

IN THE COURT OF APPEALS OF IOWA

No. 9-604 / 89-341

FILED

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CLERK SUPREME COURT

BIRDEEN HIMSCHOOT,

Appellant,

89

vs.

**MONTEZUMA MANUFACTURING, FIREMAN'S FUND INSURANCE COMPANY,
and SECOND INJURY FUND OF IOWA,**

Appellees.

Appeal from the Iowa District Court for Polk County,
Arthur E. Gamble, Judge.

Petitioner appeals from award of workers' compensation
benefits. **AFFIRMED.**

Dennis L. Hanssen and Gregory T. Racette of Hopkins &
Huebner, P.C., Des Moines, for petitioner-appellant.

Richard G. Book of Jones, Hoffmann & Huber, Des Moines,
for respondents-appellees Montezuma and Fireman's Fund.

Thomas J. Miller, Attorney General, and Greg Knoploh,
Assistant Attorney General, for respondent-appellee Second
Injury Fund.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

In September 1980, petitioner started working for Montezuma Manufacturing as a production worker. Shortly after she began this employment she began to notice a numbness in her hands. It occurred more often in her right hand than her left, and when it began to occur at night as well as during the day, she visited her personal physician.

Through referrals of both her personal physician and her employer, petitioner saw a number of doctors. She informed each physician that she had endured numbness or tingling in both hands since November 1980. She was diagnosed as having bilateral carpal tunnel syndrome and a ganglion cyst on the right median nerve. Surgery was performed on her right carpal tunnel on June 4, 1981.

Petitioner received workers' compensation benefits until she was released to return to work without any restrictions on September 9, 1981. After returning to work on September 10, 1981, she noticed a worsening of her problems in her left wrist. After a work layoff between October 20, 1981, and January 8, 1982, petitioner returned to work and found her left hand was worse, and she was sent to the company doctor. She was taken off work on February 19, 1982, due to the pain in her left wrist.

A left carpal tunnel release was performed on April 9, 1982. She was released to do light work on July 6, 1982. Her employer had no light work available and informed her to get a full release and return for work in a month.

Petitioner informed her employer of the reoccurrence of a ganglion cyst on her right wrist.

In August of 1982, petitioner terminated her employment because she did not think she had the strength to do the job. The workers' compensation benefits she had received for her left carpal tunnel since February 18, 1982, were terminated on August 8, 1982. It is conceded petitioner received no notice prior to termination of her benefits.

Petitioner filed a petition for review-reopening on August 23, 1983. After her employer denied liability for the recurring ganglion cyst, she secured Title XIX coverage to pay for its surgical removal on December 10, 1984.

In his ruling the Deputy Industrial Commissioner concluded the recurrence of the ganglion cyst was caused by petitioner's employment and ordered her to be compensated for expenses related to its removal. He also ordered the payment of forty weeks of permanent partial disability related to the impairment of petitioner's right and left hands.

The Deputy Commissioner made three other findings which are now at issue on appeal. He concluded: 1) all of petitioner's symptoms arose at the same time and she sustained only one injury and therefore has no claim against the Second Injury Fund; 2) petitioner was not entitled to additional healing period benefits as a result of the recurring ganglion cyst as she failed to prove by a preponderance that it was the cause of any temporary or

permanent disability; and 3) the employer's failure to give her thirty days' notice prior to termination of her benefits entitled petitioner to thirty additional days of temporary disability benefits.

On appeal, the Industrial Commissioner affirmed the Deputy Commissioner's findings. The only difference in the analysis offered by the Industrial Commissioner is the Industrial Commissioner's reliance on a "constructive notice" theory. The Industrial Commissioner concluded that because of her previous experience of receiving workers' compensation and the discussion she had with her employer in July 1982, petitioner had constructive notice her benefits would terminate on August 8, 1982. Despite this constructive notice, the Commissioner still held petitioner was entitled to thirty additional days of benefits due to the failure of the insurance carrier to send her notice.

Upon petition for judicial review, the district court affirmed the Industrial Commissioner's decision with the exception of the notice issue. The district court concluded the remedy for failure to send notice is an award of additional benefits from the date the benefits were terminated until petitioner filed her petition for review-reopening.

On appeal, petitioner now claims the district court erred as a matter of law in: 1) finding she did not sustain separate injuries and thus liability was not established against the Second Injury Fund; 2) finding she was not

entitled to additional healing period benefits; and 3) not awarding her benefits until February 1984 (when she began a new job) due to the failure to send her notice of the termination of her workers' compensation benefits.

