IN THE COURT OF APPEALS OF IOWA

No. 1-946 / 11-0879
Filed January 19, 2012

FINLEY HOSPITAL,
Petitioner-Appellant,

vs.

THERESA M. HOLLAND,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Employer appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's finding that claimant suffered a "body as a whole" injury and sixty percent industrial disability. **AFFIRMED.**

Katrina A. Nystrom of Scheldrup Blades Schrock Smith Aranza, P.C., Cedar Rapids, for appellant.

Mark J. Sullivan of Reynolds & Kenline, L.L.P., Dubuque, for appellee.

Heard by Eisenhauer, P.J., Danilson, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

DANILSON, J.

Employer Finley Hospital appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's finding that claimant Theresa Holland suffered a "body as a whole" injury and sixty percent industrial disability. Because the commissioner's findings are supported by substantial evidence we affirm.

I. Background Facts and Proceedings.

On September 9, 2007, Theresa Holland was working as a certified nursing assistant (CNA) at Finley Hospital. She attempted to catch a 200-pound patient from falling and in the process took the patient's full weight, jamming her left leg and driving her left heel into the floor. X-rays indicated possible plantar fasciitis and foot sprain. She was restricted to work performed while sitting and was assigned by Finley to quality management duties. She wore an air cast and used crutches.

An MRI on October 2, 2007, suggested a fractured left heel. The next day plantar fasciitis was confirmed. Holland could not put any weight on her left heel. Dr. Gerald Meester, an orthopedic specialist, ordered physical therapy and an orthotic CAM boot, which made her left leg higher than her right. Holland was released to regular duty in mid-October and prescribed to wear the boot when working on tile or hard surfaces. Holland wore the boot at home as well because she could not put her heel on the floor without the boot without pain. Holland reported the use of the boot resulted in back pain, which shot down to her right knee.

On December 4, 2007, Dr. Warren Verdeck, an orthopedic surgeon, found Holland had a deep bone bruise as well as fasciitis. Holland was restricted to sitting work only. Dr. Verdeck offered Holland a molded leg brace instead of the orthotic boot, which she received on January 2, 2008. Holland was also given a compensating insole to place in her right shoe to offset the height of the left foot brace. Holland must wear a larger shoe size to accommodate the insole and the brace. She wears the left leg brace daily, as well as the right shoe insert.

In February 2008, Holland was released to regular duty. She continues to work as a CNA with Finley. She has transferred to another department and is able to do her job with help from coworkers. She works full-time and earns about the same as when she was injured. She accepts overtime hours. Holland wears the left leg brace, the compensating right insole, a back brace, and a TENS unit (which provides electrical pulses as a method of pain relief) at all times while working.

Holland sought workers' compensation benefits, alleging permanent partial disability as a result of the September 9, 2007 injury. She asserted a body as a whole injury based on the left foot injury and consequent low back pain. Finley argued the foot injury did not extend to the body as a whole, but was a scheduled member injury only. Conflicting medical opinions were offered into evidence at the arbitration hearing.

On June 26, 2009, the deputy commissioner issued a decision, which reads in part:

> [T]here is a divergence of opinion among the doctors as to whether claimant's current back pain is caused by, or aggravated by, her foot injury. Dr. Verdeck apparently felt it was, although he later

> backed off that view based on incorrect information from Dr. [Howard] Kim. Dr. [David] Field feels it is not related but does not explain why in any detail, nor does he explain claimant's new protruding disc or her sudden severe increase in back pain. Dr. [Thomas] Hughes feels claimant's back pain is caused or aggravated by her foot injury and fully explained his reasoning.
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> What is clear from the record is that claimant suffered a severe injury to her left foot at work. That injury resulted in a very tender heel and required her to wear a bulky, heavy orthotic boot for three months. She continued to work on a hard tile floor and be on her feet a lot. It would seem she returned to work too soon by Dr. Kim and others.
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> At any rate, coupled with Dr. Hughes' opinion that her back pain is caused by her altered gait from the boot, is the chronological timeline, which establishes claimant had minor back problems years ago, which resolved and were asymptomatic until she severely injured her foot, had to wear an uncomfortable and bulky orthotic boot for three months, followed by wearing a leg brace, all of which very quickly resulted in low back pain and a disc protrusion. That low back pain began at the time that suggests it was indeed caused by her wearing the boot and brace, and no other possible cause appears in the record that would explain the onset of low back pain during and right after wearing the orthotic boot. The temporal relationship and lack of another cause in the record, along with Dr. Hughes' detailed opinion, leads to the conclusion that the greater weight of evidence shows claimant's low back condition was caused or aggravated by a sequel[la] of her foot injury, that is the medical need to wear the orthotic boot for three months and the leg brace thereafter. Using these devices altered her gait and resulted in low back pain that continues to this day. As such, it constitutes an injury to the body as a whole and any disability benefits awarded will be on the basis of industrial disability. It is further found claimant's September [9], 2007, work injury to her left foot has resulted in a back injury and permanent disability to both her foot and her back.

