

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

NORDSTROM, INC.,

Petitioner,

**PAMELA CARMER (f/k/a
PAMELA HYDE),**

Respondent.

Case No. **CVCV063044****ORDER ON JUDICIAL REVIEW**

This is a petition for judicial review from a final decision of the Iowa Workers' Compensation Commission. At hearing, Petitioner, Nordstrom, Inc. ("Nordstrom"), and Respondent, Pamela Carmer ("Carmer"), appeared through their counsel of record. After hearing the arguments of counsel, reviewing the court file, the administrative record, and being otherwise advised in the premises, the court enters the following ruling:

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND.

At the time of the arbitration hearing, Carmer was a 52-year-old woman with pre-existing injuries who sustained a work-related injury on August 6, 2018, while employed by Nordstrom. Prior to her employment, in April 2023, Carmer was diagnosed with right rotator cuff and biceps tendinitis. In October 2003, she underwent an arthroscopy of the shoulder with debridement of small rotator cuff tears and a subacromial decompression. (Ex. 1, p. 11). She had no post-surgery problems with her right shoulder until the time of her 2018 workplace injury. (Tr., p. 12). In 2005, Carmer was involved in an automobile collision. Following that accident, she reported some neck pain and intermittent tingling in her left arm. (Ex. 1, p. 12).

In 2018, Carmer worked for Nordstrom in receiving, unboxing clothing and accessories, hanging merchandise on Nordstrom hangers, filling totes, and putting on labels. (Tr., pp. 37-38). She lifted boxes weighing up to seventy pounds. (Tr., p. 38). On August 6, 2018, Carmer was moving boxes. She picked up a box while wearing gloves and it slipped out of her hand. (Tr., p. 15). Carmer attempted to grab the box and immediately felt pain. (Tr., p. 15). She reported her work injury, and Nordstrom sent Carmer for medical treatment. (Tr., p. 16).

On August 7, 2018, Carmer presented for treatment with Alexi Becker, ARNP at Mercy Medical Center. (JE 1, p. 1). Carmer complained of right shoulder pain, reporting she heard a pop in her right shoulder at the time of the accident. (JE 1, p. 1). Becker diagnosed her with acute right shoulder pain and abnormal musculoskeletal x-ray, and prescribed a sling and hydrocodone. (JE 1, pp. 2-3). On August 9, 2018, Carmer underwent an MRI of her right shoulder. The radiologist noted a large full-thickness superior rotator cuff tear. (JE 2, p. 4).

On August 22, 2018, Carmer presented for an evaluation with Brendan Patterson, M.D., an orthopedic surgeon with the University of Iowa Hospitals and Clinics ("UIHC"). She reported aching, burning, and pins and needles pain in her right shoulder, a burning and stabbing headache for the past two to three days, and burning and pins and needles sensations in her legs, as well as a lower extremity rash and swelling. (JE 3, p. 5). Carmer reported the pain woke her at night and increased with lifting, reaching and rotation of her arm. She also reported intermittent numbness, radiating from the mid-forearm to her fingers. (JE 3, p. 5). Dr. Patterson assessed Carmer with a right shoulder full-thickness rotator cuff tear, opined the work incident was a significant factor in her

current findings and need for treatment, including surgery. (JE 3, pp. 7-8). On October 24, 2018, Carmer returned for a follow-up with Dr. Patterson. Following the appointment, he imposed restrictions of no lifting, pushing, or pulling over five pounds with the right arm and no repetitive reaching away from the body or above chest height with the left arm. (JE 3, p. 10).

On December 6, 2018, Dr. Patterson performed a right shoulder arthroscopy rotator cuff repair, open subpectoral biceps tenodesis, “[e]xtensive debridement,” and subacromial decompression on Carmer. (JE 3, p. 11). He ordered Carmer to be non-weightbearing with the upper right extremity. (JE 3, p. 15),

Carmer attended 17 physical therapy sessions from January 9, 2019 through May 6, 2019. (JE 4). During the May 6, 2019, session, the physical therapist documented that Carmer reported her shoulder “ha[d] not been too painful over the past few weeks,” and while she believed her range of motion had improved, her strength was still limiting her. (JE 4, p. 21).

