

IN THE COURT OF APPEALS OF IOWA

No. 1-875 / 11-0792
Filed January 19, 2012

BEN KREMENAK,
Petitioner-Appellant,

vs.

**STEINER CONSTRUCTION and
GRINNELL MUTUAL INSURANCE
COMPANY,**
Respondents-Appellees.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill,
Judge.

Ben Kremenak appeals from a review-reopening decision denying
additional permanent partial disability benefits. **AFFIRMED.**

Thomas M. Wertz and Daniel J. Anderson of Wertz & Dake, Cedar
Rapids, for appellant.

John M. Bickel and Sarah W. Anderson of Shuttleworth & Ingersoll,
P.L.C., Cedar Rapids, for appellees.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

This case returns to our court following a remand to allow the workers' compensation commissioner to clarify whether the claimant met his burden of proof under the standard articulated by our supreme court in *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 392 (Iowa 2009) (holding that worker bringing a review-reopening claim must prove by a preponderance of the evidence that worsening physical condition or diminution in earning capacity was proximately caused by original injury). In *Kohlhaas*, 777 N.W.2d at 391, the court disavowed obiter dictum from *Acuity Insurance v. Foreman*, 684 N.W.2d 212, 217 (Iowa 2004), suggesting a worker was required to prove that the change in his or her condition since the time of the original injury must not have been contemplated by the decision maker at the time of the original award.

After applying the *Kohlhaas* standard on remand, the deputy commissioner again determined Kremenak failed to prove a deterioration of his physical or economic condition proximately caused by his original back injury. Because we find substantial evidence in the record to support the deputy commissioner's determination, we affirm.

I. Background Facts and Proceedings

We outlined the factual and procedural history of Kremenak's claim in his first appeal from the judicial review of the deputy commissioner's opinion, as follows:

On August 21, 1996, Kremenak suffered a low back strain while loading sheets of plywood in the course of his employment with Steiner Construction. Following the injury, Kremenak underwent an MRI, which demonstrated degenerative changes at

L4-5 and L5-S1, asymmetric disc bulging at L4-5 affecting the L5 nerve root, and a central disc bulge at L5-S1 that was of questionable clinical significance.

As a result of his injuries, Kremenak filed a petition for workers' compensation benefits. This claim resulted in an appeals decision by the Iowa Workers' Compensation Commissioner on October 28, 1999. After determining Kremenak's permanent work restrictions to be no lifting above seventy-five pounds and avoidance of repetitive bending with the back, Kremenak was awarded weekly benefits based on a fifteen-percent industrial disability.

While this decision was on appeal to the supreme court, the parties entered into an "Agreement for Settlement" vacating the appeals decision and awarding Kremenak a loss of earning capacity equal to a permanent partial industrial disability of 22.740184 percent. The settlement agreement was approved by the workers' compensation commissioner on November 28, 2000.

Kremenak v. Steiner Constr., No. 09-0428 (Iowa Ct. App. Sept. 17, 2009)
(*Kremenak I*).

We went on to recount the developments in the case after Kremenak filed his petition for review-reopening pursuant to Iowa Code section 86.14 (2003) on November 25, 2003.

[Kremenak] claimed that he had sustained a worsening of his back and economic condition and that he was entitled to additional permanent partial disability benefits.

In defense of Kremenak's claim, Steiner Construction argued that Kremenak could not prove by a preponderance of the evidence that subsequent to the settlement agreement (1) he suffered an impairment or lessening of earning capacity proximately caused by the original injury and (2) any such change was not contemplated by the parties at the time of settlement. See *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 217 (Iowa 2004).

At an evidentiary hearing on June 13, 2006, the parties submitted the medical records and opinions of four doctors as to whether Kremenak suffered a change in condition proximately caused by the 1996 workplace injury. First, Dr. David Durand noted "significant changes" when comparing MRIs taken in 1996 and 2003, but opined, "I do not believe that [Kremenak's] current pain can be attributed to his previous work injury in the 1990's. I believe this is a new process." Second, in response to a letter from

Kremenak's attorney, Dr. Loren Mouw stated, "I believe Mr. Kremenak's current back pain is simply [a] continuation of his prior discomfort, which started August 21, 1996 and was work related." Dr. Mouw also answered yes to whether he would consider the 1996 injury a substantial factor with respect to Kremenak's current complaints and symptoms and that Kremenak's current complaints and symptoms were consistent with the 1996 injury. Third, in an independent medical evaluation report, Dr. Ray Miller found that "Kremenak's current complaints and symptoms are believed to be related to the work injury of 08/21/1996" and "a slow progression of changes from the previous injury." Finally, Dr. Craig Dove opined after neurodiagnostic studies that Kremenak was suffering from meralgia paresthetica of an unknown etiology, but that is often associated with obesity and tight tool belts.

Id.

After the June 2006 hearing, the deputy worker's compensation commissioner denied Kremenak additional permanent partial disability benefits. The December 15, 2006 decision concluded the claimant failed to prove he had "an increase in impairment, increase in loss of function or lessening of earning capacity proximately caused by the work injury on August 22, 1996." In *Kremenak I*, we said:

From this language it appears the deputy commissioner simply concluded that Kremenak failed to prove he had undergone a change in his physical or economic condition attributable to the 1996 injury, and that the deputy commissioner did not need to reach the second *Acuity* prong, namely, that any change was not contemplated by the parties at the time of settlement.

Id. But we also noted that the deputy commissioner referred to the "not contemplated" dicta from *Acuity* in its discussion of Dr. Mouw's opinion.

Specifically, the deputy commissioner stated:

A careful reading of Dr. Mouw's September 2004 letter reveals that he really never answered the question whether claimant's condition had worsened or deteriorated in a manner not contemplated at the time of the agreement for settlement.

