IN THE COURT OF APPEALS OF IOWA

No. 8-328 / 07-1112
Filed May 29, 2008

PELLA CORPORATION,
Petitioner-Appellant,

vs.

DOUGLAS MENNENGA,
Respondent-Appellee.

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

Employer Pella Corporation appeals from the district court's ruling on judicial review affirming the Workers' Compensation Commissioner's award of industrial disability benefits to employee Douglas Mennenga. **AFFIRMED.**

David L. Jenkins of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellant.

Jason D. Neifert of Max Schott & Associates, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Employer Pella Corporation appeals from the district court's ruling on judicial review affirming the Workers' Compensation Commissioner's award of industrial disability benefits to employee Douglas Mennenga. We affirm.

I. Background Facts

On or about June 5, 2003, Douglas Mennenga felt a pop and resulting pain in his left shoulder while undergoing physical therapy for a work-related injury to his upper extremities, which occurred on March 12, 2001. A physical therapy note dated June 10, 2003, substantiates this version of events. A few days later, an employee at Pella Corporation (Pella) rolled a cart toward Mennenga while he was performing light duty work. Mennenga put up his left arm to stop it and felt a pop and resulting pain in his left shoulder.

On June 11, 2003, Mennenga saw Dr. Quenzer. The doctor's impression was a left shoulder strain. Mennenga did not notify his employer of the injury because based on the doctor's impression he did not believe it was serious.

When the shoulder did not improve, Mennenga again saw Dr. Quenzer on September 11, 2003. The doctor recommended an MRI be performed on the shoulder. Based on the doctor's recommendation, Mennenga notified his employer of the injury on September 23, 2003.

Dr. Brindle conducted an MRI on November 21, 2003, which indicated a small tear. Mennenga saw Dr. Neff on December 3, 2003. The doctor recommended an EMG. Dr. Koenig performed the EMG on December 15, 2003, and opined Mennenga had brachial plexopathy of his left shoulder. Dr. Neff

reviewed the EMG and recommended Mennenga be seen at the neurology department at the University of Iowa Hospitals and Clinics.

Mennenga saw Dr. Worrell, who scheduled a repeat EMG/NCS study. The study was performed on January 22, 2004. While the NCS was normal, the EMG did not clearly demonstrate a brachial plexopathy. Mennenga saw Dr. Nepola on February 24, 2004. Another MRI was performed on March 9, 2004, which indicated a small tear. Mennenga returned to Dr. Nepola, who recommended treatment options. The record does not indicate Mennenga returned to the doctor for additional care for his left shoulder injury.

On February 16, 2004, Dr. Kuhnlein conducted an independent medical evaluation of Mennenga and issued his report on April 7, 2004. At the time, the doctor did not have the medical records from the University of Iowa Hospitals and Clinics. The doctor opined Mennenga had a tear and a brachial plexopathy of the left shoulder. Based on the types of injuries, the doctor believed the plexopathy occurred during the therapy incident and the tear occurred during the cart incident. The doctor did not believe Mennenga had reached maximum medical improvement regarding the plexopathy. However, "[a]bsent additional treatment, he will have reached maximum medical improvement for all of these conditions, as I would not expect material improvement barring appropriate treatment and diagnostic workup." The doctor rated Mennenga's plexopathy at twenty-five percent impairment.

II. Proceedings

On December 8, 2003, Mennenga filed an original notice against Pella, claiming the left shoulder injury was work-related and had resulted in an

industrial disability. Pella asserted the affirmative defense of untimely notice. A contested case hearing was held. On May 10, 2005, the deputy commissioner issued his arbitration decision, denying Mennenga's industrial disability claim. The deputy determined the injury arose out of and in the course of the employment but determined the precise date of injury could not be established based on the facts in the record. Nevertheless,

> [i]t is concluded that claimant did sustain an injury on or about June 5, 2003, and based on the finding of claimant's credibility pertaining to his testimony, it is concluded that claimant has established that it either occurred while he was in physical therapy for the accepted work injury of March 12, 2001 or while at work.

However, the deputy found lack of medical causation and, therefore, no industrial disability.

