IN THE COURT OF APPEALS OF IOWA

No. 3-110 / 12-0892
Filed May 15, 2013

ESTATE OF JOHN A. HERMAN,
Plaintiff-Appellant,

vs.

OVERHEAD DOOR COMPANY OF DES MOINES, INC., and COLUMBIA INSURANCE GROUP,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

The Estate appeals a district court decision upholding the workers' compensation commissioner's denial of benefits for Herman's right foot injury. **REVERSED AND REMANDED.**

Nicholas W. Platt of Hopkins & Huebner, P.C., Des Moines, for appellant.

Mary M. Schott and Ronald E. Frank of Sodoro, Daly & Sodoro, P.C., Omaha, Nebraska, for appellees.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

After John Herman's death, the Estate of John Herman was substituted as the appellant in the instant action. The Estate appeals a district court decision upholding the workers' compensation commissioner's denial of benefits for Herman's right foot injury. Because we find the commissioner's outright rejection of uncontroverted medical opinions is not supported by substantial evidence when the record is viewed as a whole, and we find Herman's injury arose out of and in the course of his employment as a matter of law, we reverse and remand.

I. Background Facts and Proceedings.

John Herman worked primarily as a manual laborer during his lifetime. He worked for Overhead Door Company of Des Moines from August 1994 until his alleged work injury in January 2009. The Overhead Door facility had a heated front office for customers, a shop area, a warehouse area, and a Morton building connected to the warehouse. The warehouse and Morton buildings were unheated.

Herman spent the majority of his time in the shop area, though his work activities varied by the day. Herman testified that the shop was unheated at the time of his injury, and that the heaters had been broken for a couple of years. He further testified that he told his bosses that the heaters were not working and that it was very cold. Due to the temperature in the shop and warehouse, he wore long underwear, jeans, a hooded sweatshirt, work coat, thermal socks, boots, and gloves. General Manager Jeff Barnett testified that the company had ongoing issues with heaters, and that one of the heaters in the warehouse was

not working. Overhead Door's owner, Jim McNabb, confirmed that there was a broken heater in the warehouse area during the time of Herman's injury. Herman testified that McNabb told him "you guys are going to freeze your asses off this winter," in reference to the broken heaters in the shop.

Herman's duties included throwing away scrap material and emptying trash cans, which required him to walk outside to the dumpster multiple times per day. The dumpster was approximately ten to twenty feet from the warehouse. The warehouse door opened for trucks picking up or making deliveries, which could happen multiple times per day. However, McNabb testified no deliveries were made that day.

During the day he first noticed his injury, January 21, 2009, Herman estimated the temperature in the warehouse was in the teens. The National Oceanic and Atmospheric Administration (NOAA) reports the local low temperature was sixteen degrees and the high temperature thirty-three degrees, on that day. There was no new snow, but the ground was covered with five inches of previous accumulation. McNabb testified that the snow had been cleared in the area where Herman was required to walk, and it was not Herman's job to clear the snow. Yet, Herman noticed blisters on his right foot and toes after work on January 21, 2009. The following day, while at work, Herman noticed that his foot was wet, and he discovered that the blisters had broken open. The low temperature was twenty degrees and the high temperature was forty-seven degrees on January 22. Herman testified that outside of work he did not participate in any outdoor activities during January 21 through the 23.

Upon arrival at work on January 23, Herman showed his foot to his supervisor, Jeff Barnett, who sent Herman to the emergency room. Herman was admitted to the hospital the next day. Doctors determined that he had frostbite and a secondary infection on his right foot.

Dr. Lester Yen treated Herman during and after his hospital stay. Yen attempted to repair the damage on Herman's foot with a skin graft on March 6, 2009. A second attempt to re-graft the skin was made in May 2009. After his right great toe became infected, Herman was referred to a bone specialist. Ultimately, Herman was referred to Dr. Colin Pehde, who treated Herman from June 2009 through filing of appellate briefs. Dr. Pehde performed a partial amputation of Herman's right great toe on July 22, 2009. As a result of the amputation, Herman developed ulcerations on his second and third toes. Dr. Pehde performed a tenotomy to address persistent pain. On January 11, 2010 Dr. Pehde noticed infection in the area where the tenotomy was performed. Herman was hospitalized until February 2, 2010.

Herman sought compensation for his right foot injury. Both of his treating physicians offered expert opinions supporting causation. Dr. Yen opined that it was "more likely than not" that Herman's injury was caused or aggravated by work. Dr. Pehde opined that, to a reasonable degree of medical certainty, Herman's surgery and further treatment were causally related to his work injury on January 21, 2009.

