IN THE COURT OF APPEALS OF IOWA

No. 6-173 / 05-1373
Filed May 10, 2006

SKW BIOSYSTEMS/DEGUSSA HEALTH AND NUTRITION and FIREMAN'S FUND INSURANCE CO.,
Petitioners-Appellants,

vs.

KEITH WOLF,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Employer appeals from a district court order affirming an award of workers' compensation benefits. **AFFIRMED.**

Nathan R. McConkey of Huber, Book, Cortese, Happe & Lanz, P.L.C., West Des Moines, for appellants.

Daniel D. Bernstein of William J. Bribriesco & Associates, Bettendorf, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

EISENHAUER, J.

In July 1999, Keith Wolf, an employee of SKW Biosystems, filed a claim for workers' compensation benefits, alleging his back was injured at work in December 1998. He later amended his petition to allege cumulative trauma. A deputy workers' compensation commissioner ruled against him in August 2001, and the workers' compensation commissioner affirmed the deputy's decision in July 2002. Wolf filed a petition for judicial review, and in February 2003 the district court remanded the matter to the agency for consideration of Wolf's cumulative injury claim.

On remand, the deputy again ruled in favor of the employer, and Wolf again appealed. The commissioner, in December 2004, found and concluded Wolf had sustained a cumulative injury, with February 16, 1999 being the date of injury. The employer sought judicial review, and the district court affirmed. The employer appeals. We apply Iowa Code section 17A.19(10) (2003) to determine whether we reach the same result as the district court. *ABC Disposal Sys., Inc v. Department of Natural Res.*, 681 N.W.2d 596, 601 (Iowa 2004). After doing so, we affirm.

At the administrative hearing, Wolf testified he had injured his back frequently at work beginning in 1993. He stated he was released to work without restrictions after those injuries, and he took no medications for those injuries. He injured his back on December 14, 1998, while moving a heavy barrel on a cart. While moving these barrels, he was required to duck under an overhanging auger while pushing the cart across a trench. He testified he told other people at

work about the injury, including his supervisor. He sought medical and chiropractic treatment.

On February 16, 1999, Wolf was diagnosed by David S. Field, M.D., with a herniated disc, which would require surgery. On March 3, 1999, Wolf informed his employer of the needed surgery, and requested that workers' compensation pay for the surgery. Wolf testified his employer advised him to use a 1993 date as a date of injury, including waiting for him outside of the shower at the close of one of his shifts to take him to sign paperwork with 1993 as the date of injury. Wolf's surgery was performed in April 1999.

The employer's witnesses testified Wolf never told them of the December 1998 injury. They pointed to injury logs, which contained no evidence of a December 1998 injury. The employer also noted Wolf never told his treating physicians of this alleged injury until well after it allegedly occurred.

Dr. Field, in deposition testimony and documents he authored, could not state whether Wolf's herniated disc was caused by an incident in December 1998 or any other particular date. He did, however, characterize the exertion requirements of Wolf's job as medium to heavy labor. He stated Wolf complained of increased discomfort in the two months prior to his diagnosis, on February 16, 1999. Finally, he wrote the following: "On the basis of our assessment of this patient, knowing his overall problems that he has experienced, I really have little doubt that he did indeed hurt his back at work, as an opinion."

On appeal, the employer claims (1) "[t]he agency erred in finding claimant credible and that he met his burden of proving a compensable, cumulative injury"

and (2) "[t]he agency erred in finding the date for the cumulative injury was February 16, 1999, and that the defendants had notice of such." We address each contention in turn.

I. Credibility and Burden of Proof.

The employer essentially challenges the sufficiency of the evidence to sustain the commissioner's award of benefits.