> Although an MRI of claimant's left shoulder on November 21, 2003 demonstrated findings consistent with a tear of claimant's labrum in his left shoulder and EMG studies performed in December 15, 2003 demonstrated findings consistent with BP, later studies at the University of Iowa Hospitals and Clinics . . . found that neither of these were in fact present. Dr. Kuhnlein's opinion pertaining to claimant being permanently disabled as a result of his left shoulder injury were based on the original findings. Dr. Kuhnlein did not have the records of the University of Iowa Hospitals and Clinics. Dr. Kuhnlein indicated that the impairment rating he offered of 25 percent of claimant's left shoulder was entirely related to BP and not to any intrinsic shoulder pathology. As Dr. Kuhnlein did not have the benefit of the later tests, it is concluded that Dr. Kuhnlein's opinion relating to claimant's left shoulder cannot be given any weight.

Finally, the deputy found Pella had not met its burden of proof on its affirmative defense because Mennenga did not recognize the seriousness of his injury until Dr. Quenzer recommended the MRI and shortly thereafter Mennenga reported the injury to Pella. Both parties filed applications for rehearing. The deputy denied the applications.

Both parties appealed to the workers' compensation commissioner. On August 30, 2006, the commissioner reversed on the issue of industrial disability. The commissioner adopted the deputy's findings of fact but issued his own conclusions of law. The commissioner found Mennenga had suffered an industrial disability of ten percent for the left shoulder injury. In awarding industrial disability benefits, the commissioner relied on Dr. Kuhnlein's impairment rating, among other factors. The commissioner also apportioned the work-related injuries that occurred on March 12, 2001, and June 5, 2003, equally to prevent overlapping disabilities because at the time of the latter injury Mennenga would have received permanent partial disability benefits for the former injury. Based on the parties' stipulation, the commissioner assigned April 7, 2004, as the commencement date of permanent partial disability benefits for the June 5, 2003 injury. Pella filed an application for rehearing. The commissioner denied the application but corrected his decision to state that the parties did not stipulate to the April 7, 2004 date.

On October 26, 2006, Pella filed a petition for judicial review in the district court. On April 30, 2007, the district court affirmed. Pella filed an Iowa Rule of Civil Procedure 1.904(2) motion. The district court denied the motion.

On appeal, Pella claims:

I. THE AGENCY DECISION FINDING A SHOULDER INJURY AND AWARDING BENEFITS . . . IS NOT BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD, IS UNREASONABLE, ARBITRARY AND CAPRICIOUS, AND RESULTS FROM AN ABUSE OF DISCRETION.

II. THE AGENCY . . . ERRED IN REJECTING THE DEFENSE OF UNTIMELY NOTICE UNDER IOWA CODE SECTION 85.23.

III. THE APPEAL DECISION ERRED IN FAILING TO PROPERLY APPLY IOWA CODE SECTION 85.36(9)(C).

III. Standard of Review

Our review of a final decision of the commissioner, like that of the district court, is for correction of errors of law. *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). In determining whether the district court erred in exercising its power of judicial review, we apply the standards of Iowa Code section 17A.19(10) (2003) to the agency's action to determine whether our conclusions are the same as those of the district court. *Williamson v. Wellman Fansteel,* 595 N.W.2d 803, 806 (Iowa 1999); *E.N.T. Assocs. v. Collentine,* 525 N.W.2d 827, 829 (Iowa 1994). The agency's findings are akin to a jury verdict, and we broadly apply them to uphold the agency's decision. *Shank,* 516 N.W.2d at 812.

Pella claims the Commissioner's decision

> failed to properly interpret controlling legal principles, employed irrational reasoning and acted arbitrarily, capriciously, and with abuse of discretion in finding facts and applying law to those facts, and further that the facts (even as found by the agency) are inadequate to satisfy the governing legal standards.

Our supreme court recently stated:

> On judicial review, courts are bound by the commissioner's resolution of . . . finding the operative facts from the evidence presented . . . if supported by substantial evidence in the record as a whole. In other words, the question on appeal is not whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence "supports the findings actually made." On the other hand, application of the law to the facts . . . takes a different approach and can be affected by other grounds of error such as erroneous interpretation of law; irrational reasoning; failure to consider relevant facts; or irrational, illogical, or wholly unjustifiable application of law to the facts. We allocate some degree of discretion in our review of this question, but not the

> breadth of discretion given to the findings of fact. When the agency exercises its discretion based on an erroneous interpretation of the law, we are not bound by those "legal conclusions but may correct misapplications of the law."

