IN THE COURT OF APPEALS OF IOWA

No. 2-1080 / 11-1755
Filed February 13, 2013

DEBRA COOPER,
Plaintiff-Appellant,

vs.

KIRKWOOD COMMUNITY COLLEGE and IMPAC,
Defendant-Appellees.

Appeal from the Iowa District Court for Linn County, Douglas S. Russell, Judge.

Debra Cooper appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's determination that she is ineligible for workers' compensation benefits. **AFFIRMED.**

Dennis Currell of Currell Law Firm, Cedar Rapids, for appellant.

Joseph A. Quinn of Nyemaster Goode, P.C., Des Moines, for appellee.

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

POTTERFIELD, P.J.

Debra Cooper appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's determination that she is ineligible for workers' compensation benefits. She contends the agency and district court (by way of affirmation) erred by applying the wrong legal standard in finding her injury did not arise out of and in the course of her employment, and by not adopting the opinion of her expert. She also argues, with regard to the procedural issue of her notice of injury, that the agency and district court erred by finding her employer did not have sufficient notice of her injuries, by imputing her knowledge of her injuries prior to manifestation, by establishing a date imputing knowledge regarding work-relation, by finding an affirmative defense was raised by the employer, by failing to follow agency precedents, and by engaging in independent fact finding during judicial review. Kirkwood asserts we lack subject matter jurisdiction to hear Cooper's claims. We affirm, finding we have subject matter jurisdiction, the agency did not err in finding Cooper's injuries did not arise out of her employment and we therefore do not reach the notice issue.

I. Facts and Proceedings

This is the second time we have heard this case on appeal. *Cooper v. Kirkwood Cmty. Coll.*, 782 N.W.2d 160 (Iowa Ct. App. 2010). We incorporate the facts as set forth in that appeal here.

> As the deputy commissioner detailed, Cooper has had a variety of health problems beginning in 1987. In 1992, Cooper began working for Kirkwood Community College (Kirkwood) as a custodian, at which she earned $9.16 per hour. Her job duties required her to dust, empty trash, mop, vacuum, clean blinds, and change light bulbs. Cooper's last day of work was March 15, 2001.

On March 4, 2003, Cooper filed a petition with the Workers' Compensation Commissioner alleging she sustained a work-related injury March 18, 2001. On March 18, 2003, Kirkwood filed an answer raising two affirmative defenses—that Cooper's claims were barred by her failure to comply with Iowa Code section 85.23 (employee must give employer notice of injury within ninety days of occurrence of injury unless employer has actual knowledge of the injury) and Iowa Code section 85.26 (two-year statute of limitations). A hearing was held on February 15, 2005. On March 16, 2005, the deputy commissioner filed an arbitration decision, which thoroughly discussed the medical evidence and testimony presented and found that Cooper failed to carry her burden of proof that she sustained an injury to either her knees or right shoulder that arose out of and in the course of her employment. Additionally, no doctor had opined that Cooper's other health conditions—depression, myofascial pain syndrome, and fibromyalgia—were caused by or aggravated by Cooper's work. Therefore, the deputy found it was unnecessary to reach Kirkwood's affirmative defenses.

On April 4, 2005, Cooper filed an application for a rehearing. The following day, Kirkwood filed a resistance to Cooper's application and an application for a rehearing requesting the deputy rule on its affirmative defenses. After granting both parties' applications for rehearing, the deputy issued a ruling on June 6, 2005. The deputy carefully considered and discussed the parties' arguments, and ultimately affirmed the decision filed March 16, 2005. On intra-agency appeal on May 16, 2006, the commissioner adopted the deputy's decision.

On June 5, 2006, Cooper petitioned for judicial review asserting that the agency incorrectly found her injuries were not work related and failed to award her benefits. Kirkwood answered, resisting Cooper's claims. Both parties briefed their arguments, with Kirkwood reasserting its two affirmative defenses. On November 15, 2006, Cooper filed a motion to dismiss Kirkwood's affirmative defense arguments. On January 26, 2007, the district court denied Cooper's motion to dismiss. The district court found that a ruling on Kirkwood's affirmative defenses would require certain fact-finding by the agency and remanded the case to the agency for a ruling on Kirkwood's affirmative defenses.

