IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT
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FARMLAND FOODS, INC. and AETNA LIFE & CASUALTY COMPANY,

Petitioners-Appellees/Cross-Appellants,

vs

MARY ANN TEN EYCK,

Respondent-Appellant/Cross-Appellee.

85-582
85-02

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Appeal from the Iowa District Court for Carroll County - James C. Smith, Judge

In a workers' compensation case arising from a shoulder injury, claimant appeals the district court's order reversing and remanding an industrial commissioner's decision. The employer and insurer cross-appealed claiming the district court erred in sustaining the agency's award of healing period benefits. **AFFIRMED.**

Thomas M. Plaza, of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for petitioners-appellees/cross-appellants.

Robert L. Brink, of Nash, Eller, Brink & Claussen, Denison, for respondent-appellant/cross-appellee.

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

Claimant has appealed contending the district court erred in finding that the industrial commissioner erred as a matter of law in concluding that the claimant's shoulder injury is a disability to the body as a whole. The employer and insurer cross-appealed claiming the district court erred in sustaining the award of healing period benefits to claimant from April 1981 to July 1982.

When exercising the power of judicial review, the district court is functioning in an appellant capacity to correct errors at law. Iowa Code § 17A.19(8); Korhorst v. Iowa State Commerce Comm'n, 347 N.W.2d 619, 621 (Iowa 1984). Our duty is to correct errors of law made by the district court. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). In doing so, we apply the standards set forth in section 17A.19(8) to the agency action and determine whether our conclusions are the same as the district court's. Doerfer Division of CCA v. Nicol, 359 N.W.2d 428, 432 (Iowa 1984). Findings of fact by the industrial commissioner are considered binding if supported by substantial evidence; however, questions of law are not conclusive and are subject to review. Id.

Claimant injured her right shoulder while bagging hams at Farmland Foods, Inc., in February 1980. Claimant underwent conservative treatment and returned to work making boxes. When she was reassigned to bagging hams in September 1980, the pain recurred. Claimant was diagnosed as having tendonitis of the right shoulder and surgery (an arthrotomy, anterior acromionectomy, biceps tenodesis) was performed on her right shoulder in December 1980. Claimant was then rehospitalized in January 1981 and additional medical procedures were performed on her right shoulder. In February 1982, because of problems claimant was experiencing in her right hand, claimant had a diagnostic ganglion block performed on the right.[1]

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[1] There was no evidence of any injury or pain to claimant's neck or back.

In its ruling, the district court concluded that the extent of a shoulder injury should determine whether it is a scheduled disability of the arm[2] or nonscheduled disability to the body as a whole.[3] The court stated:

> In the case of a shoulder disability, the fact finder must determine whether the disability affects only the Claimant's use of her arm or whether it also affects the use of her neck, back, torso or some other nonscheduled member or organ.
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> For the reasons discussed above, the Court concludes that a shoulder disability can be a scheduled disability of the arm if the shoulder disability affects only the Claimant's use of her arm. The Deputy Industrial Commissioner erred as a matter of law in concluding that a shoulder disability is always a disability to the body as a whole.
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> The proper relief in this case is for the Court to remand to the agency for further action. The agency did not find which parts of Ten Eyck's body were affected by her shoulder injury. The power to make such findings in worker's compensation cases is given to the agency and not to this Court. The Court shall remand to the agency for further action consistent with this ruling. Iowa Code Section 17A.19(8) (1983).

In Alm v. Morris Brick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949), the court held the shoulder injury was correctly determined as a disability to the body as a whole since the claimant "suffered a fracture of the distal end of the collar bone where it joins the shoulder blade, together with injuries to the soft tissue of the shoulder and two hernias." Id. at 1176, 38 N.W.2d at 162.

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[2] The employer and insurer claims her injury falls within Iowa Code section 85.34(2)(m) which states: "The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks."

[3] Claimant Ten Eyck is contending her injury falls within Iowa Code section 85.34(2)(u) which states: "In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the disability bears to the body of the injured employee as a whole."

The Alm court further stated: **93**

> [The employer's] contention does not take into account the hernias. Moreover, it assumes an injury to a shoulder is an injury to an arm. This assumption is unwarranted. Subsection 13 does not apply to a shoulder injury, nor is such an injury scheduled in any other subsection of section 85.35. Dailey v. Pooley Lumber Co. 233 Iowa 758, 763, 765, 10 N.W.2d 569, 573, states:
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> "As the injury suffered by appellee extended beyond the scheduled area, the schedule of course does not apply. * * * But where there is injury to some scheduled member and also to parts of the body not included in the schedule, the resultant 'permanent total disability,' if established, is compensable under Code section 1395." § 85.34, Code of 1946, I.C.A.
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> In the case at bar neither injury was scheduled in section 85.35, and the fixing of the amount of the award under section 85.34 was not error.

Id at 1177, 38 N.W.2d at 162.[4]

We find the district court's determination was consistent with Alm. A shoulder injury can be the loss of an arm or a loss to the body as a whole, and the determination depends upon the extent of the injury. The district court was correct in its conclusion.

As to the issue of healing period benefits, we also agree with the district court's determination in which the commissioner's decision was upheld.

