IN THE COURT OF APPEALS OF IOWA

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DARLENE MORRISON, f/k/a **DARLENE JUNGE**,

Plaintiff-Appellant,

vs.

CENTURY ENGINEERING,

Defendant-Appellee,

FIREMAN'S FUND INSURANCE CO., and **EMPLOYER'S INSURANCE OF WAUSAU**,

Defendant.

8-213
87-934

Appeal from the Iowa District Court for Linn County (No. EQ 10747), William Thomas, Judge.

Petitioner appeals from the district court's ruling on further review which affirmed the decision of the industrial commissioner finding that she was not entitled to benefits. **REVERSED AND REMANDED.**

Robert R. Rush and Matthew J. Nagle of Lynch, Dallas, Smith & Harman, Cedar Rapids, for petitioner-appellant.

John Bickel and Diane Kutzko of Shuttleworth & Ingersoll, Cedar Rapids, for defendants-appellees Century Engineering and Employer's Insurance of Wausau.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J.

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Petitioner appeals from the district court ruling on further review which affirmed the decision of the industrial commissioner finding that she was not entitled to benefits. Petitioner claims: 1) the agency should not permit communication between her physician and defense counsel; 2) it was error to receive into evidence a medical report authored by defense counsel; 3) the agency abused its discretion in excluding an independent medical report; 4) the agency abused its discretion in denying a motion for continuance; and 5) the agency's denial of healing period benefits is not supported by substantial evidence. We reverse.

Petitioner Darlene Morrison began employment with Century Engineering in 1977. In 1978 she was assigned to operate a spot welding machine, which was operated with her right foot while placing her weight on her left foot. Darlene had previously injured her left foot in 1975 and 1976. A few months after being assigned to the spot welder, also known as the stomper, Darlene sought medical treatment for the pain in her left foot. Surgery was performed on her left foot in May 1978. She returned to work, but because of continuing foot problems she had surgery again in 1979. Again Darlene returned to work, but continued to experience pain in her foot and lower back. A third foot operation was performed in 1980. Darlene returned to work, but again required foot surgery in 1981.

Before she was allowed to return to work she was laid off on March 13, 1981. Since that time Darlene has found other employment. She was hospitalized for back pain in 1983 and had further surgery on her foot in 1984.

Darlene sought compensation for her problems beginning in 1979. There was evidence that she had a cavus foot, which is an unusually high arch, and that she is prone to form calluses. A deputy found Darlene was entitled to temporary total disability. In 1981 Darlene asked for reopening and filed a petition alleging a reinjury in 1980. A deputy found that the extent of her injuries before 1980 is res judicata, but that she could attempt to show a change in condition since that date. The review-reopening was heard by a deputy in 1985. The deputy determined that Darlene did not need to show a change in condition, that the 1980 injury was not an injury, and that an earlier injury was caused by her employment. The industrial commissioner found that Darlene did need to show a change in condition and she had failed. He further found that the 1980 injury was not compensable. Darlene sought judicial review. The district court affirmed the commissioner.

The industrial commissioner approved an order which allowed defendants' counsel to conduct private, ex parte communications with Darlene's treating physician. Darlene claims that she did not waive the physician-patient privilege and that Iowa Administrative Rule 500-4.6 should be

applied. Darlene's second argument concerns a medical report written by defense counsel, but signed by her treating physician. She states that this was not actually the report of a doctor and should not have been admitted. The agency refused to admit the medical report of an independent examination on the ground that it was served untimely. The report would have been timely under amended Rule 500-4.17. Darlene asks that this rule be applied retroactively.

Darlene, Century Engineering, and Fireman's Fund Insurance all asked for a continuance in order to obtain the deposition of the independent examining physician. The deputy denied the motion because a prehearing order stated continuances would be granted only for emergencies. Darlene feels that the good cause standard should have been used. Darlene's final argument is that she should have been granted healing period benefits. Generally, healing period benefits are available only for recuperation from permanent injuries. Darlene argues that her injuries were permanent, not temporary as was previously determined.

Our scope of review in this action is limited by Iowa Code sections 17A.19 and 17A.20. Dillinger v. City of Sioux City, 368 N.W.2d 176, 182 (Iowa 1985). It is this court's duty to determine if the district court made errors of law when it exercised its power of review over the industrial commissioner's decision. McClure v. Iowa Real

Estate Comm'n, 356 N.W.2d 594, 596 (Iowa App. 1984). The district court is limited to a determination of whether the agency committed any of the errors of law listed in Iowa Code section 17A.19(8) (1987). Relief is appropriate for the petitioner who has substantial rights prejudiced by an agency action coming within one of the seven categories of section 17A.19(8)(a)-(g). McClure, 356 N.W.2d at 596.

