IN THE COURT OF APPEALS OF IOWA

No. 0-685 / 10-0256
Filed November 24, 2010

VERIZON BUSINESS NETWORK SERVICES, INC. f/k/a MCI WORLDCOM NETWORK SERVICES, INC. d/b/a MCI TELECOMMUNICATIONS CORP.,
Petitioner-Appellant/Cross-Appellee,

vs.

MELINDA MCKENZIE,
Respondent-Appellee/Cross-Appellant.

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

An employer appeals, and an employee cross-appeals, from a district court judicial review ruling affirming in part and reversing in part the appeal decision of the workers' compensation commissioner, and remanding to the agency for determination of the commencement date. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Timothy A. Clausen of Klass Law Firm, L.L.P., Sioux City, for appellant.

Dennis J. Mahr, Sioux City, for appellee.

Heard by Eisenhauer, P.J. and Potterfield and Doyle, JJ.

DOYLE, J.

MCI Worldcom Network Services, Inc. doing business as MCI Telecommunications Corporation (MCI)[1] appeals, and Melinda McKenzie cross-appeals, from a district court judicial review ruling affirming in part, reversing in part, and remanding the appeal decision of the workers' compensation commissioner on McKenzie's review-reopening petition. The dispositive question in this case is whether the agency erred in the standard it applied to determine McKenzie established her current condition warranted an increase of compensation.

I. Background Facts and Proceedings.

On December 26, 1999, Melinda McKenzie slipped and fell on a wet floor while working at MCI. She sought medical treatment the next day, complaining of lower back and left leg pain. Her condition did not improve with conservative treatment, and surgery was not recommended. Although only light-duty restrictions were imposed, McKenzie was not able to return to work in any capacity. More than one physician advised her that losing some weight would help combat her persistent pain.

McKenzie filed a petition with the Iowa Workers' Compensation Commissioner in January 2001, alleging she had suffered an injury to her lower back, left leg, and buttock. About a month before the arbitration hearing, McKenzie was referred to pain management specialist Dr. Bruce Keppen. He started her on a low-dose of methadone, a narcotic pain medication. Keppen

[1] MCI is now known as Verizon Business Network Services, Inc.

informed her, "Definitely weight loss is the only thing that is going to give . . . long term relief."

Following an arbitration hearing, the deputy workers' compensation commissioner determined McKenzie had suffered a twenty-five percent industrial disability, entitling her to 125 weeks of permanent partial disability benefits at a rate of $196.57 per week. The deputy found McKenzie's

> recovery from the injury has been complicated by [her] own situation, namely obesity and personal psychological make-up. She has not had surgery and none has really been recommended. . . . She has impairment ratings of 8 percent and 15 percent. Medical care providers have not resolved her symptoms but that may be due in part to claimant's personal situation. It is difficult to assess whether claimant can work or what she can do. . . . Claimant's subjective complaints are not supported by objective findings.

McKenzie continued to suffer from lower back and left leg pain. She underwent gastric bypass surgery in July 2006, and eventually lost more than two hundred pounds. MCI refused to authorize the surgery and declined to pay for it. Although her pain improved, she had to take a higher dose of narcotic pain medication due to a malabsorption condition caused by the surgery.[2] As a result, McKenzie remained unemployable. She filed a review-reopening petition in February 2007, requesting an increase in compensation as an odd-lot employee, as well as reimbursement for the unauthorized gastric bypass surgery.

The deputy commissioner issued a review-reopening decision in May 2008, finding McKenzie

[2] A physician explained that when portions of McKenzie's digestive system were removed during the gastric bypass surgery, her ability to properly absorb medications was affected thus necessitating an increase in the amount of medication required to address her remaining back and leg pain.

> proved by a preponderance of the evidence that there has been a change in the condition of the claimant that was not anticipated at the time of the original decision. The claimant has failed to improve after significant weight reduction and elimination of her morbid obesity medical condition. It is found that the claimant has suffered a substantial change in circumstances or condition that was not anticipated at the time of the settlement or original arbitration decision.

The deputy concluded McKenzie had suffered a 100 percent permanent total industrial disability, entitling her to permanent benefits commencing on September 11, 2002, a date agreed upon by the parties. Finally, the deputy ordered MCI to pay for McKenzie's gastric bypass surgery, as well as her anticipated follow-up surgery to reshape her skin and muscles.

