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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

527

GENEVIEVE WRIGHT,	)	
Claimant-Appellee,	)	Filed September 24, 1985
vs.	)	
NORTH D.M. NURSING CORP., d/b/a RIVERVIEW MANOR NURSING HOME, Employer, and GREAT AMERICAN INSURANCE COMPANIES, Insurance Carrier,	)	5-318 84-997
Respondents-Appellants.	)	

Appeal from the Iowa District Court for Polk County - Richard A. Strickler, Judge.

Defendants appeal the district court's affirmance of worker's compensation benefits to plaintiff. **AFFIRMED.**

Jack W. Rogers of Putnam, Putnam & Rogers, Des Moines, Iowa, for respondents-appellants.

John R. Hearn, Des Moines, Iowa, for claimant-appellee.

Considered by Donielson, P.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J.

Defendants North D.M. Nursing Corp. and Great American Insurance Companies appeal the district court's affirmance of worker's compensation benefits to plaintiff Wright. We affirm the district court.

Genevieve Wright was 60 years old and divorced with two dependents while she was employed as a laundress at defendant nursing home in 1979. She had previously worked at Wimpy's restaurant for 14 years making salads before the restaurant closed. Plaintiff has a history of leg ailments prior to 1979, which includes phlebitis and moderately severe degenerative arthritis in her left leg.

On March 27, 1979, while unloading a load of laundry at defendant's place of business, plaintiff twisted her knee after stepping in some water that had accumulated near the washer. Her knee swelled up considerably and caused her such pain that she could hardly walk. Shortly after the incident that same day, plaintiff told both the administrator and assistant administrator of her fall and showed them the condition of her left knee. They sent her immediately to the hospital. Plaintiff was treated by Dr. Foley at Iowa Lutheran Hospital who later testified by written report per Iowa Industrial Commission Rule 500.4.17 that her work at defendant's place of business aggravated her preexisting leg condition and caused her knee injury on March 27, 1979.

In May of 1979, plaintiff was visiting a friend when her left knee gave out causing her to fall down a flight of stairs. She broke both of her arms during the fall but did not injure her knee. Plaintiff later testified that her arthritis and phlebitis would at times cause her knee to "catch," but it would never "give out" as it did at her friend's residence.

By June 1980, plaintiff's leg pain refused to subside, so Dr. Foley referred her to Dr. Roland, an orthopedic surgeon, who in turn became her treating physician. Dr. Roland testified that plaintiff's fall on March 27, 1979, tore "medial

cartilage" in her left knee and that her employment at defendant nursing home aggravated her prior arthritis. He evaluated plaintiff's disability at 16% to her left leg. Dr. Roland also stated that he felt it highly likely that the torn medial cartilage caused plaintiff's later fall in May, 1979. He performed an operation to repair the damage to plaintiff's knee and permitted the plaintiff to return to work under limited conditions on September 2, 1981.

Plaintiff Wright returned to work at a restaurant on September 27, 1981, where she remained employed until January 17, 1982.

Defendants contest several factual issues in this matter. There is considerable dispute over testimony from the only eyewitness to plaintiff's actual injury at the nursing home on March 27, 1979. Plaintiff's friend and co-employee, Betty Perkins, was in the same laundry room with plaintiff when the incident occurred. She initially supported plaintiff's statements regarding the cause of the injury and the extent of the damage to the knee. However, some time later she allegedly signed a document prepared by defendant nursing home administrator that in effect said plaintiff injured her knee previously while employed at Wimpy's restaurant. When confronted with the document with her signature on it, she denied ever signing it. Defendants also emphasize the fact that there is no accident report on file concerning plaintiff's injury. The assistant director at the nursing home testified that she recalled plaintiff walking with a limp in March of 1979, and that she told plaintiff to go to the hospital. She does not remember the specific incident but maintains that she routinely made out accident reports although she doesn't remember making one out March 27, 1979.

Plaintiff's claim was initially decided by the deputy industrial commissioner at arbitration proceedings. The deputy commissioner specifically rejected the testimony of co-employee Betty Perkins as unreliable. The deputy found that the plaintiff suffered a torn cartilage while employed at defendant nursing

home, and that the injury later caused the plaintiff's fall down her friend's stairway in May, 1979. The deputy's report also stated that plaintiff sustained permanent-partial disability of 16% of her left leg as a result of the work-related injury, and that she also sustained no permanent partial disability from her fall down the stairway. Plaintiff was awarded healing period benefits of 116.429 weeks at a weekly rate of $81.26, and permanent partial disability benefits of 35.2 weeks at a weekly rate of $81.26. An award was also made for medical expenses incurred by plaintiff.

