IN THE COURT OF APPEALS OF IOWA

No. 9-373 / 89-48

FILED
DEC 2 1989
CLERK SUPREME COURT

CLIFFORD F. MUILENBURG,

Appellee,

vs.

279

JOHN MORRELL & COMPANY,

Appellant.

Appeal from the Iowa District Court for Dickinson County, Tom Hamilton, Judge.

Appellant appeals the judicial review of the Industrial Commissioner's decision in this workers' compensation case. **AFFIRMED.**

Dick H. Montgomery of Greer, Montgomery, Barry & Bovee, Spencer, for respondent-appellant.

Ernest W. Wilcke of Wilcke Law Firm, Spirit Lake, and E.J. Kelly of Hopkins & Huebner, P.C., Des Moines,for petitioner-appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Appellant John Morrell & Company appeals the judicial review of the Industrial Commissioner's decision in this workers' compensation case. The appellant argues 1) substantial evidence existed to support the agency's decision; and 2) appellee failed to prove by a preponderance of the evidence that he sustained a hearing loss which arose out of and in the course of his employment with John Morrell & Company. We affirm.

Muilenburg worked on a ranch after graduating from twelfth grade. He served in the U.S. Army from 1956 to 1958 where he was trained to use artillery, specifically, 105 howitzers and 4.2 mortars. Muilenburg farmed from 1958 to 1967. He then worked for respondent John Morrell & Company from 1967 to April 1985. During this time he worked in a number of areas, but was primarily at the loading dock. Morrell never conducted a noise level test at the loading dock. Muilenburg first noticed a hearing loss in the late 1970s and was fitted with a hearing aid in 1978. Appellant had a binaural hearing loss of 31.5%.

Muilenburg filed this claim for workers' compensation, alleging that his hearing loss was caused by his work for Morrell. After an administrative hearing a deputy Industrial Commissioner concluded that one-third of petitioner's hearing loss was caused by his employment with Morrell. Muilenburg was awarded permanent partial

disability benefits and one-third the cost of his hearing aid.

Muilenburg appealed to the Industrial Commissioner seeking full benefits for his hearing loss. The commissioner reversed on the ground that petitioner had not established by a preponderance of the evidence that he sustained occupational hearing loss while working for Morrell. The commissioner found that Muilenburg had been exposed to loud noise while in the Army and as a farmer. The commissioner noted there was no evidence to support Muilenburg's claim because there had been no noise level study at the loading dock.

Muilenburg filed a petition for judicial review. The district court reversed the commissioner. The court pointed out that it was Morrell that did not test the noise level at the loading dock. There was evidence of the noise in that area through the testimony of coworkers. The court also found there was no evidence that Muilenburg had any hearing loss before working at Morrell. There was evidence that he had normal hearing in 1967. The court remanded the case to the commissioner with directions to award petitioner full benefits for his hearing loss and the full cost of his hearing aid.[1]

---

1. The parties do not contest the level of benefits awarded by the district court to appellee, nor the authority of the district court to do so.

This appeal results from a contested case state agency proceeding. See Iowa Code § 17A.2(2) (1987). In "contested case" proceedings, the agency, rather than the district court, is empowered to hear evidence and make findings of fact. Iowa Code § 17A.19(7) (1987). The district court, when exercising the power of judicial review over agency action, is functioning in an appellate capacity to correct errors at law. Iowa Code § 17A.19(8) (1987). Kohorst v. Iowa State Commerce Commission, 348 N.W.2d 619, 621 (Iowa 1984). Our review of the district court's decision is limited to correction of errors law. Roberts v. Iowa Dep't of Job Service, 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. Evidence is substantial if a reasonable person would find it adequate for reaching a decision. Peoples Memorial Hospital v. Iowa Civil Rights Comm'n, 322 N.W.2d 87, 91 (Iowa 1982).

The appellant argues that the agency's decision is supported by substantial evidence and therefore the district court erred in reversing the finding of the agency. We disagree with appellant and affirm the decision of the district court. It is uncontested that appellee has suffered a significant hearing loss. The issue before the agency was whether appellee's hearing loss arose out of and in the course of his employment with John Morrell.

