

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ANNETT HOLDINGS, INC., D/B/A TMC TRANSPORTATION, Petitioner, v. KELLY STILES, Respondent.	Case No. CVCV060917 ORDER ON JUDICIAL REVIEW
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Telephonic oral argument on Petitioner Annett Holdings, Inc. d/b/a TMC Transportation's (TMC) Petition for Judicial Review (the Petition) was held on February 12, 2021. Appearing for TMC was attorney Sasha L. Monthei. Appearing for Respondent Kelly Stiles (Kelly) was attorney Kellie L. Paschke. Oral argument was not reported.

Upon review of the Petition, the certified record and the court file in light of the relevant law, and after considering the respective statements of counsel, the court enters the following Order.

BACKGROUND FACTS AND PROCEEDINGS

Kelly and TMC stipulated to the existence of an employer-employee relationship at the time of Kelly's alleged injury. (Tr. 4). Kelly filed a petition in arbitration on July 11, 2018, alleging he sustained a cumulative injury to his left upper extremity and body as whole while working for TMC as a truck driver. (07/11/18 Pet.). He further alleged that his left shoulder injury manifested prior to July 1, 2017, predating a change in Iowa law. (*Id.*). TMC argues Kelly's injury did not arise out of and in the course of his employment with TMC, and, if it did, the injury manifested after July 1, 2017, making it a scheduled injury under the law change.

An arbitration hearing was held on August 5, 2019, in front of a deputy commissioner (the Deputy). In a decision entered November 15, 2019, the Deputy found Kelly sustained a cumulative injury to his left shoulder that manifested after July 1, 2017. (11/15/19 Arb. Dec. at 10-11, 13). The Deputy ordered TMC to pay Kelly 52 weeks of permanent partial disability benefits as well as temporary total disability benefits during his healing period. (*Id.* at 13). TMC filed a notice of appeal on December 2, 2019. (12/02/19 Notice). Kelly filed a notice of cross-appeal on December 5, 2019. (12/05/19 Notice).

On October 2, 2020, the workers' compensation commissioner (the Commissioner) issued his appeal decision affirming the Deputy's ruling that Kelly suffered a cumulative left shoulder injury arising out of and in the course of his employment. (10/02/20 Appeal Dec. at 2). The Commissioner further determined that the injury manifested in January or February 2017—before the July 1, 2017, statutory changes classifying the injury as a body as a whole took effect—and concluded Kelly suffered a 35% industrial disability. (*Id.* at 2-5).

TMC filed the Petition on November 2, 2020, alleging the Commissioner's decision violated Iowa Code section 17A.19(10)(a)-(h). In other words, the Commissioner's decision was unreasonable, arbitrary, and capricious and should be reversed. Kelly argues that substantial evidence supports the Commissioner's decision and it should be affirmed in its entirety.

STANDARD OF REVIEW

As an initial matter, the parties disagree on the applicable standard of review. Courts are bound on judicial review by the Commissioner's findings of fact if they are supported by substantial evidence in the record as a whole. *Meyers v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Substantial evidence is not absent just because it is possible to draw different conclusions from the same evidence. *Univ. of Iowa Hosp. v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). Instead, “the focus of the judicial inquiry is whether the evidence is sufficient to support the decision made,

not whether it is sufficient to support the decision not made.” *Riley v. Oscar Meyer Foods Corp.*, 532 N.W.2d 489, 491-92 (Iowa Ct. App. 1995); *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844-45 (Iowa 2011).

Evidence is substantial if reasonable minds would find it adequate to reach a given conclusion. *Riley*, 532 N.W.2d at 491-92. Administrative law disputes are often won or lost at the agency level. *Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm’n.*, 412 N.W.2d 600, 604 (Iowa 1987).

TMC argues the substantial evidence standard of review does not apply here because the Commissioner relied upon incorrect facts, did not consider material facts, or wholly rejected material evidence without explanation. A different level of review applies where the Commissioner fails to consider all the material evidence or relies upon incorrect facts. *JBS Swift & Co. v. Hedberg*, 873 N.W.2d 276, 280-81 (Iowa Ct. App. 2015). In such cases, the standard is whether the Commissioner’s action is unreasonable, arbitrary, and capricious. *Id.* at 281. When reviewing the Commissioner’s decisions, the district court acts in an appellate capacity to apply the standards in Iowa Code section 17A.19(10) and to correct errors of law. *Iowa Planners Network v. Iowa State Commerce Comm’n.*, 373 N.W.2d 106, 108 (Iowa 1985).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Causal Relationship. To receive workers’ compensation benefits, an injured employee must show that, by a preponderance of the evidence, the injury arose out of and in the course of his employment. *2800 Corp. v. Fernandez*, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. *Quaker Oats v. Ciha*, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational

consequence of a hazard connected to the employment, and not merely incidental to the employment. *Koehler Elec. v. Wills*, 608 N.W.2d 1, 3 (Iowa 2000).

