IN THE COURT OF APPEALS OF IOWA

No. 1-678 / 11-0205
Filed October 5, 2011

FLOYD BUTTREY,
Petitioner-Appellee,

vs.

SECOND INJURY FUND OF IOWA,
Respondent-Appellant.

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

The Second Injury Fund appeals the district court's ruling on judicial review reversing for lack of substantial evidence the workers' compensation commissioner's finding that Floyd Buttrey had failed to prove a second qualifying loss for purposes of Fund benefits. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Jennifer M. York, Assistant Attorney General, for appellant.

Steven C. Jayne, Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

The Second Injury Fund appeals the district court's ruling on judicial review reversing the workers' compensation commissioner's denial of Fund benefits to Floyd Buttrey. The district court concluded the commissioner's election to give more weight to one of two competing expert opinions was based on facts that were "all incorrect and not supported by the record." The court remanded to the commissioner stating, "If on remand the Commissioner still believes Dr. Reagan's opinion should be accepted over Dr. Koenig's, different and additional reasons for such determination will need to be given in support of that determination." Finding no error, we affirm.

I. Background Facts and Proceedings.

Floyd Buttrey worked as a mechanic for Ruan Leasing from 1983 to 1992. On August 1, 1989, the tips of the first and second fingers of Buttrey's right hand were amputated as a result of a work-related accident. He had surgery the next day under the care of Dr. Paul Ho. Following the surgery, and secondary to post-traumatic swelling, Buttrey developed right carpal tunnel syndrome. The right carpal tunnel syndrome symptoms resolved by May 21, 1990. Dr. Ho assigned a seven percent impairment of the right hand as a result of the injury and amputation. In a May 21, 1990 letter, Dr. Ho stated, "[Buttrey's] carpal tunnel which has resolved has not been taken into account in performing this rating, and this may be an evolving problem which may need treatment in the future."

In November 1991, Dr. Scott Neff examined Buttrey "primarily" "for right upper extremity problem." Dr. Neff noted in a letter to the employer that an EMG on July 17, 1991 "showed right and left carpel tunnel syndromes with delay of the

right ulnar nerve across the wrist at Guyon's canal as well." Dr. Neff opined, however, "Floyd's primary complaint, however, is not consistent with carpal tunnel or ulnar tunnel syndrome symptoms, but consistent with pronator muscle entrapment in the forearm." Dr. Neff did not recommend carpal tunnel or ulnar tunnel decompression at that time, but did recommend continued work activity.

In March 1992 nerve conductions were repeated and continued to show carpal tunnel syndrome, entrapment of the radial nerve at the elbow, and bilateral cubital tunnel syndrome. Consequently, in June, Dr. Neff performed a surgical release of Buttrey's right radial nerve at the elbow, right cubital tunnel, and right carpel tunnel. After follow-up care, "Buttrey did well, and he continued to improve."

In August 1992 Buttrey left Ruan Leasing and went to work for Container Recovery (later known as Iowa Recycling Systems) driving a semi-truck and picking up recyclable beverage containers. He continued to have "classic symptoms of left nerve entrapment."

On September 15, 1994, Dr. Keith Riggins performed an independent medical examination "directed towards problems with the right shoulder and both upper extremities." Dr. Riggins diagnosed bilateral cubital tunnel syndrome; bilateral carpal tunnel syndrome; entrapment of the radial nerve at the right elbow; "[s]tatus post operative release right radial nerve, right cubital tunnel, right carpal tunnel"; and "[r]otator cuff tear, shoulder improved." Dr. Riggins opined there was "no ratable impairment" for the right extremities as "those conditions are due to cumulative injury to the left and traumatic injury to the right upper extremity super-imposed on cumulative injury to the right." Dr. Riggins rated

Buttrey's impairment for left carpal tunnel syndrome at ten percent of the left upper extremity. He recommended Buttrey not engage in activities involving repetitive gripping, fine motions of the digits, or handling of vibrating tools.

In a letter to Buttrey's counsel in September 1994, Dr. Neff stated he had reviewed Dr. Riggins's report and that "I am very pleased to report that this patient's neurologic symptoms in the right arm have been eliminated by my surgical treatment and by his recovery." Dr. Neff "concurred" with Dr. Riggins that Buttrey had "0% impairment to the right upper extremity." He noted Buttrey was "still having symptoms on the left side" and opined Buttrey's carpal tunnel and rotator cuff tear were work related.

While performing his work duties on June 24, 1998, Buttrey fell and injured his left wrist and arm. He did not seek treatment immediately. Due to worsening symptoms however, in January 1999 he went to Dr. Timothy Schurman. Dr. Schurman performed surgery on the left wrist. Buttrey unfortunately "developed some very difficult problems after this treatment."

