IN THE COURT OF APPEALS OF IOWA

No. 9-306 / 08-1931
Filed June 17, 2009

WILLIAM BERGELL,
Plaintiff-Appellant,

vs.

QWEST COMMUNICATIONS, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

A claimant appeals from the district court decision on judicial review that affirmed the agency decision claimant had no permanent partial disability. **AFFIRMED.**

Channing Dutton of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des Moines, for appellant.

Edward Krug and Sasha Monthei of Krug Law Firm, P.L.C., North Liberty, for appellee.

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

SACKETT, C.J.

The claimant, William Bergell, appeals from the district court decision on judicial review that affirmed the agency decision he suffered no permanent disability from a work-related injury. He contends (1) it was legal error to ignore the extensive benefits that had been paid, (2) substantial evidence supports a finding of permanent partial disability, and (3) the determination that claimant had an extensive back injury history is not supported by substantial evidence. We affirm the district court.

I. Background Facts and Proceedings.

In 2000, Bergell began his employment with the defendant, Qwest Communications, Inc. (Qwest). Bergell reported a work injury to his back on May 11, 2005. Between the time of the injury and the decision of the agency that denied benefits, Qwest paid for Bergell's medical care including back surgery, healing period benefits, and benefits based on a twenty percent permanent partial impairment rating by his treating physician in February of 2006.

Agency Proceedings. Bergell filed his workers' compensation claim in April of 2006, claiming disputed issues of "rate; healing period; extent of disability; medical benefits; penalty benefits; PPD;[1] and IME."[2] The May 18, 2007 arbitration decision concluded Bergell sustained an injury that arose out of and in the course of his employment with Qwest, but further concluded he "failed to prove his injury resulted in a permanent disability."

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[1] Permanent Partial Disability.
[2] Independent Medical Examination.

On appeal, Bergell contended the company doctor gave him a twenty percent permanent partial disability rating, Qwest paid benefits based on that rating, and the actions of Qwest in paying benefits that included medical care, healing period benefits, and disability benefits should be considered proof his disability was caused by his work-related injury. The March 2008 appeal decision adopted and affirmed the arbitration decision as final agency action with additional analysis concerning causation. The decision concluded, in part:

> What this record shows is that prior to his February 2006 report issuing an impairment rating and restrictions, Dr. Carlstrom had previously opined that claimant recovered from an earlier work injury of May 11, 2005, and this view was buttressed by the view of Dr. Kuhnlein who felt that claimant also recovered from the May 11, 2005 injury when Dr. Carlstrom issued his report.
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> The most that can be said of Dr. Carlstrom's views is that they are arguably unclear and they certainly do not establish causation by a preponderance of the evidence.

District Court Proceedings. Bergell sought judicial review in April of 2008. He contended, in part, that the agency "failed to consider the pattern and conduct of the employer up to the time of hearing which conclusively established the compensable nature of the case;" the agency reached an unreasonable, arbitrary, or capricious result; and the agency erred in concluding the record did not support a permanent partial disability award.

The district court affirmed the agency action. The court considered Bergell's argument that the agency failed to give proper consideration to Qwest's conduct in paying all benefits due as evidence of a compensable permanent partial disability. It noted that the agency could consider the voluntary payment of benefits as evidence, but was not required to give it any certain weight. The court further noted that the agency "need not discuss *every* evidentiary fact and

the basis for its acceptance or rejection so long as the [agency's] analytical process can be followed on appeal." Concerning causation, the court considered the conflict in the evidence and the principle that the agency, not the court, weighs the evidence in concluding substantial evidence supported the agency's findings. The court also concluded the agency's application of the law to the facts "was not affected by erroneous interpretation of law; irrational reasoning; failure to consider relevant facts; or irrational, illogical, or wholly unjustifiable application of law to the facts."

Medical Background. Bergell has a lengthy history of back problems. Medical records reveal he received occasional treatment for minor back problems in the 1980s and early 1990s. In 1996 he had two back surgeries at the L5-S1 level. These surgeries resulted in a compromise case settlement in 1998. Two doctors rated Bergell's whole-body impairment at twelve percent and sixteen percent. In 1999 he had another back surgery at the same level.

In May of 2002 he sought treatment for a work-related lumbar strain. It resulted in no permanent impairment or restrictions. In July of 2004 Bergell was treated for lower back and leg pain. It resulted in no permanent impairment or work restrictions. Bergell's family doctor, however, noting Bergell's "problems with low back pain," and "three surgeries on his back for disc disease of the last 10 years," recommended that he buy a hot tub "to use at home for his symptomatology when he has acute flare-ups."

