IN THE COURT OF APPEALS OF IOWA

No. 0-036 / 09-1102
Filed April 21, 2010

NEUMANN BROTHERS, INC., Employer,
and EMC INSURANCE COMPANIES,
Insurance Carrier,
Petitioners-Appellants,

vs.

DENNY DERSCHEID,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

Petitioners appeal the district court order affirming the workers' compensation commissioner's decision awarding workers' compensation benefits to respondent. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Iris J. Post of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellants.

Joseph S. Powell, Thomas J. Reilly and Kyle T. Reilly of Thomas J. Reilly Law Firm, P.C., Des Moines, for appellee.

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

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

I. Background Facts & Proceedings

Denny Derscheid injured his back on October 11, 1995, while working for Neumann Brothers, Inc. Dr. Daniel McGuire determined Derscheid had an eight percent permanent impairment rating as a result of the injury. Derscheid received workers' compensation benefits based on the impairment rating, and last received weekly compensation benefits on August 8, 2000. He continued to work for Neumann Brothers until he was discharged for insubordination in 1997.

Derscheid continued to have back and leg pain. He had a discectomy and fusion of the spine from the L4 to S1 levels in 1998. He had a refusion in 1999. In 2001 Derscheid enrolled in a three-year program at Des Moines Area Community College to become a surveyor. He began receiving Social Security disability benefits in 2003. After he graduated from the surveyor program Derscheid began work as a surveyor, but quit in 2005 because the work was too physically demanding. After an independent medical evaluation in 2005, Dr. David Berg stated Derscheid should have "very sedentary work activity, or no work at all, until his current condition is addressed."

The employer authorized treatment with Dr. Thomas Carlstrom, a Des Moines physician.[1] In 2006, on the advice of relatives, Derscheid travelled to Arizona to seek treatment from Dr. Richard Zipnick. Derscheid had fusion surgery for the third time in April 2006, performed by Dr. Zipnick. The surgery did not resolve his problems with back and leg pain.

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[1] We will refer to Neumann Brothers and its insurance carrier, EMC Insurance Companies, together as the employer.

On March 15, 2004, Derscheid filed a petition in arbitration seeking workers' compensation benefits. The employer claimed Derscheid's petition was untimely under Iowa Code section 85.26 (2003) because it was not filed within two years after the date of the injury, or within three years of the date of the last payment of weekly compensation benefits.

The administrative hearing was held on December 11, 2006. Derscheid testified he had attended an independent medical evaluation with Dr. Carlstrom, but could not remember the date. Evidence was presented to show that no copy could be found of a notice of commencement of payments, as required by Iowa Code section 86.13 and Iowa Administrative Code rule 876-3.1(2).[2] The employer presented evidence that generally the notice of commencement of payments was attached to a permanent partial disability letter. Such a letter, that had been sent to Derscheid, was presented as an exhibit, but there were no attachments, and no indication in the letter that there had been any attachments.

After the hearing, the employer filed a motion seeking to suspend benefits under section 85.39, claiming Derscheid had failed to attend a scheduled independent medical evaluation with Dr. Carlstrom. Derscheid filed a resistance and submitted "Proposed Exhibit #16," which consisted of an affidavit stating he had attended an appointment with Dr. Carlstrom on April 18, 2006, and receipts showing he had travelled from Phoenix to Des Moines in April 2006, and spent

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[2] "Notice of commencement of payments shall be filed within 30 days of the first payment." Iowa Admin. Code r. 876-3.1(2). The notice should be filed with the workers' compensation commissioner. *Id.*

the night of April 17 in a Des Moines motel. The employer objected to Derscheid's proposed exhibit.

The deputy workers' compensation commissioner determined there was no reliable evidence in the record that a notice of commencement of benefits had been filed. The deputy found the commissioner had not accepted the letter to Derscheid as a notice of commencement of benefits. The deputy concluded the statute of limitations was tolled under section 86.13, which provides, "If an employer or insurance carrier fails to file the notice required by this section, the failure stops the running of the time periods in section 85.26 as of the date of the first payment."

The deputy found Derscheid to be credible. The deputy noted Derscheid made "an admirable attempt" to return to the workforce. The deputy concluded Derscheid suffered a 100% loss of earning capacity as a result of the work injury. The deputy also found that the employer failed to show that benefits should be suspended under section 85.39 for a failure to submit to a medical examination.

The deputy made a finding that Derscheid had moved to Arizona at some point, the employer had not authorized a physician in Arizona, and this constituted abandonment of Derscheid's care. The deputy determined Dr. Zipnick provided reasonable and necessary treatment. The deputy concluded the expense of treatment by Dr. Zipnick should be covered by the employer.

