IN THE COURT OF APPEALS OF IOWA

No. 3-624 / 13-0303
Filed August 21, 2013

MIKE BROOKS, INC. and GREAT WEST CASUALTY CO.,
Plaintiff-Appellants,

vs.

JAMES DAVID HOUSE,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Christopher L. McDonald, Judge.

Mike Brooks, Inc. and Great West Casualty Insurance Company appeal from the district court's affirmance of the Iowa Workers' Compensation Commissioner's award of permanent total disability benefits to James House. **REVERSED AND REMANDED.**

Stephen W. Spencer and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., West Des Moines, for appellants.

Martin Ozga of Neifert, Byrne & Ozga, P.C., West Des Moines, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

This appeal arises from James House's petition filed with the Iowa Workers' Compensation Commissioner for benefits relating to a back injury that occurred on March 7, 2007, while he was working for Mike Brooks, Inc. Mike Brooks, Inc. and Great West Casualty Company (Brooks) appeal the district court's order affirming the agency's award of permanent total disability benefits to House. Brooks asserts on appeal that substantial evidence does not support the agency's decision House suffered an industrial disability causally related to the work injury and also that the evidence does not support a finding of permanent total disability.

Upon our review of the record, we agree the agency's decision was not supported by substantial evidence. The medical experts who made the causal connection lacked critical information, and the sequence of events of this case do not support the agency's conclusion based on our review of the totality of the circumstances. Because we find substantial evidence does not support the causation decision, we need not address the issues relating to the award of permanent total disability.

I. Factual and Procedural Background

House began to work for Brooks on July 26, 2005, driving a commercial truck. On March 7, 2007, House suffered an injury to his back after slipping on ice in the truck loading area. Orthopedic surgeon David Hatfield, M.D., prescribed rehabilitation and physical therapy. After two and one-half months, House underwent and passed a Department of Transportation (DOT) physical and returned to work, though he later testified his back "hurt all the time." On

January 31, 2008, House underwent back surgery performed by Dr. Hatfield and returned to work six to eight weeks later. After just a few days of work and continuing to feel pain in his back, House heeded Dr. Hatfield's advice and ceased working. On November 13, 2008, Dr. Hatfield performed an anterior fusion, and then a posterior back fusion the following day.

House filed the workers' compensation claim relating to the March 7, 2007 injury on December 16, 2009. His claim proceeded to a hearing on December 8, 2012.[1] House testified at the hearing about an incident on January 4, 2008, where he pushed open a heavy door and had a burning sensation "like somebody stuck a red hot poker in my back."[2]

The deputy commissioner issued an arbitration decision on May 16, 2011, awarding House permanent total disability benefits at the rate of $569.64 per week. The arbitration decision found the record did not support Brooks's position the January 2008 injury was distinct from the March 7, 2007 injury. As to the conclusion House is permanently and totally disabled, the deputy noted House could no longer drive a truck, and various physical restrictions preclude him from returning to work as a millwright or welder. The deputy also observed House does not have the education, experience, or training to work in an office setting. The deputy found the disability benefits commenced on February 1, 2008, and Brooks should be given credit for its payment of temporary benefits during a few

[1] The hearing on the petition was before Deputy Commissioner McElderry. When McElderry was transferred to another position, Deputy Commissioner Elliott came to preside over the case, though he was not present at the hearing.
[2] In his June 26, 2008 deposition he stated, "I felt it when it popped." Deposed again on August 5, 2010, he stated, "I pushed a heavy door open on them—going out of the shop into the—into the office break room; and I felt a change in there, felt like somebody stuck a red hot poker in my back."

weeks after House's January 31, 2008 surgery. Brooks was directed to pay all of House's medical expenses relating to the March 2007 injury, as well as the costs of the proceedings.

Brooks appealed this decision, asserting several bases of error. First, it claimed the deputy erred in finding a causal connection between House's March 7, 2007 injury and his disability. Second, Brooks alleged the evidence does not support the deputy's finding of permanent total disability. Finally, it asserted February 1, 2008, is not the correct commencement date for the disability award, and the award should be suspended for 74.429 weeks to avoid overlapping payments with House's award from C&C Distribution.[3]

The commissioner issued a decision affirming the award "without additional comment." Brooks then filed a petition for judicial review, and the agency's decision was affirmed by the district court.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act, as set forth in Iowa Code chapter 17A. *See* Iowa Code § 17A.19 (2011). We apply the standards of this section to the commissioner's decision and then decide whether the district court correctly applied the law in exercising its function of judicial review. *Lakeside Casino v. Blue*, 743 N.W.2d 169, 172–73 (Iowa 2007). To

[3] The agency decision allowed no credit or apportionment for House's previous injury and disability claims, which were payable through July 7, 2009. The previous claim arose from a January 10, 2004 injury to his neck while House was working for C&C Distribution. C&C's workers' compensation case was settled for 26.2% industrial disability. House later filed a petition to reopen the case, and on August 11, 2011, the deputy awarded House an additional 100 weeks of benefits, which overlaps with House's award from Brooks.

determine the proper standard of review, we must first identify the nature of appellant's claim. *Id.* at 173.

