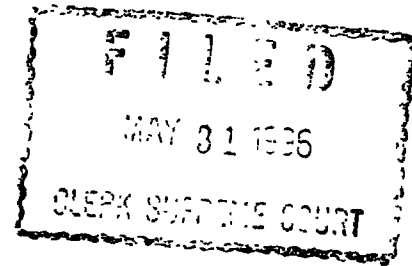


IN THE COURT OF APPEALS OF IOWA

No. 5-720/95-211



ROBERT HOBBS,

Appellant/Cross-Appellee.

vs.

WEITZ COMPANY, INC., and EMPLOYER'S MUTUAL COMPANIES,

Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

The petitioner appeals the decision of the district court affirming the Industrial
Commissioner's denial of his worker' compensation claim on the basis it was barred
by the statute of limitations. **AFFIRMED.**

Scott M. Wood, Ankeny, for appellant.

D. Brian Scieszinski of Bradshaw, Fowler, Proctor & Fairgrave, P.C.,
Des Moines, for appellees.

Considered by Sackett, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

PER CURIAM

This is an appeal by an employee claiming the district court erred by affirming the Industrial Commissioner's conclusion that his claim for workers' compensation benefits was barred by a statute of limitations. The employer cross-appealed, claiming the district court did not have subject matter jurisdiction to consider the employee's claims. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Robert Hobbs received a head injury on October 2, 1987, while working for Weitz Company, Inc. In April 1988 he returned to work for a new employer. Hobbs received weekly compensation benefits until May 24, 1988. After this date, the employer's insurance carrier continued to reimburse Hobbs for medical expenses, mileage, and time lost from work for medical appointments.

On February 27, 1992, Hobbs filed a petition for arbitration, seeking to be awarded permanent disability benefits based on continued problems from the 1987 injury. The Industrial Commissioner determined Hobbs' claims were barred by the statute of limitations found in Iowa Code section 85.26(1) because the petition was filed more than three years from the date of the last payment of weekly compensation benefits. The district court affirmed the decision of the commissioner. Hobbs appealed and respondents cross-appealed.

I. We first address the cross-appeal. Respondents contend Hobbs failed to preserve any issues for consideration on judicial review because he did not file a brief

supporting his appeal of the deputy's decision to the Industrial Commissioner. The deputy's decision addressed one issue, whether Hobbs' action was barred by the statute of limitations. The commissioner adopted the deputy's decision. We conclude Hobbs has sufficiently preserved error to allow us to address this issue.

II. Respondents also claim the district court did not have subject matter jurisdiction because Hobbs failed to timely file a proper petition for judicial review. They point out that under section 86.29, a petition for judicial review must name the opposing party as respondent rather than the agency. Hobbs' initial petition named the commissioner as the respondent. The district court later granted Hobbs' motion to substitute parties.

Amendments which change the party against whom a claim is asserted are subject to the requirements of Iowa Rule of Civil Procedure 89. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 180 (Iowa 1993). Under this rule, a substituted party must receive notice of the institution of the action within the prescribed limitations period. *Erickson v. Wright Welding Supply, Inc.*, 485 N.W.2d 82, 85 (Iowa 1992). Here, the employer and insurance carrier received copies of the petition for judicial review **within thirty** days of the commissioner's decision, as required by 17A.19(3). We conclude the district court had jurisdiction to consider the petition.

III. In his appeal, Hobbs contends section 85.26 should not apply in the present case because his weekly compensation benefits were never properly terminated under section 86.13. The district court did not rule on this issue. Hobbs

failed to file a motion pursuant to Iowa Rule of Civil Procedure 179(b), and therefore, we conclude he failed to preserve error on this issue. *See Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995).

IV. Hobbs claims he continued to receive weekly compensation benefits, and thus, the three-year statute of limitations found in section 85.26 never began to run. He claims the payments he received after May 24, 1988, were actually based on his weekly compensation rate, and were not based on reimbursement for his current wages.

We review to determine whether the agency decision is supported by substantial evidence when viewing the record as a whole. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa App. 1991). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach the given conclusion. *Id.*

We find the commissioner's decision was supported by substantial evidence. The amounts Hobbs received were linked to his requests for reimbursement for medical expenses and time lost from work. A representative of the insurance carrier testified the amounts Hobbs received were based on his rate of pay with his new employer, and were not based on his weekly benefit amount. Medical benefits are not considered weekly compensation benefits under our Workers' Compensation Act. *Powell v. Bestwall Gypsum Co.*, 255 Iowa 937, 942, 124 N.W.2d 448, 451 (1963).

Thus, the receipt of reimbursement for medical expenses would not toll the running of the statute of limitations found in section 85.26(1).

V. Hobbs also claims the commissioner's decision was arbitrary and capricious. He states he was denied benefits based only on the insurance carrier's characterization of its payments to him. We note that Hobbs' requests for reimbursement were based on his medical expenses. We find the payments he received were for medical expenses, and not merely characterized by the insurance carrier as such.

We affirm the district court and the Industrial Commissioner on the appeal and the cross-appeal. Costs of this appeal are assessed one-half to petitioner and one-half to respondents.

AFFIRMED.