The employer filed a motion for rehearing or reconsideration. The deputy denied the motion. The workers' compensation commissioner affirmed, with further discussion, the deputy's conclusions regarding the statute of limitations

and that benefits should not be suspended under section 85.39 for failure to attend a medical examination. The commissioner found, however, that the employer had not abandoned Derscheid's care. The commissioner reversed the award of alternative medical care and treatment by Dr. Zipnick.

The employer filed a petition for judicial review. The district court determined that while there was substantial evidence supporting the commissioner's conclusion the employer did not abandon Derscheid's medical care, the commissioner did not address whether the employer was precluded from asserting an authorization defense due to the employer's denial of liability for Derscheid's condition. The court concluded the matter of Dr. Zipnick's medical care should be remanded to the commissioner for consideration of an authorization defense. The court affirmed the commissioner on all other issues. The employer appeals.

II. Standard of Review

Our review of decisions of the workers' compensation commissioner is governed by Iowa Code chapter 17A. Iowa Code § 86.26 (2007). We review the commissioner's decision for the correction of errors at law, not de novo. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005). We review the district court's decision by applying the standards of section 17A.19 to the commissioner's decision to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

We reverse the factual findings of the commissioner only if those findings are not supported by substantial evidence. *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). Evidence is substantial if a reasonable mind would accept it as adequate to reach the same conclusion. *Asmus v. Waterloo Community School Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The ultimate question is not whether the evidence might support a different finding, but whether it supports the findings actually made. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 420 (Iowa 2001).

On issues of law, "the 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). For this reason, we do not defer to the commissioner's interpretation of the law. *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 334 (Iowa 2008). If the commissioner's interpretation is erroneous, we substitute our interpretation for that of the commissioner. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

Where an issue is raised regarding the application of the law to the facts, we reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*l*); *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004). We give some deference to the commissioner's determination, but less deference than we give to the commissioner's findings of fact. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

III. Statute of Limitations

The employer contends the commissioner erred by finding Derscheid's petition was not barred by the statute of limitations found in section 85.26. On statute of limitations issues, we review the commissioner's determination for the correction of errors at law. *Id.* at 851; *Chapa v. John Deere Ottumwa Works*, 652 N.W.2d 187, 189 (Iowa 2002).

Under section 86.13, if an employer or insurance carrier does not file a notice of commencement of benefits, this tolls the running of the statute of limitations found in section 85.26. *See Powell v. Bestwall Gypsum Co.*, 255 Iowa 937, 942, 124 N.W.2d 448, 451 (1963) (finding statute of limitations was tolled by the failure to file a memorandum of agreement as then required by section 86.13). The commissioner found evidence "the agency had not received a notice of commencement of benefits as of February 27, 2004." Derscheid filed his claim for benefits on March 15, 2004. The commissioner concluded Derscheid's claim was not barred by the three-year statute of limitations found in section 85.26.

The employer contends the deputy improperly used his own knowledge of the workers' compensation commission computer system.[3] The deputy found:

> Consequently, Travis failed to explain why payment notice date was not entered in the PYMT NOTICE section of the claims screen, if the agency had considered receipt of the letter to Dennis and/or any 2A form as an acceptable notice of commencement of benefits. Defendants argue that I should not give weight to the views of Polite as she was not an employee of the agency in 1996. However, the claims screen currently used by Polite is the same

[3] The deputy did not state he was taking judicial notice of any facts. We therefore determine that Iowa Code section 17A.14(5), as opposed to section 17A.14(4), applies in this case. For this reason we do not address the employer's arguments regarding judicial notice or due process under section 17A.14(4).

> claims screen that this agency was using in 1996. Also, Polite's testimony agrees with my own understanding of the claims screen in 1996 and I was on staff at this agency at that time.

Section 17A.14(5) provides, "[t]he agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 606 (Iowa Ct. App. 1990). In considering the employer's argument, the commissioner found:

> The deputy's use of his own understanding in this instance is well within the permissible scope for his evaluation of evidence. It is therefore concluded that the personal observation made by the presiding deputy was appropriate and did not lead to error in his decision.

We agree with the commissioner's conclusion. Under section 17A.14(5), the deputy could use his "experience, technical competence, and specialized knowledge" in evaluating the evidence. We further note the deputy used his personal knowledge only on a narrow issue concerning a conflict between the testimony of Wade Travis and the testimony of Janna Polite as to whether a notice of commencement of benefits would be entered in the PYMT NOTICE section of the claims screen.