On May 11, 2005, Bergell suffered another injury while at work, which he immediately reported to Qwest. He was seen by Dr. Matlock that day, taken off

work, and given medication. On May 16 he underwent an MRI, which was later compared with a March 1999 MRI. The comparison noted both MRI's showed "a moderately large left posterior lateral extruded post operative disc herniation at L5-S1," and "virtually no change" between the two images. On May 17 Bergell returned to work with restrictions, but was taken off work again on May 18. On May 31 Dr. Carlstrom evaluated Bergell for lower back pain radiating into the left leg. Dr. Carlstrom opined the recent MRI showed "a recurrent herniated disc on the left at L5-S1. After a steroid injection on June 2, Bergell was released for work without restrictions on June 15. In response to an inquiry from the claims management company, Dr. Carlstrom marked the inquiry form that Bergell was released without restrictions for full duty, that he reached maximum medical improvement on June 16, that he sustained no permanent partial impairment, and that he was released from Dr. Carlstrom's care.

On August 4, 2005, Bergell consulted a physician's assistant, complaining of low back pain. The next day Bergell returned, stating he had sneezed that morning and felt immense pain in his lower back. He was referred again to Dr. Carlstrom. Bergell saw Dr. Carlstrom on September 1, complaining of left leg pain.

On September 28, Dr. Carlstrom performed another lumbar laminectomy at the L5-S1 level. On October 4, Bergell returned to Dr. Carlstrom, complaining of low back pain. A November 8 follow-up MRI showed little change from the May MRI. On November 10, Dr. Carlstrom told Bergell to take it easy for another month. On December 15, Bergell consulted Dr. Carlstrom for lower back and leg

pain. In reviewing a January 3, 2006 CT scan and myelogram, "sizeable disc protrusion" was "not seen."

On February 7, 2006, Bergell again consulted Dr. Carlstrom for pain in the low back with some radiating to his leg. Following this consultation, Dr. Carlstrom wrote a letter to Dr. Honsey, stating:

> At this point I think he should be considered to be at maximum benefits of healing. I think he should be considered to have sustained impairment of about 20% of the body as a whole due to his back condition, and I think he needs to have permanent restrictions placed upon him. . . . I think he should be considered to have reached maximum benefits of healing at this time.

Bergell returned to work with restrictions that prevented him from working in his former position. Qwest assigned him temporarily to a lighter duty position and told him he had eighty days to find another suitable position within Qwest or he would be terminated. Bergell investigated, but did not accept another position within the eighty days. His employment with Qwest ended in June of 2006.

Dr. Honsey treated Bergell for sciatica in May and August of 2006, then referred him back to Dr. Carlstrom, who requested another MRI. He reviewed the MRI in December of 2006, noting the MRI and bone scan were "basically normal."

Qwest requested an independent medical examination by Dr. Kuhnlein. Following the November 16 exam, Dr. Kuhnlein opined, in part:

> There is little question that Mr. Bergell had a significant problem with his lumbar spine prior to the May 11, 2005 incident. He had intermittent flares of his symptoms, consistent with the natural history of the condition. He had also had three surgeries for the condition, indicating fairly significant pathology before the May 11, 2005 injury. However, his symptoms had resolved at that point.
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> While walking up the stairs of a customer's home, he had a symptom flair again. This resolved after an epidural injection. It

> recurred, and significantly worsened when he sneezed on or about August 4, 2005.
>
> . . . Medically, I don't see that dipping his head to avoid an overhang would constitute an new injury to the lumbar spine. There was no significant lumbar stressor when doing so. . . .
>
> . . . Mr. Bergell recovered after the steroid injection and was able to return to work on full-duty status. Both Dr. Thomas Hansen and Dr. Thomas Carlstrom released him to full-duty work with no further impairment. . . .
>
> Mr. Bergell was able to work thereafter, his symptoms did flare somewhat, but it was only when he sneezed on or about August 4, 2005, that his symptoms permanently changed, according to the available record. This would not be work-related.