On remand, the commissioner entered an order stating that the deputy "is delegated authority to take final agency action" and the decision issued by the deputy "will be the final agency decision and will not be subject to intra-agency appeal to the workers' compensation commissioner." On August 23, 2007, the deputy entered a remand decision finding that Cooper's claims were barred by the notice provisions of Iowa Code section 85.23, but were not barred by the two-year period of limitations of Iowa Code section 85.26.

> On August 31, 2007, Kirkwood filed an application for rehearing requesting the deputy reconsider its statute of limitations defense. Cooper did not respond to the application, but on September 12, 2007, petitioned for judicial review of the remand decision. On September 14, 2007, the deputy ruled on Kirkwood's application finding that Cooper's filing of a petition for judicial review deprived the agency of jurisdiction to rule on Kirkwood's application for rehearing and therefore, denied Kirkwood's application.
>
> On June 5, 2008, the district court issued its ruling. Although Kirkwood had asserted that the district court did not have subject matter jurisdiction because Cooper did not petition for judicial review from a final agency decision, the district court found it did have subject matter jurisdiction to hear Cooper's petition. Next, the district court found that "the medical records and opinions provided by Dr. Coates, Dr. Bahls, and Dr. Riggins provide substantial evidence" for the agency's decision that Cooper did not establish she sustained a cumulative injury as a result of her work activities as custodian for Kirkwood on March 18, 2001, and that the agency applied the proper legal standards in reaching this decision. Additionally, the district court affirmed the agency's decision that Cooper's claims were barred by her failure to comply with section 85.23, but that Cooper's claims were not barred by the statute of limitations.

Id. at 162–64. Our court found the district court lacked subject matter jurisdiction because Cooper was required to wait until the application for rehearing was resolved before filing for judicial review. We remanded for dismissal of the district court petition. Our supreme court declined to take the case on further review, and procedendo issued in April 2010.

The district court dismissed Cooper's petition for judicial review on April 26, 2010. Following inaction by the agency on Kirkwood's August 31, 2007 motion for rehearing, Cooper filed a second petition for judicial review of the August 23, 2007 agency decision twenty-eight days later, on May 24, 2010. Kirkwood filed a motion to dismiss asserting the petition for judicial review was not timely filed. The court denied Kirkwood's motion and affirmed the agency decision, finding Cooper failed to prove an injury arising out of and in the course

of her employment. The court also found that Cooper did not provide Kirkwood timely notice of her injury under Iowa Code section 85.23 (2003). She appeals from this decision.

II. Analysis

Our review of the decisions of the workers' compensation commissioner is governed by Iowa Code section 86.26. "Factual findings of the commissioner are reversed only if they are not supported by substantial evidence. . . . [W]e may reverse the commissioner's application of the law to the facts only if it is irrational, illogical, or wholly unjustifiable." *Midwest Ambulance Service v*. *Ruud*, 754 N.W.2d 860, 864 (Iowa 2008) (citing Iowa Code section 86.26). "When an agency has been clearly vested with the authority to make factual determinations, it follows that application of the law to those facts is likewise vested by a provision of law in the discretion of the agency." *Burton v*. *Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (internal quotations omitted).

A. Subject Matter Jurisdiction

Kirkwood first argues this court lacks subject matter jurisdiction over this case as Cooper filed her petition for judicial review more than two and one-half years after the time limit set by Iowa Code section 17A.19(3). Failure to file an application for judicial review in a manner complying with the provisions of Iowa Code section 17A.19 will deprive both the district court and our court of subject matter jurisdiction. *Cooper*, 782 N.W.2d at 167–68. Iowa Code 17A.19(3) provides, in part: "If a party files an application under section 17A.16, subsection 2, for rehearing with the agency, the petition for judicial review must be filed within thirty days after that application has been denied or deemed denied." "An

application for rehearing shall be deemed to have been denied unless the agency grants the application within twenty days after its filing." *Id*. § 17A.16.

Kirkwood argues that the second petition for judicial review was untimely since the application for rehearing was filed in 2007, and the petition for judicial review was not filed until 2010, after dismissal of the first petition by the district court. We disagree.