Because the deputy commissioner's decision "*may have been* influenced by the language in *Acuity*," our court—"out of an abundance of caution"—reversed and remanded to allow the commissioner "to determine and clarify whether Kremenak has met the burden of proof under the standard set forth in *Kohlhaas*." *Id.*

On remand, Workers' Compensation Commissioner Christopher Godfrey delegated authority to Deputy Commissioner Clair Cramer to issue the final agency decision. On June 17, 2010, the deputy commissioner issued an order applying the *Kohlhaas* standard. After analyzing all of the evidence originally presented, the deputy commissioner ultimately determined:

When all the evidence is considered, claimant has failed to prove he has had a physical or economic change of condition since the agreement for settlement approved on November 28, 2000 that might entitle him to additional permanent partial disability benefits.

Kremenak petitioned for judicial review. On April 20, 2011, the district court affirmed the deputy commissioner's remand review-reopening decision. Kremenak now appeals.

II. Scope and Standards of Review

We review a district court's judicial review order in a workers' compensation case for legal error. *Kohlhaas*, 777 N.W.2d at 390. We apply the standards of the Iowa Administrative Procedure Act (APA) to the agency action to determine if our conclusions are the same reached by the district court. *Id.*

Under Iowa Code section 17A.19(10) (2009), "a reviewing court may reverse the decision of the workers' compensation commissioner if it is unsupported by substantial evidence in the record or characterized by an abuse

of discretion.” *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). The APA defines “substantial evidence” as 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). An abuse of discretion occurs when the commissioner’s exercise of discretion is “clearly erroneous or rests on untenable grounds.” *Waters*, 674 N.W.2d at 96.

III. Analysis

Kremenak argues on appeal that the agency’s remand decision is “simply a regurgitation of the Review-Reopening Decision with a few cosmetic changes.” He contends the deputy commissioner failed to follow the order of our court. In particular, Kremenak faults the deputy commissioner for failing to consider how Dr. Mouw’s opinion would impact the review-reopening determination. He goes on to criticize the district court for doing its own evaluation of the evidence in light of Dr. Mouw’s opinion. Kremenak asks us to once again remand the case to the agency so that it can “conduct a proper review of the evidence in accord with the original ruling” in *Kremenak I*.

For their part, Steiner Construction and its insurance carrier Grinnell Mutual (collectively Steiner) initially challenge Kremenak’s preservation of error. Steiner contends Kremenak should have asked the district court to directly address whether the agency complied with our court’s remand order. Steiner

also asserts that Kremenak has waived his substantial evidence argument. We reject Steiner's preservation-of-error arguments.

Our decision directed the agency to apply *Kohlhaas* to the review-reopening petition. The district court recognized it was "Deputy Cramer's job . . . to determine whether Petitioner's physical condition worsened or his earning capacity was reduced and whether these alleged changes were proximately caused by the original injury." See *Kohlhaas*, 777 N.W.2d at 392. The district court then found the deputy commissioner considered all the evidence and determined on remand that "Petitioner had failed to prove by a preponderance of the evidence that he had a physical or economic change in condition proximately caused by the 1996 injury." Given that analysis by the district court, Kremenak did not need to ask for a more specific ruling on his claim. Neither do we think that Kremenak waived his challenge to the agency's ruling as not being supported by substantial evidence.

In response to Kremenak's substantive claims, Steiner argues that the deputy commissioner's decision satisfied our remand order by correctly applying *Kohlhaas* and again rejecting Kremenak's claim for additional benefits. Steiner disputes the claimant's assertion that the agency failed to consider the effect of Dr. Mouw's opinion on the review-reopening standard. Steiner believes that Kremenak's appeal misconstrues the scope of our remand order:

There can be no presumption that the Agency initially rejected Dr. Mouw's opinion due to *Acuity* or that, had the decision not been so tainted and had it properly considered Dr. Mouw's opinion, the Agency should and would have ruled for Claimant.

We agree with Steiner's assessment on the substantive issues. Our decision in *Kremenak I* did not presuppose that once the deputy commissioner cleansed its decision of the contemplation prong discussed in *Acuity*, then Dr. Mouw's opinion would necessarily tip the scale toward an award of additional benefits. In the remand order, the deputy commissioner noted Dr. Mouw's September 2004 opinion that Kremenak's "current back pain was simply a continuation of his prior discomfort." The deputy commissioner then weighed that expert viewpoint against the opinion of Dr. Durand that Kremenak's pain in 2003 could not be attributed to his 1996 injury and was "a new process," and the impressions of Dr. Miller and Dr. Dove that Kremenak's partnership work after leaving Steiner Construction caused the increase in his symptoms. The deputy commissioner also highlighted Kremenak's "somewhat selective memory of events since 2000," suggesting that he "did not help his cause" by failing to remember medical treatment received after he slid off a roof, fell from a deck, and experienced a motor vehicle accident.

The deputy commissioner also rejected Kremenak's allegation that he experienced an economic change of condition since the agreement for settlement. The remand decision stated that it was unclear whether Kremenak's income had decreased or merely fluctuated since 2000. The deputy commissioner reasoned that the claimant's decrease in earnings could not be wholly attributed to ongoing effects of the 1996 injury because in 2002 his income increased despite continued lower back pain.

As the trier of fact, the deputy commissioner had the duty to determine the credibility of all the witnesses, including expert witnesses, and to weigh the evidence. See *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 420 (Iowa 2001). As Iowa reviewing courts have often said, “the question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made.” *Id.* Here, the deputy commissioner’s remand decision was supported by substantial evidence. Like the district court, we find the agency record contains a sufficient quantity and quality of evidence to defeat Kremenak’s claim that his disability—proximately caused by the back injury sustained during his employment with Steiner—has increased since the settlement agreement.

AFFIRMED.