IN THE COURT OF APPEALS OF IOWA

No. 8-361 / 07-1254
Filed June 25, 2008

HI-RAIL CORPORATION,
Employer, and
THE CINCINNATI INSURANCE COMPANIES,
Insurance Carrier,
Petitioners-Appellants,

vs.

JAMES THOMSON and ZENITH INSURANCE COMPANY,
Respondents-Appellees.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

The appellants appeal a district court ruling affirming the decision of the workers' compensation commissioner. **AFFIRMED.**

J. Richard Johnson and Laura Ostrander of White & Johnson, P.C., Cedar Rapids, for appellants.

Jack C. Paige and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellee James Thomson.

Harry Dahl, Des Moines, for appellee Zenith Insurance Company.

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

MAHAN, J.

Employer Hi-Rail Corporation and its former insurance carrier—the Cincinnati Insurance Companies—(hereinafter appellants) appeal from a district court ruling on judicial review affirming the workers' compensation commissioner's award of industrial disability benefits to employee James Thomson. The appellants claim the commissioner should have determined the date of injury was January 25, 2002, rather than March 20, 2002. We affirm.[1]

I. Background Facts and Prior Proceedings

Thomson began working for Hi-Rail in 1993 performing manual labor. In 1999 a portion of his left hand was crushed in a machine at Hi-Rail, resulting in a partial amputation and a significant impairment to his upper left extremity. In January 2001 Dr. Curtis Steyers concluded Thomson had reached his maximum medical improvement from this injury, so Thomson resumed working at Hi-Rail in February 2001, doing most of his work with his right arm.

On January 25, 2002, Thomson met with Dr. Steyers to discuss recurring pain in his left arm related to the previous injury. During this exam, Thomson told Dr. Steyers that during the course of his working day he developed pain and numbness in his right shoulder and right arm. Dr. Steyers did not take Thomson off work, limit his work activities, or prescribe treatment for his right shoulder. Instead, he referred Thomson to a shoulder specialist—Dr. R. Kumar Kadiyala. Thomson made an appointment to see Dr. Kadiyala on March 20, 2002.

[1] Zenith Insurance Company was Hi-Rail's workers' compensation insurance carrier until February 9, 2002. Appellee Cincinnati Insurance Company became Hi-Rail's insurance carrier after February 9, 2002.

Thomson continued to work his regular schedule until March 18, when he left work early because of the pain in his right shoulder. On March 19 Thomson once again left work early because of the pain in his right shoulder. The next day, Thomson went to his appointment with Dr. Kadiyala. Dr. Kadiyala diagnosed Thomson with right shoulder impingement and right lateral epicondylitis. He gave him a cortisone injection, prescribed physical therapy, and took him off work.

Thomson eventually underwent surgery on his shoulder. This surgery was not successful, and Thomson was unable to return to work. Thomson filed the present claim for workers' compensation benefits in February 2003. Because Hi-Rail had changed its workers' compensation carrier in February 2002, one of the main issues before the deputy workers' compensation commissioner was the actual date of the injury. When assigning the date of injury, the deputy made the following finding:

> The date of injury in this case is March 20, 2002 which is the date that Dr. Kadiyala took the claimant off of work because of his right shoulder. While it is true that the claimant had shoulder pain before this date and that he wanted to see Dr. Kadiyala sooner, it is also true that claimant was able to work up to March 18, 2002. Dr. Steyers did not take the claimant off of work. The claimant's condition did not reach a point where he was unable to continue working until March 18, 2002. . . .
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> . . . .
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> The record does not show that in January 2002 the claimant knew or even that a reasonable person would know that the shoulder problem was going to impact his employment. The doctor claimant was seeing at that time did not take him off of work or restrict his working in any way. Even though Dr. Steyers was not a shoulder specialist, he certainly could have taken claimant off of work or imposed restrictions if he felt claimant was in need of them at that time. In fact, claimant was still able to work. It only became apparent to both claimant and his wife after seeing Dr. Kadiyala on

> March 20, 2002 that claimant had sustained an injury to his right upper extremity.

At the conclusion of his decision, the deputy ordered Hi-Rail and Cincinnati Insurance Company to pay Thomson permanent total disability benefits commencing on March 20, 2002, for as long as he remained permanently and totally disabled. The commissioner adopted the deputy's decision as his own, so the appellants filed a petition for judicial review in district court.

The district court affirmed the commissioner's decision, noting there was substantial evidence in the record to support the commissioner's finding that the injury occurred on March 20, 2002.