Overhead Door denied benefits claiming his injury was not work related. The arbitration decision held that Herman did not meet his burden of proof to

demonstrate that the injury was causally related to work. The commissioner affirmed the deputy. Herman filed a petition for judicial review. The district court affirmed the agency, finding substantial evidence supported the decision that the work environment at Overhead Door did not cause Herman's frostbite injury. Herman's Estate appeals, challenging the findings that Herman's injury (1) was not caused by his employment, and (2) did not arise out of or in the course of his employment.

II. Scope and Standard of Review.

Iowa Code chapter 17A governs judicial review of the decisions of the workers' compensation commissioner. Iowa Code § 86.26 (2009); *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. Our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. §17A.19(10).

"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*, 807 N.W.2d 839, 844 (Iowa 2011). Therefore, the commissioner's finding regarding medical causation may only be reversed if it is not supported by substantial evidence. Iowa Code § 17A.19(10)(f). "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.

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." *Pease*, 807 N.W.2d at 845 (quoting *Wal–Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003)). Thus, we review the Estate's allegations of error to determine if the factual findings of the workers' compensation commissioner regarding causation are supported by substantial evidence. *Id*.

The Estate also alleges the commissioner erred in application of the law to the facts with his determination that Herman's injury did not arise out of and in the course of employment. On this assertion of error, "we will disturb the commissioner's decision 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)).

III. Discussion.

A. Causation.

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 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).

This case does not present a classic "battle of the experts" where the commissioner chose between conflicting expert opinions. *Cf*. *Pease*, 807 N.W.2d at 850. Rather, Herman presented uncontroverted expert medical opinions in support of causation. The experts provided written opinions and testified by deposition, but did not appear before the commissioner. The commissioner made no credibility findings with respect to the expert opinions; he merely adopted the findings of the deputy who inexplicably stated the doctors were not helpful in determining whether the frostbite occurred at work.

Other objective evidence of record also supported a finding of causation. Medical histories recorded by five different physicians demonstrate that Herman provided consistent accounts of feeling pain and wetness in his foot while he was at work on January 21, 2009. Dr. Randleman, who evaluated Herman in the emergency room, stated, "Mr. Herman related that he had first noted the foot

exhibiting signs of irritation on Wednesday the 21st of January." Hospital physician Dr. Joseph Schupp III noted Herman "had frozen his toes . . . he had socks on his foot which was stuck to his foot on Wednesday." Dr. Nargis Naheed noted:

> Per the patient, on Wednesday, he was working outdoors and felt that his right foot was wet and he had pain in his foot as well. When he got home, he noticed that the lateral three toes were swollen. The next day, on 1/22/09, he went to work again and worked outdoors all day. This time, he felt the same and noticed that there were blisters which burst open.

On January 27, Dr. Eric Scott noted Herman

> states on Wednesday he was working outside as a garage door maintenance person. His boots were ankle high. He did have wet foot. He states that he was in the cold weather for approximately eight hours. He got home that day. He had blisters over his right lateral toes. He went to work on Thursday. After work, he took his socks off, and his blisters opened.

In a note from the same date, Dr. Lester Yen observed Herman "works both indoors and outdoors apparently or inside some sort of unheated warehouse space and noticed that last Wednesday about six days ago that he had some wetness in his foot. He apparently had his sock frozen to his foot at that time and had to peel this off."

Dr. Yen treated Herman from shortly after his injury for several months. He opined, "Mr. Herman's frostbite injuries to his right foot were more likely than not caused or aggravated by his working conditions on January 21, 2009, and January 22, 2009, and precipitated the necessity of the treatment which I have provided him." Dr. Pehde treated Herman from June 2009 through the filing of appeal. He agreed that "within a reasonable degree of medical certainty . . .

Herman's frostbite on his right foot and subsequent problems in treating this frostbite are causally related to his January 21, 2009 work injury."

Nonetheless, the agency rejected these opinions. The deputy observed, the "fighting issue is whether the frostbite occurred at work. None of the doctors were of help in answering this question." Yet, he fails to explain why he disregarded the doctors' opinions. The commissioner acknowledged that Herman "presented medical evidence of a relationship between his employment and his injury" yet concurred with the deputy's finding that Herman's work environment was not sufficiently cold to cause his workplace injury. Like the deputy, the commissioner failed to provide any explanation as to why he disregarded the uncontroverted medical expert opinions.

Both the deputy and the commissioner failed to acknowledge the testimony of Dr. Yen, who explained that frostbite results from a combination of environmental factors, "for example, it's not the absolute temperature but maybe the duration that it's exposed, and it's not just an absolute temperature and duration issue, but you probably lower the threshold for a frostbite full-thickness-type injury if there is a cold, specific length of time and pressure on top of that." Similarly, the district court dismissed the medical opinions and continued the singular focus on temperature by stating, "[n]either doctor had any special knowledge of the temperature inside the workshop, so substantial evidence supports the Commissioner's decision to disregard the doctor's opinions on the issue of workshop temperature."

