IN THE COURT OF APPEALS OF IOWA

No. 2-711 / 11-1864
Filed October 31, 2012

O'REILLY AUTO PARTS and
GALLAGHER BASSETT SERVICES,
Petitioners-Appellants,

vs.

JERRY ALEXANDER,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

O'Reilly Auto Parts appeals a district court order upholding the workers' compensation commissioner's decision awarding benefits to Alexander. **AFFIRMED.**

Richard C. Garberson, Terri C. Davis, and Sarah W. Anderson of Shuttleworth & Ingersoll, P.L.C. Cedar Rapids, for appellants.

Christopher D. Spaulding of Berg, Rouse, Spaulding & Schmidt, P.L.C., Des Moines, for appellee.

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

DANILSON, J.

O'Reilly Auto Parts appeals a district court order upholding the workers' compensation commissioner's decision awarding benefits to Jerry Alexander. O'Reilly challenges the commissioner's finding that Alexander sustained injuries arising out of and in the course of his employment, and argues his sua sponte addition of an insurance carrier into the proceedings reflected bias and was reversible error. Because substantial evidence supports the commissioner's finding that Alexander sustained injuries arising out of and in the course of his employment, and the commissioner's action in adding the correct insurance carrier was within the authority granted to him by the legislature and was not indicative of bias, we affirm.

I. Background Facts and Proceedings.

Jerry Alexander retired from a long career as a programmer in 1998. He obtained new part-time employment driving a truck and delivering parts for O'Reilly Auto Parts in 1999. Alexander eventually began working full-time and continued full-time work until May 8, 2008. On that date, Alexander alleges he sustained hip and back injuries while unloading a tote from the truck and twisting his body to take a step.

Alexander returned to O'Reilly where he encountered the paint supervisor who asked him what was wrong. He replied that he could hardly walk. On May 12, 2008, Alexander returned to O'Reilly using a walker. He alleges at that time he reported the injury to the store manager, Rene de la Rosa. An injury report was completed that day and signed by both de la Rosa and Alexander; however,

the injury dates listed were August 8, 2006, and December 2007. Alexander testified that he was upset because he was denied the right to see the company doctor, and he likely didn't even read the document before signing it. He conceded that some of the report was completed in his handwriting, but his testimony demonstrates that he did not understand the importance of the form and he was confused about what the dates were to represent.

De la Rosa testified that Alexander did report lifting a tote out of a truck and hurting his hip. However, de la Rosa's recollection was also uncertain about when Alexander reported the injury. De la Rosa marked the July accident report "questionable" noting that Alexander originally reported hip pain that he then believed stemmed from a 2003 work injury.[1]

Throughout the proceedings, O'Reilly consistently denied that Alexander suffered an injury arising out of his employment in May 2008, by focusing on Alexander's inconsistent statements. O'Reilly sought to challenge Alexander's credibility and establish that he could not have sustained a new injury as he alleged, emphasizing that the auto part which he was assigned to deliver when the injury allegedly occurred weighed only four ounces.

Alexander testified that there were often additional parts in his tote other than the part listed on the delivery log. De la Rosa confirmed that there may have been additional parts in the tote on May 8, 2008, and that the delivery totes typically weighed between twenty and forty pounds.

---

[1] Alexander slipped on ice and fell and broke his pelvis while working for O'Reilly in 2003. He received workers' compensation benefits for treatment at the time of injury, but did not seek permanent partial disability payments, although his impairment never fully resolved.

Alexander sought treatment for his injury from three doctors. While he did not explain the mechanism of injury to his family doctor, he thereafter reported that he sustained an injury while twisting at work, in May. Dr. Thaddeus Ray opined that Alexander's work at O'Reilly contributed to a worsening of pain from his pre-existing condition of spinal stenosis. He assigned Alexander an eight percent whole-person functional impairment.

Alexander sustained a stroke in late February 2009, before both his deposition, taken on March 31, 2009, and the August 4, 2009 arbitration hearing. Alexander was seventy-five years old at the time of the hearing. He frequently explained that he could not remember or was having trouble with his memory during his deposition.

After the arbitration hearing, the deputy commissioner denied Alexander's claim, finding the May 8, 2008 injury did not arise out of and in the course of employment. On intra-agency appeal, the commissioner reversed that decision. The commissioner concluded that the claimant's testimony, his wife's testimony, and medical records provided substantial evidence that Alexander suffered an injury on May 8, 2008, which arose out of and in the course of his employment. On judicial review, the district court upheld the decision of the commissioner, finding the "facts the commissioner found to be credible constituted substantial evidence to support his conclusion that the respondent suffered a work-related injury on May 8, 2008."

