

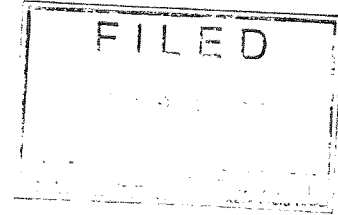
IN THE COURT OF APPEALS OF IOWA

No. 1-521 / 00-0999
Filed December 28, 2001

SOLVAY ANIMAL HEALTH and **NATIONAL UNION**,
Appellants,

vs.

DENNIS CASTER,
Appellee.



Appeal from the Iowa District Court for Polk County, David L. Christensen,
Judge.

The petitioners appeal the district court's ruling on judicial review affirming
the workers' compensation commissioner's award of permanent partial disability
benefits to the respondent. **REVERSED AND REMANDED.**

Aaron T. Oliver and William D. Scherle of Hansen, McClintock & Riley,
Des Moines, for appellants.

Roger L. Sutton, Sutton & Troge Law Office, Charles City, for appellee.

Heard by Vogel, P.J., and Miller and Eisenhauer, JJ.

VOGEL, P.J.

An employer, Solvay Animal Health, and its insurance carrier, National Union, ("Solvay"), appeal from a district court ruling on judicial review affirming the workers' compensation commissioner's award of permanent partial disability benefits to the claimant, Dennis Caster. We find Caster was improperly allowed to amend his petition and that the petition was therefore barred by the statute of limitations. We reverse the award of benefits.

Background Facts and Proceedings.

Dennis Caster began working for Solvay in 1978. Caster injured his back in both 1984 and 1986 while working and later had a discectomy performed. He was off work for three months and returned with restrictions. As a result of the injury, Caster received ten percent permanent partial disability benefits. He subsequently reinjured his back in 1987 and 1988 and was again placed on light duty work. After the 1988 injury he had a second surgery. Caster was given a lifetime lifting restriction and an eighteen percent permanent impairment rating for his injury. Caster again sought treatment for his back in 1994. On October 20, 1995, Solvay terminated Caster's employment for reasons unrelated to his injuries.

On June 12, 1996, Caster filed a claim for workers' compensation benefits alleging an injury date of August 1986. On August 4, 1997, Solvay amended its answer to assert a statute of limitations defense under Iowa Code section 85.26(1) (1997). In response, Caster moved to amend his petition to assert a cumulative injury date of either March 31, 1995, or October 20, 1995. Solvay filed a resistance to the amended petition, alleging unfair surprise and prejudice in that the amendment substantially changed the issues. On the same day the resistance was filed, the deputy commissioner entered an order in which he

stated the motion to amend had not been resisted, and therefore granted the motion.

The case then proceeded to arbitration, and following a hearing the deputy commissioner entered a decision finding Caster suffered a work-related "gradual" injury on October 24, 1994 and awarded benefits based on a permanent partial disability. The deputy commissioner further determined Caster suffered a forty percent industrial disability from the 1994 injury. The workers' compensation commissioner affirmed the deputy's decision. The district court then affirmed that decision on judicial review. Solvay appeals from this ruling.

Standard of Review.

Iowa Code section 17A.19(8) governs our review of appeals from administrative actions. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996). Like the district court, we are authorized to grant relief only if the agency's action is affected by error of law, unsupported by substantial evidence in the record, or characterized by abuse of discretion. *Id.* The industrial commissioner's well-supported factual findings are binding on us, as are the reasonable inferences that may be fairly drawn from disputed evidence in the record. *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 257 (Iowa 1996).

Error preservation.

Solvay contends the district court erred in approving Caster's amended petition. In its ruling on judicial review, the district court determined that Solvay failed to preserve this contention for its review. The court noted that Solvay did not raise the issue at the outset of the appeal and that nothing in the record showed it objected to the amendment as to the date of injury or the cumulative nature of the injury.

Upon our own review of the record, we conclude the district court erroneously found Solvay failed to preserve for review its contention that the

deputy commissioner abused his discretion in allowing the amendment. Our review is generally limited to questions raised at or before the hearing held by the agency. *Buccholtz v. Iowa Dep't of Public Instruction*, 315 N.W.2d 789, 794 (Iowa 1982). The reasons for this rule of error preservation are (1) fairness requires that an issue be raised while one's opponent has an opportunity to respond, and (2) the agency should have an opportunity to consider and rule on the issue. *Soo Line R.R. Co. v. Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994).

Here, the record shows various instances in which Solvay raised the issue of whether the amended petition was correctly allowed. Solvay filed a resistance in which it asserted the amendment was both untimely and unduly prejudicial. It appears, however, that the deputy commissioner never considered this resistance. Then, in its appeal brief to the commissioner, Solvay argued the erroneous allowance of the amendment. Again in its petition for judicial review, Solvay asserted Caster should not have been allowed to amend his petition. Based on the repeated instances in which this issue was raised below, both of the reasons underlying our rule requiring error preservation have been satisfied. The district court erred in refusing to reach this issue.

The amended petition.

