IN THE COURT OF APPEALS OF IOWA

No. 7-938 / 06-1748
Filed March 14, 2008

AMY ANN SCHUTJER,
Petitioner-Appellant/Cross-Appellee,

vs.

ALGONA MANOR CARE CENTER and IOWA LONG TERM CARE RISK MANAGEMENT ASSOCIATION,
Respondents-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Kossuth County, Joseph J. Straub, Judge.

Claimant appeals the district court's judicial review ruling of her workers' compensation claim and her employer and insurance carrier cross-appeal. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Mark Soldat, of Soldat & Parrish-Sams, P.L.C., West Des Moines, for appellant.

Michael Mock, of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

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

EISENHAUER, J.

Amy Schutjer appeals from a district court judicial review decision of her petition for workers' compensation benefits and Algona Manor Care Center and Iowa Long Term Care Risk Management Association (Algona Manor) cross-appeal.

I. BACKGROUND FACTS AND PROCEEDINGS

On November 5, 2002, Schutjer became a certified nursing assistant for Algona Manor. Her last day of work at Algona Manor was January 5, 2003. The parties agree Schutjer injured her left hip, left leg, and lower back while transferring a patient to a wheelchair on December 2, 2002. Algona Manor arranged for immediate treatment and Dr. Bottjen's physician's assistant determined Schutjer needed physical therapy, administered an injection, and prescribed medication. Schutjer was taken off work until December 9, 2002, and then was allowed to work on a limited basis with a prohibition against patient transfers and lifting over twenty pounds.

On December 9, 2002, Schutjer returned for a scheduled appointment with Dr. Bottjen and stated the pain medication had not helped much. Dr. Bottjen thought her complaints were exaggerated and her symptoms inconsistent with her injury. Dr. Bottjen increased her pain medication, but told Schutjer he would not provide further treatment.

Dr. Culbert became Schutjer's authorized doctor, examined Schutjer on December 12, 2002, and diagnosed acute low back pain with left sciatica. Dr. Culbert prescribed medication, continued physical therapy and limited Schutjer's work duties.

Schutjer returned to work on December 17, 2002, and worked sporadically until her employment ceased on January 5, 2003. The parties dispute whether Schutjer voluntarily quit her position on January 5.

After seeing Schutjer on December 19, 2002, Dr. Culbert continued her restrictions and ordered an MRI which, on December 27, 2002, showed a L4-5 bulging, but no significant encroachment on the spinal canal.

Dr. Culbert referred Schutjer to Dr. Palit, an orthopedic surgeon, after her January 15, 2003 exam revealed continued pain. On January 22, 2003, Dr. Palit reviewed the prior MRI, diagnosed mild lumbar degenerative disc disease, and noted a small disc bulge at L4-5 that did not seem to be causing neural compression. Dr. Palit thought Schutjer's pain complaints seemed out of proportion to her physical and MRI findings. Dr. Palit ordered four weeks of physical therapy and allowed light-duty work with restrictions.

On January 27, 2003, Schutjer started work in the Hy-Vee floral department and worked there until voluntarily terminating her employment on April 28, 2003.

On February 28, 2003, Schutjer returned to Dr. Palit who noted she was working in the Hy-Vee floral department and had not gone to physical therapy. Dr. Palit determined Schutjer had reached maximum medical improvement and returned her to regular work duty, but advised her to continue taking anti-inflammatory medication.

On April 3, 2003, Schutjer saw Dr. Doenecke of Britt Medical Clinic, primarily for continuing problems with chronic anxiety and depression, and received a psychiatric referral and a prescription for Prozac. During this time

Schutjer did not report problems with her back or leg to her psychiatrist, Dr. Okoli, or to the physicians she saw at Britt Medical Clinic.

On June 4, 2003, Schutjer saw Dr. Taylor and told him about her December 2 work injury and complained of numbness and radiating pain in her left leg. Dr. Taylor continued pain prescriptions and referred Schutjer to Dr. Beck, a neurosurgeon. During the initial appointment with Dr. Beck on June 16, 2003, he noted Schutjer was quite histrionic and recommended an MRI, which showed a little disc bulge at L4-5 with some degeneration. Based on Schutjer's pain complaints, Dr. Beck performed a discogram even though the MRI did not indicate surgery was needed. The discogram revealed a posterior annulus tear and the need for surgery to fuse the L4-5 vertebrae. Surgery was completed on July 10, 2003.

