IN THE COURT OF APPEALS OF IOWA

No. 8-626 / 08-0191
Filed December 17, 2008

STACEY SANDBERG,
Petitioner-Appellant,

vs.

RUBBERMAID HOME PRODUCTS,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Employee appeals from a ruling on petition for judicial review reversing the workers' compensation commissioner's award of industrial disability benefits. **AFFIRMED.**

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

Stephanie L. Marett and Coreen K. Sweeney of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Heard by Vogel, P.J., Miller, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ZIMMER, S.J.

The question on appeal is whether chronic pain alone can serve as the basis for converting what would otherwise be a scheduled member injury to a body–as–a–whole injury. The workers' compensation commissioner adopted a deputy commissioner's decision that answered the question in the affirmative. On the employer's petition for judicial review, the district court reversed. Stacy Sandberg now appeals.

I. Background Facts and Proceedings.

Stacy Sandberg graduated from high school and then obtained a degree in interior design from Patricia Stevens Career and Finishing School. She also attended Indian Hills Community College and is six credit hours short of an associate of arts degree. She has worked as a cashier, shelf stocker, customer service worker, and pharmacy assistant.

Sandberg began working for Rubbermaid Home Products in March 1998, left in June 1998, and then returned in December 1998. While in Rubbermaid's employ, Sandberg worked in production, as a utility worker, and as a fill-in supervisor. On December 9, 2000, Sandberg suffered a work-related injury when she stepped down from a machine, rolled her right ankle, and felt a pop or snap in her foot.

Sandberg continued to have problems with her right extremity—including chronic pain—since the date of the injury and an April 2001 tarsal tunnel surgery. Sandberg left Rubbermaid on October 3, 2001, stating she did not want to reinjure her foot. She was making $10.25 per hour when she resigned.

On June 18, 2002, Dr. Kenneth Pollack, Sandberg's treating physician, found her to have reached maximal medical improvement and opined:

> Ms. Sandberg has impaired sensory function over the 3rd and 4th toes and dysesthesias of the medial and lateral plantar nerves. Maximum impairment due to dysesthesias of these nerves are [sic] indicated on Table 17-37, page 552 of the AMA Guides to the Evaluation of Permanent Impairment, 5th ed. These maximum values are 5% for each nerve, which I believe is appropriate due to the severity of her pain. The sensory deficit is fairly limited, not involving the entire peripheral distribution of both these nerves, and therefore should be reduced from the maximum 5% lower extremity impairment for each nerve. I therefore assign impairment due to dysesthesias, 5% for the lower extremity due to medial plantar nerve, 5% due to dysesthesias of the lateral plantar nerve, and 3% due to sensory loss. Using the Combined Values Chart on page 604, these three values combine for a total of 13% of the lower extremity.

After leaving Rubbermaid, Sandberg returned to a previous employer, Bratz Texaco, as cashier and shelf stocker. She worked "forty-plus" hours per week for Bratz for about three years. When she resigned in January of 2004 she was earning $10.25 per hour. She resigned because she could not "handle working on my feet on those long hours."

Since January 2004, Sandberg has been self-employed, performing cleaning services for several local businesses. The cleaning work provides flexible hours. She works about four hours and earns about $185 per week.

On June 13, 2005, Sandberg filed a petition with the workers' compensation commissioner alleging a December 9, 2000 work injury to her right lower extremity, chronic regional pain syndrome (CRPS), and depression. Rubbermaid admitted the injury to Sandberg's right lower extremity, but otherwise denied the allegations in the petition.

Following a hearing, Larry Walshire, a deputy commissioner, issued a ruling finding specifically that Sandberg was credible; Sandberg's work injury caused significant permanent impairment to the right leg; Sandberg left Rubbermaid due to chronic pain; Sandberg did not suffer from CRPS "because the weight of evidence cannot support such a finding"; Sandberg has developed "major mental depression" that is "likely permanent based upon the uncontroverted views of Dr. [James] Corcoran [DO] who stated that the depression is caused by the chronic pain and varies with the level of chronic pain"; the "mental depression to date is not a cause of restrictions"; and Sandberg has not put much effort into seeking sedentary work "despite having the apparent skills to be successful in such work." None of these findings (except the permanency of Sandberg's depression) was seriously challenged upon hearing of Rubbermaid's petition for judicial review to the district court.

Rubbermaid, however, did challenge the finding—adopted without comment by the commissioner—that the "injury which began in the foot, later extended into the ankle and up the leg, has now extended via the nervous system, including the brain, into the body as a whole." From that finding, the deputy concluded that Sandberg was entitled to be compensated for a body-as-a-whole injury and found a sixty percent industrial disability under Iowa Code section 85.34(2)(u) (2007).

