IN THE COURT OF APPEALS OF IOWA

No. 1-638 / 11-0255
Filed September 8, 2011

LAURIE ANN BENSLEY,
Petitioner-Appellee,

vs.

DEE ZEE MANUFACTURING and
ACE AMERICAN INSURANCE COMPANY,
Respondents-Appellants.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Respondents appeal the district court decision reversing the determination of the workers' compensation commissioner that petitioner was not entitled to benefits. **AFFIRMED.**

Mark A. King of Patterson Law Firm, L.L.P., Des Moines, for appellants.

Joseph S. Powell and Kyle T. Reilly of Thomas J. Reilly Law Firm, P.C., Des Moines, for appellee.

Considered by Vogel, P.J., Potterfield, J., and Schechtman, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SCHECHTMAN, S.J.

Dee Zee Manufacturing and its insurer, Ace American Insurance Company, (collectively Dee Zee) appeal from the district court's decision on judicial review reversing the workers' compensation commissioner's decision on causation. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

Laurie Bensley quit high school when she was fifteen years old. She had a continuum of minimum-wage jobs, with a seven-year hiatus staying at home tending to her children. In September 2001, Bensley fell off a porch at her home. She was diagnosed with a strained left shoulder and was out of work for a brief period thereafter. In 2002, she was employed by firms in packaging, requiring the lifting of parcels exceeding fifty pounds above shoulder level.[1]

Bensley was hired full-time by Dee Zee in February 2006. Her principal assignment was "deburring" running boards in the fabrication stage. This required the operation of a five-pound drill suspended from an overhead source. The drill was manually forced down to chest level to grind loose metal away from fourteen drilled holes per tube, a series of tubes comprising a part of the fabrication. She estimated deburring eighty-eight to one hundred tubes per hour, ten hours per day. Additionally, she assisted in assembling and packing the end product.

On January 26, 2007, Bensley struck her left elbow on a corner of a control stand, incurring pain to her left arm. Though continuously requested, she was not authorized for medical care until March 26, 2007. The company

[1] Bensley was only five-foot-two inches in height.

physician injected the elbow, prescribed medication, and released her for light duty. She had missed work due to increased symptoms. Bensley was terminated on April 7, 2007, for alleged excessive absences.[2]

Bensley filed a petition with the Iowa Workers' Compensation Commissioner in June 2007, alleging she had suffered injuries to her left elbow and shoulder on January 26, 2007. A second petition filed several months later alleged injuries to her left shoulder, neck, and arm due to the repetitious work she performed at Dee Zee.

Following those filings, Bensley was referred by her family physician to an orthopedic surgeon, Dr. Scott Neff. She submitted to surgery on her left elbow on January 21, 2008.[3] Bensley continued to sustain left shoulder discomfort. Upon evaluation, Dr. Neff concluded

> she has a definite infringement syndrome in the left shoulder. The pain in her elbow may have masked the shoulder. There is no direct anatomic relationship between the elbow and the shoulder, other than that they both can occur as a result of repetitive activity, push, pull, lifting, and work. She says her left shoulder is bothering her a great deal.

Dr. Neff scheduled arthroscopic left shoulder surgery. Bensley sought second opinions, which recommended a more conservative pre-surgical procedure. Surgery was delayed due to her concerns about its costs and insurance coverage. Bensley's pain persisted, persuading her to opt for an August 8, 2008 surgery on her left shoulder, decompressing it, and the

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[2] An unemployment hearing ensued, resulting in a finding of no misconduct and an award of unemployment benefits.

[3] Bensley was compensated by the workers' compensation insurer for expended medical costs and eleven weeks temporary total disability payments for the injury to the left elbow, which is not the subject of any dispute herein.

debridement of a lesion that had developed from "wear and tear." Physical therapy followed. The surgeon opined that "the work at Dee Zee Manufacturing aggravated her arm and shoulder necessitating the subsequent surgical treatment."[4] Her family physician concluded, "Bensley told me she did a lot of overhead working and pulling down of objects. All the work was very repetitive, therefore, I believe her work activities are related to aggravating her left elbow and shoulder discomfort." An independent medical examiner concluded that her osteoarthritis in her left shoulder was "aggravated by repetitive pushing, pulling, and lifting from her job," resulting in compensatory impairment.