The deputy then reviewed the various doctors' opinions of Holland's permanent partial disability: Dr. Verdeck found a ten percent permanent partial impairment (PPI) of body as a whole based on use of leg brace; Dr. Michael Jackson found a three percent PPI of the whole person due to left calf atrophy and plantar fasciitis; and Dr. Hughes found a twenty-five percent PPI of body as whole due to plantar fasciitis and stress fracture—he did not rate Holland's back

condition as he felt she needed further treatment. The deputy also reviewed Holland's current physical condition, which "requires her to wear a leg brace in order to function" and affects her "stamina and her ability to perform not only work duties, but tasks in her personal life as well"; her work restrictions; inability to return to jobs held before working for Finley; Holland's back pain, which disrupts her sleep and prevents participation in recreational activities she once enjoyed. The deputy also noted:

> Holland was 50 years old at the time of the hearing. Her age would work against her if she were to seek employment in the job market. Her education consists of a high school diploma, completion of a community college program in x-ray technology, and certification as a certified nurses' aide. She has completed course work to be a Licensed Practical Nurse but has not become licensed.
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> Her work experience has mostly been in the medical field as a CNA. She currently still works for defendant employer and has satisfactory evaluations. She earns the same hourly wage she did when she was injured and has not suffered a loss of earnings. She is able to do her present job but might not be able to do past jobs she did for the hospital because of the lifting required. She works in pain, and has to wear a leg brace on a permanent basis. She also has to use a TENS unit and lumbosacral support for her back pain.

Considering all those factors, the deputy found Holland has an industrial disability of sixty percent.[1]

The employer appealed.

On intra-agency review, the commissioner rejected Finley's contention that the overwhelming evidence failed to support the deputy's findings. The commissioner wrote,

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[1] The deputy also awarded Holland penalty benefits, which the commissioner reversed on intra-agency appeal. The commissioner's ruling in that regard was upheld by the district court. No appeal was taken from that ruling, and the issue of penalty benefits is not before this court.

> Although there is medical evidence to support defendant's contention, the finding of the deputy is well-reasoned and supported by the greater weight of the evidence contained within the record of the case. The deputy's reliance on the medical opinion of Dr. Hughes is not in error as the temporal relationship of claimant's increased complaints, the lack of any other cause within the record, claimant's credible complaints of significantly increased lumbar pain and impairment, and the detail within Dr. Hughes' opinion all support the finding that claimant's injury is a whole body injury. It is therefore concluded that the deputy's finding that claimant sustained a whole body injury and should be compensated industrially is affirmed.

With respect to Finley's challenge to the extent of industrial disability, the commissioner found "no compelling basis to amend that award after a de novo review." The commissioner affirmed the award of permanent partial disability benefits.

Finley sought judicial review in the district court. The district court thoroughly reviewed the record evidence and affirmed the commissioner. Finley now appeals, contending the commissioner erred in finding Holland suffered an injury to the body as a whole and the extent of the disability.

II. Scope and Standard of Review.

Our scope and standard of review have been thoroughly discussed and recited by our supreme court:

> Our decision is controlled in large part by the deference we afford to decisions of administrative agencies. Medical causation presents a question of fact that is vested in the discretion of the workers' compensation commission. *See Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). We will therefore only disturb the commissioner's finding of medical causation if it is not supported by substantial evidence. *See* Iowa Code § 17A.19(10)(*f*).
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> The Iowa Administrative Procedure Act defines "substantial evidence" as follows:
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> > [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.

Id. § 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. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003).

Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. *John Deere Dubuque Works of Deere & Co. v. Weyant*, 442 N.W.2d 101, 105 (Iowa 1989). To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007); *Missman v. Iowa Dep't of Transp.*, 653 N.W.2d 363, 367 (Iowa 2002). Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made. *See* Iowa Code § 17A.19(10)(*f*); *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 557–58 (Iowa 2010).

Cedar Rapids Cmty. Sch. Dist. v. Pease, ___ N.W.2d ___ (Iowa 2011). The substantial evidence standard also does not permit us to reweigh the evidence. As observed by our supreme court in *Arndt*, 728 N.W.2d at 394-95:

> Making a determination as to whether evidence "trumps" other evidence or whether one piece of evidence is "qualitatively weaker" than another piece of evidence is not an assessment for the district court or the court of appeals to make when it conducts a substantial evidence review of an agency decision. *See Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996) (stating under a substantial evidence review it is not the task of the reviewing court "to weigh the evidence or the credibility of the witnesses"). It is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue. *See Dunlavey*, 526 N.W.2d at 853 (stating in deciding whether to accept the opinion of an expert witness "[t]he 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"). The

> reviewing court only determines whether substantial evidence supports a finding "*according to those witnesses whom the [commissioner] believed.*" *Tim O'Neill Chevrolet, Inc.*, 551 N.W.2d at 614.