MCI appealed, and the deputy's decision was affirmed and adopted by the commissioner with some additional analysis. The commissioner concluded

> it was anticipated at the time of the initial arbitration hearing that weight loss would significantly improve claimant's pain symptoms, and thus her overall level of disability.
>
> . . . .
>
> Despite her commendable efforts, claimant has had only slight improvement in her pain and she did not improve as had been anticipated in the arbitration hearing deputy's analysis of her disability. Sufficient grounds are shown under the case law outlined in the review-reopening decision to review the level of claimant's disability. . . .
>
> It is further concluded that the weight loss surgery constituted reasonable and necessary treatment of the work injury.

Finally, the commissioner found MCI's

> complaint about the use of a stipulated commencement date cannot be addressed on appeal. Although raised as an issue, it was not discussed in the appeal brief. It is concluded that the agency shall not, under such circumstances, overrule a stipulation of the parties.

MCI filed a petition for judicial review. Following a hearing, the district court issued a ruling affirming the agency's determination that McKenzie had

established her current condition warranted an increase in compensation and the agency's award of permanent total disability benefits. The court nevertheless disagreed with the agency's order requiring MCI to pay for McKenzie's gastric bypass procedure and related follow-up surgery because those procedures were not authorized by MCI. The court also determined the agency erred in failing to address the commencement-date issue, finding it was "raised, albeit in poor form, and therefore should have been addressed by the agency." The court accordingly remanded the case to the agency for determination of that issue.

MCI appeals. It claims that after the agency entered its decision, the Iowa Supreme Court issued an opinion clarifying a claimant's burden of proof in a review-reopening proceeding, which the district court failed to apply. *See Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 391-92 (Iowa 2009). MCI asserts that when the correct standard is applied, substantial evidence does not support the agency's finding that McKenzie established a change in condition justifying an increase in compensation. MCI also takes issue with the extent of disability found by the agency.

McKenzie cross-appeals, claiming the district court erred in reversing the agency's order requiring MCI to pay for her gastric bypass surgeries and in remanding the case to the agency to determine whether the parties stipulated to the correct date for commencement of benefits.

II. Scope and Standards of Review.

Our scope of review is for the correction of errors at law. *Kohlhaas*, 777 N.W.2d at 390. We review the district court decision by applying the standards of the Iowa Administrative Procedure Act, Iowa Code chapter 17A (2007), to the

agency action to determine if our conclusions are the same as those reached by the district court. *Id.* Under section 17A.19(10), a reviewing court may reverse the agency's decision if it is unsupported by substantial evidence in the record as a whole, based upon an irrational, illogical, or wholly unjustifiable application of law to fact, or otherwise characterized by an abuse of discretion. *Id.* at 391.

III. Discussion.

A. Burden of Proof.

Iowa Code section 86.14(2) provides that in a review-reopening proceeding, "inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon." In *Acuity Insurance v. Foreman*, 684 N.W.2d 212, 217 (Iowa 2004), our supreme court stated the commissioner must make the following two determinations in review-reopening proceedings:

> (1) whether there has been a change in the worker's condition as a result of the original injury, and (2) whether this change was contemplated by the parties at the time of any settlement or stipulation with respect to industrial disability or whether it was beyond what the commissioner contemplated at the time of the original assessment of industrial disability.

The *Acuity* test was re-examined in *Kohlhaas*, 777 N.W.2d at 391-92, which was decided after the agency's review-reopening decision but before the district court's judicial review ruling. In *Kohlhaas*, the court determined the second element of the test

> is ambiguous and seems to condone an agency's consideration of, or speculation about, future changes in condition or earning capacity at the time of the initial award. What we attempted to say in *Acuity* is that a condition that has already been determined by an award or settlement should not be the subject of a review-reopening petition.

777 N.W.2d at 391-92. The court reasoned the "functional impairment and disability resulting from a scheduled loss is what it is at the time of the award and is not based on any anticipated deterioration of function that might or might not occur in the future." *Id.* at 392. Similarly,

> in an unscheduled whole-body case, the claimant's loss of earning capacity is determined by the commissioner as of the time of the hearing based on the factors bearing on industrial disability then prevailing—not based on what the claimant's physical condition and economic realities might be at some future time.

Id. Future developments, including the worsening of a physical condition or a reduction in earning capacity, should be addressed in a review-reopening proceeding. *Id*. The *Kohlhaas* court accordingly concluded a review-reopening claimant need no longer prove, as an element of the claim, that the current extent of disability was not contemplated by the commissioner in the arbitration award. *Id.*

Although the agency did not cite *Acuity* in its review-reopening decision, it is apparent it utilized the *Acuity* test. The deputy's decision concluded McKenzie "proved by a preponderance of the evidence that there has been a change in the condition of the claimant *that was not anticipated at the time of the original decision*." (Emphasis added.) The commissioner's appeal decision adopted that finding and reiterated:

> *[I]t was anticipated at the time of the initial arbitration hearing* that weight loss would significantly improve claimant's pain symptoms, and thus her overall level of disability.
>
> . . . .
>
> Despite her commendable efforts, claimant has had only slight improvement in her pain and *she did not improve as had been anticipated* in the arbitration hearing deputy's analysis of her disability.