Initially, we find the deputy commissioner abused his discretion in failing to consider the timely resistance filed by Solvay. The deputy commissioner ruled on Caster's amended petition the same day the resistance was filed and admittedly did not even consider the resistance. This was despite the fact that the resistance was filed within ten days following the motion to expand amendment deadlines. A failure to exercise discretion is an abuse of discretion. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 631 (Iowa 2000) (citing *Sullivan v. Chicago & N.W. Transp. Co.*, 326 N.W.2d 320, 328 (Iowa 1982)). Moreover, a

discretionary decision generally entails some degree of balancing of competing interests. The deputy commissioner here did not consider one side of the issue, but simply found, "Claimant's motions are not resisted." We conclude the deputy commissioner abused his discretion in failing to consider Solvay's resistance.

However, even if the deputy commissioner did not abuse his discretion in failing to consider the resistance, we conclude the amendment was improperly allowed for other reasons as well and that Solvay was thereby prejudiced. Iowa Administrative Code section 876-4.9(5) provides that after a party's discovery is closed, that party may amend the pleading only by leave of the workers' compensation commissioner and that such leave to amend shall be freely given when justice so requires. However, one's right to amend is not unlimited. A motion to amend pleadings should not be granted in close proximity to trial if it will substantially alter the issues. *Britt-Tech Corp. v. American Magnetics Corp.*, 487 N.W.2d 671, 674 (Iowa 1992). Further, our supreme court has affirmed the denial of a motion to amend where the amendment substantially changed the issues, potentially denied the opposing party of adequate representation, altered the course of trial preparation by reopening the entire discovery process, and there was strong indication the moving party knew of the potential for asserting the new claims well in advance of when that party actually did so. See *Glenn v. Carlstrom*, 556 N.W.2d 800, 804 (Iowa 1996),

We believe the deputy commissioner abused his discretion in accepting Solvay's amended petition because, among other things, the amendment clearly injected a new issue virtually on the eve of the hearing. For some thirteen months, and during the entirety of the discovery process, this case proceeded with the understanding that it involved an allegation of acute injury occurring in August of 1986. The order granting the amended petition, which contained the first claim of cumulative injury, was entered less than three weeks before the

hearing. The distinction between an August 1986 acute injury claim and a 1995 cumulative injury claim is critical to a number of issues, not the least of which is statute of limitations. See *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 829 (Iowa 1992). In this case, an injury date of August 1986, as alleged in the original petition, was clearly outside the statute of limitations whereas a 1995 injury date, as alleged in the amended petition, would have been within the applicable period.

Also, the change of alleged injury types prejudiced Solvay's ability to investigate and argue its case. A cumulative injury requires different elements and proof than does an allegation of acute injury. Generally speaking, a cumulative injury "relates to the type of injury that develops over time from performing work-related activities and ultimately produces some degree of industrial disability." *Ellingson v. Fleetguard, Inc.*, 559 N.W.2d 440, 444 (Iowa 1999). The date of a cumulative injury is "the time at which both the fact of disability and the causal relationship of the disability to the employment would be apparent to a reasonable person." *Id.* A single or discrete injury, on the other hand, occurs at a highly specific time. Under the allegation that an August 1986 injury provided the compensable event, it is difficult to see that at the last possible moment, Solvay could have adequately defended against a claim of injury occurring gradually over the course of virtually a decade following the originally alleged date of injury.

Solvay's ability to defend this case was further complicated, and the deputy commissioner's abuse of discretion compounded, when at the hearing the deputy commissioner allowed Caster to proceed on alternate, as well as open-ended injury dates. Due process requires that a party be informed of the issues involved in order to allow an opportunity to prepare and prevent surprise at the hearing. *Wedergren v. Board of Directors*, 307 N.W.2d 12, 16 (Iowa 1981).

Even given the deputy's grant of an additional sixty days before resuming testimony, the deputy's decision did not meet the test of fundamental fairness.

The amended petition listed alternative injury dates of either March 31, 1995, or October 20, 1995. Iowa Administrative Code section 876-4.6 requires that a "separate injury date shall be alleged and a separate notice and petition shall be filed on account of each . . . gradual injury . . . alleged by an employee." Further, [i]f more than one . . . gradual injury . . . is included in the same original notice and petition, the workers' compensation commissioner shall enter an order requiring filing of separate original notices and petitions." Here, the deputy commissioner allowed an amended petition that improperly alleged alternate injury dates. The import of requiring a single injury date is evinced in the administrative rules stating a petition shall be automatically dismissed if the petition is not corrected to allege no more than a single injury date. See 876 IAC 4.6.

Based on the above considerations, we conclude the deputy commissioner should have exercised his discretion and denied the amended petition. Had the deputy commissioner rejected the amended petition, the workers' compensation petition clearly would have been barred by the applicable statute of limitations. See Iowa Code § 85.26(1). We therefore reverse the district court's order denying the petition for judicial review and remand to the industrial commissioner for further proceedings consistent with this opinion.

REVERSED AND REMANDED.