Because the initial petition for judicial review was taken filed before a final agency decision was issued, Cooper's appeal was provisional or conditional—i.e., interlocutory in nature. *Cooper*, 782 N.W.2d at 167; *IBP*, *Inc*. *v*. *Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000); *Wolf v*. *City of Ely*, 493 N.W.2d 846, 848 (Iowa 1992). In our previous decision regarding this case, we stated: "While Kirkwood's application for rehearing was pending, Cooper filed her petition for judicial review. As a result, the deputy did not rule on the merits of Kirkwood's application for rehearing because he concluded the agency was divested of jurisdiction." *Cooper*, 782 N.W.2d at 165. Therefore, we found Cooper "did not appeal from a final agency decision as required by section 17A.19. . . . While the application [for rehearing] is pending, the final agency decision becomes in effect provisional or conditional until the application is ruled upon." *Id*. "We find the statutory language clearly requires a party to wait until the application [for rehearing] has been resolved by the agency before filing for judicial review." *Id*. at 167.

Iowa Code 17A.19(3) requires the thirty-day time limit to begin from the issuance of an "agency's final decision." Our supreme court has previously "assume[d] this designated reference point means the thirty-day time limit under

section 17A.19(3) does not apply to petitions for judicial review from interlocutory actions." *City of Des Moines v*. *City Development Bd*. *of State*, 633 N.W.2d 305, 310 (Iowa 2001). Similarly, here, we find the twenty-day window until an application for rehearing is "deemed to have been denied" was tolled and the thirty-day time limit to petition for judicial review was stayed pending the decision by our court and subsequent dismissal by the district court. Iowa Code § 17A.16.

Otherwise, any premature petition for judicial review would signal the end of litigation. We have never held this to be true. In fact, we have specifically abrogated such an interpretation in our rules of appellate procedure. Iowa R. App. P. 1(d) ("If an appeal to the supreme court is improvidently taken because the order from which the appeal is taken is interlocutory, this alone shall not be ground for dismissal. The papers upon which the appeal was taken shall be regarded and acted upon as an application for interlocutory appeal."). Under our appellate rules, an order granting an interlocutory appeal stays further proceedings. *Al-Gharib*, 604 N.W.2d at 628 (Iowa 2000) (citing Iowa R. App. P. 2(b)). By reading our administrative procedure act as staying the rule 17A.19(3) time limits during an improvident petition for judicial review, we comport with the letter of the law and avoid an unjust or absurd result. *See State v*. *Perry*, 440 N.W.2d 389, 391 (Iowa 1989).

The original agency decision from which Cooper sought judicial review was issued on August 31, 2007. Cooper filed her first petition for judicial review on September 12, 2007. Therefore, the agency had eight more days to rule on the application for rehearing before it would be deemed denied. Iowa Code § 17A.16. She was required to file her petition for judicial review within thirty

days after a decision was issued or the application for rehearing was deemed denied. *Id*. Her second petition for judicial review was filed after the application for rehearing was deemed denied and twenty-eight days after dismissal by the district court. We agree with the district court that the petition for judicial review was timely. We therefore have subject matter jurisdiction and proceed to the merits of Cooper's appeal.

B. Application of "Arising out of Employment" Standard

Our review of whether the workers' compensation commissioner applied an improper legal standard to the facts presented allows us to disturb the agency decision only if the application is "irrational, illogical or wholly unjustifiable." *Burton*, 813 N.W.2d at 256.

> When an agency has been clearly vested with the authority to make factual determinations, "it follows that application of the law to those facts is likewise 'vested by a provision of law in the discretion of the agency.'" *Mycogen Seeds v*. *Sands*, 686 N.W.2d 457, 465 (Iowa 2004) (quoting Iowa Code § 17A.19(10)(*f*)). When the application of law to fact has been clearly vested in the discretion of an agency, a reviewing court may only disturb the agency's application of the law to the facts of the particular case if that application is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*m*); *see also Mycogen Seeds,* 686 N.W.2d at 465.

Id. The application of law to facts regarding whether an injury arises out of employment is clearly vested with the agency. *Id*.; Iowa Code § 85.61; *Lakeside Casino v*. *Blue*, 743 N.W.2d 169, 172 (Iowa 2007).

