IN THE COURT OF APPEALS OF IOWA

No. 2-1017 / 12-1120
Filed January 9, 2013

ANGEL RICHARDS,
Petitioner-Appellant,

vs.

CRESTON NURSING &
REHABILITATION CENTER,
Respondent-Appellee.

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

Angel Richards appeals a district court order affirming the denial of her claim by the workers' compensation commissioner. **AFFIRMED.**

Steven C. Jayne, Des Moines, for appellant.

Joseph D. Thornton of Smith & Peterson Law Firm, L.L.P., Council Bluffs, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Angel Richards appeals a judicial review order affirming a decision from the workers' compensation commissioner that she did not sustain a permanent injury while working for the Creston Nursing and Rehabilitation Center in October 2006. She argues the commissioner's causation determination hinged on erroneous factual findings.

Like the district court, we conclude substantial evidence supports the agency's decision that Richards failed to meet her burden to prove by a preponderance of the evidence that her work injury caused permanent impairment or disability. The deputy commissioner cited Richards's inconsistent and incredible accounts of her back injury as the primary reason for denying benefits. In turn, the deputy discounted a medical opinion based on "a very suspect history" of the injury offered by Richards. The commissioner adopted these findings on intra-agency appeal. Because assigning credibility is a function we leave to the fact finder, we defer to the agency's determination.

I. Background Facts and Proceedings

Angel Richards, now thirty-three years old, worked for several employers leading up to and following the stipulated injury date. Her medical records show a history of back pain from 2002 through 2009. In September 2002 Richards saw a chiropractor for pain in her mid-to-low back and neck associated with falling backwards while she carried a sixty-pound child up bleachers. She returned in August and October 2003 with more low back symptoms, and again

in July 2004 after falling on some stairs. In late 2004 Richards experienced pain radiating down her left leg after bending over to pick up a spoon.

Richards began working as a nursing assistant at Creston Nursing and Rehabilitation Center (CNRC) in October 2005. She obtained her certified nursing assistant (CNA) certificate, finished on-the-job training, and worked at the facility full time. She helped elderly residents with daily needs, transfers, lifts, and feeding.

Richards injured her back on February 13, 2006, while moving a patient. After seeking medical attention the night of the incident, she returned to light duty work four days later, and according to the attending physician, was fully recovered on February 27, 2006. The parties stipulated that on October 10, 2006, Richards injured her low back while assisting a resident out of bed. After the pain persisted for a week, Richards visited Dr. John Hoyt, who diagnosed her with acute low back pain. An MRI indicated "mild degenerative disc disease with a small central disc protrusion at L5-S1." Richards received two epidural steroid injections in November and continued on her pain medications, muscle relaxers, and physical therapy. Her conditions improved and she began working half days with no lifting, though she still experienced some radiating right leg pain.

Because Richards's radiating leg and low back pain had improved, in early December 2006 Dr. Hoyt authorized her to lift up to fifty pounds, but limited her to assisted transfers of patients. Later in December she aggravated her back while cleaning under tables at work.

Orthopedic surgeon Dr. Lynn Nelson saw Richards in January 2007 and ordered a second MRI, which revealed "a mild degree of disc desiccation at L4-5 and [L5-S1] with very small (noncompressive) degenerative disc bulges at both levels [and] [t]he thecal sac and nerve roots are without significant compression." Because these results confirmed Dr. Nelson's theory that Richards was not experiencing a "significant degree of impingement," he told her neither surgical treatment nor injections would be necessary, though he did restrict her to office work with no repetitive movements and a fifteen-pound lifting restriction.

Later in January 2007, Richards slipped on ice in CNRC's parking lot. She again sought treatment from Dr. Hoyt, who considered the second MRI to be "normal." Because her symptoms were improving, he switched her medication from Percocet to Vicoden. Richards told Dr. Hoyt that a CNRC administrator questioned her work restrictions and she asked Dr. Hoyt to provide a note to her employer.[1] On February 21, 2007, CNRC fired Richards for "excessive absenteeism" after she overslept and informed her boss she could not work her shift because of child care issues.

Dr. Hoyt discontinued Richards's Vicoden in March 2007 and discharged her from his care.[2] Richards worked as a telemarketer until June 2007, when

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[1] Richards testified to her superior's behavior: "I was on work restrictions by a doctor, so to me I felt like, you know, being harassed was him telling me that I worked for him, not for the doctors, that I needed to do my jobs as he tells me to do them, not how my doctors wanted me to do them, so I just felt that it was harassing and I couldn't take a whole lot more of it."

