

IN THE COURT OF APPEALS OF IOWA

No. 3-369 / 92-1531

FILED

APR 26 1994

CLERK SUPREME COURT

LOUIS RICH and THE HARTFORD,

Petitioners-Appellees,

vs.

GAYLE FOOR,

Respondent-Appellant.

Appeal from the Iowa District Court for Scott County,
John A. Nahra, Judge.

Gayle Foor, a workers' compensation claimant, appeals a ruling of the district court on judicial review reversing the decision of the Industrial Commissioner awarding her benefits and remanding the case to the Industrial Commissioner for further proceedings. We affirm the Industrial Commissioner and reverse the district court.
REVERSED.

David W. Newell, Muscatine, for appellant.

Vicki L. Seeck of Betty, Neuman & McMahon, Davenport,
for appellees.

Considered by Donielson, C.J., and Sackett and Habhab,
JJ.

SACKETT, J.

Respondent-appellant Gayle Foor appeals a district court ruling reversing and remanding the decision of the Industrial Commissioner back to the Commissioner. She contends there was substantial evidence to support the decision of the Commissioner, and the trial court incorrectly determined the Commissioner erred in admitting a deposition in evidence. Foor contends the decision of the Commissioner should be affirmed. We agree and reverse the district court and affirm the agency.

Foor sought workers' compensation benefits for an alleged injury she complained arose out of her employment with petitioner-appellee Louis Rich on or about May 8, 1988. The Deputy Industrial Commissioner held a hearing and, over the objection of the employer appellee Louis Rich and insurer petitioner-appellee The Hartford, admitted a discovery deposition the attorney for the employer-insurer had taken earlier of Foor. Foor, for an unexplained reason, had not appeared at the arbitration hearing.

Foor first contends the district court erred in concluding the Commissioner improperly considered as evidence the discovery deposition.

On June 21, 1990, the attorney for the employer-insurer took the deposition of Foor¹. Before taking the deposition, the attorney for the employer-insurer dictated

1. Foor was married shortly before the deposition and used the name Gayle M. Beverlin in the

the following stipulation agreed to by claimant's attorney:

Let the record show that this is a discovery deposition of Gayle Foor, . . . Being taken June 21, 1990, before Shelley J. Lincoln, a duly certified shorthand reporter, under and pursuant to both the applicable provisions of the Iowa Rules of Civil Procedure and the Rules of Practice before the Iowa Industrial Commissioner. The deposition may be used for any and all purposes contemplated by either of the aforementioned rules. . . .

All deposition questions were asked by the employer's-insurer's attorney.

Prior to the hearing, the parties, pursuant to direction of the agency, filed witness lists and exhibit lists. Foor was listed as a witness. Her June 21, 1990, deposition did not appear on the exhibit list.

Foor's attorney sought to admit her deposition as an exhibit. The attorney for the employer-insurer objected on the grounds the deposition had not appeared on the exhibit list. He claimed he had no opportunity to cross-examine Foor. The Deputy Industrial Commissioner admitted the deposition in evidence finding it was testimony and Foor had been listed as a witness on the witness list.

The decision of the Deputy was affirmed by the Industrial Commissioner. The trial court found the Deputy's admission of the deposition violated the agency's own order that no exhibit would be admitted unless it

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appeared on the exhibit list, the Deputy's decision was unfair and arbitrary; the Deputy improperly concluded the presence of Foor's name on the witness list rendered the deposition admissible; and, the admission of the deposition violated Iowa Rule of Civil Procedure 144 and Iowa Code section 86.18(2) and was not consistent with Iowa Code Chapter 17A which allows a party to cross-examine in an agency proceeding.

The deposition was admitted in a proceeding before an administrative agency.

Iowa Code section 17A.14 makes provision for rules of evidence in contested cases before administrative agencies and includes, in part, the following:

(1) [A] finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. (Emphasis supplied).