Meyer v. IBP, Inc., 710 N.W.2d 213, 218-19 (Iowa 2006) (citations omitted).

IV. Industrial Disability

First, Pella argues the deputy failed to pinpoint the precise date and nature of the left shoulder injury, whether it resulted from the physical therapy or cart incident. As a result, Pella argues the deputy erroneously found the injury arose out of and in the course of the employment. Pella also argues the commissioner did not address this issue, although it was properly raised and preserved.

We initially note Pella cites no authority to support its claim that the agency must pinpoint the precise date and nature of the injury. *See* Iowa R. App. P. 6.14(1)(*c*) (stating "[f]ailure in the brief to . . . cite authority in support of an issue may be deemed waiver of that issue"). The employee has the burden of proof that the injury both arose out of and in the course of the employment. Iowa Code § 85.3(1). While the "arising out of" requirement means "there is a causal relationship between the employment and the injury," the "in the course of" requirement concerns "the time, place, and circumstances of the injury." *Ciha v. Quaker Oats Co.*, 552 N.W.2d 143, 150 (Iowa 1996).

While the commissioner adopted the deputy's findings of fact, the commissioner did not directly address the issue in his conclusions of law. Because the commissioner awarded industrial disability benefits, the commissioner must have impliedly agreed with the deputy that the June 5, 2003

injury arose out of and in the course of the employment. The deputy found Mennenga credible and relied on this and the medical records to support his finding that Mennenga was injured either during the physical therapy or cart incident, which were both work-related. We will not disturb the agency's credibility findings. *See Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455, 464 (Iowa 1969) (stating it is the agency's role to determine the credibility of the witnesses).

Pella also argues the commissioner erred in disregarding the deputy's finding that Dr. Kuhnlein's report establishing medical causation was entitled to no weight. "The employee must prove by a preponderance of the evidence that the injury is a proximate cause of the claimed disability." *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). "A cause is proximate if it is a substantial factor in bringing about the result." *Blacksmith v. All-Am., Inc.*, 290 N.W.2d 348, 354 (Iowa 1980). Although all evidence must be considered by the commissioner, medical causation is essentially within the domain of expert testimony. *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The weight to be given to an expert opinion by the commissioner depends on the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. *Bodish v. Fisher, Inc.*, 257 Iowa 516, 521, 133 N.W.2d 867, 670 (1965). However, it is the commissioner's role to determine the weight to be given to any evidence, and he or she may accept or reject it in whole or in part. *Deaver*, 170 N.W.2d at 464.

Although the commissioner did not specifically address the medical causation issue, the commissioner impliedly disagreed with the deputy's findings

on medical causation by awarding industrial disability benefits. In fact, the commissioner relied on Dr. Kuhnlein's report, specifically the impairment rating for plexopathy, in awarding industrial disability benefits. Therefore, the commissioner's decision gave weight to Dr. Kuhnlein's report. We will not disturb this finding. We also note the commissioner relied on other evidence. We affirm on this issue.

V. Notice of Injury

Next, Pella argues the commissioner erred in rejecting its untimely notice defense. Under section 85.23, compensation is not allowed unless the employer either has actual knowledge of the injury or the employee has notified the employer of the injury within ninety days of the date of the occurrence of the injury. The purpose of the notice requirement is to enable the employer to investigate the facts relating to the injury while the information is fresh. *Dillinger v. City of Sioux City*, 368 N.W.2d 176, 180 (Iowa 1985). The employer has the burden of proving this affirmative defense. *DeLong v. Iowa State Highway Comm'n*, 299 Iowa 700, 703, 295 N.W. 91, 92 (1940).

The discovery rule applies to section 85.23. *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 258 (Iowa 1980). Under this rule, notice need not be given until the claimant either recognizes or should recognize "the nature, seriousness, and probable compensable character of the condition." *Johnson v. Heartland Specialty Foods*, 672 N.W.2d 326, 328 (Iowa 2003). According to our supreme court,

> [t]he seriousness component of the discovery rule exists so that "every minor ache, pain, or symptom" does not begin the [notice requirement]. Thus, the failure to [give notice within ninety days] of

> the occurrence of the injury may be excused if the claimant had no reason to believe the condition was serious. If the injury is trivial or minor, or the symptoms indicate no serious trouble, the seriousness component is not met.