III. Causation

Brooks asserts the agency incorrectly found House sustained an industrial disability causally related to the March 7, 2007 slip and fall. Specifically, it argues substantial evidence does not support the finding of causation, as the January 2008 incident, where House pushed open a heavy door and experienced a second, acute trauma described as a burning or popping sensation in his back, was the medical cause of House's subsequent surgeries as well as his claimed disability. Given this subsequent injury was not pleaded in the original proceedings, Brooks maintains there can be no finding of causation as to the March 7, 2007 injury, and House cannot be compensated for the permanent, total disability he now claims. In response, House argues substantial evidence supports the finding of causation, as he continued to have pain after the March 2007 incident, which was established in both his testimony and the nurse practitioner's notes. Additionally, he also argues there was no expert testimony or medical opinions supporting Brooks's position the March 7, 2007 injury was distinct from the January 2008 incident.

The issue of medical causation is a question of fact vested in the discretion of the administrative agency. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844 (Iowa 2011). As long as the finding of causation is supported by substantial evidence, we will not disturb the decision. *Id.* at 845.

Substantial evidence is defined as:

> [T]he 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). When reviewing a finding of fact for substantial evidence, we judge the decision "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." *Id.* § 17A.19(10)(f)(3). We carefully review the facts of the case, and "do not simply rubber stamp" the agency's decision. *Pease*, 807 N.W.2d at 845. However, evidence is not insubstantial simply because reasonable minds could draw different conclusions. *Id.* Thus, our task is to determine if, viewing the record as a whole, the evidence supports the findings actually made. *Id.*

Additionally, the issue of causation is traditionally within the domain of expert testimony. *Id.* (citations omitted). As the trier of fact, the agency is charged with weighing the evidence and measuring the credibility of witnesses. *Id.* As such, "the determination of whether to accept or reject an expert opinion is within the 'peculiar province' of the commissioner." *Id.* (citations omitted).

The progression of events in this case is as follows. On March 7, 2007, House slipped and fell on the ice in Brooks's loading area. He first saw his family physician, Patricia Magle, M.D., and then Dr. Hatfield, who recommended a series of injections and physical therapy. On March 22, 2007, an MRI was performed, and the report stated there was a "[d]isc herniation at L4-5 with protrusion of disc material left paracentral extending to the margins of the nerve roots possibly causing slight displacement or compression of the L5-S1 nerve

roots on the left side." The report did not cite any acute injury as the cause of the displacement.

On May 4, 2007, House again saw Dr. Hatfield, whose report stated House "tells me that his buttock and leg symptoms have dramatically improved. He continues to have a sense of pain and stiffness in his back. He tells me that he is very eager to get back to his full activities." Dr. Hatfield released House "without focal restrictions." House returned to work and, on May 8, 2007, underwent and passed a DOT physical, though the report noted periodic monitoring was required. On August 6, 2007, Dr. Hatfield wrote a letter asserting House was at maximum medical improvement (MMI), assigning him a 5% impairment of the whole person.

On January 4, 2008, House pushed open a heavy door while at work. At the December 8, 2010 hearing, the following exchange regarding this incident took place:

> Q: Well, in your deposition you talked about pulling a large door and having–
>
> A: I didn't say pulled no door; I said I pushed a door.
>
> Q: And that you felt something changed in your back when you did that.
>
> A: The pain that was already there got worse, yeah.
>
> Q: And you testified that it felt like a red hot poker was stuck in your back?
>
> A: Sure did. In the same spot that it always been hurting before, it just got worse in that same spot; and I told them about it immediately.

On January 16, 2008, House saw Lori Bailey, a nurse practitioner. Her notes do not mention the door-pushing incident. Regarding House's history, she stated:

> He was released without restrictions on 05/04/2007 at MMI. He was given a 5% impairment of the whole person at that time by Dr. Hatfield. He returns today stating that on 01/04/2008, he started to notice an increase in his low back pain. He reports that since his initial injury in March, he has always had pain in his low back which he rates a 3 to 4 on a 0-10 pain scale.

