IN THE COURT OF APPEALS OF IOWA

No. 6-809 / 05-1265
Filed January 31, 2007

MELODY KAY BURTNETT,
Petitioner-Appellant,

vs.

WEBSTER CITY CUSTOM MEATS, INC.,
and VIRGINIA SURETY COMPANY,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Petitioner appeals and respondents cross-appeal from the district court decision on judicial review of the workers' compensation appeal decision. **AFFIRMED IN PART AND REVERSED IN PART ON APPEAL; REVERSED ON CROSS-APPEAL.**

Mark S. Soldat, West Des Moines, for appellant.

Jennifer A. Clendenin and Andrew T. Tice of Ahlers & Cooney, P.C., Des Moines, for appellees.

Heard by Sackett, C.J., and Miller, J, and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

SACKETT, C.J.

The petitioner-appellant, Melody Burtnett, appeals from the district court decision on judicial review that affirmed the appeal decision of the workers' compensation commissioner. She contends the court erred in affirming the commissioner's (1) denial of certain benefits, (2) failure to reach the alternate care and bifurcation issues, (3) calculation of her functional disability, (4) assessment of penalties for underpayment of benefits, and (5) apportionment of the independent medical examination fee. The cross-appellants, Webster City Custom Meats, Inc. and Virginia Surety Company ("employer"), contend the court erred in affirming the commissioner's (1) calculation of functional disability and (2) apportionment of the independent medical examination fee. The employer also challenges the court's remand of the award of a portion of the penalties for further explanation. We affirm the agency decision. We affirm the district court in part and reverse in part on appeal. We reverse the court on cross-appeal.

I. Background

Melody Burtnett worked for Webster City Custom Meats from June of 1993 until she was laid off in January of 2001. Starting in 1998, she changed from full-time to part-time, working about twenty hours per week so she could attend classes to obtain an associate degree in computer networking. Her work schedule changed each semester to accommodate her school schedule. In January of 2000, she was transferred to the pack-off department. She began having problems with her right arm a few days after her transfer, including pain, numbness, and tingling. She was evaluated by an orthopedic specialist, Dr. Reagan, who performed carpal, cubital, and radial tunnel releases on April 21, 2000. At her follow-up appointment on May

8, she complained of pain, but no numbness or tingling. Dr. Reagan released appellant to work with a restriction of no use of her right hand.

Melody Burtnett filed a claim for benefits, alleging a January 12, 2000 manifestation of a cumulative injury to her right arm. She also claimed benefits from the Second Injury Fund, alleging a 1995 injury to her left arm.[1] The deputy commissioner concluded appellant suffered a ten percent impairment to her right arm, awarded healing period benefits, but denied her request for alternate medical care and temporary partial disability benefits. The deputy also awarded penalties for underpayment of healing period benefits and delay in paying the impairment rating. Appellant moved to amend her claim to conform to the proof, seeking benefits for both arms and certain healing period benefits. The deputy denied the amendment and claim for other benefits. On rehearing, the deputy apportioned one-third of the independent medical examination fee to the employer. On appeal, the commissioner affirmed the deputy, except to change the start date of the permanent partial disability benefits and to apportion one-half of the exam fee to the employer.

On judicial review, the district court affirmed the commissioner, except to remand for further explanation the award of penalties for delay in paying the impairment rating. Burtnett appealed and the employer cross-appealed.

II. Scope of review

Appellate review of a district court's review of agency action is for correction of errors of law. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001). Review is limited to whether the district court correctly applied the law in exercising its judicial review function. *Id.* We are bound by the workers' compensation commissioner's

[1] The claim against the Second Injury Fund was settled prior to hearing and is not at issue in this appeal.

factual findings if they are supported by substantial evidence in the record. *Id.* Evidence is substantial if a reasonable mind would accept it as adequate to reach the same conclusion. *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 649 (Iowa 2000). "The fact that a different or opposite result may have been fully justified by the record is of no importance." *Carstensen v. Bd. of Trustees*, 253 N.W.2d 560, 562 (Iowa 1977); *see Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). "The substantial evidence test accords respect to the expertise of the administrative tribunal and helps promote uniform application of the law." *City of Davenport v. PERB*, 264 N.W.2d 307, 312 (Iowa 1978). On issues involving the agency's discretion, however, appellate courts have applied an abuse of discretion standard of review. *See, e.g.*, *Trade Prof'ls, Inc., v. Shriver*, 661 N.W.2d 119, 123 (Iowa 2003); *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 631 (Iowa 2000). In addition, we must "give appropriate deference to the view of the agency with respect to matters that have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11)(1)(c) (2005).