Dr. Douglas Reagan evaluated Buttrey at the request of his employer on December 20, 1999. Dr. Reagan's report notes that following surgery, casting, and physical therapy, Buttrey continued to experience stiffness, soreness, and decreased motion in his left hand. Buttrey's "main problems" in December 1999 were "decreased grip and inability to move the thumb." Dr. Reagan wrote, "We will not consider surgery at this time."

In a March 30, 2000 update, Dr. Reagan observed Buttrey "returns today for follow up of painful hand and wrist, status post Blatt syndrome, with persistent degenerative arthritis of the STT joint and stiffness of the hand." Buttrey's

condition remained "about the same" as in December, and he was "not anxious to go ahead" with available options, including surgery.

On May 24, 2000, Dr. Reagan rated Buttrey's impairment of the left upper extremity at thirty-nine percent, which converted to forty-three percent of the hand.

On August 2, 2001, Dr. William Koenig performed an independent medical evaluation of Buttrey, whose "difficulties relate to the musculoskeletal system, specifically the upper extremities." Buttrey reported his June 24, 1998 fall[1] in which he landed on his left hand and arm; the subsequent surgery performed by Dr. Schurman; and his protracted recovery, which led to seeing Dr. Reagan for a second opinion related to his left arm. Buttrey reported he continued to work at Container Company and that he "has nearly constant pain." Dr. Koenig recorded Buttrey's observation that "others will point out to him that he will seem to be favoring the left side and using the right side more than would be expected." Following nerve conduction studies conducted, Dr. Koenig reported "there is an active bilateral carpal tunnel syndrome present and also a mild left cubital tunnel syndrome present."

Dr. Koenig offered opinions as to the 1998 injury and "Second Injury Fund." For the 1998 injury date "[s]tatus post left upper extremity trauma and scapholunate ligament repair and dorsal capsulodesis," he diagnosed "[a]ctive carpal tunnel syndrome, left" and "[m]ild left cubital tunnel syndrome," which led to a permanent partial impairment rating for the left upper extremity of thirty-five

[1] Throughout his report, Dr. Reagan uses July 24, 1998 as the date of Buttrey's fall. This is incorrect as all agree the fall occurred on June 24, 1998.

percent. For purposes of the Second Injury Fund and "[s]tatus post skin graft procedures for traumatic amputations right index and thumb tips" and "post successful right radial tunnel release and right cubital tunnel release surgeries," Dr. Koenig diagnosed "[a]ctive right carpal tunnel syndrome." Dr. Koenig wrote,

> By patient history, it certainly would seem the case for an obvious pathogenesis for overuse injury of the right upper extremity and therefore recurrent carpal tunnel syndrome based upon the injuries to the left upper extremity and limitation of usage in that regard. However, it is impossible from the medical record to discern for sure whether there is a recurrent carpal tunnel syndrome or an incomplete surgical release of the original. (By patient history, there is also consideration that this may be true regarding the latter mechanism.)

In response to a letter from Buttrey's attorney, on August 23, 2001, Dr. Koenig opined that with respect to the right carpal tunnel syndrome diagnoses noted above, Buttrey had a ten percent permanent partial impairment of the right upper extremity.

On December 11, 2001, the employer informed Dr. Reagan of Dr. Koenig's opinion that Buttrey's right carpal tunnel syndrome was related to his June 24, 1998 fall and asked Dr. Reagan, "Do you feel that Mr. Buttrey's right Carpal Tunnel Syndrome is medically related to the left hand injury of [6]-24-98? On what medical principle do you base this opinion?"

On March 28, 2002, Dr. Reagan replied:

> Mr. Buttrey does have a significant underlying condition of actually having had previous carpal tunnel syndrome on the right side. Mr. Buttrey apparently uses his right hand much more than he did before. Because of the apparent increase in use of the right hand because of his inability to use the left hand, I feel that he probably has had an aggravation of his right hand to within a reasonable degree of medical certainty.

On July 29, 2005, Dr. Reagan wrote to the employer attorney:

> You have stated in your letter that Mr. Buttrey has had no symptoms in the right upper extremity since well before his work related injury of 1998. . . . In order for carpal tunnel syndrome to be diagnosed, clinical symptoms and signs of carpal tunnel must also be present and are actually more important than prolonged nerve conduction velocities. Mr. Buttrey continues to have prolonged conduction velocities on the right side but if no symptoms are present then carpal tunnel as a diagnosis could not be given. If this is indeed the case then he does not have carpal tunnel syndrome. Therefore, this could not be work related to his job at Iowa Recycling and he would therefore have no permanent restrictions or permanent partial impairment related to the right side.