After the initial hearing at the arbitration proceedings, the deputy industrial commissioner requested that both parties submit briefs to him indicating what the evidence "showed." The plaintiff's attorney complied with the request but the defendant's attorney did not. Five months after the hearing, the deputy industrial commissioner filed his decision without the requested brief from defendants. The defendants appealed the decision to the industrial commissioner who entered a written order, [Rule 500-4.28(86,17A)], requiring defendants to submit a brief stating (a) the issues on appeal, and (b) an argument on behalf of the defendants pertaining to each issue. Once again the defendants failed to provide any written statements of the issues on appeal or arguments supporting them.

Despite allegations from plaintiff's counsel that defendants had in effect waived their arguments on appeal, the industrial commissioner decided the appeal de novo. The industrial commissioner affirmed the arbitration decision and added interest at 10% per year from the date of the injury to the awards made to plaintiff. Defendant respondents then filed a petition for judicial review, this time more fully delineating the issues they were raising on appeal. The district court affirmed the industrial comissioner's decision en toto.

I. Before we address the issues raised by defendants, we feel it proper to address the issues raised by plaintiff on appeal. Plaintiff Wright alleges that the trial court erred in refusing to hold that defendants waived all alleged errors when they failed to provide the industrial commissioner with the required brief under the commissioner's ruling.

The industrial commissioner issued the ruling pursuant to Industrial Commission Rule 500-4.28(86,17A), which is subject to sanctions provided for in Iowa Administrative Code 500-4.36(86). The sanctions referred to are discretionary and are not mandatory should the ruling be disobeyed or not carried out. See Iowa Admin. Code 500-4.36(86). Since the industrial commissioner chose not to impose any sanctions and instead reviewed the appeal de novo, it appears therefore that the issues raised and litigated at the arbitration hearing were the same as those considered by the industrial commissioner. "In worker's compensation cases appellate review is limited to those matters raised and litigated before the commissioner." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 184, 187 (Iowa 1980). We are convinced, from the industrial commissioner's holding, and the district court's affirmance, that the issues initially raised at the arbitration hearings have been raised and litigated before each tribunal and were not waived.

Plaintiff also alleges that the trial court erred when it failed to award plaintiff liquidated damages under Iowa Code section 86.13 [(1978)], due to defendant's unreasonable refusal to pay benefits. Section 86.13 [(1983)], states in part:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

The above-quoted paragraph does not appear in the Iowa Code until 1982, when it was adopted by the Sixty-Ninth General Assembly. See Iowa Acts ch. 1161 sec. 23. Consequently, if plaintiff is alleging that the paragraph above applies to the acts of defendants prior to the legislative change in 1982, his argument is without merit. As to any acts by defendants after the legislative change, it appears that the delays were due to nothing other than the appeals process and the exhaustion of their lawful remedies. We are not prepared to hold that a party should be penalized for pursuing his lawful remedies to a higher court.

II. On appeal defendants raise the following issues: (1) plaintiff did not receive an injury to her left knee out of and in the course of her employment; (2) there was no causal connection between the injury to plaintiff's wrist and arms and the alleged work injury; (3) the trial court erred in finding 16% disability of the lower left extremity; (4) the plaintiff failed to give her employer timely notice as required under Iowa Code section 85.23; (5) the trial court erred in granting a healing period of 116.429 weeks to plaintiff; (6) the trial court erred in establishing the rate applied to the benefits awarded plaintiff; and (7) the trial court erred in rejecting the testimony of Betty Perkins. We affirm the trial court on all issues.

III. The scope of our review of the industrial commissioner's decision is not de novo; the findings of the commissioner have effect of a jury verdict. Ward v. Iowa Dept. of Transp., 304 N.W.2d 236, 237, 238 (Iowa 1981); Paveglio v. Firestone Tire & Rubber Company, 167 N.W.2d 636, 640 (Iowa 1969). The commissioner, not the court, weighs the evidence. The court should broadly and liberally apply those findings in order to uphold rather than defeat the commissioner's decision. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 298 (Iowa 1974). The question on judicial review is not whether the evidence

might support a different finding but whether the evidence supports the findings the commisioner actually made. Hence the findings of the commissioner are binding on appeal unless a contrary result is demanded as a matter of law. Wetzel v. Wilson, 276 N.W.2d 410, 412 (Iowa 1979).

Administrative findings of fact are binding on a reviewing court if they are supported by substantial evidence when the record is viewed as a whole. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407, 409 (Iowa 1984); Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300, 303 (Iowa 1979); Iowa Code § 17A.19(8)(f) (1983). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. Sumner, at 409; City of Davenport v. Public Employees Relations Board, 264 N.W.2d 307, 311 (Iowa 1979).