III. Discussion.

A. Injury to body as a whole. Finley acknowledges Holland suffered a work-related injury to her left lower extremity but denies any causal relation between that work injury and her low back complaints. Because Finley denies Holland's back condition is related to the work injury, it argues the commissioner erred in finding Holland suffered an injury to the body as a whole.

As in the case recently decided by our supreme court, "[a]t the heart of this case is the issue of the extent to which expert testimony constitutes substantial evidence in a workers' compensation claim." *Pease*, ___ N.W.2d at ___. Conflicting expert opinions were presented regarding the causation of Holland's back pain. The commissioner ultimately determined Dr. Hughes' expert opinion (that Holland's back pain is caused by her altered gait from wearing first the orthopedic boot and then the leg brace) was to be given more weight than contrary expert opinions. Finley now asks us to hold Dr. Hughes' opinions relied upon by the commissioner were so flawed they failed to constitute substantial evidence supporting the commissioner's findings. We decline to do so.

> Medical causation "is essentially within the domain of expert testimony." The commissioner, as trier of fact, has a duty to weigh the evidence and measure the credibility of witnesses. The weight given to expert testimony depends on the "accuracy of the facts relied upon by the expert and other surrounding circumstances." Also, an expert's opinion is not necessarily binding upon the commissioner if the opinion is based on an incomplete history. Ultimately, however, the determination of whether to accept or

> reject an expert opinion is within the "peculiar province" of the commissioner.

Id. at ___ (internal citations omitted).

The commissioner is free to accept or reject an expert's opinion in whole or in part, particularly when relying on a conflicting expert opinion. *Id.* at ___. We may not accept contradictory opinions of other experts in order to reject the finding of the commissioner. *Id.*

It was the duty of the commissioner to weigh the evidence as a whole, taking into consideration the credibility of the witnesses, and determine whether Holland suffered an injury to the body as a whole. *See id.* at ___ (citing *Burns v. Bd. of Nursing,* 495 N.W.2d 698, 699 (Iowa 1993) ("Because review is not de novo, the court must not reassess the weight to be accorded various items of evidence.")). The commissioner relied on the opinion of Dr. Hughes, which the commissioner found was supported by "the temporal relationship of claimant's increased complaints, the lack of any other cause within the record, claimant's credible complaints of significantly increased lumbar pain and impairment, and the detail within Dr. Hughes' opinion." Based on the record before us, we are satisfied the commissioner's findings are supported by substantial evidence.

We also acknowledge that Finley argues the agency decision cannot be upheld because of the agency's misstatements of the facts. We perceive some of the alleged misstatements to be disputed facts and other alleged misstatements to be a disagreement concerning the characterization of the testimony and evidence including some of the medical opinions. We conclude the alleged misstatements do not detract from our finding of substantial evidence.

B. Extent of disability. The commissioner reviewed de novo the record and the deputy's finding Holland suffered a sixty percent industrial disability and affirmed. The district court recognized different conclusions might be drawn from the record, but the question was whether substantial evidence supports the findings made. *See id.* The district court answered that question in the affirmative, as do we.

Industrial disability is determined by an evaluation of the employee's earning capacity. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000). "The commissioner may consider a number of factors in determining industrial disability, including functional disability, 'age, education, qualifications, experience, and [the claimant's] inability, because of the injury, to engage in employment for which [s]he is fitted.'" *Pease*, ___ N.W.2d at ___ (quoting *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980)).

Finley focuses solely on the fact Holland has suffered no reduction in earnings with respect to Finley. While this may be considered in the industrial disability analysis, it is not dispositive. *See Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 857 (Iowa 2009) (stating "[a]n assessment of industrial disability implicates all the factors that bear on the claimant's actual employability" (internal quotations, citations, and emphasis omitted)); *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 158 (Iowa 1996) (upholding finding of eighty percent industrial disability where no loss of earnings and noting even though employer had made accommodations, "if claimant were to be suddenly thrust into the job market, his ability to compete with other workers for positions would be limited in the most extreme sense"); *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa

1995) (stating "we are satisfied that the commissioner was correct in viewing loss of earning capacity in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer"). We are satisfied the appropriate factors relating to Holland's loss of earning capacity were considered by the commissioner, and we cannot say the commissioner's resolution of this issue was irrational, illogical, or wholly unjustifiable. We therefore affirm the finding of sixty percent industrial disability.

AFFIRMED.