IN THE COURT OF APPEALS OF IOWA

No. 1-864 / 11-0438
Filed January 19, 2012

GRACE COZAD,
Petitioner-Appellee,

vs.

RUSSELL CORPORATION and AMERICAN HOME ASSURANCE,
Respondents-Appellants.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Employer and insurer appeal from the district court's decision reversing the agency's denial of workers' compensation benefits. **AFFIRMED.**

Aaron T. Oliver of Hanson, McClintock & Riley, Des Moines, for appellants.

Neven J. Mulholland and James L. Kramer of Johnson, Kramer, Good, Mulholland, Cochrane & Driscoll, P.L.C., Fort Dodge, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Russell Corporation and its insurer, American Home Assurance (jointly Russell), appeal from the district court's decision reversing the agency's denial of workers' compensation benefits to Grace Cozad. We affirm.

I. Background Facts.

In June 1998, Cozad began working for Russell in its sports equipment manufacturing facility in Jefferson. Cozad worked as a general laborer in the main plant. In addition to her work for Russell, Cozad has had other part-time employment as a waitress, dishwasher, gas station clerk, in-home childcare provider, and restaurant shift supervisor. From August 2004 until October 2004, Cozad also worked part-time as a telemarketer for Sitel Corporation, but left the position because of discomfort in her back from prolonged sitting.

Cozad has a significant history of lower back pain. She has suffered from low back pain since 1996, and has received treatment for the pain since 1998. Cozad suffered workplace injuries to her lower back at Russell in 1999, 2001, and 2002.

Following the 2002 injury, Cozad's family physician, Dr. Thomas Fagg, referred her to Dr. Mark Palit, an orthopaedic surgeon. Dr. Palit diagnosed Cozad with Grade I spondylolisthesis at L5-S1 with a pars defect and referred her to a pain clinic where she received two epidural injections. Cozad also participated in physical therapy. She was initially given work restrictions, but was released by Dr. Palit to "continue working at regular duty" on February 25, 2003.

On November 10, 2004, Cozad suffered the workplace injury at issue in this case. Cozad was asked by her production supervisor to help work on the Velcro machine putting Velcro on carpet for gymnastics floors. When Cozad knelt down to place carpet into the machine, the machine started. Cozad stood to shut the machine off, and her back "made a big cracking noise." Cozad then informed her husband, a fellow employee, that she was not going to be able to help him on the machine any more. Cozad informed her lead person that her back was hurting, and that she was going to return to her normal job on the floor area. At the floor area, Cozad was helping a coworker lift a 4x8 fiberglass pressboard that weighed between seventy-five and one hundred pounds when her back "pinched real bad" and "locked." Cozad felt immediate pain in her lower back that radiated into her legs, left worse than right. An ambulance was called, and Cozad was placed onto a backboard and transported to the hospital.

Cozad was admitted to the emergency room where she was seen by Dr. Fagg, her family physician. Dr. Fagg diagnosed Cozad with a lumbar strain. Cozad was started on physical therapy and prescribed a pain medication and a muscle relaxer.

Cozad had follow-up appointments with Dr. Fagg on November 15 and November 19, 2004. By November 15, Dr. Fagg noted that Cozad's pain had improved fifteen to twenty percent, but she continued to have pain in her lower back with occasional radiation into her buttocks. Cozad denied any numbness or tingling in her legs. At the November 19 appointment, Dr. Fagg documented that since her last visit, Cozad reported that her back was "much improved." Dr. Fagg

stated that Cozad could "increase activity as tolerated" and was being "released to return to work without restriction." Due to the Thanksgiving holiday and inventory work within the facility, Cozad did not actually return to work until November 29, 2004.

Cozad testified that when she returned to work, her back continued to cause her pain and discomfort. Cozad returned to her normal work, but was having other employees do any lifting required. Cozad's production supervisor testified that he did not recall Cozad having any problems or difficulties in performing her job.

Due to cuts in production, Russell requested volunteers for layoffs in December 2004. Cozad testified that due to her back pain, she accepted the voluntary layoff on December 8, 2004, only ten days after her return to work. During her layoff, Cozad received unemployment benefits.