Dr. Kuhnlein also discussed Dr. Carlstrom's May 31, 2005 comments that the MRI taken showed a recurrent disc herniation:

> When reviewing the report of the MRI scan, an addendum was made on June 10, 2005, so it was not until then that the radiologist had compared the films to those from 1999. This would explain why Dr. Carlstrom might have felt that this was a recurrent disc herniation. Unfortunately, the MRI scan was not repeated prior to the September 28, 2005 surgery, to see if the disc had progressed. It was only later that it was repeated. It initially showed a recurrent disc, but the CT with myelogram did not show the disc herniation. Therefore, it appears that Dr. Carlstrom's September 28, 2005 surgery dealt with a disc herniation, which did not recur, and [Bergell's] ongoing symptoms would represent postoperative changes. These would be unrelated to the May 11, 2005 injury, . . .

II. Scope and Standards of Review.

Under Iowa Code chapter 17A (2007), a district court is authorized to review decisions rendered by administrative agencies. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 534 (Iowa 1991). The district court may reverse or modify an agency's decision if the decision is erroneous under a ground specified section 17A.19 and a party's substantial rights have been prejudiced. Iowa Code § 17A.19(10). When we review the district court's decision, "we apply the standards of chapter 17A to determine whether the conclusions we reach are the

same as those of the district court. If they are the same, we affirm; otherwise we reverse." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004).

Our review of an agency's decision is for correction of errors at law. *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999). Our role as an appellate court reviewing this agency decision is threefold: (1) to determine if the commissioner applied the proper legal standard or interpretation of the law, (2) to determine if there was substantial evidence to support the commissioner's findings, and (3) to determine if the commissioner's application of the law to the facts was irrational, illogical, or wholly unjustifiable. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603-04 (Iowa 2005) (discussing the interplay between Iowa Code sections 17A.19(10)(c), (f), and (m)).

It is well-settled that "'[t]he interpretation of workers' compensation statutes and related case law has *not* been clearly vested by a provision of law in the discretion of the agency.'" *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007) (citation omitted). Therefore, we do not defer to the agency's interpretation of the law. *Id.*; *see* Iowa Code § 17A.19(10)(c).

Factual determinations in workers' compensation cases, on the other hand, are "'clearly vested by a provision of law in the discretion of the agency.'" *Mycogen Seeds*, 686 N.W.2d at 465 (citation omitted). We defer to the agency's factual determinations if they are based on "substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19 (10)(f). "Substantial evidence" is:

> 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 we review factual questions delegated to the agency, "the question before us is not whether the evidence supports different findings than those made by the agency, but whether the evidence 'supports the findings actually made.'" *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009) (quoting *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 649 (Iowa 2000)).

The application of the law to the facts is also vested in the agency. *Mycogen Seeds*, 686 N.W.2d at 465. We will reverse only if the agency's application was "irrational, illogical, or wholly unjustifiable." *Id.*; Iowa Code § 17A.19(10)(*l*). This requires us to give some deference to the agency's determinations, but less than we give to the agency's findings of fact. *See* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act*, at 70 (1998).

III. Analysis.

Consideration of Benefits Paid. Bergell contends the agency erred in not considering Qwest's conduct in paying extensive benefits over an extended period of time. These include (1) all medical charges, including surgery, (2) all healing period benefits from May 11, 2005, to February 7, 2006, and (3) all permanent partial disability benefits for the sixty-nine weeks from February 8, 2006, to the date of the agency hearing on March 17, 2007. He cites *Tussing v. George Hormel & Co.*, 461 N.W.2d 450, 452 (Iowa 1990), in support of his argument that the agency can consider an employer's conduct in paying benefits as proof of disability arising from an injury.

In *Tussing*, the supreme court considered the effect of a 1982 amendment to Iowa Code section 86.13, which then provided, in relevant part:

> If an employer or insurance carrier pays weekly compensation benefits to an employee, . . . [t]he payments establish conclusively that the employer and insurance carrier have notice of the injury for which benefits are claimed but the payments do not constitute an admission of liability under this chapter or chapter 85, 85A, or 85B.

Iowa Code § 86.13 (1983). In interpreting this language, the supreme court said:

> This enactment provides that voluntary payments "establish conclusively that the employer and insurance carrier have notice of the injury for which benefits are claimed but the payments do not constitute an admission of liability under this chapter."
>
> *We do not interpret this language as indicating that under no circumstances may voluntary benefit payments be considered evidence of a work-related injury.* We believe, rather, that this amendment was intended to reverse prior law which viewed voluntary payments as being conclusive under some circumstances in establishing that an injury arose out of and in the course of employment. Moreover, we believe that, in making up the issues for hearing before the deputy commissioner, the parties acknowledged that some work-related injury occurred on or about May 9, 1983, for which benefits had been paid.

