

**IN THE COURT OF APPEALS OF IOWA**

No. 9-816 / 09-0502  
Filed December 30, 2009

**PELLA CORPORATION,**  
Petitioner-Appellant,

**vs.**

**TERRY L. SHARP,**  
Respondent-Appellee.

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

An employer appeals from a district court ruling affirming the workers'  
compensation commissioner's findings of causation and liability. **AFFIRMED.**

David L. Jenkins of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des  
Moines, for appellant.

Wendy D. Boka and Randall P. Schueller of Hopkins & Huebner, P.C.,  
Des Moines, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

**DANILSON, J.**

Pella Corporation challenges the district court's affirmance of the workers' compensation commissioner's ruling that Tyler Sharp's biceps tendon rupture on November 27, 2005, was related to his previous cumulative injury to his right arm as of August 30, 2001. We affirm.

**I. Background Facts & Proceedings.**

In August 2001 Tyler Sharp was an employee of Pella Corporation working with special glass doors. The work was repetitious and demanding. The parties agreed that Sharp sustained a cumulative injury to his right arm as of August 20, 2001, for which Pella paid medical expenses and weekly benefits.<sup>1</sup>

This dispute arises from Sharp's November 27, 2005 ruptured biceps tendon, which occurred as he pulled a lawnmower from a shed. Sharp sought additional workers' compensation benefits from Pella, contending the November 2005 injury was related to the 2001 cumulative injury. His claim was supported by the opinion of Douglas S. Reagan, M.D., an orthopedic surgeon who performed several surgeries on Sharp.<sup>2</sup> On June 4, 2004, Dr. Reagan performed "right carpal tunnel release, ulnar tunnel release with exploration of deep branch, cubital tunnel release with marsupialization, radial tunnel release, and release of lateral epicondyle." He reattached Sharp's biceps tendon to the elbow on December 23, 2005. Dr. Reagan opined that Sharp's 2005 biceps tendon rupture was related to his work at Pella because of Sharp's continuing complaints

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<sup>1</sup> Timothy Schurman, M.D., performed neuroplasty surgery on April 3, 2002.

<sup>2</sup> Dr. Reagan began seeing Sharp upon a referral from Dr. Schurman.

related to the elbow region and his unresolved symptoms despite numerous surgical interventions.

Pella, however, denied any causal link between the 2005 biceps tendon rupture and the 2001 cumulative injury. It relied upon the opinion of Teri S. Formanek, M.D., who saw Sharp on March 27, 2007, upon Pella's request for an independent medical examination. Dr. Formanek opined that

biceps tendinopathy was not likely present since 2001 as it would be unlikely for a biceps tendinopathy to be ongoing continuously for a period of four years before rupture occurred without some identifiable historical and physical findings, which would be consistent with that disorder. It is unlikely that multiple physicians over multiple examinations would not be able to identify this as an ongoing problem during his extensive treatment throughout the course of dates from 2001 initial report until the time of rupture.

Following a hearing, the deputy commissioner made findings of fact outlining Sharp's symptoms and course of treatment and surgeries from 2001 through 2007. The deputy gave greater weight to the opinion of Dr. Reagan who had the benefit of examining Sharp over an extended period of time, performed numerous surgical procedures on his right arm, and had the opportunity to observe Sharp's right arm "on the surgical table," both before and after those surgeries. The arbitration decision awarded Sharp healing period benefits, medical expenses causally related to the work condition, and the cost of an independent medical examination (IME) performed by Dr. Jacqueline Stocken.

Pella appealed to the commissioner, who adopted the deputy's ruling as its final decision. On Pella's petition for judicial review, the district court affirmed.

Pella now appeals, arguing the commissioner erred in concluding Sharp's biceps tendon rupture was causally related to the cumulative work-related 2001

injury. Pella also contends the commissioner erred in awarding full reimbursement for the IME.

## **II. Scope & Standard of Review.**

We review a final agency action for correction of errors at law. *Eyecare v. Dep't of Human Servs.*, 770 N.W.2d 832, 835 (Iowa 2009). "We review the district court decision by applying the standards of the Iowa Administrative Procedure Act to the agency action to determine if our conclusions are the same reached by the district court." *Id.* (citation omitted). We are bound by the agency's findings so long as they are supported by substantial evidence. *Id.*

"*Substantial evidence*" means 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.

Iowa Code § 17A.19(10)(f)(1) (2007).

The commissioner, as the finder of fact, has the duty to weigh proffered testimony and determine its credibility. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 395 (Iowa 2007); *Dodd v. Fleetguard, Inc.*, 759 N.W.2d 133, 137 (Iowa Ct. App. 2008). The commissioner's decision does not lack substantial evidence because the court may draw different conclusions from the record. *Arndt*, 728 N.W.2d at 393.

## **III. Discussion.**

"For the Workers' Compensation Act to apply, the proponent must show by a preponderance of the evidence that the employee's injuries arose out of and in the course of the employment." *Bailey v. Batchelder*, 576 N.W.2d 334, 338 (Iowa 1998). An injury "arises out of" the employment provided there is a causal

connection between the employment and the injury. *Id.* When an employee sustains an injury, and subsequently sustains a second injury, the employee may seek a workers' compensation award predicated on the first injury if the second injury was proximately caused by the first. See *DeShaw v. Energy Mfg. Co.*, 192 N.W.2d 777, 780 (Iowa 1971).