The commissioner's findings have the effect of a jury verdict, and this court will broadly and liberally apply those findings in order to uphold rather than defeat the commissioner's decision. Briar Cliff College v. Campolo, 360 N W.2d 91, 93 (Iowa 1984). We are bound by the finding of the commissioner where it has substantial support in evidence when record is reviewed as a whole. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 352 (Iowa 1980); Iowa Code § 17A.19(8)(f). Claimant is entitled to healing period or recuperation benefits

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[4] Iowa Code section 85.34 (1946) stated: " Permanent total disability. For an injury causing permanent total disability, the employer shall pay the weekly compensation during the period of his disability, not however, beyond four hundred weeks."

until healing is completed and the extent of the disability can be determined. Armstrong Tire and Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa App. 1981). We find there is substantial evidence in the record to support the commissioner's findings on this issue.

We affirm the district court.

AFFIRMED.

All judges concur except Schlegel, J., who dissents.

I dissent. The decision of the district court to reverse and remand the decision of the Deputy Industrial Commissioner is based upon unsound legal reasoning.

In its ruling, the district court stated, "The statute awards compensation for the loss of the use of an arm or other member. Iowa Code section 85.34(m) (1983)." (Emphasis mine.) Based upon this concept, the district court then concluded that the statutory language supported its position that recovery should not be necessarily determined by the location of the physical injury. This, the court reasoned, was the better analysis because lengthy and pointless litigation would be avoided over the precise point where, for example, an arm ends and a shoulder begins. "Under (this) method," it concluded, "the extent of the employee's recovery depends to a greater degree on the extent of her disability."

I must differ with the district court at this point. I must point out that Iowa Code section 84.34(m) (1983) states, "The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks." The statute does not include "loss of use" language in section 84.34(m) or in any of the other scheduled injury descriptions. I believe this is crucial. If the statute said what the district court stated it did, I would concur with his analysis. However, the legislature did not put in "loss of use" language, and it certainly could have if it wanted the scheduled injuries to be interpreted the way the court below did. However, we must accept the fact that it didn't. Scheduled injuries are distinct descriptions and arbitrary limitations of injuries in order to avoid the confusion that is likely to occur should this case be remanded. Contrary to the district court's conclusion, a

remand in these situations would, instead of avoiding, in reality foster needless litigation

I also disagree with the district court's case law analysis. In its ruling it said

> Deputy Commissioner Moranville found that a shoulder injury is an injury to the body as a whole based on the precedent of Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Alm, the Iowa Supreme Court stated as dicta that an injury to the shoulder is an injury to the body as a whole. Id. at 1177; 38 N.W.2d at 163. Alm's injuries were actually far more extensive than just an injury to the shoulder. Id. at 1176-77, 38 N W.2d at 162-63. The statement in Alm is strong evidence of what the law is in Iowa, but, as dicta, the statement is not conclusive.

I believe the statement in Alm, whether it is dicta or not, is what the law is in Iowa. Six years prior to Alm, in Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943), the supreme court was faced with the issue of whether an injury to a scheduled part of the body, but affecting an unscheduled portion, should be construed as a scheduled injury only, or as an injury to the body as a whole. While our facts are the reverse, the rationale of the Pooley court is, I think, extremely illuminating:

> As the injury suffered by appellee extended beyond the scheduled area, the schedule of course does not apply. We must therefore seek some other basis for computing compensations. Before leaving this part of the case, however, it is proper to refer to the briefs on both sides which discuss cases from other jurisdictions.
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> Appellants' contention may be best indicated by this quotation from their brief: "Even though the injury be to a scheduled member we readily concede that if as a result of such injury some other part of the body is affected so as to create a disability separate and distinct from the usual, ordinary and natural results of the injury to the scheduled member, compensation may be awarded in addition to that provided in the schedule. **Conversely we contend that even should the situs of the injury be without the schedule, the workman nevertheless is limited by the provisions of the schedule when the disability and incapacity flowing from the injury are manifested**

> **in and confined to the scheduled member.**" (Italics are ours.)
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> Support for their argument is found in some of the cases they cite from other jurisdictions, but we find ourselves unable to agree with the doctrine of these decisions. The term "total disability," in the sense of loss of earning power, cannot be said to be "manifested in and confined to" any particular scheduled member. It is an inability of the individual, as such, to earn,—not a mere inability of a certain member to function. It may arise solely from some injury to or loss of a scheduled member; or it may result from some injury of wider extent. Cases from other states are of little aid to us here. We are disposed, rather, to rest our decision upon an analysis of the language of our own states.

Pooley, 233 Iowa at 763, 64, 10 N.W.2d at 573.

In that case the supreme court held that because the actual physical injury extended beyond and outside the scheduled area, the compensation should be determined as it applies to "permanent total disability."

I believe this reasoning is sound and controlling in the case before us. Therefore, based upon the statutory language of Iowa Code section 84.34(m) (1983), and the case law as it exists in Iowa, I would affirm the Deputy Industrial Commissioner's conclusion that a shoulder injury is, as a matter of law, an unscheduled injury. Thus, claimant's compensation should be determined according to its effect on her total and industrial disability. I would affirm.