During the arbitration hearing, Kelly testified that he hauled and delivered various types and sizes of boats including pontoons, sea rays, bass boats, power boats, and jon boats for TMC. (Tr. at 16). He was required to lift large steel bars for each boat to release the pins, lift the main frame, and then break down the rest of the structure. (Tr. at 15). Each steel bar weighed up to 85 pounds. (Tr. at 14). TMC's witness disputed the bars weighed more than 50 pounds, but agreed the bar weight exceeds Kelly's abilities. (Tr. at 121-122). Kelly was also required to exercise caution when performing his job duties because the bars would tear up the asphalt. (Tr. at 17). He was required to lift 12 to 16 steel bars per load and complete up to five loads a week. (Tr. at 16). He worked on the road for two to three months at a time, and was only home for 36 hours at a time. (Tr. at 18-19).

On May 31, 2016, Kelly completed an IDOT exam. (Ex. 6; Tr. at 20-22). He identified previous surgeries on his left knee and right shoulder. (Tr. at 108-109). He did not report any limited use of his arms, hands, or fingers. (Ex. 6 at 33; Tr. at 21). He did not report bone, muscle, joint, or nerve problems. (Ex. 6 at 33; Tr. at 21). All of his extremities and joints were marked normal. (Ex. 6 at 34; Tr. at 21).

In January to February of 2017, Kelly first noticed significant, day-to-day pain while he was delivering loads to Canada. (Tr. at 22-24; 85). He began carrying ice and "trying to muscle through" the pain, but acknowledged it was interfering with his ability to efficiently perform his job. (Tr. at 22-24). At that time, he notified his fleet manager Marty Coffey of his injury from work. (Tr. at 22, 102-105). He testified that he confirmed his injury to Mr. Coffey a number of times. (Tr. at 24).

Kelly was later evaluated by an orthopedic surgeon, Dr. V. Durga Madhusudana Rao, who diagnosed him with a tear of the left rotator cuff. Dr. Rao scheduled surgery for August 31. (JEx. 4 at 14-15, 30). Kelly's MRI showed a moderate, deep partial surface tear of the supraspinatus tendon involving greater than 75% of the tendon thickness. (JEx. 4 at 19). Dr. Rao opined that Kelly's injuries were the direct result of chronic repetitive use causing acute injury, and that the repetitive work as an over-the-road trucker for TMC directly resulted in Kelly's left shoulder injury. (Exs. 2-3).

Medical causation is within the domain of expert testimony. *Pease*, 807 N.W.2d at 844-45. Expert testimony is an integral to that determination because "whether an injury has a direct causal connection with the employment or arose independently thereof" is generally established by expert testimony. *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000). The trier of fact must weigh the evidence and measure the credibility of expert witnesses. *Id.* The trier of fact may accept or reject expert testimony in whole or in part. *Frye v. Smith-Doyle Contractors*, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). This is particularly true when relying on conflicting expert opinions. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998); *Huwe v. Workforce Safety & Ins.*, 746 N.W.2d 158, 161-62 (N.D. 2008) ("When confronted with a classic 'battle of the experts,' a fact-finder may rely upon either party's expert witness.").

In this case, the Commissioner adopted the Deputy's findings. The Deputy relied upon the opinions of Dr. Rao and other evidence to conclude Kelly's injury was work related. The Deputy found Dr. Rao's opinion more persuasive due to his superior training as an orthopedic surgeon and because he was directly responsible for treating Kelly's left shoulder injury, including performing surgery.

Conversely, the Deputy noted deficiencies in the opinions of TMC's expert Dr. Mooney, an occupational medicine physician. TMC hired Dr. Mooney to perform an independent medical examination (IME) of Kelly. The Deputy specifically noted Dr. Mooney found no causation, but then assigned an impairment rating. In doing so, he did not reference the AMA guides. For these reasons, the Deputy determined Dr. Mooney's opinion was not persuasive.

When considering the weight of an expert opinion, the fact finder may consider a variety of factors including whether the examination occurred shortly after the injury, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and any other factor bearing upon the weight and value of the opinion. *Rockwell Graphic Sys., Inc. v. Prince*, 366 N.W.2d 187, 192 (Iowa 1985).