Swartzendruber v. Schimmel, 613 N.W.2d 646, 650 (Iowa 2000) (citations omitted).

The commissioner found and we agree Mennenga's notice to Pella was timely under section 85.23. Although Mennenga saw Dr. Quenzer on June 11, 2003, the doctor believed he merely had a shoulder strain. Therefore, Mennenga did not believe the injury was serious and did not inform Pella of the injury. However, when the shoulder did not improve, Mennenga again saw the doctor on September 11, 2003. The doctor recommended an MRI be performed on the shoulder. Based on the doctor's recommendation, Mennenga believed the injury was now serious and notified his employer of the injury on September 23, 2003. We affirm on this issue.

VI. Apportionment

Finally, Pella argues the commissioner erred in applying the apportionment statute to the two work-related injuries that occurred on March 12, 2001, and June 5, 2003. In general, disabilities resulting from two successive work-related injuries are not apportioned absent a governing statute. *Excel Corp. v. Smithhart*, 654 N.W.2d 891, 897 (Iowa 2002). Section 85.36(9)(c)[1] is an apportionment statute and provides:

[1] The Iowa Legislature repealed section 85.36(9)(c) effective September 7, 2004. *See* 2004 Iowa Acts, 1st Ex.Sess. ch. 1001, §§ 11, 12. However, section 85.36(9)(c) was still in effect at the time the injuries in the instant case occurred, and the statute in effect at the time of the injury is controlling. *See Brown v. Star Seeds, Inc.*, 614 N.W.2d 577, 581 (Iowa 2000) (holding the statute in effect at time of the injury is controlling).

> [i]n computing the compensation to be paid to any employee who, before the accident for which the employee claims compensation, was disabled and drawing compensation under the provisions of this chapter, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries which the employee shall have suffered.

Stated another way,

> [i]f an employee is incapacitated to work because of a compensable injury and is receiving temporary total disability, temporary partial disability, permanent partial disability, healing period, or permanent total disability benefits and again suffers a compensable injury, the statute applies. The statute applies even though the employee is not receiving but is entitled to receive such benefits at the time of the second injury. That is because benefits are retroactive to the date they are due.

Mycogen Seeds v. Sands, 686 N.W.2d 457, 466 (Iowa 2004). This section's purpose is to prevent overlapping or stacking of disabilities. *Excel Corp.*, 654 N.W.2d at 899-900.

More specifically, Pella claims the commissioner erred in choosing April 7, 2004, as the commencement date for permanent partial disability benefits for the June 5, 2003 injury. Compensation for a permanent partial disability begins at the termination of the healing period. Iowa Code § 85.34(2). The healing period begins "on the first day of disability after the injury" and ends when (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated," or (3) "the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." *Id.* § 85.34(1).

Pella claims the commencement date should be June 5, 2003, the date of the injury because this is when Mennenga returned to work. We disagree.

When Mennenga was injured on June 5, 2003, he was working light duty as a result of his March 12, 2001 injury. After his June 5, 2003 injury, Mennenga continued to work in this capacity. Therefore, Mennenga could not return to work when he had not left work because of a work-related injury.

The commissioner did not elaborate why he chose April 7, 2004, as the commencement date, other than by reference to the parties' stipulation. The parties did not stipulate to this date, as stated in the commissioner's order denying rehearing. Dr. Khunlein's report was issued on April 7, 2004. Although the doctor did not believe Mennenga had reach maximum medical improvement, he found "[a]bsent additional treatment, he will have reached maximum medical improvement for all of these conditions, as I would not expect material improvement barring appropriate treatment and diagnostic workup." The record does not indicate Mennenga returned to doctors for additional care for his left shoulder injury. Therefore, Mennenga reached maximum medical improvement on the date Dr. Khunlein issued his report. We affirm on this issue.

To the extent this opinion does not address any other arguments made by the parties, we find they are without merit and accordingly affirm.

AFFIRMED.