A. In & Out of Course of Employment. The tribunals below found that plaintiff was injured while employed by defendant nursing home. Even without the testimony of Betty Perkins, there is substantial evidence to support plaintiff's contention on this issue. The testimony by plaintiff herself, by the assistant director at the nursing home, and by the two physicians who treated her all substantially support the trial court's findings.

B. Causal Connection to Plaintiff's Subsequent Fall. Dr. Roland testified that it was "highly likely that the cause of a fall without an antecedent etiological event would be from her torn knee cartilage" (occurring March 27, 1979). Defendants failed to effectively rebut this testimony. It is reasonable, therefore, to accept this evidence as adequate to reach the same conclusion as that of the lower tribunals, that is, that the plaintiff fell at her friend's residence in May of 1979, due to her prior injury at defendant's business in March, and as a result of this fall, broke both of her wrists.

C. Disability. Defendants also allege that the industrial commissioner and the district court erred in holding that plaintiff suffered 16% disability

to her lower left extremity. The only tangible evidence on this issue is that produced by plaintiff's physician, Dr. Roland, who estimated that the plaintiff suffered the 16% disability from her fall on March 27, 1979.

In Sondag v. Ferris Hardware, 220 N.W.2d 903, 907 (Iowa 1974), the court said:

> The general rule, of course, is that expert opinion testimony, even if uncontroverted, may be accepted or rejected, in whole or in part, by the trier of fact. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 857 (Iowa 1973); Olson v. Katz, 201 N.W.2d 478, 482 (Iowa 1972); Wells v. Wells, 168 N.W.2d 54, 59 (Iowa 1969); McCormick, Opinon Evidence in Iowa, 19 Drake L.Rev. 245, 271 (1970). But a study of our cases indicates greater deference is ordinarily accorded such testimony where the opinion necessarily rests on medical expertise. See Merchant v. SMB Stage Lines, supra; Wells v. Wells, supra, 168 N.W.2d at 59 ("* * * the courts in this jurisdiction hold opinions of medical experts in high regard * * *"); Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 383, 101 N.W.2d 167, 171 (1960).

We hold there is substantial evidence to support the district court's finding that plaintiff suffered 16% disability to her lower left extremity due to her fall at defendant's place of business March 27, 1979.

D. Notice. We find that the testimony of the assistant adminsitrator at defendant nursing home substantially supports the lower tribunals finding that notice was given the very same day the incident occurred.

E. Healing Period of 116.429 Weeks. Iowa Code section 85.34 states, in part:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in Section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first. (Emphasis ours.)

The record shows that although plaintiff attempted to return to work before September 2, 1981 (the date that Dr. Roland released her to work after her knee operation), her actual injury had neither been diagnosed or repaired at that time. It is apparent that the industrial commissioner took this fact into consideration in computing the number of weeks awarded for plaintiff's healing period. We concur with the industrial commissioner and the district court on this issue.

F. Rate of Compensation Benefits. The deputy industrial commissioner found that plaintiff's weekly rate of entitlement to be $81.26 based upon her gross weekly wages of $170 with two dependent children. There is nothing in the record to dispute the deputy commissioner's findings. We concur with his findings.

G. Rejection of the Testimony of Betty Perkins. The details of Betty Perkins' testimony have previously been provided in our discussion of the disputed factual issues. Defendants assert that fact finders below have arbitrarily rejected this witness's testimony. In Langford v. Keller Excavating and Grading, Inc., 191 N.W.2d 667, 669 (Iowa 1971), the court said:

> The finder of fact may still reject the testimony as being without credibility or he may accept one of the several inferences flowing from it. In that event his conclusion is binding on us. However, this does not mean the fact finder may arbitrarily or totally reject the offered testimony, simply that he has the duty to weigh it and determine its credibility. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 464 (Iowa 1969). For discussions bearing on this point see Williams v. Cohn, 201 Iowa 1121, 1126, 206 N.W. 823, 825 (1926); Kindred v. Crosby, 251 Iowa 198, 202, 100 N.W.2d 20, 23 (1959); Bodish v. Fischer, Inc., 257 Iowa 516, 524, 133 N.W.2d 867, 871 (1965) and Randall v. Mullen, 164 N.W.2d 589, 591 (Iowa 1969).

Since we find no evidence of arbitrary or capricous decision-making by the fact finder, the decision on this issue is binding upon us.

We have carefully considered all of the allegations raised by both parties and affirm the district court on all issues.

AFFIRMED.