IN THE COURT OF APPEALS OF IOWA

No. 2-871 / 12-0475
Filed November 29, 2012

USORO NKANTA,
Petitioner-Appellant/Cross-Appellee,

vs.

WAL-MART STORES, INC., and
AMERICAN HOME ASSURANCE,
Respondents-Appellees/Cross-Appellants.

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

Usoro Nkanta appeals from the denial of workers' compensation benefits. The employer cross-appeals from the commissioner's rejection of its offer to confess judgment and the commissioner's assessment of costs. **AFFIRMED ON BOTH APPEALS.**

Ryan T. Beattie of Beattie Law Firm, P.C., Des Moines, for appellants.

Peter M. Sand, Des Moines, for appellee.

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

DANILSON, J.

Usoro Nkanta appeals from the denial of workers' compensation benefits. The employer cross-appeals from the commissioner's rejection of its offer to confess judgment and the commissioner's assessment of costs. Substantial evidence supports the commissioner's finding that Nkanta failed to prove he sustained a permanent injury as a result of the November 15, 2008 work injury. The commissioner did not err in concluding Iowa Code chapter 677 (2009) is inapplicable to workers' compensation proceedings. And the commissioner did not abuse his discretion in requiring each party to bear their own costs. We affirm on both appeals.

I. BACKGROUND FACTS AND PROCEEDINGS.

The district court aptly set out the facts underlying this workers' compensation proceeding.

> Usoro Nkanta was thirty-eight years of age at the time of the agency hearing. He was born in Nigeria and graduated from high school there. He also graduated from a four-year program where he learned to make shoes and bags out of leather. Nkanta immigrated to the United States in 1998 and became a U.S. citizen in 2007. He has taken courses in computers and English as a Second Language at a community college. He also took classes to become a certified nursing assistant but did not become certified. At the time of hearing he was taking English literacy and pronunciation classes at Drake University. Since coming to the U.S. he has worked in landscaping, at a greenhouse, and as a cook and dishwasher.
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> Nkanta began employment with Wal-Mart in 1999 at the warehouse in Mount Pleasant, Iowa, loading trucks. He was transferred to the Wal-Mart in Ankeny in approximately 2001, where he mostly unloaded trucks but would sometimes do other various jobs when needed. It is undisputed that on November 15, 2008, Nkanta sustained a low back injury that arose out of and in the course of his employment at Wal-Mart. He testified when he woke up the next day he was in extreme pain so his wife took him to the

Mercy North Clinic. He was assessed with a back strain and prescribed medication.

On November 19, 2008, Wal-Mart arranged for Nkanta to see Bern Boyett, M.D. Dr. Boyett assessed him as having left lower back pain with spasm. (Ex. A at 2-3.) He was given additional medication and taken off work. On November 24, 2008, Nkanta underwent a lumbar spine x-ray that revealed mild degenerative spondylosis. On that date he was returned to work, restricted to sit-down duties only. Physical therapy was also ordered. (Ex. A-4.)

Nkanta continued to describe pain in his lower back and weakness in his left leg to Dr. Boyett on December 5, 2008, and requested an MRI which Boyett refused at that time. Dr. Boyett noted "symptom magnification and nonphysiologic findings." Boyett continued Nkanta with physical therapy and modified work at Wal-Mart. He also referred him to Lynn Nelson, M.D., an "ortho spine specialist." (Ex. 3-1 and 3-3.) On January 15, 2009, Dr. Nelson performed an examination. He recommended MRI of the lumbar spine. (Ex. B at 1 -2.) The MRI was performed on January 22, 2009, and was clear. (Ex. B-3.) Dr. Nelson stated he could not attribute Nkanta's complaints to his lumbar spine, and referred him to William Koenig, M.D., a physiatrist. (Ex. B-4.)

On January 28, 2009, Dr. Koenig performed a thorough examination and diagnosed Nkanta with myofacial pain syndrome, depression, and (probable) conversion reaction. He also performed an EMG of the left back and left lower extremity with normal results. Dr. Koenig did not feel Nkanta was a surgical candidate. He allowed Nkanta to remain off work until February 10, 2009, continued his medications, and noted the "optimum" treatment plan would be for him to enroll in a comprehensive low back rehabilitation program with Dr. Chen at the University of Iowa Hospitals and Clinics (UIHC). Dr. Koenig also opined Nkanta should undergo psychiatric consultation; in the alternative, he could perhaps see a pain psychologist. (Ex. 2 at 6-7.) After Koenig's conclusions, Wal-Mart cut off payment for Nkanta's care and scheduled him for an independent medical examination (IME) with Dr. Boyett's partner, Richard McCaughey, D.O.