III. Discussion

Claims on appeal

The jointly submitted hearing report sought temporary partial benefits for these periods in 2000: January 18 to April 20, May 9 to August 12, August 28 to September 15, November 19 to 25, and December 4 to 31. It also sought temporary partial benefits for January 1 to 16, 2001. The report sought healing period benefits for these periods in 2000: April 21 to May 8, August 13 to 27, September 16 to November 18, November 26 to December 3. In sum, benefits were sought for the period from January 18, 2000, to January 16, 2001.

The arbitration decision awarded healing period benefits for the periods claimed. The decision denied the claims for temporary partial benefits because "the absences due to the work injury during the periods claimed could not be specifically identified." The decision notes "that many absences were not due to the work injury." The arbitration decision considered the healing period benefits only for the periods claimed in the joint report. It did not consider the periods in appellant's post-hearing brief because they were "inconsistent with the hearing report." The modification of orders in decision, issued after appellant's request for rehearing, again denied the request to change the dates in the hearing report.

On appeal, the commissioner affirmed the arbitration decision on all grounds except to "modify the arbitration decision with regard to the date permanent partial disability compensation commences and the amount of reimbursement for the section 85.39 examination." The appeal decision ordered twenty-five weeks of permanent partial disability beginning on May 9, 2000, but "suspended during the subsequent intervals when healing period compensation is awarded."

On judicial review, the district court affirmed the agency, holding:

> [T]he Deputy and Commissioner did not commit an error of law in denying temporary partial benefits because Burtnett did not distinguish which days she missed work due to her injury. The benefits are payable because of a reduction in an employee's earning ability when suffering from an injury. If Burtnett took personal time off of work for reasons other than her injury, she should not receive temporary partial benefits for those times.

A. Temporary partial benefits. Appellant contends the commissioner should have, but did not award temporary partial benefits for several periods in 2000: January 18 to April 20, May 9 to August 11, August 29, and December 4 to 31. She also contends she should have received the benefits for January 1 to 15, 2001. The

employer contends benefits are payable only for a reduction in earnings attributable to a work injury.

Iowa Code section 85.33(2) (2001) provides in part:

> "Temporary partial benefits" means benefits payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability. Temporary partial benefits shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury.

Appellant contends she need show only that her earning ability was reduced during the periods claimed and that she was injured. She argues the statute does not make any provision for factoring in the times she was off to attend classes or for other reasons not related to her injury. Appellant admits she has the burden of proof. *See Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998).

The district court held the deputy and commissioner did not commit an error of law in denying the benefits. The statutory language supports the denial in that it provides for benefits for a "temporary partial reduction in earning ability as a result of the employee's temporary partial disability." Iowa Code § 85.33(2). The reduction in earning ability must be "as a result of" the injury, not other absences. Our conclusion is the same as the district court's. We affirm the district court on this issue.

B. Healing period benefits. After the hearing with the deputy commissioner, appellant sought to change some of the dates in the joint hearing report for which healing period benefits were sought. The arbitration decision refused her request to change dates after the hearing. She argues the dates in the hearing report for

temporary partial benefits and healing period benefits were disputed and refusing the requested modification of dates based on "an artificial label distinction" is "not only hypertechnical, but also arbitrary, capricious, and an abuse of discretion." *See* Iowa Code §§ 17A.19(10)(i), (m), and (n). The district court concluded:

> [T]he Deputy and Commissioner were not being hypertechnical in their refusal to deny [*sic* grant] benefits which were not requested until after the hearing. Further, the no abuse of discretion occurred; it is more than reasonable to require a claimant to list the dates prior to the hearing.

Our conclusion is the same as the district court's. It is not arbitrary, capricious, or an abuse of discretion for the agency to set procedures for its contested case proceedings. *See* Iowa Code §§ 86.17, 86.18; Iowa Admin. Code r. 876-4.20. "Because the commissioner has the responsibility for deciding cases in an expeditious and timely manner, we must not 'trench in the slightest degree upon the prerogatives of the [commissioner]' in this area." *Marovec v. PMX Indus.*, 693 N.W.2d 779, 787 (Iowa 2005) (quoting *Zomer v. West River Farms, Inc.*, 666 N.W.2d 130, 133 (Iowa 2003)). The agency required a hearing report setting forth the issues, claims, and stipulations. This is a reasonable approach to deciding cases in an expeditious and timely manner. We agree with the conclusion of the district court that "it is more than reasonable to require a claimant to list the dates prior to the hearing." We conclude there was no abuse of discretion in denying appellant's post-hearing motion to change the dates in the hearing report.