We turn to the issue of whether there is substantial evidence in the record to support the commissioner's factual finding the employer had not filed a notice of commencement of benefits. The employer asserts that the greater weight of the evidence showed the notice of commencement of benefits was filed on November 25, 1996, when the letter regarding permanent partial disability benefits was sent. The employer points out that former and current workers'

compensation commission employees Tamara Evans, Virginia Peterson, and Wade Travis testified it was the practice of the insurer to attach the notice of commencement of benefits to the letter.

The agency files contain a copy of a letter sent from the insurer to Derscheid informing him of the benefits due to him for his permanent partial impairment. The employer presented testimony that generally a notice of commencement of benefits was attached to the copy of the letter sent to the agency. The agency's files do not contain a copy of any attachments to the letter, and the letter itself does not mention that there were any attachments. Furthermore, the copy of Form 2A kept by the insurer does not have the box checked next to the provision, "Check here if this is a Commencement of Payment Notice." Instead, there is a notation "N/A," which would mean, "Not Applicable," at an adjoining location where the employer is to designate any "Date Disability Began." We determine there is substantial evidence in the record to support the commissioner's factual finding that the employer had not filed a notice of commencement of benefits with the commissioner.

The employer also contends that the letter itself would constitute a notice of commencement of benefits, and that because the agency received a copy of the letter this satisfied the requirements of section 86.13. The employer points out that Travis testified the letter itself would constitute a "first payment notice or commencement of payment notice." At the time the letter was sent, in 1996, section 86.13 (1995) provided, "If an employer or insurance carrier pays weekly compensation benefits to an employee, the employer or insurance carrier shall

file with the industrial commissioner *on forms prescribed by the industrial commissioner* a notice of the commencement of payments." (Emphasis added). The appropriate forms were found in the Iowa Administrative Code. *See* Iowa Admin. Code r. 343-3.1 (1995). Under section 86.13, the letter, which was not one of the forms found in the Iowa Administrative Code, would not have constituted a notice of commencement of benefits. Additionally, there was evidence that if the letter had been accepted as a notice of commencement of benefits, the PYMT NOTICE section of the agency's computer screen would have been filled in, and as noted above, as of February 27, 2004, this was not filled in.

We affirm the district court's affirmance of the commissioner's determination that Derscheid's claim was not barred by the statute of limitations.

IV. Suspension of Benefits

The employer asserts the commissioner should have suspended Derscheid's benefits under Iowa Code section 85.39 (2003) for failure to attend an independent medical examination. Section 85.39 provides, "[t]he refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal."

The employer requested that Derscheid submit to an examination by Dr. Carlstrom, as permitted by section 85.39. At the administrative hearing on December 11, 2006, Derscheid testified he had seen Dr. Carlstrom since the last hearing in February 2006, but he did not remember the date. The employer asked the deputy to hold the record open to allow it to present evidence to

support its contention that Derscheid had not seen Dr. Carlstrom. The deputy responded, "At this point in time I'm not leaving the record open for that purpose unless you show me otherwise."

On December 19, 2006, the employer filed a motion to suspend benefits pursuant to section 85.39. Attached to the motion was a statement from Dr. Carlstrom's office that Derscheid cancelled an appointment scheduled for April 20, 2006, and had not been seen since 2003. Derscheid filed a resistance to the motion, and submitted proposed Exhibit #16 showing he had traveled from Arizona to Iowa and back between April 16 and April 19. In an affidavit that was part of the proposed exhibits he stated he had seen Dr. Carlstrom on April 18. On December 29, 2006, the employer filed a written objection to Derscheid's proposed exhibits.

The deputy found:

> Attached to claimant's hearing brief were yet more proposed exhibits, labeled exhibit 16. These exhibits, consisting of airplane fare, car rental, and motel receipts in April 2006, are apparently submitted in response to a motion to suspend benefits for failing to submit to medical examination filed shortly before hearing on December 18, 2006. I received no objection to these from defendants and they are received.

The deputy referred to Exhibit 16 and concluded, "Dennis's testimony is uncontroverted and I must therefore find that defendants failed to show that Dennis refused medical examination."

The commissioner did not directly address the issue of whether Exhibit 16 should be considered, but affirmed the deputy on the issue of the suspension of benefits. The commissioner stated that upon a request from the employer to

keep the file open for additional evidence the deputy had aptly noted that the employer had "many months" to gather the necessary evidence to prove whether claimant attended a medical appointment with Dr. Carlstrom but it had failed to do so. The district court affirmed the commissioner, finding the deputy's decision was made based on Derscheid's testimony and was independent of the information in Exhibit 16.