In August 2003, Schutjer was hospitalized for three days for back and right leg pain under the care of Dr. Beck and had several additional appointments before her last visit on October 6, 2004, where he noted her fusion looked good and she was going to try a light back brace.

In August 2004, Schutjer was evaluated by Dr. Kuhnlein, who discussed Schutjer's histrionic behavior.

> Complicating all of Ms. Schutjer's evaluations are some of the psychosocial issues in her histrionic behavior. [In the doctor's evaluations] after her back injury, she had pain described as being in excess of that which would be expected. . . . I think this speaks to the impact of mental health issues, such as her depression, on her physical condition. . . . Also complicating the issue is her hypothyroidism. . . . Certainly untreated or under treated hypothyroidism can make musculoskeletal pain worse."

On September 4, 2003, Schutjer filed a workers' compensation claim. On March 10, 2005, the deputy utilized the earnings rate advocated by Algona

Manor and ruled Schutjer was not entitled to additional temporary benefits. The deputy found no permanent disability and determined Schutjer was not entitled to alternate care, penalty benefits, or additional interest. In denying Schutjer's subsequent request for rehearing on April 4, 2005, the deputy based her denial on her finding Schutjer lacked credibility. Schutjer filed an intra-agency appeal which was resolved on March 28, 2006, when the agency adopted the deputy's March 10 decision as its final agency action.

In April 2006, Schutjer sought judicial review of the agency action and the district court's opinion was filed on August 24, 2006. Schutjer appeals the district court's affirming the commissioner on two issues: (1) Schutjer voluntarily quit on January 5, 2003, ending temporary benefits; and (2) Schutjer's December 2002 injury is not a substantial cause of continuing back problems resulting in permanent disability.

Algona Manor cross-appeals the district court's decision to reverse and remand to the agency on four issues: (1) rate calculation; (2) benefit entitlement without benefit award; (3) temporary benefits from December 2, 2002 to January 4, 2003; and (4) penalty benefits.

II. SCOPE OF REVIEW

We review decisions of administrative agencies for correction of errors at law. *Kostelac v. Feldman's, Inc.,* 497 N.W.2d 853, 856 (Iowa 1993). We are bound by the commissioner's findings of fact if supported in the record as a whole and will reverse the agency findings only if we determine substantial evidence does not support them. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa

2006). The definitive question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Id.* at 218.

"We are not bound, however, by an agency's erroneous conclusions of law." *Kostelac,* 497 N.W.2d at 856. If the claim of error "lies with the agency's interpretation of the *law*, the question on review is whether the agency's interpretation is erroneous, and we may substitute our interpretation for the agency's." *Meyer*, 710 N.W.2d at 219. We allocate some degree of discretion in our review of the application of the law to the facts, but not the breadth of discretion given to the findings of fact. *Id*. at 218-19.

"With respect to the workers' compensation statute in particular, we keep in mind that the primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee." *Griffin Pipe Prods. Co. v. Guarino,* 663 N.W.2d 862, 865 (Iowa 2003).

We have chosen to address the issues in the following order:

III. ALGONA MANOR CROSS-APPEAL: COMPENSATION RATE

Workers' compensation benefits are generally based on thirteen weeks of pre-injury earnings. Iowa Code § 85.36 (2005). However, Schutjer was injured less than a month after starting employment and did not have thirteen weeks of pre-injury wage records. Additionally, Schutjer was absent for personal illnesses in the pre-injury work weeks. Schutjer was paid an hourly wage, but the parties dispute whether Schutjer's anticipated full time work schedule was thirty-two hours or forty hours.

Algona Manor's position is a thirty-two hour week was Schutjer's anticipated full time work schedule and multiplying thirty-two by $8.40 resulted in

an average weekly wage of $268.80 with a weekly compensation rate of $195.50, which it paid.

