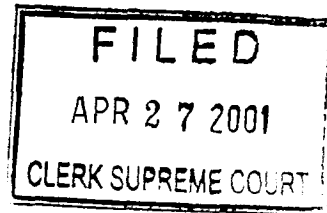


IN THE COURT OF APPEALS OF IOWA

No. 1-24 / 00-498
Filed April 27, 2001

**BROWN BROS., INC. ELECTRICAL
CONTRACTORS and THE
CINCINNATI INSURANCE COMPANY,**
Petitioners-Appellants,



vs.

MICHAEL THOMPSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

The petitioners appeal from the district court's ruling on judicial review affirming the workers' compensation commissioner's award of permanent partial disability benefits to Michael Thompson. **REVERSED IN PART, CONDITIONALLY AFFIRMED IN PART, AND REMANDED IN PART.**

David L. Jenkins of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellant.

Mark T. Hedberg of Hedberg, Owens, Hedberg & Spaulding, P.C., Des Moines, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

000053

HUITINK, P.J.

I. Background Facts and Proceedings.

Thompson is a journeyman electrician with at least eighteen years of experience. As a member of a local electrical workers' union, Thompson has been employed by various contractors, including Brown Bros., Inc., based on referrals made by the union. He was last employed by Brown Bros. from May 15, 1995, to July 8, 1995.

Thompson submitted a first report of injury to Brown Bros. on August 1, 1995. In this report, Thompson claimed he suffered a shoulder injury on May 31, 1995, as the result of work-related exertions. Thompson underwent surgery on August 8, 1995, to repair a torn rotator cuff in his left shoulder.

These proceedings commenced with Thompson's arbitration petition filed July 15, 1996. In his petition, Thompson requested an award of workers' compensation benefits for a disabling cumulative injury to his left shoulder on July 8, 1995. The deputy industrial commissioner's arbitration decision provided in pertinent part:

This is a case in which the injury the claimant has is a cumulative injury which, according to the opinions of the two doctors who did examine claimant, occurred over a period of years prior to his surgery of August 8, 1995. Dr. Neff offered that upon his view of the tear, the tear had occurred at least six months before August 8, 1995. Dr. Bashara offered that he did not believe that a date of that type could be determined based on viewing the tear as Dr. Neff on that date.

...

This is a difficult case in which to assess whether or not the injury was caused by claimant's employment with defendant employer after he returned to work for them on May 15, 1995. The opinion of Dr. Neff as to how long the rotator cuff tear had been in existence prior to his surgery in August 1995 will be accepted over

000054

the opinion of Dr. Bashara as Dr. Neff had the advantage of viewing the rotator cuff tear during the course of the surgeries he performed on claimant. The fact that claimant was able to work for approximately two months after May 15, 1995, and the fact that claimant's left shoulder symptoms again presented themselves after he was on crutches as the result of the injury that was sustained off the job, leads to the conclusion that the claimant's injury in this case did not arise out of and in the course of his employment with defendant employer on July 8, 1995. It is the conclusion of the deputy that the claimant's injury was in existence at the time that his employment began with defendant employer on May 15, 1995, and that the claimant's employment thereafter did not significantly increase or aggravate that injury to allow for it to be compensable.

The determination of noncompensability of the claim is dispositive of the case and no other issues need to be addressed.

On appeal, the industrial commissioner reversed the deputy's arbitration decision stating:

The fact that the rotator cuff tear may have begun prior to working for this employer is not determinative. Nor is the fact that claimant began seeking medical attention for his shoulder prior to working for this employer. Claimant's injury is not caused by a single traumatic event occurring prior to his employment with this employer. Rather, the medical evidence generally indicates that claimant's shoulder condition is caused by his work activity over several years. It was work for this employer that constituted claimant's "last injurious exposure" prior to his surgery of August 8, 1995. Claimant's treatment prior to the surgery, and prior to working for this employer, consisted of injections and conservative treatment only. While working for this employer, claimant's symptoms increased and he had to undergo surgery.

