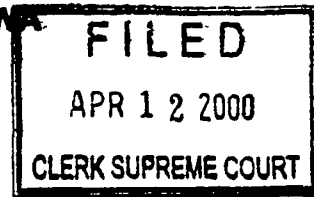


IN THE COURT OF APPEALS OF IOWA

No. 0-111 / 99-933
Filed April 12, 2000



**FRANCIS ELLIOTT,
Petitioner-Appellant,**

vs.

**JOHN DEERE DUBUQUE WORKS,
Employer, Self-Insured,
Respondent-Appellee**

Appeal from the Iowa District Court for Dubuque County, R.J. Curnan,
Judge.

The petitioner, Francis Elliott, appeals the district court's affirmance of the industrial commissioner's decision not to reopen his workers' compensation proceeding and grant additional benefits. **AFFIRMED.**

Thomas J. Wertz, Wertz and Leehey, Cedar Rapids, for appellant.

Arthur F. Gilloon and Christopher R. Paar of Norman, Gilloon, Wright &
Hamel, P.C., Dubuque, for appellee.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

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ZIMMER, J.

The petitioner, Francis Elliott, appeals the district court's affirmance of the industrial commissioner's decision not to reopen his workers' compensation proceeding and grant additional benefits. We affirm.

Petitioner, Francis Elliott, Jr., worked for respondent John Deere Dubuque Works ("John Deere") for approximately nineteen years. He sustained several work-related injuries, but the subject matter of this proceeding was a back injury suffered on July 27, 1989. Elliott herniated a disc and underwent surgery. Thereafter, he was restricted to light-duty work, unable to lift more than thirty pounds and required to avoid repetitive motions. He applied for social security disability in August of 1990 and was awarded those benefits in November of 1991. Meanwhile, John Deere had terminated his employment in October of 1990. Elliott filed a petition against John Deere and was awarded damages for wrongful discharge in December of 1992. However, John Deere refused at all times to hire Elliott back. Elliott has not worked since 1989.

On December 6, 1990, Elliott filed a petition in arbitration seeking workers' compensation benefits for injuries to the body as a whole, to his left leg and for depression associated with the injuries. John Deere and Elliott entered into a settlement agreement on November 21, 1991. The parties agreed Elliott had sustained a twenty-five percent industrial disability due to the July, 1989 injury.

Elliott filed a review-reopening petition on November 8, 1994. He based his petition on an alleged worsening of his depression and an additional loss of earning capacity. The industrial commissioner found no change in Elliott's

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conditions and, therefore, awarded him no additional benefits. On judicial review, the district court affirmed the industrial commissioner.

Elliott appeals. He contends first that, at the time of the settlement, no one foresaw the worsening of his depression to a degree where he could not work. Furthermore, he argues his economic loss was much greater than anticipated at the time of settlement because he assumed John Deere would hire him back but John Deere subsequently refused.

I. Scope of Review. Our scope of review in workers' compensation proceedings is well-established:

Our review of agency action under Iowa Code section 17A.19(8) is to determine whether our conclusions are the same as those of the district court. The district court, and we, accord only limited deference to the agency's interpretation of law, including statutory and agency rule interpretations. Our review of factual findings is greatly more circumscribed; we uphold the decision of the agency if it is supported by substantial evidence, when the record is viewed as a whole. We are not free to interfere with any agency finding where there is a conflict in the evidence or when reasonable minds might disagree about the inference to be drawn from the evidence, whether it is disputed or not.

West Side Transport v. Cordell, 601 N.W.2d 691, 693 (Iowa 1999) (citations omitted). Evidence is substantial if a reasonable person would find it adequate to reach the conclusions reached by the agency. *Myers v. F.C.A. Services, Inc.*, 592 N.W.2d 354, 356 (Iowa 1999). The commissioner's decision does not lack substantial evidence merely because inconsistent conclusions may be drawn from the same evidence. *Id.* Evidence is still substantial even though it would have supported contrary inferences. *Id.*

II. Review-Reopening Standards. Pursuant to Iowa Code section 86.14(2), the industrial commissioner is authorized to reopen an award of

workers' compensation benefits to determine whether or not the condition of the employee warrants a decrease or increase in compensation. *E.N.T. Associates v. Collentine*, 525 N.W.2d 827, 829 (Iowa 1994). To recover in a review-reopening proceeding, a claimant must prove that, subsequent to the date of the settlement or award, he or she suffered an impairment or lessening of earning capacity or an increase in industrial disability proximately caused by the injury. *Williamson v. Wellman Fansteel*, 595 N.W.2d 803, 805 (Iowa 1999). A failure of condition to improve to the extent originally anticipated may also constitute a change of condition. *Meyers v. Holiday Inn of Cedar Falls*, 272 N.W.2d 24, 26 (Iowa App. 1978). The burden of proof is on the employee to show the additional consequences by a preponderance of evidence. *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455, 457 (Iowa 1969).