On appeal, the appellants claim the commissioner improperly emphasized the date Thomson was taken off work when concluding the injury date was March 20, 2002. The appellants claim the commissioner's decision was unreasonable, arbitrary, capricious, and an abuse of discretion because it ignored other important evidentiary factors by focusing on the date Thomson was taken off work. Finally, the appellants claim substantial evidence supports a January 25, 2002 injury date rather than a March 20, 2002 injury date.

II. 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). 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.

III. Merits

The primary issue on appeal can be summarized in one question: Was there substantial evidence to support the commissioner's conclusion that Thomson's injury date was March 20, 2002?

The date of injury under the cumulative-injury rule is "the date on which [the] disability manifests itself." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 221 (Iowa 2006) (citation omitted). Our supreme court describes this as:

> The date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. . . . Factors to be considered in determining when an injury manifests itself include 'absence from work because of inability to perform, the point at which medical care is received, or others, none of which is necessarily dispositive.'

Id. (quoting *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 830 (Iowa 1992)). For the purposes of judicial review, "the commissioner is entitled to substantial latitude" when making the "fact-based determination" as to the specific date of the cumulative injury. *Id.*

In light of the aforementioned test, we find the commissioner's conclusion that the date of injury was March 20, 2002, rather than January 25, 2002, is supported by substantial evidence. Thomson first spoke with Dr. Steyers about his right shoulder on January 25, 2002, during a scheduled appointment to address pain in his *left* arm. At this point, the pain in his right shoulder was only

a three or a four on a scale of one to ten. The doctor did not prescribe any treatment for the right shoulder, did not take Thomson off work, and did not limit his work activities. At the hearing before the deputy, Thomson described how he felt at work after his January 25, 2002 doctor's appointment: "I was having some tingling and a little bit of discomfort in my [right] arm, but nothing really to – you know, at my age, you have some aches and pains every day when you get done with work. . . ."

Thomson continued to work, but his shoulder pain became worse. On March 18, 2002, after working five hours, Thomson left early due to pain in his right shoulder. This was the first time he missed any work because of pain in his right shoulder. The next day, Thomson worked seven hours and again left work early because of his right shoulder pain. On March 20, 2002, Thomson went to his scheduled appointment with Dr. Kadiyala. Dr. Kadiyala gave him a cortisone injection, took him off work for six weeks, and prescribed physical therapy for his right shoulder. By this point, Thomson's shoulder pain had increased to a nine or a ten on a scale of one to ten.

As illustrated by his testimony at the hearing, Thomson did not correlate his "aches and pains" with a work injury and an inability to perform his job until well after his January 25 appointment. We find that such a correlation would also not have been apparent to a reasonable person. *See id.* This, when coupled with the fact that he did not miss any work because of his shoulder pain until March 18 and the fact that he did not get any medical treatment for his right shoulder until he received a cortisone shot on March 20, constitutes substantial

evidence in support of the commissioner's decision to assign March 20, 2002, as the date of his cumulative injury. *See id.*

The appellants' remaining arguments challenge whether the commissioner should have assigned January 25, rather than March 20, as the date of the cumulative injury. In essence, the appellants claim there was substantial evidence to support a January 25 injury date, but the commissioner "ignored" or "only briefly mentioned" such evidence. Specifically, the appellants point to one exhibit where Dr. Kadiyala opined that if he had seen Thomson on January 25, 2002, he would have taken him off work, given him a cortisone injection, and ordered him to undergo physical therapy.

It is well settled that the agency is free to accept or reject, in whole or in part, an expert's medical opinion. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa Ct. App. 1991). In this case, the agency gave little weight to Dr. Kadiyala's opinion that, had he actually seen Thomson's shoulder two months earlier, he would have recognized the injury, taken him off work, and prescribed treatment. Such a judgment call is clearly within the province of the agency. *See id.* We find no error here.

Likewise, our review in agency proceedings is not focused on "whether the evidence might support a different finding *but whether the evidence supports the findings actually made.*" *Id.* (emphasis added). Simply because there could be two inconsistent conclusions drawn from the same evidence does not mean one of those conclusions is unsupported by substantial evidence. *Id.* Because there is clearly substantial evidence to support the agency's decision in this case, we find the district court correctly affirmed the agency's decision on judicial review.

IV. Conclusion

After reviewing all arguments raised on appeal, whether or not specifically addressed in this opinion,[2] we affirm the district court's decision.

AFFIRMED.

[2] The appellants also request that we overrule our supreme court's holding in *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 374 (Iowa 1985), which states "clearly the employee is disabled and injured when, because of pain or physical inability, he can no longer work." Despite the appellants' claims to the contrary, we find *McKeever* has not been rendered invalid by subsequent decisions by our supreme court. Accordingly, we decline to overrule it. *See State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.").