

IN THE COURT OF APPEALS OF IOWA

No. 5-109 / 94-1003

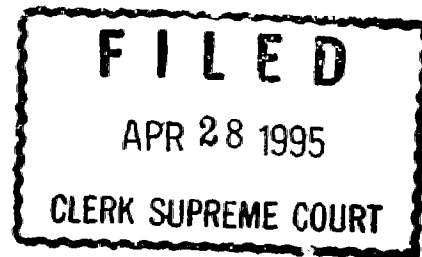
THE CELOTEX CORPORATION,

Petitioner-Appellant,

vs.

DOUGLAS AUTEN,

Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

Petitioner appeals from the district court's ruling on judicial review affirming the industrial commissioner's decision which awarded permanent total disability benefits on respondent's workers' compensation claim. **AFFIRMED.**

Stephen W. Spencer and Joseph M. Barron of Peddicord, Wharton, Thune and Spencer, P.C., Des Moines, for appellant.

Tito Trevino of Trevino & Lahey, Fort Dodge, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

SACKETT, P.J.

Petitioner-appellant employer the Celotex Corporation appeals from a district court's ruling on judicial review affirming the industrial commissioner's decision awarding respondent-appellee Douglas Auten permanent total disability benefits. The employer claims: (1) the commissioner erred in determining Auten was permanently and totally disabled from a rotator cuff injury to his right shoulder in May 1987; (2) in failing to apportion part of his disability to a preexisting condition for which he had received compensation; and (3) in finding Auten had sustained a body as a whole injury. We affirm.

Auten worked for Celotex from May 1959 until June 1989. Auten received work-related injuries to his neck in 1977, and to his arm in 1982. Auten was given a fifteen percent whole body impairment rating for the 1977 injury. Auten and Celotex settled both workers' compensation claims arising out of these injuries. In addition, Auten received other nonwork injuries. Work restrictions from these injuries caused Auten to take a janitorial position with Celotex.

In May 1987, Auten injured his right shoulder while removing some hoses. The injury resulted in a tear to the rotator cuff of Auten's right shoulder. After surgery, Auten returned to work in April 1988, and continued as a janitor until he was terminated in June 1989, because, under the union contract, he was replaced by a worker with more seniority. The restrictions imposed upon him because of his 1987 injury precluded Auten from other available jobs.

Auten applied for workers' compensation benefits for his 1987 injury. The industrial commissioner, on the basis of a deputy commissioner's arbitration decision, determined Auten had suffered an unscheduled injury to a body as a whole, resulting in one hundred percent permanent total industrial disability.

Celotex filed a petition for judicial review challenging the commissioner's decision. Celotex claimed the commissioner incorrectly determined Auten was permanently and totally disabled on the basis of the May 1987 injury, in failing to apportion disability to his preexisting condition, and in determining Auten had sustained a body as a whole injury. Auten claims Celotex never raised the apportionment issue before the commissioner.

The district court affirmed the industrial commissioner's decision finding the commissioner's determination Auten suffered an injury to the body as a whole and was totally and permanently disabled were supported by substantial evidence. The court also determined the commissioner did not err in failing to apportion Auten's disability to a preexisting condition.

Celotex contends the commissioner, while recognizing a considerable portion of Auten's disability was the result of a condition that existed before his 1987 injury, improperly found total disability was proper because the 1987 injury was the straw that broke the camel's back. Celotex advances, prior to the 1987 injury, Auten was so disabled the only job he could perform at the plant was the janitor position. Celotex advances, after the 1987 injury, Auten performed the job for fourteen months and lost the job only because he was bumped by another employee under the terms of the union contract.

The first issue we address is whether the commissioner, while finding a considerable portion of Auten's disability was the result of the prior injuries, erred in failing to find a portion of his disability attributable to prior conditions.

While the preexisting condition was a result of a work-related condition, Celotex advances the extent of disability was determined. Auten has been paid \$27,000 in full settlement for his prior injuries and these injuries contributed to or caused a substantial portion of his current disability. To be apportionable, an

impairment must have independently produced some degree of disability before the accident. *Tussing v. George A. Hormel & Co.*, 461 N.W.2d 450, 453 (Iowa 1990). Clearly, the evidence shows and, as the commissioner found, the earlier injuries independently produced some of Auten's disability.

