IN THE COURT OF APPEALS OF IOWA

No. 1999-488 (9-745) / 99-0085
Filed March 15, 2000

DICO, INC. and NATIONAL UNION FIRE INSURANCE COMPANY,
Petitioners-Appellants,

vs.

JAMES LOVELL,
Respondent-Appellee.

FILED
MAR 15 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

The petitioners appeal from the district court's ruling on judicial review which affirmed the Industrial Commissioner's award of workers' compensation benefits. **AFFIRMED.**

John E. Swanson and Aaron T. Oliver of Hanson, McClintock & Riley, Des Moines, for appellants.

David D. Drake of Lawyer, Lawyer, Lawyer, Dutton & Drake, West Des Moines, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Habhab, S.J.*

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HABHAB, S.J.

The employer and its insurance carrier appeal the decision of the Industrial Commissioner which ordered it to pay sixty percent industrial disability to James Lovell. They claim the Commissioner should have apportioned all or a part of Lovell's disability to a later injury. We affirm on appeal.

Lovell was employed by DICO, Inc., a manufacturer of auto components, from March 1990 until July 1995. Lovell was first injured in July 1993 while cleaning up the plant after the 1993 flood. He slipped and fell while attempting to move some tires. Lovell saw a physician and complained of right knee pain and low back pain after this injury. Stooping and bending at work began to bother him.

A second injury occurred in October 1993, when Lovell slipped, but did not fall, while walking at work. He began to experience more back and knee pain. He began a course of physical therapy. Lovell was placed on restricted duty at work.

Lovell suffered a third injury in September 1994. He was sitting on a picnic bench at work eating his lunch when the bench broke, causing him to fall. Lovell did not suffer any additional loss of range of motion due to this injury. He continued to attend physical therapy.

Dr. David Berg and Dr. Daniel McGuire determined Lovell had degenerative disc disease with spondylosis of the low back with sprain/strain from the work injuries. A licensed physical therapist performed a functional capacity evaluation on Lovell and found him to be capable of only light duty work.

Dr. Thomas Carlstrom provided a second opinion, which indicated Lovell had a five percent whole body permanent impairment. He determined Lovell should have permanent restrictions against lifting more then twenty-five pounds, bending or twisting, or sitting or standing for more than one hour in any one position. Dr. Carlstrom testified Lovell's condition did not completely heal after the first injury. He also testified Lovell's complaints of neck and knee pain were not related to the third injury.

Lovell filed a claim for workers' compensation benefits in September 1994. Lovell has not been employed since the DICO plant closed in July 1995. Until December 1, 1993, DICO was insured by National Union Fire Insurance Company. After that date is was insured by another carrier.

A hearing was held before a deputy Industrial Commissioner. The deputy found:

> [A]ll of the disability caused by the total condition is found to be causally connected to the first two injuries. They were at least a significant cause of the total condition.
>
> The injury of September 20, 1994, was not shown to be a cause of any permanent impairment or of any significant disability, loss of work or medical treatment. Claimant simply was permanently injured after the first two DICO injuries and the incident of September 20, 1994 was only a brief, temporary aggravation.

The deputy determined Lovell had suffered a sixty percent loss of his earning capacity as a result of his work injuries in July 1993 and October 1993. The deputy noted the full responsibility rule. The deputy determined all of Lovell's disability should be attributed to the first two injuries.

DICO and National Union (hereinafter DICO) appealed the decision to the Industrial Commissioner. The commissioner also considered the full responsibility rule, and determined Lovell's disability was only causally connected to the first two injuries. The commissioner affirmed the deputy's conclusions and incorporated much of his decision.

DICO filed a petition for judicial review. It claimed the Industrial Commissioner should have apportioned all or a part of Lovell's disability to his third injury. The district court found there was substantial evidence to support the Commissioner's finding the third injury was only a brief temporary aggravation. The court affirmed the Industrial Commissioner's decision. DICO appealed.

I. SCOPE OF REVIEW

Iowa Code chapter 17A governs our review. *Stumpff v. Second Injury Fund,* 543 N.W.2d 904, 905 (Iowa 1996). We apply the standards of section 17A.19(8) to determine whether our legal conclusions are the same as those reached by the district court. *Mortimer v. Freuhauf Corp.,* 502 N.W.2d 12, 14 (Iowa 1993).

An agency's findings must be supported by substantial evidence when the record is viewed as a whole. Iowa Code § 17A.19(8)(f) (1997). Evidence is substantial if a reasonable person would find it adequate to reach the conclusion reached by the agency. *Quaker Oates v. Ciha,* 552 N.W.2d 143, 150 (Iowa 1996). 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. *Stephenson v. Furnas Elec. Co.,* 522 N.W.2d 828, 831 (Iowa 1994).

II. FULL RESPONSIBILITY RULE

DICO contends the Industrial Commissioner should have applied the full responsibility rule under the facts of this case. It asserts that under this rule, the full amount of Lovell's industrial disability should have been applied to the September 1994 injury, because this was the last injury resulting in disability.

