IN THE COURT OF APPEALS OF IOWA

No. 9-296 / 08-1643
Filed June 17, 2009

BROADLAWNS MEDICAL CENTER,
Petitioner-Appellant/Cross-Appellee,

vs.

ROSE MARIE SANDERS,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

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

Michael L. Mock and D. Brian Scieszinski, Des Moines, for appellant.

Michael Hoffman of Hoffman Law Firm, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Broadlawns Medical Center (BMC) appeals from the district court's ruling on judicial review, affirming the award of workers' compensation benefits to its former employee, Rose Sanders. BMC argues that the commissioner erred in (1) finding Sanders was entitled to additional temporary benefits, (2) finding Sanders sustained a permanent mental injury, and (3) awarding penalty benefits, and (4) Sanders cross-appeals that the district court erred in reducing her penalty benefits. We reverse.

I. Background Facts and Prior Proceedings.

Rose Marie Sanders was hired by BMC to work as a Certified Nurses' Aide (CNA)/Certified Medication Aide (CMA) to care for mentally challenged adults. She primarily worked as a CNA/CMA between two psychiatric houses, the Arlington House (Arlington) and Oakland House (Oakland). On July 18, 2003, while working at Arlington, she checked on a client and found that the client had hung herself from a closet door. Sanders had to pull the door off of the frame in order to get the client down. She then administered CPR, but to no avail. After the body was removed, Sanders was responsible for cleaning the client's room, doing her laundry, and gathering her belongings for the family. She returned to work the next day. Sanders then began to experience psychological problems: olfactory hallucinations and flashbacks caused by what she described as the "death smell," sleeplessness, and difficulty performing her work duties.

Sanders was seen by Martin B. Mortens, D.O., on July 23, 2003, who prescribed Xanax after diagnosing her with situational anxiety and Post

Traumatic Stress Disorder (PTSD). Deems Ortega, Ph.D., met with Sanders on several occasions in October and November 2003, and determined she suffered from anxiety, nightmares, and hypervigilance. He excused her from work on October 2 and 7, 2003. On November 7, 2003, Sanders asserted Dr. Ortega did not understand her distress and discontinued her therapy with him. James L. Gallagher, M.D., became Sanders's new physician, and he determined she had the same problems as diagnosed by Dr. Ortega. Dr. Gallagher excused her from work on October 23 and 24, 2003. He felt that with ongoing treatment, the emotional impact "should lessen with the passage of time." He continued to see Sanders as needed, continuing with his prognosis that her condition would improve. By March 26, 2004, Dr. Gallagher noted that Sanders had "stored up a number of things" that were still troubling her, and he excused her from work for that day. By May 7, 2004, Dr. Gallagher felt that Sanders was "on the mend," but by July 16, 2004, while she was very close to maximum medical improvement (MMI), he noted that she still felt anxious about returning to work at Arlington.

On July 21, 2004, Dr. Gallagher restricted Sanders from returning to work at Arlington, and based on this restriction, on September 13, 2004, Sanders received a termination notice from BMC. However, to allow Sanders to keep her job, Dr. Gallagher rescinded the restriction of working at Arlington, as he felt she had made substantial progress. Sanders continued to work primarily at Oakland, only working at Arlington on an emergency basis. On March 24, 2005, BMC informed her that they would continue to primarily staff her at Oakland, but she was expected to attend all mandatory meetings at Arlington. Dr. Gallagher met with her again on October 7, 2005, and found that if she remained working at her

present location, and occasionally went to Arlington on an emergency basis, he felt she would do well, and no medication was required.

On October 24, 2005, on the recommendation of her attorney, Sanders met with Kenneth R. Mills, Ph.D., who confirmed the diagnosis of PTSD, but agreed that she would continue to improve. While he believed that she had not reached MMI, he could not assign any level of permanent impairment, and limited the amount of work she could perform at Arlington. Dr. Gallagher primarily agreed with Dr. Mills's assessment that Sanders would probably continue to improve, but found problematic that Sanders "had not been particularly motivated for appropriate treatment," so was likely at or close to MMI. He stated that her impairment was mild, "as outside of Arlington House, she seems to conduct herself quite well," and if she were motivated to seek appropriate treatment, she would have the possibility of other employment. Dr. Gallagher was unable to state that Sanders's condition was permanent in nature but maintained she would likely continue to improve.