To determine if the district court acted properly, this court applies the standards of section 17A.19(8) to the agency decision to determine whether this court's conclusions are the same. If the conclusions are the same, affirmance is in order. If not, reversal may be required. McClure, 356 N.W.2d at 596. Reversal or modification shall be made if the decision is affected by error in the application of an administrative rule or law. Iowa Code section 17A.19(8)(a)(b)(c)(d)(e). Reversal may be necessary if the decision is not supported by substantial evidence in the record made before the agency when the record is viewed as a whole. And, reversal or modification may also occur if the agency acted unreasonably, or their decision was arbitrary or capricious, or a clearly unwarranted exercise of discretion. Iowa Code § 17A.19(8)(g) (1987); McClure, 356 N.W.2d at 596.

Petitioner's first assignment of error is the district court's ruling that the filing of a workers compensation claim permits private communications between defendants'

counsel and Morrison's treating physician. The workers compensation law was established to benefit the working person. Hoenig v. Mason and Hanger, Inc., 162 N.W.2d 188, 190 (Iowa 1968). Its beneficial purpose is not to be defeated by reading something into the law which is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298, 299 (Iowa 1979).

Ex parte communications are not authorized by the workers compensation act. See Iowa Code Ch. 85. The Code does provide for the release of all information relative to the claim. Iowa Code § 85.27. Further, the Code waives any privilege for the release of this information. Id. § 85.27. But it does not follow that ex parte communications with one's doctor are thus authorized as was affirmed by the industrial commissioner. Even though the commissioner's determination of a question of law is given careful consideration, it is subject to our review. Briar Cliff College v. Campolo, 360 N.W.2d 91, 93 (Iowa 1984). We do not agree with this determination.

The Supreme Court of Iowa recently addressed a similar question regarding Iowa Code section 622.10 (1985). The physician-patient rule provided in this section is an evidentiary rule, limited to the testimonial setting (a witness in court or in a deposition). Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 355 (Iowa 1986). Ex parte communications are not addressed in Iowa Code

section 622.10, but a waiver is provided. To construe this waiver to also apply to private interviews would violate a "basic principle of statutory construction." Iowa Code section 622.10 was found to be clear and unambiguous so there was no need to search for a meaning beyond that expressed. Roosevelt, 394 N.W.2d at 355-56. A plaintiff's suit was found not to totally waive the confidential nature of the physician-patient relationship of Iowa Code section 622.10. Roosevelt, 394 N.W.2d at 356. Iowa Code section 85.27 is also clear and unambiguous. There is no need to give it meaning beyond that expressed.

Although section 85.27 is not limited by the words "in giving testimony," the same policies used in Roosevelt are applicable here. First, we have a policy to encourage discovery. Our discovery rules are to be liberally construed to effectuate disclosure of all relevant material. Mason v. Robinson, 340 N.W.2d 236, 241 (Iowa 1983). But discovery rules speak only of depositions, interrogatories, production of documents, inspection, physical and mental examination, and requests for admissions. Iowa R. Civ. P. 121. Ex parte informal interviews with physicians are not included and cannot be compelled. Roosevelt, 394 N.W.2d at 358.

The workers compensation laws also do not provide for ex parte discovery. Instead, reference is made to doctor's

reports in 500 Iowa Administrative Code 4.17 (1985).[1] Depositions are discussed in Iowa Code section 56.18. Use of these methods will preserve the confidential relationship while still allowing access to the relevant information.

The court in Roosevelt was troubled by the possibility of inadvertent wrongful disclosure of confidential matters. This concern equally applies to workers compensation cases.

> Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court available to settle disputes.

Roosevelt, 394 N.W.2d at 357.

This evidence is better obtained and preserved through a deposition with counsel present. However, as the court stated in Roosevelt, this is not meant to change the policy that parties are encouraged to cooperate with one another in the discovery process when possible. Interpreting Iowa Code section 85.27 to allow ex parte communications was an error at law.

