IN THE COURT OF APPEALS OF IOWA

No. 8-349 / 06-0698
Filed July 16, 2008

STEPHANI ANNE SESKIS,
Petitioner-Appellee/Cross-Appellant,

vs.

CLC HEALTHCARE, INC., and
COMMERCE & INDUSTRY
INSURANCE COMPANY,
Respondents-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Employer appeals and employee cross-appeals from a district court judicial review decision affirming the workers' compensation commissioner's award of workers' compensation benefits. **AFFIRMED.**

Aaron T. Oliver of Hansen, McClintock & Riley, Des Moines, for appellants.

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

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

CLC Healthcare, Inc. and its workers' compensation insurance carrier, Commerce & Industry Insurance Company (collectively CLC), appeal and Stephani Seskis cross-appeals from a district court judicial review decision affirming the workers' compensation commissioner's award of workers' compensation benefits. We affirm the judgment of the district court.

I. Background Facts and Proceedings

Seskis was hired by CLC as a certified nursing assistant (CNA) on September 11, 2002. On April 14, 2003, she was repositioning a patient when she felt a "pop" in her lower right back. She sought medical treatment for her injury the following day.

Seskis was seen by Dr. Dale Steinmetz who observed that she was "sitting bent forward and leaning to the left side. She walks with an antalgic gait, trying to drag the right leg behind [her] and stooped forward, again leaning to the left." She told Dr. Steinmetz it was difficult for her to walk due to the severity of pain in her lower back, which radiated into her right buttock and thigh.

After an x-ray revealed degenerative disc disease with chronic spurring and disc space narrowing noted at the L3-4 and L4-5 levels, in addition to facet osteoarthropathy at L5-S1, Dr. Steinmetz diagnosed Seskis with acute low back pain secondary to a disc herniation. He placed her on bed rest and prescribed ibuprofen to relieve her pain. Seskis, however, continued to experience significant pain and an inability to straighten up. She remained off work and began physical therapy, which initially yielded little improvement in her symptoms. Dr. Steinmetz found it difficult to "gauge [her] response to therapy"

due to his belief that "she has a lot of psychosocial overtone to her exaggerated history on presentation." However, he felt "she does have a very real disc herniation."

Seskis began seeing Dr. Peter Wirtz, an orthopaedic surgeon, on May 12, 2003. He ordered an MRI to "[r]ule out degenerative disc disease lumbar spine." The MRI revealed a mild diffuse disc bulge at the L3-L4 level and a mild central disc bulge at the L5-S1 level. After receiving the results of what he described as the "relatively negative" MRI, Dr. Wirtz released Seskis to part-time sit-down work. She returned to work in a light duty capacity on May 28 and continued with physical therapy, which brought some relief and improvement in her symptoms.

An EMG and nerve conduction study was performed on June 2, 2003, and revealed her motor and sensory amplitudes were normal. However, it was performed on her left lower extremity, despite her consistent complaints of pain in her right lower back. Seskis was unable to complete a subsequent functional capacity examination (FCE) due to pain in her lower back and right leg. Although the FCE report indicated she "exhibited minimal symptom/disability exaggeration behavior," her inability to complete the exam "suggest[ed] very poor effort or voluntary submaximal effort, which is not necessarily related to pain, impairment or disability."

Upon receiving the results of the EMG and nerve conduction study and the FCE report, Dr. Wirtz released Seskis to work without restrictions on June 18, 2003, although he noted that her "[s]ymptoms continue with restricted spinal and walking condition." Yet, he opined that "[t]here is no condition noted that is in any way impairing as a result of the injury occurring on 4/14/03."

Seskis reported for work on June 22, 2003, but she was physically unable to perform the duties assigned to her throughout that week. Her coworkers observed there "was no way she could perform her job adequately in the state and condition that she was in physically." Seskis was terminated from her employment at CLC on June 30. CLC thereafter refused to authorize any further treatment for her injury.

Due to her ongoing lower back pain following her termination from CLC, Seskis was referred by her family practitioner to Dr. Bruce Hughes, a neurologist. Her first appointment with Dr. Hughes was in December 2003. She informed him "her pain, which will radiate into the right leg, has been progressively worsening." She was unable to sit up straight, walk in an upright position, or bear weight on her right leg. Dr. Hughes diagnosed her with gait disturbance, low back pain, right lower extremity pain, and paresthesias. He noted the etiology for her condition was unclear, stating, "The gait is highly atypical for any organic process. This gait is not the gait that is seen with lumbar disc herniation." He recommended a second MRI and an EMG and nerve conduction study "of the right lower extremity as the prior study involved the unaffected leg." He also recommended physical therapy for gait training.