Appellee testified that he suffered from no hearing loss upon his discharge from the Army. Appellant produced no evidence to counter this testimony. Additionally, appellee's Morrell & Company employment application form denotes that he suffered from no hearing abnormalities. When appellee commenced employment with John Morrell & Company he had no problem hearing his fellow employees on the plant floor in spite of its elevated noise level. Appellee first noticed a hearing loss in the late 1970s, some twenty years after his discharge from the Army. Appellee's testimony concerning the onset of his hearing loss was corroborated by his wife.

Appellee also produced substantial evidence that his work environment at John Morrell & Company was noisy. Both he and a coemployee, Charles Fuller, testified about the noisy conditions which existed in the plant, including the loading dock. Fuller further testified that up until the time he left his employment at John Morrell & Company, in 1974 or 1975, the company made no attempts to limit noise levels in the plant.

Appellant's witness, Denny Howrey, testified that he did not consider the loading dock to be excessively noisy, especially when compared to other locations within the plant. It must be noted, however, that Howrey's employment at the Estherville plant did not commence until 1978, a date subsequent to the onset of appellee's hearing loss.

The Industrial Commissioner states the following in his findings of fact: "After discharge from the army, claimant farmed from 1958 through 1968 and was exposed to excessively loud noise." The record in this case, however, is absolutely devoid of evidence upon which to reach this conclusion. Appellee's entire testimony about his farming experience is as follows:

> Q. And then after you got out you went into farming, is that right? A. Yeah. I worked for a farmer. Farm work for him.
> Q. During that period of time I assume you were around tractors and machinery and grinders? A. Right. I was -- well, we -- just regular farm work, you know. Go out and maybe work out in the field all day one day. And the next day you might be working in the hog yard with the pitch fork.
> Q. Depended on the weather? A. Depended on what's got to be done. We had a lot of livestock. We done a lot of chores.

The Industrial Commissioner placed particular emphasis upon the fact that there was no objective data indicating the noise level on the loading dock. Appellant's "Pork Plant Noise Survey" dated February 24, 1982, was introduced. The loading dock was not included in this survey. Obviously, the choice not to include the loading dock in the survey was appellant's, not appellee's. Furthermore, chapter 85B does not require that a claimant demonstrate that the claimant has been subjected to a particular decibel level of noise in order to collect under the statute. As the Iowa Supreme Court pointed out in Muscatine County v. Morrison, 409 N.W.2d 685, 688 (Iowa 1987):

> Chapter 85B is unique among workers' compensation laws. By adopting time and intensity exposure standards, the legislature did not seek to rule out hearing losses that do not rise to those levels; rather, the legislature sought to simplify prior problems of proof by recognizing presumptive exposure levels for gradual noise-induced hearing loss. When the tables are not implicated, the claimant must prove the loss of hearing was due to exposure at work to sound capable of producing that loss.

Here, since the sound tables were not implicated, appellee was required to prove that his loss of hearing was due to his exposure at John Morrell & Company to sound capable of producing that loss.

We find appellee met his burden in this matter. Appellant produced no evidence as to the sound level on the loading dock for the period prior to 1978. This is the period when appellee first noticed his hearing loss. Appellant's own expert, Dr. Jorgenson, stated in response to a hypothetical question that appellee's employment could have contributed to his hearing loss. Similarly, Dr. Carignan attributed appellee's hearing loss to his employment at John Morrell & Company.

The only record evidence which indicates that appellee's loss of hearing may have been caused by anything other than his employment at John Morrell & Company is the testimony of Dr. Jorgenson. He felt appellee's military experience in the artillery was "probably more significant" than his exposure at appellant's plant. The sum total of appellee's artillery experience was firing howitzers and

mortars forty or fifty times. Dr. Carignan, however, stated upon cross-examination that he did not consider appellee's actions prior to 1967 to have had much to do with his hearing loss since appellee had normal hearing at the time he commenced employment with John Morrell & Company.

Upon our review of the evidence of this case, we conclude that the agency's decision is not supported by substantial evidence. Appellee produced sufficient evidence to prove by a preponderance of the evidence that he sustained a hearing loss which arose out of and in the course of his employment at John Morrell & Company. We therefore affirm the decision of the trial court.

AFFIRMED.

Hayden, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. There is substantial evidence in the record to support the agency's decision.

I agree with the majority claimant had a hearing loss. I find substantial evidence in the record to support a finding it was not work related.