[2] Dr. Hoyt describes Richards's improvements: "She can flex forward and only lacks a couple of inches to touch the floor. It is full, in my opinion, for her normal range of motion. She can extend well. Side-bend and rotation are full without tenderness. She walks without a limp or problem. There is no pain on palpitation of the lower back."

she left that job to care for her father-in-law. Once his condition improved, Richards began working as a CNA at Crest Haven Care Center; she held that job from January to June of 2008. In her pre-employment physical with Dr. James Gerdes, Richards revealed her history of lower back issues but reported she was pain free at the date of examination. She testified her work duties at Crest Haven were similar to those at CNRC, but less lifting was required because the residents were more independent. She worked without restrictions and denied any back pain. Richards testified that conflict with coworkers, the needs of her father-in-law, and her desire to try a different line of work spurred her departure from Crest Haven.

In April 2008, Richards started working as a cashier for a Kum & Go convenience store. She testified the job involved less lifting, and although she experienced slight discomfort, it was not enough to interfere with her duties.[3]

At 4:00 a.m. on August 1, 2008, Richards fell in the Kum & Go parking lot. Later that day, she visited Dr. Gerdes, complaining of severe tail bone and back pain. Dr. Gerdes diagnosed her with acute lower back spasm and prescribed pain medication and muscle relaxers. Richards returned to work a week later, but was restricted from lifting more than twenty pounds or making repetitive movements that would impact her spine. In follow-up visits with Dr. Gerdes, she reported ongoing back pain and numbness down the outside of her left leg to the foot.

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[3] Around this same time, Richards visited a chiropractor for lower back pain. The chiropractor attributed her pain to her sleeping habits.

On September 1, 2008, Richards reported feeling light headed and again falling while working at Kum & Go. Another MRI revealed "mild degenerative disc disease at L4-L5 and L5-S1 with presence of annular disc bulges," but no other maladies.

Upon a request from a representative of Kum & Go, Dr. Nelson compared Richards's September 2008 neurological exam and MRI scan with her exam and scan from January 2007. He found no significant difference. Because Richards's back condition appeared unchanged after the parking lot fall, Kum & Go denied her workers' compensation claim. Her employer also suspected Richards may have lied about the fall to obtain time off work.[4]

In November 2008, Richards sought an independent evaluation from neurosurgeon Robert Jones. Dr. Jones attributed her lower back pain primarily to the October 2006 injury. He found her improving symptoms did not mean the injury had completely resolved, but he could not apportion what percentage of her pain was caused by either the CNRC injury or the Kum & Go parking lot fall. Dr. Jones opined Richards has a five percent permanent functional impairment causally related to the two injuries.

Kum & Go fired Richards in October 2008 for unexcused absenteeism. She has since sought work but with no success. Richards filed a workers' compensation claim against CNRC on April 20, 2009. She also applied for social

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[4] A Kum & Go representative noted Richards had earlier asked to take vacation from August 1 through August 3 to attend a class reunion, but was called into work after another employee was hospitalized. The representative also observed her clothes were not dirty after the fall.

security disability insurance (SSDI) and supplemental security income (SSI) in February 2010.

Richards's counsel requested Dr. Nelson's opinion whether the incident at CNRC or the parking lot fall at Kum & Go caused her injury. In a February 2009 letter, Dr. Nelson acknowledged a person with lumbar spine degenerative changes could sustain aggravation of those underlying conditions by either event, but refused to "within a reasonable degree of medical certainty, opine that either . . . incident produced permanent functional impairment." Prompted by counsel for a clarification, Dr. Nelson wrote in May 2009:

> My opinion, within a reasonable degree of medical certainty, is that Angel Richards' reported incident on or about October 10, 2007 [sic] did not result in a permanent functional impairment. I cannot state with absolute certainty that it did or did not.

At a video deposition conducted by CNRC, Richards testified she enjoys attending local stock car races, but now needs a railing or assistance to climb bleachers and that sitting is uncomfortable. In preparation for the deposition, CNRC hired a private investigator who recorded Richards attending races at Adams County Speedway, where she appeared capable of ascending and descending the grandstand stairs and sitting on a seat cushion with back support for extended periods of time.

Richards's counsel requested Dr. Jones's opinion concerning the cause of his client's injury and provided the doctor with the deposition, surveillance footage, the 2009 exchange with Dr. Nelson, and medical records. Dr. Jones responded in an August 6, 2010, letter that he maintained his opinion the

October 2006 nursing home injury was a "significant causative factor" in Richards's "current presentation of low back and leg complaints."

A deputy workers' compensation commissioner held an evidentiary hearing on August 11, 2010, to take Richards's testimony and receive exhibits. On October 12, 2010, the deputy issued an arbitration decision concluding Richards failed to carry her burden of proof to show by a preponderance of the evidence that her work injury in October 2006 caused her permanent impairment or permanent disability. His conclusion was "primarily due to claimant's lack of credibility while testifying at her deposition and at the hearing." The deputy also found Dr. Jones relied "only upon a very suspect history and consequently his views are not convincing."