On May 8, 2019, Carmer presented for a follow-up appointment with Dr. Patterson. (JE 3, p. 18). Dr. Patterson documented Carmer was doing well overall, her pain was minimal, her shoulder felt very comfortable, and she had improved with physical therapy. (JE 3, p. 18). Dr. Patterson opined Carmer had reached maximum medical improvement and released her without restrictions, with use of her shoulder as tolerated, to be careful with her shoulder, and to avoid excessive heavy lifting. (JE 3, p. 18). Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides”),

Dr. Patterson assigned Carmer a four percent upper extremity or two percent whole person impairment. (JE 3, p. 19).

Carmer testified that her right shoulder condition worsened after her treatment with Dr. Patterson ended, and she began to have increased difficulty using her right arm for activities of daily living. (Tr., p. 23).

On September 10, 2019, Mark Taylor, M.D., an occupational medicine physician, conducted an independent medical examination of Carmer. (Ex. 1). Dr. Taylor opined Carmer's injury was causally related to the work incident. (Ex. 1, p. 6). He did not recommend any additional treatment and found Carmer had reached maximum medical improvement at the time of her last appointment with Dr. Patterson on May 8, 2019. (Ex. 1, p. 9). Dr. Taylor assigned Carmer a 10% upper extremity impairment, or a 6% whole person impairment. (Ex. 1, p. 9).

Carmer testified after her surgery she started experiencing pain in her left arm, which she ignored and tried to push through. (Tr., pp. 27, 65). In late 2020, Carmer requested medical care from Nordstrom. (Tr., p. 29).

On January 8, 2021, James Milani, D.O., a family practice physician, conducted an independent medical examination of Carmer for Nordstrom (Ex. A). Dr. Milani diagnosed Carmer's left shoulder pain as "etiology uncertain: Most likely contributor to pain is underlying degenerative changes and/or progressive underlying systemic inflammatory arthritis/rheumatologic disorder that has not been diagnosed yet. It appears she has an advancing destructive joint disease/rheumatologic etiology that is affecting more than just her left shoulder." (Ex. A, p. 9). Dr. Milani opined Carmer's left

shoulder symptoms were not causally related to the work injury and he assigned no impairment rating. (Ex. A, p. 9).

David Segal, M.D., a neurosurgeon, conducted an independent medical examination for Carmer. He noted after the work injury and surgery, Carmer started relying on her arm for most activity, favoring her right arm, and overusing her left arm. (Ex. 2, p. 16). Dr. Segal found the work injury caused a permanent aggravation of a preexisting right shoulder injury. (Ex. 2, p. 29). With respect to the left shoulder, Dr. Segal diagnosed Carmer with left shoulder arthropathy caused in part by overuse and compensation due to the right shoulder injury. (Ex. 2, p. 29). Dr. Segal found Carmer reached maximum medical improvement for her right shoulder on December 6, 2019, one year after surgery when her symptoms stabilized. Ex. 2, p. 36) For her left shoulder, Dr. Segal opined Carmer's left shoulder had not been properly evaluated and that she was probably not at maximum medical improvement. (Ex. 2, p. 36). Dr. Segal assigned a 17 percent whole person impairment for the left shoulder and a 20 percent whole person impairment for the right shoulder, for a combined 34 percent whole person impairment. (Ex. 2, pp. 37-38).

On March 17, 2020, Carmer filed an arbitration petition, which came before the Deputy Workers' Compensation Commissioner on March 2, 2021, for Arbitration Hearing. The issues before the Deputy Commissioner were (1) whether Carmer sustained a scheduled member disability to the right shoulder or an industrial disability because the injury extends past the shoulder into the body as a whole and/or because Carmer has sustained a sequela injury to the left side; (2) the extent of Carmer's disability; (3) whether Carmer is entitled to temporary benefits from February 28, 2019, through May 7, 2019;

(4) whether Nordstrom is entitled to a credit under Iowa Code section 85.38(2) for payment of sick pay/disability income in the amount of \$1,531.70; (5) whether Carmer entitled to penalty benefits for an injury extending into the body as a whole or otherwise being compensable under Iowa Code section 85.34(2)(v); and (6) costs. (Arb. Dec. p.2).