The commissioner found the claimant to be credible, and made no indication that he thought the experts were provided with an inaccurate or incomplete history. The commissioner also acknowledged that Herman "presented medical evidence of a relationship between his employment and his injury." We find the commissioner's outright rejection of the doctors' uncontroverted medical opinions is not supported by substantial evidence when the record is viewed as a whole.

B. Arising out of and in the course of employment.

Whether or not an injury arose out of and in the course of employment is a mixed question of law and fact; thus, we review the agency determination for abuse of discretion. Iowa Code § 17A.19(10)(m); *Meyer v. I.B.P., Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). While application of the law to the facts is vested by law in the discretion of the agency, if the agency exercises its discretion based on an erroneous interpretation of the law, we are not bound by those conclusions. *Stroup v. Reno*, 530 N.W.2d 441, 443 (Iowa 1995). If the claim of error lies with the agency's interpretation of the law, we may substitute our interpretation for the agency's. *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596, 604 (Iowa 2005). "[W]e will disturb the commissioner's decision if it is '[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact.'" *Jacobson Transp. Co.*, 778 N.W.2d at 196 (quoting Iowa Code § 17A.19(10)(m)).

Our supreme court recently explained compensability for injuries "in the course of" and "arising out of" employment:

> The element of "in the course of" refers to the time, place, and circumstances of the injury. To satisfy this requirement, the injury must take place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.
>
> The element of "arising out of" requires proof that a causal connection exists between the conditions of [the] employment and the injury. In other words, the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of [the] employment.

Lakeside Casino v. Blue, 743 N.W.2d 169, 174 (Iowa 2007) (internal citations and quotation marks omitted). 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)).

Here, the medical record and climatological evidence demonstrates that Herman's injury coincided as to time, place, and circumstances, and occurred within the period of the employment, while Herman was fulfilling work duties or engaged in something incidental thereto, thereby satisfying the "in the course of" element. While Herman and his employer offered conflicting testimony, the agency did not find one party more credible than the other. The deputy concluded, "I could not detect from John's demeanor that he was untruthful, but the same can be said of the demeanor of the owner of Overhead Door, McNabb and his witnesses."

The medical expert opinions further support the conclusion that Herman's injury arose out of and in the course of his employment. The district court noted that Dr. Yen agreed the injury could have occurred between January 15 and

January 24. However, Dr. Yen also said there was nothing inconsistent in his observation with the injury occurring on January 21, 2009.

The district court stated the "doctor's opinions merely support a diagnosis of frostbite. The opinions do not suggest where the injury occurred because, as Dr. Yen stated, neither doctor was present when Herman experienced his frostbite." First, we conclude this statement is factually incorrect. Both Dr. Yen and Dr. Pehde provide opinions that Herman's injury was caused by his work conditions. The district court also erred in applying the law to the facts by requiring Herman to present an expert who was present at the time of the injury in order to satisfy the "arising out of" and "in the course of" employment elements.

Under the actual-risk doctrine, to establish the "arising out of" element, Herman is only required to prove that the nature of his employment exposed him to the risk of such an injury. *Lakeside Casino*, 743 N.W. 2d at 174. He has done so through his testimony, medical expert opinions, medical records, and weather reports. Furthermore, although the deputy commissioner questioned the temperature at the work site, he noted that the owner and another witness testified that one heater was not working at the time of the injury. We also observe that Dr. Yen explained that some people are more susceptible to frostbite injury than others.

The employer relies heavily on Herman's comment made to co-workers on the job-site on January 21, 2009, that his injury "doesn't have anything to with this place." However, on January 25 Herman inquired of one of his physicians if

his foot injury could have been caused by frostbite. Clearly Herman did not know the actual cause of his injury. Moreover, even some of the physicians did not initially know the cause of his injury. Accordingly, we find this statement not significantly supportive to the employer's position.

We conclude the commissioner's finding that Herman's injury did not arise out of or in the course of employment was based upon an irrational, illogical, or wholly unjustifiable application of law to fact.

IV. Conclusion.

We find the commissioner's outright rejection of uncontroverted medical opinions is not supported by substantial evidence when the record is viewed as a whole. The commissioner made no credibility findings regarding the expert opinions, and provided no reasons for discounting their opinions. We conclude the evidence does not support the finding actually made by the commissioner that Herman's injury was not caused by his work environment, in light of the medical evidence supporting causation. We also find Herman's injury arose out of and in the course of his employment as a matter of law. Accordingly, we reverse the district court's decision upholding the agency denial of workers' compensation benefits to Herman and remand to the district court for remand to the commissioner for a determination of benefits.

REVERSED AND REMANDED.