here, but rather Iowa Code section 85.36(9)(c) governs.

The extent of industrial disability is a question of fact for the workers' compensation commissioner. *See Bearce*, 465 N.W.2d at 536. Here the commissioner concluded that as a result of "successive work-related injuries" Ferch sustained an industrial disability of thirty percent related to her 2003 injury. The commissioner ruled: (1) Oakview was to pay one hundred weeks of permanent partial disability benefits from February 21, 2002, at a rate of $253.84 per week; (2) Oakview was to pay 6.857 weeks of permanent partial disability benefits from December 4, 2003, to January 21, 2004, at a rate of $30.61 per week; and (3) Oakview was to pay 143.143 weeks of permanent partial disability

benefits from January 22, 2004, at a rate of $284.45 per week. (We note that the rates of pay per week were stipulated by the parties.) The commissioner found that Iowa Code section 85.36(9)(c) applied. The commissioner noted an overlap of benefit periods and awarded Ferch benefits as to only one injury during the period of overlap, at the higher rate of pay.

Oakview argues that application of the statute in such a way "as to merely eliminate overlap in payment is not the equivalent of apportioning the disability resulting from or the disability benefits associated with the two injuries." We conclude the commissioner's method of apportionment was not erroneous.

"Apart from statute, in a situation of two successive work-related injuries, 'the employer is generally held liable for the entire disability resulting from the combination of the prior disability and the present injury.'" *Celotex Corp. v. Auten*, 541 N.W.2d 252, 253 (Iowa 1995) (quoting 2 Arthur Larson, *The Law of Workmen's Compensation* § 59.00, at 10-492.320 (1994)). This is our full-responsibility rule. Thus, we have no difficulty holding Oakview responsible for Ferch's successive work-related injuries.

Oakview claims this conclusion must be abrogated by the following statutory provision:

> In computing the compensation to be paid to any employee who, before the accident for which the employee claims compensation, was disabled and drawing compensation under the provisions of this chapter, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries which the employee shall have suffered.

Iowa Code § 84.36(9)(c) (2003).

If an employee is incapacitated to work because of a compensable injury and is receiving permanent partial disability benefits and again suffers a compensable injury, section 85.36(9)(c) applies. *See Mycogen Seeds*, 686 N.W.2d at 466. In *Excel Corp. v. Smithart*, 654 N.W.2d 891, 898 (Iowa 2002) (citing *Celotex Corp.*, 541 N.W.2d at 254-55), our supreme court noted that the rationale for the full-responsibility rule is that regardless of the disability sustained, a worker who returns to work does so as a "working unit." The court noted that the rationale that supports the full-responsibility rule supports the statutory exception.

> If a worker was disabled from a prior injury and still receiving benefits for that prior injury, the worker has not yet, in theory, resumed employment as a "working unit." Thus, when two injuries occur too close in time, it is the apparent judgment of our legislature that the worker loses his or her entitlement to two separate compensable disabilities and may only recover compensation for the total disability as a result of both injuries.

Excel Corp., 654 N.W.2d at 899.

The district court found that the commissioner correctly applied the apportionment statute, allowing Ferch to recover for only one injury during the time of overlapping benefit periods. An agency's application of law to the facts can only be reversed if we determine such an application was "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*m*). We do not find the commissioner's method of apportionment was "irrational, illogical or wholly unjustifiable."

District Court's Denial of Motion to Stay Judgment. The Iowa Supreme Court has recently issued two decisions addressing motions to stay entry of judgment on a workers' compensation award. *See Snap-On Tools v.*

Schadendorf, ____ N.W.2d ____ (Iowa 2008); *Grinnell College v. Osborn*, 751 N.W.2d 396, 401-04 (Iowa 2008). In *Grinnell College*, the supreme court emphasized that a stay in a workers' compensation proceeding could only be entered under the same guidelines governing a stay in other agency action. *Id.* at 401. It is the movant's burden to establish the propriety of a stay. *See Snap-On Tools*, ____ N.W.2d at ____.

Oakview argues, as did the employer in *Grinnell College*, that should the district court ultimately decide to reduce or reverse the benefit award, there are legal and practical impediments to recovering overpayments from the employee and thus it would suffer irreparable injury. This mere allegation of "irreparable injury" is not sufficient. *See Grinnell College*, 751 N.W.2d at 403. Oakview argues that Ferch did not show she would suffer harm were benefits not paid. However, it was not Ferch's burden. As movant, it was Oakview's burden to establish the propriety of the stay. *See Snap-On Tools*, ____ N.W.2d at ____ (affirming stay where movant failed to provide court with record to review). Oakview did not sustain its burden; therefore, the district court did not err in denying its motion.

Due Process. Oakview alleges the denial of it motion to stay constituted a denial of its constitutional rights to due process. While this claim was summarily made in resistance to the application for entry of judgment, no ruling was made on the claim by the district court. Oakview did not file a motion requesting a ruling by the district court. The issue is not properly preserved. *See Grinnell College*, 751 N.W.2d at 404.

Conclusion. There is substantial evidence to support the commissioner's award of permanent partial disability benefits for Ferch's June 4, 2001 injury, and that award is therefore affirmed. The award of penalty benefits cannot stand; however, the claim of industrial disability where Ferch returned to work without restrictions was fairly debatable as a matter of law. The commissioner's award of penalty benefits for failure to pay permanent partial disability benefits related to the June 2001 neck injury is reversed. The commissioner's award for permanent partial disability benefits related to Ferch's November 2003 back injury is supported by substantial evidence and is therefore affirmed. The commissioner's apportionment of benefits was not erroneous and is affirmed. Finally, the district court did not err in denying Oakview's motion to stay, and that ruling is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.