Rubbermaid argued to the district court that chronic pain does not entitle Sandberg to industrial disability. The district court agreed.

> [T]he Court is aware of no case law that supports the notion that chronic pain alone can serve as the basis for converting what would otherwise be a scheduled member injury to a body-as-a-whole

> injury. Claimant has provided no such case law to the Court, and petitioners assert there are no such cases.
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> . . . . [T]here have been several decision from the Workers' Compensation Commissioner in which chronic pain has served as the basis for a finding of a body-as-a-whole injury. However, petitioners also note important factors about these decisions. First, they are factually distinguishable from the case before the Court. Second, they have all been written by the same deputy. From reading the deputy's decision here, it is clear to the Court that he (and the Commissioner by summarily affirming the decision of the deputy) is attempting to extend existing law. The deputy reasoned that because chronic pain is by definition felt in the brain, it thus serves as an injury to the body as a whole and justifies a finding of industrial disability. The court can find no legal basis for such a conclusion. There is nothing in the statute or existing case law that suggests that a scheduled member injury becomes converted to an injury to the body as a whole where chronic pain results from the injury *unless* the pain becomes invasive to other parts of the body as with CRPS. The Court concludes that the mere presence of chronic pain does not justify a finding of an injury to the body as a whole.

The district court also concluded that even though substantial evidence supported the agency finding of permanent depression, given that the agency also found that the depression did not result in work restrictions, the depression could not serve as a basis for a finding of industrial disability. The district court reversed the industrial disability award and remanded for further action. Sandberg now appeals.

II. Scope and Standard of Review.

Our scope of review in workers' compensation cases is governed by the Iowa Administrative Procedure Act, chapter 17A (2007). *Meyer v. IBP, Inc*., 710 N.W.2d 213, 218 (Iowa 2006). Our review of the commissioner's decision is for errors at law, not de novo. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated

in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218.

The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so we are bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds*, 686 N.W.2d at 464-65. Because factual determinations are within the discretion of the agency, so is its application of law to the facts. *Clark*, 696 N.W.2d at 604; *see also Meyer*, 710 N.W.2d at 219 (stating the reviewing court should "allocate some degree of discretion" in considering the agency's application of law to facts, "but not the breadth of discretion given to the findings of facts"). We will reverse the agency's application of the law to the facts if we determine its application was "irrational, illogical, or wholly unjustifiable." *Meyer*, 710 N.W.2d at 218.

III. Merits.

Sandberg argues that the district court erred as a matter of law in concluding her depression did not result in a body-as-a-whole injury to be compensated industrially. She also argues that chronic pain must be compensated industrially for the same reasons that CRPS can be compensated industrially.

A. Depression.

Our Workers' Compensation Act divides permanent partial disability into a scheduled or unscheduled loss. *See* Iowa Code § 85.34(2)(a)-(u) (2007). Sections 85.34(2)(a)-(t) specify the scheduled injuries, such as a loss of a hand, and set forth the compensation payable for such injuries. Compensation for scheduled injuries is based on functional impairment and is limited to the loss of the physiological capacity of the body or body part. *Mortimer v. Freuhauf Corp.,* 502 N.W.2d 12, 14 (Iowa 1993).

In contrast, according to section 85.34(2)(u), unscheduled injuries are compensated by determining the employee's industrial disability. One arrives at industrial disability by determining the loss to the employee's earning capacity. *Id.* Measuring the employee's loss of earning capacity requires the commissioner to consider the employee's functional impairment, age, education, work experience, and adaptability to retraining; to the extent any of these factors affect the employee's prospects for relocation in the job market. *Id.*

When there is injury to some scheduled member and also to parts of the body not included in the schedule, the resulting disability is compensated on the basis of an unscheduled injury. *Id.* at 16.

Sandberg contends the agency's finding of permanent depression justifies the award of industrial disability, i.e., compensation on the basis of an unscheduled injury. We agree that depression *may* justify compensation for injury to one's body-as-a-whole. However, the agency did not base its award on such a finding. In fact, the agency found her "mental depression to date is not a cause of restrictions." No appeal was taken from this finding and it is thus

binding upon us. Because the agency did not find industrial disability based on Sandberg's depression, we will not uphold the award on that basis.