In preparation for the upcoming IME, Dr. McCaughey spoke with Dr. Koenig on February 20, 2009. His notes indicate that neither Drs. Koenig nor Nelson could find any organic pathology in Nkanta. They discussed possible diagnoses, including depression, hysteria, conversion reactions, and malingering. They agreed he would probably benefit from psychiatric evaluation. Dr. Koenig told McCaughey he saw no evidence of any ongoing work compensation injury. (Ex. 3-2.) Dr. McCaughey's IME opined he could not attribute Nkanta's complaints to "organic pathology" as a

> result of work activities on November 15, 2008, and thus he was unable to identify a compensable injury. McCaughey indicated that if Wal-Mart's carrier declined further payment, Nkanta could pursue Dr. Koenig's treatment suggestions through his personal healthcare provider. (Ex. 5 at 6-7.)
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> In May 2009 Nkanta, on his own, saw and was evaluated by Joseph Chen, M.D., at UIHC. Dr. Chen opined Nkanta suffered from myofacial pain with no MRI or EMG evidence of nerve root pathology and recommended he work on physical therapy and home exercise. (Ex. D.)
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> On November 4, 2009, Nkanta retained Robert Jones, M.D., a neurosurgeon, to perform a second IME on his behalf. Dr. Jones's impression was low back strain and some depression. He opined Nkanta had a "Lumbar DRE Category II" injury with a 5% impairment rating to the body as a whole. He recommended restrictions of avoiding lifting over twenty pounds occasionally and ten pounds frequently, and avoiding excessive bending and lifting. (Ex. 1.) Dr. Jones further recommended Nkanta try a TENS (transcutaneous electrical nerve stimulation) unit and a trial of antidepressants.

Nkanta filed a petition for workers' compensation benefits on March 12, 2009. At the arbitration hearing Nkanta testified he still has constant lower back pain and numbness in his left leg, which limits his physical activities, and activity aggravates his symptoms. He also testified he has looked for work since leaving Wal-Mart but has been unsuccessful. His wife's testimony was consistent with Nkanta's. The Wal-Mart store manager also testified that Nkanta returned for a short period doing sit down work; he was offered light duty and a leave of absence, but chose neither.

The deputy issued an arbitration decision, concluding Nkanta failed to prove his November 2008 injury was a cause of a permanent impairment. The deputy found Dr. Jones's opinions to be unconvincing because he "gave no analysis . . . why [Nkanta] had a permanent impairment given his normal

diagnostic studies," and he did not address the discrepancy of the opinions of the other experts with his. The deputy concluded,

> Three experts have opined that there is no organic explanation for [Nkanta's] continued pain complaints of lower back and leg pain. [Nkanta's] diagnostic studies were normal. It has been found Dr. Jones's opinion[s] regarding permanent impairment are not convincing. Based on these facts and findings, and the facts as detailed above, [Nkanta] has failed to carry his burden of proof that his November 2008 injury caused a permanent impairment.

The deputy also noted that prior to hearing Wal-Mart had filed a "confidential" sealed envelope with the commission that included an offer to confess judgment. The deputy determined the agency does not have the authority to accept sealed documents because all documents filed in a contested case are public unless specially made confidential by law. He stated he did not view the contents of the offer of judgment "as they are not material in awarding costs in this case." In addition, the deputy stated "there are no procedures, under the statutes and rules of this agency, for awarding costs under an offer of judgment." Each party was ordered to pay their own costs.

On intra-agency appeal and cross-appeal, the commissioner adopted the deputy's findings and rulings as the final agency decision. With respect to Wal-Mart's cross-appeal, the commissioner expressly concluded that "offers to confess judgment pursuant to chapter 677 of the Iowa Code are not available in proceedings under the Iowa workers' compensation act."

Wal-Mart filed a motion to enlarge or amend the appeal decision, contending that without regard to chapter 677, it should not be taxed with any costs because it was the prevailing party. In a ruling filed August 29, 2011, the

commissioner denied the motion, noting Nkanta was successful on a portion of his claim—seeking reimbursement for an independent medical examination fee.

