IN THE COURT OF APPEALS OF IOWA

No. 1-554 / 11-0052
Filed August 10, 2011

WAL-MART STORES and
AMERICAN HOME ASSURANCE,
Petitioners-Appellants,

vs.

JULIE HENLE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Wal-Mart and American Home Assurance appeal the district court's decision dismissing their application for judicial review. **AFFIRMED.**

Peter M. Sand, Des Moines, for appellants.

Pete Leehey and Anthony J. Olson of Pete Leehey Law Firm, P.C., Cedar Rapids, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Wal-Mart Stores and American Home Assurance appeal from a district court decision affirming a deputy industrial commissioner's decision that a second dismissal of Julie Henle's claim for workers' compensation benefits was not a dismissal with prejudice. We affirm.

BACKGROUND. Henle filed a petition on August 1, 2007, contending she was injured on May 30, 2006, while working for Wal-Mart. She noted in the filing that the nature and extent of permanent disability was not known. The matter was assigned for hearing on July 29, 2008. On July 25, 2008, Henle filed a dismissal without prejudice. Wal-Mart did not resist and a deputy industrial commissioner sustained her motion.

Henle filed a second petition addressing the same claim on July 8, 2009. She indicated the nature and extent of permanent disability was substantial but undetermined. The commissioner entered an order setting hearing on the claim for June 10, 2010, at 1 p.m. On April 28, 2010, Henle filed a motion to continue the June 10th hearing stating that the only issue remaining in the case was that of permanency and that issue was not ripe for determination. On May 5, 2010, a deputy commissioner filed an order addressing the continuance and said:

> Claimant moves for continuance on the basis that she has not yet reached maximum medical improvement, and the only issue ripe for determination is entitlement to permanency benefits.
>
> The motion indicates that there may currently be no justiciable issue before the agency.
>
> Therefore, it is ordered: Claimant shall, within ten days of the filing of this order, show cause why this claim should not be dismissed without prejudice for want of a justiciable issue. Absent such cause, the claim will be dismissed.

Henle responded on May 6, 2010. She noted (1) she would not be at maximum medical improvement by the time of the scheduled trial, (2) that the only disagreement is permanent partial/industrial disability and that issue is not ripe, (3) to dismiss and file again is a waste of resources and the matter should be continued. On May 14, 2010, a deputy dismissed the case without prejudice saying:

> Claimant moved to continue this case, now scheduled for hearing on June 10, 2010. The motion indicated that no issues are currently ripe for resolution. Accordingly, an order to show cause why the claim should not be dismissed for want of a justiciable issue was entered. Claimant has now responded, indicating that she has not reached maximum medical improvement "and no current issues exist to be determined on the scheduled trial date."
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> Claimant's petition indicates that weekly benefits have been paid and the statute of limitations does not appear to be involved. As there currently exists no justiciable issue before the agency, the claim should be and is hereby dismissed without prejudice. Each party shall bear its own costs.

On May 25, 2010, Wal-Mart filed a motion to reconsider/motion to amend dismissal. It advanced among other things that Henle was asked by the agency to show cause why the case should not be dismissed due to the lack of a justiciable issue. After Henle responded, the agency deemed the cause shown insufficient and dismissed the case without prejudice. Wal-Mart stated on May 19th, three weeks before the hearing date, it received a report from Dr. Ana Recober stating Henle is at MMI for her claimed work-related condition which changes the issue of whether the cause was ripe for trial. Wal-Mart asked that the issue of dismissal be reheard. Wal-Mart contended that Iowa follows the rule that a plaintiff cannot dismiss the same action twice without prejudice attaching. Wal-Mart argued (1) the agency should apply Iowa Rule of Civil Procedure

1.943[1] or rule 1.946[2] and the dismissal should be amended to attach prejudice; (2) if not amended to dismiss with prejudice, a hearing on the question should be held; and (3) if relief is denied, the agency should vacate the dismissal and reinstate the June 10 trial date as new medical evidence is available. On June 2nd a deputy commissioner denied the motion stating in a handwritten note that rule 1.943 does not apply because the claimant did not dismiss.

