FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STEVE EARL LEWIS,

Claimant-Appellee,

vs.

MICH COAL COMPANY, Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier,

Defendants-Appellants,

and

SECOND INJURY FUND, STATE OF IOWA,

Defendant-Appellee.

Filed April 27, 1982

2-46
2-65991

Appeal from Mahaska District Court - Ira F. Morrison, Judge.

The employer and its insurance carrier appeal the trial court's ruling on judicial review affirming the industrial commissioner's decision that claimant's second injury was responsible for his present disability and, therefore, appellants rather than the Second Injury Fund should compensate claimant. REVERSED AND REMANDED.

John N. Moreland, Ottumwa, for defendants-appellants.

Thomas J. Miller, Attorney General of Iowa, and Thomas A. Evans, Jr., Assistant Attorney General, for defendant-appellee.

Harold B. Heslinga of Heslinga & Heslinga, Oskaloosa, for claimant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

The employer and its insurance carrier appeal the trial court's ruling on judicial review affirming the industrial commissioner's decision that claimant's second injury was responsible for his present disability and, therefore, appellants rather than the Second Injury Fund should compensate claimant. On appeal, appellants assert that the trial court erred in finding the industrial commissioner's finding was supported by substantial evidence because the evidence shows that a combination of the two injuries was responsible for claimant's disability and that the Second Injury Fund should therefore compensate the claimant. We reverse and remand.

I.

Our scope of review in this matter is not de novo and the findings of the industrial commissioner have the force and effect of a jury verdict. Paveglio v. Firestone Tire and Rubber Company, 167 N.W.2d 636 (Iowa 1969). The commissioner, not the court, weighs the evidence and the court liberally construes the commissioner's findings to uphold rather than defeat his decision. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 298 (Iowa 1974). The question is not whether the evidence is sufficient to support a finding the commissioner did not make but whether the evidence supports the finding he did make. Id.

II.

Claimant Steve Earl Lewis was injured in a work related accident at Michigan Coal Company in 1963. His fractured left leg was repaired with a metal late, and as a result was a quarter of an inch longer than the right leg. Claimant lso lost some flexibility in the left leg. He was paid benefits based on a 54% loss f use of the leg.

Claimant returned to work for Michigan Coal Company in 1964 and was able perform the same work as before the accident without restrictions. In 1972, his

right leg was fractured in another work-related accident. As a result of the fracture, there was an angulation to his leg which shortened it one and a quarter inches. Circulation in the leg was also impaired. Claimant was paid benefits based on a 55% loss of use of the right leg. He returned to work in 1973 but was forced to quit when the pressure on his feet due to the difference in the lengths of his legs caused ulcers to develop.

In Second Injury Fund v. Michigan Coal Company, 274 N.W.2d 300 (Iowa 1979), a previous appeal of this same case, the supreme court remanded the case to the industrial commissioner for a fact finding as to the degree of disability to the body as a whole caused by the 1972 injury. Upon remand, the deputy commissioner found that zero percent of the claimant's industrial disability was due to the 1972 accident. This finding was reversed on appeal by the industrial commissioner's finding that the full 80% of claimant's current disability is due to the 1972 accident.

III.

On appeal, the employer argues that the industrial commissioner employed an improper standard in determining the liability of the second injury fund. We agree. As indicated in the decision in the first appeal of this case, "The second injury fund bears the cost of disability in excess of the costs of disability which would have resulted if there had been no pre-existing disability." 274 N.W.2d at 302. The determination of the liability of the fund therefore requires that a finding be made in the present case as to the extent of permanent disability which would flow from the second injury had the first injury and its consequences never occurred. That was the standard employed by the deputy industrial commissioner in his decision. Unfortunately, the industrial commissioner's review decision does not approach the problem of allocation in this manner. That decision instead focuses on the extent to which the second injury reduced the claimant's ability to

work beyond the degree of disability which existed following the healing of the first injury. As a result of this approach, the industrial commissioner concluded that because there would have been no permanent industrial disability but for the second injury, the entire disability falls on the employer. This is an improper standard for determining the liability of the second injury fund.

In view of the evidence in the record that without the consequences of the first injury, the extent of claimant's industrial disability for which claim is now made would have been substantially less, we must assume that the improper legal standard applied by the industrial commissioner may have induced an improper decision on the ultimate issue. We therefore reverse the judgment of the district court, vacate the decision of the industrial commissioner, and remand the case to the industrial commissioner for further proceedings consistent with this decision.

REVERSED AND REMANDED.