The second error alleged was the admission of the medical report authored by defendants' attorney and signed by Dr. Coates. This was in violation of the agency's own

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1. Changed to 343 Iowa Admin. Code 4.17 (1986).

rule. 500 Iowa Admin. Code 4.18.[2] This rule provides for the admissibility of medical reports of a doctor. Even though strict rules of evidence are not to be applied in proceedings before the industrial commissioner, there must be some rules to govern these proceedings. Polson v. Meredith Publishing Co., 213 N.W.2d 520, 525 (Iowa 1973). The most elementary rules of evidence should not be discarded in order to obey the statutory admonition for liberal application. Id.

Iowa Rule of Evidence 803(6) provides for admissions of records of regularly conducted activity as an exception to the hearsay rule. A report of diagnosis,

> made at or near the time by, or from information transmitted by, a person of with knowledge, if kept in the course of a regularly conducted business activity . . . unless the source of information or method or circumstances of preparation indicate lack of trustworthiness.

A medical report authored by defense counsel lacks trustworthiness. Therefore, the report does not come within rule 803(6) and should be excluded.

Since medical reports are the basis for a workers compensation award, it is important that reliable reports be used even under relaxed rules of evidence. In this adversary context, attorneys are not to prepare reports to be adopted by the physician. The attorney is not trained in medical terminology, nor is the doctor in the law. By

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2. Changed to 343 Iowa Admin. Code 4.18 (1986).

putting the medical report into legal terms, the independent evaluation is lost. It is the industrial commissioner's job to interpret the medical terminology and weigh the evidence. But this is made impossible by the defense attorney writing the report. This is not to say that attorneys should not help form the issues for the doctors. Guidance leading to the relevant information is helpful to all parties, but once the circumstances indicate untrustworthiness, the basic rules of evidence require the exclusion of the evidence.

Petitioner's third claim is that the agency abused its discretion in excluding the medical report of Dr. David Naden. An abuse of discretion has been described as discretion exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. McClure v. Iowa Real Estate Com'n, 356 N.W.2d 594, 597 (Iowa App. 1984).

Pursuant to Iowa Code section 85.39, Morrison was authorized to obtain an independent examination. The appointment was scheduled for April 4, 1985. This was just twelve days before the prehearing conference. Hundreds of pages of medical records had to be evaluated. Dr. Naden's report was not finished at the prehearing, but was discussed with all parties present. The hearing was set for July 18, 1985, and no deadline was established for the doctor's report. Other discovery continued to take place

after the prehearing. Dr. Naden's report was received on July 8, 1985, and immediately served on opponent's counsel.

At the time of the hearing the administrative rule 500-4.17 required service of medical records within ten days of receipt. Even though this was a change in the rule, this version applied to the hearing. When a statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively. State ex rel. Leas In Interest of O'Neal, 303 N.W.2d 414, 419 (Iowa 1981). This court is not bound by the agency's interpretation of the rule since it is inconsistent with the law. Des Moines Independent Community School District v. Department of Job Service, 376 N.W.2d 605, 609 (Iowa 1985). The agency ruling excluding the evidence was thus an abuse of discretion. The parties were fully aware the report would be forthcoming. The delay was attributable to the nature of the continuing injury and to the volume of records amassed. Furthermore, excluding the independent report is contrary to the purpose of the workers compensation act. The primary purpose is to benefit the worker insofar as the statutory requirements permit. McSpadden v. Big Bend Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

Motions for continuances were filed in response to Dr. Naden's report, but the requests were denied. This is the fourth alleged error. A prehearing order stated no continuance would be granted except for an "emergency."

Emergency was not defined. The deputy's ruling that no emergency existed was contrary to law. The industrial commissioner is required by rule 500 Iowa Admin. Code 4.25 to follow the rules of civil procedure unless it is in conflict with an agency rule. Iowa Rule of Civil Procedure 183(A) provides: "A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained." The agency rule provides continuances for "good cause." 500 Iowa Admin. Code 2.1. The emergency requirement was more strict and in violation of the agency rule and an abuse of discretion.

Finally, the petitioner asserts that the agency's denial of healing period benefits was not supported by substantial evidence in the record. Evidence is substantial when a reasonable mind would accept it as a basis for reaching a conclusion. Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890, 893 (Iowa App. 1983). The district court reviewed the evidence using the substantial evidence standard. However, the district court erred by using the evidence before the hearing officer in September of 1980. The injury was not determined to be permanent until December 1982.

Healing period benefits are provided during the period of recuperation from a permanent injury. The healing

period generally terminates at the time the attending physician determines that the employee has recovered as far as possible from the injury. Armstrong Tire and Rubber v. Kubli, 312 N.W.2d 60, 65 (Iowa App. 1981). Healing benefits are to be awarded up to the point at which the disability can be determined. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). Morrison received a permanent impairment rating on December 9, 1982, after her condition had stabilized. This was the reason for the 1985 hearing. The district court's affirmance of the denial of benefits was a misapplication of Armstrong and not supported by substantial evidence.