If the commissioner's findings of fact are supported by "substantial evidence" when the record is considered as a whole, we may not disturb them. Iowa Code § 17A.19(10)(f). "Substantial evidence" is evidence that a reasonable and neutral person would find satisfactory to demonstrate the existence of a fact "when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Id.* § 17A.19(10)(f)(1). We must consider evidence that undermines the agency's findings, as well as those that support those findings. *Id.* § 17A.19(10)(f)(3). "The requirement that we take all record evidence into account in reviewing administrative findings does not detract from our duty to grant appropriate deference to the agency's expertise." *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa Ct. App. 1991). Although we may not "rubber stamp" the agency decision, we may not disturb a decision merely because the record would support a contrary decision. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003). We will "broadly and liberally apply [agency] findings to uphold rather than to defeat the agency's decision." *Id.* at 501 (citation omitted).

A. Wolf's Credibility. The employer argues Wolf was not a credible witness, and the commissioner erred in giving any weight to his testimony. We

disagree. The commissioner specifically found Wolf's testimony about sustaining an injury on December 14, 1998 was not credible. He specifically found other aspects of Wolf's testimony were credible and corroborated by other evidence in the record. Typically, we "accord deference to the agency's decision on witness credibility." *Clark v. Iowa Dep't of Revenue & Fin.*, 644 N.W.2d 310, 315 (Iowa 2002). Giving due weight to the commissioner's findings about Wolf's credibility, we cannot, consistent with the limitations imposed on us by Iowa Code chapter 17A, disturb them.

The employer's attacks on Wolf's credibility revolve around his claim of a workplace injury that occurred in December 1998. First, the commissioner already accounted for this testimony in his decision. Second, to the extent the employer urges Wolf's credibility is an all-or-nothing proposition, we reject that contention as inconsistent with our law. A witness's credibility is for the fact-finder, even if a portion of the witness's testimony is impeached. *See, e.g., McVay v. Carpe*, 238 Iowa 1131, 1138, 29 N.W.2d 582, 585 (1947). Iowa courts have always rejected a rule that one falsehood makes a witness's entire testimony, as a matter of law, incredible. *See McCrary v. Crandall*, 1 Clarke 117, 120 (Iowa 1855).

Viewing Wolf's testimony in light of the record, we cannot conclude it is so unbelievable that it "should be deemed a nullity by the court." *State v. Smith*, 508 N.W.2d 101, 102 (Iowa Ct. App. 1993). This issue does not provide a basis to reverse the final agency action.

B. Expert Testimony on Causation. Next, the employer contends Wolf did not present expert evidence linking his injury to the workplace. Again, we must

disagree. Ordinarily, causation must be established by expert testimony, *Lithcote*, 471 N.W.2d at 66; however, non-expert evidence and expert evidence may be viewed together to establish causation. *See, e.g., Giere v. Aase Haugen Homes, Inc.*, 259 Iowa 1065, 1072-73, 146 N.W.2d 911, 915-16 (1966); *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 135, 115 N.W.2d 812, 815 (1962). "The possibility of causation is not sufficient; a probability is necessary." *Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) (citation omitted).

Considering these principles, we conclude Dr. Field's letter expressing "little doubt" that Wolf's injury was work-related, when considered in light of his deposition testimony and the balance of the record, provides sufficient evidence of causation. Wolf has established, through expert testimony, a "probability" that his injury was work-related. *Id.*

The employer argues a disc herniation cannot be a cumulative injury, as it occurs at a discrete point in time. While this may be true, expert testimony, when viewed in light of the balance of the administrative record, would allow a fact-finder to conclude Wolf's cumulative trauma set the stage for his disc herniation.

In essence, the employer's argument on this point is an invitation to reweigh the evidence. We decline the employer's invitation to depart from the standard of review prescribed for us by chapter 17A.

II. Date of Cumulative Injury and Notice.

This issue involves questions of fact, which are governed by the substantial evidence principles set forth above. It also concerns questions of law and mixed questions of law and fact. Although we provide the deference required by section 17A.19(1) to the commissioner's decisions on these

questions, we may correct the commissioner's erroneous answers to these questions.

A. Timely Notice. The employer first argues the employer did not receive timely notice from Wolf of his injury, as required by Iowa Code section 85.23. We reject this contention. In March 1999, Wolf informed the employer he was seeking workers compensation coverage for his back surgery. We conclude this adequately placed the employer on notice of Wolf's claim.