(Emphasis added.)

In its judicial review ruling, the district court quoted the test from *Acuity* and then mentioned in a footnote the court's decision in *Kohlhaas* disavowing the second element of that test. The court stated, "However, this authority was not available at the time Ms. McKenzie filed her Petition for Review-Reopening." It then proceeded to analyze the substantial-evidence question raised by MCI under the *Acuity* test, ultimately concluding, "The change in condition or circumstances resulted from Ms. McKenzie's dramatic weight loss which was not, and could not have been, considered by the original presiding deputy."

MCI argues the district court erred in failing to conclude the agency analyzed McKenzie's review-reopening claim under an incorrect standard. We agree. *See Beeck v. S.R. Smith Co.*, 359 N.W.2d 428, 484 (Iowa 1984) ("As a general rule, judicial decisions, including overruling decisions, operate both retroactively and prospectively."); *accord Farm Bureau Serv. Co. v. Kohls*, 203 N.W.2d 209, 211 (Iowa 1972). McKenzie does not dispute an incorrect analysis was used by the agency. Instead, she urges remand is not necessary "just to have the Industrial Commissioner rewrite his decision to restate or avoid words such as 'anticipated' and 'contemplated.'" We conclude otherwise.

In *Kohlhass*, the court stated,

> Although it could be argued there is substantial evidence in the record that Kohlhaas' current condition does not warrant an increase in compensation, it is fair to conclude the commissioner's determination may have been influenced by the language in *Acuity* we have just disavowed.

777 N.W.2d at 393. The court accordingly remanded the case to the commissioner to determine on the record already made whether the claimant met the new burden of proof required in a review-reopening proceeding. *Id.*; *see also Xenia Rural Water Dist. v. Vegors*, 786 N.W.2d 250, 257 (Iowa 2010) (reversing agency determination regarding proper allocation of burden of proof and remanding to allow agency to apply proper burden to evidence).

We believe we should do the same here, first because the agency's determination may have been influenced by the disavowed language in *Acuity*,[3] and second because we cannot make the necessary factual findings as a matter of law. *See McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 186 (Iowa 1980) ("Remand is also necessitated in order to permit the agency to re-evaluate the evidence, applying the correct rule of law, unless the reviewing court can make the necessary factual findings as a matter of law because the relevant evidence is both uncontradicted and reasonable minds could not draw different inferences from it.").

Because we are remanding the case to the commissioner to determine on the record already made whether McKenzie met her burden of proof under *Kohlhaas*, we need not and do not address MCI's other claim that the commissioner erred in finding McKenzie was entitled to a permanent total

[3] In determining McKenzie had established a change in condition, the agency and district court cited *Meyers v. Holiday Inn*, 272 N.W.2d 25, 26 (Iowa Ct. App. 1978), which holds the failure of a diagnosed condition to improve to the extent anticipated at the time of the original disability determination may support an increased award on review-reopening. *See also Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 435 (Iowa 1999) ("[C]ompensation may be increased when an increase in industrial disability results from a failure of a diagnosed physical condition to improve to the extent anticipated."). Neither McKenzie nor MCI discusses how, if at all, that rule may have been affected by the court's decision in *Kohlhaas*.

disability award. That finding is necessarily dependent on the agency's re-evaluation of the evidence under the correct rule stated in *Kohlhaas*. *See, e.g.*, *Xenia Rural Water Dist.*, 786 N.W.2d at 260 n.1 (noting issue regarding whether commissioner erred in finding claimant was entitled to a permanent total disability award did not need to be addressed due to remand on issue of entitlement to compensation). We do, however, find it necessary to address the two issues raised in McKenzie's cross-appeal.

B. Medical Expenses.

The deputy ordered MCI to pay for McKenzie's gastric bypass surgery and her anticipated follow-up surgery, finding the gastric bypass surgery was recommended by Dr. Keppen, McKenzie's authorized treating doctor for the management of her back and leg pain. The commissioner adopted that finding on appeal and additionally found "the weight loss surgery constituted reasonable and necessary treatment of the work injury."

MCI challenged those findings on judicial review, arguing it did not authorize McKenzie's gastric bypass surgery; therefore, it was not required to reimburse her for the surgery under Iowa Code section 85.27. In response, McKenzie argued "the 'current rule' is that if the medical care improved the employee's condition, the care need not be authorized for the employee to receive medical expenses." The district court agreed with MCI, relying on an unpublished decision from this court rejecting the argument that section 85.27 should be read "in hindsight such that liability would attach if the unauthorized care proved to be successful and beneficial." *See City of Ames v. Tillman*, No. 08-1677 (Iowa Ct. App. July 22, 2009).