On January 4, 2005, Cozad returned to Dr. Palit, her orthopedic surgeon, for her low back pain with radiation to the lower left leg. Dr. Palit ordered an MRI scan. On January 11, Cozad returned to Dr. Palit and was informed that the MRI showed lumbar degenerative disc disease. At this time, Dr. Palit discussed with Cozad her options including weight loss, continued physical therapy and strengthening, and the possibility of discography.

On April 14, 2005, Cozad saw Dr. William Boulden for an independent medical examination requested by a workers' compensation case manager. Dr. Boulden determined:

> [I]t is my medical opinion that the patient's work definitely could have aggravated these preexisting problems. She says she has

> had many flare-ups, and each flare-up has probably lead [sic] to some increasing weakness, as far as muscle strength goes; therefore, causing less support and further degeneration has occurred over the years, to the point where this unstable segment can develop the need for surgical treatment modality.
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> . . . .
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> At this point in time, the patient is incapable, and probably was incapable when she began doing the kind of work that was asked of her. She had a preexisting weak segment in her spine that work definitely, in my opinion, would have aggravated.
>
> Dr. Palit's recommendation for discography and surgical fusion would be appropriate if everything else has failed.

In his report, Dr. Boulden mentioned a bathtub slip reported by Cozad's physical therapist on November 18, 2004, that allegedly aggravated her symptoms. The physical therapist's notes are not in the record. Cozad testified that she never slipped, and that the physical therapist misunderstood what she reported.

In April 2005, Cozad and her husband started two family businesses: a towing company and a can/bottle redemption center. Cozad testified that she only worked at these businesses for about three to three and a half hours on three to four days a week. Cozad testified that her tasks were answering the phones and occasionally counting cans.

A co-worker of Cozad's at Russell testified that on one occasion he observed Cozad working at the redemption center. He stated that while he was at the redemption center Cozad lifted a ten to fifteen pound bag of aluminum cans over her shoulder in order to dump the cans into boxes for counting.

On July 11, 2005, Cozad was called back to work at Russell. However, after two days, her lower back pain was overwhelming. Therefore, Cozad left her employment.

On July 26, 2005, Cozad returned to Dr. Palit for her continued back pain. Dr. Palit took Cozad off work. He further had her return to physical therapy. Cozad returned to Dr. Palit again on August 23, 2005. Dr. Palit advised Cozad that her options were "living with the pain or operative intervention." Because Dr. Palit was leaving the area in two weeks to pursue a different practice, he recommended a new physician.

On January 3, 2006, Cozad met with Dr. Lynn Nelson, her new orthopedic surgeon, to discuss surgical intervention. Dr. Nelson performed an L5-S1 decompression, instrumented posterior spinal fusion, posterior iliac crest bone grafting, and an instrumented posterior lumbar interbody fusion surgery on February 13, 2006.

II. Prior Proceedings.

On May 17, 2005, Cozad filed a petition in arbitration for workers' compensation benefits from Russell for her November 10, 2004 back injury. In a hearing before a deputy commissioner, the parties stipulated Cozad sustained an injury arising out of and in the course of her employment on November 10, 2004. The parties disputed whether the injury was a cause of temporary or permanent disability[1] as well as the extent and authorization of medical expenses.

No medical testimony was given at the hearing. Instead, Cozad submitted letters from Dr. Palit and Dr. Nelson written in response to requests by Cozad's

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[1] Russell stipulated to temporary benefits from November 10 through November 22, 2004. The parties further stipulated that if a permanent disability is found, it would be industrial with a weekly rate of $353.77.

attorney. Dr. Palit wrote that after reviewing his own medical records as well as the records from Dr. Boulden and Dr. Nelson:

> Ms. Cozad did have a pre-existing back condition which was aggravated by the work related injury of 11/10/2004 where she was attempting to lift some board.
>
> Since Ms. Cozad's injury of 11/10/2004, it is my opinion that Ms. Cozad was medically unable to return to performing full activities required of her based on her job description which you have enclosed for me to review.

