

IN THE COURT OF APPEALS OF IOWA

No. 8-486 / 07-2016
Filed October 29, 2008

**ROBERTS DAIRY and OLD
REPUBLIC c/o CRAWFORD & COMPANY,**
Plaintiffs-Appellants,

vs.

VERNON PASTOUR,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano,
Judge.

An employer appeals from the district court's ruling on judicial review,
affirming the award of workers' compensation benefits to its former employee.

AFFIRMED.

Joseph M. Barron and Stephen Spencer of Peddicord, Wharton, Spencer,
Hook, Barron, & Wegman, LLP, Des Moines, for appellant.

Randall P. Schueller of Hopkins & Huebner, P.C., Des Moines, for
appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

Roberts Dairy and its insurance carrier, Old Republic, appeal from the district court's ruling on judicial review affirming the award of workers' compensation benefits to Vernon Pastour. We affirm.

I. Background Facts and Proceedings

In 1985, Pastour began working for Roberts Dairy as a maintenance worker. He later bid into a production job on the assembly line and eventually became a utility worker, filling in for other workers on vacation or sick leave. On February 21, 2003, Pastour was loading cartons onto a cart when he felt "a sting or a twinge or like a little electric shock" in the lower right side of his back. The following day, Pastour reported his injury to his supervisor, who filled out a workers' compensation report and referred Pastour to Dr. Colin Kavanaugh. On February 24, 2003, Dr. Kavanaugh diagnosed Pastour with a lumbosacral sprain and restricted Pastour to light duty work. The following month, Pastour experienced a relapse of symptoms and Dr. Kavanaugh continued Pastour's work restrictions and recommended physical therapy, which Pastour completed. On April 7, 2003, Dr. Kavanaugh released Pastour to work without restrictions. On October 1, 2003, Pastour saw Dr. Jay A. Rosenberger for a routine physical, and did not report any back problems.

On October 7, 2003, following his work day, Pastour drove to a Department of Transportation office to renew his driver's license. As he was getting out of his car, he felt the same type of sting or twinge as he had felt in February 2003. The following day, Pastour reported the pain to his supervisor and scheduled an appointment with Dr. Kavanaugh. After an examination, Dr.

Kavanaugh noted Pastour “feels that his back has never been quite right since [the] original injury,” and diagnosed Pastour with an exacerbation of chronic low back pain. His referral to an orthopaedic back specialist was not pursued as Roberts Dairy did not approve it. On October 23, 2003, Pastour returned to Dr. Kavanaugh for a follow-up visit. Dr. Kavanaugh released him to return to regular job duties as tolerated, but continued to recommend that Pastour “have a second opinion about his low back with an orthopaedic specialist to help him out in terms of overall prognosis.”

In March 2004, Pastour saw a chiropractor, Kari Swain, for back pain. He reported that his pain began while moving cartons in February 2003 and became aggravated while exiting his car in October 2003. Dr. Swain’s records note that Pastour aggravated his back in May, June, and July while doing non-work related activities. However, Pastour does not remember reporting these instances to Dr. Swain. Pastour stopped treatment with Dr. Swain in August 2004.

In August 2004, Pastour saw an orthopaedic surgeon, David E. Hatfield, for his back pain. He again reported that his pain began in February 2003. Dr. Hatfield ordered an MRI, which revealed spinal stenosis at the L2-3, L3-4, and L4-5 levels, and subsequently recommended spinal decompression surgery. On September 21, 2004, Pastour underwent the surgery, which also revealed a disc herniation. During his post-op visit, Dr. Hatfield restricted Pastour from lifting more than thirty pounds. Pastour returned to work on November 8, 2004, and remained working at Roberts Dairy until the plant closed in June 2005.

On February 10, 2005, Pastour filed a workers’ compensation petition. A hearing was held, during which Pastour testified and his medical records were

introduced and received into the record. The evidence included the reports of Drs. Kavanaugh and Hatfield, as well as that of Dr. William R. Boulden, who provided an independent medical evaluation on behalf of Roberts Dairy. On March 22, 2006, the deputy issued an arbitration decision, finding Pastour's herniated disc was causally related to his February 2003 work injury, and he was entitled to healing period benefits after his September 21, 2004 surgery until his return to work on November 8, 2004. The deputy further found that Pastour sustained a twenty percent industrial disability entitling him to 100 weeks of permanent partial disability. The deputy denied Pastour's request for penalty benefits as he found the case was fairly debatable at the time Roberts Dairy denied Pastour's claim. Roberts Dairy appealed and Pastour cross-appealed. On January 20, 2007, the commissioner affirmed, adopting the arbitration decision. The district court on judicial review affirmed the commissioner's award. Roberts Dairy appeals.