Richards appealed the denial of her claim to the workers' compensation commissioner, who held:

> The presiding deputy properly found that claimant provided inconsistent testimony regarding her physical abilities and pain level following her injury of October 10, 2006 and was also inconsistent regarding her subsequent employment and a subsequent fall at Kum & Go. Those inconsistencies, coupled with a lack of supportive and reliable medical evidence, requires that the finding of the presiding deputy be affirmed.

On May 17, 2012, the district court found substantial evidence supporting the commissioner's determinations. Richards filed this appeal from the judicial review order.

II. Scope and Standard of Review

Iowa Code chapter 17A (2009) directs our review of workers' compensation proceedings. *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d

549, 557 (Iowa 2011). We follow the standards in section 17A.19(10) to determine whether our conclusion matches the district court's results. *Evercom Sys., Inc. v. Iowa Utils. Bd.*, 805 N.W.2d 758, 762 (Iowa 2011). If the agency's action prejudiced the petitioner's substantial rights and the action meets one of the criteria listed in section 17A.19, we may grant relief. *Id.*

Because the commissioner's fact determinations are clearly vested by a provision of law in the agency's discretion, we defer to the fact findings if they are supported by substantial evidence in the record viewed as a whole. *Schutjer*, 780 N.W.2d at 557. "Substantial evidence" is "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." Iowa Code § 17A.19(10)(f)(1). We judge the agency's finding in light of the relevant evidence that may either detract from or support it. *Id.* § 17A.19(f)(3).

Evidence is not insubstantial just because it is susceptible to varying conclusions. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). Therefore, the fact we may draw different conclusions than the commissioner drew does not mean the record lacks substantial evidence to affirm the commissioner. *Westling v. Hormel Foods Corp.*, 810 N.W.2d 247, 251 (Iowa 2012). Our task on review is not to decide whether the record would support a different finding, but to decide whether substantial evidence supports the findings actually made. *Pease*, 807 N.W.2d at 845.

Because the commissioner is charged with evidence weighing, we broadly and liberally construe the findings to uphold the agency decision. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 331 (Iowa 2005). We also "give due regard to the commissioner's discretion to accept or reject testimony based on his assessment of witness credibility." *Schutjer*, 780 N.W.2d at 558. We perform a fairly intensive review of the record to avoid rubber stamping the agency's finding. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003). But we do not engage in a scrutinizing analysis, "for if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality." *Midwest Ambulance Serv. v. Rudd*, 754 N.W.2d 860, 866 (Iowa 2008) (internal quotation marks and citation omitted).

III. Analysis

A. Causation standards

Medical causation involves a question of fact vested in the workers' compensation commissioner's discretion. *Pease*, 807 N.W.2d at 844. A claimant holds the burden to prove by a preponderance of the evidence that the injury proximately caused her disability. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 752 (Iowa 2002). This burden is met when the causal connection is probable, not merely possible. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998).

Establishing a causal connection generally requires expert testimony. *Id.*

> The commissioner must consider the expert testimony together with all other evidence introduced bearing on the causal connection

> between the injury and the disability. The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Such weight depends on the accuracy of facts relied upon by the expert and other surrounding circumstances. The commissioner may accept or reject the expert opinion in whole or in part.

Id. An expert's opinion is not binding upon the commissioner when the opinion is based on incomplete facts. *Pease*, 807 N.W.2d at 845. "Ultimately, however, the determination of whether to accept or reject an expert opinion is within the 'peculiar province' of the commissioner." *Id.*

Nonmedical testimony is material and relevant to the issue of causation and extent of an injury. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 273 (Iowa 1995). It is entirely within the commissioner's right to weigh all evidence on record and reject any deemed less reliable than contradicting evidence. *Id.*

B. Challenge to agency's determination

Richards contends the deputy's critique of her credibility and dismissal of Dr. Jones's opinion on medical causation were not supported by substantial evidence. She asserts the deputy misstated portions of the record, undermining his belief that she was not a credible witness.

The deputy questioned Richards's veracity both at her deposition and at the arbitration hearing, "especially her confusing and inconsistent testimony describing her condition before the Kum & Go fall." The deputy was skeptical of her testimony describing why she was fired from Kum & Go, the inaccurate injury date referenced by Dr. Nelson, and Richards's inclusion of August 1, 2008, as a possible injury date qualifying her for compensation. The deputy then details

multiple inconsistencies in Richards's testimony regarding whether her CNRC injury had fully healed before the Kum & Go fall. The commissioner adopted these findings.