TMC urges Dr. Rao's opinion should be set aside because it was not based upon accurate information. Specifically, TMC says Dr. Rao did not understand (1) how long Kelly worked in the boat division, (2) the mechanics of breaking down steel bars, (3) the weight of the steel bars, and (4) the amount of time Kelly spent doing this activity. However, the record shows Dr. Rao was provided information about Kelly's work duties from a variety of sources, including TMC. Dr. Rao received release paperwork to complete for Kelly on August 23, 2017. (JEx. 4 at 22). To evaluate whether Kelly was physically qualified to perform the job, TMC provided Dr. Rao with the "Dedicated Driver Job Description." (JEx. 4 at 25-26). The job description states that an essential job function is lifting 120/150 pounds or more above a driver's head and climbing on and off equipment and cargo to secure cargo sometimes 14 feet high. (JEx. 4 at 26).

TMC also argues Kelly's responsibility for unloading, moving and putting steel bars and anything else used to secure his loads away was too infrequent to be considered a repetitive motion. This argument is unsupported by authority and is contrary to well-established case law. The

frequency or time spent performing a work activity is not an appropriate measure of whether that activity is sufficiently “repetitive” for causation purposes. As the Iowa Supreme Court (the Court) explained in *Meyer v. IBP*, 710 N.W.2d 213 (Iowa 2006), “if the injury manifested during his first minute of [employment activity] as an IBP employee, it still would have arisen out of his employment because his job duties with IBP, as shown by the record, increased the risk that carpal tunnel syndrome would manifest”. *Id.* at 225.

TMC has presented insufficient evidence that the agency relied upon incorrect facts, failed to consider, or ignored material information when reaching its decision. Kelly presented evidence of a causal relationship between his injury and his employment through expert opinion, medical records, and direct testimony. This information meets the substantial evidence burden. Medical causation presents a question of fact, vested in the discretion of the Commissioner. *Pease*, 807 N.W.2d at 844. Therefore, the district court can only disturb the Commissioner’s medical causation findings if they are unsupported by substantial evidence. *Id.* at p. 845; Iowa Code § 17A.19(10)(f). This record when considered as a whole reasonably supports a finding that Kelly’s left shoulder injury arose out of and in the course of his employment with TMC.

B. Manifestation Date of Injury. Under the recent change in the law noted above, a shoulder injury may now be classified as either industrial or scheduled, depending upon when the injury occurred.¹ Because the injury was cumulative rather than acute, the date when the injury

¹ This issue arises from a change in the law effective July 1, 2017. Effective that date, the Iowa Legislature added a shoulder injury as a scheduled member disability. 2017 Iowa Acts, ch. 23, § 7. Prior to July 1, 2017, a shoulder injury was an unscheduled injury allowing industrial disability. The 2017 amendment adding the loss of a shoulder as a scheduled member disability states the amendment only applies “to injuries occurring on or after the effective date of this Act.” Kelly alleged as a date of injury all workdays up to the date of his surgery. (07/11/18 Petition). Therefore, which law applies depends on the date of Kelly’s injury. The Commissioner reasonably found that Kelly’s date of injury was in January or February of 2017, predating the effective date of the 2017 amendment. (10/02/20 App. Dec. pp. 2-3).

occurred is the date when the injury manifests. *Menard, Inc. v. Simmer*, No. 14-2078, 2015 WL 04936122, at *3 (Iowa Ct. App. Aug. 19, 2015). An injury manifests when “the claimant, as a reasonable person, would plainly be aware that (1) he or she suffers from a condition or injury, and (2) the condition or injury was caused by the claimant’s employment.” *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 854 (Iowa 2009). When both elements are satisfied, the injury is deemed to have occurred.

Kelly testified at the arbitration hearing that in the six to seven months prior to his July 2017 hospitalization, he reported his left shoulder problems to Mr. Coffey. (Tr. at 100). Upon further questioning by TMC’s counsel, Kelly testified that he requested medical care, but wanted to wait until he returned from his work assignment in Canada. (Tr. at 102-103). Finally, when asked whether he specifically told Mr. Coffey that his left shoulder injury was work-related, Kelly said he told his manager he “hurt it while unloading trucks.” (Tr. at 104). TMC offered no evidence to refute this testimony.