An MRI was taken on January 22, 2008, which indicated a "[p]rogressing left paracentral and lateral disc protrusion at L4-5 disc space causing moderate spinal stenosis and encroachment of the non exited L5 nerve roots, left greater than the right from the previous exam of 3/22/07." As with the first MRI, this report did not cite an acute injury as the cause for the abnormality. On January 28, 2008, House had an appointment with Dr. Hatfield. Dr. Hatfield's report stated he "last saw [House] in May 2007. [House] was subsequently released and doing relatively well. He tells me that approximately two weeks ago, *with no additional trauma*, he began having severe pain in his back and into both lower extremities." (Emphasis added.) Dr. Hatfield recommended surgery, and on January 31, 2008, House underwent a partial disectomy.

On April 1, 2008, House again passed a DOT physical and was released to return to work. He drove approximately 500 miles a day for five days over a span of two weeks but continued to have severe pain. On April 23, 2008, he visited Dr. Hatfield, who recommended he not return to work pending a follow-up MRI. The MRI showed "no evidence of recurrent disc extrusion," though there were "[m]odic changes at the L4-5 level." House never returned to work.

On May 16, 2008, House was again examined by Dr. Magle. In the history section of Dr. Magle's report, there was no mention of House's increase in pain following the January 2008 door-pushing incident. Orthopedic surgeon

Christian Ledet, M.D., performed a pre-surgery consultation for House on August 11, 2008. On September 22, 2008, House visited Daniel McGuire, M.D., for neck pain. Neither doctor was informed of the January 2008 incident. On November 13 and 14, 2008, House underwent fusion surgery and then posterior fusion and instrumentation surgery, performed by Dr. Hatfield.

House returned to Dr. Hatfield on December 3, 2008, and January 5, 2009. Dr. Hatfield's notes indicated House reported improvement, though he was still unable to return to work. None of Dr. Hatfield's notes, letters, or testimony referenced House's January 2008 incident with the door, and from the doctor's January 28, 2008 report, which indicated there was "no additional trauma," it appears Dr. Hatfield was never made aware of this incident. Without House reporting the January incident, there was no other event, save for the March 7, 2007 slip and fall, to which Dr. Hatfield could causally relate the need for House's surgeries and subsequent disability.

John Kuhnlein, D.O., provided independent medical assessments of House. The notes from House's first visit in November 2009 do not mention the January 2008 door incident. The report from the June 21, 2010 visit, however, does reference House's increased pain after pushing the door. When asked whether he agreed with Dr. Hatfield's conclusion House's disability was causally related to the March 7, 2007 slip and fall, Dr. Kuhnlein stated:

> I would agree with Dr. Hatfield that the changes were related to the March 7, 2007 incident. After recovery, Mr. House relates that he continued to have pain at work, with the subsequent incident while opening the door, which would represent a sequela of the original injury, as he did not have back pain before. The March 7, 2007 injury was a substantial contributing factor to all of the back problems treated by Dr. Hatfield, up to and including the surgeries.

Additionally, a letter from Scott Neff, D.O., FAAOS, who reviewed the medical records in the case and examined House in October 2010 to provide an independent medical assessment, did not reference the January 2008 door incident in the summary of House's medical history.

In concluding House showed by a preponderance of the evidence his disability was causally related to the March 7, 2007 incident, the agency stated:

> The medical evidence in the record does not support the defendant's contention that his injury in January 2008 was distinct from his March 7, 2007 injury. Dr. Hatfield stated in December 2009 the claimant's back problems were related to the March 7, 2007 back injury. Dr. Kuhnlein found the claimant's back injuries related to his March 7, 2007 injury. Ms. Bailey's notes of January 16, 2008 reported the claimant continued to have back pain after his March 7, 2007 injury and that the claimant noted an increase in pain while walking through the shop at work. The convincing medical evidence in the record is that the claimant suffered an injury to his back on March 7, 2007, and the resulting problems and surgeries arose out of that injury.

Given the facts above, and in particular, the failure to provide critical information to Dr. Hatfield, we do not find substantial evidence supports the agency's finding of causation. This is demonstrated by the fact that, on May 4, 2007, Dr. Hatfield noted, while House continued to have a sense of pain and stiffness in his back, he was nonetheless "very eager to get back to his full activities." House returned to work on May 8, after Dr. Hatfield released him without restrictions. On August 6, 2007, Dr. Hatfield declared House at MMI, with a 5% impairment of the whole person.

Between May 2007 and December 2007, House did not have any medical appointments where he reported pain, and he continued to work without incident. Dr. Hatfield noted that, prior to January 2008, House was "doing relatively well."

