

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BOUAPHAN SEVERIN, Petitioner, v. SECOND INJURY FUND OF IOWA, Respondent.	Case No. CVCV063424 RULING ON PETITION FOR JUDICIAL REVIEW
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On December 16, 2022, the above-captioned matter came before this Court for hearing. Petitioner, Bouaphan Severin (Severin), was represented by attorney Thomas M. Wertz. Respondent, Second Injury Fund of Iowa (Fund), was represented by Assistant Attorney General Meredith C. Cooney. After hearing the arguments of Counsel and reviewing the court file, including the briefs filed by the parties and the Certified Administrative Record, the Court now enters the following ruling.

I. BACKGROUND FACTS AND PROCEEDINGS.

Severin filed a petition in arbitration with the Iowa Workers' Compensation Commission seeking workers' compensation benefits from the Fund, as a result of an alleged first injury sometime in May 2007 and an alleged second injury on September 2, 2010 her left arm. (Certified Record (CR), Part 1, p. 53.) The issue in this case turns on whether Severin had a qualifying first injury.

Severin was evaluated by Dr. Nate Brady on May 17, 2007 for right ankle pain. (Id. at 221.) An x-ray was "within normal limits except for an osteochondral defect." (Id.) Dr. Brady opined Severin had a right ankle sprain. (Id.) Dr. Brady put Severin in an air cast, gave her crutches, and work restrictions of sitting only. (Id.) Severin returned to Dr. Brady on August 30, 2007 again complaining of right ankle pain. (Id. at 222) Severin was referred to a podiatrist and physical

therapy without work restrictions. (Id.) She attended physical therapy from September 27, 2007 until October 25, 2007. (Cert. Record Part 2 at 33) Severin's physical therapy records indicate that she was discharged from physical therapy and met all her physical therapy goals. (Id.)

On August 9, 2013 Severin returned to Dr. Brady for right ankle pain. (Id. at 226-27.) Dr. Brady recommended that Severin get insoles for her shoes and assessed her as having chronic right ankle pain. (Id.) Dr. Brady recommended Severin have an MRI of her right ankle done. (Id.) He stated "I believe this injury is still a work related complaint." (Id.) Severin saw Dr. Phinit Phisitkul on December 12, 2013 for her right ankle pain. (Id.) Dr. Phisitkul noted that Severin had:

She has recently had x-rays as well as an MRI reported as osteochondral injury of the medial talar dome, thinning, and irregularity of the medial tibial plafond articular cartilage, 10 x 2 x 4 mm ossific interim-articular loose body of the ankle joint with the donor site being at the osteochondral injury of the medial talar dome with articular cartilage irregularity of the medial tibial plafond, as well as os naviculare.

(Cert. Record Part 2 at 26.) Severin was released with no restrictions and given five treatment options. (Id. at 27.) Severin did not pursue further treatment with Dr. Phisitkul. A March 25, 2014 doctor's note by Dr. Brady indicates that Severin wasn't ready to undergo such a large procedure on her right ankle. (CR at 228).

Severin testified that she has not had recent treatment for her right ankle, despite difficulty with her ankle after standing for a full day of work. (CR at 56.) Severin further testified that she has no permanent restrictions for her right ankle. (Id.)

Dr. Marc Hines performed an independent medical examination (IME) on August 7, 2015. (Id. at 54, 183.) Dr. Hines opined that Severin has a free fragment in her right ankle. (Id. at 54-55.) Dr. Hines assigned Severin a one percent whole person impairment due to the free fragment in her ankle. (Id. at 55, 193.)

The Arbitration Decision held that the claimant failed to carry her burden of proof to show she has a qualifying first injury. (Arb. Dec. at 6; CR at 57). On Appeal, the Commissioner affirmed the Arbitration Decision, first in an Appeal Decision and then, with greater description, in a Ruling on Claimant's Motion for Rehearing. (CR at 5-7). Severin filed her Petition for Judicial Review on April 6, 2022.

II. SCOPE AND STANDARDS OF REVIEW.

This Court's review of a workers' compensation action is governed by Iowa Code chapter 17A. Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 748 (Iowa 2002); see Iowa Code § 86.26. The commissioner's factual determinations are "clearly vested by a provision of the law in the discretion of the agency" and this Court will defer to those factual determinations if they are based on "substantial evidence in the record before the court when that record is viewed as a whole." Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 557 (Iowa 2010) (quoting Iowa Code § 17A.19(10)(f)).