Cooper first argues the agency applied an improper legal standard in its application of the law to the expert opinion regarding whether her injuries arose out of and in the course of employment. *See Meyer v*. *IBP*, *Inc*., 710 N.W.2d 213, 222 (Iowa 2006) ("In applying this arising-out-of element, it is important not

to draw in the causation standards applicable to tort law."). In its opinion, the agency wrote:

> No doctor has specifically opined that claimant's work activities as of March 2001 were a substantial factor in causing her underlying condition to become symptomatic. Although claimant's work activities possibly caused her underlying condition to become symptomatic, claimant must prove that her work was the probable cause and/or a material aggravation.

Cooper argues these words, "claimant must prove that her work was the probable cause," show that both the agency and district court (by way of affirming the agency) applied the wrong legal standard to her case—a tort causation standard—and thereby committed reversible legal error. As part of this argument, she contends the agency erred in requiring her underlying osteoarthritis to be a condition precedent to compensation for her depression, myofascial pain syndrome, or fibromyalgia injuries.

In *Meyer*, our supreme court considered the proper legal standards for the four separate requirements for workers' compensation coverage: 1) personal injury; 2) employer-employee relationship; 3) injury arose out of the employment and, 4) injury arose in the course of the employment. 710 N.W.2d at 220. Looking at element three, which is the focus of Cooper's arguments, the supreme court stated "[t]he concept of proximate or legal cause applicable to tort law is misplaced in determining work-connectedness under workers' compensation law." *Id*. at 223. "The element requires that the injury be a natural incident of the work, meaning the injury must be a rational consequence of the hazard connected with the employment." *Id*. at 222 (internal quotations omitted). An injury must not have "coincidentally occurred while at work, but in some way be

caused by or related to the working environment or the conditions of the employment." *Lakeside Casino*, 743 N.W.2d at 174 (internal quotations omitted). "Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony." *Cedar Rapids Cmty*. *Sch*. *Dist*. *v*. *Pease*, 807 N.W.2d 839, 845 (Iowa 2011). Whether the commissioner decides to accept or reject an expert opinion is peculiarly within its power. *Id*.

In this case, the commissioner carefully weighed the expert testimony, noting "[n]o doctor has specifically opined that claimant's work activities as of March 2001 were a substantial factor in causing her underlying condition to become symptomatic" and that "[n]o doctor has opined that [Cooper's myofacial pain, depression, and fibromyalgia] standing by themselves were caused by or aggravated by claimant's work." The commissioner concluded evidence of causation was lacking. Instead, the commissioner found the conditions "were most likely derivatives of the osteoarthritis of claimant's knees and shoulders."

The commissioner, applying the law to the facts, found no connection between Cooper's work at Kirkwood and her injuries. The district court, reviewing the agency's legal application, agreed ,stating: "It was appropriate for the Commissioner to apply the 'material aggravation' standard based on the facts of this case. The Commissioner also properly recited the facts regarding fibromyalgia and depression, and did not apply an improper standard in considering these facts."

We agree with the district court that the agency did not apply a tort standard of review, and instead applied the correct causation standard in

considering Cooper's injuries. *See Meyer,* 710 N.W.2d at 220. We find the agency's application of law to the facts was not irrational, illogical or wholly unjustifiable. Iowa Code § 17A.19(10); *Burton*, 813 N.W.2d at 256; *Lakeside Casino,* 743 N.W.2d at 173.

C. Agency Acceptance of Expert Testimony.

Cooper next asserts the agency erred by not adopting the opinion of her expert, Dr. Brooks, because Kirkwood presented no evidence regarding causation of her fibromyalgia and depression. Cooper points to Dr. Brooks' statement that "[Deborah's] chronic knee pain and associated physical difficulties have been a predisposing factor in the development of fibromyalgia and depression. I would therefore, feel that the work at Kirkwood Community College has played a role in this development." "As we have explained, the commissioner, as fact finder, is responsible for determining the weight to be given expert testimony. The commissioner is free to accept or reject an expert's opinion in whole or in part[.]" *Pease*, 807 N.W.2d at 851. In our deferential review of the agency's opinion, we find its determination to be supported by substantial evidence. *See id*.; *Meyer*, 710 N.W.2d at 219.

Because we find the agency's finding that Cooper's injuries did not arise out of and in the course of employment is supported by substantial evidence, we need not address Cooper's arguments regarding Kirkwood's affirmative notice defense under Iowa Code section 85.23.

AFFIRMED.