Iowa Code § 17A.14(1),

and

(3) Witnesses at the hearing, or persons whose testimony has been submitted in written form if available, shall be subject to cross-examination by any party as necessary for a full and true disclosure of the facts. (Emphasis supplied).

Iowa Code § 17A.14(3).

Administrative agencies are not bound by technical rules of evidence. Hamer v. Iowa Civil Rights Comm'n, 472 N.W.2d 259, 262 (Iowa 1991); see also McConnell v. Iowa Dep't. of Job Serv., 327 N.W.2d 234, 237 (Iowa 1982).

Iowa Code section 17A.14 allows for written presentations of witnesses' testimony. The employer's-insurer's claim the testimony had to be live is without merit, particularly, where as here, it was testimony given under oath and in accordance with generally accepted practices for perpetuating testimony. Furthermore, Rule 17A.14(1), contrary to the employer's-insurer's argument, does not make the availability for cross-examination a requisite for admission. The deposition was admissible in the administrative proceedings. The Commissioner properly found the deposition was testimony of a witness as opposed to an exhibit.

However; as the employer-insurer points out, there is a fundamental right to cross-examine witnesses. That right is not absolute but, as provided in Iowa Code section 17A.14(3), is allowed "as necessary for a full and true disclosure of the facts." And to that issue, the hearing officer has some discretion. See generally McCormick on Evidence, Administrative Evidence § 358 at 535 (West 4th ed. 1992).

The attorney for the employer-insurer used a claim of cross-examination to attempt to block the admission of the evidence and, when he was not successful in blocking the evidence, he did not make a request to cross-examine Foor. The request to cross-examine not having been made, we cannot assume, if it was made, it would have been denied.

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Nor can we find from the unique facts of this case that cross-examination was necessary for a full and true disclosure of facts. The test, stated abstractly, is that cross-examination must be allowed when it is required for determining the truth. McCormick at 535. It becomes a question of a line between unnecessary cross-examination and a reasonable opportunity to test opposing evidence. See generally McCormick at 535.

The only evidence admitted by deposition was testimony elicited by the attorney for the employer-insurer in answers to questions he propounded. The attorney for the employer-insurer complained he might have asked more questions, but he had prior notice of all of Foor's testimony and, if he wished to impeach or discredit her, he could have presented evidence to do so. Cross-examination was not necessary for a full and complete disclosure of the facts. The employer-insurer next argue admission of the deposition violated Iowa Rule of Civil Procedure 144. While this is an administrative proceeding, the parties did stipulate the deposition could be used under Iowa Rules of Civil Procedure without deciding whether Rule 144 was applicable. We do not find it violated.

Iowa Rule of Civil Procedure 144(e) provides:

On application and notice, the court may also permit a deposition to be used for any purpose, under exceptional circumstances making it desirable in the interests of justice; having due regard for the importance of witnesses testifying in open court.

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The employer-insurer had over a month after the deposition to locate any impeaching evidence.

The trial court erred when it held the deposition evidence could not be considered by the Commissioner.

The trial court found the deposition could not be considered and then determined there was not substantial evidence supporting the agency decision. The employer-insurer argues there was not substantial evidence to award permanent partial disability benefits. The question is whether there was substantial evidence to support the Industrial Commissioner's finding of a five percent impairment. The trial court said William F. Blair, M.D., testified that although he believed Foor suffered real pain, there was no objective evidence on which to base an impairment rating. In his belief, most people in Foor's situation suffered a zero to ten percent impairment and the Commissioner arbitrarily chose a number within that range. The court found that had Foor testified at the hearing there may have been some basis for the Industrial Commissioner's decision but, absent testimony, there was not.

There was evidence to support a finding Foor sustained an injury to her hands and arms arising out of and in the course of her employment and she could not expect to return to her employment. There was substantial evidence to support the decision. We affirm the Industrial

Commissioner and reverse the district court.

REVERSED.