Both parties sought judicial review in the district court. The district court concluded the commissioner's ruling, that Nkanta sustained no permanent work injury, was supported by substantial evidence and affirmed the determination of no award of benefits. The court also affirmed the commissioner's determination that Iowa Code chapter 677 does not apply to agency actions in workers' compensation cases, "fully agree[ing] with the totality of the Commissioner's well-reasoned findings and conclusions on this issue."

Nkanta appeals and Wal-Mart cross-appeals. Nkanta disagrees with the commissioner's finding that he failed to prove he sustained a permanent work-related injury. On cross-appeal, Wal-Mart argues the commissioner and district court erred in ruling that an offer to confess judgment is not allowed in actions pending before the commissioner. The employer also contends the commissioner abused his discretion in taxing each party their own costs.

II. Standard of Review

We review final agency action for correction of legal error. *Eyecare v. Dep't of Human Servs.*, 770 N.W.2d 832, 835 (Iowa 2009). Under the Iowa Administrative Procedure Act, we examine whether our conclusions parallel those of the district court. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). So long as the agency's findings are supported by substantial evidence, we will affirm its decision. *Eyecare*, 770 N.W.2d at 835. The Act defines "substantial evidence" 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) (2011). We decide the substantial evidence question after viewing the record as a whole. *See id*. § 17A.19(10)(f)(3).

If an agency decision flows from an erroneous interpretation of the law, we will reverse or otherwise grant relief. Iowa Code § 17A.19(10)(c); *Andover Volunteer Fire Dep't v*. *Grinnell Mut*. *Reins*. *Co* ., 787 N.W.2d 75, 80 (Iowa 2010).

> [W]hen the statutory provision being interpreted is a substantive term within the special expertise of the agency, we have concluded that the agency has been vested with the authority to interpret the provisions. When the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing, we have generally concluded interpretive power was not vested in the agency. When a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretative authority.

Renda v. *Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010). When interpretive authority has been granted an agency, we must defer to the agency's interpretation and may only reverse if the interpretation is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*l*).

III. Discussion.

A. Nkanta's Appeal—sufficiency of evidence.

The commissioner, in adopting the deputy's arbitration ruling, found that Nkanta had failed to prove he had sustained a permanent work injury. The commissioner accepted the conclusions of Drs. McCaughey, Nelson, and Koenig—all of whom found that Nkanta's complaints of lower back and leg pain

could not be connected to any organic pathology as a result of his work activities on November 15, 2008—and rejected the opinion of Dr. Jones. The commissioner adequately explained why he found Dr. Jones' opinion unconvincing.

We only disturb the workers' compensation commissioner's findings if they are not supported by substantial evidence. *Cedar Rapids Cmty. Sch*. *Dist*. *v*. *Pease*, 807 N.W.2d 839, 845 (Iowa 2011). "Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. *Id*. Pursuant to the deference we afford the commissioner, we affirm the finding that Nkanta did not prove he has suffered permanent impairment due to a work-related injury. We decline to re-weigh the evidence. The district court wrote a well-reasoned decision with which we agree. Further discussion on this issue would serve no useful purpose. We affirm on Nkanta's appeal.

***B*. *Cross-appeal—applicability of chapter 677*.**

The employer served upon Nkanta the following notice—

> **To Usoro Nkanta and his attorney Ryan Beattie:**
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> ON THIS 24 DAY OF NOV, 2009, Defendants . . . after answer and before trial or hearing, now offer to allow judgment to be taken against them upon all claims made in the above-listed agency files, for a total sum identified and specified in the attached sealed envelope, all pursuant to a compromise case settlement under Section 85.35. This offer is made pursuant to Iowa Code Section 677.7.
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> If this offer is not accepted as provided by Section 677.8, it shall be governed by Iowa Code Sections 677.9 and 677.10, and Claimant will be required to pay all costs henceforth if recovery at hearing does not exceed the amount offered herein.

The commissioner reasoned that "[n]othing in either chapter 676 or 677 expressly extends either chapter's provisions generally to administrative

agencies regulated under Chapter 17A or more specifically to proceedings under the workers' compensation act." Because the commissioner has not been granted the authority to interpret chapter 677, this interpretation is given no deference and we are free to substitute our judgment for that of the commissioner. *See Renda*, 784 N.W.2d at 13.