Tussing, 461 N.W.2d at 452 (emphasis added).

Bergell asserts the language in *Tussing* emphasized above is not limited to proving injury. He argues the lesson from *Tussing* is that *the conduct* of extensive payment and funneling of case activity to a specific injury date should not be ignored by the decision maker, or if ignored, the decision should be "sufficiently detailed to show the path taken through conflicting evidence." *Terwilliger v. Snap-on Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995). He further argues that Qwest's conduct in this case should be conclusive evidence of Bergell's permanent impairment resulting from a work-related injury.

Neither the arbitration decision nor the agency's appeal decision mentions *Tussing* or Qwest's voluntary payment of benefits. The district court noted it was "undisputed that Qwest voluntarily paid Bergell benefits following his May 11, 2005 injury." The court acknowledged *Tussing* allowed that voluntary workers' compensation payments may be considered as evidence that a claimant suffered an injury that arose out of and in the course of employment. *See Tussing*, 461 N.W.2d at 452. The court continued:

> However, the issue here is whether the work-related injury caused permanent disability. *Tussing* does not speak to this issue. Further, *Tussing* merely allows voluntary payment of workers' compensation to be considered as evidence; it does not require such evidence be given a certain weight.

See id. The court did not assume the agency did not consider the voluntary benefits merely because they were not mentioned. Instead, the court found the agency's findings were supported by substantial evidence.

We believe the district court properly understood *Tussing* as not mandating that the agency consider the evidence of voluntary payments and that even if it considers such evidence, it is for the purpose of establishing a work-related injury. Our conclusions on this issue are the same as those of the district court. Accordingly, we affirm on this issue. *See Mycogen Seeds*, 686 N.W.2d at 464.

Proof of Permanent Disability. Bergell contends the district court erred in affirming the agency's denial of benefits for failure of proof of permanent impairment resulting from the May 11, 2005 injury. He argues the statement in the agency decision that "no physician" has offered an opinion of permanent impairment from the May 11, 2005 injury is erroneous.

There is conflicting evidence from Dr. Carlstrom alone. He filled out a form from Qwest's claims management company on June 24, 2005, that Bergell reached maximum medical improvement, was released to work with no restrictions, and had no permanent impairment from the May 11, 2005 injury. On February 7, 2006, Dr. Carlstrom wrote to Dr. Honsey and said Bergell reached maximum medical improvement and had a twenty percent impairment of the body as a whole, but did not expressly relate the impairment rating to the May 2005 injury. The only mention in the letter of any identifiable point of reference is that Bergell was "almost four months status post lumbar laminectomy," but Dr. Carlstrom did not expressly relate the impairment rating to the surgery either.

The agency, when considering how to weigh Dr. Carlstrom's February 2006 letter and whether to conclude the impairment rating related to the May 2005 injury noted:

> Arguably, I could infer that the doctor was referring to the effects of the work injury when he issued the February 2006 rating and restrictions, but only if the evidence shows a lack of back symptoms before the work injury and a continuous pattern of symptoms and treatment of those symptoms by the doctor until the rating was issued. That is not true in this case.

The appeal decision details the evidence that supports the agency conclusion that Bergell did not prove causation: his long history of lower back problems, including three prior surgeries; Dr. Carlstrom's June 24, 2005 opinion that Bergell did not suffer any permanent disability from the May 11, 2005 injury; Bergell's return to work without restrictions until symptoms recurred in August of 2005; and Dr. Kuhnlein's opinion that Bergell had recovered from the May 2005 injury when Dr. Carlstrom completed the June 2005 form.

"Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony." *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The agency considered the expert testimony. Bergell argues Dr. Kuhnlein's opinion should be given no weight because his opinion that Bergell sustained no significant injury on May 11, 2005, is wrong. At issue is how to reconcile Dr. Carlstrom's reading of the May 2005 MRI and Dr. Kuhnlein's, as set forth in the appeal decision:

> First, I agree with claimant in this appeal that Dr. Kuhnlein's comparison of the March 1999 MRI and the May 2005 MRI does not contradict the views of the treating physician, Dr. Carlstrom. The earlier MRI revealed a herniated disc later corrected by surgery. It would not be unusual for the later MRI to show no change given the treating physician's diagnosis of a recurrent herniated disc at the same vertebral level.