The question is whether the fact the prior disability that independently produced some of Auten's disability that was caused by employment precludes apportionment. *Id. see Varied Enters., Inc. v. Sumner*, 353 N.W. 407, 411 (Iowa 1984). Apportion is limited to those situations where a prior injury or illness, unrelated to the employment, produces some ascertainable portion of ultimate industrial disability. However, in *Tussing*, 461 N.W.2d at 453, the court, in addition to finding the prior injury related to the employment, further noted it could not be established some ascertainable prior industrial disability existed from the earlier injuries.

Here, the earlier disability was clearly established and Auten was compensated for it. Also, it clearly was producing some degree of disability before the accident. The focal question then is whether the fact it was work-related precluded apportionment. Cited cases have different factual situations. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 537 (Iowa 1991) (no substantial record evidence exists to support a finding any prior impairment was independently affecting Bearce's earning capacity at time of second injury); *Tussing*, 461 N.W.2d at 453 (it could not be established there was some ascertainable industrial disability from earlier injuries); *Varied Enters.*, 353 N.W.2d at 411 (commissioner found he could not interject or speculate on apportionment).

The dictate of our supreme court is, because the prior injury was work-related, it is not apportioned. *Bearce*, 465 N.W.2d at 537; *Tussing*, 461 N.W.2d at 453; *Varied Enters.*, 353 N.W.2d at 411.

Celotex next claims the commissioner erred in 1987 in determining a scheduled injury to a right upper extremity was an injury to the body as a whole. Celotex contends, because the tear was on the arm side of the shoulder, it was an injury only to the arm and not the body as a whole.

Auten says it does not matter what side of the rotator cuff tears and the entire tendon is considered to be an anatomical part of the body as a whole and an injury to the shoulder is an injury to the body as a whole. He cites *Lauhoff Grain Co. v. McIntosh*, 395 N.W.2d 834 (Iowa 1986).

Celotex argues the agency erred as a matter of law in determining Auten's shoulder injury was an injury to the body as a whole. Celotex reasons the tear in Auten's rotator cuff was on the "arm side" of the cuff; consequently, the injury is an injury to the arm and not to the body as a whole. In support of its argument, Celotex points to the fact several doctors who examined Auten assigned him a disability rating to the upper right extremity, not to the body as a whole.

Section 85.34 of the Iowa Code provides for the compensation of permanent disabilities. Subsections 85.34(2)(a)-(t) describe what are known as "scheduled" disabilities. These disabilities, generally, affect a hand, arm, foot, leg, or eye. Subsection 85.34(u) provides compensation for "unscheduled" disabilities, i.e., any disability other than scheduled disability. Compensation for a scheduled disability is based upon the functional disability of the body part affected and continues for a specified number of weeks. Compensation for an unscheduled disability is based upon the disability to the body as a whole and other variables such as the worker's age, work experience, and education. Consequently, an unscheduled disability may be determined to have resulted in total permanent disability and may be compensable for as long as the disability lasts.

Both the agency and Celotex agree Auten injured his right shoulder. The disagreement arises over the classification of Auten's injury as a scheduled or unscheduled disability. The industrial commissioner reasoned, because the rotator cuff is anatomically a part of the body as a whole, Auten suffered an injury to the body as a whole. Consequently, the industrial commissioner concluded the injury resulted in an unscheduled disability. By arguing Auten's rotator cuff was torn on the arm side, Celotex seeks to have Auten's disability classified as a scheduled disability affecting only the right arm.

In *Alm v. Morris Barick Cattle Co.*, 240 Iowa 1174, 1177, 38 N.W.2d 161, 163 (1949), the court stated that the assumption a shoulder injury is an injury to the arm is unwarranted. The court determined a shoulder injury was unscheduled. *Id.* More recently, the Supreme Court of Iowa has observed the weight of authority is that shoulder (and hip) injuries are entitled to whole-body compensation. *Lauhoff Grain*, 395 N.W.2d at 838. That the tendon tear was on the "arm side" of the joint is not alone determinative. The question is whether the effect of the injury extended to other parts of the body. *See id.* The commissioner concluded the injury resulted in an impairment of the shoulder as well as the arm, a conclusion well supported by the medical record. Indeed, Dr. Hanssen, on whom Celotex principally relies, did not limit the disability to the arm. This court, therefore, concludes the agency's decision Auten's shoulder injury was an injury to the body as a whole is not wrong as a matter of law and is supported by the evidence.

The fact some of the doctors who examined Auten stated he had a disability of the upper right extremity is not significant. Those doctors agree Auten injured his rotator cuff, i.e., his shoulder. A rotator cuff tear can be rated as an impairment of the upper extremity or to the body as a whole. Thus, the classification itself is not significant.

We affirm on this issue.

AFFIRMED.