The agency ruled: "The record evidence at best creates equipoise as to whether claimant's average weekly earnings should have been projected on a 40 hour or 32 hour weekly basis," and utilized the thirty-two hour compensation rate.

The agency relied upon Iowa Code section 85.36(7), which states when an employee has worked less than a full thirteen weeks, gross weekly earnings are determined by either the earnings of similar employees over the full period or by "averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer." Since the record contains no evidence of the earnings of similar employees, the agency did not utilize this method. Without additional analysis, after quoting Iowa Code section 85.36(7), the agency "concluded that claimant's weekly rate of compensation is $195.50." The agency used the projection process advanced by Algona Manor, but this is not the averaging process specified in section 85.36(7). We therefore conclude the agency's application of law to fact is "irrational, illogical or wholly unjustified." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004).

The district court reversed and remanded for the agency to reconsider the appropriate benefits based on an anticipated full time work schedule of forty hours. The court determined the agency erred in not utilizing Iowa Code section 85.36(6), which instructs how computation of benefits should be handled if the time actually worked is not representative of the time scheduled to be worked. Due to numerous personal and family illnesses, Schutjer rarely worked her

anticipated hours. When this occurs, section 85.36(6) instructs the agency to exclude earnings from weeks that are not customary of the employee's earnings. *Griffin Pipe Prod. Co.,* 663 N.W.2d at 862-867 (holding the focus of the statute is on the customary hours the employee is regularly required to work).

The key issue on appeal is whether substantial evidence supports the agency's determination Schutjer's customary earnings should be projected on a thirty-two hour basis. On the day Schutjer was injured, Algona Manor's supervisor filled out an incident investigation report stating: "Employee's normal weekly hours 40." Schutjer testified she was hired to work forty hours.

While Algona Manor's records generally do not specify scheduled hours, on the two records showing scheduled hours, Schutjer is scheduled to work eight-hour days without exception. Algona Manor issued two checks each month; one covering the first to the fifteenth and one covering the sixteenth to month's end.

Schutjer's first full pay period was November 16 to November 30. During the first part of this pay period, Algona Manor scheduled Schutjer to work five days.[1] Schutjer did not work all the scheduled hours due to personal and family illnesses. When she arrived at work for the second part of the pay period, she was told she had to make up some weekend time because she had left work early on the day before, a Saturday, due to her husband's illness. Algona Manor scheduled Schutjer to work five days and she also worked a sixth day –

[1] Algona Manor scheduled Schutjer to work on November 18, November 19, November 20, November 21, and November 23. Schutjer worked two days, was sick two days, and left early on Saturday November 23 when her husband went to the emergency room for a migraine and she had to take care of their children.

Saturday, November 30. Schutjer received overtime for this pay period.[2] Therefore, the records of the first full pay period combined with the records showing consistent eight-hour scheduling support Schutjer's testimony and Algona Manor's written record stating Schutjer was hired to regularly work forty hours.

The next full pay period occurred after Schutjer's injury and is from December 16 to December 31, 2002. As detailed below, the records of this second full pay period also support Schutjer's testimony and Algona Manor's written record stating Schutjer was hired to work forty hours. It is uncontroverted and Algona Manor admits the first week Schutjer was scheduled to return to work after her injury, December 16 to 22, Algona Manor scheduled Schutjer for a forty-hour week.[3]

Algona Manor ignores its written record stating Schutjer was expected to work forty hours, ignores the evidence showing it scheduled her for forty hours on the first week back from her injury, and argues thirty-two hours was anticipated based solely on its claim Schutjer was scheduled for a thirty-two hour week on the second part of her post-injury return to work. In support, Algona Manor relies on its letter answering a request for Schutjer's scheduled hours from December 23 to December 29, 2002. While Schutjer was scheduled for four eight-hour days totaling thirty-two hours during the dates for which information was requested, the pay period continues to December 31, 2002, and the record

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[2] Algona Manor scheduled Schutjer to work on November 24, November 25, November 26, November 28, November 29, and she worked all these days. She also worked Saturday November 30.