C. Alternate care and bifurcation. Appellant contends the district court erred in affirming the agency decision denying her request for alternate care and to reserve the determination of permanent disability until maximum medical improvement has been reached. The hearing report contains the stipulation, "The

alleged injury is a cause of permanent disability." The parties also stipulated, "The commencement date for permanent partial disability benefits . . . is the 17th day of January, 2001," or "whenever the temporary disability or healing periods terminated." The arbitration decision noted:

> Claimant indicated in the hearing report and her post hearing brief that she is seeking alternate care in that she has not reached maximum healing. However, claimant stipulated that her alleged work related condition is permanent. Such a stipulation renders moot any alternate care request.

The decision found "a portion of the troublesome symptomatology has not been shown to be related to the work injury of January 2000." The right arm, hand, and finger problems that "spiked" in March of 2002 and that were evaluated by Dr. Kuhnlein in September of 2003 were related to her work for other employers.

The district court in its findings quoted the reasoning of the agency that the request for alternate care was moot:

> Specifically, Dr. Cherny found Burtnett's complaints in 2002 were due to her new activities of cleaning homes, RV's and businesses, as well as working as a bartender, waitress and cook and attending classes for computers. He indicated there had been a significant change in her condition since his last evaluation in January of 2001 and the 2002 complaints were due to a new reoccurrence that was not causally related to her former employment at Custom Meats.

The court determined the agency did not commit an error of law in finding the 2002 complaints were related to appellant's new jobs, not her previous injury. Therefore, the court reasoned, "the employer has no duty to provide care for the new injuries." Iowa Code section 85.27 provides for alternate care:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate

> the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

The appellant argues the agency misinterpreted the hearing report stipulation, "The alleged injury is a cause of permanent disability" as meaning "her alleged work related condition is permanent." She contends her current symptoms are a continuation of symptoms she had during her treatment by Dr. Cherny for the January 2000 injury. She points to the independent evaluation by Dr. Kuhnlein finding her symptoms were "ongoing unabated" and recommending further evaluation and diagnostic testing to determine appropriate treatment.

The evidence from Dr. Cherny and Dr. Kuhnlein concerning whether appellant's current symptoms relate to the January 2000 injury differs. Dr. Cherny found no causal relationship. Dr. Kuhnlein suggested a possible relationship. The agency, in its role as fact finder, determines what weight to give testimony. *Sherman*, 576 N.W.2d at 321. "The question is not whether evidence might support a different finding, but whether the evidence supports the findings actually made." *Id.* at 319. The district court affirmed the agency findings and concluded the employer had no duty to provide treatment for new injuries. We conclude the district court correctly applied the law and affirm on this issue.

D. Functional disability rating. Appellant contends the ten percent rating is too low. On cross-appeal, the employer contends the rating is not supported by the medical evidence. Dr. Cherny opined that appellant suffered a two percent permanent partial impairment of her right upper extremity, reaching maximum

medical improvement on January 16, 2001. In September of 2003, Dr. Kuhnlein found objective evidence to support a one percent rating.

The arbitration decision found,

> the rather minimal ratings by the physicians using the [*AMA Guides to the Evaluation of Permanent Impairment* (5th ed. 2001)] in this case are insufficient to assess the true loss of use of her arm. The problem apparently is that subjective complaints were not considered or evaluated along with the permanent inability to use the arm in highly repetitive work environments. Work after all is also an activity of daily living. Therefore, using agency expertise, I find that due to the January 12, 2000 injury Melody suffered a ten percent permanent partial loss to use of her right arm. This finding gives at least some weight to the subjective but credible views of Melody and her family, which describe an impact on the activities of daily living far more than minimal. I am unable to give full weight to these subjective complaints because a portion of the troublesome symptomatology has not been shown to be related to the work injury of January 2000. There appears to have been a spiking of her right arm complaints in March 2002 and other new finger and hand problems at a time when she was not working at Custom Meats but working for other employers.