The Deputy Commissioner ruled that Carmer's left shoulder injury was causally related to her June 6, 2018, work injury. She further found both Carmer's left-sided injury and right-sided injury were shoulder injuries, as opposed to injuries to the body as a whole. Further, the Deputy Commissioner found that because Carmer suffered injuries to two shoulders, she had sustained an industrial disability. With respect to Carmer's extent of disability, the Deputy Commissioner found Carmer sustained a 70 percent industrial disability, entitling her to 350 weeks of permanent partial disability benefits, at the stipulated rate of \$476.20, commencing on the stipulated commencement date of May 8, 2019. The Deputy Commissioner ruled Carmer was not entitled to temporary benefits after February 7, 2019, and Nordstrom was not entitled to credit for the disability payments paid to her. Finally, the Deputy Commissioner also awarded Carmer \$250.00 in penalty benefits.

Nordstrom appealed the Arbitration Decision to the Commissioner. It appealed each of the Deputy Commissioners rulings, with the exception of the rulings related to temporary benefits and credit for the disability payments paid to Carmer. The Commissioner issued the final agency order on December 29, 2021. The Commissioner affirmed the Arbitration Decision in part, and modified it in part. (App. Dec.). Specifically, the Commissioner affirmed the Deputy in all respects, except he modified her finding of

industrial disability from 70% to 50%, thereby reducing Carmer's award of permanent partial disability benefits to 250 weeks at \$476.20 per week.

Nordstrom appeals the final agency decision in every respect, except for the finding regarding the payment of costs.

II. ANALYSIS AND CONCLUSIONS OF LAW.

A. Standard.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); 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. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. See id. § 17A.19(10). 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).

"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. Mycogen Seeds v. Sands, 686 N.W.2d 457, 464-65 (Iowa 2004). 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.” Iowa Code § 17A.19(10)(f)(1); Mycogen, 686 N.W.2d at 464. “When reviewing a finding of fact for substantial evidence, we judge the finding ‘in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it.’” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (quoting Iowa Code § 17A.19(10)(f)(3)). “Evidence is not insubstantial merely because different conclusions may be drawn from the evidence.” Pease, 807 N.W.2d at 845. “To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder.” Id. “Judicial review of a decision of the [Commission] is not de novo, and the commissioner's findings have the force of a jury verdict.” Holmes v. Bruce Motor Freight, 215 N.W.2d 296, 297-98 (Iowa 1974).

The application of the law to the facts is also an enterprise vested in the commissioner. Mycogen, 686 N.W.2d at 465. Accordingly, the Court will reverse only if the commissioner's application was “irrational, illogical, or wholly unjustifiable.” Id.; Iowa Code § 17A.19(10)(l). “A decision is “irrational” when it is not governed by or according to reason.” Christensen v. Iowa Dep’t. of Revenue, 944 N.W.2d 895 at 905 (Iowa 2020). A decision is “illogical” when it is “contrary to or devoid of logic.” Id. “A decision is “unjustifiable” when it has no foundation in fact or reason” or is “lacking in justice.” Id.

This standard requires the Court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009). However, when the legislature has not vested the agency with such authority, the Court reviews an agency's interpretation of a statute for correction of errors at law. Westling v. Hormel Foods Corp., 810 N.W.2d 247, 251 (Iowa 2012).

B. Analysis

1. Whether the Commissioner's determination that Carmer's injuries were unscheduled industrial injuries was in error.

Nordstrom argues the Commissioner erred in ruling that two separate shoulder injuries are unscheduled industrial injuries as opposed to scheduled injuries.

In 2017, the legislature amended Iowa Code Chapter 85. Relevant to this action, a shoulder injury was recategorized from an unscheduled injury to a scheduled one. See Iowa Code §85.34(2)(n). In making its amendments, the legislature did not amend Iowa Code §85.34(2)(t) which would have added shoulders to the group that can be compensated by a 500-week award if both are injured in a single accident. The Iowa Supreme Court, in dicta, seems to agree subsection t does not apply to injuries involving two shoulders. Chavez v. MS Technology LLC, 972 N.W.2d 662, 670-671 (Iowa 2022) ("Chavez acknowledges this section does not apply because it does not mention shoulder injuries...").