Dr. Nelson wrote that it was his opinion, with a reasonable degree of medical certainty, that Cozad's "spondylothesis well pre-dated her reported workplace injury of November 10, 2004. The November 10, 2004 work place injury, however, may have 'lighted up' this pre-existing back condition."

Following the contested hearing, the deputy commissioner issued an arbitration decision finding the November 10, 2004 workplace injury to be a "temporary aggravation of a preexisting progressive degenerative condition" that did not result in any ongoing medical treatment or permanent disability. The arbitration decision did not mention Dr. Palit, any of his appointments with Cozad, or his opinion that Cozad's preexisting back condition was aggravated by the November 10 workplace injury.

Cozad appealed the arbitration decision to the workers' compensation commissioner. On February 27, 2008, the commissioner affirmed the deputy's decision finding that Cozad only suffered a temporary aggravation of a preexisting progressive degenerative condition. In regard to the expert evidence, the commissioner stated:

> Only Dr. Palit declaratively states that claimant's November 10, 2004 injury is producing her current disability. His opinion must be discounted because the history he received from claimant on

> January 4, 2005 was not fully accurate. Doctors Boulden and Nelson speak in the language of mere possibilities. Such opinions can prevail when the evidence overall demonstrates the likelihood of the injury having caused or aggravated the claimed disabling condition. On the present record, that is not the case. Claimant's symptoms after her return to work on November 29, 2004, as she reported them to Dr. Palit on January 4, 2005, are consistent with the normal progression of her degenerative back condition – a fact evidenced by claimant's symptoms progressing throughout the period when she did not work for the employer.

Cozad petitioned the district court for judicial review. On January 30, 2009, the district court issued a ruling questioning whether the reason given by commissioner for discounting Dr. Palit's opinion was a valid one. The district court recognized that the commissioner cited an inaccurate history, but noted he did not articulate with specificity why he considered the history inaccurate, or how the inaccurate history was medically significant. Accordingly, the district court remanded the case back to the commissioner for further explanation.

On June 15, 2010, the commissioner reaffirmed his prior decision disavowing Dr. Palit's opinion for three reasons:

> First, Dr. Palit was unaware of the extent and severity of [Cozad's] past medical history as it pertains to her back. . . .
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> . . . .
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> Second, Dr. Palit was unfamiliar with the treatment and subsequent work history of [Cozad] following her November 10, 2004, injury. . . .
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> . . . .
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> Third, Dr. Palit's opinion in 2006 was based on the history [Cozad] gave him on January 4, 2005, which was noted in the prior appeal decision to be incomplete and inconsistent with the medical records. . . .

Cozad again sought judicial review in the district court. On February 22, 2011, the district court determined that the commissioner's finding and grounds for ignoring Dr. Palit's relevant and uncontroverted opinion was "illogical based

on the record as a whole." Accordingly, the district court found the agency's ruling was not supported by substantial evidence, and Cozad had met her burden showing she sustained a permanent disability resulting from the November 10, 2004 injury. The district court reversed the commissioner's decision and remanded for the award of disability benefits.

Russell appeals.

III. Scope and Standard of Review.

Iowa Code chapter 17A governs judicial review of the decisions of the workers' compensation commissioner. Iowa Code § 86.26; *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). In reviewing a district court's decision on appeal, we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court. *Mycogen Seeds*, 686 N.W.2d at 464. The district court may reverse or modify an agency's decision if the agency's decision is erroneous under a ground specified in the Act and a party's substantial rights have been prejudiced. Iowa Code § 17A.19(10); *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007).

"Medical causation presents a question of fact that is vested in the discretion of the workers' compensation commission." *Cedar Rapids Cmty. Sch. Dist. v. Pease*, ___ N.W.2d ___, ___ (Iowa 2011). Therefore, the commissioner's finding of medical causation may only be reversed if it "is not supported by substantial evidence in the record before the court when the record is viewed as a whole." Iowa Code § 17A.19(10)(f); *Pease*, ___ N.W.2d at ___. "Substantial evidence" is statutorily defined as:

> 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). When reviewing a finding of fact for substantial evidence, we judge the finding "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). "Our review of the record is 'fairly intensive,' and we do not simply rubber stamp the agency finding of fact." *Pease*, ___ N.W.2d at ___ (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003)).