Bergell argues that if both the March 1999 and May 2005 MRIs showed a herniated disc and the March 1999 MRI showed his condition *before* it was corrected by the 1999 surgery, then the May 2005 MRI shows a new herniation of the disc caused by his injury. Dr. Carlstrom opined the 2005 MRI showed a recurrent disc herniation. Dr. Kuhnlein's opinion noted, "When Mr. Miller talks about a disc protrusion at L5-S1 on May 17, 2005, and Dr. Carlstrom talks about a recurrent disc herniation on May 31, 2005, I do not believe that they had the pre-existing MRI scans available." He opined, "This would explain why Dr. Carlstrom might have felt that this was a recurrent disc herniation." Dr. Kuhnlein's opinion could be read as disagreeing with Dr. Carlstrom's, so Bergell asserts the agency did not weigh the evidence properly.

The weight given to expert opinions is for the finder of fact, in this case the agency, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. *See id.* The mere fact that inconsistent conclusions may be drawn from the same evidence does not mean substantial evidence does not support the agency's determinations. *See Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995). The district court considered the expert opinions, the causation analysis of both agency decisions, and the appeal decision's additional analysis in determining substantial evidence supported the agency's decision, even though the court "may have viewed the evidence contrary to the [agency's] view."

The district court correctly set forth the scope of review that "where there is conflict in the evidence or when reasonable minds might disagree about the inferences to be drawn from the evidence," the court "may not interfere" with the agency decision. *See Ward v. Dep't of Transp.*, 304 N.W.2d 236, 239 (Iowa 1981). "The ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made." *Munson v. Dep't of Transp.*, 513 N.W.2d 722, 723 (Iowa 1994).

Clearly there is conflict in the evidence, even as to whether the expert opinions agree or disagree. Our scope of review controls the outcome on this issue. We, like the district court, determine substantial evidence supports the agency's decision. As our conclusion is the same as the district court's we affirm on this issue.

Error in Factual Determination. Bergell contends the agency's determination that he had an extensive back injury history is not supported by the evidence. He asserts this mistaken determination "is a critical finding that is central to the result." He asserts, "Even the district court correctly found that [Bergell] certainly had no significant care during [the] five-year period [before his injury]."

The district court outlined Bergell's history of problems with his back. Concerning only the time following his third back surgery, the court mentioned a 2002 lumbar strain with radiating leg pain and 2004 treatment for back pain and leg pain. The record, however, contains other evidence of back problems during the five years Bergell was employed by Qwest before the May 2005 injury.

The arbitration decision provides these details:

> In 2001 claimant treated on several occasions with Scott Honsey, M.D. for continued low grade back discomfort. In a January 30, 2002 letter Dr. Honsey recommended that claimant get a hot tub to deal with low back pain and chronic problems with sciatica.
>
> Claimant also treated with Patrick Linthicum, D.O., from 1991 through 2003 for lower back pain.
>
> In May of 2002, claimant had a lumbar strain with pain radiating to the left leg following a slipping injury at work with Qwest. Claimant was returned to work without impairment or permanent restrictions.

The appeal decision noted,

> an extensive history of back problems before the May 11, 2005 work injury, including three prior back surgeries to the same vertebral level that is involved in this case, L5-L1 [sic], and a pattern of recurrent back pain in the years preceding the injury.

Bergell argues that his back was fine after he had the 1999 surgery up to the time he was injured in 2005. The evidence does not support his view.

Although one might take issue with the agency's characterization of the history as "extensive," the district court also noted continued problems in the five years leading up to the injury. Regardless of how Bergell's history of back problems are described, it is clear they continued from before his first surgery in 1996 until at least 2004. As the agency's appeal decision aptly states: "The issue in this case is not whether claimant has a back problem; the issue is what has caused his back problem." The agency concluded the evidence was not sufficient to establish a disability proximately caused by the May 11, 2005 injury. In affirming the agency, the district court concluded substantial evidence supported that conclusion. We agree with the district court and affirm on this issue.

IV. Conclusion.

We have considered all of Bergell's claims and arguments from his briefs and oral argument. Having reviewed the evidence in the record, the two agency decisions, and the district court's decision, our conclusions are the same as those of the district court. We therefore affirm the decision of the district court that affirmed the agency's appeal decision.

AFFIRMED.