Richards argues the deputy reached his credibility determination based on false premises, detailing three examples where the deputy's hypertechnical review of the evidence may have led him to overstate her tendency to deceive. After carefully considering Richards's arguments, we agree with the district court's conclusion that despite possible overstatements, the deputy's credibility determinations withstand a substantial-evidence challenge. The deputy pointed to numerous inconsistencies in Richards's testimony at the deposition and in the hearing that supported his finding.

The deputy also determined facets of her subsequent work history as a telemarketer and a nursing assistant contradicted her claim of permanent disability. The deputy noted Richards started working at Crest Haven after passing a pre-employment physical in which she denied any pain from the CNRC injury, contradicting her testimony that she still experienced pain after leaving the CNRC. The deputy also referred to her testimony that the Crest Haven job required less lifting, but noted her inconsistent reasons for leaving Crest Haven. In her deposition, Richards attributed her departure to coworker conflict and a desire to find a different occupation. But she told Dr. Jones that her back pain was in part to blame.

We believe substantial evidence appears on record to bolster the deputy's determination that Richards was not a credible witness. As a baseline, we

cannot overlook the deputy's firsthand perception of Richards at the hearing. *See Neimann v. Butterfield*, 551 N.W.2d 652, 654 (Iowa App. 1996) ("We are keenly aware of the [fact finder's] superior vantage point to make credibility determinations due to its ability to consider firsthand the demeanor and appearance of the parties."). And even if we acknowledge the deputy overplayed certain inconsistencies in Richards's statements concerning her injuries and work history, his conclusions are not lost given the many inconsistencies in her testimony that are not even disputed in this appeal. The deputy's credibility findings remain deserving of our deference. *See Arndt v. City of Le Claire*, 728 N.W.2d 389, 394–95 (Iowa 2007).

We next turn to the expert opinions regarding medical causation. Richards contends that combining the opinions of Dr. Nelson and Dr. Jones would "support a finding that the October 10, 2006 injury caused an aggravation of [her] preexisting spinal condition resulting in her current disability." That may be true. But our job is not to decide whether evidence could support a contradictory conclusion. Our task is to determine if the agency's conclusion is supported by substantial evidence. *See Caselman*, 657 N.W.2d at 501.

In his 2009 correspondence with Richards's counsel, Dr. Nelson advised that a person with lumbar spine degenerative changes could aggravate symptoms by moving a patient or falling in a parking lot, but he could not opine within a reasonable degree of medical certainty which incident produced Richards's functional impairment. Richards concedes Dr. Nelson's opinion standing alone cannot prove medical causation. *See Anderson v. Oscar Mayer*

& Co., 217 N.W.2d 531, 536 (Iowa 1974) (holding "expert testimony that a condition could be causally related to a claimant's employment, although not sufficient alone to support a finding of causal connection, may be coupled with nonexpert testimony tending to show causation . . . [but] such evidence does not compel an award as a matter of law," and is for the fact-finder to decide).

Dr. Jones opined in November 2008 that the CNRC injury caused Richards's permanent disability. He stuck with that opinion even after reviewing Richards's deposition, a surveillance video, and Dr. Nelson's contrary view. In communicating his opinion to Richards's counsel, Dr. Jones did not acknowledge any inconsistent statements in Richards's deposition.

The deputy found "Dr. Jones is relying only upon a very suspect history and consequently his views are not convincing." While the deputy may accept or reject an expert's opinion as to causation in whole or in part, if that testimony is uncontroverted, the deputy must disclose his reasoning for rejection. *See IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 631 (Iowa 2000). Here the deputy explained that Dr. Jones's opinion was not reliable because it was based on Richards's statements that the deputy already found to lack credibility. *See Sherman*, 576 N.W.2d at 321 (concluding substantial evidence upheld commissioner's denial of causation when commissioner found expert based her opinion on claimant's statements rather than objective evidence). The deputy did not abuse his discretion in denying any weight to the medical opinion. *See Al-Gharib*, 604 N.W.2d at 631 (applying abuse of discretion standard to an agency's rejection of medical opinion). Even if Dr. Jones's opinion stood uncontroverted, the suspect

nature of the facts underlying it provided a sufficient basis for the deputy's rejection.

It is not our place to reweigh the evidence or the credibility of the witnesses. *See Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996). If we were to reverse on the grounds urged by Richards, we would be doing just that. Such reweighing is greatly discouraged when the issue is medical causation—where determining whether to accept or reject an expert's opinion rests within the "peculiar province" of the fact finder. *See Pease*, 807 N.W.2d at 845. Because this record when viewed as a whole contains substantial evidence to support the deputy's findings, as adopted and affirmed by the commissioner, we will not disturb the agency decision on appeal.

AFFIRMED.