The second MRI revealed a minimal right paracentral disc bulge at the C4-5 level. The radiologist was unable to discover an etiology for Seskis's clinical complaints. The EMG and nerve conduction study of her right lower extremity was normal. Because he was unable to discover a neurologic explanation for her symptoms, Dr. Hughes referred Seskis to Dr. Henry Paulson, a neurologist at the University of Iowa Hospitals and Clinics.

Dr. Paulson diagnosed Seskis with a "disabling chronic lower back pain syndrome that affects her posture and gait." He noted she had experienced significant improvement in her symptoms as a result of physical therapy, which he "suspect[ed] could lead to a complete recovery." He recommended that she continue with physical therapy.

Dr. Hughes concurred with Dr. Paulson's impression and noted as of April 6, 2004, that Seskis's lower back pain was improving. Her gait disturbance, which he remained unable to explain, was also improving as she was "able to toe, heel, and tandem walk without difficulty." Dr. Hughes believed she could return to work full-time.

Seskis filed a petition with the Iowa Workers' Compensation Commissioner on August 13, 2003, alleging she suffered an injury to her back, hips, and lower extremities on April 14, 2003, when she was repositioning a patient at work. The parties stipulated Seskis's injury arose out of and in the course of her employment with CLC. CLC also stipulated that Seskis's claimed medical expenses incurred before July 1, 2003, were related to her work injury.

Before the hearing began on May 5, 2004, the deputy workers' compensation commissioner excluded a May 3, 2004 report from Dr. Hughes because it was not specifically listed in Seskis's exhibit list and was not provided to CLC until shortly before the hearing. Following the hearing, the deputy determined Seskis's work injury "was and is a cause of [her] low back and leg pain, along with the altered gait and posture problems." He found that Seskis had been physically unable to return to work as a CNA since her injury and that

she had not yet reached maximum medical improvement because "further treatment will likely substantially improve her physical condition."

The deputy accordingly awarded Seskis temporary total disability benefits from April 15, 2003, through May 27, 2003, and a running award of temporary total disability benefits beginning on June 30, 2003. She was also awarded temporary partial disability benefits for the days she worked at CLC in a light duty capacity. Finally, the deputy ordered CLC to pay Seskis's medical expenses and granted her claim for additional medical care from Dr. Hughes at her employer's cost. The deputy denied Seskis's claim for penalty benefits.

CLC appealed and Seskis cross-appealed the deputy's decision. The workers' compensation commissioner affirmed and adopted the deputy's decision. CLC and Seskis both filed petitions for judicial review. Following a hearing, the district court affirmed the agency decision.

CLC appeals. It claims the agency erred in (1) finding Seskis's gait problems are causally related to the work incident based solely on lay testimony; (2) awarding Seskis a running award of temporary total disability benefits; and (3) ordering it to pay all of Seskis's medical expenses and ongoing alternative medical care. Seskis cross-appeals, claiming the agency erred in (1) excluding Dr. Hughes's May 3, 2004 report, (2) failing to declare temporary partial disability benefit amounts and due dates, and (3) denying her claim for penalty benefits.

II. Scope and Standards of Review

The Iowa Administrative Procedure Act, chapter 17A of the 2005 Iowa Code, governs the scope of our review in workers' compensation cases. Iowa Code § 86.26; *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the

Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

"If the claim of error lies with the agency's findings of *fact*, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so we are bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004).

Because factual determinations are within the discretion of the agency, so is its application of law to the facts. *Clark*, 696 N.W.2d at 604; *see also Meyer*, 710 N.W.2d at 219 (stating the reviewing court should "allocate some degree of discretion" in considering the agency's application of law to facts, "but not the breadth of discretion given to the findings of facts"). We will reverse the agency's application of the law to the facts if we determine its application was "irrational, illogical, or wholly unjustifiable." *Meyer*, 710 N.W.2d at 218.

III. Discussion

A. Causal Connection

CLC first claims the agency erred in finding Seskis's alleged gait problems are causally related to the April 14, 2003 work injury based solely on lay witness testimony. She argues "Iowa law is clear that determining whether a medical condition is causally connected to a work injury is solely within the domain of expert testimony."