[3] The record shows Algona Manor scheduled Schutjer to work eight hours on December 16, December 17, December 19, December 20 and December 22.

indicates Schutjer was scheduled to work on December 30, 2002.[4] Therefore, the record shows Algona Manor scheduled Schutjer to work two, forty-hour shifts during the full pay period following her return to work.

We find no substantial evidence to support the agency's conclusion Schutjer's earnings should have been projected on a thirty-two hour basis. "When the relevant evidence is uncontroverted and reasonable minds could not draw different inferences from the evidence, we can on review determine the facts as a matter of law." *Bearce v. FMC Corp*., 465 N.W.2d 531, 534 (Iowa 1991). We agree with the district court's remand on this issue and order the agency to reconsider the appropriate level of compensation based on forty hours.

IV. ALGONA MANOR CROSS-APPEAL: TPD AND TTD ENTITLEMENT

The agency ruled Schutjer was entitled to temporary benefits for several dates but did not award benefits due to "lack of evidence presented as to the amount of benefit due." The district court ruled the agency "did not follow the spirit of the workers' compensation law in finding an entitlement but refusing to award any compensation," and stated the computation of compensation "is not as speculative and difficult as the [agency] apparently determined it to be." Noting workers' compensation statutes are to be construed liberally in favor of the employee, the court determined the agency "should have taken pains to ensure that, once an entitlement was found, compensation was made."

[4] Algona Manor's letter states Schutjer was scheduled to work eight hours on December 23, December 24, December 26, and December 27. The record indicates Schutjer was scheduled to work on December 30 by Algona Manor, but called in sick due to blood sugar issues. While Algona Manor ignores December 30 in this section of its brief, later it states: "Schutjer was scheduled to work on 12/30/02, but called in sick."

The court remanded to the agency to choose between two methods of computation: (1) instruct the parties to work out the amounts themselves, or (2) permit further evidence to be submitted. We affirm the district court's decision.

V. ALGONA MAJOR CROSS-APPEAL: TEMPORARY BENEFITS

On the issue of awarding temporary benefits owed on specific dates from December 2, 2003 to January 4, 2003[5], we agree with the findings and conclusions of the district court and adopt them as our own with one exception. Substantial evidence supports the agency determination Schutjer was scheduled to work on December 23 and 24 but negotiated not coming in to work and not being paid so she could complete her Christmas shopping. Schutjer is not entitled to benefits for those two days.

VI. SCHUTJER APPEAL: JANUARY 5 VOLUNTARY QUIT

Schutjer appeals the agency and district court determination she is not entitled to benefits because she voluntarily quit her employment on January 5, 2003. On January 5, Schutjer's work duties were restricted. If Algona Manor offered Schutjer suitable work within her restrictions, she is required to accept the work in order to receive temporary benefits. *See* Iowa Code § 85.33(3). However, if Schutjer refuses suitable work, she is not entitled to those benefits. *See id*. Therefore, under section 85.33(3), a two part analysis is needed: (1) was Schutjer offered suitable work within her restrictions; and (2) did Schutjer refuse it?

The agency found: "The greater weight of the objective credible evidence would establish that [Schutjer] voluntarily quit her employment on January 5,

[5] District court decision sections III, IV, V, and VI.

2003," and ruled Schutjer was not entitled to temporary benefits beyond what Algona Manor had already paid. The district court agreed. While the agency found Schutjer voluntarily quit, the issue is irrelevant under section 85.33(3). The determinative issue is whether she was offered suitable work within her restrictions and she refused. There is no agency analysis of this issue. Therefore, we must remand for a determination of whether on January 5 suitable work within her restrictions was offered to Schutjer and she refused.

VII. SCHUTJER APPEAL: PERMANENT DISABILITY

The agency's conclusion Schutjer "has not established a causal relationship between her December 2, 2002 injury and her claimed permanent partial disability" was upheld by the district court on appeal.

The opinions of the medical experts varied. Dr. Palit opined Dr. Beck's surgery was not medically necessary, was not related to the December 2002 injury, and Schutjer had no permanent disability. Dr. Kuhnlein, Schutjer's independent medical examiner, found Schutjer had a permanent disability but stated: "I cannot objectively make the relationship between the December 2002 injury and the June 2003 pain, given the several months interval where no back pain is mentioned." Dr. Beck, Schutjer's surgeon, determined the December 2002 injury was a substantial cause of Schutjer's subsequent back issues and permanent disability.