When Sanders began working primarily at Oakland, her overtime hours dropped from an average of 17.17 to 4.68 hours per week, as Oakland did not offer as many overtime opportunities. Sanders claimed that her inability to work at Arlington reduced her earning capacity. She filed a petition in arbitration alleging she sustained a mental injury. BMC stipulated Sanders sustained an injury arising out of and in the course of her employment, and also to being off work for four days, with one day compensable as a temporary total disability. On November 27, 2006, the deputy in his decision determined Sanders was entitled to temporary total disability benefits (TTD) for all four days; temporary partial

disability benefits (TPD) in the amount of $2983.91; permanent partial disability benefits (PPD) for 150 weeks, beginning July 16, 2004; medical expenses; and $5000 in penalty benefits. On February 19, 2008, the commissioner affirmed the decision. On judicial review, the district court affirmed but reduced the penalty benefits. BMC appeals asserting (1) the award of additional temporary benefits was in error, (2) the finding of a permanent mental injury absent any supporting medical opinion was in error, and (3) the award of any penalty benefits was in error as the extent of her disability was "fairly debatable." Sanders cross-appeals the reduction of the penalty benefits.

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). 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). 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.* However, our review of the agency's interpretation of statutory language depends on whether such interpretation has "clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(c) (2003). If such discretion has not

been clearly vested in the agency, we must reverse the agency's decision if it is based on "an erroneous interpretation" of the law. *Id.* The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity. *Id.* § 17A.19(8)(a).

III. Temporary Benefits.

BMC claims the commissioner erred in finding that Sanders was entitled to additional TPD benefits as she almost immediately returned to "substantially similar" employment. Iowa Code section 85.33(2) defines TPD as:

> [t]he condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability. "Temporary partial benefits" means benefits payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability. Temporary partial benefits shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury.

BMC resists the award of additional TPD benefits, contending that because Sanders's work at Oakland was "substantially similar" to her work at Arlington, she is not entitled to the benefits. It contends the commissioner's statutory interpretation of "substantially similar" employment is not correct.

The commissioner found that Iowa Code section 85.33(2) refers to a change in employment, not just a change in duties. It found that the decrease in overtime caused a change in Sanders's employment, and awarded her TPD. At the time of the injury, Sanders was working as a CNA/CMA on a full time basis at

Arlington with overtime hours. Following the injury, Sanders was able to perform her regular job duties as a CNA/CMA, just at a different location, Oakland. She returned to work without any medical restrictions, with the exception of avoiding the Arlington site. She testified that her work at Oakland was substantially similar to her work at Arlington, that she was able to do all that the work entails, and that she "loved" her work at Oakland. Her singular argument supporting the deputy's finding that she experienced "a change in her employment" was the reduction of her income due to the lack of overtime opportunities available at Oakland. We disagree that this reduction in overtime alone constituted a change in employment under the statute.

Further, the final sentence in Iowa Code section 85.33(2) states that "temporary partial benefits shall not be considered benefits payable to an employee . . . because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury." There is no evidence that Sanders was unable to secure equivalent work to what she was doing prior to the injury. Sanders testified that she was capable of performing all the duties of a CNA/CMA. As discussed above, there is no evidence that Sanders did not return to employment "substantially similar," as the work she performed immediately after the injury was identical to the work she performed prior to the injury. Sanders's only medically advised restriction was to not work at Arlington. She still had the skills, ability, and capability of performing all of her duties as a CNA/CMA at Oakland. There is also evidence in the record she had the ability to attain a similar job with a different employer in which she could have received overtime. In reviewing the agency's decision, it appears the agency

based its decision on "an erroneous interpretation" of the law; that is expanding the interpretation of what is "substantially similar" employment. Iowa Code § 17A.19(10)(c).