However, House testified in both his depositions and during the hearing that after he pushed open the door in January 2008, he felt a severe increase in pain, "like a red hot poker," and that he "felt when it popped." It was after this episode he went to Dr. Hatfield and then underwent a partial disectomy on January 31, 2008. While House returned to work for a few days in April 2008, his back pain was too severe to continue driving a commercial truck. Thereafter, on November 13 and 14, 2008, House underwent additional back surgeries. This sequence of events demonstrates House's severe pain, his surgeries, and his inability to work due to back pain occurred *after* the January 2008 incident, as he was working without complaint for several months subsequent to the March 2007 slip and fall.

Furthermore, the expert testimony regarding causation does not support the conclusion the March 2007 slip and fall caused House's current disability. Dr. Hatfield was never informed of the January 2008 door incident. In fact, his notes from the January 2008 appointment stated House began having severe pain "*with no additional trauma*." While Nurse Bailey's notes indicate House continued to experience back pain before January 2008, her notes do not refer to House's additional injury. In 2010 Dr. Kuhnlein was made aware of the increase in pain after House pushed open the door, as is evidenced in his second report referencing the incident. However, although he concluded the increase in severity was a sequela of the original injury, he did so by relying on the previous opinion of Dr. Hatfield, which lacked an adequate history. Moreover, Dr. Kuhnlein's opinion is internally contradictory. The first part of his 2010 statement asserts: "After recovery, Mr. House relates that he continued to have pain at work, with the subsequent incident while opening the door," but then he goes on to state

that this incident represents "a sequela of the original injury, as *he did not have back pain before*." This indicates an unreliable, factually deficient conclusion, and the agency should not have used it as support for its decision.

Additionally, neither Dr. Magle nor Dr. Neff referenced the January 2008 door incident in any of their reports. The district court itself noted "it is clear that House was less than forthcoming with medical professionals about the event that immediately preceded the worsening of his condition on January 4, 2008."

Though two experts, Drs. Hatfield and Kuhnlein, concluded causation was established, an expert's opinion is not reliable if the expert is not aware of all the facts in the case. *See generally Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 560 (Iowa 2010) (noting that while the commissioner determines the weight to be given to expert testimony, such weight necessarily depends on the accuracy of the facts relied upon by the expert). Here, nothing in the record indicates Dr. Hatfield was informed of the January 2008 incident, and Dr. Kuhnlein's opinion alternately relied on the factually deficient opinion of Dr. Hatfield, and was itself internally inconsistent. Therefore, the expert opinions regarding causation do not provide substantial evidence House's disability is causally related to the March 2007 slip and fall.

Consequently, we find substantial evidence does not support the agency's finding of causation. Given that the causal connection was made by the experts with a lack of critical information, and combined with the sequence of events in this case, the totality of the circumstances simply does not support the agency's conclusion. *See Great Rivers Med. Ctr. v. Vickers*, 753 N.W.2d 570, 576–77 (Iowa Ct. App. 2008) (substantial evidence did not support the agency's finding

claimant returned to work for the purpose of verifying her illness, because no evidence existed to support this conclusion). As substantial evidence does not support the finding of causation, we reverse the decision awarding House disability benefits. *See* Iowa Code § 17A.19(10)(f)(1). Given we are reversing on the issue of causation, there is no need to address Brooks's claim of the sufficiency of the evidence to support the award of permanent total disability or the issue of overlapping benefits with the prior award from House's former employer. However, the case is remanded for the agency to address whether House sustained an industrial disability arising from the March 7, 2007 injury prior to the January 4, 2008 door-pushing incident and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bower, J., concurs; Vaitheswaran, J., dissents.

VAITHESWARAN, J. (dissenting)

The Iowa Supreme Court recently reiterated that "[u]nder the definition of substantial evidence found in section 17A.19(10)(f)(1)," a commissioner's decision may be supported by substantial evidence "even though there is a possibility of drawing inconsistent conclusions from the same evidence." *Coffey v. Mid Seven Transp. Co.* 831 N.W.2d 81, 93-94 (Iowa 2013). The court found substantial evidence to support the commissioner's finding notwithstanding the court's possible disagreement with the finding. *See id.* at 94. Similarly, in *Midwest Ambulance Service v. Ruud*, 754 N.W.2d 860, 865 (Iowa 2012), the court stated the "burden on the party who was unsuccessful before the commissioner is not satisfied by a showing that the decision was debatable, or even that a preponderance of evidence supports a contrary view." As House points out, the court disavowed the "scrutinizing analysis" advocated by the appellants. *Id.*

Based on this interpretation of the standard of review set forth in Iowa Code section 17A.19(10)(f), I would find substantial evidence to support the commissioner's determination of causation and I would affirm.