The claimant has the burden of proving by a preponderance of the evidence that some employment incident or activity brought about the health impairment on which he bases his claim. A possibility is insufficient; a probability is necessary. The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it.

*Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 239 (Iowa 1981) (quoting *Holmes v. Bruce Motor Freight, Inc.*, 215 N.W.2d 296, 297 (Iowa 1974)).

"The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." 1 Arthur Larson & Lex K. Larson, *Larson's Worker's Compensation Law* § 10.01, at 10-2 (ed. 2008). Larson notes that the necessary causal connection with the primary injury has been found where the weakness resulting from a compensable injury has made the limb more susceptible to re-injury. *Larson* § 10.06[2], at 10-15.

The question of causal connection is essentially within the domain of expert testimony. See *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000) ("Whether an injury has a direct causal connection with the employment or arose independently thereof is ordinarily established by expert testimony, and the weight to be given such an opinion is for the finder of fact."). Here, the commissioner found Dr. Reagan's opinion more convincing than Dr. Formanek

and concluded that Sharp's 2005 biceps tendon rupture was traceable to the 2001 cumulative injury.<sup>3</sup>

In *Ward*, 304 N.W.2d at 237, an employee was injured while cleaning debris from the highway. He was hospitalized, complaining of low back pain. *Id.* His condition improved temporarily with rehabilitation; however, he was again hospitalized and remained in pain. *Id.* More than a year after his work-related injury, the employee suffered a fatal heart attack. *Id.* His widow filed a petition to reopen contending his death resulted from his employment injury. *Id.* Conflicting testimony from two doctors was presented to commissioner: one concluded that the heart attack was work-related; the other, that he could not find a causal connection. *Id.* at 239. The commissioner found no causal connection, which finding the supreme court concluded was supported by substantial evidence. *Id.* The court noted, "We are not free to interfere with the commissioner's findings where there is conflict in the evidence or when reasonable minds might disagree about the inference to be drawn from the evidence whether disputed or not." *Id.*

Pella, not surprisingly, challenged the commissioner's determination of liability in this case in light of the lengthy time span between original injury and the lawn mower injury, and Dr. Formanek's opinion that the two injuries were unrelated. We acknowledge that if our review was de novo, the causation issue could lead to debate.

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<sup>3</sup> We find no merit in Pella's assertion that the agency gave greater weight to Dr. Reagan's testimony "simply" because he was a treating physician. The commissioner cited several factors for its decision, noting that Dr. Reagan had the benefit of examining Sharp over an extended period of time, had performed numerous surgical procedures, and had the opportunity to observe Sharp's right arm before, during, and after those surgeries.

However, the question of causation was for the commissioner as fact finder. See *id.* The question on appeal “is not whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence ‘supports the findings actually made.’” *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). The evidence concerning the causal link to the compensable work injury was clearly contradictory. It was the commissioner’s responsibility to sort through the conflicting evidence to reach a conclusion. While there may be evidence in the record to support a different conclusion, our review is limited to whether the evidence supports the commissioner’s decision. Based on our review of the evidence, we conclude substantial evidence supports the findings made by the commissioner.

Pella also objects to the commissioner’s finding that Pella must reimburse Sharp for the impairment evaluation by Dr. Stoken. Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee’s choice where an employer-retained physician has previously evaluated “permanent disability” and the employee believes that initial evaluation is too low. In January 2003, Dr. Schurman evaluated Sharp with three percent impairment to his right upper extremity. On December 20, 2004, Dr. Reagan opined that Sharp had reached maximum medical improvement and determined he had a permanent partial impairment rating of five percent of the right upper extremity. In March 2007, following the biceps tendon rupture and reattachment, Sharp went to Dr. Stoken, who evaluated Sharp with five percent impairment to the right upper extremity.

Pella argues that because it had not performed any evaluation of impairment following the biceps tendon rupture (because it denied liability for injury and thus would not authorize treatment), there is no predicate evaluation with which the employee can disagree and therefore it cannot be required to cover the evaluation. Pella argues it “arguably” is

obligated to provide reimbursement for a §85.39 IME only as a result of those prior ratings, but only with respect to conditions caused by the August 30, 2001 work injury which those impairment ratings addressed, no part of which pertained to the biceps tendon.

Pella contends the commissioner was required to apportion its obligation, ordering payment “only for the expenses related to [Dr. Stoken’s] evaluation of impairment regarding conditions for which Dr. Schurman and Dr. Reagan provide impairment ratings.”

Pella offers no authority for its claim that the commissioner was required to make such an apportionment, and we find none. We find no error. *Cf. McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 194 (Iowa 1980) (noting agreement with agency that no reimbursement could be ordered under section 85.39 until liability had been established by filing a memorandum of agreement *or by an adjudication*). Once the commissioner determined Pella’s liability, it did not err in the ordering reimbursement.

#### **IV. Conclusion.**

Substantial evidence supports the commissioner’s finding that Sharp’s 2005 injury was related to his 2001 work-related injury. The commissioner did not err in ordering Pella to reimburse Sharp for the evaluation by Dr. Stoken.

**AFFIRMED.**