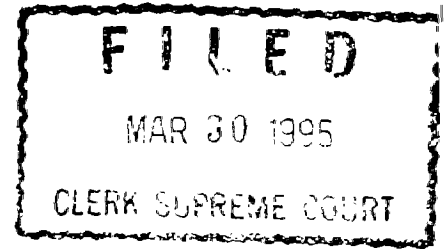


IN THE COURT OF APPEALS OF IOWA

No. 5-042 / 94-394



AT&T,

Appellant,

vs.

BARBARA WHEELS,

Appellee.

Appeal from the Iowa District Court for Polk County,
Linda R. Reade, Judge.

AT & T appeals the district court ruling affirming the industrial commissioner's decision on Wheels' workers' compensation claim. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Joseph M. Barron and Thomas J. McCann of Peddicord, Wharton, Thune & Spencer, Des Moines, for appellant.

Harry Dahl, Des Moines, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HUITINK, J.

AT&T appeals the district court ruling affirming the industrial commissioner's decision on Barbara Wheels' workers' compensation claim. We affirm in part, reverse in part, and remand.

Wheels, employed as a long-distance operator since 1979, began working for AT&T in 1985. In 1988 Wheels began experiencing numbness and pain on her right side. On March 14, 1989, while at work, she experienced numbness and pain in her right hand and leg which AT&T has attributed to a stroke. Wheels was diagnosed as suffering from carpal tunnel syndrome and thoracic outlet compression. She claims the conditions were work related.

During the course of 1989, Wheels' condition deteriorated. She left her employment on October 27, 1989, upon the advice of physicians and underwent surgery. On November 2, 1989, she filled out an AT&T accident report stating her thoracic outlet syndrome was work related. AT&T claims this report was its first notice of the injury as being work related. AT&T laid Wheels off in December, and she has not worked since that time.

Wheels filed a workers' compensation claim with the industrial commissioner alleging she suffered a cumulative injury. In May 1992 a deputy industrial commissioner entered an arbitration decision concluding Wheels suffered a cumulative injury on October 27, 1989, as a result of the repetitive use of her hands and arms at AT&T. The deputy

determined the injury caused a seventy-five-percent industrial disability. The deputy awarded healing-period benefits from October 27, 1989, to January 14, 1992, permanent partial disability benefits, penalty benefits under Iowa Code section 86.13 for the unreasonable denial of disability benefits, medical benefits, interest and costs.

AT&T appealed the deputy's decision to the industrial commissioner claiming (1) Wheels' claim was barred due to her failure to provide notice as required by Iowa Code section 85.23; (2) its notice defense was fairly debatable, making the imposition of penalties pursuant to section 86.13 inappropriate; (3) the award of healing period benefits was not supported by substantial evidence; and (4) an assessment of seventy-five-percent disability was not supported by substantial evidence.

The industrial commissioner affirmed most of the deputy's decision but reduced the amount of the penalty for unreasonable denial of benefits. AT&T filed for judicial review. In February 1994 the district court affirmed the industrial commissioner's decision.

Our review of the district court's decision is limited to corrections of errors at law. Roberts v. Iowa Dep't of Job Serv., 356 N.W.2d 218, 221 (Iowa 1984). We like the district court, are bound by the agency's fact findings if those findings are supported by substantial evidence. Iowa Code § 17A.19(8)(f) (1993). Evidence is substantial if a

reasonable person would find it adequate for reaching a decision. Peoples Memorial Hosp. v. Iowa Civil Rights Comm'n, 322 N.W.2d 87, 91 (Iowa 1982).

We review the district court's decision on the validity of an agency action to determine only whether the court correctly applied the law. Henry v. Iowa Dep't of Transp. M.V.D., 426 N.W.2d 383, 385 (Iowa 1988). We apply the standards of section 17A.19(8) to determine whether our conclusions are the same as those of the district court. Id.

AT&T first contends the district court erred in upholding the industrial commissioner's ruling rejecting AT&T's notice defense. AT&T argues Wheels' injury date for notice purposes was March 14, 1989; therefore, Wheels' claim should be time barred. We disagree.

In her petition Wheels alleged she suffered a cumulative injury. The date of the occurrence of the injury for purposes of gradual/cumulative injury cases is the date when the pain prevents the employee from continuing to work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). For purposes of computing benefits, the date of injury is that time when the disability manifests itself. Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992)(citations omitted).