In district court, O'Reilly argued there was insufficient evidence of the necessary causal connection between the conditions of employment and the

injury to support the commissioner's conclusion that Alexander sustained an injury arising out of his employment. The district court declined to address this argument, finding it was not presented at the agency and was therefore not preserved for judicial review.

II. Standard of Review.

Under the Administrative Procedures Act, section 17A.19(10) (2009),

> our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. If an agency has been clearly vested with the authority to make factual findings on a particular issue, then a reviewing court can only disturb those factual findings if they are "not supported by substantial evidence in the record before the court when that record is reviewed as a whole." This review is limited to the findings that were actually made by the agency and not other findings that the agency could have made.

Burton v. *Hilltop Care Ctr*., 813 N.W.2d 250, 256 (Iowa 2012) (quoting Iowa Code § 17A.19(10)(f)) (other citations omitted). Thus, we review O'Reilly's allegations of error regarding the date of injury and whether the injury occurred as alleged to determine if the factual findings of the workers' compensation commissioner are supported by substantial evidence. *Id.*

If the petition for review alleges error "in the commissioner's application of the law to the facts, we will disturb the commissioner's decision only if it is '[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact.'" *Jacobson Transp*. *Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010) (quoting Iowa Code § 17A.19(10)(m)).

O'Reilly asserts the commissioner incorrectly held Alexander's injury arose out of his employment, specifically contending on judicial review that if

Alexander sustained an injury at work, it did not result from an actual risk presented by the conditions of his employment. This presents a mixed question of law and fact. *See Lakeside Casino v*. *Blue*, 743 N.W.2d 169, 173 (Iowa 2007). Thus, we will disturb the commissioner's decision on this issue only if it is irrational, illogical, or wholly unjustifiable. Iowa Code §17A.19(m).

III. Discussion.

A. Commissioner's ruling is final agency action subject to review.

O'Reilly contends the commissioner improperly overturned the deputy's decision based solely on a rejection of the deputy's veracity determination. In overturning the deputy's decision, the commissioner concluded that the inconsistencies in the record were not outweighed by Alexander's credible testimony, that of his spouse, and the medical opinion in the record. However, a court sitting in judicial review is to base its decision on the commissioner's findings because "the deputy industrial commissioner's proposed findings are not in consideration on judicial review. Only final agency action is subject to judicial review." *Myers v*. *FCA Servs*., *Inc*., 592 N.W.2d 354, 358 (Iowa 1999). We proceed to review the commissioner's findings.

B. Error was adequately preserved.

The district court concluded that O'Reilly advanced a new theory during the judicial review of the agency decision: Alexander's injury was in no way caused by or related to the conditions of his employment, as his work presented no

particular hazards of such an injury. The district court concluded error was not preserved on this issue. In commenting upon error preservation in administrative appeal proceedings, our supreme court has stated:

> Our review is generally limited to questions raised at or before the hearing held by the agency. There are two reasons for this rule of error preservation. First, fairness requires that an issue be raised while one's opponent still has an opportunity to respond to the issue. Second, the agency should have an opportunity to consider and rule on the issue.
>
> Consistent with the reasons underlying this rule of error preservation, we have recognized limited exceptions. An issue not raised in the initial pleading before the agency may be preserved for appeal by inclusion in a motion for rehearing if the party could not have raised the issue earlier. We have also considered an issue on judicial review when it was raised for the first time in an application for rehearing where the opportunity for response by the opponent was adequate at that stage of the proceedings.

Soo Line R. Co. v. Iowa Dep't of Transp., 521 N.W.2d 685, 691 (Iowa 1994) (citations omitted). In *Soo Line*, the court concluded an issue was not raised before the agency where the issue was not raised in the initial pleadings or identified by the ALJ as an issue to be resolved at the outset of the administrative hearing. *Id*.

Here, the issue of whether Alexander's injury was caused by or related to the conditions of his employment was not set forth in any initial pleadings, nor was it specifically identified by the deputy commissioner as one of the issues the parties agreed were in dispute. However, among the issues identified by the deputy were: (1) whether the injury "arose out of and in the course of employment"; (2) whether the "injury, alleged injury, is a cause of temporary disability" or permanent disability; and (3) whether Alexander was "entitled" to temporary benefits and permanent partial disability benefits.