IV. Permanent Injury.

BMC next claims the commissioner erred in finding Sanders sustained a "permanent" mental injury as there was no medical opinion to support that finding. In the case of unscheduled injuries, permanent partial disability is determined by the employee's industrial disability. *Hill v. Fleetguard, Inc*., 705 N.W.2d 665, 673 (Iowa 2005). Industrial disability is based upon a loss in earning capacity, which rests on a comparison of what the injured worker could earn before the injury as compared to what the same person could earn after the injury. *Id.* Expert medical evidence is generally necessary to establish the permanency of an injury. *Haynes v. Second Injury Fund*, 547 N.W.2d 11, 13-14 (Iowa Ct. App. 1996). It is, however, not always essential. In some cases, permanency may be inferred from the nature of the injury. *Id.*

Sanders was awarded PPD benefits, to commence from the agency's determination she reached MMI on July 16, 2004. Sanders argues that she suffered a permanent disability, and the permanent restriction from working at Arlington limited her earning capacity. BMC, on the other hand, argues that all of the medical evidence supports the fact that Sanders's condition has and will continue to improve, and there is nothing in the record to suggest and thereby support her claim that her condition is permanent.

The word "permanent" can have different interpretations based on the context of the injury. *Compare Wallace v. Bhd. of Locomotive Firemen &*

Enginemen, 230 Iowa 1127, 1130, 300 N.W. 322, 324 (1941) (interpreting permanent to mean "for an indefinite and undeterminable period"), *with* Larson's Workers' Compensation Law *Kinds and Elements of Disability* § 80.04, at 80-14 (2007) ("permanent means lasting the rest of claimant's life. A condition that, according to available medical opinion, will not improve during the claimant's lifetime is deemed a permanent one. If its duration is merely uncertain, it cannot be found to be permanent.") In some situations, permanency may be inferred from the obvious physical nature of the injury, requiring no expert testimony for proof. *Roling v. Daily*, 596 N.W.2d 72, 74-75 (Iowa 1999) (requiring no expert testimony to establish physical injuries such as bruises on head and neck, fractured ribs, a fractured thumb, and bruised legs from the knees to the ankles). Other situations involve injuries, such as mental or emotional, where the diagnosis is discernible only by a trained expert in that field. *Id.*

While there is no medical support in the record that Sanders's injury was permanent, in making a finding on Sanders's condition, the deputy concluded:

> The fact that Dr. Gallagher is reluctant to call her condition permanent in response to a letter from defendant's counsel reflects more his hope the condition will improve than it does an opinion it is temporary only. *It is clearly a permanent condition in that it has not resolved over three years later*. She clearly has a mild psychological condition that would limit her ability to compete with other workers for similar jobs with other employers.

(Emphasis added.) This opinion was not based on expert testimony, or the prognosis of any of Sanders's doctors. It was solely the opinion of the deputy, as adopted by the commissioner, and as BMC argues, indicates the deputy substituted his own opinion for that of any expert of record. While Dr. Gallagher and Dr. Mills found that Sanders did suffer from PTSD, none of their reports ever

reached the conclusion that her condition was permanent. When specifically asked, Dr. Gallagher, who had been Sanders's primary treating physician since shortly after the injury, stated that he could not find that Sanders's condition was permanent. Quite the contrary, as he consistently noted that she continued to improve and her condition would resolve in time. Further, he did not require that she permanently refrain from working at Arlington. He recommended that her time there be limited, but she could return upon improvement. Dr. Mills's report also indicated that Sanders's condition would further improve. While Dr. Mills did opine that other similar work facilities could cause anxiety, he still did not go so far as to state that Sanders had suffered a permanent injury; he only affirmed that her work at Arlington should be limited.

In *Haynes*, expert testimony was required to establish a permanent impairment rating. *Haynes*, 547 N.W.2d at 14. Haynes sought permanent industrial disability based on two successive injuries; the second injury for which compensation was sought was carpal tunnel. In order to receive compensation from the Second Injury Fund, three elements were required to be met, one of which was a showing of a permanent disability. Iowa Code § 85.64. Upon an employee meeting the requirements, liability was then apportioned between the employer and the Second Injury Fund for the difference between the compensation for which the current employer was liable and the total amount of industrial disability suffered by the employee, reduced by the compensable value of the first injury. *Haynes*, 547 N.W.2d at 13. The court found that in the absence of medical evidence, it was reluctant to embellish the medical evidence

and designate a permanent impairment rating or find restrictions where none were articulated by any physician. *Id.* at 14.