In October 2005, Buttrey and Container Recovery filed an application for full commutations settling Buttrey's June 1998 injury for a twenty-four percent impairment of the body as a whole. The parties noted it had been "unclear whether the impairment rating for the right carpal tunnel syndrome included pre-existing impairment from the previous right sided syndromes and that the current disability is causally related to the June 24, 1998 injury." The commissioner approved the application on October 31, 2005.

On October 31, 2007, Buttrey filed a petition seeking Fund benefits alleging an initial injury to his right hand in 1989 and a second injury to his left hand and arm on June 24, 1998. In an amended petition allowed in March 2009, Buttrey asserted an alternative initial injury to his left arm (left carpal tunnel syndrome) in 1992.

On March 5, 2009, Dr. Koenig performed repeat conduction velocity studies to compare with 2001 studies. Dr. Koenig opined Buttrey's cold intolerance was "quite likely related to the presence of carpal tunnel syndrome right and left"; and:

> 1. Mild left cubital tunnel syndrome . . . very slightly worse than 08/02/01 study.

> 2. Active right carpal tunnel syndrome . . . slightly worse than 08/02/01 study.
> 3. Active left carpal tunnel syndrome . . . slightly worse than 08/02/01 study.

Buttrey's counsel later asked Dr. Koenig: "In your opinion, does the current right carpal tunnel syndrome and corresponding cold intolerance still have its causal origins in the left wrist injury of 1998 as explained in your August 2, 2001 report?" To which Dr. Koenig replied:

> Mr. Buttrey continues to have symptoms which I feel are related to right carpal tunnel syndrome and which also cause his cold intolerance. I do believe that the causal origin of his right carpal tunnel syndrome relates to the left wrist injury of 1998 as per mechanisms explained in my prior August 21, 2001 report.

An arbitration hearing before a deputy commissioner was held on April 1, 2009, at which the deputy observed:

> It is disputed that Claimant sustained an injury on June 24, 1998, bilaterally to the left and right upper extremities. I understand that Claimant's alleged first date of injury is a left upper extremity injury, injury occurring either in 1991 or 1992.

The deputy issued an arbitration decision in which Buttrey's testimony was summarized in part:

> Claimant testified that after the 1998 accident he returned to work for Container at the same job. Claimant returned to work with no job restrictions. In a 2005 deposition, Claimant testified he anticipated to continue to work for Container. Claimant indicated he would eventually retire, but that he had no plans, at that time, on retiring.
>
> Claimaint testified he cut back his hours with Container in January 2006. Claimant and his wife testified this decision to work part-time was based, in part, on Claimant's lack of grip strength and difficulty with his hands getting cold. Both Claimant and his wife testified Claimant had never gotten treatment for coldness in his hands. Claimant testified he still worked part-time with Container. He testified he limits his hours with Container to ensure his pay with Container does not negatively impact his Social Security Retirement benefits.

> Claimant testified he has a 60 acre farm. He testified he still bails and sells hay.

The deputy found Buttrey had proved a first qualifying loss—his diagnosis of left carpal tunnel syndrome in 1992 resulting in a ten percent permanent impairment to his left upper extremity.

As to Buttrey's second qualifying loss, the deputy noted Buttrey did not plead a 1998 *right* upper extremity injury "until the date of the hearing." However, because the Fund did not object until after hearing, the deputy found any objection was waived. Nonetheless, the deputy concluded Buttrey had failed to prove a second qualifying loss. In support of this conclusion, the deputy wrote:

> In 1998 claimant fell and injured his left upper extremity. Claimant ultimately had surgery on his left upper extremity. Dr. Reagan performed claimant's surgery[2] and treated claimant for an extended period of time. Dr. Reagan opined, on two occasions, claimant had no permanent impairment to his right upper extremity. Dr. Koenig initially did not indicate claimant had permanent impairment to this right upper extremity from the 1998 injury. Dr. Koenig also suggested it was impossible to give an opinion that any permanent impairment claimant had to his right upper extremity was due to recurrent carpal tunnel syndrome, or was due to a 1992 surgery. Dr. Koenig later altered the opinion. Settlement documents between claimant and defendant employer indicate that it is unclear if any permanent impairment claimant has to his right upper extremity is due to a 1998 injury or to the 1992 surgery. Based upon the above, claimant has failed to prove he sustained a loss of use to the right upper extremity in 1998 that would qualify him for Second Injury Fund benefits.