The district court concluded the agency found: "the opinions of Dr. Palit and Dr. Kuhnlein, along with the testimony of [Schutjer], to support the finding that [Schutjer's] continuing back problems were not caused by the December 2002 incident at Algona Manor." We disagree. The agency based its causation

ruling solely on its determination Schutjer lacked credibility. While the agency summarized the medical opinions, nowhere in its ruling does it explain the weight given to the varied medical opinions or explain its resolution of the conflicts in the medical evidence. The agency decision is totally lacking in any analysis of the medical evidence.

Dr. Beck, a doctor active in Schutjer's treatment chain and the doctor who performed the surgery that is the subject matter of the permanency dispute, reported both permanency and substantial causation. The agency's conclusions "shall be supported by . . . a reasoned opinion." Iowa Code § 17A.16(1). If the agency rejects Dr. Beck's evidence of permanent disability caused by the December 2002 injury, "the reason for its rejection should be assigned . . . for purposes of judicial review." *Tussing v. George A. Hormel & Co.*, 417 N.W.2d 457, 458 (Iowa 1988). The agency has a duty to state the evidence relied upon and "specify in detail the reasons for [its] conclusions. [Its] decision must be sufficiently detailed to show the path . . . taken through conflicting evidence." *Catalfo v. Firestone Tire and Rubber Co*., 213 N.W.2d 506, 510 (Iowa 1973).

We reverse the denial of permanent disability benefits and remand for the agency to "show the path" taken through the conflicting medical evidence and for a discussion of the relevant benefits and expenses.

VIII. ALGONA MANOR CROSS-APPEAL: PENALTY BENEFITS

Penalty benefits, created by Iowa Code section 86.13, may be awarded based on the underpayment of benefits. *Robbennolt v. Snap-On Tools Corp*., 555 N.W.2d 229, 237-38 (Iowa 1996). Once the claimant proves underpayment, the burden then shifts to the insurer to prove "a reasonable cause or excuse."

City of Madrid v. Blasnitz, 742 N.W.2d 77, 81 (Iowa 2007). One type of "reasonable cause or excuse" occurs when "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).

The agency determined Schutjer was not entitled to penalty benefits. However, the district court reversed and remanded for the agency to consider whether underpayment penalty benefits are appropriate after recalculations using the forty-hour anticipated work schedule.

Algona Manor argues the record shows a "reasonable factual dispute" as to Schutjer's anticipated full time work schedule. *See Gilbert v. USF Holland, Inc.,* 637 N.W.2d 194, 201 (Iowa 2001). Algona Manor claims the reasonableness of its position is demonstrated by the agency's use of its calculation.

We agree the "focus is on the existence of a debatable issue, not on which party was correct." *Bellville v. Farm Bureau Mut. Ins. Co.,* 702 N.W.2d 468, 473-74 (Iowa 2005). However, as the district court ruled: "Given the sparseness of [Algona Manor's] personnel records, it is even more significant that there are multiple references to [Schutjer] being scheduled for forty hours." We agree with the district court's remand to the agency on this issue.

We have considered all appellate issues and adopt the district court's opinion on any issue not specifically discussed herein.

IX. CONCLUSION

We affirm the district court's remand to the agency: (1) to recalculate the appropriate rate based on an anticipated forty-hour work schedule; (2) to award

compensation after an entitlement is found based on either the parties working out the amounts or on the submission of further evidence; and (3) to consider whether underpayment penalty benefits are appropriate.

We affirm the district court's remand to the agency for reconsideration of benefits owed from December 2, 2002 to January 4, 2003, with the modification of affirming the agency's determination of no benefits for December 23 and 24, 2002.

We reverse the denial of benefits and remand for the agency to analyze whether on January 5 suitable work within Schutjer's restrictions was offered to her and she refused.

We reverse the denial of permanent disability benefits and remand for the agency to analyze the medical evidence and discuss relevant benefits and expenses.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.