The commissioner noted the mandatory cost assessment provisions are general statutes, which conflict with the more specific statutory discretion afforded to the commissioner in Iowa Code section 86.40. The commissioner also concluded that a confession of judgment is a form of coerced settlement, but Iowa Code section 86.27 expressly states that notwithstanding provisions in the Iowa administrative procedural act encouraging settlements, "no party to a contested case may settle a controversy under any provision of the 'Workers Compensation Act' without the workers' compensation commissioner's approval."[1] Given that the assessment of costs in hearings before the commissioner are "in the discretion of the commissioner," Iowa Code § 86.40, and that settlements in workers' compensation proceedings must be approved by the commissioner, *id.* § 86.27, we give deference to the commissioner's interpretations on these issues and will interfere only if the commissioner's interpretation is "irrational, illogical, or wholly unjustifiable." *Id*. § 17A.19(10)(*l*).

The employer invokes section 677.7 in its offer to confess judgment. Section 677.7 provides: "*The defendant in an action for the recovery of money*

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[1] We note our supreme court has equated offers to confess judgments "to offers of settlement." *Hughes v. Burlington N. R.R. Co*., 545 N.W.2d 318, 320 (Iowa 1996). And their purpose is to encourage settlement of disputes, rather than a form of coerced settlements. *Id.*

only may, at any time after service of notice and before the trial, serve upon the plaintiff or the plaintiff's attorney an offer in writing to allow judgment to be taken against the defendant for a specified sum with costs." (Emphasis added.) The consequence of such an offer to confess judgment is stated in sections 677.10 and 677.13. Section 677.10 provides, "If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay the defendant's cost from the time of the offer." Section 677.13 states:

> If the plaintiff does not accept the offer, the plaintiff shall prove the amount to be recovered as if the offer had not been made, and the offer shall not be given in evidence or mentioned on the trial, and if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the defendant shall recover the defendant's costs incurred in the defense.

Nkanta points out that in a workers' compensation proceeding, there is "no defendant" and the proceeding is not an "action for the recovery of money." We find merit to these arguments, beginning with a broader view of the statutory scheme.

Chapter 677 is part of Title XV of the Iowa Code entitled "Judicial Branch and Judicial Procedures," subtitle 3, "Civil Procedure." Chapter 611, "Actions," part of the same subtitle, provides, "*Every proceeding in court is an action*, and is civil, special, or criminal." (Emphasis added.) The language of section 677.1—an "action for the recovery of money"—is informed by the definition in section 611.1, leading to the conclusion that an action is a proceeding *in court*. In *Dean v. Iowa-Des Moines National Bank & Trust Co*., 281 N.W. 714, 715 (1938), the court was interpreting a statute of limitations provision, Iowa Code section

11007(6) (1935) (now codified at Iowa Code § 614.1(6)). In that context, the court wrote:

> The requirement of this statute is, that *actions* be brought within stated periods of time, after *their causes* accrue. Between "actions" and "their causes" there is a clear distinction. That is, *an action is a proceeding in court*. Whereas a cause of action is the fact or facts which establish or give rise to the right of action.

(Emphasis added).

The terms used in the provisions, "an action for recovery of money only," "plaintiff," and "defendant," all refer to court actions. Other provisions in chapter 677 similarly refer to the court or actions in court. *See* Iowa Code §§ 677.3 (stating "[o]n the trial thereof"); 677.4 (noting that "[a]fter an action for the recovery of money is brought, the defendant may offer *in court* to confess judgment" (emphasis added)). Those terms are not used in administrative proceedings.

Administrative procedures are governed by chapter 17A, which is found at subtitle 6 of Title I, entitled "State Sovereignty and Management." The Administrative Procedures Act "is intended to provide a minimum procedural code for the operation of all stated agencies when they take action affecting the rights and duties of the public." The Act defines a "contested case" as "a proceeding" "in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code § 17A.2(5).

The matter before us arises from Nkanta's petition for workers' compensation benefits "seeking relief under the Chapters of the Iowa Code

relating to workers' compensation." It became a "contested case" when the employer denied Nkanta's injury was the cause of permanent disability. *See* Iowa Code §§ 86.14, .17. "Contested cases" are governed by chapters 17A and 86. *See* Iowa Code §§ 17A.12, 86.14, 86.17.

Pursuant to Iowa Code section 86.18, "Evidence, process *and procedure* in contested case proceedings or appeal proceedings within the agency under this chapter, chapters, 85 and 85A shall be as summary as practicable consistent with the requirements of chapter 17A." (Emphasis added.)