This leaves ambiguity in the statute. Are two shoulder injuries to be treated as scheduled injuries under Iowa Code Section 85.34(2)(n) or as industrial injuries pursuant

to Section 85.34(2)(v)? Applying the rules of statutory construction, the court finds that both the Deputy Commissioner and the Commissioner's finding that they are to be treated as industrial injuries is the correct interpretation of the statute, and, accordingly, the Commissioner did not err in so finding.

In Chavez v. MS Technology LLC the Iowa Supreme Court discussed how the rules of statutory construction should be applied to Iowa Code Chapter 85. The Court noted:

Our goal in interpreting the statutory provisions contained in chapter 85 of the Iowa Code "is to determine and effectuate the legislature's intent." We do so "by looking at the legislature's language rather than speculating about what the legislature might have said." Further, "[w]e assess the statute in its entirety rather than isolated words or phrases to ensure our interpretation is harmonious with the statute as a whole." "[L]egislative intent is expressed by omission as well as by inclusion....") Thus, when the legislature includes certain language in one section of a statute but omits it in another section of the same statute, we generally presume the omission is intentional.

Chavez, 972 N.W.2d at 667–68 (internal citations omitted). Applying those principles here, injuries to the shoulder are not specifically included in subsection (t), and accordingly, and the court presumes the omission to be intentional. Additionally, section 85.34(2)(n) refers only to single scheduled members and not to the loss of two members in a single accident. That leaves only Iowa Code Section 85.34(2)(v) as the only logical option for the loss of both shoulders in a single accident. As such, the court finds the Commissioner did not err in applying section 85.34(2)(v) in determining how Carmer should be compensated.

2. Whether the Commissioner Erred in Awarding Dr. Segal's Rating for the Scheduled Member Injury to the Right Shoulder Under Iowa Code Section 85.34(2)(n).

Nordstrom next argues that even if the left shoulder sequela is accepted, relying on Dr. Segal's impairment ratings to reach the 50% industrial disability rating is not supported by substantial evidence.

When considering the extent of disability, the Commissioner must consider all evidence, both medical and nonmedical. See Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016). The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)). "Industrial disability measures an injured worker's lost earning capacity." Myers v. F.C.A. Servs., Inc., 592 N.W.2d 354, 356 (Iowa 1999). The factors to be considered include the "employee's functional disability, age, education, qualifications, experience, and the ability of the employee to engage in similar employment." Id.

The Commissioner considered each of the industrial disability factors when evaluating the lay testimony presented at the arbitration hearing. He also considered each doctor's impairment ratings. Specifically, both the Commissioner and the Deputy Commissioner accepted only Dr. Segal's range of motion impairment ratings when determining Carmer's industrial disability. The Commissioner noted his opinion was based on Carmer's age, education, work experience, and restrictions, and impairment ratings, which were set forth in the factual findings. The Commissioner specifically noted that while Carmer was working, she would have never, and will never, return to her prior types of employment because of the restrictions imposed as a result of her work injury.

Accordingly, the court finds the Commissioner's reliance on Dr. Segal's impairment ratings was not erroneous and is supported by substantial evidence.

3. Whether the Commissioner Erred in Finding the Claimant Had a Left Shoulder Injury Causally Connected to Her Work Injury.

Nordstrom next challenges the commission's determination that Carmer's left shoulder injury is a sequela of her right shoulder injury. At the commission level, "[a] claimant must prove by a preponderance of the evidence that the injury is a proximate cause of the claimed disability." Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) (quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa 2002)). An injury "arises out of" the employment when a causal relationship exists between an injury and the employment. Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Quaker Oats v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996)

"Ordinarily, expert testimony is necessary to establish the causal connection between the injury and the disability for which benefits are claimed." *Id.* With regard to the commission's consideration of expert testimony,

[t]he commissioner must consider [such] testimony together with all other evidence introduced bearing on the causal connection between the injury and the disability. 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.