Our supreme court has stated that the issue of "[w]hether an injury has a direct causal connection with the employment or arose independently thereof is *essentially*," not solely, "within the domain of expert testimony." *Dunlavey v. Economy Fire & Casualty Co.*, 526 N.W.2d 845, 853 (Iowa 1995) (emphasis added). "The law requires the commissioner to consider *all* evidence, both medical and nonmedical, in arriving at a disability determination." *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 273 (Iowa 1995) (emphasis added). "[L]ay witness testimony is relevant and material on the issue of cause and extent of an injury." *Id.*

The physicians in this case were unable to determine a cause for Seskis's gait problems. Although Dr. Steinmetz was concerned with her "apparent exaggeration of symptoms," he believed "she [had] a very real disc herniation." Dr. Hughes stated he was unable to discover a neurological explanation or cause for Seskis's altered gait, but he did agree with Dr. Paulson that she suffered from "chronic low back pain resulting in disturbance of posture of gait." None of these physicians rendered an opinion as to whether or not Seskis's gait disturbance was caused by her April 14, 2003 injury. Dr. Wirtz, however, stated "[t]here is no

condition noted that is in any way impairing as a result of the injury occurring on 4/14/03." CLC asserts the agency erred in rejecting Dr. Wirtz's opinion in favor of lay witness testimony. We do not agree.

It is a basic tenet of law that it remains within the province of the commissioner "to weigh the facts presented to him and it is entirely within his right to reject any evidence he considers less reliable than other contradictory testimony." *Id.* The weight to be given an expert opinion may be affected by the completeness of the premise given the expert and other surrounding circumstances. *Dunlavey*, 526 N.W.2d at 853. However, the commissioner must state his reasons for disregarding uncontroverted expert medical evidence. *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 510 (Iowa 1973).

The deputy rejected Dr. Wirtz's opinion as "not convincing," noting that Dr. Wirtz apparently viewed the "suggestion" from the FCE that Seskis gave a "very poor effort or voluntary submaximal effort which is not necessarily related to pain, impairment or disability" as evidence of malingering "despite no change in her complaints or presentation." The deputy considered the testimony of Seskis's coworkers, all of whom were "trained LPNs or CNAs [with] considerable experience with disabled persons," more credible than Dr. Wirtz's opinion, which was based on the "limited FCE testing." The deputy additionally observed her coworkers "were far more experienced with [Seskis] both before and after the work injury than either the FCE evaluator or Dr. Wirtz." We believe there is substantial evidence supporting the deputy's findings and conclusion. *See* Iowa Code § 17A.19(10)(f)(1) (defining substantial evidence).

Seskis testified, and her medical records show, that after her injury on April 14, 2003, she suffered from muscle spasms and lower back pain, which radiated into her right lower extremity. She was unable to bear weight on her right leg and could not walk in an upright position. Seskis's coworkers testified that she did not walk with an altered gait before her injury on April 14. After her injury, however, they observed that she was in obvious pain and consistently walked with a pronounced limp.

We reject CLC's argument that the agency "failed to discuss or mention important causation evidence" regarding Seskis's "prior gait problems." The deputy detailed Seskis's medical history leading up to her injury on April 14, 2003. He noted she had "prior low back problems in 1993, . . . and a prior low back injury from a fall and lifting in January 2003, only a couple of months before the injury in this case." The deputy discounted those incidents as potential sources for her condition after April 14, stating,

> [Seskis] testified that she fully recovered from these conditions and injuries and subsequently returned to her employment without problems. Nothing in the record contradicts those assertions. According to coworkers and her supervisor at CLC who testified at the hearing, [Seskis] was fully performing CNA duties, including lifting of residents, prior to her work injury of April 14, 2003.

We also reject CLC's argument that the agency failed to carefully evaluate Seskis's credibility. At the beginning of the arbitration decision, the deputy stated he found Seskis and the witnesses she called to testify on her behalf credible based on his "observation of their demeanor at [the] hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of other evidence." *See Arndt v. City of Le*

Claire, 728 N.W.2d 389, 394-95 (Iowa 2007) (stating it is the commissioner's duty as the trier of fact to determine the credibility of witnesses).

Finally, we note CLC stipulated before the hearing that Seskis's injury, which she alleged affected her back, hips, and lower extremities, arose out of and in the course of her employment. *See Weishaar v. Snap-On Tools Corp.*, 506 N.W.2d 786, 790 (Iowa Ct. App. 1993) ("Stipulations tending to expedite the hearing should be enforced unless good cause is shown to the contrary."). Furthermore, CLC is not appealing the deputy's finding that the April 14, 2003 work injury "was and is a cause of [Seskis's] chronic low back and leg pain," which Drs. Hughes and Paulson both believed resulted in Seskis's gait problems.