If a party challenges the commissioner's ultimate conclusion, "then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." Meyer v. IBP, 710 N.W.2d 213, 219 (Iowa 2006); Iowa Code § 17A.19(10)(i), (j).

If a challenge is to the interpretation of law, the standard of review depends upon whether interpretation of the provision of law at issue has been clearly vested in the discretion of the agency. Compare Iowa Code §17A.19(c) with §17A.19(l). The Iowa Supreme Court has repeatedly found the Iowa Workers' Compensation Commission is not vested with authority to interpret Iowa's workers' compensation statutes. See e.g. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d

759, 769 (Iowa 2016) (finding legislature did not vest commission with authority to interpret provision at issue and noting the Court has declined to defer to the commissioner's interpretations of various provisions in recent years). Therefore, review is for correction of errors at law. Id. at 768; Iowa Code §17A.19(c) (court reviews whether agency action was “based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.”)

III. ANALYSIS AND CONCLUSIONS OF LAW.

Severin challenges the Commission's rejection of Dr. Hines' opinion that the 2007 right ankle injury resulted in a 1% permanent impairment. Severin challenges this rejection on two grounds: first, that the Commission relied on “agency expertise” and, second, that the Commission relied on a factual determination that Dr. Hines did not review x-rays or imaging studies unsupported by substantial evidence.

A. Did the Agency abuse its discretion by relying on “agency expertise” in its rejection of Dr. Hines' impairment rating of Severin?

Iowa Code section 85.34(2)(x) prohibits the Commission from relying on “agency expertise” or “lay testimony” to determine the extent of loss or percentage of permanent impairment. Subsection (2)(x) provides in relevant part:

x. In all cases of permanent partial disability described in paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or **agency expertise shall not be utilized in determining loss or percentage of impairment** pursuant to paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(x) (emphasis added).

Here, the Commission abused its discretion by employing “agency expertise” in its rejection of Dr. Hines’ impairment rating of Severin. The Commission held that Table 17-31 of the Guides, upon which Dr. Hines relied, does not apply to claimant’s alleged injury. (See Ruling on Motion for Rehearing at 2; Arbitration Decision at 6; CR at 6, 57). However, there was no expert opinion to that effect. Instead, it was the Deputy Commissioner and Commissioner’s own opinion that Table 17-31 regarding arthritis impairments based upon roentgenographically determined cartilage intervals does not apply in this case.

Certainly, the Commission is not required to accept an expert opinion simply because there is no contrary expert opinion. “The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. The commissioner may accept or reject the expert opinion in whole or in part.” Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010); see also Sanchez v. Blue Bird Midwest, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) (“Expert opinion testimony, even if uncontroverted, may be accepted or rejected in whole or in part by the trier of fact.”). Therefore, the Commission may reject an expert opinion because of a factual determination or credibility determination that is foundational to the expert opinion, even if the expert opinion is uncontroverted.

Here, however, the Commission did not act based solely on a foundational factual or credibility determination. Instead, the Commission relied on the agency’s own expertise in applying the AMA guides to disagree with Dr. Hines’ application of the guides. This is an action that is specifically prohibited by Iowa Code section 85.34(2)(x).

The Commission’s reliance on agency expertise is highlighted in this petition for judicial review. The undersigned has no expertise in the AMA guides or Table 17-31. Essentially, this

Court would be required to determine whether the Deputy Commissioner and Commissioner's opinions based on their agency expertise as to the appropriate application of the AMA guides and Table 17-31 are correct or whether Dr. Hines' opinion on application of the AMA guides and Table 17-31 are correct.

Therefore, the Court concludes the Commission erred in its application and interpretation of law, specifically Iowa Code section 85.34(2)(x). See e.g. Harrell v. Denver Findley & Sons, Inc., 2022 WL 2824746 (Iowa Ct. App. July 20, 2022) (reversing and remanding due to agency reliance on "lay testimony" in assigning impairment rating). Remand is the appropriate remedy here. See e.g. Aluminum Co. of America v. Musal, 622 N.W.2d 476, 480 (Iowa 2011). The Commission should be provided the opportunity to evaluate the evidence in the absence of considerations of agency expertise regarding application of the guides.