Although the jet ski accident was the incident that actually took claimant off work for defendant employer, it was work with this employer that caused an increase in claimant's symptoms immediately before the surgery on August 8, 1995. It is therefore held that claimant's cumulative injury manifested itself on July 8, 1995, and that the injury arose out of and was in the course of claimant's employment. It is also held that claimant's current shoulder condition is causally related to his work injury of July 8, 1995.

The commissioner also determined Thompson suffered a resulting industrial disability of twenty-five percent. Brown Bros. was ordered to pay Thompson temporary total disability benefits from August 8, 1995, through December 28, 1996; 125 weeks of permanent partial disability benefits; and all of Thompson's past and future medical expenses necessitated by his work injury.

On judicial review, Brown Bros. claimed the commissioner's decision was not supported by substantial evidence and that the commissioner erred in awarding medical expenses which were not placed into issue and not supported by the evidence. The district court affirmed the commissioner's ruling. The court determined:

The Court concludes that there was substantial evidence on the record to support the Commissioner's conclusion that Thompson's last injurious exposure occurred while under the employ of Brown Brothers. . . . The mere fact that Thompson was aware of shoulder pain on other doctor's visits is not dispositive to fixing the date of his injury for the purpose of worker's compensation benefits. Even if his shoulder was already torn . . . in February, 1995, there was substantial evidence to show that Thompson was employed by Brown Brothers when he experienced his last injurious exposure. Therefore, the decision of the Commissioner should be upheld with respect to this issue.

The court also concluded that there was substantial evidence to support the commissioner's award of a twenty-five percent industrial disability. The commissioner's award of necessary medical expenses was also affirmed.

In this appeal Brown Bros. claims the commissioner improperly applied the "last injurious exposure rule" in finding a compensable cumulative shoulder injury; that such a finding was based on an allegedly improper application of the cumulative injury rule and was not supported by substantial evidence; that the

finding of twenty-five percent industrial disability did not account for Thompson's preexisting disability and was not supported by substantial evidence; and that the commissioner erred in awarding medical expenses which allegedly were not placed in issue and were without evidentiary support.

II. Standard of Review.

Our review of an industrial commissioner's decision is on error, not de novo. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995). We, like the district court, are bound by factual findings made by the commissioner so long as those findings enjoy substantial support in the record made before the agency. *Id.*

The industrial commissioner's interpretation of the workers' compensation statutes is entitled to deference, but the final interpretation of law rests with the supreme court. *Teel v. McCord*, 394 N.W.2d 405, 407 (Iowa 1986). Our task is to determine whether the district court, acting in its appellate capacity in these judicial review proceedings, applied the law correctly. *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 281 (Iowa 1991).

III. Applicability of Last Injurious Exposure Rule.

As noted earlier, the commissioner and the district court cited Thompson's "last injurious exposure" at Brown Bros. as justification for imposing liability on Brown Bros. for Thompson's injuries. The "last injurious exposure rule" imposes liability for occupational disease benefits on the employer in whose employment the employee was last exposed to the hazards of such disease. Iowa Code § 85A.10 (1995); *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428, 432 (Iowa 1984);

McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 191 (Iowa 1980). Liability under the last injurious exposure rule results without the necessity of proof that the disease is causally linked to a particular employer. *McSpadden*, 288 N.W.2d at 188-89. The rule's rationale has been applied to resolve the issue of successive insurer liability in an accidental injury case. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 376-77 (Iowa 1985).

There is substantial agency precedent extending the last injurious exposure rule beyond the occupational disease context to repetitive trauma or overuse syndrome cases. See e.g. *Coleman v. Second Injury Fund of Iowa*, Iowa Indus. Comm'r, No. 1122366 (Jan. 22, 1998); *Phipps v. Ace Construction, Inc.*, Iowa Indus. Comm'r, No. 1008391 (Jan. 12, 1994); *Henniger v. Green Acres Express, Inc.*, Iowa Indus. Comm'r, No. 8176371 (Feb. 24, 1994). These decisions suggest the last injurious exposure rule is equally applicable to accidental injury cases involving cumulative or overused syndrome injuries.