II. Scope and Standard of Review

A district court reviews agency action pursuant to the Iowa Administrative Procedure Act. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001). When we review a district court decision reviewing agency action, our task is to determine if we would reach the same result as the district court in our application of the Act. *City of Des Moines v. Employment Appeal Bd.*, 722 N.W.2d 183, 189-90 (Iowa 2006). The district court may reverse or modify an agency's decision if the agency's decision is erroneous under a ground specified in the Act and a party's substantial rights have been prejudiced. Iowa Code § 17A.19(10) (2005). The district court or an appellate court can only grant relief

from the commissioner's decision based upon a determination of fact by the commissioner that "is not supported by substantial evidence in the record before the court when that record is viewed as a whole." *Id.* § 17A.19(10)(f). Just because the interpretation of the evidence is open to a fair difference of opinion does not mean the commissioner's decision is not supported by substantial evidence. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 603 (Iowa 2004). An appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record. *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33-34 (Iowa 2005).

III. Causal Connection

Roberts Dairy first asserts that Pastour failed to meet his burden of proof that his February 2003 work injury is causally related to his current disability. To receive workers' compensation benefits, an employee must show by a preponderance of the evidence that his work injury is the proximate cause of the disability on which his claim is based. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998).

Generally, expert testimony is essential to establish causal connection. The commissioner must consider the expert testimony together with all the other evidence introduced bearing on the causal connection between the injury and the disability. The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Such weight depends on the accuracy of the facts relied upon by the expert and surrounding circumstances. The commissioner may accept or reject the expert opinion in whole or in part.

Id.

In the present case, the agency found that Pastour had established that his herniated disc was causally related to his February 2003 work injury. The

agency based this finding upon the medical opinions of Drs. Kavanaugh and Hatfield, as well as Pastour's "credible testimony" and other medical records. Pastour's medical records indicated that prior to February 2003, Pastour did not have any back pain. Dr. Kavanaugh, who treated Pastour following both the February 2003 injury and the October 2003 aggravation, expressed the opinion that the two were directly related. Based upon Pastour's presenting history, physical exam findings, MRI findings, and findings at the time of surgery, Dr. Hatfield believed that Pastour's condition was the result of an exacerbation of an underlying condition. Pastour testified that following his February 2003 injury, he had never been pain-free. In contrast to the two doctors who treated Pastour, Dr. Boulden provided an independent medical evaluation and opined that Pastour's February 2003 injury and October 2003 symptoms were not related and neither would support a permanent restriction or impairment.

Roberts Dairy argues that the agency gave too much weight to Dr. Kavanaugh and Dr. Hatfield's opinions. However, as the district court noted, this finding "goes to the weight and credibility of the expert's testimony, which is a determination left to the Deputy." See *St. Luke's Hospital v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000) (stating the weight to be given to expert testimony is for the finder of fact); *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998) ("The commissioner, as the fact finder, determines the weight to be given to any expert testimony."). The agency weighed the evidence and found Dr. Kavanaugh and Dr. Hatfield's medical opinions to be both competent and credible.

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.

Arndt v. City of Le Claire, 728 N.W.2d 389, 394 (Iowa 2007). Consequently, upon our examination of the entire record, we conclude the agency's findings are supported by substantial evidence.

IV. Industrial Disability

Roberts Dairy next asserts that substantial evidence does not support the agency's award of twenty percent industrial disability.

Industrial disability goes beyond body impairment and measures the extent to which the injury impairs the employee's earning capacity. Functional disability is, however, one factor in the determination of industrial disability. Other factors included in the determination of industrial disability are the employee's age, education, qualifications, experience, and the ability of the employee to engage in employment for which the employee is fitted.

Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994).

At the time of the hearing, evidence established that Pastour was 62 years old, a high school graduate, had attended two years of college, and had worked at Roberts Dairy since 1985. Dr. Hatfield assigned a ten percent permanent impairment of the whole body. Due to his injury, Pastour had lost access to heavy work that he was able to perform prior to his injury, but is employed part-time, with only self-imposed limitations due to his back injury. He collects both social security and Teamster's retirement benefits.

As a fact finder, it is the agency's function to determine the weight evidence should be given in computing an industrial disability award. *Arndt*, 728 N.W.2d at 394-95 ("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.”). We conclude that the agency considered the appropriate factors and although a different conclusion could have been made, the agency’s finding that Pastour suffered a twenty percent industrial disability is supported by substantial evidence.

Because we find substantial evidence supports the agency’s decision, we affirm the district court.

AFFIRMED.