The district court determined substantial evidence supported the agency's findings. The court gave deference to the agency findings because "the evidence is in conflict or reasonable minds might disagree about the conclusion to be drawn from the evidence."

Appellant argues credible evidence from her family shows she has lost forty to fifty percent use of her arm functions. The employer focuses on the objective medical ratings of one and two percent.

The agency had expert medical evidence providing ratings based on the AMA Guides and lay evidence from appellant and family members. The agency recognized the disparity between the objective and subjective information. The AMA Guides recognize the difficulty in factoring in subjective complaints:

> Subjective concerns, including fatigue, difficulty in concentrating, and pain, when not accompanied by demonstrable clinical signs or other

> independent, measurable abnormalities, are generally not given separate impairment ratings. . . . The Guides does not deny the existence or importance of these subjective complaints to the individual or their functional impact. The Guides recommends that the physician ascertain and document subjective concerns. Because the presence and severity of subjective concerns varies among individuals with the same condition, the Guides has not yet identified an accepted method within the scientific literature to ascertain how these concerns consistently affect organ or body system functioning.

AMA Guides to the Evaluation of Permanent Impairment 10 (5th ed. 2001). Under Iowa Administrative Code rule 876—2.4, the AMA Guides are guides, and the agency may accept "other medical opinions or guides or other material evidence" in its quest to determine the degree of impairment for the computation of benefits. *See Sherman*, 579 N.W.2d at 319 (noting the Guides "are just that—guides"). The district court deferred to the agency's fact findings. It is clear the agency considered both the Guides and the "subjective but credible" evidence from appellant and family members. The agency may use medical and nonmedical evidence to determine the extent of disability, and "lay testimony could buttress the medical testimony and would be relevant and material" to the agency's fact-finding. *Id.* at 322. We conclude the district court correctly applied the law in affirming the agency on this issue.

E. Penalties. Appellant contends the district court erred in affirming the commissioner's "variant imposition of the penalties for the same underpayments." On cross appeal, the employer contends the court erred in remanding for further explanation the penalty assessed for a delay in payment of the impairment rating, because this claim was not raised at hearing.

The arbitration decision concluded:

> Defendants voluntarily paid benefits for two weeks at $263.00 per week and at $131.50 until March 2001. No evidence was

> submitted to justify such a rate. Evidence was submitted to reasonably justify a rate of $247.37. Therefore, claimant was paid about $16.00 less than a reasonable rate for about 25 weeks.[2] The appropriate penalty for this underpayment shall be $8.00 per week or $200.00 for underpayment of the rate.
>
> Claimant was paid the rating of Dr. [Cherny] but these were delayed by many weeks without explanation or excuse. An appropriate penalty for this delay is $200.00.

The commissioner affirmed on appeal. The district court deferred to the agency's findings "regarding a lack of reasonable justification for underpayment for 25 weeks resulting in a $200 penalty for delay." The court remanded the $200 penalty for delay in paying Dr. Cherny's rating because,

> the Deputy did not state his reasoning for the additional $200 penalty for delay of payment on Dr. Cherny's rating. Without an explanation, the Court has no way to determine whether the Deputy misapplied the law or acted arbitrarily in assessing the penalty.

Appellant contends the uncontroverted payment records show the employer underpaid not only the twenty-five weeks of healing period benefits, but also ten weeks of permanent partial disability benefits. She argues the proper computation "to avoid arbitrariness and capriciousness" should be fifty percent of thirty-five weeks at $16.00, [3] plus ten percent interest from February 4, 2004.

The employer contends the court properly affirmed the agency denial of the additional ten weeks of penalty benefits, but erred in remanding the issue of delayed payment of the impairment rating because that issue was not raised at the hearing. The employer also challenges the calculation of the underpayment, arguing it corrected any underpayment by overpaying temporary total disability and

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[2] Twenty-five weeks is calculated by taking a ten-percent impairment rating times 250 weeks for loss of an upper extremity. *See* Iowa Code § 85.34(2)(m).

[3] 35 x 16 x .50 = $280.

permanency benefits, "thus there was no basis for assigning penalty benefits, let alone the maximum amount allowed by law."