In light of the foregoing, we agree with the district court that there is substantial evidence supporting the agency's determination that Seskis's April 14, 2003 injury, which caused a documented gait disturbance, was causally connected to her employment at CLC. We consequently deny CLC's claims that the agency erred in ordering it to pay for the medical expenses Seskis incurred both before and after June 18, 2003, and in ordering it to authorize additional and ongoing medical care with Dr. Hughes. *See* Iowa Code § 85.27; *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 195-96 (Iowa 2003).

B. Temporary Disability Benefits

We turn next to CLC's claim that the agency erred in awarding Seskis a running award of temporary total disability benefits. The deputy determined Seskis was entitled to a running award of temporary total disability benefits because she "has been physically unable to return to work as a CNA since April 14, 2003," and she "has not as yet reached maximum medical recovery in

that further treatment will likely substantially improve her physical condition." The deputy thus concluded any determination as to the permanency of Seskis's injury was premature.

Iowa Code section 85.33(1) governs temporary total disability benefits. This provision provides that the employer shall pay the employee such benefits "until the employee has returned to work or 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." Iowa Code § 85.33(1).

Healing period benefits, on the other hand, are governed by Iowa Code section 85.34(1). That section provides that such benefits are payable

> until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until 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.

Iowa Code § 85.34(1). Temporary total disability compensation benefits and healing period compensation benefits refer to the same condition, *Clark*, 696 N.W.2d at 604, and have been analyzed in the same manner.[1] *See Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 446 (Iowa 1999) (stating the payment of healing period compensation under section 85.34(1) is subject to the same restrictions that apply to temporary total disability benefits under section 85.33(1)).

[1] The difference between temporary total disability benefits and healing period benefits involves permanent partial disability. *Clark*, 696 N.W.2d at 604. If permanent partial disability results, the payments made prior to payment for permanency are healing period benefits. *Id.* When an injury does not result in permanent partial disability, the payments are called temporary total disability benefits. *Id.* Thus, the determination of what label to place on temporary benefits must ordinarily await the determination of whether some degree of permanent disability has been sustained by the claimant. *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 391 n.1 (Iowa 1993).

Though it is undisputed that Seskis had not returned to work at the time of the arbitration hearing, CLC argues the deputy's award of temporary total disability benefits was not supported by substantial evidence because Seskis was medically capable of returning to her pre-injury employment. It additionally argues the deputy erred in awarding such benefits based on the fact Seskis might continue to improve with treatment. For the reasons that follow, we disagree.

In support of its argument that Seskis was medically capable of returning to substantially similar employment, CLC relies on Dr. Wirtz's medical report, which released Seskis to work without restrictions on June 18, 2003. The deputy, however, discounted Dr. Wirtz's opinion as not credible for reasons previously discussed. *See Arndt*, 728 N.W.2d at 395 *(*"The reviewing court only determines whether substantial evidence supports a finding '*according to those witnesses whom the [commissioner] believed*.'" (citation omitted)). Furthermore, testimony from Seskis and her coworkers, whom the deputy did believe, supports his finding that Seskis was not medically capable of returning to her employment as a CNA.

Seskis testified she was physically unable to perform the duties assigned to her upon her return to work without restrictions because she could not sit, stand, or walk in an upright position. Her supervisor, Kimberly Singleton, testified she was "horrified" when Dr. Wirtz released Seskis to work without restrictions on June 18 because "it was clear . . . there was no way she could perform her job adequately in the state and condition that she was in physically." Seskis's coworker, Michael Hopson, likewise testified she could not perform her duties

upon her return to work, noting "[s]he could not keep up with us. She couldn't lift. She couldn't even walk."

The deputy also relied on the opinions of Drs. Hughes and Paulson in finding Seskis had not yet reached "maximum medical recovery" based on indications in their medical reports that "further treatment will likely substantially improve her physical condition." Dr. Paulson noted Seskis's progress in physical therapy had yielded "significant improvement" in her symptoms, which he believed "could lead to a complete recovery." Dr. Hughes agreed with Dr. Paulson, stating, "her prognosis is good and she will likely have a complete recovery with physical therapy exercises." However, Dr. Hughes indicated that "[f]rom [his] standpoint, she can return to work full-time" as of April 6, 2004.

An anticipated improvement in continuing pain, if medically indicated, may extend the length of the healing period if a substantial change in industrial disability is also expected to result. *Pitzer*, 507 N.W.2d at 392; *see also Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60, 65 (Iowa Ct. App. 1981) ("The healing period may be characterized as that period during which there is reasonable expectation of improvement of the disabling condition and ends when maximum medical improvement is reached."). If, however, it is not likely further treatment of continuing pain will decrease the extent of permanent industrial disability, then continued pain management should not prolong the healing period. *Pitzer*, 507 N.W.2d at 392. Thus, the healing period generally terminates when "the attending physician determines that the employee has recovered as far as possible from the effects of the injury." *Armstrong Tire & Rubber Co.*, 312 N.W.2d at 65.