When an employee suffers more than one injury, our supreme court has recognized:

> [a] successive-injury problem arises from the obvious fact that the combined effect of two physical disabilities is often far greater than would be reflected by merely adding together the schedule allowances for each injury existing separately.

Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995) (quoting 2 Arthur Larson, *The Law of Workmen's Compensation* § 59.10, at 10-492.329 (1994)).

There are three approaches to this problem: (1) the full responsibility rule, which imposes liability for the entire resulting disability upon the employer; (2) apportionment statutes, under which the employer pays only for the single member lost to employment; and (3) second injury funds, which ensure that the employee receives the full disability benefits, but reimburses the employer for the difference between this sum and what it would pay under an apportionment statute. *Id.* at 255.

The three rules apply in different situations. Apportionment is limited to situations involving a prior injury or illness which is unrelated to the employment.[1] *Varied Enter., Inc. v. Sumner,* 353 N.W.2d 407, 411 (Iowa 1984). Apportionment does not apply where the second injury merely aggravates the pre-existing condition. *Bearce v. FMC Corp.,* 465 N.W.2d 531, 536 ((Iowa 1991). Furthermore, it does not apply where the prior condition or injury has not caused any industrial disability. *Id.* at 535. In these situations, the employer is liable for the full industrial disability. *Second Injury Fund v. Nelson,* 544 N.W.2d 258, 265 (Iowa 1995).

Under section 85.64, the second injury fund provisions apply only if an employee has (1) either lost, or lost use of a hand, arm, foot, leg, or eye; (2) the employee sustained loss, or loss of use of another such member or an organ through a work-related injury; and (3) there must be some permanent disability from the injuries. *Second Injury Fund v. Shank,* 516 N.W.2d 808, 812 (Iowa 1994).

The full responsibility rule applies as follows:

> [I]n a situation of two successive work-related injuries, the employer is generally held liable for the entire disability resulting from the combination of the prior disability and the present injury.

Celotex Corp., 541 N.W.2d at 254. Thus, an employer liable for a current injury is also liable for any preexisting industrial disability caused by a work-related injury when that disability combines with industrial disability caused by a later

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[1] Apportionment is limited to those situations where a prior injury or illness, unrelated to the employment, independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment-related aggravation. *Varied Enter.,* 353 N.W.2d at 411.

injury. *Nelson,* 544 N.W.2d at 265. There is no provision in our workers' compensation law for apportionment in the case of successive injuries sustained by an employee in the same employment, regardless of whether or not the employee receives compensation for the prior injury. [2] *Celotex,* 541 N.W.2d at 256.

The full responsibility rule would apply to the September 1994 injury only if that injury was actually the last injury resulting in industrial disability. As noted above, an employer is liable for a preexisting industrial disability caused by a work-related injury when the preexisting disability combines with industrial disability caused by a later injury. *Nelson,* 544 N.W.2d at 265. Application of the rule presupposes the later injury resulted in industrial disability.

An employee's condition must be more than slightly aggravated to be considered a personal injury under Iowa law. *Ziegler v. U.S. Gympsum Co.,* 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960). Under the facts of the present case the Industrial Commissioner found the September 1994 injury did not result in industrial disability, but was only a brief, temporary aggravation of Lovell's earlier injuries. The Commissioner determined the September 1994 injury did not increase Lovell's industrial disability.

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[2] Employers may receive credit in certain situations which are not present here. *Celotex,* 541 N.W.2d at 256. For example, an employer is entitled to a credit for weekly healing period benefits if the same injury produces permanent partial disability, Iowa Code section 85.34; an employer is entitled to credit for permanent partial disability payments where the employee suffers a permanent partial disability and permanent total disability arising from the same injury, section 85.34(3); and an employer is entitled to a credit for specific benefit amounts paid in excess of amounts required by workers' compensation statutes, section 85.34(4). *Id.*

There is substantial evidence in the record to support the Commissioner's findings. Dr. Carlstrom testified:

> Q. Now, with regard to the neck and the knee, can you tell me, Doctor, whether the complaints asserted by Mr. Lovell are related at all to the last injury, that of September 1994? A. Yes.
> Q. And what's your opinion with regard to that, Doctor? A. I don't think they are related to that injury.

He also testified Lovell did not have any loss of range of motion after the third injury. He testified the third injury did not result in any change to the structure of Lovell's spine.

Having found the September 1994 injury did not result in industrial disability, we therefore conclude the full responsibility rule does not apply to that injury.

III. INDUSTRIAL DISABILITY

DICO claims the Industrial Commissioner should have assigned at least part of Lovell's industrial disability to the September 1994 injury. As discussed above, however, there is substantial evidence in the record to show the September 1994 injury did not result in any additional industrial disability for Lovell. We find there is substantial evidence in the record to support the Commissioner's decision not to assign part of Lovell's industrial disability to the September 1994 injury.

We affirm the decision of the Industrial Commissioner and the district court.

AFFIRMED.