The question before us is not whether evidence might support a different finding, but whether the evidence supports the finding actually made. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). Our role as a reviewing court is not to weigh the evidence or the credibility of the witnesses, but to ensure that substantial evidence supports a finding according to the witnesses whom the commissioner believed. *Arndt*, 728 N.W.2d at 394-95.

IV. Analysis.

The issue in this case is medical causation; namely, whether the November 10, 2004 injury resulted in a temporary or permanent impairment. Medical causation "is essentially within the domain of expert testimony." *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The weight to be given those opinions is for the commissioner, as the finder of fact, and "that may be affected by the completeness of the premise given the expert and other surrounding circumstances." *Id.*

> When an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion.

Id. However, if the commissioner rejects uncontroverted expert testimony, he must state why he has done so with sufficient specificity in order for the reviewing court to determine if the commissioner has acted arbitrarily or misapplied the law. *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 510 (Iowa 1973); *accord Schutjer v. Algona Manor Care Center*, 780 N.W.2d 549, 560 (Iowa 2010). "We are reluctant to allow the commissioner totally to reject expert testimony which is the only medical evidence presented." *Poula v. Siouxland Wall & Ceiling, Inc.*, 516 N.W.2d 910, 911-12 (Iowa Ct. App. 1994).

At the outset, it is important to note that this case does not present a classic "battle of the experts" where the commissioner must choose between conflicting expert opinions. *Cf. Pease*, ___ N.W.2d at ___. Rather, the only evidence concerning medical causation was the opinions of Drs. Palit, Boulden, and Nelson. It was Dr. Palit's opinion that Cozad's November 10 workplace injury aggravated her preexisting back condition causing her current impairment. Dr. Boulden opined Cozad's "work definitely could have aggravated these preexisting problems" and Dr. Nelson opined "[t]he November 10, 2004 work place injury, however, may have 'lighted up' this pre-existing back condition." There are no medical opinions in the record supporting the commissioner's finding that Cozad's workplace injury was temporary. Furthermore, these doctors

did not testify, and only their reports and causation letters were placed into the record. Thus, the commissioner made no credibility determinations.

Nonetheless, the commissioner rejected all three opinions. The commissioner dismisses Dr. Boulden and Dr. Nelson for speaking in "mere possibilities," and then supports the rejection of Dr. Palit's opinion by reaching conclusions concerning: (1) Dr. Palit's lack of knowledge concerning the extent and severity of Cozad's medical history prior to November 2004, (2) Dr. Palit's unfamiliarity with Cozad's treatment and return to work in November 2004, and (3) Dr. Palit's lack of knowledge concerning Cozad's work at her can redemption center in April 2005. We find the commissioner's outright rejection of the three doctors' uncontroverted medical opinions is not supported by substantial evidence when the record is viewed as a whole.

Dr. Boulden and Dr. Nelson do not provide distinct opinions on causation, and thus their opinions may not be sufficient standing alone to support a finding of medical causation. *See Anderson v. Oscar Mayer & Co.*, 217 N.W.2d 531, 536 (Iowa 1974) ("[E]xpert 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 and thus be sufficient to sustain an award. However, such evidence does not compel an award as a matter of law. It is for the fact finder to determine its ultimate probative value."). When Dr. Palit's opinion concerning causation is coupled together with the opinions of Drs. Boulden and Nelson which are consistent with Dr. Palit's opinion, they all support a finding that the November

2004 injury caused an aggravation of Cozad's preexisting condition, resulting in her current disability. There is no contrary expert opinion in the record, only the commissioner's independent conclusions on causation. Those conclusions are either unsupported by substantial evidence or contrary to the evidence in the record.