Following an arbitration hearing in March 2009, the deputy workers' compensation commissioner found Bensley had not met her burden of proof on her claimed left shoulder injury, as "it could not be determined how the claimant's shoulder injury occurred." The deputy commented in his findings that Bensley

> had a fairly serious fall onto her left shoulder in 2001 . . . at home for which she missed approximately six weeks of work. Given the previous injury, the fact that the shoulder became symptomatic eight months after the work ended, the claimant's nearly year delay in claiming the left shoulder was from work activities, and the significant non-work related arthritic condition, it is unknown how the injury to the left shoulder occurred.

On intra-agency appeal, the commissioner affirmed and adopted the deputy's decision after "[c]onceding that the presiding deputy made limited mention of the medical opinions contained within the record." The commissioner stated the greater weight of the evidence is that "claimant's shoulder condition

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[4] The surgeon acknowledged a report by an ergonomics expert that analyzed and studied the functional applications of Bensley's job, including "cutting, drilling, hole punching, bending, and deburring" at chest or above level, with the conclusion that the diagnosis of left shoulder pain resulting in surgery was causally connected to her fabrication position at Dee Zee.

was a result of non-work injuries predating her employment," notably the 2001 fall followed by medical attention to her shoulder in April 2006.

Bensley filed a petition for judicial review, alleging the commissioner erred in determining she failed to prove a causal connection between her work and left shoulder injury. The district court reversed and remanded the agency's decision, finding "the Agency decision lacks substantial evidence to support it"; the medical evidence was "overwhelmingly" in favor of work-related causation; and "the Agency's application of the law to the facts was irrational, illogical, and wholly unjustifiable and otherwise arbitrary and capricious" due to its summary dismissal of the uncontradicted medical evidence.

Dee Zee appeals, claiming the district court erred by finding the decision of the workers' compensation commissioner was not supported by substantial evidence.

II. Scope and Standards of Review.

Our scope of review is for the correction of errors at law. *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 390 (Iowa 2009). We review the district court decision on judicial review by applying the standards of the Iowa Administrative Procedure Act, Iowa Code chapter 17A (2009), to the agency action to determine if our conclusions are the same as those reached by the district court. *Id.* Under section 17A.19(10), a reviewing court may reverse the agency's decision if it is unsupported by substantial evidence in the record as a whole, based upon an irrational, illogical, or wholly unjustifiable application of law to fact, or otherwise characterized by an abuse of discretion. *Id.* at 391.

We are bound by the commissioner's findings of fact so long as those findings are supported by substantial evidence. *See* Iowa Code § 17A.19(10)(f). Substantial evidence means the

> quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Id. An abuse of discretion occurs when the commissioner's exercise of discretion is "'clearly erroneous or rests on untenable grounds.'" *IBP, Inc. v. Burress*, 779 N.W.2d 210, 214 (Iowa 2010) (citation omitted).

III. Analysis.

Dee Zee argues Bensley failed to show by a preponderance of the evidence that her shoulder injury arose out of and in the course of her employment. It contends Bensley's left shoulder problems pre-dated her employment with the company, pointing to the fact that she has significant degenerative arthritis in her left shoulder, as well as evidence in the record showing her shoulder problems began with a fall from a porch in 2001.

"Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony." *Dunlavey v. Economy Fire & Cas. Co.,* 526 N.W.2d 845, 853 (Iowa 1995). The weight to be given those opinions is for the commissioner, as the finder of fact, and "that may be affected by the completeness of the premise given the expert and other surrounding circumstances." *Id.* The commissioner is "free to reject expert testimony so long as valid reasons are specified as to why this is done." *Leffler v. Wilson & Co.*, 320 N.W.2d 634, 637 (Iowa Ct. App. 1982) (citing *Catalfo*

v. Firestone Tire & Rubber Co. 213 N.W.2d 506, 510 (Iowa 1973)). As stated in *Catalfo*, appropriate credibility assessments should include: "Did he find the doctor's testimony incredible? If so, was it because he did not testify truthfully or because claimant's complaints were spurious? Why did he reject, discount, or disregard it?" 213 N.W.2d at 509. The administrative decision must be sufficiently detailed to show the path of reasoning. *Id.* When the agency disregards uncontroverted expert medical evidence, the agency must say why it has done so. *Id.* at 510.