TMC argues Kelly’s injury manifested after July 1, 2017, because (1) no medical provider had provided an opinion regarding causation prior to that date, and (2) Kelly did not miss any work due to his injury. TMC misstates the appropriate test for determining when an injury manifests. Medical opinions regarding causation and whether an employee missed work are evaluated to determine when a claimant was required to give notice of the injury (thereby starting the clock for statute of limitations purposes). The manifestation date for an injury is “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.” *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 829 (Iowa 1992). “[T]he Commissioner’s determination regarding the date on which

the injury manifests itself, so long as supported by substantial evidence as is required by Iowa Code section 17A.19(8)(f), will not be disturbed on appeal." *Id.* at 830.

TMC also argues nothing in the record supports a manifestation date in January or February 2017. TMC says the Commissioner ignored other relevant testimony by Kelly that was inconsistent. The instant record establishes the Commissioner clearly and thoughtfully articulated the facts supporting his decision, including adopting the Deputy's finding that Kelly was credible when he said he informed his manager. As noted above, TMC offered no evidence to refute Kelly's testimony that he informed Mr. Coffey of his work-related injury. The Commissioner reasonably concluded it was uncontroverted that Kelly notified his employer prior to July 1, 2017, that he believed his left shoulder injury was work-related. (10/02/20 App. Dec. at 2-3).

The requirement that the Commissioner must explain his decision is not intended to be onerous. The Commissioner's decision must be detailed enough to show the path he took through the conflicting evidence. The law does not require a discussion by the Commissioner of every fact in the record, accompanied by an explanation as to why he accepted or rejected each fact. *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 560 (Iowa 2010) (quoting *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995)).

As described above, Kelly's left shoulder injury manifested when he (1) became aware of his condition or injury, and (2) realized his injury was caused by his employment. Nothing more is required. Substantial evidence supports the Commissioner's finding that Kelly's left shoulder injury manifested—and therefore occurred—when he reported it to his manager in January or February 2017. (10/02/20 App. Dec. at 2-3). The changes to Iowa Code chapter 85 effective July 1, 2017, urged by TMC, do not govern the result here.

C. **Industrial Disability.** A person's age, education, qualifications, experience, and inability to engage in the same employment because of his injury are all relevant to calculating industrial disability. *McSpadden v. Big Ben Coal Co.*, 288 N.W. 2d 181 (Iowa 1980). Kelly is fifty-eight years old with a high school education. (Tr. at 7). He worked for TMC as a truck driver for ten years. (Tr. at 10, 26, 54). Prior to that, he worked in the military and performed other manual labor or factory work. (Tr. at 7-10). Although he is a hard worker, he has few other employable skills.

Kelly cannot perform the work he could before his injury. He cannot be a truck driver or more specifically earn the higher rate of pay he earned hauling boats as a truck driver for TMC. His functional capacity examination (FCE) indicated his maximum weight to lift from waist to overhead is 30 pounds. (Tr. at 43-44). The dedicated driver description states that an essential job function is lifting tarps weighing 120/150 pounds or more above the head and climbing on and off equipment and cargo while securing cargo up to 14 feet high. (JEx.4 at 26). For boat hauling, Kelly testified he had to lift 12 to 16 steel bars 3 to 5 times a week. (Tr. at 16-17). He further testified the bars weighed up to 85 lbs. (Tr. at 14). Prior to his surgery, Kelly's gross wages were \$1,286.74 per week. (Ex. 5). As of the arbitration hearing date, his gross wages are \$594.00 per week working as a janitor for a local school district.

TMC's argument that Kelly did not suffer a 35% industrial disability is unsupported by substantial evidence when this record is considered as a whole. Substantial evidence supports the Commissioner's reasonable award of 35% industrial disability to Kelly.

CONCLUSION

For the reasons set forth above, the court concludes that when this record is taken a whole, substantial evidence supports the Commissioner's findings that (1) a causal relationship exists

between Kelly's left shoulder injury and his employment, (2) the injury manifested prior to a July 1, 2017, change in the relevant law, and (3) Kelly suffered a 35% industrial disability as a result of the shoulder injury. TMC's argument that the Commissioner relied upon incorrect facts, and failed to consider, ignored, or rejected material evidence without explanation—making his decision unreasonable, arbitrary and capricious—is without merit.

The Commissioner's decision should be affirmed in its entirety, the Petition should be dismissed, and costs should be assessed to Petitioner.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Commissioner's decision is affirmed in its entirety and the Petition is dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs are assessed to Petitioner.



State of Iowa Courts

Case Number
CVCV060917
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Case Title
ANNETT HOLDINGS INC V KELLY STILES
ORDER FOR JUDGMENT

So Ordered

A handwritten signature in cursive script, reading "Jeanie Vaudt".

Jeanie Vaudt, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2021-04-13 15:38:16