Contrary to agency precedent, we are convinced *McKeever* was limited to the resolution of successive insurer liability and should not be read to include extension of the last injurious exposure rule to cumulative injury claims. Although the court referred to the rule, it did so by analogy only, and the decision rested on other principles of employer and insurer liability expressed in Iowa Code sections 85.3(1) and 87.1. Moreover, a cumulative injury resulting from repetitive trauma or overuse syndrome is excluded from the definition of occupational disease implicating the rule's application under section 85A.10. See Iowa Code § 85.61(4)(b); see also *Noble v. Lamoni Prods.*, 512 N.W.2d 290, 293-94 (Iowa

1994) (Carpal tunnel syndrome is not an occupational disease.). We accordingly hold the last injurious exposure rule has no application in the context of a disabling accidental injury, cumulative or otherwise. The commissioner and the district court erred by concluding that it does.

The remaining question concerns the consequences resulting from the commissioner's erroneous application of the last injurious exposure rule. Ordinarily, an erroneous application of a rule of law necessitates a remand to the administrative agency for a redetermination in accordance with the controlling rule of law. *Loeb v. Employment Appeal Bd.*, 530 N.W.2d 450, 452 (Iowa 1995).

Under controlling legal principles, Thompson had the burden of proving that his cumulative injury arose out of and in the cause of his employment. *McDowell v. Town of Clarksville*, 241 N.W.2d 904, 908 (Iowa 1976). The words "arising out of" refer to the cause or source of the injury. *Sheerin v. Holin Co.*, 380 N.W.2d 415, 417 (Iowa 1986). We are unable to discern whether the commissioner determined Thompson sustained his burden based on finding a causal connection between Thompson's injury and work at Brown Bros. or whether liability was imposed simply because that was Thompson's last place of employment. Under these circumstances, a remand to the commissioner for a redetermination of Brown Bros.' liability under controlling legal principles is required.

IV. Industrial Disability.

Although we have remanded the issue of Brown Bros.' liability, we nevertheless consider this issue to determine if the commissioner's determination

of Thompson's industrial disability should be conditionally affirmed. Brown Bros. argues that the commissioner erred "in failing to consider the apportionable preexisting disabilities and restrictions Thompson had before the alleged injury, and in seemingly ignoring the fact that he continued to work as an electrician without loss of earning capacity despite his asserted limitations or restrictions." We disagree.

Industrial disability includes loss of earning capacity and is not limited to functional disability. *Arrow-Acme Corp. v. Bellamy*, 500 N.W.2d 92, 94 (Iowa Ct. App. 1993). Other relevant factors include age, education, qualifications, experience, motivation, loss of earnings, severity, situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted, and the employer's offer of work or failure to so offer. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000). Our review of the commissioner's findings on this issue discloses a comprehensive consideration of these factors. Contrary to Brown Bros.' claims, the commissioner considered Thompson's continued employment as an electrician but did not find it dispositive. The commissioner's finding that Thompson suffered a twenty-five percent industrial disability is therefore conditionally affirmed pending the commissioner's resolution of other issues remanded for her consideration.

V. Medical Expenses.

Brown Bros.' challenge to the commissioner's award of medical expenses is premised on a prearbitration hearing report indicating these expenses were not disputed. Although both parties signed the report containing this declaration,

each has a different version of its meaning. According to Brown Bros., Thompson waived any entitlement to medical expenses by failing to offer evidence on this issue. Thompson claims that this designation meant that a favorable liability finding presumptively included an award of necessary medical expenses pending a subsequent challenge by Brown Bros. Resolution of these conflicting versions is more appropriately addressed to the discretion of the commissioner than to this court on appeal. This issue, like the issue of Brown Bros.' liability, shall be resolved on remand to the commissioner.

VI. Disposition.

The decision of the industrial commissioner is reversed in part, conditionally affirmed in part, and remanded to the commissioner for further proceedings in conformity with our opinion.

**REVERSED IN PART, CONDITIONALLY AFFIRMED IN PART, AND
REMANDED IN PART.**