Id. (quotations omitted). However, the “commissioner may not arbitrarily or totally reject the testimony, but must weigh the evidence... [Courts] are reluctant to allow the commissioner totally to reject expert testimony which is the only medical evidence presented.” Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910, 911–12 (Iowa Ct. App. 1994).

There was conflicting expert evidence in the record on this issue. Dr. Segal, a neurosurgeon, opined that Carmer’s with left shoulder arthropathy was caused in part by overuse and compensation due to the right shoulder injury, thereby, causally connecting the right shoulder injury to Carmer’s 2018 work injury. To the contrary, Dr. Milani, a family medicine physician, opined that Carmer’s left shoulder injury was not causally connected to her work injury and was instead caused by rheumatoid or other inflammatory arthritis. In reaching this conclusion, Dr. Milani points to swelling of Carmer’s fingers. But as the Deputy Commission explained:

Contrary to Dr. Milani’s opinion, there is no evidence Carmer has rheumatoid arthritis or that an autoimmune or systemic rheumatological disease or process is the cause of her left-sided symptoms. It is undisputed Carmer has swelling and deformity in her hands. Carmer testified she underwent testing to determine if she had rheumatologic disease, which was negative. Even if Carmer has underlying arthritis in her left shoulder, which is not supported by her medical records, I do not find Nordstrom has proven underlying preexisting arthritis is the sole cause of Carmer’s left shoulder symptoms.

(Arb. Dec. p. 17).

The Commissioner’s determination is supported by substantial evidence and is not illogical, irrational, unreasonable, or an abuse of discretion. The Commissioner is allowed to weigh all of the evidence in determining whether to accept or reject expert opinions. The weight given to expert testimony depends on the accuracy of the facts relied upon

by the expert and other surrounding circumstances. Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011). Weighing the expert opinions and the surrounding circumstances was within the province of the commissioner. Id. The basis of the Deputy Commissioner's determination is set forth above. She considered the entirety of the medical evidence in the record. She did not arbitrarily ignore any of it. The Deputy Commissioner carefully weighed it, and as such, the Court finds there was substantial evidence to support the agency's decision that Carmer's left-sided shoulder problems were causally related to her work injury.

4. Whether the Commissioner Erred in Finding the Claimant was Entitled to Penalty Benefits.

The Deputy Commissioner assessed penalty benefits for unreasonably withheld weekly permanency benefits from May 8, 2019 through June 4, 2019. Iowa Code section 86.13 provides for penalty benefits if certain criteria are met. Penalty benefits shall be awarded if:

- (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
- (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

Iowa Code § 86.13(b)(1-2).

A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996). "Reasonable or probable cause or excuse" must also satisfy the following statutory criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Iowa Code § 86.13(c)(1-3).

The Deputy Commissioner held Nordstrom lacked a reasonable basis for the delay in paying benefits from May 8, 2019 through June 4, 2019. In making this finding, the Deputy Commissioner noted:

Dr. Patterson was the treating surgeon Nordstrom selected in this case. The undisputed evidence demonstrates Dr. Patterson issued his opinion on May 11, 2019. According to Exhibit 7, Nordstrom issued "First PPD" check to Carmer for the period of May 8, 2019 to June 4, 2019, on June 6, 2019, nearly one month after Dr. Patterson issued his impairment rating. No one testified on behalf of Nordstrom regarding the delay at hearing, nor was any documentary evidence provided establishing an excuse for the delay. No letter was produced at hearing communicating any reason for the delay to Carmer. Nordstrom delayed paying weekly permanency benefits to Carmer after Dr. Patterson issued his impairment rating.

(Arb, Dec. p.29). The Court finds the Deputy Commissioner's award to be supported by substantial evidence and is not illogical, irrational, unreasonable, or an abuse of discretion.

Order

IT IS HEREBY ORDERED that the decision of the Worker's Compensation Commission is AFFIRMED. Costs are assessed to the Petitioners.



State of Iowa Courts

Case Number
CVCV063044

Case Title
NORDSTROM INC V PAMELA CARMER FKA PAMELA
HYDE
Type: ORDER FOR JUDGMENT

So Ordered

Heather Lauber, District Judge,
Fifth Judicial District of Iowa

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