I. Scope of Review. Our scope of review in this agency proceeding is governed by the principles summarized in Doerfer Division of CCA v. Nicol, 359 N.W.2d 428, 432 (Iowa 1984):

A review of the industrial commissioner's decision is governed by Iowa Code section 17A.19. The scope of review is not de novo. The commissioner's findings have the effect of a jury verdict. Those findings are applied broadly and liberally to uphold rather than defeat the commissioner's decision; they are binding on appeal unless a contrary result is demanded as a matter of law. The commissioner's determination of a law question is entitled to careful consideration but nonetheless is subject to review. . . . We review the district court's appeal decision for errors of law. In this pursuit we reapply the section 17A.19(8) standards to the agency action to determine whether our conclusions are the same as those of the district court.

(Citations omitted.)

II. Second Injury Fund. Petitioner claims the district court erred as a matter of law when it affirmed the Industrial Commissioner's finding that she did not sustain separate injuries and could not establish liability against the Second Injury Fund. The Second Injury Compensation Act, Iowa Code section 85.63 (1983), provides compensation when an employee becomes permanently disabled by a compensable injury to a specified organ or extremity

and the employee had previously lost the use of another organ or extremity.¹

The purpose of the Second Injury Fund is to encourage employers to hire disabled or handicapped workers. Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300, 302 (Iowa 1979). There are three requirements for application of the Second Injury Fund: 1) the employee must have previously lost, or lost use of, a hand, arm, foot, leg, or eye; 2) the employee must have sustained the loss, or loss of use of, another such member or organ through a compensable injury, and 3) the compensable injury must render the employee permanently disabled. Iowa Code § 85.64. The loss of use and permanent disability required by the

1. If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

. . . .

Iowa Code § 85.64 (1983).

statute need not be a total loss of use or total disability for the statute to apply. Irish v. McCreary Saw Mill, 175 N.W.2d 364, 369 (Iowa 1970).

There was substantial evidence in the record to sustain a finding that the injuries to petitioner's wrists arose at the same time, shortly after she began to work for Montezuma Manufacturing. The evidence reveals petitioner told several doctors she had experienced numbness in both hands since November 1980. While the pain in her right wrist was initially more severe than that in her left, and she underwent the right hand surgery first, there was substantial evidence that the injuries to her wrists arose shortly after she began her work for employer. See J. Lawyer & J. Graves Higgs, Iowa Workers' Compensation Law and Practice § 124 (1984) (manifestation of one injury on two occasions does not satisfy the requirement of prior loss).

We must reject petitioner's argument that Montezuma's execution of two memorandums of agreement conclusively establishes she sustained two separate injuries for purposes of the Second Injury Compensation Act. Montezuma filed two memorandums of agreement with the Industrial Commissioner in 1981 and 1982 pursuant to Iowa Code section 86.13 (1981). A memorandum of agreement establishes only the existence of an employee-employer relationship and that an injury arose out of and in the course of employment. Caterpillar Tractor Company v. Mejorado, 410 N.W.2d 675,

679 (Iowa 1987); Whitters & Sons, Inc. v. Karr, 180 N.W.2d 444, 446 (Iowa 1970). A memorandum of agreement does not foreclose inquiry into the nature and extent of a disability. Freeman v. Luppes Transport Company Inc., 227 N.W.2d 143, 150 (Iowa 1975).

The memorandums of agreement at issue in this case do not establish the existence of separate injuries sufficient to invoke application of the Second Injury Fund. A single injury may manifest itself at separate times, and for purposes of reaching compensation agreements, an employer may execute separate memorandums of agreement. Those agreements would not necessarily establish the existence of the three requirements necessary to recover from the Second Injury Fund. The agency was correct in reviewing the record to see if the separate injury requirements of section 85.64 were met.

Even if the memorandums of agreement somehow established the existence of separate injuries, such agreements could not bind the Second Injury Fund, which was not a party to either agreement. At the hearing before the Deputy Industrial Commissioner, the Fund refused to stipulate two injuries had occurred, and the memorandums are not binding upon it. Cf. Jackwig, The Second Injury Fund of Iowa: How Complex Can a Simple Concept Become?, 28 Drake L. R. 889, 907 (1978-79) ("An agency determination regarding the nature and extent of the disability resulting from the second injury as it relates to the question of

Fund liability and exposure is not controlled by any agreement for settlement entered into by the claimant and employer with respect to the second injury.").

III. Recurring Ganglion Cyst - Healing Period Benefits. The Industrial Commissioner found the recurring ganglion cyst was causally connected to petitioner's employment and ordered the employer to pay for the cost of its removal. Petitioner claims she is entitled to healing period benefits from August 10, 1982, (the date of the recurrence of the cyst) through January 10, 1985, (the date her physician indicated she had recovered from the surgery) less the periods of time she unsuccessfully attempted part-time employment.