While expert testimony was required to find a permanent impairment for a physical injury in *Haynes*, likewise we conclude that expert testimony is necessary to prove the permanency of a mental injury as in this case. While in some instances, permanency may be inferred from the nature of the injury, in the case of mental injuries, that inference can only be made by an expert. *Roling*, 596 N.W.2d at 75. In this situation, we have no expert testimony stating that Sanders's injury was permanent, and without that, it was error for the agency to substitute its judgment, making its own determination that Sanders suffered a permanent injury. In order to authorize a permanent impairment rating for a mental injury, expert testimony is required. Finding no such evidence in the record to support the agency's conclusion that Sander's injury was permanent, we reverse the award of permanent disability benefits.

V. Penalty Benefits.

BMC claims the commissioner erred in awarding penalty benefits to Sanders. Sanders cross-appeals that the district court erred in twice reducing the agency's award of penalty benefits. If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under chapter 86, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied. Iowa Code § 86.13. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim, or (2) the employer had a

reasonable basis to contest the employee's entitlement to benefits. *Christensen v. Snap-On Tools Corp*., 554 N.W.2d 254, 260 (Iowa 1996). A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." *Id.* Except as to injuries resulting in permanent partial disability, compensation shall begin on the fourth day of disability after the injury. Iowa Code § 85.32.

The agency found that Sanders had missed four days of work as a consequence of her mental injury (October 2, 2003; October 7, 2003; October 24, 2003; and March 26, 2004). The district court found that BMC had only paid Sanders for one of those missed days of work, so ordered BMC to pay Sanders $1063.00 for the remaining three unpaid days, as well as a $500 penalty pursuant to Iowa Code section 86.13. On a motion to reconsider, the district court found its calculation was incorrect, and Sanders was only entitled to $152.01, making the maximum penalty therefore only $76.00.

Sanders contends that she missed five days of work: October 2, 7, 23, 24, 2003; and March 26, 2004, for which she was entitled to benefits. Even if BMC does not owe for the three-day waiting period under Iowa Code section 85.32, she argues she is entitled to payment of the fourth day, which BMC had stipulated to and paid as a TTD, as well as the fifth day of disability benefits. Sanders asserts that the penalty benefits should not have been reduced by the district court. BMC argues that the district court was correct in reducing the penalty benefits, and argues that there is a "fairly debatable" issue whether any penalty benefits were owed for the days off work.

The question we must examine is whether BMC had a reasonable basis to find Sanders's claim of temporary or permanent disability benefits "fairly

debatable." Following the July 18, 2003 injury, Sanders was able to immediately return to her work and perform her regular job duties as a CNA/CMA, without medical restrictions, other than to avoid returning to the location of the suicide. As discussed above, we found that she was able to return to "substantially similar" employment. Because of her ability to resume her same duties and perform her work as ably as prior to the injury, BMC appropriately questioned Sanders's entitlement to receive TPD benefits. We agree with BMC; the issue was "fairly debatable." Likewise, although the agency awarded a penalty for BMC's failure to pay any PPD benefits, we found the agency in error. Nothing in the record supported her claim that her condition was permanent, and no doctor was able to opine that Sanders had suffered a permanent injury. BMC's obligation to pay PPD benefits was "fairly debatable" and no penalty should have been assessed.

Finally, BMC asserts no penalty benefits should have been awarded for additional days Sanders missed work. Iowa Code section 85.32 provides "[E]xcept as to injuries resulting in permanent partial disability, compensation shall begin on the fourth day of disability after the injury." In reversing the agency's decision to award temporary or partial disability, the district court found that as Sanders had missed four days of work and BMC had only paid for one day, a penalty should be assessed for the remaining three days. However, this is contrary to the plain statutory language. *Id*. We therefore reverse the award of penalty benefits.

VI. Conclusion.

We reverse the award of TPD benefits as that was based on the agency's erroneous interpretation of the law. Further, finding no evidence in the record to support the agency's conclusion that Sanders's injury was permanent, we reverse the award of PPD. Therefore, in reversing the agency's decision to award temporary partial and partial permanent disability benefits, we reverse the award of penalty benefits.

REVERSED.