Upon Buttrey's application for rehearing, the deputy issued a rehearing decision, which provides in part:

> As noted in the arbitration decision, claimant alleged a second loss to his right upper extremity occurring in June of 1998. Douglas Reagan, M.D., noted, on two occasions, claimant had no permanent impairment to his right upper extremity. William Koenig,

[2] This is inaccurate. Dr. Schurman performed the 1999 surgery on Buttrey's hand.

> M.D., initially noted it was impossible to give an opinion that, if claimant had any impairment to his right upper extremity, whether that was due to a 1992 or a 1998 injury. Settlement documents between the claimant and the defendant employer, also indicate it is unclear if any permanent impairment claimant has to right upper extremity is due to a 1998 injury or a 1992 injury.
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> Based on the above, claimant has failed to prove he had a second qualifying loss for the purposes of the Fund benefits in 1998 as plead. For this reason, claimant's application is denied.

On intra-agency appeal, the commissioner affirmed and adopted the deputy's ruling as the final agency determination. In an application for rehearing, Buttrey asserted an alternative ground for Fund liability, which the commissioner rejected as not having been timely raised. Buttrey then sought judicial review in the district court, arguing in part that the commissioner's determination that he failed to establish he sustained a qualifying loss to his right upper extremity in June 1998 was not supported by substantial evidence.

The district court reversed and remanded for further consideration. The court ruled in pertinent part:

> In essence, the contradictory evidence regarding whether Buttrey sustained a permanent disability to his right upper extremity from the June 1998 injury can be summarized as follows. On one side there is Dr. Koenig's unequivocal belief that Buttrey had carpal tunnel on the right side that was caused by overuse due to the June 1998 injury to the left side, which resulted in a permanent partial impairment rating of ten percent to the right upper extremity. On the other side is Dr. Reagan's initial silence in 2000 on the issue of the right side altogether, then an opinion in 2002 from him stating Buttrey has a significant underlying condition from having had carpal tunnel on the right and that it was aggravated by necessitated overuse due to the 1998 injury to the left, and finally in 2005, a less than firm opinion that a carpal tunnel diagnoses could not be given, it was not work related, and there is no permanent partial impairment, assuming what Container's attorney told him about Buttrey's symptoms was true without actually examining Buttrey again himself.
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> . . . .

> Here the commissioner chose to accept the expert opinion of Dr. Reagan and give it more weight than that of Dr. Koenig. It appears the agency largely based this determination on three facts: (1) Dr. Reagan performed Buttrey's 1999 left wrist surgery following his 1998 injury; (2) Reagan treated Buttrey for an extended period of time; and (3) Reagan opined on two occasions that Buttrey had no permanent impairment to his right upper extremity. However, when the record is carefully viewed as a whole, the Court finds all of these facts to be incorrect. First, in February 1999 *Dr. Schurman* performed surgery on Buttrey's left wrist, not Dr. Reagan. Second, Buttrey specifically testified Dr. Reagan did not treat him at all, he only saw him for consultation purposes, and Reagan had not done anything to help him. Finally, the court's review of the entire agency record shows there is only *one* occasion where Dr. Reagan expressly opined Buttrey had no permanent impairment to his right upper extremity. Further, that opinion was not based on Reagan's examination of Buttrey but merely a description of Buttrey's symptoms from Container's attorney, and Reagan hedged this opinion by stating only if what counsel was saying "indeed was the case," then "carpal tunnel as a diagnosis could not be given." In addition, this less than firm opinion from Dr. Reagan that Buttrey did not have work-related carpal tunnel on the right side seems somewhat contradictory to his March 2002 opinion that Buttrey's previous right-side carpal tunnel had been aggravated due to its necessitated overuse because of the June 1998 work injury to his left side.
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> . . . .
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> The Court further concludes there is not substantial evidence in the record to support the Commissioner's determination that Buttrey failed to establish he sustained a qualifying injury in June 1998. There are two competing and conflicting expert medical opinions on this issue, and the Commissioner's determination that Dr. Reagan's opinion should be given more weight and accepted over Dr. Koenig's is not supported by substantial evidence when the record is viewed as a whole, including that the facts relied upon by the Commissioner in making this determination are incorrect and not supported by the record. Accordingly, this case must be remanded to the agency for further proceedings consistent with this ruling. If on remand the Commissioner still believes Dr. Reagan's opinion should be accepted over Dr. Koenig's, different and additional reasons for such determination will need to be given in support of that determination.

The Fund now appeals arguing the commissioner's ruling *was* supported by substantial evidence and the district court was thus required to affirm.