After the district court entered its judicial review ruling, our supreme court decided *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 202 (Iowa 2010), and addressed the very question raised here: whether an employer in a contested-case proceeding can be liable for medical benefits under section 85.27 based on unauthorized medical care to treat a work injury.[4] The court answered that question affirmatively, stating the statute could not be

> narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. The allocation of this significant burden to the claimant maintains the employer's statutory right to choose the care under section 85.27(4), while permitting a claimant to obtain reimbursement for alternative medical care upon proof by a preponderance of the evidence that such care was reasonable and beneficial.

Id. at 206.

Although the agency determined McKenzie's gastric bypass surgery "constituted reasonable and necessary treatment of the work injury," it did not address whether the surgery was beneficial to her work-related injury. *Cf. id.* at

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[4] Section 85.27(1) requires an employer to furnish a wide range of reasonable medical services for compensable injuries to employees. *See Bell Bros.*, 779 N.W.2d at 202. Once compensability is acknowledged, section 85.27(4) gives the employer "the right to choose the care," subject to certain employee protections monitored by the workers' compensation commissioner. *See id.* at 203-04 (stating under section 85.27(4) an employee may choose his or her own medical care at the employer's expense (1) in an emergency situation, (2) upon agreement with the employer, or (3) when ordered by the commissioner following a prompt, informal hearing). An employee may also choose his or her own medical care at his or her own expense "independent of the statutory scheme." *Id.* at 204.

208 (examining whether substantial evidence supported commissioner's finding that unauthorized medical care was necessary and beneficial). Because the facts bearing on that question are not undisputed, we think remand for application of the analysis set forth above on the record already made is required. *See McSpadden*, 288 N.W.2d at 186. We accordingly reverse the district court's ruling to the contrary.

C. Stipulation to Commencement Date.

At the hearing on McKenzie's review-reopening petition, MCI's attorney stipulated the commencement date for benefits, if any were awarded, would be September 11, 2002, the last day of the original arbitration award. The deputy accordingly adopted that date in its decision. On intra-agency appeal, MCI filed an appeal brief listing five issues, the last of which was "[w]hether the Deputy erred in adopting the commencement date as stipulated to by the parties." It did not, however, provide any argument on that issue in the body of its brief.

The commissioner refused to address the issue on appeal, stating, "Although raised as an issue, it was not discussed in the appeal brief. It is concluded that the agency shall not, under such circumstances, overrule a stipulation of the parties." The district court determined the case should be remanded to the commissioner for resolution of the issue because it "was raised, albeit in poor form, and therefore should have been addressed by the agency." We agree.

Iowa Administrative Code rule 876-4.28(4) requires an appellant's brief on intra-agency appeal to include a statement of the issues on appeal, in addition to an "argument corresponding to the separately stated issues and contentions of

appellant with respect to the issues presented and reasons for them." *See also Aluminum Co. of Am. v. Musal*, 622 N.W.2d 476, 478 (Iowa 2001) ("When review is sought by a party filing a notice of appeal, the rules provide for the issues to be identified in the briefs filed by the parties."). Rule 876-4.28(7) then states:

> The appeal will consider the issues presented for review by the appellant and cross-appellant in their briefs and any issues necessarily incident to or dependent upon the issues that are expressly raised . . . . An issue will not be considered on appeal if the issue could have been, but was not, presented to the deputy.

Like the district court, we conclude under rule 876-4.28(7) the commissioner should have addressed the issue expressly raised by MCI even though it was not supported by an argument, as it was presented for the agency's review. *See, e.g.*, *Aluminum*, 622 N.W.2d at 478 (concluding commissioner was authorized to decide case even though parties did not file briefs or identify issues for review). *But see* Iowa R. App. P. 6.903(2)(*g*)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). We accordingly direct the agency to reconsider the commencement date for McKenzie's benefits should it determine on remand she is in fact entitled to benefits.

IV. Conclusion.

We reverse and remand the case to the district court for further remand to the workers' compensation commissioner to determine on the record already made (1) whether McKenzie's disability has increased since the original award using the standard set forth in *Kohlhaas*, (2) if she is entitled to benefits, the correct commencement date for benefits, and (3) whether the unauthorized medical expenses should be paid by MCI under the analysis adopted by our

supreme court in *Bell Brothers*. The judgment of the district court is accordingly affirmed in part, reversed in part, and remanded. Costs on appeal are taxed to the parties equally.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.