Petitioner has been denied substantial rights through the five errors found. Judgment of the district court is reversed and remanded for a decision in conformity with this court's findings.

REVERSED AND REMANDED.

Hayden, J., concurs; Habhab, J., concurs in part and dissents in part.

HABHAB, J. (concurring in part, dissenting in part)

I concur with the majority that this cause must be reversed and remanded. However, I respectfully dissent to parts of the majority opinion in the particulars hereafter set forth:

1. I do not believe that the ex parte communication that took place between defense counsel and the treating physician is a ground for reversal. When I assume, although I do not necessarily decide, that the filing of a worker's compensation claim does not permit private communications between defense counsel and the treating physician, I cannot find that the appellant was in any way prejudiced. Factually, it appears that defense counsel had deposed the treating physician prior to the private communications. There is nothing in the record that demonstrates that defense counsel obtained any material that would not be admissible because of the patient-physician privilege. Although the agency may have been wrong in its ruling, I do not believe the plaintiff was prejudiced. Thus, I would not assign this alleged error as a ground for reversal.

2. Nor do I believe that the agency erred in admitting the medical report of Dr. Coates that was prepared by defense counsel. Dr. Coates gave the attorney the information for that report. Prior to signing, the doctor read it. I believe the report is admissible under 500 Iowa

Admin. Code 4.18. I concur with the majority that such practice should be discouraged for a report prepared in the manner here is tainted from the very beginning. However, these circumstances go to the weight and credit it should receive; but it should not render it inadmissible.

As stated, I believe the doctor's report is admissible under 500 Iowa Admin. Code 4.18 (changed to 343 Iowa Admin. Code 4.18 (1986)) as a "relevant medical record or report." I do not agree that it is admissible under Iowa Rule of Evidence 803(6).

Iowa Rule of Evidence 803(6) provides for admissions of records of regularly conducted activity as an exception to the hearsay rule. Therefore a report or diagnosis is admissible if

> made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity . . . unless the source of information or method or circumstances of preparation indicate lack of trustworthiness.

Thus, under rule 803(6), the doctor's records as referred to under that rule are admissible, provided the foundational requisites are met. However, that rule does not encompass a report that contains opinions and conclusions of the doctor that are not necessarily a part of the records referred to in rule 803(6). That is the circumstance here and to the extent that the majority opinion holds otherwise, I dissent. The measure of trustworthiness as relied on by the majority should not be tested under

rule 803(6). It has no application under the circumstances here.

3. I do not believe that the agency abused its discretion when it excluded the report of Dr. Naden. The question of whether administrative rule 500-4.17 is applied prospectively and retrospectively need not be reached. The rule in effect at material times to this controversy required the service of medical reports prior to the prehearing. The plaintiff failed to do so. Thus the fact that the rule changed one month after the prehearing, eliminating the requirement that medical reports be served prior to the prehearing and substituting a ten-day requirement is of no consequence.

4. The agency did not abuse its discretion when it overruled the motion for continuance. Considerable discretion rests with the deputy as it relates to continuances. As our supreme court states in State v. Kyle, 271 N.W.2d 689 (1978):

> Granting or refusing of motion for continuance rests largely in sound discretion of trial court and such discretion is very broad; Supreme Court will interfere with action of trial court in passing on motion for continuance only where there has been clear abuse of judicial discretion and injustice thereby done to defendant.

The fact that the deputy stated that a continuance would not be granted except for an emergency is not, standing alone, grounds for reversal. Although the deputy's ruling is predicated on an erroneous ground, if we find from the

record a proper ground on which to sustain the ruling, then the ruling will not be disturbed. The record before us establishes that the moving party failed to establish good cause for the continuance.

5. There yet remains the question of whether the agency's denial of healing period benefits for the plaintiff is supported by substantial evidence in the record. My review of the record reveals that Dr. Coates, at the time of the hearing in September 1980, was unable to determine that claimant's injuries were permanent. By December 9, 1982, however, he did find that claimant's condition had stabilized and he assigned a "permanent impairment rating of 12% to the left foot which correlates medically with 3% of the body as a whole." The Industrial Commission did not consider this in its February 1987 order reversing the Deputy Commissioner's award of benefits. Accordingly, I concur with the majority as to this division.