Iowa Code section 86.13 provides for penalties:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

A reasonable or probable cause or excuse exists if the delay was necessary for the insurer to investigate the claim or if the employer had a reasonable basis to contest the employee's entitlement to benefits. *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). Underpayment of benefits also can be a ground for assessing penalties. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 237 (Iowa 1996).

The agency used the formula in section 85.36(9) for calculating benefits, which provides "the weekly earnings shall be one-fiftieth of the total earnings . . . during the twelve calendar months immediately preceding the injury." The agency assessed a penalty for underpayment of benefits for twenty-five weeks because it found no support for the amount the employer paid. The district court deferred to the agency's findings "regarding a lack of reasonable justification" for the underpayment. Having affirmed the denial of temporary partial benefits, we conclude the court was correct in affirming the agency decision not to assess penalties for the additional ten weeks claimed by appellant. We conclude the court correctly applied the law on this claim.

Concerning the penalty for delay in paying the impairment rating, the employer contends it paid a lump sum for all amounts owed from the date of the

rating until the employer received notice of the rating, the issue was not raised in appellant's answers to interrogatories, and appellant presented no evidence the employer unreasonably delayed or denied benefits. The employer argues it was an abuse of discretion to award penalty benefits for delay in paying the rating because it was not put on notice of such a claim or given the opportunity to present evidence on the claim. It requests a reversal of this award or the opportunity to present evidence if the remand is upheld.

The evidence supports the agency conclusion the employer did not begin paying permanent partial disability payments until March of 2001 even though appellant's healing period ended in January of 2001. Section 85.34(2) provides that permanent partial disability payments "shall begin at the termination of the healing period." The agency was correct in assessing penalty benefits for delay in paying the benefits. The district court remanded for further explanation because it could not determine whether the agency misapplied the law or acted arbitrarily. Our conclusion differs from the district court's, because we conclude the agency acted properly. Neither the district court nor an appellate court is free to substitute its discretion for that of the agency concerning the degree of punishment imposed. *See Marovec*, 693 N.W.2d at 786-87. We reverse the district court's remand and affirm the agency's award of a penalty for late payment of the permanent partial disability payments.

F. Independent medical exam fees. Iowa Code section 85.39 allows an employee to be reimbursed for "the reasonable fee for a subsequent examination by a physician of the employee's own choice" if the employee believes the permanent disability evaluation by the physician chosen by the employer is too low. Appellant

had an independent medical examination by Dr. Kuhnlein in September of 2003. He provided ratings in five areas. The arbitration decision directed the employer to pay one-third of the $4300 fee. The decision awarded only one-third of the fee because the examination evaluated both upper extremities and the low back, while appellant's claim was for the right upper extremity.

On appeal, the commissioner determined apportioning one-half of the fee to the employer was appropriate because a fee for evaluating three conditions in one evaluation "is likely to be considerably less than the total charged for three separate evaluations." The decision noted a more precise apportionment was not possible because the fee was not itemized: "If defendants desired a more specific allocation, they needed to introduce evidence accordingly." The district court found appellant's argument to be "illogical" and determined the commissioner "did not err in allocating the IME fee and his decision was supported by substantial evidence."

Iowa Code section 85.39 provides, in part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Appellant contends the plain language of the statute does not provide for dividing the fee if more than one condition is evaluated. Appellant argues all the conditions evaluated were relevant to her case against either the employer or the Second Injury Fund. She asserts the agency's decision to apportion the fee was an unwarranted exercise of common law authority that undercuts the function of the legislature.

The employer first contends it should not pay any of the fee because appellant did not prove the fee was reasonable. Assuming the employer is responsible for some of the fee, it contends allocating the fee was correct, but that it should only pay the fee for one of the five conditions evaluated, not half of the fee. The employer points to a letter from the doctor's office, in response to an itemization, recommending splitting the bill equally between all conditions evaluated. The employer asserts, if it is responsible for any portion of the fee, at most it would be $860.

We conclude the district court did not err in affirming the agency decision on this issue and affirm.

IV. Conclusion

Except for the district court's remand for further explanation of the penalty for late payment of permanent partial disability benefits, our conclusions are the same as those of the district court and we affirm its decision. We reverse only the portion of the district court's decision remanding the award of penalties for late payment of the impairment rating for further explanation and affirm the decision of the agency. Costs of this appeal are taxed two-thirds to appellant and one-third to appellees.

AFFIRMED IN PART AND REVERSED IN PART ON APPEAL; REVERSED ON CROSS-APPEAL.