Ultimately, however, "the question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made." *Sherman v. Pella Corp.*, 576 N.W.2d 312, 320 (Iowa 1998). "We are reluctant to allow the commissioner totally to reject expert testimony which is the only medical evidence presented." *Poula v. Siouxland Wall & Ceiling, Inc.*, 516 N.W.2d 910, 911-12 (Iowa Ct. App. 1994).

It is clear the evidence does not support the following findings actually made by the commissioner:

> The greater weight of the evidence is that the claimant had an ongoing left shoulder condition which began with a fall from a porch in September 2001. In April 2006 claimant sought medical care for left shoulder complaints including tenderness to palpation, decreased range of motion, and pain to where she was not sleeping well at night. . . . Her complaints in April 2006 were noted to have been first recognized following an injury in 2001. In spite of medical opinions that her workplace duties were sufficient to cause her left shoulder complaints, the greater weight of the evidence is that claimant's shoulder condition was a result of non-work injuries predating her employment with defendant-employer.

The office visit on April 3, 2006, to Bensley's family physician was not for her shoulder pain, but for "depression." The clinic's memo stated, "In general,

she is in no acute distress." Her list of "Active Problems" was confined to "Allergic Rhinitis, Attention-Deficit Disorder, Depression, Upper Respiratory Infection," with no mention of the left shoulder. The left shoulder pain arose solely in the medical history given to the physician, per the latter's notes, which included a statement, "This occurred about 2001 when she was in an altercation with an individual. They did test for rotator cuff tear which was negative." An x-ray was ordered, which showed only a left shoulder sprain. Bensley was directed to return in two weeks, which was done on April 20, 2006. The reason for that visit was "neck glands swollen," again with no mention of the left shoulder or attention given it. And, importantly, these medical consultations were *after* Bensley had been employed by Dee Zee.

The commissioner also failed to recite that the left shoulder arthrogram following the 2001 fall was "normal or negative," with a diagnosis of a "strained left shoulder." After her termination from Dee Zee, and subsequent elbow surgery, this had progressed to a "tear of the labrum in addition to impingement" and eventual surgery. Bensley had related to her surgeon that "she had been having left shoulder pain with a sensation of clicking or popping . . . *that started about the same time as the elbow*." (Emphasis added.) The commissioner did not make any findings regarding the credibility, or lack thereof, of Bensley or of any of the medical experts, including the surgeon, Dr. Neff. *See Langford v. Kellar Excavating & Grading, Inc.*, 191 N.W.2d 667, 669 (Iowa 1971) (stating the commissioner may not "arbitrarily or totally reject the offered testimony," but instead "has the duty to weigh it and determine its credibility").

The medical experts, ad nauseam, all highlighted their opinions on causation, with repeated observations that the work at Dee Zee was repetitive in nature—"repetitive overhead use of the arm"; "repetitive pushing, pulling, and lifting;" "very repetitive." The administrative decision relies on the delay in reporting the shoulder problem as a reason to discount the causative conclusions, yet ignores and does not address, as opined by the surgeon, that everyone was concentrating on the compensatory elbow injury, which may have "masked" attention to the shoulder.

The commissioner and deputy appeared to focus on the absence of some specific blow or trauma at some specific time. The surgical diagnosis was "post impingement decompression, left shoulder, arthroscopic, with debridement of Type I SLAP lesion and debridement of partial thickness rotator cuff tear." The lengthy causative report by Dr. Neff thoroughly explained the state of the left shoulder at the time of surgery:

> This particular patient is five feet two inches tall, thus it is possible that she would have to work with her arms at a higher level than she otherwise might were she, for example, five feet six or eight inches tall. The changes found in her shoulder at arthroscopy were not traumatic. She had what is called a degenerative, Type I SLAP lesion, which simply means there is wear and tear. . . . Repetitive overhead use of the arm, repetitive pull down, repetitive push up, especially at or above the height of the shoulder, would be expected to contribute to Type II impingement syndrome. This would especially be true if the ongoing activity had been going on for months and years and not just weeks.[5]

The commissioner overlooked, without explanation or comment, that in April 2006, while employed by Dee Zee, the diagnosis was a shoulder sprain and,

[5] Bensley worked as a "temp" for Dee Zee for a period, then was employed full-time for fourteen months prior to her termination.

after termination, it required surgery with no other intervening employment or injury.