III. The Merits. A claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before a review-reopening award is appropriate. See *Bousfield v. Sisters of Mercy*, 86 N.W.2d 109, 113 (Iowa 1957), superseded by statute on other grounds as stated in *Dickenson v. John Deere Products Engineering*, 395 N.W.2d 644, 647 (Iowa App. 1986). There is no dispute Elliott's mental condition worsened and that he was not permitted to return to work at John Deere. However, the issue to be addressed on appeal is whether his economic and mental conditions deteriorated in ways not contemplated at the time of the settlement agreement. We find substantial evidence supported the agency and district court conclusions that Elliott did not suffer any change in condition that was not contemplated at the time of the original settlement agreement.

A. Economic Condition. Elliott claims he believed that despite his retaliatory discharge suit against John Deere and his filing of a union grievance, he would be returning to a position there. Elliott also testified that in November of 1991, he felt he was physically capable of returning to John Deere in a limited capacity. We find John Deere's refusal to rehire Elliott was within the contemplation of the parties at the time of the settlement agreement and affirm the decision of the industrial commissioner.

A comparison of Elliott's situation as it existed in November of 1991 with his current condition demonstrates support for the commissioner's conclusion. Elliott was unemployed at the time of settlement and had been since October of 1990; he continues to be unemployed now. He had filed a lawsuit and a union grievance against John Deere. His lawsuit did not seek reinstatement as a remedy. Elliott's asserted beliefs about regaining employment with John Deere were unrealistic in light of these events. John Deere did nothing to lead him to this belief and it was clear that John Deere was not going to rehire Elliott. Furthermore, Elliott viewed himself as totally disabled, such that he could not work, and made a claim for social security disability benefits just one day before entering into the settlement agreement. The industrial commissioner surmised that Elliott had made no other attempts to secure employment elsewhere, despite his expressed desire to return to work. We find substantial evidence supports the commissioner's decision. We affirm on this issue.

B. Worsening of Depression. Elliott maintains that neither he nor any of the medical professionals involved in his case envisioned a "recurrence" of his depression in a form so severe that he would be prevented from working. He

claims his depression was in "remission" in November of 1991. We find that a worsening of Elliott's depression was contemplated and foreseeable at the time of the settlement.

Elliott's diagnoses have remained constant for nearly two decades: major depression. His adulthood has been marked by an ebb and flow of the disorder since the late 1970s. On at least two occasions before his 1989 work injury, he attempted suicide and was hospitalized. While it is true that his work injury aggravated his depression, it was not unforeseeable that he would have comparable, recurring bouts of severe depression in his lifetime. One day before he entered into the settlement agreement, Elliott acknowledged to the Social Security Administration that he considered himself disabled in part due to his depression. In fact, he was still on disability at the time of his review-reopening hearing in September of 1996. Furthermore, in late November of 1990 he had been diagnosed by his current therapist, Brenna Healy, with "recurrent major depression." Healy stated the probable duration of his treatment was unknown at that time. In February of 1991, Healy again noted that Elliott's prognosis was guarded. Elliott's psychiatrist, Dr. Thomas Piekenbrock, also stated in September of 1996 that recurrences in severity of Elliott's depression are likely to result from other stressors aside from his injury or pain. Dr. Piekenbrock specifically concluded that "given the history and diagnosis of dysthymia for which [Elliott] was treated in 1979, recurrent bouts of major depression would not be unexpected." Elliott took himself off of anti-depressants some time in 1992 and has not resumed medications.

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In support of his claims, Elliott points to the testimony of therapist Michael Appleman who quantified Elliott's depression as a thirty-five percent impairment. Appleman stated in a 1996 report that Elliott's symptoms had worsened since 1991 and would continue to do so. While this statement of Elliott's condition is accurate, Appleman's report does not describe this worsening as an unforeseen consequence that could not have been and was not contemplated in November 1991. The commissioner was entitled to disregard this testimony and we do not interfere with her assignment of weight to testimony. *See, e.g., Robbenolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996) (noting that appellate court does not reassess weight of evidence, a function exclusively within agency's domain).

Elliott also claims that the commissioner applied an erroneous causation standard because she noted there were stressors other than his back injury which contributed to his depression. He contends that the exacerbation of his depression was caused by his work injury, at least in part. We do not find this statement to be an error on the commissioner's part. She was not concluding that Elliott's back injury had not caused an aggravation of his depression. She was merely repeating Dr. Piekenbrock's statement that Elliott's bouts of depression were likely to recur due *both* to his injury and the other enumerated stressors.

We find substantial evidence to support the commissioner's conclusion that Elliott's depressive condition did not change in a manner unforeseen at the time of his settlement agreement. We affirm.

AFFIRMED.

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