IN THE COURT OF APPEALS OF IOWA

No. 0-799 / 10-0358
Filed January 20, 2011

WAL-MART STORES and
AMERICAN HOME ASSURANCE,
Petitioners-Appellants,

vs.

KATHRYN JOHNSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

An employer appeals the district court decision affirming the award of workers' compensation benefits by the workers' compensation commissioner. **AFFIRMED.**

Peter M. Sand, Des Moines, for appellants.

Jerry Jackson of Moranville & Jackson, P.C., West Des Moines, for appellee.

Considered by Sackett, C.J., Vogel, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.

I. Background Facts & Proceedings

Kathryn Johnson was employed by Wal-Mart Stores, Inc. in Indianola, Iowa. She worked in the pharmacy department, where her job duties included stocking shelves. She began experiencing pain in her right shoulder in May 2007, when she had more work while they were taking inventory at the store. The pain became worse over the next two months. She also stated that during this period of time she attempted to pull on a pallet jack and was injured when it did not move. On July 21, 2007, Johnson was eating dinner with her husband when her pain increased to the point that she went to the emergency room.

Johnson was sent by her employer to Dr. Robin Epp on July 25, 2007, and was diagnosed with right shoulder pain, non-work related. Johnson was then examined by Dr. Mary Hlavin on August 27, 2007. Dr. Hlavin determined Johnson had a herniated disc in her neck. Johnson had surgery on the C5-C6 level in September 2007. Johnson's pain did not improve after the surgery. Dr. Hlavin gave the opinion that Johnson's neck, shoulder, and arm problems were all work related. She stated the cause was potentially due to repetitive lifting, but was more likely due to the pallet jack incident. Johnson has not returned to work since July 21, 2007.

Johnson filed a claim for workers' compensation benefits. The employer denied liability. The employer requested that Johnson have an independent medical examination (IME), pursuant to Iowa Code section 85.39 (2007), and scheduled an appointment for her with Dr. William Boulden. Johnson refused to attend on the ground that the employer did not have the right to request an IME

when it denied liability. The employer filed a motion asking the workers' compensation commissioner to "compel attendance at a re-scheduled examination." While the motion was pending, Dr. Boulden conducted a records-only review in which he determined Johnson's condition was not work related.

A deputy workers' compensation commissioner entered a ruling that denied the motion to compel attendance. The employer then filed a motion to reconsider, and the deputy denied that motion as well. At the administrative hearing the attorney for the employer stated he did not want to waive the issue regarding the IME. The deputy made an oral ruling that the employer was not entitled to an IME when it denied liability.

The deputy issued a decision finding Dr. Hlavin was familiar with Johnson's condition, and her views on causation and impairment were accepted. The deputy found Dr. Boulden's opinions were entitled to little weight because he misinterpreted or seemed unaware of certain facts regarding Johnson's work and the facts surrounding her claim. The deputy concluded Johnson had suffered a forty percent loss of earning capacity. The deputy found there was an injury date of May 20, 2007. The deputy did not address the issue of the IME in the written decision. The employer appealed, and the commissioner affirmed and adopted the deputy's decision.

The employer filed a petition for judicial review. The district court affirmed the decision of the commissioner. The court determined the employer had not preserved error on its issue regarding the IME because the issue had not been raised before the commissioner. The employer appeals the decision of the district court.

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).

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).

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). 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).

III. Issue Preservation

The employer contends the commissioner should have required Johnson to attend a medical examination as requested under section 85.39. The

employer claims the deputy improperly ruled that the employer could not request an IME when it denied liability. Johnson argues that the employer did not preserve error on this issue.

The district court found the employer did not preserve error on this issue because it did not raise it in the intra-agency appeal to the commissioner. A review of the appeal brief filed by the employer before the commissioner, however, shows the issue was clearly raised in the appeal brief. The employer's brief stated, "The Defendants were denied an opportunity to have the Claimant examined under sec. 85.39 in this case."