Neither Dr. Hughes nor Dr. Paulson determined Seskis had recovered as far as possible from the effects of the injury. Although Dr. Hughes indicated Seskis could return to work, he also concurred with Dr. Paulson that further improvement in her condition was anticipated. In addition, Dr. Hughes did not specify whether Seskis could return to work substantially similar to the employment in which she was engaged at the time of injury. It was the deputy's duty to sort out the conflicting evidence presented by the opinions of Drs. Wirtz, Hughes, and Paulson as to the anticipated improvement in Seskis's disability, and "the decision that he rendered may not be overturned on judicial review." *Pitzer*, 507 N.W.2d at 392. We therefore agree with the district court that the agency's running award of temporary total disability benefits should be affirmed.

C. Cross-Appeal

It is appropriate to first address the timeliness of Seskis's cross-appeal. CLC filed its notice of appeal on April 27, 2006, which was prior to the expiration of the thirty-day appeal period. *See* Iowa R. App. P. 6.5(1) ("[A]ppeals to the supreme court must be taken within, and not after, 30 days from the entry of the order, judgment, or decree . . . ."). Seskis did not file her notice of cross-appeal until May 8, 2006, more than five days after CLC's appeal was taken. *See id.* ("A cross-appeal may be taken within the 30 days for taking an appeal or in any event within 5 days after the appeal is taken."). Seskis nonetheless contends her cross-appeal should be considered timely filed due to CLC's failure to correctly serve her with the notice of appeal.

In a statement filed with this court, Seskis's counsel asserts he did not receive a copy of the notice of appeal until May 8, 2006, because CLC mailed the

notice to an incorrect address. Attached to that statement is a copy of an envelope addressed to Seskis's counsel at his former law firm's address that was mailed on May 1 by CLC's counsel. The certificate of service on the notice of appeal, however, indicates it was mailed to Seskis's counsel at his correct address on the date it was filed. Regardless of any deficiencies in service of the notice of appeal, we conclude we must dismiss Seskis's cross-appeal as untimely in light of our supreme court's opinion in *Carpenter v. Ruperto*, 315 N.W.2d 782, 786 (Iowa 1982).

In *Carpenter*, the cross-appellant argued rule 6.5(1) should be interpreted to allow a cross-appeal within five days after receipt of a copy of the notice of appeal. 315 N.W.2d at 786. Our supreme court rejected that argument, reasoning that under rule 6.6(*a*), an appeal is "taken and perfected by filing a notice with the clerk of court where the order, judgment, or decree was entered, signed by appellant or appellant's attorney." *Id.* Therefore, the court determined the five-day period begins on the date the notice of appeal was filed with the clerk, rather than the date it was served on the opposing party. *Id.*; *see also Rowen v. LeMars Mut. Ins. Co.*, 347 N.W.2d 630, 638 (Iowa 1984) ("[A]n appeal may be 'taken and perfected' without service of the notice . . . .").

We reject Seskis's argument that it would be "unjust, inequitable, unfair, and unreasonable not to exercise jurisdiction over the cross-appeal." *See Rowen*, 347 N.W.2d at 638 (rejecting argument that defendants were prejudiced by failure of timely service due to their lost opportunity to cross-appeal, because they were able to urge grounds to affirm the court's judgment in resisting the appeal). "Compliance with the time limitations for taking a cross-appeal is

mandatory and jurisdictional." *Carpenter*, 315 N.W.2d at 786. Because the cross-appeal was not timely, we did not acquire jurisdiction of it, and it must be dismissed. *Id*.

IV. Conclusion

We agree with the district court that there is substantial evidence supporting the agency's determination that Seskis's April 14, 2003 injury, which caused a documented gait disturbance, was causally connected to her employment at CLC. We consequently deny CLC's claims that the agency erred in ordering it to pay for Seskis's medical expenses incurred both before and after June 18, 2003, and in ordering it to authorize additional and ongoing medical care with Dr. Hughes. The district court was also correct in finding that the agency's running award of temporary total disability benefits should be affirmed. We dismiss Seskis's cross-appeal as untimely. The judgment of the district court affirming the workers' compensation commissioner's award of workers' compensation benefits is therefore affirmed.

AFFIRMED.