The deputy commissioner stated in his arbitration decision that the "first issue to be determined is if the claimant had an injury on May 8, 2008, that arose out of and in the course of his employment." After explaining the burden was upon the claimant to establish proximate cause for the disability, he stated: "[t]he question of causal connection is essentially within the domain of expert testimony." The deputy then analyzed the evidence, and concluded, "I find it difficult to resolve the issue of causation in claimant's favor with the numerous inconsistencies in the evidentiary record."

Ultimately, the commissioner reversed the arbitration decision concluding the inconsistencies relied upon the by deputy did not outweigh the claimant's testimony, his wife's testimony, and the medical opinion rendered by Dr. Ray. The commissioner concluded Alexander did suffer an injury that arose out of and in the course of Alexander's employment.

In resolving this error preservation question, it is helpful to consider that in *Lakeside Casino*, our supreme court discussed two different doctrines utilized by courts in determining whether an injury arises out of employment: the actual-risk doctrine and the positional-risk doctrine. 743 N.W.2d at 174–76. Under the actual-risk doctrine, an injury is compensable "'as long as the employment subjected [the] claimant to the actual risk that caused the injury.'" *Id*. at 176 (quoting 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 3.04, at 3–5 (2007)). This doctrine was adopted by the court in *Hanson v. Reichelt*, 452 N.W.2d 164, 168 (Iowa 1990).

The positional-risk doctrine, on the other hand, provides that "'[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he would be injured.'" *Lakeside Casino*, 743 N.W.2d at 176 (quoting Larson § 3.05, at 3–6). This doctrine supports compensation in situations where "the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time" when the employee "was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment." Larson § 3.05, at 3–6. Our supreme court declined to adopt the positional-risk doctrine as a basis to support a compensable injury in *Lakeside Casino*, 743 N.W.2d at 177.

Clearly, the issues of whether an injury occurred, and if so, if it occurred in the course of employment commanded most of the focus during the proceedings in this case. However, O'Reilly has consistently raised the issue of whether Alexander's act of lifting and carrying a tote, which allegedly only contained a four ounce filter, was sufficient to establish a compensable injury although neither O'Reilly nor the deputy specifically referenced the positional risk doctrine. We view O'Reilly's contention as claiming there was no causal connection between the injury and a condition, risk, or hazard of Alexander's employment. *See Lakeside Casino*, 743 N.W.2d at 176.

Thus, contrary to the district court, we are satisfied that error was preserved because the "arising out of" requirement was raised, litigated, and

decided by the agency. Moreover, the determination of causation under the actual-risk doctrine is incidental to and intertwined with the causation issue. *Presbytery of Southeast Iowa v*. *Harris*, 226 N.W. 2d 232, 234 (Iowa 1975) (concluding if the issue is incident to other issues properly presented the contention will be entertained); *see also Feld v*. *Borkowski*, 790 N.W.2d 72, 84-85 (Iowa 2010) (Appel, J. concurring in part and dissenting in part) (citing *Presbytery of Southeast Iowa* in support of considering issues intertwined with or "incident" to a determination of other issues properly presented).

C. Substantial evidence supports the commissioner's finding that Alexander sustained an injury "arising out of" and "in the course of" his employment.

"[C]redibility determinations in workers' compensation claims are within the domain of the commissioner as trier of fact." *Cedar Rapids Cmty*. *Sch*. *Dist*. *v*. *Pease*, 807 N.W.2d 839, 847 (Iowa 2011). "[W]itness testimony may be 'so impossible or absurd and self-contradictory that it should be deemed a nullity by the court . . . .'" *Id*. at 847-48 (quoting *Graham v*. *Chicago & N*.*W*. *Ry*., 119 N.W. 708, 711 (1909)). However, Alexander's testimony cannot be so characterized.

Alexander exhibited obvious confusion during his testimony before the deputy commissioner. He also stated that his memory was "not all that good" in his March 2009 deposition. His deposition testimony also reflected confusion regarding how the dates of injury were reported on the form he completed on May 12, 2008. Alexander did not understand that the form was an important one used to determine how O'Reilly would address his request for medical treatment.

He could not explain why the document did not contain a reference to a May 8, 2008 injury, but testified that he likely signed the form without reading it.

Alexander informed a co-employee and his wife of his injury on the day of its occurrence. He also consistently testified that he reported the injury to de la Rosa, the O'Reilly store manager, the day after the injury occurred or the following Monday.