First, there is no evidence that Dr. Palit was unaware of the extent and severity of Cozad's prior medical history. Cozad was referred to Dr. Palit by Dr. Fagg following a workplace injury in 2002. In his December 2002 consultation, Dr. Palit noted that Cozad had a history of back pain and had previously been seen by a Dr. Decker for IM pain medication as well as an MRI scan. Dr. Palit referred Cozad to a pain clinic for two epidural injections and had her participate in physical therapy. By February 2003, following two more appointments, Dr. Palit discharged Cozad to continue working at regular duty. There is no evidence that Cozad sought treatment between her discharge in 2003 and her workplace injury in 2004. In January 2005, Dr. Palit again noted Cozad "has had a long history of low back pain for the past 6 years or so." Dr. Palit was clearly aware of Cozad's history of back pain and that the 2004 injury was an aggravation. While the lack of specificity in the articulation of Cozad's history may be a reason to give less weight to Dr. Palit's opinion if this were a "battle of the experts" case, it does not support the commissioner's wholesale disregard of the opinion.

Second, substantial evidence does not support a finding that Dr. Palit was unaware that Cozad was treated by Dr. Fagg immediately after the November 10 injury. Dr. Palit's January 5 notes explicitly state that he reviewed the x-rays

done at the hospital on November 10. In addition, we agree with the district court that in order for the commissioner to believe that Dr. Fagg's "release" on November 22 to be conclusive, one would have to believe that Cozad suffered another injury subsequent to November 10 that led to her permanent impairment, or that her degenerative condition progressed its way to Cozad's current disability. For a subsequent injury, the commissioner points to a possible bathtub slip recorded by Cozad's physical therapist on November 18. However, the physical therapist did not testify, the physical therapist's notes are not in the record, the slip is only mentioned in passing in Dr. Boulden's report, and Cozad testified that the slip never happened. There is not substantial evidence to support a finding that Cozad suffered an injury to her low back as a result of falling in a bathtub. As for the progression on the degenerative condition, the commissioner would have to find that even if the November 10 injury did not occur, Cozad still would have sought treatment with Dr. Palit. Not only is this finding belied by the short period of time between Cozad's treatment with Dr. Fagg and Dr. Palit, but Cozad testified that her pain continued. If the commissioner rejected her testimony concerning the progression of her pain in the fall of 2004 and winter of 2005, he failed to make credibility findings in support of such rejection. *Schutjer*, 780 N.W.2d at 561-62; *Langford v. Keller Excavating & Grading, Inc.*, 191 N.W.2d 667, 669 (Iowa 1971) (stating the commissioner may not "arbitrarily or totally reject the offered testimony," but instead "has the duty to weigh it and determine its credibility"). In addition, Dr. Fagg did not provide an opinion on causation in this case.

Third, the commissioner relies on what he characterizes as an "inaccurate history" given to Dr. Palit by Cozad on January 5. However, despite the initial remand by the district court, the commissioner does not explain what this alleged "inaccurate history" was or how it was medically significant. The commissioner also further emphasizes Cozad's work at the redemption center between April 2005 and October 2005. However, no evidence was presented showing that this activity caused any aggravation or further degeneration to Cozad's low back.

V. Summary and Disposition.

We conclude the evidence does not support the finding actually made by the commissioner that Cozad's November 10, 2004 lower back injury was only a temporary aggravation. The evidence on medical causation is uncontroverted, and the commissioner did not provide any valid reasons for discounting it and substituting his own opinion. Further, his independent conclusions on medical causation are not supported by substantial evidence. Accordingly, we affirm the district court's decision reversing the agency denial of workers' compensation benefits to Cozad.

AFFIRMED.

Tabor, J. concurs; Danilson, P.J., concurs specially.

DANILSON, J. (concurring specially)

I specially concur. Our review is not de novo, so we may not reassess the weight of the evidence. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, ___ N.W.2d ___, ___ (Iowa Dec. 16, 2011); *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). Our task is to determine if substantial evidence exists to support the agency's finding, but we must not "simply rubber stamp the agency finding of fact." *Pease*, ___ N.W.2d at ___; *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003). As observed by the majority, "medical causation is essentially in the domain of expert testimony." *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The agency must consider both medical and nonmedical evidence. *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 425 (Iowa 1994). However, this case presents an agency decision that relies upon nonmedical evidence to rebut medical evidence that is not in substantial conflict. Without treading upon the agency's duties but not abdicating our own, the agency decision lacks substantial evidence in view of the medical evidence supporting causation on the issue of permanent impairment. I agree the district court's ruling should be affirmed.