IN THE COURT OF APPEALS OF IOWA

No. 1-311 / 90-1650

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CLERK SUPREME COURT

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OSCAR MAYER FOODS CORPORATION,

Appellant,

vs.

DEBBIE TASLER,

Appellee.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

The employer, Oscar Mayer, appeals a judgment of the district court affirming the industrial commissioner's finding employee, Debbie Tasler, sustained cumulative bodily injuries while employed at Oscar Mayer, thereby sustaining a fifteen-percent industrial disability. **REVERSED.**

Harry W. Dahl, Des Moines, for appellant.

Wayne H. McKinney, Jr., of McKinney Law Offices, P.C., Waukee, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Debbie Tasler, age thirty-one, began working at the Oscar Mayer plant in Perry, Iowa, on September 3, 1983. Her preemployment physical examination was normal, and no physical restrictions were noted. During her first year of employment Tasler worked as a ham boner. Later in 1984 she became a band saw operator.

On January 25, 1985 Tasler fell and struck her right elbow on a conveyer belt rail. Tasler was sent to a doctor at the company's direction who referred her to Dr. Grundberg, an orthopedic surgeon. Dr. Grundberg noted ulnar nerve, cervical spine, elbow, and wrist irritation and restricted Tasler from using the band saw on April 30, 1985. Dr. Grundberg's impression was Tasler suffered thoracic outlet syndrome. With respect to Tasler's ulnar nerve irritation, Dr. Grundberg opined its onset was gradual and occurred at work. Tasler lost no time from work as a result of this injury; however, she was removed from operating the band saw and assigned to work as a ham skinner.

During 1986 and 1987 Tasler continued to complain of acute pain in her arms and neck. Oscar Mayer sent Tasler to various physicians. Numerous diagnostic tests were performed. All test results were normal. Dr. Klise diagnosed muscle strain injury. Dr. Brenton determined Tasler suffered from musculoskeletal pain syndrome secondary to hard manual labor and recommended reassignment

to a position which did not require repetitive and vigorous upper extremity work.

On July 26, 1987, Tasler injured her back when she picked up a bowling ball while at home. Although this injury required hospitalization and six weeks of convalescence, Tasler was able to return to work without restrictions.

Tasler continued to experience pain in her back, shoulders, arms, and neck. Dr. Roleck diagnosed bilateral thoracic outlet syndrome and cervical spine strain on January 25, 1988, and indicated her condition was permanent. However, he placed no restrictions on Tasler's work activities.

On February 18, 1988, Tasler sustained a lower back injury while reaching across a conveyer belt. Tasler was referred to Dr. Winston and complained she had been experiencing lower back pain since injuring herself while picking up the bowling ball. Various tests were performed, and all were normal. Dr. Winston diagnosed myofascitis and probable thoracic outlet syndrome. Again, Tasler missed no work as a result of this injury.

The only additional restrictions placed on Tasler's work activities occurred in April 1988 when Dr. Sohn prescribed a fifteen-minute break each hour and no lifting greater than fifteen pounds. Dr. Sohn's notes indicate these restrictions were to continue until the end of 1988.

The only physician to render a permanent impairment rating was Dr. Rolek on November 28, 1988. Dr. Rolek determined the impairment to Tasler's back was twelve percent and the impairment to her upper extremities was sixteen percent. Dr. Rolek related the neck complaints to a work-related injury in April 1985 and the lower back complaints to a work-related injury of February 18, 1988.

Tasler continued to work at Oscar Mayer until February 3, 1989, when the plant closed. Tasler was under no permanent or temporary restrictions on her employment activities when the plant closed except for the band saw restriction. Tasler did not seek further employment; however, she did enroll in executive assistant program.

Subsequently, Tasler filed petitions alleging she sustained work injuries on four different dates. The deputy industrial commissioner determined although Tasler failed to prove any specific injuries on the dates alleged in the petitions, she had sustained a cumulative injury on February 3, 1989, the date Oscar Mayer closed the plant in Perry. The deputy awarded Tasler a fifteen percent industrial disability. The deputy did not base Tasler's compensation rate on her earnings the date the plant closed. Rather, the deputy used the compensation rate on February 6, 1988, the alleged injury date closest in time to February 3, 1989.

The industrial commissioner affirmed the deputy's decision. The district court also affirmed, concluding the agency decision was supported by substantial evidence.

Oscar Mayer appeals, claiming the deputy commissioner erred in finding Tasler sustained a cumulative injury on February 3, 1989, and in calculating the disability compensation rate. Additionally, because Tasler neither alleged a cumulative injury nor sustained an injury on February 3, 1989, the company asserts it was prevented from effectively defending. In the alternative, Oscar Mayer claims the deputy's award of fifteen percent industrial disability is not supported by substantial evidence.

Petitioner's action was properly brought under the provisions of section 17A.19 of the Iowa Code. Our scope of review in cases arising out of the Iowa Administrative Procedure Act is to correct errors of law made by the district court. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 164-65 (Iowa 1982). The review function of the district court under section 17A.19 is to correct errors of law which are specified in section 17A.19(8). When we review decisions of the district court which were rendered in its capacity as an appellate body under section 17A.19, the issue for our determination is whether the district court correctly applied the law. Id. at 165. In order to make that determination, we apply the standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court. Jackson County Pub. Hosp. v. Public Employment Relations Bd., 280 N.W.2d 426, 429-30 (Iowa 1979).

Our supreme court adopted the cumulative injury rule in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The cumulative injury rule applies when a disability caused by a work activity develops over a period of time; then the compensable injury itself is held to occur at a later time. Id. at 373.

In the present case, the deputy commissioner determined Tasler sustained a cumulative injury on February 3, 1989. Because Tasler did not lose any time from work as a result of the injuries she sustained, the deputy commissioner determined the injury date most analogous to McKeever was the date her employment was terminated when the plant closed. We disagree with the deputy's interpretation of the cumulative injury rule.

In McKeever our supreme court specifically concluded under the cumulative injury theory an "employee is disabled and injured when, because of pain or physical inability, [the employee] can no longer work." Id. at 374 (emphasis added). Tasler lost no time from work because of pain or physical inability. In fact, the only time Tasler was absent from work was the six-week period following her back injury sustained when lifting a bowling ball at home. The reason Tasler was no longer able to work on February 3, 1989, was because the plant closed.

Thus, we conclude the law was not properly applied in the present case. We reverse the district court's judgment which affirmed the agency's decision. In light of our

holding, we do not address Oscar Mayer's additional or alternative assignments of error.

REVERSED.