The issue of whether to hold the record open for additional evidence was within the deputy's discretion. *See Polson v. Meredith Publ'g Co.*, 213 N.W.2d 520, 526 (Iowa 1973). An abuse of discretion occurs when an agency acts on clearly untenable grounds or to a clearly unreasonable extent. *Haynes v. Second Injury Fund*, 547 N.W.2d 11, 14 (Iowa Ct. App. 1996). We determine the deputy did not abuse his discretion by ruling the record would be closed at the end of the administrative hearing. As the deputy noted, the employer had many months to secure the evidence it sought to present.

Once the record was closed, however, the deputy abused his discretion by considering evidence submitted with Derscheid's post-hearing resistance. It is clear that contrary to the deputy's statement, the employer had objected to Derscheid's proposed Exhibit 16. Furthermore, the employer did not have the opportunity to question Derscheid concerning his affidavit and the related documents. We believe it clear that the deputy considered these documents in making his decision. He stated that the exhibits contained in Exhibit 16 "are received," and later stated in findings of fact that Derscheid had "submitted exhibit 16 . . . showing that he had travelled to Des Moines to this examination in

April 2006." The commissioner did not directly address the issue of these documents, but stated, "I affirm the presiding deputy's decision as set forth in the arbitration decision."

We reverse the decision of the district court. We conclude the commissioner should reconsider the issue of the suspension of benefits under section 85.39 taking into consideration only the evidence presented at the administrative hearing. We reverse the decision of the district court and remand the case to the district court for an order of remand for further proceedings before the workers' compensation commissioner.

V. Unauthorized Medical Treatment

The employer claims the district court erred in reversing the commissioner's decision that treatment by Dr. Zipnick was unauthorized. The deputy found, "defendants have denied liability for the condition that precipitated the requested medical expenses and its causal connection to the injury," and thus an authorization defense was not available to the employer. The deputy additionally found that the employer had abandoned Derscheid's medical care when it had not authorized a physician for him in Arizona. The commissioner reversed the deputy, finding, "[t]he record does not support a finding that defendants abandoned claimant's medical care." The commissioner found the employer was not obligated to provide a doctor in Arizona because Derscheid was not living there.

The district court found there was substantial evidence in the record to support the commissioner's finding that the employer had not abandoned

Derscheid's medical care. The court determined, however, that the case should be remanded to the commissioner because the commissioner had not addressed the deputy's finding that the employer was not entitled to an authorization defense because it had denied liability for Derscheid's condition. On appeal, the employer asserts that it did not deny liability, but merely asserted the statute of limitations as a defense.

Under section 85.27(4), "the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care." The statute provides three exceptions: (1) in an emergency, when the employer cannot be reached immediately; (2) when the employer and employee consent to alternative medical care; and (3) when the employee establishes the right to seek alternative medical care in a proceeding before the agency. Iowa Code § 85.27(4); *Bell Bros. Heating & Air Conditioning, Inc. v. Gwinn*, 779 N.W.2d 193, 203-04 (Iowa 2010).

Additionally, the employer's right to control the treatment is lost if the employer denies liability for the employee's injury.[4] *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 575 (Iowa 2006); *Trade Professionals, Inc. v. Shriver*, 661 N.W.2d 119, 124 (Iowa 2003). The Iowa Supreme Court recently stated, "we reject the notion that an employer loses the right to choose medical care under section 85.27 when the employer acknowledges the compensability of a work-

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[4] Another scenario arises when an employee abandons the protections of section 85.27 and seeks independent medical care; the employer is liable if the employee presents "proof by a preponderance of the evidence that such care was reasonable and beneficial." *Bell Bros.*, 779 N.W.2d at 206. This issue has not been raised in the present appeal.

related injury and furnishes care but later disputes the nature and extent of the disability." *Bell Bros.*, 779 N.W.2d at 207. Also, "a denial of compensability that results in the employer's loss of the right to choose the medical care is a denial that the claimed injury arose in the course and scope of employment." *Id.* The employer does not lose the right to control the treatment if the employer disputes only the nature or extent of the employee's disability. *Id.*

As noted above, the deputy found, "defendants have denied liability for the condition that precipitated the requested medical expenses and its causal connection to the injury." We concur in the district court's finding that the commissioner did not make clear whether the deputy's finding had been accepted or rejected. We affirm the court's decision remanding this issue to the commissioner for a determination of whether the employer is reasonably liable for Derscheid's unauthorized medical expenses.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.