The Industrial Commissioner did not award petitioner healing period benefits for the recurring cyst because she failed to prove the cyst was the cause of any permanent partial disability. Healing period benefits are awarded if an employee has sustained a permanent partial disability. Iowa Code 85.34(1). A workers' compensation claimant has the burden to show by a preponderance of the evidence an injury and disability resulting therefrom. Kellogg v Shute & Lewis Coal Co., 256 Iowa 1257, 1261, 130 N.W.2d 667, 669 (1956).

The record in this case reveals petitioner's evidence focused on her employment as being the cause of her recurring cyst as opposed to establishing the existence of a permanent partial disability caused by the cyst.

Substantial evidence exists from which the Industrial Commissioner could have concluded petitioner failed to establish her right to healing period benefits for the recurring ganglion cyst. The district court did not err in affirming this aspect of the Industrial Commissioner's decision.

IV. Termination of Benefits. Petitioner claims the district court erred in determining what remedy is afforded an employee when an employer fails to provide an employee with notice pursuant to section 86.13 that workers' compensation benefits will be terminated. Iowa Code section 86.13 (1983) provides in relevant part:

If commenced, the payments shall be terminated only when the employee has returned to work, or upon thirty days' notice stating the reason for the termination and advising the employee of the right to file a claim with the industrial commissioner.

In Auxier v. Woodward State Hospital-School, 266 N.W.2d 139, 142 (Iowa 1978), cert. denied 439 U.S. 930 (1978), the Iowa Supreme Court held a claimant's interest in workers' compensation benefits is a property right which cannot be taken away without due process of law. The court found that on the basis of fundamental fairness, due process demands that, prior to termination of workers' compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to notice which, at a minimum, requires the following:

[1] the contemplated termination,

[2] that the termination of benefits was to occur at a specified time not less than 30 days after notice,

[3] the reason or reasons for the termination,

[4] that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,

[5] that the recipient had the right to petition for review-reopening under § 86.34 [now § 86.14].

Id. at 142-43.

In the case at bar, no notice pursuant to Auxier or section 86.13 was provided to petitioner prior to termination of her benefits on August 8, 1982. The Industrial Commissioner concluded that due to the insurance carriers' failure to send her Auxier notice, she was entitled to an additional thirty days of healing period benefits.² Upon judicial review, the district court concluded the Commissioner erred as a matter of law in awarding petitioner only thirty days of additional benefits. The court concluded the award merely gave petitioner the benefits she was entitled to if notice had

2. We decline to address the applicability of "constructive notice" to an Auxier situation. Though the Industrial Commissioner concluded petitioner had constructive notice her benefits would be terminated in August 1982, no evidence appears in the record to support the view that petitioner also had any type of notice of her right to submit evidence to dispute the proposed termination or to petition for review-reopening. It is this type of information which must, at a minimum, be conveyed in an Auxier notice, and nothing in the record indicates petitioner had either actual or constructive notice of these rights.

been given, and it provided no remedy for the respondent's additional failure to give her notice of her right to submit evidence disputing termination and to seek review-reopening. The district court determined the proper remedy for the failure to give Auxier notice would be to award additional healing period benefits from the time benefits were terminated until the date petitioner filed her petition for review-reopening.

On appeal, petitioner claims the district court's remedy was not consistent with Auxier. In Auxier, the district court had ordered that benefits be paid until the date of the Commissioner's decision on the review-reopening, id. at 141, and in affirming the district court's ruling on the due process violation, the supreme court affirmed this remedy. Petitioner argues her additional benefits should have continued until the earlier of two incidents, her return to work in February 1984, see Auxier, id. at 142 (notice not necessary where employee returns to work), or the date a decision is filed on the petition for review-reopening. Id. at 141. Montezuma argues the district court erred in extending the period of benefits and should have affirmed the Industrial Commissioner's award of an additional thirty days of benefits.

We must reject the arguments of both parties. Auxier addressed the due process implications of a termination of workers' compensation benefits. Other than the reference

to an employee's return to work, id. at 142, the supreme court did not consider for what additional duration of time benefits should be awarded when Auxier notice is not provided. It is not apparent that this issue was even raised before the Auxier court.

Contrary to Montezuma's assertion, the remedy fashioned by the Commissioner was not adequate. Petitioner was entitled to notice prior to termination of her benefits, and this notice was not given. Due process required that she be informed of her right to submit evidence to dispute the termination and of her right to petition for review-reopening. Id. at 143. As the district court aptly noted, petitioner was no longer prejudiced by the lack of notice at the time she filed her petition for review-reopening, and the additional healing period benefits should run until that date. The decision of the district court is affirmed.

AFFIRMED.