B. Was there substantial evidence in the record that Dr. Hines did not have x-rays nor imagining studies available to him when he rendered his impairment rating opinion?

The Deputy Commissioner and Commissioner concluded that Dr. Hines did not have x-rays or imaging studies to review to arrive at his opinion. Severin argues that determination is unsupported by substantial evidence in the record.

"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 the Court is bound by the Commissioner's findings of fact if they are supported by substantial evidence. Clark v. Vicorp Restaurants, Inc., 696 N.W.2d 596, 604 (Iowa 2005). Substantial evidence is defined as evidence of the quality and quantity "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are

understood to be serious and of great importance.” Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (citing Iowa Code § 17A.19(10)(f)(1)).

The Court concludes that there is not substantial evidence in the record, when viewed as a whole, to conclude that Dr. Hines did not have x-rays or imaging available to him. In the 8/17/2015 report, Dr. Hines identified medical records he was provided, including: “I have Mercy Medical Center records including x-rays of the right ankle and MRI of the ankle.” (Cl. Ex. 2 p.10, CR 183). Dr. Hines does recite what other providers found in the films, for example, on pages 19-20 of the report he summarizes Dr Phisitkul’s findings. (see eg. Cl. Ex. 2 p. 19, CR 192). However, Dr. Hines also states his own opinion of the films. He states on page 20: “In fact the radiographic films demonstrate that there is a free fragment and the patient has continuing symptoms so that it is not complete resolution.” (Cl. Ex. 2 p. 20, CR 193).

On 9/16/2015, Dr. Hines was provided with additional medical records that were listed as follows:

- Mercy Medical Center 8/9/13 X-ray: Right ankle, 1 page
- Mercy Medical Center 8/21/13 MRI: Right ankle, 2 pages
- UIHC 12/12/13 X-ray: Right ankle, 2 pages
- St. Luke’s Hospital 5/17/07 X-ray: Right ankle, 1 page
- RCI 09/12/07 MRI – Right ankle, 1 page
- Mercy Occupation Health (Brady) 08/09/13 X-ray: Right ankle, 1 page

(Cl. Ex. 2, p. 7; CR 180). In a follow up 12/1/2015 letter, Dr. Hines stated that he had received the additional medical records and that his opinion had not changed. (Cl. Ex. 2, p. 22-23; CR 195-96). It is unclear from this description whether these additional records included imaging or reports from the MRIs and X-rays.

The Arbitration Decision cites only to a letter from a claims adjuster that stated: “Regarding the ankle, without radiographic evidence of a cartilage defect, it’s unclear how Dr. Hines arrived at the 1% whole person impairment.” (Ex. BB, CR at 160). However, this letter does not clear up

whether Dr. Hines had the images of the X-rays and MRI; it appears to state a conclusion about what those X-rays and MRI do or do not show.

Defendant argues the Court should assume that Dr. Hines' references to having X-rays and MRI were inaccurate and that he only reviewed reports. However, there is no evidence on which to conclude that he did not have the x-rays and MRI. He stated he had them and he stated his own conclusion as to what the radiographic films demonstrated: "In fact the radiographic films demonstrate ..." (Cl. Ex. 2 p. 20, CR 193). There is no testimony by deposition or hearing regarding whether or not Dr. Hines had the actual x-ray and MRI images and there was no written correspondence presented in which he was asked to clear up this issue.

Therefore, the Court concludes the Agency's determination that Dr. Hines did not have x-rays nor imaging studies available to him when he rendered his permanent impairment rating of Severin's right ankle is not supported by substantial evidence. The Court finds that, on remand, the agency shall reconsider the case without relying on the factual determination that Dr. Hines did not have X-Rays or MRI imaging.

IT IS THEREFORE ORDERED that the Commission's Final Agency Action is REVERSED and REMANDED for further consideration consistent with this Opinion.

Costs are assessed to Respondent. IT IS SO ORDERED.



State of Iowa Courts

Case Number
CVCV063424

Case Title
BOUAPHAN SEVERIN VS SECOND INJURY FUND OF
IOWA
Type: OTHER ORDER

So Ordered

A handwritten signature in black ink, appearing to read "Sarah Crane", is written over a horizontal line.

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

Electronically signed on 2023-02-14 17:52:18