Chapter 17A encourages "informal settlements of controversies." Iowa Code § 17A.10. Section 17A.10(1) provides:

> Unless precluded by statute, informal settlements of controversies that may culminate in contested case proceedings according to the provisions of this chapter are encouraged. *Agencies shall prescribe by rule specific procedures for attempting such informal settlements prior to the commencement of contested case proceedings*. This subsection shall not be construed to require either party to such a controversy to utilize the informal procedures or to settle the controversy pursuant to those informal procedures.

(Emphasis added.)

Section 85.35(1) specifically authorizes settlements in workers' compensation matters, but the settlement must be in writing and "submitted to the worker's compensation commissioner for approval." And section 86.27 provides that "[n]otwithstanding the terms of the Iowa administrative procedure act, chapter 17A, no party to a contested case under any provision of the 'Workers' Compensation Act' may settle a controversy without the approval of the workers' compensation commissioner."

Reading all these provisions together, we conclude that chapter 677 generally, and section 677.7 specifically, is inapplicable in contested case proceedings before the workers' compensation commissioner. The district court and commissioner made no error of law. Settlements (which would include the offer to confess judgment) in workers' compensation contested cases are governed by the specific administrative provisions noted.

The commissioner concluded that the consequence for failing to accept a section 677.7 offer to confess judgment—that is, that defendant shall recover costs—conflicts with discretion granted to the commissioner in Iowa Code section 86.40. Here, we give deference to the commissioner's interpretation as he has been specifically vested with discretion in assessing costs. *John Deere Dubuque Works v. Caven*, 804 N.W.2d 297, 300 (Iowa Ct. App. 2011).

The commissioner also concluded that "[c]hapter 677's mandatory cost assessment provisions are general statutes that conflict with the express provisions of Iowa Code section 86.40, which specifically provides that all costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." We do not find this interpretation "irrational, illogical, or wholly unjustified" and therefore affirm. *See* Iowa Code § 17A.19(10)(*l*).

C. Taxation of costs.

The employer also argues that notwithstanding the offer to confess judgment, the commissioner abused his discretion in ordering each party to pay their own costs. As noted, section 86.40 states, "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner."

An abuse of discretion may be shown when it is exercised on untenable grounds or was clearly erroneous. *IBP, Inc. v. Al–Gharib,* 604 N.W.2d 621, 630 (Iowa 2000). Our supreme court has stated, "When reviewing the taxation of costs, we consider the success of the applicant on the issues raised on appeal as shown by the record." *Robbennolt v. Snap-On Tools Corp*., 555 N.W.2d 229, 238 (Iowa 1996) (remanding the assessment of costs back to the commissioner for redetermination of costs).

Wal-Mart asserts that Nkanta was wholly unsuccessful in the proceedings before the commissioner. Nkanta argues, however, that at the time of hearing, Nkanta's independent medical evaluation (IME) remained unpaid and Wal-Mart did not agree to pay for the cost of evaluation until the hearing. The commissioner apparently agreed, ruling on Wal-Mart's post-hearing motion to enlarge or amend:

> The hearing order documents a stipulation made at the time of hearing the defendants "admit they owe IME fee and stipulate it is reasonable." Defendants therefore are found to have failed to reimburse claimant for the reasonable fees associated with an IME prior to the hearing of this matter. For that reason claimant was successful in a part of his claim by presenting the case for hearing. The motion to enlarge/amend is therefore denied.

Wal-Mart here contends that the issue of an IME bill was not submitted for determination by the deputy at the arbitration hearing, and therefore, it was an abuse of discretion for the commissioner to rule that the deputy's acceptance of the stipulation constituted success in a part of Nkanta's claim.

The petition filed with the commissioner asserts the dispute in this case as: "Arising out of and in the course of, extent of TTD [temporary total disability],

PTD [permanent total disability], TPD [temporary partial disability], HP, PPD [permanent partial disability] medical and mileage." The defendants "admitted that the listed issues are in dispute between the parties." A review of the March 26, 2010 hearing transcript indicates that the "two issues in dispute in this case are whether or not the alleged injuries are a cause of permanent disability; and if so, the extent of Claimant's entitlement to permanent disability benefits." However, the stipulation to which the commissioner refers appears on the "Hearing Report" submitted at the arbitration hearing, and "identif[ies] disputed issues and stipulations" for the deputy.

In as much as "medical" appears to have been put in issue by the petition, we cannot say the commissioner abused his discretion in finding the claimant partially successful. We affirm.

AFFIRMED ON BOTH APPEALS.