B. Compensability of Chronic Pain.

It is the anatomical situs of the permanent injury or impairment that determines whether the schedules in Iowa Code section 85.34(2)(a)-(t) are applied. *Lauhoff Grain v. McIntosh*, 395 N.W.2d 834 (Iowa 1986). In determining whether an impairment is scheduled or unscheduled, we look beyond the situs of the original injury and consider the impact of the injury on all parts of the body. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 290, 110 N.W.2d 660, 663-64 (1961). In *Barton,* the employee suffered an injury to the foot, a scheduled member. *Id.* at 287, 110 N.W.2d at 661. Because of the injury, causalgia affected the employee's entire nervous system. *Id.* The supreme court held that because of the causalgia, the employee was entitled to compensation based on industrial disability. *Id.* at 292, 110 N.W.2d at 664. Thus, it is clear that when an employee has an injury to a scheduled member and also to a part of the body not included in the schedule, the resultant permanent disability is compensable as an unscheduled injury. *Id*.; *see also Sherman v. Pella Corp.*, 576 N.W.2d 312, 320-21 (Iowa 1998) (discussing thoracic outlet syndrome, which would allow finding of industrial disability). Here, if an actual impairment occurred to an unscheduled portion of the body, a disability has been sustained to the body as a whole.

As already noted, one of the basic principles of judicial review in workers' compensation cases is that, because the commissioner is the fact finder, the commissioner's findings are binding on the court if supported by substantial

evidence. *Lauhoff Grain v. McIntosh*, 395 N.W.2d 834, 840-41 (Iowa 1986). We will broadly and liberally apply those findings in order to uphold, rather than defeat, the commissioner's decision. *Ward v. Iowa Dep't of Transp.,* 304 N.W.2d 236, 237 (Iowa 1981). But, the evidence must support the findings actually made.

"[B]ased largely upon the views of [Dr. Pollack]," the agency concluded that Sandberg's injury "extends to the brain and impacts the whole body." Based upon this finding, the agency then stated "when the effects of such an injury spills over or extends into the body as whole, the injury is compensated industrially rather than limited to any particular schedule in Iowa Code section 85.34."

Only the most strained reading of Dr. Pollack's deposition testimony can support the agency's finding that Sandberg's injury "extends to the brain." Dr. Pollack testified:

> Q. If she doesn't have recurrent tarsal tunnel syndrome and the psychological test is okay to go through the spinal cord stimulator, treatment, then does she have CRPS? A. She does not have CRPS—
>
> Q. Okay. A. –in my opinion.
>
> Q. Okay. What if we rule out tarsal tunnel syndrome? Where does that leave us? What's the next step? A. That leaves us with a woman who has chronic pain.
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> . . . . But she still would not meet the diagnostic criteria of CRPS due to the lack of physical findings.
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> . . . . [C]hronic pain means continuous or ongoing. It's typically characterized by a minimum of three months' duration.
>
> And pain is what the individual defines as an unpleasant sensory sensation.
>
> . . . .
>
> Q. Is the brain involved? A. The brain has to be involved, yes.
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> Q. So you can't have chronic pain when the brain isn't involved? A. Pain is a cognitive experience, so if there is no brain function, there can't be an awareness of pain.

From this exchange, the agency concludes Sandberg's injury extends to her brain. There is no evidentiary basis for this finding—only an unreasonable interpretation of testimony. We agree with the district court that there is nothing in the statute or existing case law that suggests that a scheduled member injury becomes converted to an injury to the body as a whole where chronic pain results from the injury unless the pain becomes invasive to other parts of the body as it does with CRPS.

Dr. Pollack repeatedly rejected a diagnosis of CRPS, which is a recognized body-as-a-whole injury under *Collins v. Department of Human Services*, 529 N.W.2d 627, 629 (Iowa 1995) (finding that reflex sympathetic dystrophy, now known as CRPS, which is a dysfunction of the sympathetic nervous system is compensable as an unscheduled injury). Dr. Pollack described CRPS in this manner:

> A. It's a condition of chronic pain and hypersensitivity that leads to progressive deformity and dysfunction of the limb.
> And it's a disease of the central nervous system.
> It's thought to involve a loss of the modulating pathways in the brain and spinal cord that suppress pain signals.

Dr. Pollack found no evidence to support a finding of CRPS. The agency made a specific finding that Sandberg did not suffer from CRPS. Dr. Pollack concluded Sandberg suffered a thirteen percent impairment of her lower extremity. Dr. Pollack's 2002 written opinion, noted above, also concluded that Sandberg's impairment is confined to the right lower extremity.

We agree with the district court that it appears the agency is attempting to extend the existing law. That responsibility lies with the legislature, not the

agency. The district court properly concluded that the agency's determination of industrial disability based upon chronic pain alone must be reversed.

IV. Conclusion. The district court did not err in reversing the agency's finding of an unscheduled injury based upon chronic pain alone.

AFFIRMED.