On May 26, 2010, Henle filed a motion to reconsider asking that the motion to continue be granted "due to the fact that Claimant cannot refile this matter as it has already previously been dismissed and refiled." This motion was also denied June 2nd with no explanation.

On June 8, 2010, Wal-Mart filed a motion to enlarge/amend contending it raised an issue that required the application of rule 1.946 and the agency did not address it.

On June 21, 2010, Wal-Mart appealed to the commissioner. It noted the matter was dismissed without prejudice on May 14, 2010, and despite post-dismissal motions, the dismissal stands as is. Wal-Mart stated it was aggrieved

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[1] Iowa Rule of Civil Procedure 1.943 provides in applicable part:

> A party may, without order of court, dismiss that party's own petition . . . at any time up until ten days before the trial is scheduled to begin. . . . A dismissal under this rule shall be without prejudice unless otherwise stated, but if made by any party who has previously dismissed an action against the same defendant, in any court, . . . including or based on the same cause, such dismissal shall operate as an adjudication on the merits, unless otherwise ordered by the court, in the interests of justice.

[2] Iowa Rule of Civil Procedure 1.946 provides:

> All dismissals not governed by rule 1.943 or not for want of jurisdiction or improper venue, shall operate as adjudications on the merits unless they specify otherwise.

by the ruling on the second filing of this action and it appealed to the agency to seek modification.

On July 7, 2010, the commissioner addressed the appeal stating:

> On June 21, 2010, defendants filed a notice of appeal and application for review pursuant to Rule 876 IAC 4.27[3] from an order filed May 14, 2010.
>
> Upon review of the record in the agency file, I find the ruling in issue is interlocutory. I further find that while substantial rights may be affected by the ruling, the ruling will not necessarily materially affect the final decision and that determination of the correctness of the ruling at this time will not necessarily better serve the interests of justice than preserving the potential issue for review

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[3] Iowa Administrative Code rule 876-4.27 provides:

> Except as provided in 4.2(86) and 4.25(17A,86), an appeal to the commissioner from a decision, order or ruling of a deputy commissioner in contested case proceedings shall be commenced within 20 days of the filing of the decision, order or ruling by filing a notice of appeal with the workers' compensation commissioner. If two or more contested cases were consolidated for hearing, a notice of appeal in one of the cases is an appeal of all the cases. The date the notice of appeal is filed shall be the date the notice of appeal is received by the agency. *Miller v. Civil Constructors*, 373 N.W.2d 115 (Iowa 1985). The notice shall be served on the opposing parties as provided in 4.13(86). An appeal shall be heard in Polk County or in any location designated by the workers' compensation commissioner.
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> An interlocutory decision, order or ruling can be appealed only as hereinafter provided. A decision, order or ruling is interlocutory if, when issued, it does not dispose of all issues in the contested case that are ripe for adjudication. If the sole issue remaining for determination is claimant's entitlement to additional compensation for unreasonable denial or delay of payment pursuant to Iowa Code section 86.13, the decision is not interlocutory. An adjudication that awards ongoing payments of weekly compensation under Iowa Code section 85.33 or 85.34(1) is not interlocutory. The workers' compensation commissioner may, upon application from any party or on the commissioner's own motion, and upon such terms as the commissioner orders, grant an appeal from an interlocutory decision, order or ruling if the commissioner finds that the ruling affects substantial rights, that the ruling will materially affect the final decision and that determination of the correctness of the ruling will better serve the interests of justice.
>
> A cross-appeal may be taken under this rule or 4.25(17A,86) in the same manner as an appeal within the 20 days for the taking of an appeal or within 10 days after filing of the appeal, whichever is later.

> when the case in chief is decided on appeal if events progress to that point. Grounds do not exist to grant an appeal from the interlocutory ruling.
>
> I conclude that the appeal is interlocutory and that the application to grant an appeal from the interlocutory ruling should be denied.
>
> It is therefore ordered that defendants' application to grant an appeal from an interlocutory ruling is denied and the notice of appeal filed June 21, 2010, is dismissed.

Wal-Mart filed a petition for judicial review on July 30, 2010. It stated (1) venue is proper because of Iowa Code 17A.19(2), (2) the commissioner's final decision dismissed the action without prejudice, (3) the commissioner's decision should be reversed and prejudice should attach to the dismissal, and (4) it should be given relief because the agency's ruling constitutes an error of law.