B. Wolf's "Failure" to Plead February 16, 1999 As An Injury Date. The employer next argues Wolf should be barred from recovery because he pled December 14, 1998, as the date of his cumulative injury, and not February 16, 1999. This argument lacks merit.

From the outset, we note the date of any such injury was always at issue. Although a claimant alleging a cumulative injury must allege a date of injury, that allegation need not be precise. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 98-99 (Iowa 2004). Moreover, under the facts of this case, we cannot conclude the difference between the date pled and the date found by the commissioner is an unfair surprise to the employer. As noted by the commissioner in denying the employer's request for rehearing, "Any reasonably competent claim adjustor is familiar with the cumulative injury rule and that with cumulative injuries, selecting the correct date of injury is invariably an issue unless it is established by stipulation, which was not the case here." We find this observation is within the "technical competence, and specialized knowledge" of the commissioner, *see* Iowa Code § 17A.14(5), and we concur in it. The employer has not demonstrated the commissioner exercised his "discretion on

untenable grounds or its exercised of discretion was clearly erroneous." *Waters*, 674 N.W.2d at 99 (citation omitted).

Next, the employer argues its due process rights were violated. We cannot agree. We conclude the decision of the commissioner was not fundamentally unfair, and further conclude the employer received adequate notice of the issues in dispute. *Id.* at 97 (citing *Oscar Meyer Foods Corp. v. Tasler*, 483 N.W.2d 824, 828 (Iowa 1992)).

Finally, the employer argues the commissioner's decision violates Iowa Administrative Code rule 876-4.6, which at the time required claimants to plead specific dates of "gradual" injury. Our supreme court rejected this contention in *Waters*, 674 N.W.2d at 98-99.

C. Alleged Failure to Follow Remand Order. The employer claims the commissioner, in fixing the date of manifestation as February 16, 1999, violated the district court's remand order. We disagree. On remand, the agency was to consider whether any cumulative injury manifested itself "on or about December 14, 1998." That order, like all judgments, is to be interpreted in a common-sense manner. *See, e.g., Weir & Russell Lumber Co. v. Kempf*, 234 Iowa 450, 454, 12 N.W.2d 857, 860 (1944). Reading the remand order as a whole, and not restricting ourselves to isolated words or phrases, *see id.*, and considering the record made before the agency, we conclude the commissioner could consider evidence pointing to a February 1999 manifestation date. Given the fact-intensive nature of determining the date of manifestation of a cumulative injury, *see, e.g., Meyer v. IBP, Inc.*, 710 N.W.2d 213 (Iowa 2006), and given the employer contested the occurrence of a cumulative injury, the construction the

employer puts on the December 2003 remand order is unduly narrow. We reject the argument that the commissioner's consideration was limited to December 14, 1998, and conclude the commissioner did not exceed the scope of the remand order.

D. Substantial Evidence of the February 1999 Date of Injury. The employer argues this date is not supported by substantial evidence. Recognizing the "substantial latitude" given to the commissioner to determine the date of a cumulative injury, *see Meyer*, 710 N.W.2d at 220, we disagree.

The date of injury in the cumulative injury rule is the date the injury manifests itself. *Id.* at 221. The commissioner concluded Wolf first learned on February 16, 1999 that his back condition was quantitatively and qualitatively different than before. On that date, Wolf learned he no longer had a run-of-the-mill sore back; it required surgery. Liberally construing the record in favor of the commissioner's decision, *see Caselman*, 657 N.W.2d at 501, and affording the "substantial latitude" to the commissioner's determination of the date of Wolf's cumulative injury, *see Meyer*, 710 N.W.2d at 220, we conclude substantial evidence supports the commissioner's conclusion that Wolf's cumulative injury manifested on February 16, 1999.

III. Conclusion.

After considering all issues presented, we affirm the judgment.

AFFIRMED.