II. Scope and Standard of Review.

Iowa Code section 17A.19 (2009) lists the instances when a court may, on judicial review, reverse, modify, or grant other appropriate relief from agency action. "In exercising its judicial review power, the district court acts in an appellate capacity." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). When we review the district court's decision, "we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court. If they are the same, we affirm; otherwise, we reverse." *Id.* at 464.

> We broadly and liberally construe the commissioner's findings to uphold, rather than defeat the commissioner's decision. We must examine whether the commissioner's conclusions are supported by substantial evidence in the record made before the agency when the record is viewed as a whole. Evidence is substantial "if a reasonable mind would find it adequate to reach a conclusion. An agency's decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence."

Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543, 546 (Iowa 1995) (citations omitted).

III. Second Injury Fund Framework.

> [T]he Fund was conceived by the legislature to encourage the employment of disabled persons "by making the current employer responsible only for the disability the current employer causes." The Fund's salutary purpose is accomplished by an award of compensation after a second qualifying injury to "an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye." Iowa Code § 85.64. Thus, [a claimant's] entitlement to benefits from the Fund is dependent upon proof of the following propositions: (1) [the claimant] sustained a permanent disability to a hand, arm, foot, leg, or eye (a first qualifying injury); (2) [the claimant] subsequently sustained a permanent disability to another such member through a work-related injury (a second qualifying injury); and (3) the permanent

> disability resulting from the first and second injuries exceeds the compensable value of "the previously lost member." *Id*.

Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398–99 (Iowa 2010) (citations and footnote omitted).

The burden is upon the claimant seeking benefits from the Fund to prove the two qualifying injuries. *See Bergeson*, 526 N.W.2d at 547–48 ("The *employee must prove* three things to trigger the liability of the Fund. First, that he or she has either lost, or lost the use of a hand, arm, foot, leg, or eye. Second, the employee sustained the loss, or loss of use of another such member or organ through a work-related, compensable injury. Third, there must be some permanent injury from the injuries.")[3]

IV. Substantial Evidence Does Not Support the Commissioner's Finding.

In situations in which the workers' compensation commissioner has rendered a finding that the claimant's evidence is insufficient to support the claim under applicable law, that negative finding may only be overturned if the contrary appears as a matter of law. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). A finding may be made as a matter of law if the evidence

[3] In *Second Injury Fund of Iowa v. Kratzer*, 778 N.W.2d 42, 45 (Iowa 2010), the court stated it "is beyond dispute" that an injury qualifies as a second injury for Fund purposes if it "(1) follows a previous disability to an enumerated member and (2) results in 'the loss of or loss of use of another such member.'" (Citation omitted.) The *Kratzer* court concluded the meaning of the phrase "another such member" is to be understood as an expression of the General Assembly's intention that "any disabling injury to an enumerated member, including one that was previously partially disabled, may qualify as a second injury so long as the member in question is not the same member upon which the claimant relies for proof of the first qualifying injury." 777 N.W.2d at 45–46. Buttrey, on application for rehearing before the commissioner, asked that *Kratzer* be applied to allow a finding of Fund liability based upon yet further allegations of qualifying first and second injuries. The commissioner ruled these allegations were not properly preserved.

is uncontroverted and reasonable minds could not draw different inferences from the evidence. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 534 (Iowa 1991); *Armstrong v. State of Iowa Bldgs. & Grounds*, 382 N.W.2d 161, 165 (Iowa 1986).

Here, the district court did not conclude as a matter of law that Buttrey had sustained a second qualifying injury. Rather, the district court noted the expert opinions conflicted, but the commissioner had relied upon incorrect facts in choosing the opinion to use and thus there was not substantial supporting evidence to support the commissioner's decision. We agree.

Our case law is clear that the question of "[w]hether 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). It is the role of the commissioner, not the court, to determine the credibility of witnesses and the weight to be given to any evidence. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998) (stating commissioner, as fact finder, determines the weight to be given to any expert testimony and "may accept or reject the expert opinion in whole or in part").

We recognize the oft repeated principle that the "appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record." *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007). However, just as an expert's opinion is not binding upon the commissioner if it is based upon an incomplete history, *see Dunlavey*, 526 N.W.2d at 853, the commissioner's opinion grounded upon inaccurate facts does not warrant the deference normally accorded. We agree with the district court

that substantial evidence does not support the commissioner's ruling; a reasonable mind would not accept as adequate a choice of one contradictory opinion over another when that choice is grounded upon inaccurate facts.

Because the facts upon which the commissioner relied are not supported by the record evidence, we affirm the district court's ruling reversing and remanding for further proceedings.

AFFIRMED.