On September 30, 2010, a deputy filed a ruling on the motion to enlarge/amend. It traced the history of the case and noted that Henle filed a third petition for benefits on June 10, 2010. It then noted that on June 8, 2010, Wal-Mart filed a motion to enlarge/amend on the basis that the June 2, 2010 ruling made no mention of the application of Iowa Rule Civil Procedure 1.946. The deputy denied the motion to enlarge/amend and said:

> The dismissal of May 14, 2010, specified Henle's petition was dismissed without prejudice. Wal-Mart's complaint that the ruling of June 2, 2010 failed to address Rule 1.946 is correct but nevertheless meritless since the dismissal did "specify otherwise" within the meaning of the rule.

On December 8, 2010, the district court ruled on the petition for judicial review. It acknowledged the dismissal at issue is a second dismissal. It reasoned that Iowa Rule Civil Procedure 1.946 applied because the deputy specified otherwise by indicating the dismissal was without prejudice. It denied

Wal-Mart's contention that a more specific explanation should have been given to justify the non-prejudicial dismissal.

DISMISSAL OF ACTION. Wal-Mart contends the commissioner erred in applying the rules of civil procedure in a manner that allowed Henle's claim to be filed a third time. The commissioner dismissed the second case. A result which would have been favorable to Wal-Mart was it not for the fact the case was dismissed without prejudice and it apparently has now been refiled.[4] Wal-Mart has the right to challenge that part that is unfavorable to it. *See Lawson v. Kurtzhals*, 792 N.W.2d 251, 255 (Iowa 2010) (citing *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 112 (7th Cir. 1988)); *Darrah v. Des Moines Gen. Hosp.*, 436 N.W.2d 53, 54-55 (Iowa 1989).

Both parties address the issue assuming, without citing to authority, that the Iowa Rules of Civil Procedure are applicable to agency actions and the issue here should be decided based on an interpretation of those rules. Iowa Rule Civil Procedure 1.101 provides:

> The rules in this chapter shall govern the practice and procedure in all courts of the state, except where they expressly provide otherwise or statutes not affected hereby provide different procedure in particular courts or cases.

Iowa Administrative Rule 876-4.35 states,

> The rules of civil procedure shall govern the contested case proceeding before the workers' compensation commissioner unless the provisions are in conflict with these rules and Iowa Code chapters 85, 85A, 85B, 86, 87 and 17A, or obviously inapplicable to the workers' compensation commissioner. In those circumstances, these rules or the appropriate Iowa Code section shall govern. Where appropriate, reference to the word "court" shall be deemed

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[4] A third petition was filed on June 10, 2010.

> reference to the "workers' compensation commissioner" and reference to the word "trial" shall be deemed reference to "contested case hearing." This rule is intended to implement Iowa Code sections 17A.1, 17A.12, 17A.13, 17A.14, and 86.8.

Mindful of the administrative rule above and no argument being made that the Iowa Rules of Civil Procedure 1.943 and 1.946 are in conflict with Iowa Code chapters 85, 85A, 85B, 86, 87 and 17A, we believe that the two rules at issue are applicable to dismissals of petitions before the industrial commissioner.

The petition for judicial review in the district court filed July 30, 2010, challenged the July 7, 2010 ruling of the commissioner that an application for review from the May 14, 2010 order was interlocutory[5] and the agency erred in determining the second dismissal was without prejudice.

The dismissal came more than ten days before the date set for hearing. However, the action had been dismissed by Henle once before; therefore, it is an adjudication, unless otherwise ordered by the court in the interest of justice. Henle did not file the dismissal; rather the deputy ordered it dismissed without prejudice. We believe the ruling of the deputy fell under the "unless otherwise ordered by the court, in the interest of justice" exception to rule 1.943. We also believe there was no adjudication under rule 1.946 because by adding the phrase "without prejudice" the deputy was "specify[ing] otherwise."

AFFIRMED.

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[5] While the commissioner found the intra-agency appeal was interlocutory, this finding is not challenged in the appeal before us and we will not address it.