The problem is not that the issue was not raised before the commissioner, but that the commissioner did not rule on it. The commissioner affirmed and adopted "those portions of the proposed decision in this matter that relate to issues properly raised on intra-agency appeal." The deputy's written proposed decision did not address this issue. Therefore, the commissioner did not address it either.[1] The deputy's oral ruling would not constitute final agency action. *See Boehme v. Fareway Stores, Inc.*, 762 N.W.2d 142, 146 (Iowa 2009) (noting a deputy's ruling is not a final agency action). Judicial review under section 17A.19 is limited to those "aggrieved or adversely affected by any final agency action." §17A.19(1).

We conclude the employer has failed to preserve error on its claim regarding a medical examination under section 85.39.

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[1] The employer could have filed a motion for a rehearing asking the commissioner to address this issue. *See* Iowa Admin. Code r. 876-4.24 (setting forth the procedure to request a rehearing); *Ayers v. D & N Fence Co.*, 731 N.W.2d 11, 15 (Iowa 2007) (noting a party requested a rehearing when the commissioner failed to address an issue).

IV. Substantial Evidence

The employer asserts there is not substantial evidence in the record to support the commissioner's finding that Johnson's condition was caused by her work. The employer points out that Dr. Hlavin gave the opinion that Johnson's shoulder pain was caused by a herniated disc in her neck. The employer claims that because the C5-C6 anterior cervical discectomy did not cause an improvement in Johnson's shoulder pain, this shows the diagnosis was incorrect. The employer contends there is a lack of evidence connecting the pallet jack incident with Johnson's condition.

Dr. Hlavin examined Johnson and gave the opinion her neck, shoulder, and arm problems were work related, "potentially due to a cumulative effect from repetitive lifting of heavy objects but likely in particular related to an injury with a pallet jack that led to a cervical disc herniation." "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. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The commissioner, as the fact finder, determines the weight to be given expert testimony. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 631 (Iowa 2000). Substantial evidence may be provided by an expert's opinion on the issue of causation. *See Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 562 (Iowa 2010) (finding "the commissioner's decision on causation is supported by substantial evidence in the form of the expert opinions" of two doctors).

We conclude there is substantial evidence in the record to support the commissioner's findings on the issue of causation. Evidence is substantial if a

reasonable mind would accept it as adequate to reach the same conclusion. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The commissioner reviewed the medical opinions provided by Dr. Epps, Dr. Boulden, and Dr. Hlavin, and found Dr. Hlavin's opinions were entitled to the most weight because she was "most familiar with the claimant's condition and impairment." As noted above, the commissioner, as the fact finder, determines the relative weight to be given expert medical opinions. *See IBP*, 604 N.W.2d at 631.

V. Injury Date

The employer contends the commissioner erred by finding the date of injury was May 20, 2007, when Johnson was performing extra work for the store inventory. The employer notes that Dr. Hlavin stated Johnson's injury was potentially due to the cumulative effect of repetitive lifting, but was likely caused by the pallet jack incident. The pallet jack incident took place sometime after the May 20, 2007 date, possibly late in June 2007.

On this issue the commissioner, by adopting the deputy's findings, determined:

> The injury date here is May 20, 2007. But for the May 20, 2007 injury, and the claimant's continued work activities, the claimant's current state of impairment does not exist. It is found that the May 20, 2007 injury is the proximate cause of the claimant's injury and that the later incident with the pallet jack was a manifestation or sequelae of the May 20, 2007 injury.

We conclude the commissioner's decision on this issue is supported by substantial evidence. We consider 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). The records shows Johnson began

to have right shoulder pain about May 20, 2007, when she was engaging in extra work. Her pain continued to get worse over the next two months. It was during this period of time that the pallet jack incident occurred. After considering all of these facts, the commissioner could properly conclude that the underlying cause of Johnson's condition was the extra work performed around May 20, 2007, and that this was the actual the date of injury.

We affirm the decision of the district court and the workers' compensation commissioner.

AFFIRMED.