The commissioner summarily dismissed the three causative medical opinions,[6] with no real specific reason for their rejection, such as based on an incomplete history, or as incredible, or the claimant's complaints were spurious, or were not based on a medical probability. *See Catalfo*, 213 N.W.2d at 509. Nor did the administrative decision acknowledge that aggravation of a pre-existing condition is compensable.

> [E]mployers take employees as they find them at the time of employment. In other words, when employees are hired, employers take them subject to any active or dormant health impairments incurred prior to employment. So, if a subsequent injury aggravates a preexisting condition rendering the condition disabling, the employer is liable for the disability.

Bearce v. FMC Corp., 465 N.W.2d 531, 536 (Iowa 1991) (citations omitted). "Full compensation is allowed for the result of workplace injuries aggravating a preexisting condition." *Floyd v. Quaker Oats*, 646 N.W.2d 105, 110 (Iowa 2002).

The evidence shows that the commissioner relied upon certain assumptions that were unwarranted as the multiple, uncontradicted medical evidence and circumstances dispelled their accuracy. *See Langford*, 191 N.W.2d at 668 ("[W]e are not foreclosed from setting aside the commissioner's findings based upon evidence which is both uncontradicted and from which reasonable minds could not draw different inferences."). The commissioner opted to reject a wholesale variety of sound medical causation opinions, without any justification for that rejection. Upon viewing the record as a whole, we

[6] These ran the whole spectrum from the treating physician, the orthopedic surgeon, and an independent medical expert, corroborated by an ergonomic expert.

conclude the evidence does not support the findings of the commissioner, the agency's final decision. *See Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003) (observing under the substantial-evidence standard of review, "courts must not 'simply rubber stamp the agency fact finding without engaging in a fairly intensive review of the record to ensure that the fact finding is itself reasonable'" (citation omitted)).

IV. Conclusion.

We affirm the district court's ruling reversing the decision of the workers' compensation commissioner and remanding the case to the commissioner for a determination of appropriate benefits for Bensley.

AFFIRMED.

Potterfield, J., concurs; Vogel, P.J., concurs specially.

VOGEL, P.J. (concurring specially)

I write specially to note the lack of credibility findings of the agency, which may have provided critical information for judicial review. "In assessing evidentiary support for the agency's factual determinations, we consider evidence that detracts from the agency's findings, as well as evidence that supports them, giving deference to the credibility determinations of the presiding officer." *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006).

> "When that record is viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, *including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses* and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.

Iowa Code § 17A.19(10)(f)(3) (emphasis added).

The deputy commissioner did not believe Bensley's assertion that her left shoulder pain was causally connected to her work at Dee Zee and the commissioner, on intra-agency, de novo review of the record agreed. However, the findings are not clear as to why the ultimate causal connection, particularly the conclusion made by Dr. Neff, was discounted by the agency.

A review of the record reveals that Dr. Neff was not initially persuaded by Bensley as to any work-related causation, as on the morning of her scheduled shoulder surgery she told Dr. Neff she knew her private insurance would not cover the surgery, so she wanted it "put on work comp." In a series of medical reports, Dr. Neff relates how Bensley's various complaints to him have no anatomical explanation. For example, he writes in his September 29, 2008 letter

to Bensley's attorney, "This patient has said things to me in the office that are confusing and do not make anatomical sense." In the same letter, he wrote that Bensley had "significant arthritic disease" in her shoulder, which "would not be related to the type of employment that occurred at Dee Zee Manufacturing." With additional correspondence from Bensley's attorney, Dr. Neff then wrote on November 3, 2008, "The type of work that this patient did for Dee Zee could have contributed to the development of epicondylitis," which he explained was "tennis elbow." It was not until February 26, 2009, in response to additional correspondence with Bensley's attorney, that Dr. Neff finally and rather succinctly opined the work at Dee Zee "aggravated her arm and shoulder, necessitating the subsequent surgical treatment."

While some of this progression of reports, as well as other facts, were noted in the agency's decision, the ultimate decision was somewhat conclusory. Hence, this lead the district court to conclude "the Agency decision lacks substantial evidence to support it. . . . The medical evidence in this case was overwhelming in favor of the Petitioner." Had the appropriate credibility findings been made and the medical evidence explained in more detail by the agency, then a different result may have been reached on judicial review. Without those findings, I concur specially with the majority.