The industrial commissioner is entitled to a wide range of latitude in determining the manifestation date since this is an inherently fact-based determination. Id. (rejecting an interpretation of "manifestation" that always requires an employee suffering from a repetitive-trauma injury to fix, as the accident date, that time at which the employee first became aware of the physical condition). The commissioner may consider numerous factors such as an absence of work, the point at which medical care is obtained, or others; however, none of these factors is dispositive. Id. at 830.

In this case the commissioner determined the proper injury date was October 27, 1989. As long as substantial evidence as required by section 17A.19(8)(f) supports this finding we will not disturb it on appeal. Our review of the record leads us to conclude there is substantial evidence to support the commissioner's determination that Wheels suffered a compensable injury on October 27, 1989, as a result of the long-term repetitive use of her hands and arms at AT&T.

Next AT&T contends its notice defense was fairly debatable and the deputy industrial commissioner erred in concluding the defense was "without merit as a matter of law." For this reason, AT&T claims no penalty was warranted.

Wheels' cumulative injury prevented her from continuing work on October 27, 1989, the injury occurrence date. Under McKeever and Tasler, Wheels' compensation proceeding was not barred by section 85.23; therefore AT&T could not rely on the notice defense. AT&T denied Wheels' compensation claim on October 15, 1990. In Kiesecker v. Webster City Custom Meats, Inc., --- N.W.2d ---, --- (Iowa 1995) (slip. op. p. 10, filed February 22, 1995), our supreme court stated:

It is an unreasonable application of the penalty provision to assume that any delay after the furnishing of the medical evidence is unreasonable. Even after receipt of the medical report, issues regarding percentage of disability may still be fairly debatable.

Kiesecker, --- N.W.2d at --- (emphasis added). In light of Kiesecker, an assessment of penalties pursuant to section 86.13 may be unwarranted in this case. We therefore remand this issue back to the commissioner for a determination as to whether the percentage of disability was fairly debatable.

AT&T also claims the commissioner erred in computing the healing period benefits awarded to Wheels. Healing period benefits run from the date of injury to that time when (1) the employee returns to work; (2) the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged in at the time of the injury; or (3) it is medically indicated that significant improvement from the injury is not anticipated. Iowa Code § 85.34(1).

The commissioner determined Wheels reached the point of maximum medical improvement on January 15, 1992, the date Dr. Koenig determined Wheels' permanent impairment rating and restrictions. Wheels underwent consistent treatment for the injury and pain during 1990 and 1991. Wheels was unable to return to work during this period due to the persistent pain. This was substantial evidence supporting the commissioner's determination of healing period benefits. We affirm on this issue.

Finally, AT&T contends the commissioner's assessment of a seventy-five-percent industrial disability is not supported by the evidence. We disagree.

In determining industrial disability, the commissioner considers the employee's age, education, qualifications, experience, and her inability, because of the injury, to engage in employment for which she is fitted. Olson v. Goodyear Serv. Stores, 125 N.W.2d 251, 257, 255 Iowa 1112, 1121 (1963).

AT&T presented a vocational assessment compiled by Management Consulting & Rehabilitation Services that restricted Wheels to no lifting over fifteen to eighteen pounds on an infrequent basis and no repetitive lifting. The commissioner, as factfinder, chose to reject the vocational assessment offered by Management Consulting and Rehabilitation Services since it was not based on the most recent restrictions placed on Wheels by Dr. Koenig and Thomas Bower, a licensed physical therapist.

Dr. Koenig rated Wheels' impairment at seventeen percent and restricted her to no more than limited lifting of ten to twelve pounds. Bower, a licensed physical therapist who also treated and evaluated Wheels, gave her an impairment rating of thirty-seven percent and agreed with Dr. Koenig's restrictions. The commissioner also considered all of the factors included in Olson. When considered together the factors provide substantial evidence supporting the commissioner's industrial disability assessment. The district court is accordingly affirmed on this issue.

After our limited review, we determine the district court was correct in affirming the industrial commissioner's decision as to the issues of notice defense, healing period computation and percentage of industrial disability. We remand the penalty issue to the commissioner for a determination of its appropriateness. Costs of this appeal are assessed to AT&T.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.