De la Rosa confirmed that Alexander reported he hurt his hip when he lifted a tote out of a truck; however, de la Rosa was anything but consistent as to when the report was made. During the hearing before the deputy, he testified that Alexander first reported the injury on July 21, 2008, then testified that the report was made sometime in May, then testified that the report was made May 12, 2008, then testified the report was *not* made May 12, 2008, then testified the report was not made before July 21, 2008, and finally stated that Alexander first reported the injury more than a week after May 12, 2008.

Alexander acknowledges that he did not notify his family doctor he was injured in the course of his employment or explicitly identify a date of injury when he sought treatment on May 20, 2008. He explained that he told the doctor about a fall in 2003 and one in 2007 because the doctor specifically asked him if he had fallen, but did not ask if he was otherwise injured. However, on June 2, 2008, Alexander was evaluated by another doctor and reported an episode that occurred approximately two weeks earlier when he was twisting at work, which resulted in pain in his left lower extremity.

Dr. Ray evaluated Alexander on June 25, 2008. Alexander reported that his pain began in May while he was unloading a truck. Though he did not emphasize to Dr. Ray that this was a work injury, the facility's intake notes document that Alexander's problems were a result of "work activities." In November 2008, Dr. Ray opined that Alexander's work contributed to the worsening of his pre-existing condition of spinal stenosis. On May 13, 2009, Dr. Ray reiterated his opinion that Alexander's work injury contributed to his condition and need for medical care and treatment. He further opined that Alexander had an eight percent permanent functional impairment.

Both parties demonstrate inconsistencies with regard to Alexander's report of his injury. The commissioner found that Alexander's confusion and failure to ensure that the written report correctly reflected the date of injury were outweighed by his credible testimony, the testimony of his spouse, and the medical evidence in support of his claim. Although O'Reilly strenuously complains about the deficiencies or errors in Alexander's initial written report of the injury, we note that Alexander gave full and timely notice of the injury by filing his petition within ninety days of its occurrence, pursuant to Iowa Code section 85.23.

O'Reilly further challenged whether Alexander's injury arose out of his employment by emphasizing that the part which Alexander was scheduled to deliver at the time of injury weighed only four ounces. However, Alexander testified that while the scheduled part may have only weighed four ounces, totes may also contain other items, which would increase the weight of the load. De la

Rosa confirmed that the totes may contain additional parts and that delivery totes typically weigh between twenty and forty pounds.

While the weight of the tote and thus the hazard presented by lifting the tote was disputed, as the commissioner observed, Alexander consistently described the injury as occurring after he lifted the tote while he was twisting to take a step. We agree that the uncertain weight of the tote does not preclude the event from being a realistic mechanism of injury.

D. Dr. Ray's opinion on causation is supported by record evidence.

O'Reilly contends the commissioner could not reasonably rely on Dr. Ray's opinion on causation because he was unaware of the weight of the tote Alexander was unloading at the time of the alleged injury.

"Medical causation presents a question of fact that is vested in the discretion of the workers' compensation commission. We will therefore only disturb the commissioner's finding of medical causation if it is not supported by substantial evidence." *Pease*, 807 N.W.2d at 844-45 (citations omitted).

> The Iowa Administrative Procedure Act defines "substantial evidence" as follows:
>
> > [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.
>
> 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. . . .
>
> Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. 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. . . .
>
> 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 845 (internal quotations and citations omitted).

In *Pease*, the claimant provided inaccurate or incomplete history to the medical expert, on whose opinion the commissioner relied with respect to medical causation of her post-accident depression. Nevertheless, the supreme court found the commissioner may have reasonably relied on the expert's opinion, observing that the expert's opinion was informed not only by the claimant's history, but also by her medical records which documented her pre-existing condition. The *Pease* court found substantial evidence supported the commissioner's award of benefits with regard to the claimant's physical injury, despite video evidence offered to diminish her credibility, observing that the expert opinion offered regarding claimant's physical injury was supported by the doctor's own physical examination and review of medical records, and that the doctor's opinion did not change after being confronted with the video evidence.

Like the appellant in *Pease*, O'Reilly did not offer an expert opinion calling Dr. Ray's opinion into question. O'Reilly also failed to offer evidence that Dr. Ray's opinion on causation would have changed after being confronted with the possibility that the tote Alexander unloaded was light in weight. Even if Alexander's credibility was in doubt, "the commissioner could nevertheless

reasonably rely upon the opinion" of Dr. Ray. *Id*. at 848. O'Reilly's complaints essentially go to the weight and credibility of the expert's testimony.

> Whether an injury has a direct casual connection with the employment or arose independently thereof is essentially within the domain of expert testimony. The weight to be given such an opinion is for the finder of fact, in this case the commissioner, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances.

Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995) (citations omitted). Viewing the record as a whole, the commissioner may have reasonably concluded that the discrepancies in documentation of dates and the mechanism of injury in Alexander's reports did not wholly eviscerate or adversely affect his credibility or the opinion of Dr. Ray. Therefore, we conclude substantial evidence supports the commissioner's finding of medical causation.

The evidence in this action was disputed. Different conclusions—such as the deputy's decision—could be drawn from the evidence. However, there is substantial evidence, including uncontroverted expert medical testimony, that Alexander's injury was not coincidental or due to positional risk, but rather occurred while he was twisting and lifting the tote, and accordingly, arose out of and in the course of his employment as determined by the commissioner. Our role is not to determine "whether evidence 'trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence" when we conduct a review for substantial evidence. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394 (Iowa 2007). We are satisfied that the agency's findings are supported by substantial evidence. We also conclude the commissioner's determination that Alexander's injury arose out of his employment was not

irrational, illogical or wholly unjustified. Iowa Code § 17A.19(m); *Lakeside Casino*, 743 N.W.2d at 173.

E. Commissioner's addition of insurance carrier as a defendant was not evidence of bias or reversible error.

O'Reilly asserts that the commissioner conducted an independent investigation by reviewing the proof of coverage information on the agency's website to verify the appropriate insurer, when no request to do so had been made by either party. O'Reilly contends the commissioner's action evidences a lack of impartiality and suggests that the commissioner investigated O'Reilly's insurance status prior to issuing his ruling on Alexander's right to benefits. O'Reilly does not argue that it was injured or prejudiced by the commissioner's addition of the correct insurer; rather, it suggests the appearance of impropriety warrants reversal. Our review of a claim of bias or disqualification of an agency decision-maker is de novo. Iowa Code §17A.17(7).

> The legislature has identified that the purpose of the agency is to
>
> *adjudicate the rights and duties* of persons provided for in Iowa Code chapters 85, 85A, 85B, 86, and 87 and these rules, and to *administer and enforce the provisions* of [those chapters and rules]. The indicated chapters provide for the rights and duties of persons injured in employment *and the responsible employers and insurance carriers.*

Iowa Admin. Code r. 876-1.1 (emphasis added). In a contested workers' compensation case, "all matters relevant to a dispute are subject to inquiry." Iowa Code § 86.14(1). However, the Iowa Administrative Procedures Act provides, in part: "[A]n individual who participates in the making of any . . . final decision in a contested case shall not have personally investigated . . . or

advocated in connection with that case, the specific controversy underlying that case . . . ." Iowa Code § 17A.17(8).

There is no evidence that the commissioner investigated "the specific controversy underlying [the] case" as prohibited by section 17A.17(8). Rather, he consulted records maintained by the agency and corrected an error, which counsel failed to identify and remedy, making the decision he rendered enforceable against the proper insurance carrier. *See Zomer v. W. River Farms, Inc.*, 666 N.W.2d 130, 131 (Iowa 2003) (concluding that "the compensability of the claimant's work-related injury depend[ed] on whether the employer's insurance policy specifically cover[ed] the claimant").

We review the legality of the commissioner's action in adding the insurance company for correction of errors at law. *Id.* at 132. We acknowledge that the commissioner "has no inherent power and has only such authority as is necessarily inferred from the power expressly granted." *Id.* However in *Zomer*, our supreme court also concluded "the test with respect to the commissioner's jurisdiction is whether the disputed matter is necessary to a determination of liability under the worker's compensation statute. If so, the commissioner has the power to decide the issue." *Id.* at 135. The commissioner's action in adding the correct insurance carrier was necessary and within the authority granted to him by the legislature under the power to adjudicate the rights and duties as between injured workers and the responsible insurance carriers and the power to enforce the provisions of the code. Iowa Admin. Code r. 876-1.1.

There is no evidence that the commissioner reviewed the insurance status of the parties prior to making his determination on the merits of the controversy. In our de novo review, we do not find that the commissioner's action creates an appearance of impropriety or evidences bias. The addition of the proper insurance carrier as a party to the action did not prejudice O'Reilly and was within the jurisdiction of the commissioner. Finding no error of law, we do not disturb the decision to add O'Reilly's insurance carrier as a party to this action.

IV. Conclusion.

Substantial evidence supports the commissioner's finding that Alexander sustained injuries arising out of and in the course of his employment and the commissioner's action in adding the correct insurance carrier was within the authority granted to him by the legislature.

AFFIRMED.